What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child

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Georgetown Public Law and Legal Theory Research Paper No. 1319366

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WHAT YODER WROUGHT: RELIGIOUS DISPARAGEMENT,
PARENTAL ALIENATION AND THE BEST INTERESTS
OF THE CHILD

JEFFREY SHULMAN*

ABSTRACT

Despite its grounding in a specific and peculiar set of facts, the strict
scrutiny mandate of Wisconsin v. Yoder (decided in 1972) has changed
the constitutional landscape of custody cases—and it has done so in a way
that is unsound both as a matter of law and policy. Following Yoder, most
courts require a showing of harm to the child, or a substantial threat of
harm to the child, before placing any restrictions on exposure to a par-
ent's religious beliefs and practices. This harm standard leaves children in
an untenable position when parents compete for "spiritual custody," for
the law can protect them only when the risk of harm is already substantial.
Indeed, the bar is set so high that few courts have found circumstances
that satisfy the harm standard. In this essay, I argue that a strict scrutiny
standard has no place in spiritual custody cases. It is hardly consistent with
the basic principle that the custody court's paramount consideration is the
best interests of the child. In fact, such a standard actually leaves the child
unprotected from the very injuries deemed sufficient to justify judicial in-
tervention in cases not involving religious matters.

Religious parenting rights enjoy immunity from customary family law
considerations because such rights are not subject to the rule, stated most
clearly and emphatically in Employment Division, Department of Human Re-
sources of Oregon v. Smith, that application of a neutral, generally applicable
law to religiously motivated conduct is not barred by the Free Exercise
Clause. Spiritual custody cases implicate fundamental rights under both
the Free Exercise Clause and the Due Process Clause of the Fourteenth
Amendment; that is, they present a "hybrid situation," a kind of case
where, peculiarly, the whole is greater than the sum of its constitutional
parts, and for which strict scrutiny is somehow warranted. (In other hy-
brid situations, the free exercise right is joined to a fundamental protec-
tion already subject to strict scrutiny. In religious parenting cases, the

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Wisconsin-Madison. This article was supported by a grant from the Georgetown
University Law Center. I am, as always, deeply indebted to Professors Michael
Seidman and Steven Goldberg, both of the Georgetown University Law Center, for
their encouragement and sound advice. I am equally grateful for the unflagging
and unerring work of my research assistant, Catherine Grealis. Last (but far from
least), I would like to thank the students in my Summer 2007 Religious Liberty
seminar. Their willingness to consider new ideas, and re-consider old ones, was an
invaluable and greatly appreciated resource.

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parenting right is not necessarily a fundamental one.) In Smith, the Court discussed the hybrid rights situation as an exception to general constitutional principles. But in the universe of religious parenting cases, the exception easily swallows the rule. Because such cases are hybrid by definition, strict scrutiny becomes the norm, and the result is the creation of a separate sphere of the law where the government's ability to enforce generally applicable law (in spiritual custody cases, to consider the best interests of the child) is subject to an individual's religious beliefs. In that sphere, the law grants the religiously motivated parent a special constitutional privilege greater than those awarded separately under the Free Exercise Clause or the Due Process Clause, a privilege that generally trumps any countervailing interests of the state or rights of the child.

In Part I, I examine how custody courts employ the hybrid rights doctrine, tracing how the idiosyncratic facts of Yoder encouraged the Supreme Court to abandon well-established law governing the right of religious parenting and to formulate a strict scrutiny standard ill-adapted to the existential intricacies of family disputes. In Part II, I argue that the Yoder standard fails to protect the child from harms routinely addressed in cases involving only secular matters. More specifically, I am concerned with the issue of parental alienation, the (sometimes subtle, often not) ways in which one parent may seek to turn a child against the other parent. Sensitive to the need to nurture a child's relationship with both parents, and averse to any behavior that causes alienation, custody courts commonly prohibit each parent from making disparaging remarks about the other, and they do so without subjecting such measures to the heightened scrutiny demanded by a showing of harm. Penalties for subverting this judicially mandated obligation of tolerance can be severe, including modification of custody arrangements. But toleration gives way to individual rights where disparagement is religiously motivated. The harms to the child do not change. Indeed, the kind of disparagement that bears the imprimatur of religious doctrine may be far more terrifying than a parent's personal verbal rampages. What changes is the deference courts show to the parent's claim of constitutional rights. Under the harm standard, most courts treat religious disparagement as though it were mere abstract advocacy, ignoring the coercive nature of religious beliefs (children are caught between competing moral commands) and the coercive familial context in which such speech occurs (children are caught between competing parental commands).

Judicial non-intervention amounts to little more than a way of not dealing with such cases—or, at least, of not dealing with such cases until it is too late for the child. To honor its fiduciary obligation to the child, the court must be able to consider any practice that could affect the general welfare of the child and to insist upon an appropriate form of civil discourse when religious views diverge. Where exposure to intolerance is not in the best interests of the child, the welfare of the child requires that those responsible for their upbringing observe, or be made to observe, the
boundaries of socially appropriate behavior. The duty to respect those with whom one disagrees is a civic obligation for which parents must prepare their children. It is the necessary concomitant of the parenting right. Religious belief should not absolve parents of this obligation, and disparagement born of religious conviction should not get a constitutional pass from judicial scrutiny.

INTRODUCTION

Carol Peterson believed that her ex-husband had the devil in him. After Carol and Roger Peterson divorced, Carol became a member of the Good Life Pentecostal Church, which teaches that “all religions which believe in the Trinity . . . are daughters of ‘the great whore.’” Subject to this teaching were the Peterson children, who became “afraid that the father and other relatives were consigned to perdition and that the father follows the devil, or has the devil in him or living in his house.” Roger was awarded custody of the children, and the trial court ordered Carol to “abstain from making any comments to the children with regard to her religious beliefs.” On appeal, the state supreme court modified this restriction on Carol to provide that she “abstain from making any comment to the children which in any way contradicts, disparages, or questions the validity of the father’s religion or of those with whom he or the children associate, or which in any way interferes with the children’s relationship with the father.” In limiting the restriction on Carol’s parenting, the court was governed by the standard routinely employed in this kind of “spiritual custody” case: a court will restrict a parent’s religious practices only when it “finds that particular religious practices pose an immediate and substantial threat to a child’s temporal well-being.” This harm standard has led most courts to adopt a posture of non-intervention in such cases, refusing to restrict religious parenting in any way, even when one parent’s religious teachings serve to alienate the other parent from the child’s affections. The Peterson court, in effect, came to a conclusion that few other custody courts are willing to entertain: that alienation, even when motivated by religious belief or mandated by religious doctrine, is tantamount to harm (a conclusion that may have left Carol wondering how she can teach the children her beliefs without contradicting, disparaging, or questioning those of the father).

2. Id. at 867.
3. Id. at 871.
4. Id. at 872.
5. Id.
6. Id. at 871 (quoting LeDoux v. LeDoux, 452 N.W.2d 1, 5 (Neb. 1990)).
7. See id. (setting forth harm standard adopted by other courts).
8. See id. (holding that alienation is tantamount to harm even when motivated by religious beliefs).
In this essay, I argue that the harm standard has no place in custody law. It is hardly consistent with the basic principle of custody law that the court’s paramount consideration is the best interests of the child. With those interests in mind, most courts freely restrict parental conduct, including speech, without subjecting such measures to the heightened scrutiny demanded by a showing of harm. Such restrictions are especially common in cases of parental alienation. Typically, family law courts are highly sensitive to “the ability and disposition of each parent to foster a positive relationship . . . with the other parent.” Courts prefer to nurture a child’s relationship with both parents; thus, behavior that causes alienation can be a critical factor in custody determinations “because it is so contrary to children’s best interests to learn from their parents hatred, intolerance and prejudice for the other parent.” Under the American Law Institute’s (“ALI”) Principles of the Law of Family Dissolution (“Principles”), interference with the other parent’s access to the child (whether physical or psychological) is one of several risk factors—a risk factor on the order of abuse, neglect and abandonment—that a court is required to consider in formulating a parenting plan. Indeed, such interference is so inconsistent with the best interests of the child that it may raise a strong probability of unfitness.

To protect the parent-child relationship from interference, courts often prohibit each parent from making disparaging remarks about the other, imposing a judicially mandated obligation of tolerance, and the penalties for subverting that obligation—in word, action, or demeanor—can be severe. But toleration gives way to individual rights where disparagement is religiously motivated. The harms to the child don’t change. In fact, they are likely to be more severe where parents believe, as Carol Peterson does, that a child’s soul is at stake. What changes is the deference courts show to the parent’s claim of constitutional rights. In the somewhat forlorn words of the ALI’s Principles, religiously motivated interference is a kind of harm “as to which the law is ill-equipped to save children.”

