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THE SOLOMONIC PARADOX REVISITED: SHOULD CUSTODY PROCEEDINGS DETERMINE A CHILD’S RELIGION?

Jason S. Marks*

"With the eyes of a child
You must come out and see
That your world’s spinning round
And through life you will be
A small part of a hope of a love that exists
In the eyes of a child you will see . . . ." 1

I. INTRODUCTION: “WITH THE EYES OF A CHILD”

Perhaps the most famous legend surrounding the biblical King Solomon concerned a dispute over the custody of a newborn child. Two women had come to Solomon, each claiming to have borne the child. Indeed, in a span of a few days, both women did give birth to a child—one stillborn, the other the subject of dispute. Solomon decided to resolve the dilemma by cutting the child in two, and giving one half to each of the claimants (perhaps the first recorded “split custody” award). One woman begged Solomon to forego killing the child and give it to the other claimant. Furious, the other woman asked for the split to take place. Based on the showing of compassion by the first woman, Solomon awarded her custody. Theologians and scholars alike consider Solomon a genius—but was he? Was the woman awarded custody truly the genuine birth mother because she

* B.A., Political Science and Sociology, University of Missouri-Columbia, 1989; J.D., Washington University, 1992. The author would like to thank the following individuals: Susan F. Appleton, Professor of Law, Washington University, for helpful comments on earlier drafts and, more importantly, for introducing me to the interdisciplinary approach to family law; Rabbi Jeffrey B. Stiffman, Temple Shaare Emeth, and Jeffrey Scheckner, Research Consultant, Council of Jewish Federations, for providing the most recent data on intermarriage in the Jewish population; Thad A. Brown, Professor of Political Science, University of Missouri, and Stanley L. Paulson, Professor of Law, Washington University, for continual encouragement, guidance and friendship.

was willing to forego custody to save the child? Or was Solomon simply outsmarted by a more cunning individual who played upon Solomon's sense of compassion and justice? Family courts across the country daily revisit the Solomonic paradox, for a shadow of uncertainty hovers over every child custody award whenever "best interests" include, at least in part, a subjective judgment of what both parents have to offer the child. Epistemologically, can we ever feel reassured that the decision maker has chosen the superior custodian? And even if we could, what measurements, from an ontological standpoint, could we employ to verify the selection is in the child's best interest?

With the notable rise of interfaith marriages within the last fifteen years, the Solomonic paradox has an added dimension: Should a judge, faced with determining the custody of a child, have the power to decide the child's religious future? Should such a decision be separate from the general grant of legal custody? And if such a determination is in the child's best interests, what standards should guide a judge making such a custody award? Consider the following recurring scenario.

A. Religion and Custody

Pamela and David have been married for ten years. They have three children: Adam, age eight; Rachel, age four; and Daniel, age three. Pamela "was raised a Jew and has actively practiced her faith since childhood." David "was raised a Roman Catholic but had attended Catholic services only sporadically." Prior to their marriage, Pamela and David "discussed their religious differences and agreed that any children would be raised in the Jewish faith." Throughout the marriage, the family "participated fully in the life of the Jewish faith and community." Pamela and David joined a synagogue, celebrated the Sabbath every Friday evening, and attended high holy day services annually. Active participants in the congregation, Pamela

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4. See infra notes 17-23 and accompanying text.
6. Id.
7. Id.
8. Id.
9. Id.
and David formally gave their children Hebrew names. Further, Adam has attended Sunday School and is preparing for his Bar Mitzvah. It is the parents’ intent that Rachel and Daniel will receive a formal Jewish education when they are of the appropriate age. None of the children have been exposed to any religious faith other than Judaism.\(^\text{10}\)

Pamela and David have separated, with Pamela filing for divorce. Both parties agree that Pamela will receive primary physical custody, and they both will share legal custody. David does not wish to have his visitation period hindered by being obligated to take the children to their weekend classes in Judaism. Additionally, David would like to bring the children to his church to expose them to Catholicism. Pamela objects, arguing such an exposure will confuse and disrupt their formal Jewish religious education.\(^\text{11}\)

How should the judge decide this issue? Should he abide by the oral antenuptial agreement? Should he go with the presumption that the physical custodian should be the religious custodian? If so, what of David’s rights as a parent? As a Catholic exercising his religion? What about Adam—does he have a right to choose? This scenario places the judge in a seemingly untenable position: No matter what choice is made, someone’s constitutional rights will be infringed. If the court grants religious custody to Pamela, as primary custodian or per the antenuptial agreement, this award may infringe upon David’s religious expression under the Free Exercise Clause of the First Amendment and place the judge in the position of appearing to endorse one religion over another, in violation of the Establishment Clause of the First Amendment.\(^\text{12}\) And furthermore, should any court be allowed to make ex ante the religious determination for the child? Is this in the child’s best interest? Perhaps the right to choose a religion inheres in the child, thereby avoiding a clash with the Establishment Clause, but still offending the Free Exercise Clause for the parent whose religion the child rejects. Should a child be able to make such a religious choice? And if so, at what age? Finally, what of the doctrine of family privacy and parental rights—is it the place of a court of law to make such a personal decision as the spiritual upbringing of a child?

10. Id.
11. Id.
B. The Nature of the Problem

Cases like the saga of Pamela and David, though few in number in the courts, pose serious issues as the exponential growth in interfaith marriages begins to intersect with the skyrocketing divorce rate in the United States. The "best interests" standard, as defined by state statutes and interpreted by the courts, refrains from announcing a separate rule for "spiritual custody," choosing instead to leave the cultivation of the religious environment with the ultimate custodian. But suppose a would-be spiritual caregiver can empirically demonstrate to a court that religious identity is so important to a child's subjective well-being that disruption or alteration of religious upbringing has such potentially damaging ramifications that it is in the child's best interests to be raised continually in one specific faith. If the welfare of the child is our paramount concern, should

13. This paper will focus on Jewish-Gentile intermarriage. Three reasons justify this limitation. First, it simplifies the compilation of material dealing with conflict in interfaith marriages by exclusively centering on the problems of Jewish-Gentile intermarriage. Second, the most striking rise in intermarriage is seen today in the Jewish population, and the effect of this trend has a much greater impact on the religious upbringing of the child, compared to interfaith marriages between different Christian denominations, because the divergence in parental religious beliefs is at its peak. Finally, sociologists contend that the findings attributed to the problems of the marriage between a Jew and a Gentile reflect similar problems encountered by other interfaith couples, so generalizations from the Jewish-Gentile experience are empirically permissible. See Yisrael Ellman, Intermarriage in the United States: A Comprehensive Study of Jews and Other Ethnic and Religious Groups, 49 JEWISH SOCIAL STUDIES 1, 23 (1987); EGON MAYER, LOVE AND TRADITION 23-58 (1985).

14. Recent studies estimate that more than half of all marriages will end in divorce. See Martin and Bumpass, Recent Trends in Marital Disruption, DEMOGRAPHY, Feb. 1989, at 37, 37.

15. The only exception is the highly publicized case of Simms v. Simms, Case No. 87DR3301 (Dist Ct. Denver County, Colo. Dec. 29, 1987).

16. In Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court intimated that an empirical showing of probable trauma by awarding custody to a child who would be raised in a racially mixed family is insufficient to overcome the Fourteenth Amendment's ban on racial discrimination motivated by impermissible stereotypes, even if these stereotypes have an empirical basis in fact. Because no scientific studies were provided which would demonstrate the likelihood of temporal harm to the child, the Court left unanswered whether the result would be different. Even assuming the result would not change, I believe Palmore is not a bar to the proposal made in this article, primarily because the Court reserves its most exacting scrutiny for cases of invidious racial discrimination, and that such a high standard would not exist in the religious custody context. See infra notes 155-174 and accompanying text. Further, the source of the harm differs dramatically in the two situations. In Palmore, the alleged harm—social stigmatization and psychic trauma associated with racial discrimination—is premised on acquiescing in socially created impermissible racial stereotypes. In the case of religious custody awards, the alleged harm—the threat to temporal welfare which a dissonant religious environment creates—is premised on acquiescing in family created sectarian conflicts. Palmore holds that custody awards cannot be based on the feared effects of a dysfunctional society which has no come to terms with its racism. Nothing in Palmore, however, would
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we not create a legal rule for child custody proceedings that safeguards the child’s spiritual health, just as the “best interests” standard protects the child’s physical and temporal welfare? But given the heightened scrutiny that any infringement upon either religious freedom or family privacy receives, can a rule governing spiritual custody survive a constitutional challenge?

This article will focus on these questions. Through a survey of sociological, anthropological, and psychological research, this article suggests that a court enhances a child’s temporal welfare when religious custody vests in only one faith. After examining how state statutes, the Uniform Marriage and Divorce Act, and state courts have interpreted “best interests,” and how the Supreme Court has interpreted the constitutional provisions concerning religious freedom and family privacy, this article argues that the states should adopt the following “spiritual caregiver” rules. Upon divorce, religious custody shall be awarded to the parent in whose faith the child has been raised since birth. If the child has been exposed to both parents’ religions, or to no religion at all, and no prior agreement between the parents has been made, a presumption of religious custody shall vest in favor of the primary caregiver (or legal custodian). This presumption is rebuttable upon the presentation of evidence of other factors, including the preference of the child if judged to be mature enough to have formed a religious identity, that indicate such a presumption is not in the best interests of the child. This article concludes that these rules, rooted in knowledge culled from the behavioral sciences, promote the healthy development of the child’s religious identity without violating the Court’s jurisprudence on the nature of religion and family privacy.

II. INTERMARRIAGE AND DIVORCE

A. The Demographics of Intermarriage

It is certainly no exaggeration to assert that the intermarriage pattern of Jews today is a startling, and to some, a troubling, phenomenon. Prior to 1965, less than 10% of the Jewish population prevent custody awards based on the real effects of a dysfunctional family which cannot reconcile conflicting religious preferences and prejudices.

17. Many Jewish leaders see intermarriage not simply as an issue of Jewish survival, but more urgently, as a signal of a major transformation away from Judaism as an institutional religion toward only a shared cultural heritage. See, e.g., David Firestone, Jews Seek Stronger Identity, NEWSDAY, Dec. 23, 1991, at 15; David Firestone, Marriage, Family and Judaism, NEWSDAY, Aug. 13, 1991, Part II, at 56; Gary Libman, At a Crossroads, Los ANGELES TIMES, August 6, 1991, at E1; Gary Libman, Why Marry Outside the Fold?, LOS
would marry outside of the faith; during the years 1965-74, the intermarriage rate more than doubled to 25%; this rate increased to 44% by 1984; and researchers believe that since 1985, over half of the Jewish population is marrying outside the faith.\textsuperscript{18} The impact of these exogamous marriages on the next generation of Jews is equally revealing: Of the nearly two million children under the age of 18 with at least one Jewish parent, less than half are being raised in a Jewish household. Further, of the 770,000 children of exogamous marriages, only 28% are being raised Jewish; with 41% being raised in some other faith and 31% being raised without any religious identity.\textsuperscript{19}

With divorce rates in the United States above 50%, one wonders what effect intermarriage has on divorce. The results are mixed, with some studies concluding that the divorce rate among exogamous marriages is much higher than for endogamous marriages.\textsuperscript{20} Others have found the religious factor to have been "negligible" in the marital breakup.\textsuperscript{21} One uncontroverted finding is that a divorced Jew is much more likely to remarry exogamously,\textsuperscript{22} increasing the likelihood that the children of that individual's first marriage will have to

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As more Jews become assimilated and move away from the traditional aspects of the faith, authorities believe it is quite likely that their children will not only experience a low Jewish literacy rate, but also experience an overall de-emphasis on religious identity, concomitant with an increased exposure to a multi-religious household. \textit{See infra} notes 52-75 and accompanying text. The trend of a decrease in religiously literate parents (among all faiths) coupled with an increase in exogamous marriages will yield an entire generation of children for whom religion will be a source of confusion, ignorance, dissonance, and divisiveness as their parents play out their frustrations of a lost religious faith through the upbringing of their children—especially at times of marital dissolution.

\textsuperscript{18} Barry Kosmin et al., \textit{[Publication of the Council of Jewish Federations 1991] Highlights of the CJF 1990 National Jewish Population Survey} 13-14 [hereinafter \textit{NJPS Highlights}]. Several social scientists have found similar rising trends in Christian denominations. Episcopalians and Presbyterians currently have a 72% intermarriage rate, while Baptists have a rate of 33%. Norval D. Glenn, \textit{Inter Religious Marriage in the United States: Patterns and Recent Trends}, \textit{J. Marriage \& Fam.} 555 (August 1982). Among Catholics, recent trends show a rise in intermarriage from as low as 34% to as high as 40%. Andrew M. Greeley et al., \textit{A Profile of the American Catholic Family}, \textit{America} Sept. 27, 1980, at 155; Dean R. Hoge \& Kathleen M. Ferry, \textit{Empirical Research on Interfaith Marriage in America} 1 (1981).

\textsuperscript{19} Kosmin, \textit{supra} note 18, at 15-16.


\textsuperscript{22} Ellman, \textit{supra} note 13, at 8.
face some level of dissonant religious upbringing in their post-divorce household. In sum, the statistics reveal what the conventional wisdom has presumed: Intermarriage is a rapidly rising trend which will impact upon over 40% of children in this country with at least one Jewish biological parent. How do we account for this sudden rise in exogamy? And given these trends, what does the prototypical interfaith couple look like? What is the religious environment for the children born unto parents of differing faiths?

B. The Ethnographic Dimensions of Intermarriage

Louis Berman conducted one of the earliest, and certainly one of the most exhaustive, studies to document the trend of Jewish exogamy. Berman examined a plethora of factors, and drew the following conclusions. First, those members of minority religious groups who live in communities in which they are but a minute proportion of the population are most likely to intermarry, simply because the available pool of endogamous partners is so small. Second, the college experience, especially during the first two years, increases interfaith dating because of the exposure to persons of different backgrounds and the aura of curiosity of the college campus. This trend is especially true for religious minorities from small towns, whose exposure to the cosmopolitan existence has been limited. However, the more years of college one accumulates, the less the desire to choose a mate outside of one's religious group. This finding seems to suggest that the cultural ties of an endogamous Jewish family are stronger than the temptations of more unrestrained living in the college experience.

This conclusion is reinforced by the next discernible factor, namely that intermarriage is unlikely when one's Jewishness is "experienced as a feeling of family loyalty." Berman notes that in "a society in which exogamy is strongly discouraged, the taboo is more likely to be violated by males, whose sex role designates a greater degree of independence and aggressiveness," and thus one should see

23. Id. at 10-11.
25. Id. at 83-84.
26. Id. at 89-90.
27. Id. at 90.
28. Id.
29. Id. at 90-91.
30. Id. at 91-93.
a disproportionate number of male Jews intermarrying as compared to female Jews. Age is also a significant factor, for it appears that Jews who intermarry do so at a later age than those who marry within the faith. This phenomenon may be explained as derivative of the closeness to the family factor noted above, and that as one gets older and separates from familial influence, the pressure against intermarriage is not as great. Another interesting family-related factor is order of birth: Those who intermarry tend to be the youngest child of the family, a finding that would seem to be explained by the burden placed on the oldest child to perpetuate the family heritage.

A final factor, discussed below in reference to explaining the causes of intermarriage, is the desire for upward social mobility and assimilation into a predominantly Christian culture. Thus, the higher the socio-economic status of the individual, the greater likelihood of an interfaith marriage.

How accurate is this profile of the "intermarrying individual" in today's society? Egon Mayer has perhaps performed the most detailed study of Jewish intermarrieds one generation removed from those surveyed by Berman. Surprisingly, the more recent surveys have primarily reinforced the earlier conclusions. The key difference centers on the emergence of the intermarrying Jewish woman. Mayer found that, contrary to past trends, Jewish women are now intermarrying at a rate equal to, if not in excess of, Jewish men. We can assume this trend reflects not only the growing independence of women in society, no longer bounded by cultural taboos and stereotypes, but also an ever shrinking pool of available Jewish males.

31. Id. at 94-95.
32. Id.
33. Id. at 95.
34. Id. at 95-97. Conversely, psychological profiles of the youngest child seem to suggest feelings of ambition and a flair for the unconventional, either as a means to challenge the strength of the elders or out of a sense of inferiority in being able to compete with the accomplishments of the elder siblings. "To excel is to rebel" may be the credo of the youngest child, and would support the challenge to the orthodoxy of endogamy. Berman, supra note 24, at 97.
35. Id. at 99.
36. Id. at 106.
37. See Mayer, supra note 13.
38. Id. at 103.
39. Id. "Conversion patterns are quite different. Many more non-Jewish women convert to Judaism than do non-Jewish men so the ultimate result is that in most currently all-Jewish families the Jewish-born spouse is the husband. Jewish men marry out to a greater degree than Jewish women but they also bring into their families a far greater number of converts." Ellman, supra note 13, at 8.
in proportion to available Jewish women.  

While supporting many of the general conclusions of earlier studies, the more recent surveys provide empirical insight into, and not mere speculation concerning, the connection between religious salience, family loyalty, and intermarriage. Mayer relates that the level of one's "informal and voluntary ties to one's ethnic community in a free environment . . . reflects the values one places on those ties." Thus, the greater the bonds between a Jew and his family upbringing as a member of a Jewish community and faith, the more likely he or she will stay endogamous when exposed to persons of different backgrounds. Mayer notes that the "overwhelming majority of the intermarriers are committed to a broad and somewhat abstract sense of group continuity. This they would undoubtedly share with non-intermarried Jews as well. However, only about one-half share in the more specific and particular ramifications of that general value."

Therefore, the intensity one attaches to one's religious background is highly determinative of whether one will intermarry—and this extends to Gentiles as well as Jews. This conclusion raises two critical questions, to be addressed below. What factors explain how one develops an "intense" religious attachment? And is such intensity a positive or negative social psychological trait? These are normative queries, but further objective data may "hint" at an answer.

Mayer found that "most Jews in intermarriages continued to identify with their religion of birth," so that Jews born and raised Jewish will identify as such throughout their lives. Conversely, the

40. This increasingly shrinking pool results from the fact that, as more and more Jewish men refuse to marry in the faith, successive generations of Jewish women find it increasingly difficult to find a Jewish man interested in marrying a Jewish woman. Hence, if Jewish women wish to marry and have children, the temptation to intermarry increases, and their rates of intermarriage start to reflect those of Jewish men. While Jewish men may have chosen to intermarry because of the pressures of assimilation and a disdain for institutional Judaism, as discussed below, Jewish women have intermarried predominantly by attrition. See generally, Berman supra note 24, at 94-95.

41. See Ellman, supra note 13, at 23-26 for a thorough bibliography.

42. Mayer, supra note 13, at 93.

43. Id. at 93-94.

44. Id. at 109. These observations are supported by findings of NJPS, which "pin-pointed two background factors as being of major influence in eventual intermarriage," specifically, "a reported lack of parental opposition to inter-dating," and a weak Jewish upbringing.

45. Mayer, supra note 13, at 133.

46. See infra notes 52-75 and accompanying text.

47. Mayer, supra note 13, at 134. Mayer suggests the following reason for the persistent salience of Judaism among intermarried.

I believe that the confluence of the patterns of Jewish culture, the history
non-Jewish partner in an intermarried couple is not only less attached to the religion of his or her childhood, but is also three to ten times more likely to convert out of his or her religion of birth to Judaism. Corresponding to the finding that Jews of exogamous marriages will have the more intense tie to their birth religion, Mayer also discovered that "the Jewish family tradition is more strongly represented in the intermarried family than the non-Jewish tradition."

Without getting ahead of ourselves and discussing the "why" of intermarriage and the problems exogamous partners face specifically with regard to raising children, Mayer's data suggest that, despite the mass movement toward assimilation in America, even those who are so bold as to marry outside their faith still have strong ties, often inexplicable, to their religious heritage; bonds which encourage perpetuating that heritage, as amorphous as it may be to this individual, through his or her children. Thus, the bridge between the social, psychological and legal components of our inquiry is becoming clear: The peculiar needs of the exercise of the Jewish religion, even for those who opt for intermarriage, will likely create a desire for establishing a Jewish household, complete with its religious and cultural heritage. In marriages which are unstable, the child's welfare, ceteris paribus, may actually be furthered by a legal rule which prefers, in the case of Jewish-Gentile interfaith couples, a presumption of religious custody for the Jewish parent. Before we may ad-

of Jews in America, and the social psychology of the modern Jewish family has produced the twin results of intermarriage. Although it has increased the incidence of intermarriage, it has also increased the likelihood that intermarried couples, Jews and non-Jews, will have their group identity defined more by their Jewish heritage than by any other ethnic or religious heritage. But those very same forces have also increased the fragmentary nature of what constitutes Jewish tradition and Jewish identification. Thus, although Jewish culture survives and even flourishes in modern America, it does so less as an integrated whole and more as a kind of grab bag of fragments from which individual Jews choose more or less at will . . . . So being Jewish is mostly a sometime thing. Of course feeling that one is a Jew or not a Jew is a constant existential condition, but enacting or recollecting any of the cultural imperatives of that feeling are only episodic and subject to the choice of each individual.

Id. at 170-71.
48. Id. at 136.
49. Id. at 162.
50. Id. at 164.
51. This paper recognizes that divorce is a result of the confluence of many factors, of which religion is but one. However, as an intermarriage becomes unstable, the evidence demonstrates religion becomes an increasingly salient determinant of marital discord with potentially devastating effects on the emotional well-being of the couple's children.
dress the needs of the child, however, we first must discern the internal dynamics of those individuals who intermarry: What phenomena bring an interfaith couple together, and which of these aspects are most likely to result in conflict as the relationship develops and grows over time.

C. A Theory of Contemporary Intermarriage

To understand contemporary trends of marrying across racial, ethnic, and religious lines, one must appreciate the unique composition of American society, penned by Israel Zangwill as:

[T]he great Melting-pot . . . roaring and bubbling . . . stirring and seething! Celt and Latin, Slav and Teuton, Greek and Syrian—black and yellow—[Jew and Gentile]. Yes, East and West, North and South, the palm and the pine, the pole and the equator, the crescent and the cross . . . Here shall they all unite and build the Republic of Man and the Kingdom of God.62

The "melting pot" did not yield its "American alloy" as idyllically as Zangwill's elegy for multiculturalism would suggest. Though each successive wave of immigration from Europe enhanced the ethnic and religious flavor of the nation, the mix was certainly no alchemist's dream.63 Prejudice and bigotry toward certain racial, ethnic, or religious groups were part of the baggage which immigrants brought to their new homeland—not that such elements were lacking in America, still incensed by the fires of slavery and Puritan manifest destiny.64 However, through diligence and perseverance, each wave of ethnic immigrants managed to move from their initial homogeneous ghetto into the upper strata of mainstream America.65 But this move away from a communal place of origin, from "the old country," toward a more general membership in an ethnic category, was only a temporary locus of identity. The group cohesiveness of the first generation became for their children—the "second generation"—a competing agent with the pressure to assimilate into main-

52. ISRAEL ZANGWILL, THE MELTING POT 198-99 (1908).
54. See, eg., RICHARD KLUGER, SIMPLE JUSTICE 51-104 (1975); KENNEDY, supra note 53, at 70-76. See generally THOMAS CURRAN, XENOPHOBIA AND IMMIGRATION (1975).
stream culture. Though raised in the secular American culture, the “third generation”—grandchildren of immigrants—suffered a paralysis of affiliation, strangers to their past and unsettled in their present. As assimilation persisted, the attachment to religion became more of an ethnic label, a signal of membership in some sub-group of American society. However, the traditions of the various religions were not as tenaciously adhered to as the group moniker. In place of competing religious world views arose a common value system, the ultimate product of the melting pot—the “American Way of Life.”