Religious parenting rights enjoy immunity from customary family law considerations because such rights are not subject to the constitutional rule, stated most clearly and emphatically in Employment Division, Department of Human Resources of Oregon v. Smith, that application of a neutral, generally applicable law to religiously motivated conduct is not barred by

13. Principles, supra note 11, § 2.12 at 278.
the Free Exercise Clause. Rather, because these cases implicate fundamental rights under both the Free Exercise Clause and the Due Process Clause of the Fourteenth Amendment, they present a "hybrid situation," a kind of case where, peculiarly, the whole is greater than the sum of its constitutional parts, and for which strict scrutiny is somehow warranted. (In other hybrid situations, the free exercise right is joined to a fundamental protection already subject to strict scrutiny. In religious parenting cases, the parenting right is not necessarily a fundamental one.) Under the mantle of hybrid rights, and particularly in reliance on the hybrid situation found in Wisconsin v. Yoder, custody courts have adopted a strict scrutiny standard for spiritual custody cases, under which the power of the parent is subject to limitation only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." In Smith, the Court discussed the hybrid right situation as an exception to general constitutional principles. But in the universe of religious parenting cases, the exception easily swallows the rule. Because such cases are hybrid by definition, strict scrutiny becomes the norm, and the result is the creation of a separate sphere of the law where the government's ability to enforce generally applicable law (that is, to consider the best interests of the child) is subject to an individual's religious beliefs. In that sphere, the law grants the religiously motivated parent a special constitutional privilege greater than those awarded separately under the Free Exercise Clause or the Due Process Clause, a privilege that generally trumps any countervailing interests of the state or rights of the child.

This hybrid free exercise/parenting right, derived from Yoder and Smith, has turned out to be a tough constitutional firewall, protecting parents from state interference in the religious upbringing of their children. Shepp v. Shepp is a recent, and telling, case in point. As a fundamentalist Mormon, Stanley Shepp believes in polygamy as a matter of religious conscience. He may have stated this as clearly, and certainly as succinctly, as one could when he told his thirteen-year-old stepdaughter that if she did not agree with his religious views (indeed, if she did not

16. See generally id.; Smith, 494 U.S. at 872.
18. See id. at 1166 n.2.

'Mormon Fundamentalism' denotes the beliefs and practices of contemporary schismatic groups that claim to follow the teachings of the Prophet Joseph Smith. The Fundamentalist movement began after the issuance of the Manifesto of 1890, which publicly declared an official end to plural marriage in The Church of Jesus Christ of Latter-day Saints. Fundamentalists held that God requires all 'true' believers to abide by the principle of polygamy, irrespective of Church mandate.

practice polygamy), she was going to hell. On appeal, the decision was affirmed. But the state supreme court reversed, holding that "the Commonwealth's interest in promoting compliance with the statute criminalizing polygamy is not an interest of the 'highest order' that would supersede the interest of a parent in speaking to a child about a deeply held aspect of his faith." In this case, as in most spiritual custody cases, Yoder's substantial harm standard has replaced the child's best interests as the prevailing measure by which custody determinations are made. This is unsound both as a matter of law and policy. In Part I, I examine the Shepp case in light of the hybrid rights doctrine, tracing how the idiosyncratic facts of Yoder encouraged the Supreme Court to abandon well-established law governing the right of religious parenting and to formulate a strict scrutiny standard ill adapted to the existential intricacies of family law disputes. In Part II, I argue that the Yoder standard sets the bar too high, demanding a showing of harm that leaves the child unprotected from the very harms deemed sufficient to justify judicial intervention in cases involving only secular matters. More specifically, I am concerned with the issue of parental alienation, the (sometimes subtle, often not) ways in which a parent may seek to turn a child against the other parent. It is an unfortunate, if too common, fact that religion is sometimes wielded as a weapon in a struggle to estrange parent and child.

The Yoder standard leaves children in an unenviable position, for the law can protect them only when the risk of harm is already grave. As one of the few courts to reject the standard said, with surprising force, it is an "outrageous price" to pay to safeguard the right of a parent to control a child's religious destiny. "It is grossly unfair because the children ultimately bear it." That is true enough, but in real ways, society as a whole pays the cost when religious intolerance tears at the fabric of the family. For the family serves as a pre-political training ground where children learn modes of civil discourse—or where they do not. The stakes are high: the preservation of individual rights—the only ground on which religious liberty can flourish—depends on the simple social duty to get along with each other. It is not unusual for a family law court to order each parent "to uphold the other parent as one whom the children should respect and love." But the strict scrutiny required by Yoder undermines fundamental

19. See id. at 1168 ("Manda Lee (Manda), Mother's daughter from a previous marriage, testified that when she was thirteen years old, Father (who is her stepfather) told her 'that if you didn't practice polygamy or you didn't agree with it, but mostly if you didn't practice it, that you were going to hell.').
20. Id.
21. Id. at 1173.
23. Id.
values essential to a democratic society—values, as the Supreme Court has said on repeated occasions, which "include tolerance of divergent political and religious views." 25  The duty to respect those with whom one disagrees is one of the "additional obligations" for which parents must prepare their children—that parental duty is the necessary concomitant of the parenting right. 26 Religious belief should not absolve parents of this obligation.

I

Both Mormons, the Shepps had divorced, according to the mother's testimony, primarily because they disagreed about polygamy. 27 Following separation, Stanley Shepp petitioned for shared custody of his daughter Kaylynn (who had been living with her mother and her stepsisters from the mother's previous marriages). In its final order, the trial court awarded legal custody of Kaylynn to both parents and directed that the child be raised in the Mormon faith. It also prohibited Mr. Shepp from teaching her about polygamy. (The court did not find, however, that Mr. Shepp's conduct had subjected his daughter to a grave threat of harm.) 28 On appeal, the Superior Court affirmed the decision of the trial court. Relying on Yoder, Mr. Shepp argued (1) that a parent may pursue any course of religious indoctrination during periods of lawful custody or visitation, and (2) that the objecting parent must establish a substantial risk of harm in the absence of the restriction proposed. 29 Tracey Shepp, his ex-wife, countered that Yoder did not apply because, under Prince v. Massachusetts, 30 "the power of the parent, even when linked to a free exercise claim, may be subject to limitation ... if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." 31 From the mother's point of view, the facts presented "very real concerns for the health and safety of the child Kaylynn as well as significant social burdens if Father is permitted to teach and advocate polygamy": 32

26. See Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535 (1925) ("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.").
27. For the facts and procedural history of the case, see Shepp v. Shepp, 906 A.2d 1165, 1166-68 (Pa. 2006).
28. See id. at 1168.
32. Id.
Kaylynne is of the age where polygamists are interested in her as a bride. This would certainly jeopardize her health and safe [sic], as well as being a crime against society. *Yoder* is a case about Old Order Amish objecting to Wisconsin’s compulsory school-attendance statutes—a far cry from polygamy. The balancing test the court set forth in *Yoder* is an exception to the usual rule. It is aimed at promoting and protecting the unique lifestyle of the Old Order Amish. The Amish lifestyle is not illegal, nor does it promote dangerous criminal behavior such as Mormon polygamy. The rule in *Yoder* does not apply in this case. In cases of Mormon polygamy, the accepted rule is as set forth in *Reynolds*.

The Pennsylvania Superior Court applied strict scrutiny (requiring that any restriction be justified by evidence of substantial threat of harm to Kaylynne and that the restriction be the least intrusive means adequate to prevent the specified harm), but upheld the trial court’s prohibition. The court found that Mr. Shepp, by advocating a religious practice prohibited by law, did indeed pose a grave threat to Kaylynne (and that the trial court’s conclusion to the contrary was both erroneous and unreasonable). The court also held that the trial court’s restriction was the least restrictive means of protecting Kaylynne from indoctrination in a criminal practice.

What mattered to the Superior Court was Mr. Shepp’s intent to inculcate a belief in what he knew to be illegal. The court distinguished parental instruction in polygamous religious beliefs, or other form of criminal conduct, from “insistence that [Kaylynne] engage in such conduct.” For the court, Mr. Shepp’s promotion of his beliefs amounted to insistence, not instruction. Critical to this judgment was the testimony of his stepdaughter (whose testimony was accepted as true by the trial court):

[The father’s] promotion of his beliefs to his stepdaughter involved not merely the superficial exposure of a child to the theoretical notion of criminal conduct, but constituted a vigorous attempt at moral suasion and recruitment by threats of future punishment. The child was, in fact, warned that only by committing an illicit act could she comply with the requirements of her religion.