The duplicity of the American experience with ethnic integration—an egalitarian multi-cultural assimilation on the one hand, and an existential “identity vacuum” on the other—fundamentally ex-

56. Id. at 28.
57. Id. at 30-31.
58. Herberg's definition of the “American Way of Life” is very illuminating.

It should be clear that what is being designated under the American Way of Life is not the so-called “common denominator” religion; it is not a synthetic system composed of beliefs to be found in all or in a group of religions. It is an organic structure of ideas, values, and beliefs that constitutes a faith common to Americans and genuinely operative in their lives, a faith that markedly influences, and is influenced by, the “official” religions of American society.

If the American Way of Life had to be defined in one word, “democracy” would undoubtedly be the word, but democracy in a peculiarly American sense. On its political side it means Constitution; on its economic side, “free enterprise”; on its social side, an egalitarianism which is not only compatible with but indeed actually implies vigorous economic competition and high mobility. Spiritually, the American Way of Life is best expressed in a certain kind of “idealism” which has come to be recognized as characteristically American. It is a faith that has its symbols and its rituals, its holidays and its liturgy, its saints and its sancta; and it is a faith that every American, to the degree that he is an American, knows and understands.

The American Way of Life is individualistic, dynamic, pragmatic. It affirms the supreme value and dignity of the individual; it stresses incessant activity on his part, for he is never to rest but is always striving to “get ahead”; it defines an ethic of self-reliance, merit, and character, and judges by achievement: “deeds, not creeds” are what count. The American Way of Life is humanitarian, “forward looking,” optimistic . . . . The American believes in progress, in self-improvement, and quite fanatically in education. But above all, the American is idealistic. Americans cannot go on making money or achieving worldly success simply on its own merits; such “materialistic” things must, in the American mind, be justified in “higher” terms, in terms of “service” or “stewardship” or “general welfare.” Because Americans are so idealistic, they tend to confuse espousing an ideal with fulfilling it and are always tempted to regard themselves as good as the ideals they entertain: hence the amazingly high valuation most Americans quite sincerely place on their own virtue. And because they are so idealistic, Americans tend to be moralistic: they are inclined to see all issues as plain and simple, black and white, issues of morality. Every struggle in which they are seriously engaged becomes a “crusade.”

Id. at 77-79.
plains both the prevalence of intermarriage as well as its internal discord.

To some, intermarriage represents the fulfillment of the American dream . . . . It is the ultimate embodiment of the melting pot. To others, it represents the inevitable curse of equality; the price that all minority groups must be willing to pay in the coinage of their own valued traditions for living peaceably in a free society. [For all] it constitutes an often delicate balancing of the pulls and tugs of love and tradition; a balancing between the loyalties to individuals and loyalties to ancestral memories; attachments to the compelling present and affinities to a lingering past . . . . [T]he heritages, traditions, cultural memories, and group identities of individuals who fall in love and marry do continue to play a significant role in the individuals' self-concepts and also in the life-styles of their families.59

Interrmarriage, therefore, "is inevitably a conversation about culture, history, and the personal feelings about tradition,"60 a conversation which, unfortunately, usually does not take place until issues of family identity become a source of conflict.61

What we have gleaned from our exegesis of intermarriage is that throughout "our lives ethnicity is a powerful influence in determining our identity. By providing a sense of belonging and of historical continuity, it meets a basic psychological need."62 Because ethnicity "involves conscious and unconscious processes that fulfill"63 this need, it influences "our thinking, feeling, and behavior in both obvious and subtle ways."64 It interacts with the life cycle to reinforce our "cultural identity" and provides us "with the rituals, the

59. Mayer, supra note 13, at 8, 32.
60. Id. at 72.
61. Mayer elaborates on this point:
[I]t is clear that the events or situations that necessitate negotiating matters of family identity are primarily those having to do with the holiday cycles of the calendar and certain transition points of the life cycle. As one pundit summed it up years ago, we suddenly find religion or heritage important when we "hatch," "match," or "dispatch," as in birth, marriage, and death. Less glibly, the matters that necessitate negotiations over the issues of family identity among intermarriers are the wedding itself, how to raise children, what holidays to celebrate and how to celebrate them, and—to a lesser extent—how closely to pattern the general life-style of the family on either of the couple's twin heritages.

Id. at 180-81.
63. Id.
64. Id.
symbols, and the context of familiar meanings" that enable us to deal positively with those moments when life reaches a crossroads. As our ethnicity calms the anxiety generated by the forces of change with a coherent sense of meaning, we experience a rapprochement with the nascent ideals that shape our world view. Intermarriage, however, undermines the utility of ethnicity by creating "ethnic dilemmas" where any choice will result in offending at least one partner's latent attachment to a particular religious heritage. Given the potential for recurrent conflict between different ethnic identities, how do these differences manifest themselves in the intermarrieds' relationship, and from where do these conflicts originate?

As a general rule, "the greater the cultural difference between the spouses, the more difficulty they will have understanding each other and adjusting to marriage and the more difficulty their families will have adjusting to the required changes." More specifically, several factors influence the degree of adjustment required of an intermarriage: (1) the "extent of difference in values between the cultural groups involved," (2) differences "in the degree of acculturation of each spouse," (3) religious differences, (4) racial differences, (5) the sex roles as defined by each spouse's culture, (6) socioeconomic differences, (7) "familiarity with each other's cultural context prior to marriage," (8) "the degree of resolution of emotional issues about the intermarriage reached by both families prior to the wedding," (9) differing styles of emotional expression and communication born of one's ethnicity, and (10) differing contextual views of the role the family plays in each spouse's culture.

If intermarriage presents so many possible problems, why do such marriages occur?

Generally, individuals who choose to marry out are seeking a rebalance in the characteristics of their own ethnic background. They may be attempting to move away from certain values and aspects of their cultural identity they dislike by moving toward others that they admire . . . . Those who marry out may also be seeking to solve a family dilemma. They may be attempting to detriangle from an intense emotional relationship

65. Id. at 348.
66. Id.
67. Id. at 347-48.
68. Id. at 348.
70. Id. at 349-50, 354-56.
in the family of origin.\footnote{71} 

Yet, as we have seen, the “dynamic of simultaneously wanting intimacy and distance,”\footnote{72} of balancing “love and tradition,”\footnote{73} exposes the limit of these traditional reasons for intermarriage.\footnote{74} Whether seeking balance, diversity, or escape, one’s religious upbringing, though often suppressed during courtship and the initiation of marriage, reappears almost reflexively at critical points in the life cycle.\footnote{75} We may thus conclude the following: Religion is a vital part of one’s personal identity, and in the case of interfaith marriages, it is highly probable that these religious attachments will emerge upon raising a family. The result is tension and conflict over the proper manner and environment in which to raise children—discord which becomes more virulent as the intact marriage begins to dissolve. Before we can address the legal ramifications of these differences upon marital dissolution, we must first understand precisely how religion serves to shape one’s sense of self, and what, if any, harm results if one is raised in two distinct and dissonant religious traditions.

III. The Nature of Religion

Describing the nature of religion is, without a guide star, a near futile endeavor. Religion bridges the real and the surreal, the natural and the supernatural, the man and the myth, the world that was and the world that is to be; religion links man to his inner sense of self and the world in which he interacts through some transcendent set of beliefs. To fully understand the nature of religion, one must turn to the social sciences—specifically, sociology, anthropology, and psychology.\footnote{76} This section explores the manner in which each of these fields views the impact of religion on the individual and society. A synthesis of these perspectives, in the form of a scientific description of religion, will assist us in the structuring of a legal rule concerning

\footnote{71} Id. at 350-51; see also Berman, supra note 24, at 516-46. 
\footnote{72} Susan Schneider, Intermarriage: The Challenge of Living With Differences Between Christians and Jews 22 (1989).  
\footnote{73} See supra note 59 and accompanying text.  
\footnote{74} McGoldrick & Preto, supra note 62, at 362.  
\footnote{75} Id. at 356.  
\footnote{76} Religion is obviously theological and philosophical as well. However, the scope of our investigation concerns the effect of religion \textit{qua} belief system on the temporal welfare of the individual \textit{qua} individual and \textit{qua} member of society. Thus, this section will limit its discussion to the social scientific explanations of the influences of religion on the individual, the family, and society; liturgical analyses of religion are, under this narrow construction, beyond the scope of this article.
the religious welfare of a child who is the subject of a custody proceeding.

A. The Sociological Perspective

Contemporary sociology conceives of religion as the development, through social interaction, of a world view which thematically rationalizes one's existence within society. Further, not only is religion sustained by continued social interaction, but it also institutionally sustains a particular community's way of life. Indeed, religious tenets will only retain adherents so long as they can be reaffirmed in society. Yet, why does one need a world view? How does a world view emanate from society and reinforce its institutions? The sociologist answers these questions by stressing the relationship between religion and the empowerment of the individual with a sense of self.

At its root, religion is a product of the individual's need to make sense of the Absurd—that stark paradoxical reality of the human condition that man is born replete with the gifts, intellect, and hubris to conceive of immortality, and even to seek it out, only to recognize that he is indeed condemned to die. To cope with the recurring fear and anxiety which the Absurd arouses, the individual relies on the tenets of a religion, a "system of beliefs and practices"—an ideology, reinforced by ritual, which grounds the individual in a sense of security and membership in something beyond the corporeal self. Upon realizing the truths of a particular set of beliefs, individual adherents begin to divide their world into the sacred and the profane; between that which is holy and awesome, and that which is mundane, commonplace, representative of the drone of everyday life.

79. Emile Durkheim wrote:

The believer who has communicated with his god is not merely a man who sees new truths of which the unbeliever is ignorant, he is a man who is stronger. He feels within him more force, either to endure the trials of existence, or to conquer them. It is as though he were raised above the miseries of the world, because he is raised above his condition as a mere man; he believes that he is saved from evil, under whatever form he may conceive this evil. The first article in every creed is the belief in salvation by faith.

80. The dominant "characteristic of religious phenomena is that they always suppose a
This demarcation between the spiritual and the material allows the believer to create a reality which not only begins to reinforce the precepts of the faith, but also provides a sense of order in the universe that quells the pangs of the Absurd. However, this new reality, if only in the mind of one individual, would not be very convincing. Religion, therefore, is a communal experience and “religious force is nothing other than the collective and anonymous force of the clan”\textsuperscript{81}—a collective conscience which, through mutual adherence and reinforcement, serves to integrate the individual into the society by providing a feeling of belonging, a sense of identity.\textsuperscript{82}

Religion is more than an elixir for the existentially troubled. Without doubt, religion gives the individual a sense of place in society and a community “support group” to reinforce shared beliefs when moments of crisis might lead the individual to question the plausibility of those beliefs. But religion also provides an ethical basis for the underlying structure of a society, a system of values which, by placing the state of one’s current existence—complete with its inequities and disappointments—into a broader conception of a larger social whole, maximizes social stability and minimizes unrest. Thus, in the sociological perspective, religion is a powerful force both in the socialization of the individual and in the rationalization of society.\textsuperscript{83}

\begin{itemize}
\item \textbf{bipartite division of the whole universe, known and knowable, into two classes which embrace all that exists, but which radically exclude each other.} \textit{Id.} at 40.
\item Sacred things are those which the interdictions protect and isolate; profane things, those to which these interdictions are applied and which must remain at a distance from the first. Religious beliefs are the representations which express the nature of sacred things and the relations which they sustain, either with each other or with profane things. \textit{Id.} at 40-41.
\item \textbf{81.} \textit{Id.} at 221.
\item \textbf{82.} Durkheim eloquently summarized this point:
\begin{quote}
Thus the collective ideal which religion expresses is far from being due to a vague innate power of the individual, but it is rather at the school of a collective life that the individual has learned to idealize. It is in assimilating the ideals elaborated by society that he has become capable of conceiving the ideal. It is society which, by leading him within its sphere of action, has made him acquire the need of raising himself above the world of experience and has at the same time furnished him with the means of conceiving another. For society has constructed this new world in constructing itself, since it is society which this expresses.
\end{quote}
\textit{Durkheim, supra} note 79, at 423.
\item \textbf{83.} Malinowski perhaps most succinctly described the sociological interpretation of religion: “Religion needs the community as a whole so that its members may worship in common its sacred things and its divinities, and society needs religion for the maintenance of moral law and order.” Bronislaw Malinowski, \textit{The Public and the Individual Character of Religion},
\end{itemize}
B. The Anthropological Perspective

The anthropologist begins with the same existential dilemma which the sociologist and the theologian indicate as the question: How does man cope with the reality of death and suffering? Unlike the theologian, the anthropologist does not focus primarily on a liturgical response; unlike the sociologist, the anthropologist does not focus primarily on society. Rather, the anthropologist uses the scientific method of the sociologist to examine how the theological response affects the reactions of the individual to the question.

What the anthropologist discovers is that religion "assures the victory of tradition and culture over the mere negative response of thwarted instinct."84 Through the use of religious symbols, man is able to communicate and make sense of the ineffable. "For those able to embrace them . . . religious symbols provide a cosmic guarantee not only for their ability to comprehend the world, but also, comprehending it, to give a precision to their feeling, a definition, to them, emotions which enables [man,] morosely or joyfully, grimly or cavalierly, to endure it."85 As language and communication through symbols are culturally created and shared phenomena, it seems inescapable that the anthropologist must explain religion as more than a personal experience. Religious action is "the imbuing of a certain specific complex of symbols—of the metaphysic they formulate and the style of life they recommend—with a persuasive authority."86 Part of the persuasion is the theology itself; but another part is the shared cultural experience.87 Thus, the anthropologist maintains the primacy of religion as epiphenomenal to the individual, a guidepost for coping with both everyday travails and moments of crisis. The secondary public character of religion is credited with the intergenerational conduit of a community's culture, tradition, and heritage. For the anthropologist, religion ultimately is an individually inspired,

Soc. & Rel. 144 (Norman Birnbaum & Gertrude Lentzer eds., 1969).
86. Geertz, supra note 85, at 16 (emphasis added).
87. Malinowski notes three reasons why religion has a collective, public component: (1) "social cooperation is needed to surround the unveiling of things sacred and of supernatural beings with solemn grandeur," (2) "public performance of religious dogma is indispensable for the maintenance of morals" in the community, and (3) "the transmission and the conservation of sacred tradition entails publicity, or at least collectiveness of performance." Malinowski, supra note 84, at 151-52.
culturally created system of meaning. 88

C. The Psychological Perspective

Unlike the sociologist and anthropologist, the psychologist seeks to explain the nature of religion exclusively through the individual. Foremost in the psychologist's thought is whether religious belief has any therapeutic value, or is in fact a neurotic condition. Though early Freudian theory posited that religion was analogous to obsessive neuroses, and therefore merely a symptom of a deeper, underlying problem, modern schools of psychology emphasize a positive role for religion in the life of the devout. For the believer, religion acts as an "ego strength" which helps shape and reinforce his individual identity. 89

As the individual grows and develops, from infancy to maturity, every life event becomes a challenge, and the response to the challenge contributes to that individual's self-identity. Without sufficient ego strength, failure to rise to certain challenges over time can lead to neurotic responses. But the cognitive psychologists have taught that neuroses are learned phenomena, behavioral responses which can be "unlearned" by reorienting the self's relation to past challenges. 90 The reorientation takes the form of a new set of beliefs, and

88. Clifford Geertz expounds on the importance of meaning.
    For an anthropologist, the importance of religion lies in its capacity to serve, for an individual or a group, as a source of general, yet distinctive conceptions of the world, the self, and the relations between them, on the one hand—its model of aspect—and of rooted, no less distinctive "mental" dispositions—its model for aspect—on the other. From these cultural functions flow, in turn, its social and psychological ones.
    Religious concepts spread beyond their specifically metaphysical contexts to provide a framework of general ideas in terms of which a wide range of experience—intellectual, emotional, moral—can be given meaningful form.

Geertz, supra note 85, at 17.


90. According to Erik Erikson:
    [Religion] elaborates on what feels profoundly true even though it is not demonstrable; it translates into significant words, images, and codes the exceeding darkness which surrounds man's existence, and the light which pervades it beyond all desert or comprehension. Religion . . . is primarily a source of ideologies for those who seek identities . . . . [Ideology means] an unconscious tendency underlying religious . . . thought: the tendency at a given time to make facts amenable to ideas, and ideas to facts, in order to create a world image convincing enough to support the collective and the individual sense of identity.


91. See, e.g., AARON T. BECK ET AL., COGNITIVE THERAPY OF DEPRESSION (1979);
once enmeshed in the personality, becomes an ego strength. But religion is a set of beliefs oriented specifically toward answering many of the challenges we encounter through life. Hence, for those with firm religious beliefs, "there can be no objection to making use of the therapeutic effect of his religious convictions and thereby drawing upon his own spiritual resources." 92

Religion has value for the psychologist because through devotion the believer develops self-efficacy. Religion provides a set of beliefs which can focus an individual believer keenly on the meaning in his life. Religious adherence can cognitively restructure one's subjective reality construct to empower one to struggle successfully, and with purpose, against the pitfalls in life—be they physical or existential. Finding the right connection between meaning and identity is the key to living well, and a deep religious faith is often one of the best resources for the self-discovery that is not only enlightenment, but survival.

D. Synthesis

What have we learned from examining social scientific perspectives on the nature of religion? From the sociologist we have found that religion is not only a powerful force in the socialization of the individual, but also one of the components of a societal ethic which contributes both to the cohesiveness and evolution of a community. From the anthropologist we discovered that religion serves as a cultural system of meaning, communicating through a particular set of symbols, rites, and traditions a method of grasping a sense of the ineffable. From the psychologist we learned that religion is not only socially integrating and culturally reinforcing, but also is an ego strength which can contribute to identity formation and provide a blueprint for mental wellness.

Pulling these perspectives together, we can create a synthesis which explains the nature of religion in three dimensions: (1) between the individual and society; (2) between the individual and culture; and (3) between the individual and self-efficacy. Our social scientific inquiry presents the following definition of religion: Religion is essentially a socio-cultural phenomenon which seeks, through a unified symbolic belief system, to bring a sense of personal meaning into those elements of the life cycle which seem ineffable. As man is

Albert Ellis, Reason and Emotion in Psychotherapy (1962).
ultimately a creature of society, religion not only relies on community to enhance and reaffirm the effervescence of faith, but is also a factor which contributes to the social integration and psychological stability of the individual believer.\textsuperscript{93}

E. *Empirical Perspectives on the Nature of Religion*

Recognizing the multiple benefits with which the above theoretical perspectives credit religion, we must now seek empirical verification. Is it true that religion increases socialization and self-efficacy? Are culture and ethnicity critical to individual and group identity? Are these values transmitted from parent to child? And, perhaps most importantly, is reliance upon a unitary system of faith preferable to absorption simultaneously in multiple religions?

The most general empirical verification of the impact of religion reveals that, not surprisingly, religious socialization, both within the family and the somewhat broader congregational community, has a positive influence on the level of one's religiosity, both in belief and practice.\textsuperscript{94} As one would expect, if one is raised in a religious environment, one will integrate these world views into one's personal identity, and this aspect of the self is reinforced through the network of significant others, peers, and clergy with whom one forms relationships within one's congregation. Indeed, several studies have found that the intensity of one's participation in the religious community is positively correlated with various measures of psychological well-being.\textsuperscript{95} Two more recent studies have expanded upon these

\textsuperscript{93} Herberg eloquently captured this multi-faceted essence of religion in modernity:

Confronted with the depersonalizing pressures of contemporary life, modern man experiences a profound exigency to preserve some remnant of personality and inwardness against the erosions of a mass culture. Increasingly, he turns to religion to provide him an inexpugnable citadel for the self in a world in which personal authenticity is threatened on every side; indeed, the quest for authenticity is itself substantially a religious quest. Reflecting, as it does, the crisis of our time, it also points to its deeper meaning. For ultimately, the crisis of our time is a crisis of faith . . . . At its deepest level, the turn to religion . . . owes much of its force to the search for a new and more viable "philosophy" of existence amid the spiritual chaos of our age.

Herberg, supra note 55, at 62-64.

\textsuperscript{94} Cornwall, supra note 78, at 44.

\textsuperscript{95} Gerald Gurin et al., *Americans View Their Mental Health* (1960) (finding church attendance to be positively related to job and marital happiness, lack of distress and worry, positive self-concept and general happiness); Richard V. McCann, *The Churches and Mental Health* (1962) (church attendance positively related to general happiness or life satisfaction); Elmer Spreitzer & Eldon E. Snyder, *Correlates of Life Satisfaction Among the Aged*, 29 J. Gerontology 454 (1974) (finding church attendance to be a factor in life satisfaction among the aged); Frank Clemente & William J. Sauer, *Life Satisfaction in the
correlates. Robert Witter, besides noting the positive relation between religion and subjective well-being, reports specifically that religious activity is more strongly related to subjective well-being than religiosity. This distinction means that the presence of a persistent religious network or community, more than feelings of spirituality, contribute to the development of ego strengths. Larry Petersen and Anita Roy conclude that religious salience, "the extent to which one's religious faith is a central or ultimate component of his/her life," positively relates to "meaning and purpose," which "refers to the extent to which the individual perceives that he/she leads a worthwhile, goal-oriented, or meaningful existence." Further, religious participation negatively correlates with anxiety, or "the mental distress in which the individual is apprehensive that the conditions or circumstances of his/her life will result in ill-consequences." From an empirical standpoint, therefore, it seems reasonable to conclude that religious salience, manifest primarily through participation in a religious community, is a positive-affective influence on self-efficacy and subjective well-being.