By telling his stepdaughter that she would go to hell if she did not “comply with the requirements of her religion,” Mr. Shepp was insisting that she

33. *Id.* at 8-9.
34. 821 A.2d at 637 (citing *Zummo*, 574 A.2d at 1157).
35. *See id.* at 638.
36. *See id.*
37. *Id.*
38. *Id.*
practice what he preached.\textsuperscript{39} (The stepdaughter also testified that "Father had suggested that when she became of age, that they would perhaps be married.")\textsuperscript{40} The fact that the act in question was a religiously mandated one made no difference to the court: "The question whether we would find similarly benign advocacy of drug abuse or child prostitution were they presented as foundational religious beliefs is no question at all."\textsuperscript{41}

But, as a matter of law, whether parental advocacy of criminal conduct is a question may well depend on what kind of foundational beliefs are involved. If those beliefs are religiously motivated, such advocacy is likely to pass judicial muster. If not exactly benign—indeed, such parenting could even have an adverse impact on the child—religiously motivated conduct must be substantially harmful before most courts will tamper with a parent's rights under the Free Exercise Clause. In the Shepp case, the Supreme Court of Pennsylvania found that indoctrination in criminal conduct did not pose a grave threat of harm; thus, there was "insufficient basis for the court to infringe on a parent's constitutionally protected right to speak to a child about religion as he or she sees fit."\textsuperscript{42} The court held that Smith did not apply because the facts presented a free exercise claim made in conjunction with a fundamental rights due process claim (i.e., the right of a parent to direct the upbringing of his or her child).\textsuperscript{43} In other words, the case involved a type of the hybrid situation that, even after Smith, is subject to strict scrutiny. Thus, the court turned (as had Stanley Shepp) to Yoder, a case that (as Smith points out) presents the relevant hybrid situation. Under Yoder, "only those interests of the highest order" can justify a restriction on religious parenting.\textsuperscript{44}

The Smith decision singled out a discrete subset of free exercise cases in which the Court had applied a compelling interest test: decisions which "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."\textsuperscript{45} Yoder was one of those decisions—in fact, it was the only Supreme Court decision that explicitly pointed to this hybrid theory, resting its holding on the principle that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, 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."\textsuperscript{46} When such a conjunction of rights exists, the power of the parent is subject to limitation only "if it appears that parental decisions

\textsuperscript{39} Id.
\textsuperscript{40} Shepp v. Shepp, 906 A.2d 1165, 1173 (Pa. 2006).
\textsuperscript{41} 821 A.2d at 638 (emphasis added).
\textsuperscript{42} 906 A.2d at 1174.
\textsuperscript{43} See id.
\textsuperscript{44} Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
\textsuperscript{46} 406 U.S. at 233.
will jeopardize the health or safety of the child, or have a potential for
significant social burdens." Like other family law courts before it, the
Shepp court relied on this broad formulation of personal power to hold
that "where the State interferes in matters of religious speech between par-
ent and child, such action is subject to strict scrutiny, or a showing that a
compelling governmental interest outweighs the fundamental right of a
parent to make decisions concerning a child's upbringing."

For the Supreme Court of Pennsylvania, the critical task in Shepp was
determining the appropriate level of scrutiny to apply to the Mr. Shepp's
free exercise claim. The mother argued that the state's prohibition of po-
ygamy was a neutral law of general application. Comparing the statute to
the law at issue in Smith (prohibiting the use of peyote), she assumed that
the state could prohibit conduct or speech incidental to criminal activity,
even though that conduct may be sanctioned by religious doctrine. Be-
cause the Pennsylvania statute was a valid and otherwise neutral law, "it
follows that the Commonwealth of Pennsylvania has the right to enforce,
regulate, and prohibit such conduct or speech that may be incidental to
such conduct, whether it be the use of peyote, enforcement of social secur-
ity taxes, or the practice of polygamy." The court agreed that Smith was
"critical to this issue." In fact, it agreed that the Pennsylvania statute was
neutral and generally applicable, and, accordingly, would override the fa-
ther's claim "that such [a] law places an improper limitation on the free
exercise of religion." But the court applied a compelling interest test
nonetheless. The court held that the heightened scrutiny was the "appropri-
ate standard" because the father presented a hybrid claim. Yoder pro-
vided the "appropriate standard."

47. Id. at 234.
48. 906 A.2d at 1170.
49. Id. at 1172.
50. Id. at 1171.
51. Id. at 1172.
52. Id. at 1172-73.
53. See id.
In *Yoder*, the Supreme Court considered a claim brought by members of the Old Order Amish religion contending that Wisconsin's compulsory secondary school attendance law violated the Free Exercise Clause.54

[The Amish parents believed] that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children.55

The Court, at the outset, acknowledged "the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."56 But this "paramount responsibility" could be made to yield to other fundamental rights and interests,57 "such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, 'prepare (them) for additional obligations.'"58

The contours of *Yoder*’s balancing test are, to be generous, less than precisely defined. The Court stated clearly enough that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."59 But these broad brush strokes do little to clarify the limits on parental privilege marked out by countervailing state interests. More problematic, however, is the Court’s suggestion—the suggestion that proved so useful to the *Smith* Court—that the strength of the Amish parents' claim derived from a combination of constitutional rights. (In fact, the parents had not made any claim arising from the Fourteenth Amendment. Their case was based on the Free Exercise Clause standing alone.)60

The *Yoder* Court was confronted with two relevant lines of cases: cases that found the Due Process Clause protected the right to parent, including the right of religious training, and cases establishing that the Free Exercise Clause guaranteed religious freedom. But both lines of cases fell

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55. 406 U.S. at 209.

56. Id. at 213.

57. Id.

58. Id. at 214 (quoting Pierce v. Soc’y of the Sisters, 268 U.S. 510, 535 (1925)).

59. Id. at 233-34.

60. See Brief for Respondents, State v. Yoder, 182 N.W.2d 539 (Wis. 1971) (No. State 92-94).
short of offering complete protection for parental religious rights. The due process cases did not trigger heightened scrutiny, certainly not the kind of scrutiny that would invalidate a state law requiring compulsory education to age sixteen. The free exercise cases did not establish that a parent's religious freedom included the right to control his child's religious choices, certainly not the right to do so in a way that would nullify the state's broad authority to regulate children's activities. Thus, neither line of cases dictated the conclusion that Amish parents had the right not to send their children to school. But by yoking together the interests of parenthood with free exercise rights, the Yoder Court ensured a more solid constitutional footing (or what appeared to be a more solid footing) for religious parenting than prior cases had established, in effect extending the scope of the parents' constitutionally protected rights.

The Court relied heavily on Meyer\textsuperscript{61} and Pierce,\textsuperscript{62} the seminal substantive due process cases.\textsuperscript{63} But these cases had involved "nothing more" than the general interest of parents in the upbringing of their children.\textsuperscript{64} Pierce may "stand[ ] as a charter of the rights of parents to direct the religious upbringing of their children";\textsuperscript{65} nonetheless, it is a charter of parenting, not religious, rights, and where nothing more is involved, the Court is not prepared to dispute the reasonableness of compulsory education requirements.

[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.\textsuperscript{66}

The parenting claim would not by itself overbalance the state's interest in universal compulsory education.

Moreover, the parental right to direct the religious upbringing of children is contingent on the parental responsibility to do some of the work inherent in the public education process. The child is not "the mere creature of the state,"\textsuperscript{67} but the right of those who nurture and direct his destiny is constitutionally coupled with the "high duty" to prepare him for "additional obligations," including the elements of good citizenship.\textsuperscript{68} Since Pierce, the power of the state to dictate the conditions under which the child is thus prepared for adult obligations has been repeatedly con-

\textsuperscript{61} 262 U.S. 390 (1923).
\textsuperscript{62} 268 U.S. 510 (1925).
\textsuperscript{63} See Yoder, 406 U.S. at 232-34.
\textsuperscript{64} See id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Pierce, 268 U.S. at 535.
\textsuperscript{68} Id.
firmed.\textsuperscript{69} The interest of the state is satisfied when the parent enables the child "to discharge the duties and responsibilities of citizenship,"\textsuperscript{70} but \textit{Yoder} presented the Court with difficult facts: parents who were claiming the right not to comply with state educational standards—in fact, they were claiming the right not to send their children to school at all. The Court had never held "that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."\textsuperscript{71} In \textit{Pierce}, the schools "were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not preempt the educational process by requiring children to attend public schools."\textsuperscript{72}

The Court may have rejected reliance on due process alone for a more practical reason. Only two months before, Chief Justice Burger had inveighed against the Court's willingness to strike down state legislation on substantive due process grounds. His dissent in \textit{Eisenstadt v. Baird} admonished the Court for "seriously invad[ing] the constitutional prerogatives of the States and regretfully hark[ening] back to the heyday of substantive due process."\textsuperscript{73} Justice Burger found it significant that the Massachusetts state law at issue (prohibiting the distribution of contraceptives to unmarried persons) merely regulated, but did not ban, the use of contraceptives.

\begin{quote}
I see nothing in the Fourteenth Amendment . . . that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. I do not challenge Griswold v. Connecticut . . . despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. By relying on Griswold in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.\textsuperscript{74}
\end{quote}

Writing for the Court in \textit{Yoder}, Burger may have been reluctant to strike down, as a violation of due process, a state compulsory education law that merely regulated secondary education, unlike the statute in \textit{Pierce}, which flatly prohibited private schooling. Besides, the prospect that any parent,

\textsuperscript{70} \textit{Yoder}, 406 U.S. at 234.
\textsuperscript{71} Id. at 239 (White, J., concurring).
\textsuperscript{72} Id.
\textsuperscript{73} 405 U.S. 438, 467 (1972) (Burger, J., dissenting).
\textsuperscript{74} Id. at 471-72.
for a host of reasons (however virtuous and admirable), could preempt
the educational process on due process grounds alone was surely an unac-
cetable outcome. Parenting concerns could then be interposed as a bar-
rier to reasonable state regulation of education even if they were based on
purely secular considerations.