Recognizing that religious socialization has positive psychological benefits, one wonders if these benefits are transmitted intergenerationally, from parent to child. There are two divergent theoretical responses. The first, social learning theory, asserts that "through observation of our social world, through cognitive interpretation of that world, and through reinforcements or punishments of our responses in that world, attitudes and behaviors are learned and are carried through into adulthood," with the parent as the primary "transmitter." Under this interpretation, moral development occurs by the


98. Id. at 50.
99. Id.
child internalizing the moral (which includes religious) standards of the parent.\textsuperscript{101} In contrast, emancipation theory posits that children are likely to reject parental values and seek out through other circles an alternate set of beliefs to serve as the child's "statement of independence" from the parents. Under this theory, little of the moral values of the parent will be transferred to the child.\textsuperscript{102} Though the common notion of the "generation gap" gives credence to emancipation theory, in the area of religious value transmission, research supports the general thesis of social learning theory. Roger and Margaret Dudley have found that children resemble the religious values of their parents, and in the case of parental disagreement over a religious issue, it is most likely that the child will identify with the father.\textsuperscript{103} In a more detailed study, Dianne Kiernen and Brenda Munro observed the following: (1) adolescent religious activity is positively related to both the father's congregational activity and the mother's perception of the acceptability of the family's religious life;\textsuperscript{104} (2) for the male adolescent, both the paternal and maternal rates of congregational activity are positively correlated to the child's religious activity;\textsuperscript{105} (3) the female adolescent views religious activity as a coping mechanism and the intensity of this response is positively correlated with the father's congregational activity;\textsuperscript{106} and (4) if both parents interact with the religious system, this has more of a positive impact than if only one parent participates.\textsuperscript{107} This last observation is most revealing, for it would seem to suggest that, for interfaith couples, raising the child actively in one faith with the participation of both parents is preferable to either exposure to multiple religions, participation in one faith with only one parent, or avoiding the religious issue entirely.\textsuperscript{108} Is there any empirical support, culled from research on intermarried families, to support this hypothesis?

Children of intermarriage may be raised in one of three religious environments: A single faith, a composite faith, or no religion.
at all. Sociologists and psychologists who have studied children of exogamous marriages agree on two points: (1) children of couples who choose to actively create a single religious environment suffer the least amount of distress over issues of religious identity; and (2) children who are raised in families with no religion because the parents do not wish to address the issue suffer the most emotional distortion as a result of religion.\textsuperscript{109} The one issue that seems to be timidly overlooked is the shared, or composite, faith—some argue it causes nothing but confusion and is a detriment to self-efficacy,\textsuperscript{110} while others believe that open and positive involvement with each parent’s faith helps ground the child with a sense of belonging in two cultures.\textsuperscript{111} But even those who defend “mixed religion” qualify its utility, noting it only works for some families with distinct features.\textsuperscript{112} Further, given other variables such as resentment from both

\begin{itemize}
  \item \textsuperscript{109} Schneider, supra note 72, at 159-60 (1989); Mayer, supra note 13, at 261-77; Judy Pestsen & Jack Remsen, The Intermarriage Handbook 177-211 (1988); Steven Reuben, But How Will You Raise the Children? 188-92 (1987).
  \item \textsuperscript{110} The following response from a child of intermarriage is indicative of this identity confusion:
    
    All my life I’ve been aware of being half and half. I feel like I’m on the fringes of things in a lot of ways. I’m half Jewish, half Christian. I was raised a political radical, but I don’t have any politics. I don’t have any geographic roots. I just feel there are a whole lot of ways I don’t belong. I’ve wanted to know who I was ever since I was a teenager. Paul Cowan & Rachel Cowan, Mixed Blessings: Marriage Between Jews and Christians 246 (1987). The following admonishment from a teenager of an exogamous marriage represents the “caught in the middle” phenomenon, where religion is not a sense of identity, but one commodity with which parents will curry favor with the children.

  You can’t be both. You’re neither and stuck and don’t really know who you are. You are afraid if you say you are one or the other religion that you will offend someone, so you figure out ways to avoid the subject and not get into situations where you’ll have to answer questions at all.

  Reuben, supra note 109, at 204.

  Many children of intermarriage face one of these two forms of cognitive dissonance, dual loyalty or disassociation, and when asked to advise their parents, the conventional wisdom from the “mouths of babes” is: “Choose which religion you want and stick with it. It doesn’t matter which one you choose, but choose one. It makes it a lot easier on the kid.” Id. at 209.

  \item \textsuperscript{111} See Pestsen & Remsen, supra note 109, at 193-211. Some children find this a plus, simply because it removes the pressure of religion as loyalty to one parent over another, and even encourages the experimentation with different spiritual patterns.

  I’m both, [Lori] declares without a hint of regret. “Lots of my friends are the same way, so it seems natural for me to be this way too. I think I have it good with both religions, and I feel more involved with both. I’m free to choose any religion, so I feel like I have a lot of freedom in my life. I see it as a positive thing for me growing up this way as a child. Now that I am fourteen, I can honestly look back at my childhood and say it was a positive experience for me.

  Reuben, supra note 109, at 201.

  \item \textsuperscript{112} See Pestsen & Remsen, supra note 109, at 178-81; Reuben, supra note 109, at 188-99.
\end{itemize}
of the extended families and latent feelings of ethnicity and tradition within the interfaith parents, these quiet endorsements seem to turn into nothing more than an admission that because the "mixed" option is in reality exercised, rather than condemn it, social scientists should offer qualified strategies for those families which try make this composite work.

In the end, our ultimate concern is with the children and creating a religious environment which contributes to, and not detracts from, developing a positive self-identity. Each of the various alternative religious settings has its success stories. But from both a theoretical and empirical standpoint, it seems that the most consistent thread throughout is that a unitary religious environment, with both parents actively involved in its development, is the only alternative that has a persistent therapeutic effect on the child's subjective well-being.

113. See Mayer, supra note 13, at 144-55. This is a critical factor when considering the welfare of the child. For even when couples are open about their differences, if a sense of loss of one's heritage, of alienating one's family, remains, this latent stir of a set of emotions becomes a time bomb that will explode when other aspects of the marriage are less stable. Also, one must remember that the lure of exogamy is a weakening of the attachment to tradition, so that when feelings of tradition reappear at life cycle events, these parents will not be as well equipped to handle their feelings because of their religious illiteracy—they will be drawn back to the fold without knowing why, and this inability to explain will be interpreted as some form of hostility by the other spouse and the children. Indeed, the empirical evidence suggests it is the rare case that an interfaith couple and their extended families are able to nurture positively an open and composite religious integration for their children.

114. Susan Schneider aptly summarizes what seem to be the dominant themes from the perspective of the children of interfaith marriages:

Children of intermarriage will probably always carry something of both religious traditions as part of their family associations. But all children, especially while they are young, probably need a unified religious identity, not, "My mother is this, my father is that and I'm half and half." In a perfect world, it might be possible for children to sort out that certain observances and holidays come from one parent or the other, but one of the ways children—especially in the years before adolescence—sort out their reality is by naming it and by cross-examining others. To the question: "What religion are you?" it is certainly convenient and reassuring—if not strictly necessary—to have a simple answer rather than having to "explain" one's family bifurcation, however rich in options this might seem to one's parents.

Raised with both religions, understanding that the parents' lives are a blend of sometimes disparate religions, most children in this situation will, however, ultimately choose one religion or the other as the primary one with which to identify.

Schneider, supra note 72, at 159-60. Paul and Rachel Cowan express similar sentiment:

[Children of intermarriage whom we studied] valued clarity and a sense of security. They felt parents should choose a religious identity for their children and not leave it up to them to choose. Furthermore, they thought parents should furnish an environment in which the children would feel comfortable living with that identity.

They wanted roots in one of their parents' religions and cultures, but
IV. RELIGION AND THE BEST INTERESTS OF THE CHILD IN THE DISSOLUTION OF THE INTERFAITH MARRIAGE

Having discovered our ideal type of religious environment for the child of an interfaith marriage, we now must confront the painful reality that many children will not have both parents participating in their religious upbringing, or even agreeing upon a spiritual path. We must face the impact divorce has, not only in general on the emotional stability of the child, but also specifically on how religion becomes a weapon in custody decisions. Using what knowledge social science has already given us about the empowering aspects of religion, we must transform "spiritual custody" from a feared addition to an already emotionally-laden conflict, to a means of enhancing the child's temporal well-being upon dissolution of the family.

A. Religion, Divorce and Intermarriage

Divorce stands out as one of the most traumatic events a person can encounter within the course of a lifetime. The collapse of the marital bond combines the practical—the need for separation and new direction and the economic realities associated with that shift—with the emotional—the great feelings of loss, anger, resentment, guilt—with the surreal—the strange sensation that arises as the coldly rational process of dissolution begins to coalesce with the belief that this is all one bad dream, the feeling that "this can't be happening." And the process will produce the greatest trauma of all—the sudden realignment of a child's world. Though ideally the time between separation and dissolution allows for transition and adjustment, often it becomes marked by bitter tumult. Spouses fight to retain aspects of the past, and children begin to become commodities, pawns in a sadistic game. And the greatest irony of all occurs when religion, that great resource of meaning and purpose, spirituality and wholeness, is used as a stratagem in structuring the post-marital arrangement.

What happens to children when their religious identity is reified as an element in a divorce proceeding?

Children in interfaith divorces are subject to a potentially confusing assortment of religious decisions and choices. They often feel (or are made to feel) that they must choose sides, not only between Mommy and Daddy, but between one religion...
and the other. It is particularly cruel to force such decisions and feelings upon innocent children, and it has the potential of turning them against any religion whatsoever in the future.\textsuperscript{116}

How do children respond in such situations?

Even small children know what is going on and understand much more of what you say and mean than most people give them credit for. "It was awful," Kris, aged six, said about his parents' divorce. "They used to yell a lot, and Daddy would say bad things about Christians to Mommy. I was scared that he would yell at me too if I said I wanted to see my friends at church."

Kris, who up to age six had been "raised as both Jewish and Christian" by his parents, began to feel great anxiety anytime Christianity or church was mentioned during the time of his parents' divorce. He was afraid he would lose his father's love if he showed any interest in the friends he had met at church, and was torn by his need for the protection and love of both his parents, who seemed to demand his loyalty to different religions at the same time.\textsuperscript{116}

In most relationships, "religion alone is rarely the cause of a breakup or divorce."\textsuperscript{117} Instead, religion tends to be "a smokescreen masking other issues."\textsuperscript{118} Rabbi Steven Reuben, an experienced counselor, has argued that religious issues are "usually only symbolic representations of the underlying problems and differences that drive relationships apart, and become a useful scapegoat for the frustration, anger, disappointment, and sense of failure that inevitably accompany the dissolution of a relationship."\textsuperscript{119} Unfortunately, these latent issues usually get played out through the divorce, in several detrimental ways. First, one spouse may use religion to undermine the other spouse's relationship with the children. "In this scenario, both parents are now openly practicing separate religions, and they lock horns over the question of 'double exposure' to the two faiths."\textsuperscript{120} In the process, the parents fail to realize that "since the child identifies with both parents, criticism of the religion—and by implication the values and personality—of either parent also under-

\textsuperscript{115} Reuben, supra note 109, at 228.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Pestsonk & Remsen, supra note 109, at 297.
\textsuperscript{119} Reuben, supra note 109, at 228-29.
\textsuperscript{120} Pestsonk & Remsen, supra note 109, at 300.
mines the child's own confidence and self-esteem." Second, a parent may "hoard" custody under the pretext of religious practice and education, but in reality may only want to reduce the other parent's time with the child. Third, sometimes a spouse who converted to the other spouse's religion for the welfare of the children may, upon divorce, revert to the original faith, and in the process, seek to take the children as well.

All of these mechanisms for control, regardless of the psychological manifestations behind them, serve only to injure the child by undermining the identity that the religion supplied during the marriage. Hence, the predominant advice of therapists to parents in these situations emphasizes placing the welfare of the child first. Because of the importance of religious continuity to identity, especially at a young age, whatever the custody arrangement, both parents should continue to encourage the same religious environment unless the child, upon mature reflection, decides to make a change.

Our research of the social science literature suggests the following conventional rule concerning the creation of a child's religious environment: As religion has a positive impact upon a child's self-identity and socialization, and as a single religious environment nurtured by both parents offers the most efficacious alternative in an interfaith marriage, parents in an exogamous marriage should decide before the birth of a child in what faith they will rear that child, and from the child's first breath should share in the development of that religious choice and perpetuate this spiritual growth even upon divorce. Would our jurisprudence support such a rule? To answer this question we must first understand upon what standard the law decides the issue of child custody.

B. The Best Interests Standard in Child Custody

Until recently, courts would not award custody principally by considering what would be in the "best interests" of the child, but instead by relying on presumptions rooted in sex-based role stereo-

121. Id.
122. Id. at 300-01.
123. Id. at 301-02.
124. FESTONK & REMSEN, supra note 109, at 302.
125. Id. at 302-03.
126. From the social science point of view, obviously this rule is most efficacious from birth. But the state action doctrine prohibits enforcement of this rule until dissolution of the marriage brings the issue before a court. Realistically, all the law can be expected to do is to facilitate the best interests of the child after the intermarriage dissolves. Hence, this rule has no legal impact upon intact families, for there exists no state action.
SOLOMONIC PARADOX

The common law presumed the father to be the “natural guardian of the child” as the result of a patriarchal society that viewed the married woman not as an individual but an appendage of her husband.\(^{127}\) In the late nineteenth century, a change occurred, with the presumption shifting in favor of maternal custody based on the “tender years” doctrine—the belief that children, usually under the age of eight, would, because of their young age, have needs that only a mother could nurture.\(^{128}\) Within the last twenty years, as a result of both the women’s movement and developments in child psychology,\(^{129}\) courts have shifted to a new standard, “the best interests of the child,” that instructs judges to make custody decisions not on the basis of stereotypes but by determining which parent will better serve the welfare of the child.

Because the “best interests of the child,” without more, has emerged as an amorphous, highly subjective and even arbitrary standard,\(^{130}\) many states have enacted statutes listing a specific set of factors that a judge must consider in making a custody award. Section 402 of the Uniform Marriage and Divorce Act (hereinafter UMDA) illustrates the core factors in such statutes:

The court shall determine custody in accordance with the


\(^{128}\) See Einhorn, *supra* note 128, at 128-30.

\(^{129}\) Professor Beschle aptly describes this phenomenon:

Over the last two decades, the women’s movement has made great strides in establishing the principle that the presence of individual talents and qualities should be measured directly, rather than assumed on the basis of gender. In short, society and in particular the law should rely on specific facts rather than stereotypes. At the same time, a proliferation of writing in psychology and the social sciences has attempted to isolate specific characteristics conducive to successful child rearing and to debunk the notion that these are the inevitable, gender-based attributes of maternal love.


\(^{130}\) See Mnookin, *supra* note 3, at 978; Elster, *supra* note 3, at 11-16.
best interest of the child. The court shall consider all relevant factors including:

1. the wishes of the child’s parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
4. the child’s adjustment to his home, school, and community; and
5. the mental and physical health of all individuals involved.

Only six states have specifically included the religious environment of the child as a factor to be considered in the best interests calculus. The majority of states, and the UMDA, view religion as a component of the temporal well-being of the child, which the judge need not specifically consider in arriving at a custody decision.

Though presented with a seemingly endless number of factors to consider in reaching a decision, a court has a very limited number of custody options. A parent may be awarded physical and/or legal custody, either to be shared with the other parent jointly or to be

132. Each of these states varies in phrasing the consideration of the religious environment. Alaska provides that “in determining the best interest of the child the court shall consider the physical, emotional, mental, religious, and social needs of the child.” ALASKA STAT. § 25.24.150(c)(1) (1991) (emphasis added). Hawaii weights the religious factor somewhat less, stating simply that “the court may hear the testimony of any person or expert ... relevant to a just and reasonable determination of what is for the best physical, mental, moral, and spiritual well-being of the child .... ” HAW. REV. STAT. § 571-46 (1991) (emphasis added). In contrast, Michigan is quite specific in the consideration of religion: “‘Best interests of the child’ means the sum total of the following factors to be considered, evaluated and determined by the court ... [T]he capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.” MICH. COMP. LAWS § 722.23(b) (1991). Similarly, Minnesota provides that “‘the best interests of the child’ means all relevant factors to be considered and evaluated by the court including ... [10] the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child’s culture and religion or creed, if any.” MINN. STAT. § 518.17(10) (1991). South Carolina’s statute is perhaps the most unusual, stating that the “court may ... make such orders touching the care, custody and maintenance of the children of the marriage and what, if any, security shall be given for the same as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable and just.” S.C. CODE ANN. § 20-3-160 (Law Co-op 1991) (emphasis added). Finally, Wisconsin simply directs the court to consider as one factor “[t]he child’s adjustment to the home, school, religion and community.” Wis. STAT. § 767.24(5)(d) (1991).
133. See Beschle, supra note 129, at 386-87.
134. Physical custody contemplates “residence with [or] under the care and supervision
exercised alone. Given that a court could restrict the ability of one parent to participate in decisions concerning the child’s upbringing, and could even eliminate physical contact with the child, the role of the above factors in awarding custody is heightened.

Recognizing the serious ramifications of such a decision, a judge will look for guidance in the various elements the legislature deems mandatory to consider. But when consulting these factors, how should the judge weigh one in comparison to the others? Are they all of equal weight or is one more important, such as the ability to provide for the child’s material needs, or the amount of time and love one has to give to the child? Or are the child’s wishes paramount? And how should religious environment be factored into the balance? Is joint, or shared, custody a useful option, and if so, when and how should it be exercised? Even with model parents, answering these questions seems nearly impossible, and because of this, the “best interests” standard has received much criticism.

In their landmark book, Beyond the Best Interests of the Child, Joseph Goldstein, Anna Freud, and Albert Solnit sought to document the psychological effects the trauma of divorce has upon a child. The authors note at the outset that “[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child’s normal development.” One can upset this continuity of care between a child and his “psychological parent”—the individual who “on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.” As a result, the critical stages of development for all mental processes are disrupted.

Believing that the “best interests of the child” inade-
quately accounts for the primacy of the continuity of care, Goldstein, Freud, and Solnit propose another approach. The “least detrimental available alternative for safeguarding the child’s growth and development,”140 is as follows:

[T]hat child placement and procedure for child placement which maximizes, in accord with [the urgency of a child’s instinctual and emotional needs,] the child’s opportunity for being wanted and for maintaining on a continuous, unconditional, and permanent basis, a relationship with at least one adult who is or will become the child’s psychological parent.141

The rationale for a presumption in favor of awarding custody to the “psychological parent,” or “primary caregiver,”142 is quite simi-

within his surroundings.” Id. at 32. “For infants and toddlers, lack of continuity causes “separation distress and anxiety” and “setbacks in the quality of . . . attachments” to significant others, leading to “increasingly shallow and indiscriminate” emotional attachments. Id. at 32-33. For young children under the age of 5 “disruption of continuity also affects those achievements which are rooted and develop in the intimate interchange with a stable parent figure, who is in the process of becoming a psychological parent.” Id. at 33. “For school-age children, the breaks in their relationships with their psychological parents affect above all those achievements which are based on identification with the parents' demands, prohibitions, and social ideals.” Id. For adolescents, “their behavior may convey the idea that what they desire is discontinuation of parental relationships rather than their preservation and stability,” which reinforces a sense of “abandonment or rejection on the psychological parent's part.” Id. at 34.

140. Id. at 99.

141. Id. In proposing this alternative, Goldstein, Freud, and Solnit in no way look with disfavor upon the general perspective of the “best interests of the child.”

Even though we agree with the manifest purpose of the “in-the-best-interests-of-the-child” standard, we adopt a new guideline for several reasons. First, the traditional standard does not, as does the phrase “least detrimental,” convey to the decision maker that the child in question is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development. Secondly, the old guideline, in context and as construed by legislature, administrative agency, and court, has come to mean something less than what is in the child’s best interests. The child’s interests are often balanced against and frequently made subordinate to adult interests and rights. Moreover, and less forthrightly, many decisions are “in-name-only” for the best interests of the specific child who is being placed. They are fashioned primarily to meet the needs and wishes of competing adult claimants or to protect the general policies of a child care or other administrative agency. But, even if the child’s rights were, in fact and policy, determinative and thus unequivocally superior to adult interests, the guideline would remain inadequate.

Id. at 54 (citations omitted).

142. This article uses the term primary caregiver as a synonym for “psychological parent.” The former term should not be confused with the term “primary caretaker,” used in Garska v. McCoy, 278 S.E.2d 357, 362-64 (W. Va. 1981). The terms have different connotations. A court uses a presumption in favor of the primary caretaker intending to eliminate the prospect of unfair bargaining in the process of separation, while a court using a presumption in favor of the psychological parent seeks to insure continuity of care.
lar to our rule favoring a "spiritual caregiver." Both place paramount importance on the "best interests of the child," which rests on the premise that stability and continuity are essential for healthy social integration and the nurturing of feelings of self-efficacy. Both suggest that the decision maker in a custody proceeding operate with a rebuttable presumption in favor of the parent most closely associated with the needs of the child—the "primary caregiver" for physical and temporal well-being, the "spiritual caregiver" for religious needs. However, before a rule favoring the "spiritual" parent can share the limelight with the "psychological" parent, we must resolve the apparent conflict between "religious best interests" and various provisions of the Constitution.

C. *Spiritual Custody and the Constitution*

In order to link the most efficacious dissolution, from the social scientific point of view, of the exogamous marriage with the legal rules that delimit the set of alternative forms of resolution available to the decision maker, recall the saga of Pamela and David, an interfaith couple who, upon divorce, differ vehemently over the future religious upbringing of their children.* P

143. See *supra* notes 5-12 and accompanying text.

144. Section 408 of the UMDA provides that:

[Ex]cept as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, find, upon motion by the custodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

upbringing is to prove to a court that to decide otherwise would "'endanger the child's physical health or significantly impair his emotional development'—a standard patently more onerous than the 'best interest' test."\textsuperscript{145} Thus, those states adopting the UMDA's approach would impose a heavy burden upon the "spiritual caregiver" to gain legal control over the child's religious environment, and even if this burden could be met, it would exact an incredible cost upon all family members involved. The UMDA does not provide an adequate answer to our problem.