But why not resolve Yoder solely on free exercise grounds? The Court
accepted it as settled that "only those interests of the highest order . . . can
overbalance legitimate claims to the free exercise of religion." Yet the
Court devoted little attention to cases based on the Free Exercise Clause,
perhaps because there was little case law to which it could be devoted and
what case law existed was of little help. Prior to Yoder, the Court had
announced that "[a] regulation neutral on its face may, in its application,
nonetheless offend the constitutional requirement for governmental neu-
trality if it unduly burdens the free exercise of religion." But the Sherbert
compelling interest test remained untested in the context of religious
parenting. The controlling case, as the state argued, was Prince v. Massa-
chusetts, and the Yoder Court was well-aware that Prince "might be read to
give support to the State's position." In upholding a labor law that effectively prohibited children from sell-
ing religious literature in public places, the Prince Court rejected the core
principles that would form Yoder's doctrinal foundation. In Prince, the
Court concluded that:

1. The fact that claims are made on both free exercise and due
process grounds does not broaden the scope of parenting rights
secured by the Due Process Clause. Prince, like Yoder, combined
the interests of parenthood with a free exercise claim. ("[Appel-
lant] rests squarely on freedom of religion under the First
Amendment, applied by the Fourteenth to the states. She but-
tresses this foundation, however, with a claim of parental right as
secured by the due process clause of the latter Amendment.")
But the due process right does not narrow the state's "wide range
of power for limiting parental freedom and authority in things
affecting the child's welfare" because the parent "grounds his
claim to control the child's course of conduct on religion or con-
science." The family remains subject to regulation in the pub-
lic interest "as against a claim of religious liberty."
2. Nor are state regulations of the family that impinge upon a parent's free exercise necessarily subject to heightened scrutiny, even when accompanied by a claim based on the Due Process Clause. The petitioners had argued that "when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger." The statute, in other words, was not entitled to a presumption of validity. (The petitioners also argued, alternatively, that the regulation was not reasonable.) But the Court, agreeing that such a statute would be invalid if applied to adults, concluded that:

the state's authority over children's activities is broader than over like action of adults . . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.

Prinsecteaches that the state has an interest in the welfare of children long before a situation has become a clear and present danger.

3. In a case of religious parenting, the free exercise rights of the parent and child are not identical. The free exercise claim belongs to the child; the right to give children religious training and encouragement is the parent's right. In Prinsecthe claimed liberties (free exercise and parenting) were at stake. However, the Court was careful to delineate the ownership of these rights:

One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these [tenets and practices.] [T]he parent[,] [has the] authority to provide religious with secular schooling, and the child [has the] right to receive it.

This distinction makes a real difference. For when the child is at an early age, when the custody, care and nurture of the child

83. Id. at 167.
84. See id. (discussing applicability of statute to children).
85. Id. at 168; see id. at 166-69.
Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.

Id. (internal citations omitted).
86. Id. at 164-66.
most resides in the parents, the state has a special interest in protecting the child’s welfare. (And the interest is not just in the child’s welfare but in the welfare of a democratic society.) Parents are not free “to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

In response, the Yoder Court said that prior cases had confined Prince to circumstances involving “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare.” This reading of the case law is fanciful at best. (What threat to the public welfare makes Sunday closing laws constitutional?) Nevertheless, even if the Court’s reading of the case law was right, it only begged the question whether such harm may be properly inferred from the refusal to comply with compulsory education laws. In short, the Court had to figure out whether keeping Amish children out of school would hurt them or endanger the public welfare. The Court concluded it would not. But its reasoning distorted one of the fundamental premises of family and custody law: that parents have a fiduciary duty to prepare their children for participation in social networks beyond the family and, even, beyond religious community.

First, the Yoder Court read the children out of the case. The free exercise right now belonged to the parents. For the Court, the free exercise claim at stake was based on the parents’ belief that compulsory secondary education endangered their own salvation. Because the children were not parties to the litigation, the Court was able to sidestep the “grave questions of religious freedom” that would be raised if parent and child disagreed about religious training. But the Court made it clear that in such a case it would be the parent, not the state, who stood in the place of the child.

Indeed it seems clear that if the State is empowered, as parens patriae, to ‘save’ a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child.

Like the Wisconsin Supreme Court before it (“We view this case as involving solely a parent’s right of religious freedom to bring up his chil-

87. Id. at 170. Compare id. (noting limitation on parental right to compel religious belief and practice of children), with Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 (2001) (Scalia, J., concurring) (noting that Free Exercise Clause protects private right to exert and receive “the compulsion of ideas” and “to have one’s children receive it”).
89. See id. at 209.
90. Id. at 231.
91. Id. at 232.
dren as he believes God dictates."),\textsuperscript{92} the Yoder Court linked free exercise rights and the interests of parenthood, and, by doing so, "increase[d] the State's burden in justifying the imposition of constraints on parental control over children's lives."\textsuperscript{93}

Second, the Court gave short shrift to the public welfare prong of the harm standard. The state advanced two primary arguments in support of its system of compulsory education: (1) "that some degree of [secondary] education is necessary to prepare citizens to participate effectively and intelligently in our [democratic] . . . system"; and (2) that "education prepares individuals to be self-reliant and self-sufficient participants in society."\textsuperscript{94} The Court accepted these propositions, but decided that secondary public education "would do little to serve those interests."\textsuperscript{95}

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.\textsuperscript{96}

But the Court confused the goals of the state with the choices made possible by state-mandated education. The goal of that education is not to prepare a child for life in a separatist religious community, nor is it to prepare a child for life in modern society as the majority live. It is, as the state argued, the instrument that prepares young people to participate meaningfully in society, even if that participation takes the form of a choice not to live in modern society as the majority live.\textsuperscript{97} It may well be that "[t]he

\textsuperscript{92} State v. Yoder, 182 N.W.2d 539, 542 (Wis. 1971).
\textsuperscript{93} James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 CAL. L. REV. 1371, 1386 (1994).
\textsuperscript{94} Yoder, 406 U.S. at 221.
\textsuperscript{95} Id. at 222.
\textsuperscript{96} Id.
\textsuperscript{97} See Brief for the Petitioner at 18-22, State v. Yoder, 182 N.W.2d 539 (Wis. 1971) (No. State 92-94); see also Yoder, 406 U.S. at 239-40 (White, J., concurring). Justice White asserted:

[T]he State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary . . . . A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.
Amish alternative to formal secondary school education has enabled them to . . . survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community." But such separatist success is hardly "strong evidence they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade."

Thus, under Yoder, the parent's right to provide religious training trumps the child's right to receive it. But Yoder could not entirely ignore that modern family and custody law rests on the principle that parents have a fiduciary obligation to their children. In Pierce, rights and duties are separate, if interwoven, aspects of parental responsibility: "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." In Yoder, however, the right is contingent on the duty: the parental right exists "so long as" parents prepare their children for additional obligations; if parents do not do this work, the state will, even at the cost of impinging on the right to control a child's religious destiny.

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system . . . . Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.

An impartial decision would assume only that education should equip the child with the knowledge and skills that will help him choose whichever sort of life best fits his native endowment and matured disposition. It will send him out into the adult world with as many open opportunities as possible, thus maximizing his chances for self-fulfillment.

Id. at 239-40 (White, J., concurring); cf., e.g., Joel Feinberg, The Child's Right to an Open Future, in WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken and Hugh LaFollette eds., Rowman & Littlefield 1980).

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98. Yoder, 406 U.S. at 225.

99. Id.

so long as they, in the words of Pierce, "prepare (them) for additional obligations."\textsuperscript{101}

Additionally, \textit{Yoder} makes clear that an equivalent education must ensure that children "are capable of fulfilling the social and political responsibilities of citizenship."\textsuperscript{102} The full \textit{Yoder} test acknowledges this coupling of individual rights and civic duty. But, focused on \textit{Yoder} as a charter of parental rights (as against the state), courts rarely invoke the second prong of its test. That prong, as the dissent in \textit{Shepp} argues, "suggests a broader inquiry assessing whether exercise of [parental] prerogatives will conflict with the state's legitimate interests in preserving public welfare and mitigating significant social burdens."\textsuperscript{103}

The \textit{Yoder} court did more than rescue the Amish from state education requirements. It established the principle that a hybrid right is subject to strict scrutiny when each conjoined claim, taken independently, may not be. (It's not clear how the Court did this, whether it provided greater protection for free exercise claims that involve parenting rights, or whether it bolstered due process claims where more than the general interest of the parent in the nurture and education of children is involved.) Of course, the real significance of this was not felt until the Court refused to subject generally applicable laws to strict scrutiny. After \textit{Smith}, neither the free exercise nor the due process right, taken separately, would invalidate "legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself,"\textsuperscript{104} and Stanley Shepp would not have the right to teach his daughter that polygamy is a religious mandate.

Once the \textit{Shepp} court borrowed "the appropriate standard" from \textit{Yoder},\textsuperscript{105} and adapted it to meet the particulars of this custody case ("[A] court may prohibit a parent from advocating religious beliefs . . . only where it is established that advocating the prohibited conduct would jeopardize the physical or mental health or safety of the child, or have a potential for significant social burdens.")\textsuperscript{106} it easily disposed of the case. For the court, "it [was] clear that the Commonwealth's interest in promoting compliance with the statute criminalizing bigamy is not an interest of the 'highest order' that would supersede the interest of a parent in speaking to a child about a deeply held aspect of his faith."\textsuperscript{107} Because harm was not established in this case, "there was no constitutional basis for the state's intrusion in the form of the trial court's Order placing a prohibi-

\textsuperscript{101} \textit{Yoder}, 406 U.S. at 214 (emphasis added) (citations omitted) (footnotes omitted).
\textsuperscript{102} \textit{Id.} at 225.
\textsuperscript{105} \textit{See Shepp}, 906 A.2d at 1173.
\textsuperscript{106} \textit{Id.} at 1174.
\textsuperscript{107} \textit{Id.} at 1173.
tion on Father's speech.”