A similar dilemma is encountered when using the "least detrimental alternative" advocated by Goldstein, Freud, and Solnit, who vest control over religious training in the "psychological parent" or "primary caregiver." When the primary caregiver is not also the spiritual caregiver, the "least detrimental alternative" yields the same result as the UMDA—legal rights for the spiritual caregiver would only vest upon a showing of a likelihood of significant harm resulting from allowing the primary caregiver to guide the religious training of the child.\textsuperscript{146} As imposing such a burden upon the spiritual caregiver is patently unfair and in no way furthers the overall well-being of the child, the "least detrimental alternative" is also an inadequate response to this issue.\textsuperscript{147}

Since very few states have adopted either the UMDA or the "least detrimental alternative" approach, it is important to see how the majority of state courts resolve such conflicts concerning control over a child's religious environment. "There is consensus among courts that 'moral' factors are proper considerations, and many courts also have explicitly endorsed consideration of the child's 'spiritual' welfare."\textsuperscript{148} However, there is not such a consensus as to what

\textsuperscript{146} Goldstein et al., supra note 137, at 100.
\textsuperscript{147} This article's approach to spiritual custody and the "least detrimental alternative" advanced by Goldstein share the belief that a simple legal rule ensuring continuity of care maximally promotes the best interests of the child. However, the two positions differ on the harm such a rule is designed to avoid. Goldstein argues that vesting legal custody in the "psychological parent" assures not only continuity but also optimizes parental autonomy free from judicial interference—which means that one parent should retain the authority to make decisions concerning the child's physical, temporal, and spiritual well-being. This article argues that any sacrifice of some of the scope of the psychological parent's authority, by a judicial award of spiritual custody, is outweighed by the benefit to the child in the continuous development of a single religious identity. Thus, though both this article and Goldstein agree upon the primacy of the best interests of the child, the two differ on how much judicial interference is necessary to attain this goal.
\textsuperscript{148} Beschle, supra note 129, at 397. For example, in Burnham v. Burnham, 304 N.W.2d 58, 61 (Neb. 1981), the court stated it would consider "the spiritual and temporal welfare" of the child along with other factors. For an exhaustive list of cases, see Annotation,
extent religion may be a factor in selecting a custodian. Some states believe that religion simply may not be the sole or dominant factor in the determination.\textsuperscript{149} Others prefer "the more substantial limitation that religion may be considered only to the extent that it will have a clear bearing on the secular well-being of the child."\textsuperscript{150} This requires an affirmative showing that "religion or its absence will cause physical, emotional or social benefits or harm to the child."\textsuperscript{151} With such a subjective and indeterminate standard, the role of religion in custody decisions will range from the belief that a court lacks the power "to conclude that providing a religious environment is per se beneficial to a child's welfare,"\textsuperscript{152} to the view that "[r]eligion and morality are so closely interwoven in the lives of most people that it is difficult to say whether good moral character could be molded [into] a child without some religious training."\textsuperscript{153} Thus, like the experience under the UMDA and the "least detrimental alternative," spiritual custody, unless explicitly authorized by statute, will only be awarded if the spiritual caregiver can meet the imposing burden of establishing that an improper religious environment "will jeopardize the temporal mental health or physical safety of the child."\textsuperscript{154}

Only the rule we have fashioned from the canvassing of the social sciences will resolve the conflict between Pamela and David. Given that the children have been raised as Jews for all of their lives, and have not been exposed to any other religion, Pamela, as the Jewish parent, should be the "spiritual caregiver," regardless whether she is also the legal and/or physical custodian of the children, and both parents should be supportive in nurturing this religious environment. But what if David is the legal and physical custodian, or at the very least has shared physical custody or set periods of visitation? Should he have to participate in the Jewish life of his children when his own religious preference is to participate in the Catholic faith? If a court, following our rule, answers in the affirma-

\begin{itemize}
  \item Beschle, \textit{supra} note 129, at 398.
  \item Id.
  \item \textit{In re} Marriage of Hadeen, 619 P.2d 374, 382 (Wash. Ct. App. 1980).
\end{itemize}
tive, David will argue that such a ruling offends the Constitution in at least three ways. First, by selecting one religious environment for the child over another, the court is violating the neutrality principle of the Establishment Clause of the First Amendment. Second, by forcing David to choose between his own religious preferences and sharing time with his children, the court is violating the Free Exercise Clause of the First Amendment. And finally, by removing David's ability to help decide upon the proper religious upbringing of his children, the court is improperly intruding upon the doctrine of family privacy found in the Due Process Clause of the Fourteenth Amendment. Are any of these constitutional claims valid, thereby impugning the legality of our "spiritual caregiver" rule?

1. The Establishment Clause Claim

The Establishment Clause states that "Congress shall make no law respecting the establishment of religion . . . ." Despite its scarcity of terms, few phrases in the Constitution have been the source of such endless disagreement, between both jurists and commentators, concerning the provision's precise meaning and scope.

155. U.S. CONST. amend. I (emphasis added). The First Amendment was not made applicable to the states by incorporation through the Due Process Clause of the Fourteenth Amendment until Cantwell v. Connecticut, 310 U.S. 296 (1940), and the Establishment Clause was not specifically applied to the states until Everson v. Board of Educ., 330 U.S. 1 (1947).

156. Though some would wish to consult the "original intent" of the framers, such a search would be futile. The legislative history is virtually non-existent, see Marsh v. Chambers, 463 U.S. 783, 814 (1982)(Brennan, J., dissenting), and judges and historians "have decidedly mixed views about what 'establishment' meant to the framers." Weisman v. Lee, 908 F.2d 1090, 1092 (1st Cir. 1990) (Bownes, J., concurring), affirmed, 112 S. Ct. 2649 (1992); see also Donald Beschle, The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor, 62 NOTRE DAME L. REV. 151, 120-75 (1987) (collecting academic interpretations and criticisms). For example, taking only the issue of the framers' intent, historians have isolated three possible sources: Thomas Jefferson, Roger Williams, and James Madison.

Jefferson focused on a "wall of separation between church and state" to protect the state from the church . . . . Williams thought that a "hedge or wall of separation [should exist] between the garden of the church and the wilderness of the world" in order to protect religion from the corruption of the world . . . . Madison's view was that competition among sects both religious and political was in everyone's best interest.

Weisman, 908 F.2d at 1092 n.8. The inconclusive nature of the "original intent" of the framers led Judge Bownes to conclude that:

[The] ground has been trodden so much that it is barren of meaning and persuasive power. The "historical record" is inconclusive on the various cross-currents in the minds of the framers. Because of the tangled and often conflicting historical record, it is unlikely that, as an empirical matter, we can ever know the original intention of the authors of the Constitution.
Originally, neutrality was the Court’s touchstone—government must neither “advance” nor “inhibit” religion.\textsuperscript{157} However, applying the neutrality principle—remaining neutral while attempting to resolve the tension between separation on the one hand and accommodation on the other—has proven to be a formidable task. The Court, on several occasions, has drafted or modified specific rules to determine when government action encroaches upon the Establishment Clause,\textsuperscript{158} with current doctrine advancing the following test: “The proper inquiry . . . is whether government intends to convey a message of endorsement or disapproval of religion, [or] whether a government practice [has] the effect of communicating a message of government endorsement or disapproval of religion.”\textsuperscript{159}

Professor Beschle has observed that the Court’s current jurisprudence supports the view that “government may influence or attempt to influence, without running afoul of the religion clauses, its citizens’ beliefs insofar as those beliefs relate to what constitutes temporal human welfare.”\textsuperscript{160} Relying on this interpretation of the Establishment Clause, we may answer the question whether a court, by

\textit{Id.} at 1093.  

\textsuperscript{157} Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (a statute or practice which touches upon religion if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion). The classic statement of neutrality as the proper mode through which to interpret the Establishment Clause is found in Justice Black’s opinion in Everson v. Board of Educ., 330 U.S. 1 (1947):

[The] “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a “wall of separation between church and State.”

\textit{Id.} at 15-16.  


\textsuperscript{160} Beschle, supra note 129, at 181.
granting religious custody to the spiritual caregiver, is preferring one religion over another in violation of the First Amendment. Government may "influence religious beliefs" if those beliefs "relate to what constitutes temporal welfare." As already discussed, granting religious custody to the spiritual caregiver serves to enhance the temporal welfare of the child at issue, for his or her best interests will be served by maintaining continuity in the pre-existing religious environment. Thus, a court decree awarding religious custody does not "convey a message of endorsement or disapproval of religion," but recognizes a compelling interest in furthering the best interests of the child whose custody is in dispute. Therefore, contrary to those courts that have held an award of religious custody might offend the Establishment Clause, under existing law such an award is

161. It is true that "even the most cautious application of the establishment clause" would require that government not prefer one religion to another. Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting). Out of fear of appearing to favor one religion over another, some state courts have held or implied that religious custody awards would so offend the Constitution. See, e.g., Compton v. Gilmore, 560 P.2d 861, 866 (Idaho 1977) (court reversed part of order prohibiting father from providing religious training to his daughter); Munoz v. Munoz, 489 P.2d 1133, 1136 (Wash. 1971) (en banc) (reversing order prohibiting father from taking children to church); Zummo, supra note 5, at 1146 (stating in dicta that enforcing a religious custody award would violate the Lemon test).

Most state courts, however, either consider this argument one of free exercise of religion, as discussed infra note 174 and accompanying text, or as constitutional in somewhat the same manner as presented here. For example, in Kirchner v. Caughey, 606 A.2d 257 (Md. 1992), in which a father was prohibited from exposing his daughter to the Baptist religion when the daughter had been raised as a Lutheran, the court delineated the appropriate boundaries for judicial interference with the religious upbringing of children who are the subject of custody proceedings:

When the life or physical safety of a child is threatened, the delicate accommodation between religious freedoms and an exercise of state authority is necessarily made. As the threat to the child diminishes, the balancing of interests becomes more difficult. Accordingly [the courts have required] a clear showing that a parent's religious practices have been or are likely to be harmful to the child before allowing judicial interference with those religious practices . . . . [A] factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required . . . . When the evidence is sufficient to demonstrate the need for intervention, the remedy should be that "which intrudes least on the religious inclinations of either parent and is yet compatible with the health of the child," and should be "narrowly tailor[ed] . . . so as to result in the least possible intrusion upon the constitutionally protected interests of the parent."

Id. at 261-62 (citations omitted).

Most state courts would agree that when it can be established that a change in religious environment would be detrimental to the child's welfare, the courts may intervene through religious custody awards. Indeed, in Funk v. Ossman, 724 P.2d 1247 (Ariz. Ct. App. 1986), the court, based on evidence less scientific than that presented supra notes 104-26 and accompanying text, held that it was in the best interests of the child to continue to be raised in the Christian faith, his religious environment prior to divorce, because the exposure to Judaism
2. **The Free Exercise Claim**

The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise" of religion. As the Free Speech Clause has been interpreted as a shield guarding an individual's freedom of expression, so the Free Exercise Clause has historically been perceived as the armor between the government and an individual's conscience regarding matters of religion. However, the freedom to adhere to a set of religious beliefs is broader in scope than the freedom to practice in accord with those beliefs. From its earliest statements interpreting the religion clauses, the Supreme Court has consistently maintained that "[e]ven the exercise of relig-

was causing the child emotional distress.

In sum, the majority of state courts would not object to ordering religious custody upon a showing of harm to the child's general welfare. Without the "spiritual caregiver" rule, most courts will require a showing of significant endangerment to the well-being of the child. See supra notes 132-36 and accompanying text. With the "spiritual caregiver" rule, one simply eliminates the harshness of this evidentiary burden by placing the presumption in favor of the spiritual custodian. The non-custodial parent, with regard to religion, must rebut this presumption by showing how it is manifestly against the child's wishes or best interests. As noted in the text above, this approach is within a court's power under the Establishment Clause.

162. The "endorsement" test of County of Allegheny survived Lee v. Weisman, 112 S. Ct. 2649 (1992), in which the Court held that a sectarian benediction or invocation at public high school graduation violates the Establishment Clause. The Court declined the opportunity to abandon its prior precedents, finding it unnecessary to reexamine the scope of permissible state accommodation of religion since the case sits squarely within the Court's rulings on prayer in the public schools. However, had a different approach been taken, the ensuing test would have been less exacting than the "endorsement" test. See County of Allegheny, 492 U.S. at 655-61 (opinion of Kennedy, J. dissenting).


164. As the Court observed in Cantwell v. Connecticut, 310 U.S. 296 (1940):

[The] constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. at 303-04.

For example, in Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court upheld the application of a federal law prohibiting polygamy to a Mormon whose religion required him to engage in that practice, reasoning that "government was free to reach actions which were in violations of social duties or subversive of good order." Id. at 164.
igion may be at some slight inconvenience in order that the [s]tate may protect its citizens from injury." The jurisprudential challenge has been to create a workable test which allows judges to discern when a "slight inconvenience" becomes an unconstitutional burden.