(The state supreme court chastised the Superior Court for substituting its judgment for that of the trial court—and then substituted its judgment for that of the trial court by ruling that a restriction on the father's right of religious parenting was not justified.)

The court simply ignored the second prong of the Yoder test. The dissent objected to this silence regarding the test's public welfare component, arguing that had this "distinct inquiry" been conducted, the court may well have been required "to uphold the trial court's custody order . . . because the practice of polygamy long has been identified as a 'substantial threat' to public welfare, an unsustainable burden on society, and a crime."\(^{110}\)

II

Shepp is not unique. In similar cases, the substantial harm standard has effectively replaced the child's best interests as the court's paramount consideration.\(^ {111}\) The general rule in child custody cases is that the trial court, in furtherance of the best interests and welfare of the child, is vested with "a wide latitude of discretion and in the absence of a manifest abuse of discretion in awarding the custody and control of minor children,

108. Id. at 1174.
109. Id. at 1179 (Baer, J., dissenting).
110. Id. at 1179-80.

The vast majority of courts addressing this issue, before and after Morris, have concluded that each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all period of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction.

Id. (citing cases); In re Marriage of Murga, 168 Cal. Rptr. 79, 82 (Cal. Ct. App. 1980) ("[I]n the majority of American jurisdictions that have considered the question, the courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child.") (citing cases). See generally George L. Blum, Annotation, Religion as Factor in Child Custody Cases, 124 A.L.R. 5th 203 (2004); George L. Blum, Annotation, Religion as Factor in Visitation Cases, 95 A.L.R. 5th 533 (2002). The harm standard varies in degree of rigor. Courts may require a demonstration of actual harm, see, e.g., Pater v. Pater, 588 N.E.2d 794, 801 (Ohio 1992); or that harm be imminent, see, e.g., Garrett v. Garrett, 527 N.W.2d 213, 220 (Neb. Ct. App. 1995); or that there be a substantial risk or grave threat of harm, see, e.g., Zummo, 574 A.2d at 1157. The harm standard presents high evidentiary hurdles as well, with most courts demanding demonstration "in detail" that exposure to a parent's religion caused substantial injury. See, e.g., Kendall v. Kendall, 687 N.E.2d 1228, 1232 (Mass. 1997) (requiring plaintiff "to demonstrate 'in detail' that exposure to the defendant's religion caused the children 'substantial injury, physical or emotional, and [would] have a like harmful tendency for the future'" (quoting Felton v. Felton, 418 N.E.2d 606, 607-08 (Mass. 1981)))).
its judgment will not be disturbed on appeal.”

Prior to Yoder, this best interests standard also governed most spiritual custody cases. But Yoder, despite its grounding in a specific and peculiar set of facts, changed the landscape of such cases, providing constitutional support for more rigorous tests. Most courts refuse to restrain a parent from exposing a minor child to his or her religious beliefs and practices “absent a clear, affirmative showing that these religious activities will be harmful to the child”; and while courts may struggle to define what “substantial” means, “[v]ery few have actually ruled that substantial harm has been demonstrated.” Judicial intervention in religious custody disputes without an affirmative showing of compelling reasons is, in the view of most courts, “tantamount to a manifest abuse of discretion.” Similarly, the American Law Institute’s Principles of the Law of Family Dissolution (citing Yoder on “[t]he importance of the combined interest of parents in religious liberty and autonomy in raising one’s children”) prohibits courts from examining “the religious practices of a parent or the child, except to the minimum degree necessary to protect the child from severe and almost certain harm or to protect the child’s ability to practice a religion that has been a significant part of the child’s life.”

I have argued elsewhere that this neutral posture, with its focus on the rights of individuals as against the state, supplies a standard that makes little sense in cases where the parties have conflicting and equally compelling free exercise claims. In such cases, each parent has an equal (and equally imperative) claim on the child’s conscience; and judicial non-intervention, by leaving each parent free to compete for religious primacy in the life of the child, strips the court of

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113. See id.

Thus, the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any parent having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.


See Principles, supra note 11, §2.12 at 301 (“Constitutional support for the more rigorous tests is generally drawn from Wisconsin v. Yoder, 406 U.S. 205 (1972).”).

115. Kendall, 687 N.E.2d at 1292-33. See Principles, supra note 11, §2.12 at 309 (“[T]he presence of physical harm, such as harsh physical discipline, may be required to tip the balance [toward consideration of religious factors].”); see also, e.g., Funk v. Osman, 724 P.2d 1247, 1251 (Ariz. Ct. App. 1996) (stress manifested in bowel-control problem); MacLagan v. Klein, 473 S.E.2d 778, 783 (N.C. Ct. App. 1996) (headaches and stomachaches).


117. Principles, supra note 11, § 2.12 at 272 (emphasis added).

the discretion needed to fashion a settlement that is in the best interests of the child.\textsuperscript{119}

But even if one agrees that courts should approach such cases from a neutral starting point, the \textit{Yoder} standard sets the bar too high, demanding a showing of harm that leaves the child unprotected from injuries deemed sufficient to justify judicial intervention in cases involving only secular matters.\textsuperscript{120} One such injury, common in spiritual custody cases, results from conduct by a parent that tends to alienate a child's affections from the other parent.\textsuperscript{121} It is commonplace in custody cases that each parent has "a duty to not turn a child away from the other parent by 'poisoning the well.'"\textsuperscript{122} Typically, family law courts hold fast to the principle that "minor children are entitled to the love and companionship of both parents insofar as this is possible and consistent with their welfare";\textsuperscript{123} thus, behavior that causes alienation can be a critical factor in custody determinations "because it is so contrary to children's best interests to learn from their parents hatred, intolerance and prejudice for the other parent."\textsuperscript{124}

(Courts also point to parental rights in alienation cases, noting that each parent has a "constitutionally protected 'inherent right' to a meaningful

\begin{itemize}
\item \textsuperscript{119} The harm standard assumes that judicial non-intervention serves religious liberty. But in spiritual custody cases, non-intervention inevitably restricts the religious liberty of one parent. Non-intervention may restrict the liberty of a mother who wants her children raised exclusively in the Jewish faith, see Zummo v. Zummo, 574 A.2d 1130, 1132 (Pa. Super. Ct. 1990) order prohibiting father from taking his children to religious services contrary to mother's faith was improper where mother failed to demonstrate that belief or practice of father to be restricted actually presented substantial threat of physical or emotional harm to children), or may restrict the liberty of a father who wants to perform a Hindu religious ritual upon his child, see Sagar v. Sagar, 781 N.E.2d 54, 59 (Mass. App. Ct. 2003) (upholding order that ritual should not be performed where father failed to show that child would suffer physical or psychological harm by not undergoing disputed ceremony).
\item \textsuperscript{121} \textit{See generally Principles, supra} note 11, § 2.11 at 269, § 2.19 at 406-07; R. H. Hursh, \textit{Annotation, Alienation of Child's Affections as Affecting Custody Award}, 92 A.L.R.2d 1005 (1953).
\item \textsuperscript{122} Johnson v. Schlotman, 502 N.W.2d 831, 834 (N.D. 1993).
\item \textsuperscript{123} \textit{Id.} at 835.
\item \textsuperscript{124} \textit{Id.} at 837 (Levine, J., concurring).
\end{itemize}
relationship with his children,"\(^{125}\) to enable the parent to inculcate in the child’s mind a spirit of love and respect.\(^{126}\) The state’s interest in "promoting meaningful family relationships" is also a factor in such cases.)\(^{127}\) Under the ALI Principles, interference with the other parent’s access to the child is one of several risk factors (along with abuse, neglect and abandonment) that a court is required to consider in formulating a parenting plan. Indeed, such interference "has been said to be ‘an act so inconsistent with the best interests of the children as to per se raise a strong probability that the offending party is unfit to act as custodial parent.’"\(^{128}\) Some courts, under the “friendly parent” doctrine, may consider which parent is most likely to foster the child’s relationship with the other parent (or make some version of the doctrine a factor in the custody analysis),\(^{129}\) and alienating conduct may provide a basis for a modification of a custody arrangement (i.e., a material change of circumstances), even where the standard for modification is more stringent than that for custody determinations.\(^{130}\)

\(^{125}\) Schutz v. Schutz, 581 So.2d 1290, 1293 (Fla. 1991).

\(^{126}\) See id. at 1293 n.3 (citing Frazier v. Frazier, 147 So. 464, 467 (Fla. 1933)).

\(^{127}\) Id. at 1293.


\(^{129}\) "Under the ‘friendly parent’ concept, primary residential placement is awarded to the parent most likely to foster the child’s relationship with the other parent. This is often reflected in statutes that establish that it is a matter of public policy that children have ‘frequent and continuing contact’ with both parents." Lawrence v. Lawrence, 20 P.3d 972, 974 (Wash. 2001). For a critique of the doctrine, see Margaret K. Dore, The “Friendly Parent” Concept: A Flawed Factor for Child Custody, 6 Loy. J. PUB. INT. L. 41 (2004).


By now, we, lawyers and judges, recognize that change-of-custody proceedings are wholly different animals from original custody ones. Considerations of finality guard against modifications of prior custody decrees, and in change-of-custody proceedings, the emphasis is on the continuation of the stability of the children’s relationship with their custodial parent. Only if it is ‘compelled’ or ‘required’ in the children’s best interests, should a change of custody occur and interrupt the children’s custodial relationship with their custodial parent. That is the message, loud, clear and consistent, that we have trumpeted.... So, noncustodial parents challenging custody are forewarned that theirs is a daunting, arduous task. They must prove not only that something of importance has changed significantly, but that this change has so adversely affected the children that custody must be changed. If this sounds ominous and discouraging to challengers of custody, it is intended to. We do not entertain lightly the proposed disruption of the continuity of care and custody and our aversion to changing custody sets the backdrop for any parent challenging the custodial status quo.

\(^{Id.}\) (internal citations omitted). It is well-settled that an attempt to alienate may provide a basis for modification of a custody arrangement. See id. at 877 (“Preventing the unhealthy and, indeed, intolerable disruption of children’s love and affection for their noncustodial parent, is an absolute duty of the custodial parent.”) (emphasis added); see also, e.g., Nichols v. Beran, 980 S.W.2d 342 (Mo. Ct. App. 1998).
Denial of access can take many forms, from making the child physically unavailable to

a more subtle and insidious form of interference, a form of interference which, in many respects, has the potential for greater and more permanent damage to the emotional psyche of a young child than other forms of interference; namely, the psychological poisoning of a young person's mind to turn him or her away from the [other] parent.131

Without requiring a showing of harm (that is, relying solely on the best interests of the child), custody courts routinely intervene to keep the family well untainted, restricting speech and expressive conduct that disparages the other parent and punishing a breach "either in words, actions, demeanor, implication or otherwise."132 These restrictions may be phrased negatively, prohibiting behavior that can be construed as uncomplimentary (e.g., ordering parent to "refrain[ ] from doing anything likely to undermine the [child's] relationship [with the other parent]").133 Or courts may impose more affirmative obligations designed to build relationships of trust and tolerance, insisting that each spouse inculcate in a child love and respect for the other."134 Parents have been ordered "to instill in the child . . . the good and kind qualities of the other parent."135 Not especially concerned about the genuineness of such feelings, one court ordered the mother "to affirmatively express feelings and beliefs which she does not have."136 The court found (with no little literary zeal) that "the cause of the blind, brainwashed, bigoted belligerence of the children toward the father grew from the soil nurtured, watered and tilled by the mother";137 nonetheless, it ordered the mother "to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father . . . [and] to convince the children that it is the mother's desire that they see their father and love their father."138 Courts may also require parents not to expose a child to derogatory comments made by

The policy of this State is to encourage continued loving and caring relationships between divorced parents and their children and to afford ample opportunity for close contact between both parents and their children. Our courts have previously held that facts showing an attempt by one parent to alienate a child from the other parent can form the basis for modification of custody.

Nichols, 980 S.W.2d at 347.

131. Young, 628 N.Y.S.2d at 959.
133. Id.
136. Schutz, 581 So. 2d at 1291.
137. Id. at 1292.
138. Id.
Such orders may well restrict a parent from speech that is ideological in orientation—unless that speech derives from religious belief. For example, a court may order one parent to make sure that his child is not exposed to homophobic teachings (because the other parent is homosexual), without any finding that exposure to such teachings would endanger the child’s physical health or significantly impair his emotional development. But if those same comments (like Mr. Shepp’s advocacy of polygamy) were faith-based, most courts would require a showing of harm. In short, interference born of religious conviction is likely to get a constitutional pass from judicial scrutiny. Because the right to control a child’s religious upbringing is part of the parent’s free exercise right, custody courts are unlikely to prohibit, as against the best interests of the child, religiously motivated remarks and practices that are derogatory to the other parent; and because courts rarely consider the public welfare in making custody determinations, courts are even less likely to prohibit religious disparagement on the ground that such conduct rejects civic values that are a fundamental prerequisite to the responsibilities of citizenship.

In a recent survey of custody cases, Eugene Volokh argues that court-ordered restrictions on parental speech are “generally unconstitutional.” Volokh’s defense of parental free speech rights is a vigorous one, but even he would allow restrictions on “non-ideological speech that interferes with the children’s relationship with the other parent.” (Such speech, according to Volokh, is of little public or personal value.) But not so with disparaging speech that is ideologically grounded. For Volokh, restrictions on disparaging or “poisoning” sentiments against the other parent have to “be tailored to allow ideological teachings that don’t expressly mention the other parent, even when the ideology condemns some behavior that the other parent happens to en-


141. See Dickson v. Dickson, 529 P.2d 476, 480-81 (Wash. Ct. App. 1974). One court enjoined an ex-husband from representing that his ex-wife is still his wife. (It was suggested that his assertion, which was part of a more general campaign to outlaw divorce, could lead the children to question their mother’s judgment and conduct.) Id. But the injunction had to be phrased to make clear that it does not restrain [him] from contending that she is his wife in the eyes of God, that according to the tenets of his religion, she is still his wife, or that because of his religious views he does not recognize the validity of the divorce . . . . He may not, however, unqualifiedly represent that she is ‘his wife’ or that she is his legal wife.


143. Id. at 704-05.

144. Id. at 716.
gage in or some beliefs that he holds.”

This tailoring makes for some fine linguistic, as well as constitutional, distinctions:

Many a mother who genuinely loves her husband, but disapproves of his racism, may teach her children that racism is bad, and may even feel more of a need to do so precisely because the children are especially likely to learn otherwise by looking at her husband’s actions. When the children ask her if this means their father is bad, too, she can tell them that he’s a good person who has some bad habits, like all of us do; and that the kids should emulate his many good traits but not his few bad ones. Likewise, a father who says, “anyone who doesn’t embrace Jesus will go to Hell,” “homosexuality is a sin,” “racists are bad people,” or “religion is superstitious folly,” and whose children then ask, “Does that mean mommy will go to Hell / is a sinner / is a bad person / is stupid?,” can respond with something positive: “Mommy is a good person who loves you very much, and while she’s wrong about this, I’m sure she’ll come to the right path eventually.”

Such subtle requirements may not be easy to set forth or to enforce, especially when the family is split and each parent is not emotionally inclined to defend the other parent to the children. A flat “Don’t say anything that is expressly or implicitly critical of the other parent” or “Don’t express any anti-homosexual views” may seem relatively enforceable. A more nuanced “Don’t make any non-ideological statements critical of the other parent, don’t use the other parent as an example for any of your ideological teachings, and if the children ask you whether the other parent is bad, tell them ‘no’ and sound credible” may seem like a recipe for endless future debates. Nonetheless, it seems to me that on balance courts should try to narrow their injunctions as much as possible, rather than completely banning parents from teaching their moral views whenever those views might cast the other parent in a bad light.

The idea that disparagement based on religion can be mitigated by subtle linguistic requirements depreciates both the special constitutional place of religious rights and the especially toxic power of religious disparagement. Constitutional protection for the right of free exercise presupposes that religious beliefs are not a matter of choice, that they are not, in the words of the Yoder Court, “merely a matter of personal preference.” Perhaps a parent could be asked to temper moral or philosophical views that reflect

145. Id. at 717.
146. Id. at 717-18.
147. 406 U.S. 205, 216 (1972). Cf. Davis v. Beason, 133 U.S. 333, 342 (1890) (“[T]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”); James Madison, Memorial and Remonstrance Against Religious
unkindly on the other parent, but flatly banning discussion of religious matters (when such discussion is not in the best interests of the child) would actually be less ideologically intrusive than asking a parent to reduce deeply held beliefs to verbal nuance. Such tempering is not likely to be credible anyway. Volokh is (to say the least) sanguine about human nature: "We as adults recognize that people may have traits or beliefs we disapprove of, yet still be generally good people. Children can likewise be taught this, and often are taught this." But many adults believe no such thing; their religious tenets may rule out the possibility of such subtlety. Nor are children so spiritually illiterate that they do not know the specialness of religious imperatives. It is hardly comforting for a child to learn that generally good people (like Mommy) can go to Hell if they don’t get on the right path. Indeed, the kind of disparagement that bears the imprimatur of religious doctrine may be far more terrifying than Daddy’s personal verbal rampages. The fact that the other parent is not expressly mentioned may be of little significance. Religious disparagement—really, one might say, the ultimate kind of alienation—need not take the form of overt hostility. If Dad says, “Anyone who doesn’t embrace Jesus will go to Hell,” he hardly needs to point out to the child the fact that Mom doesn’t embrace Jesus. Some religious tenets make alienation inevitable, whether or not one parent genuinely loves the other. Disparagement may be couched even in the language of love, of caring for a soul in mortal, or immortal, danger.

Reluctant to intervene in cases of religious disparagement, courts must wait for harm (or substantial harm, or the substantial threat of harm) to happen (or for harm to be substantially likely, or to be imminent). Even then, court-ordered restrictions may be so solicitous of free exercise rights that there is little chance they will have much effect. *Kendall v. Kendall* is a revealing, if unfortunate, example. The mother was an orthodox Jew. The father was a member of the Boston Church of Christ, a fundamentalist Christian faith. The trial court made the following findings that bear on the question of alienation:

24. I find that the Boston Church of Christ services to which [the defendant] has taken his children have included teachings that those who do not accept the Boston Church of Christ faith are damned to go to hell where there will be “weeping and gnashing of teeth.”

25. I find that the oldest child, Ari, has drawn from the above teaching the conclusion that [the plaintiff] may go to hell, and that this causes him substantial worry and upset . . . .

Assessments, in The Supreme Court on Church and State 18 (Robert S. Alley ed., 1988) (stating religion is “the duty we owe to our Creator”).


149. 687 N.E.2d 1228 (Mass. 1997).
56. [The defendant's] behavior toward his children fosters negative and distorted images of the Jewish culture. [The defendant] insists that all individuals who do not accept his beliefs about life and existence are sinners who are destined to tortuous punishment.

59. I credit the G.A.L.'s report and testimony that Ari "may experience choosing a religion as choosing between his parents, a task that is likely to cause him significant emotional distress." In fact, the G.A.L. specifically concludes, and I credit his conclusion, that the children are now in a position where they are perilously close to being forced to choose between their parents, and to reject one.

67. I credit the report of the G.A.L. that "should the children come to accept the religious beliefs that [the defendant] reports he wants them to accept, they are likely to come to view their mother negatively and as a person who will be punished for her sins..." resulting in a "...negative impact on their relationship with their mother... and difficulty accepting guidance and nurturance from her." I find this would be to the children's substantial detriment.150

Reviewing these findings, the state supreme court stated that "[w]hether the harm found to exist amounts to the 'substantial harm' required to justify interference with the defendant's liberty interest is a close question, especially because there is considerable value in... 'contact with the parents' separate religious preferences.'"151 When non-religious conduct poses a possible risk to a child's safety or welfare, courts intervene to protect the child—that is, they act to ensure that the risk does not result in harm. The likelihood of injury is presumed from the risky behavior. If religious activity is involved, however, most courts not only require evidence of substantial harm but also require the complaining parent to prove a causal connection between that harm and the other parent's interfering conduct.152 The Kendall court noted, presumably to show how close the question was, that "the G.A.L. has not found current damage to the children so severe that it has caused them to suffer a psychotic break, or to

150. Id. at 1233-35 (alterations in original).
152. See, e.g., Zummo v. Zummo, 574 A.2d 1180, 1156 (Pa. Super. Ct. 1990). It is also important to note the problem of causation. In order for the presence of unproductive stress to provide a basis for governmental intervention in a religious upbringing dispute, the unproductively severe stress must result from the religious upbringing dispute. If the child is distressed because the parents have divorced or because of other factors unrelated to the religious upbringing dispute, imposing an orthodoxy in the child's religious training will not remove that distress.

Id.
have a ‘formal psychiatric diagnosis.’”153 (The court hastened to point out—rightly, if unremarkably—that “[t]he case law does not require the court to wait for formal psychiatric breakdown . . .”).154 When the risk of harm derives from non-religious factors, courts impose restrictions that may include severe constraints on a parent’s conduct, restrictions calculated to ensure the child’s protection. When the risk of harm has a religious origin, however, courts impose restrictions calculated to ensure a minimal burden on parental rights. (“[T]he remedy should be that ‘which intrudes least on the religious inclinations of either parent . . .’ and should be ‘narrowly tailor[ed] . . . so as to result in the least possible intrusion upon the constitutionally protected interests of the parent.’”)155 The Kendall court upheld the “minimal burden” placed on the father by the trial court: that he “not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves.”156 Of course, narrowness is not the same as clarity, and it is not surprising that the Kendalls soon found themselves in court again, arguing about the meaning of the court order.157

Conduct that interferes with the parent-child relationship, regardless of its motivation, violates the child’s entitlement to the love and companionship of both parents. In that sense, it is always damaging to the secular welfare of the child. This may be why the ALI Principles, though they adopt a stringent test when courts are asked to restrict a parent’s religious practices (rejecting consideration of such practices “except to the minimum degree necessary to protect the child from severe and almost certain harm”), appear to treat “substantial interference” as per se severe and certain harm. The Principles offer the following illustration of this approach:

Susan is a member of a small religious community of faith in which nonbelievers are shunned as irredeemable sinners. She believes that the only opportunity for salvation from eternal damnation is through the teachings and practices of her community. She wants her three daughters, ages two, four, and seven, to have the opportunity for salvation. Because the girls’ father, Jerome, is not a member of the community, Susan has instructed the girls not to speak with him and to avoid all contact with him. As a result the girls have been uncommunicative with Jerome since the parents’ separation. Jerome argues that this conduct should be taken into account by the court in allocating of custodial responsibility.

154. Id.
156. 687 N.E.2d at 1231 (emphasis added).
Parents are entitled to raise their children in a religious community whose members live separately from others; the isolation of the girls from nonmembers in this case is insufficient to establish severe and almost certain harm to the children. Susan's actions in turning the children against Jerome, however, interfere substantially with his relationship to the children. Thus, despite the religious roots of Susan's practices, the harm is both severe and certain and thus may be taken into account.\textsuperscript{158}

Here, the children have suffered no injury other than the loss of their relationship with their father, yet the interference is treated like other activities that pose a serious risk to the child's safety and welfare. Interference is the harm. In making this equation, the \textit{Principles} seem to rely on the belief-conduct distinction that marked early free exercise cases. Thus, the mere fact that parents have conflicting religious beliefs would not warrant court intervention, as the following example from the \textit{Principles} illustrates:

Constance is a fundamentalist Christian. Edgar insists that religious fundamentalism is hypocritical and that religious indoctrination interferes with the moral and intellectual values he wishes for their two boys, ages four and six. His religious disagreements with Constance are what led to their separation. Each parent wants primary responsibility of the children.

The court may not favor either Constance or Edgar in the allocation of custodial or decision making responsibility based on the content of their religious beliefs or views about children.\textsuperscript{159}

In this ALI illustration, there is no indication that the children have been exposed to their parents' conflicting beliefs, and there is little evidence of beliefs that are implicitly disparaging. In the real world, however, children do get exposed to one parent's religious beliefs that inherently undermine their relationship with the other parent. Hard cases can make bad law, but the courts must deal with a parent who teaches a child (or allows a child to be taught) that the other parent is "spiritually unclean,"\textsuperscript{160} or one of "God's enemies,"\textsuperscript{161} or "destined for eternal damnation";\textsuperscript{162} or a parent who counsels a child, for religious reasons, that it is allowable to lie to or behave violently toward the other parent.\textsuperscript{163}

\textsuperscript{158} \textit{Principles}, supra note 11, § 2.12 at 280 (2002).
\textsuperscript{159} Id. at 279.
\textsuperscript{161} Leppert v. Leppert, 519 N.W.2d 287, 289 (N.D. 1994).
\textsuperscript{162} Kirchner v. Caughey, 606 A.2d 257, 264 (Md. 1991).
Under the "harm" standard, most courts treat a parent's religious teaching as though it were "mere abstract advocacy,"\(^{164}\) ignoring the coercive nature of religious beliefs (children are caught between competing moral commands) and the coercive familial context in which such speech occurs (children are caught between competing parental commands). Non-intervention amounts to little more than a way of not dealing with such cases, in the interest of preserving the religious parenting right created for members of a separatist religious community who wanted to keep their children out of the world. Or, at least, it is a way of not dealing with such cases until it is too late for the child.

To win a claim of religious disparagement, the complainant has to show harm to the child, or disentangle the bundled rights that make up the \textit{Yoder}-type hybrid situation. But the latter option is easier said than done. In \textit{Lange v. Lange},\(^{165}\) the court managed to separate these rights by ruling that the father "lost the parental right to choose his children's religion" by operation of a state law that vested in the mother, as legal custodian, the sole right to make major decisions for the children, including the right to choose their religion.\(^{166}\) In \textit{Lange}, the father (Robert Lange) believed that "persons of [the Lutheran] faith will go to hell."\(^{167}\) He told the mother (Elizabeth Lange), a Lutheran, "exactly that in the presence of the children, and he caused them to believe it, since they in turn have told their mother and family friends that if she keeps going to the Lutheran church she is going to hell."\(^{168}\) The father prayed with the children that their mother would become "a Christian."\(^{169}\) Without a hybrid situation before it, the \textit{Lange} court relied on \textit{Smith} to uphold restrictions on the father's religious conduct. Robert Lange was prohibited from educating the children in religious doctrine contrary to the Lutheran faith;\(^{170}\) he was not even allowed to discuss religion with the children if he "cross[ed] into

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  \item \textbf{165.} 502 N.W.2d 145 (Wis. Ct. App. 1993).
  \item \textbf{166.} \textit{Id.} at 155. The father did not contest the constitutionality of the state visitation statute, which provided that any person granted legal custody of a child has the right and responsibility to make major decisions concerning the child, including decisions regarding choice of religion. \textit{See id.} at 145.
  \item \textbf{167.} \textit{Id.} at 146 (alteration in original).
  \item \textbf{168.} \textit{Id.} at 146-47.
  \item \textbf{169.} \textit{Id.} at 147.
  \item \textbf{170.} \textit{See id.} at 146 n.2.
\end{itemize}

Consequently, the respondent is enjoined and restrained from \textit{imposing} his religious beliefs on the parties' minor children, including but not limited to taking the children to his religious services and activities, educating the children in religious doctrine that is contrary to the Lutheran doctrine which the children have been taught, and telling the minor children that the petitioner's religious beliefs and teachings are wrong. This order does not in any way restrain or enjoin the respondent from practicing his own religious beliefs, however, this order does restrain and enjoin the respondent from \textit{imposing} his beliefs on the minor children.

\textit{Id.} (emphasis added)
causing them to reject their mother’s religion.”\textsuperscript{171} Significantly, the court did not require a showing of “grave, damaging effect”\textsuperscript{172} before restricting the father’s religious rights:

The dissent concludes that the state can protect Elizabeth’s exclusive right to choose the religion of the children only if they have been emotionally harmed by Robert imposing his views on them. The health of the children is an outrageous price for that protection. No parent in Elizabeth’s position should be compelled to pay it. No parent in Robert’s position should be allowed to extort it. It is grossly unfair because the children ultimately bear it. No United States Supreme Court decision has authorized it. To the extent that other jurisdictions have implicitly set that price, we reject their decisions. This state need not require harm to the children before protecting Elizabeth’s rightful choice.\textsuperscript{173}

But there may be more rhetoric than logic at work here. Citing \textit{Yoder}, the dissent correctly observed that the trial court’s prohibition involved not only the father’s rights under the Free Exercise Clause, “but his right to freedom of speech, also protected by the First Amendment.”\textsuperscript{174} Indeed, it is difficult to imagine a case of religious disparagement in which the free exercise claim is not arguably conjoined with more than one fundamental right.

In some education-related cases, courts have sidestepped the hybrid rights problem on the ground that parents do not have a fundamental due process right to dictate how children are schooled. Thus, courts did not apply strict scrutiny where religiously motivated due process objections were made to such programs as required health or sex education,\textsuperscript{175} mandatory community service requirements,\textsuperscript{176} or a policy against part-time attendance.\textsuperscript{177} For these courts, a religious parenting claim is a hybrid one only if each claim, taken separately, is independently viable or, at least, colorable. For other courts, each claim need not state an independent constitutional violation. One thing is clear: part of what \textit{Yoder} wrought is confusion among the circuit courts. Some courts unravel the

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\item \textsuperscript{171} \textit{Id.} at 147 (alteration in original).
\item \textsuperscript{172} \textit{Id.} at 151 (Dykman, J., dissenting) (citing Felton v. Felton, 418 N.E.2d 606, 610 (Mass. 1981)).
\item \textsuperscript{173} \textit{Id.} at 148.
\item \textsuperscript{174} \textit{Id.} at 150 (Dykman, J., dissenting).
\item \textsuperscript{176} \textit{See} Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 462 (2d Cir. 1996).
\item \textsuperscript{177} \textit{See} Swanson By and Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998) (noting instance where court did not apply strict scrutiny to objection to policy against part time attendance).
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complexities of the hybrid rights situation by ignoring it altogether. These efforts to rend asunder what Yoder wrought illustrate just how unstable the hybrid rights doctrine really is. Much religious practice involves expressive conduct that implicates fundamental rights. But, as Justice Souter pointed out,

If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual.

But (again, Justice Souter) if each conjoined right “is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.” Because the interests of parenthood under the Due Process Clause enjoy an uncertain constitutional status—it is not clear that they implicate, or always implicate, fundamental rights—there is good reason for Smith to have mentioned the Free Exercise Clause with regard to them. Under Yoder, some parenting claims, when conjoined with a free exercise claim, are subject to heightened scrutiny, even though they may not be independently viable.

A more productive way to counter a hybrid rights claim is to attack the free exercise side of the case. Yoder required heightened scrutiny “when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record.” There is good reason for this careful language: the state’s compulsory education law was a religious burden for reasons peculiar to the facts of the case (an entire way of life inextricably bound to religious belief, the continued survival of a long-established and self-sufficient community, the adequacy of an alternative of informal education “in terms of precisely those overall interests the State advances in support of its program,” etc.). Without these conditions, some govern-


180. Id.


182. Id. at 235.
mental regulation that impinges on religious parenting may simply not amount to a substantial religious burden. In *Jernigan v. State*, for example, the defendants, who refused to comply with a law requiring private tutors to hold a public teaching certificate, relied on *Yoder* to challenge the law. But the court, while conceding the sincerity of the defendants' religious beliefs, found no constitutional violation because the defendants had not shown, among other things, "that their entire way of life is inextricable from their religious beliefs." (On similar facts, however, other courts have assumed a hybrid situation that demands the application of heightened scrutiny.)

Whatever a hybrid situation is, the principle that such cases are subject to heightened scrutiny has no place in custody cases. The harm standard may make sense where the rights of the parent are set against governmental regulation, but the custody court, if it is to make the best interests of the child its paramount consideration, must be free to act in ways that are meant to prevent harm from occurring. The fiduciary obligation of the court would be better served if it were able to consider any practice that could have a "detrimental effect" on or otherwise "affect the general welfare of the child." The scope of the best interests inquiry must be broad enough for a court to "consider evidence of the religious views or practices of a party... to the extent that such views or practices are demonstrated to bear upon the physical or emotional welfare of the child." If one parent’s views or

184. Id. at 1245.
185. See People v. DeJonge, 501 N.W.2d 127, 144 (Mich. 1993) ("[T]he certification requirement is not essential to nor is it the least restrictive means of achieving the state’s claimed interest.").

Thus, the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.

*Id.*


Courts may not ignore evidence of a parent’s religious views or practices which endanger the secular welfare of the child. While a parent has the right to inculcate religious beliefs in a child, that right is not immune from interference where... there is evidence that the chosen method of such inculcation poses a threat to the child’s secular well-being.

*Id.; see also* Pater v. Pater, 588 N.E.2d 794, 799 (Ohio 1992) ("[T]he law does not require that a child be actually harmed or that a parent’s unsuitability to have custody of her children be disregarded because the parent claims that the bases of her unsuitability are religious practices.” (quoting Birch v. Birch, 463 N.E.2d 1254, 1257 (Ohio 1984))).
practices tend to alienate the child's affection from the other parent, that fact should not be ignored because the parent's conduct is grounded on religious belief. In short, any evidence that would be considered in a case not involving religious factors should be considered in a case where religiously motivated practices are involved.\textsuperscript{189} "To ignore such evidence would be a dereliction of the duty of courts to 'monitor the welfare of children in their jurisdiction and promote the children's best interests';\textsuperscript{190} and the evocation of the best interests standard would be, in the words of one family law court, "but a hollow shibboleth."\textsuperscript{191}

Custody disputes are something of a legal anomaly. The need for some sort of judicial resolution requires the state to intervene in matters that would be protected by privacy rights if the family were intact. But these disputes are also an opportunity for the courts, as an instrument of the state, to insist upon "the appropriate form of civil discourse"\textsuperscript{192} when religious views diverge. Like the schools, courts have a role to play in teaching—or, perhaps more accurately, teaching parents to teach—religious tolerance. It may well be the case that under some circumstances exposure to parents' conflicting religious beliefs is the best way to teach that lesson;\textsuperscript{193} and it is surely too much to claim that "it is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects."\textsuperscript{194} But it may also be the case that exposure to intolerance is not in the best interests of the child, that a diversity of religious experience is hardly "a sound stimulant for a child."\textsuperscript{195} Where that is the case, the court can and should do the work of inculcating the habits of civility and the fundamental values that are "indispensable to the practice of self-government in the

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\textsuperscript{189} See, e.g., \textit{Pater}, 588 N.E.2d at 802 (Resnick, J., concurring in part and dissenting in part) ("It is the role of a trial judge at a custody hearing to consider all relevant factors, and then reach a decision. That decision is based primarily on the best interests of the child, with all other concerns of secondary importance.");
\textsuperscript{191} \textit{Morris}, 412 A.2d at 144.
\textsuperscript{192} \textit{Bethel Sch. Dist. No. 403 v. Fraser}, 478 U.S. 675, 683 (1986).
\textsuperscript{193} See, e.g., \textit{Felton v. Felton}, 418 N.E.2d 606, 607-08 (Mass. 1981) ("There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child."); \textit{Zummo v. Zummo}, 574 A.2d 1130, 1155 (Pa. Super. Ct. 1990) ("For children of divorce in general, and children of intermarriage and divorce especially, exposure to parents' conflicting values, lifestyles, and religious beliefs may indeed cause doubts and stress. However, stress is not always harmful, nor is it always to be avoided and protected against."); see also Carolyn R. Wah, \textit{Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation}, 28 \textit{Fam. L. Q.} 269 (1994).
\textsuperscript{194} \textit{Morris}, 412 A.2d at 142.
\textsuperscript{195} \textit{Felton}, 418 N.E.2d at 608.
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community and the nation."\textsuperscript{196} In this regard, no value is more fundamental than "tolerance of divergent political and religious views."\textsuperscript{197} If the welfare of "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens,"\textsuperscript{198} the welfare of young people requires that those responsible for their upbringing observe, or be made to observe, "the boundaries of socially appropriate behavior."\textsuperscript{199}

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\item \textsuperscript{196} Bethel, 478 U.S. at 681 (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).
\item \textsuperscript{197} Id. at 681.
\item \textsuperscript{198} Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
\item \textsuperscript{199} Bethel, 478 U.S. at 681.
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