In *Sherbert v. Verner* the Supreme Court held that "any incidental burden on the free exercise" of religion will not be tolerated unless the state can demonstrate a "compelling state interest in the regulation of a subject within the State's power to regulate." Absent such a showing, it is impermissible for a state to condition the "free exercise of [one's] constitutional liberties" on an adherent's "willingness to violate a cardinal principle of her religious faith."

In *Employment Division v. Smith*, the Court relaxed its level of scrutiny of alleged Free Exercise violations for those cases involving a "valid and neutral law of general applicability," holding that:

[The] government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.

*Smith* would seem to foreclose any argument against a spiritual custody award based on state infringement of the non-custodial parent's right to the free exercise of religion. Like the best interests standard, the spiritual caregiver rule is a generally applicable prohibition of socially harmful conduct (in this instance, endangering the temporal welfare of a child). Limiting the right of one parent to raise, or even expose, his or her child to his or her faith, as well as the duty to facilitate the religious environment of the child in the faith of the other spouse, would not be an unconstitutional infringe-

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165. *Cantwell*, 310 U.S. at 306.
167. *Id.* at 403 (citation omitted).
168. *Id.* at 406.
170. *Id.* at 1600.
171. *Id.* at 1603 (citation omitted).
ment on the burdened parent’s religious freedom.

Though Smith bypasses any consideration of Sherbert, were Sherbert still the applicable test, it is highly likely that a free exercise challenge to the spiritual caregiver rule would still fail. The state’s interest in securing the temporal welfare of a child would be “compelling,” given the demonstrable harm that can result from the sudden alteration in the child’s religious environment.\(^{172}\) It is true that the individual parent would be “burdened,” in that he or she would be unable to practice his or her faith with the child at issue, and might even have to forego some of his or her visitation schedule to facilitate the child’s religious needs. However, the individual parent would not be limited at all in the pursuit of his or her own religious life, and would be under no obligation to participate with the child and the other parent in that religious atmosphere. As an award of religious custody is a case in which “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred,”\(^ {173}\) even under the pre-existing test of strict scrutiny, it would appear the spiritual caregiver rule would withstand a challenge under the Free Exercise Clause.\(^ {174}\)

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\(^{172}\) See supra note 16 and accompanying text.


\(^{174}\) As no state has, as yet, adopted a spiritual caregiver rule, state courts must be guided by legislatively determined considerations for custody and modification of such an award. Like the UMDA, most states vest control of the religious upbringing of the child at issue in the legal custodian, and when custody is shared, courts try either to align the child with the dominant spiritual custodian or relegate this decision to one of family privacy—even if that means the child will have dual exposure without consideration of the harm such duality might cause. See Annotation, Religion as Factor in Child Custody and Visitation Cases, supra note 148, § 2 and cases referenced therein.

Despite these rules favoring control by physical proximity, and the courts’ general reluctance to “entangle” themselves in religious matters, because many religious conflicts do affect the welfare of the child, courts have had to decide how to balance parental control, free exercise rights, and the best interests of the child. As a general rule:

[In the majority of American jurisdictions that have considered the question, the courts have refused to restrain the non custodial 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 . . . . The refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another.

3. The Family Privacy Claim

A separate and distinct constitutional right of privacy originates in *Griswold v. Connecticut*, where Justice Douglas, writing for the majority, observed that various freedoms, not explicitly found in the text of the Constitution, have nevertheless been derived as elements of the Due Process Clause of the Fourteenth Amendment, rights "of the very essence of a scheme of ordered liberty ... so rooted in the traditions of our people as to be ranked as fundamental." These various "implicit" freedoms "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." These "[v]arious guarantees create zone[s] of privacy" so sacrosanct that a "governmental purpose to control or protect activities constitutionally subject to state regulation may not be achieved

N.E.2d 794, 801 (Ohio 1992); Bienenfeld v. Bennett-White, 605 A.2d 172, 182 (Md. Ct. Spec. App. 1992). In *Felton* the following words of the court indicate the tension which pulls the court in divergent directions:

The critical literature warns against perverting a quest for the child's best interests into one for psychic comfort of the parents—a warning against over-valuing the parents' constitutional liberties. A warning is equally in order against depriving a parent of all connection with the child, or connection on the religious plane, out of an exaggerated fear of injury to the child. *Id.* at 608 (citations omitted).

Lacking the utility of a spiritual caregiver rule, the courts have failed to produce a coherent rationale for their actions, instead producing fact-specific rulings, appearing to weigh the constitutional rights of the parents with the best interests of the child, but in reality selecting the outcome which maximizes the welfare of the child and minimizes acrimony among the parties. *Compare* Ledoux v. Ledoux, 452 N.W.2d 1 (Neb. 1990) (father, a Jehovah's Witness, must refrain from exposing his children to religious practices or teaching inconsistent with Baptist religion of the mother) *with* Peterson v. Peterson, 474 N.W.2d 862 (Neb. 1991) (mother could not be prevented from exposing child to beliefs of her faith, which father characterized as a cult with views which were harmful and confusing to the child). *Compare* Jacobs v. Jacobs, 323 N.E.2d 21 (Ill. App. Ct. 1974) (Jewish father could not prevent Catholic mother from exposing child to her faith) *with* In re Tisckos, 514 N.E.2d 523 (Ill. App. Ct. 1987) (Baptist father could be directed to bring child to Catholic mother's church since child was being reared in Catholic faith and was in best interests to do so). *See also*, S.E.L. v. J.W.W., 541 N.Y.S.2d 675 (N.Y. Fam. Ct. 1989); Barran v. Nayyar, 572 N.Y.S.2d 821 (N.Y. Fam. Ct. 1991).

Thus, the state court experience with free exercise challenges are cleverly resolved under the best interests standard, First Amendment platitudes to the contrary. Given the lack of principled determination in these cases, it would be preferable to adopt the spiritual caregiver rule, which would bring the true best interests of the child to the fore, and structure any challenges strictly on grounds of the child's welfare, with the non-custodial parent bearing the burden of demonstrating why the presumption of the spiritual caregiver rule should not be followed.

177. *Griswold*, 381 U.S. at 484.
by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.  Thus, the right of privacy is a fundamental right, infringement upon which will trigger strict scrutiny to assure that the state interest is compelling and that the manner chosen to effect this purpose is the least restrictive available alternative.

The right of privacy gives the individual autonomous control over the personal aspects of life, affairs traditionally thought to be beyond the reach of even the most intrusive government. Among these aspects are the freedom to choose a particular lifestyle, including the decision whether to marry or procreate. Concomitant with the freedom to create a family is the right to structure and order family life without fear of government interference.

This “doctrine of family privacy” predates Griswold and is rooted in the belief that the relationship between husband and wife, parent and child, is an expressly private relationship that should, except in rare circumstances, be governed by the discretion of its constituent members and not the state. In Meyer v. Nebraska, the Court noted that:

[The liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Two years later, in Pierce v. Society of Sisters, the Court expanded on the purely private aspects of the parent-child relationship, stating that 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.” These related strands were unified into the doctrine of family privacy in Prince v. Massachusetts.

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178. Id. at 484-85.
180. 262 U.S. 390 (1923).
181. Id. at 399 (emphasis added).
182. 268 U.S. 510 (1925).
183. Id. at 535.
It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. 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... the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.\footnote{185}

The pinnacle of the doctrine of family privacy was reached in Wisconsin v. Yoder,\footnote{186} where the Court held that an Amish family could refrain from sending their children to high school, in contravention of the state's compulsory attendance statute, because such a requirement poses a "very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant religion."\footnote{187} In so holding, the Court spoke in forceful terms of the sanctity of a parent to determine his or her child's religious life.

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. Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. The primary role of the parents in the upbring-

185. Id. at 166-67.
187. Id. at 218.
ing of their children is now established beyond debate as an enduring American tradition.\textsuperscript{188}

Though reading Pierce to stand "as a charter of the rights of parents to direct the religious upbringing of their children,"\textsuperscript{189} the Yoder Court also allowed for limited state interference in this role. "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."\textsuperscript{190}

Despite the sweeping affirmation of the primacy of the parent to chart the course of the child's religious upbringing, the state may limit this authority if it can demonstrate that a parental choice will threaten the welfare of the child. In applying this "doctrine of family privacy" to the "spiritual caregiver" rule, it appears that parental autonomy must yield to the best interests of the child. Given the empirical evidence demonstrating the harm which could result if a child's religious environment was abruptly restructured,\textsuperscript{191} the state, either by statute or judicial fiat, would be within its constitutional power as \textit{parens patriae} to create a presumption in favor of the spiritual custodian, rebuttable upon a showing by the non-custodial parent that in this particular case, the presumption under which the state is operating is wholly inapposite.\textsuperscript{192}

4. \textit{Additional Problems}

Two other possibilities arising out of the scenario involving Pamela and David need to be addressed. First, prior to their marriage, Pamela and David agreed to raise the children in the Jewish faith. Should courts afford any binding authority to such antenuptial

\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at 232.
\item \textsuperscript{189} \textit{Id.} at 233.
\item \textsuperscript{190} \textit{Id.} at 233-34.
\item \textsuperscript{191} See supra notes 93-114 and accompanying text.
\item \textsuperscript{192} One might also argue that when the intact family dissolves to the point where the court has jurisdiction—in divorce decrees and custody awards—parents cede their privacy right of family autonomy because they have voluntarily sought the assistance of the state in the resolution of their problems. By doing so, a court need not advance compelling interests for its invasion upon family privacy—something akin to rational basis would suffice. This argument applies only to a family in dissolution. For intact families, the court has no reason to entertain jurisdiction. See, e.g., Roe v. Doe, 272 N.E.2d 567 (N.Y. 1971) (where a minor child abandons her home to avoid parental restraint, she forfeits any claim to parental support, and the court will not intervene, "absent a violation of law," so as not to "undermine the integrity of the family"); McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (court will not entertain jurisdiction over a claim of financial support similar to alimony when the parties are still an intact family and do not demonstrate any desire to cease being one).
\end{itemize}
agreements? Second, one child, Adam, is eight years old, and has been inculcated in Judaism for several years. Given his familiarity with his religious experience, should Adam, rather than his parents, be able to decide his religious future? Do children have such a constitutional right? And if so, is Adam mature enough to make this decision? If not, at what age would a minor be able to select his own religious life?

a. Religious Upbringing and Antenuptial Agreements

There is a growing trend among courts to recognize antenuptial agreements, at least with respect to division of marital property and alimony. Issues concerning the children, however, are not as favored, for they encroach upon the state’s *parens patriae* interest in the welfare of the child—if the court is bound by a pre-existing contract, its ability to award custody within the best interests of the child is unduly restricted. Indeed, it is primarily for this reason that antenuptial agreements concerning the child’s religious upbringing are not favored in many states. Several states, however, do recog-


1. that party did not execute the agreement voluntarily; or
2. the agreement was unconscionable when it was executed and, before execution of that agreement, that party:
   (i) was not provided a fair and reasonable disclosure of the property or financial obligation of the other party;
   (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
   (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.


194. See Annotation, Religion as Factor in Child Custody and Visitation Cases, supra note 148, § 15(a) and cases cited therein. The court in Zummo v. Zummo, noted other reasons why such contracts are found void:

1) such agreements are generally too vague to demonstrate a meeting of the minds, or to provide an adequate basis for objective enforcement;
2) enforcement of such an agreement would promote a particular religion, serve little or no secular purpose, and would excessively entangle the courts in religious matters; and,
3) enforcement would be contrary to a public policy embodied in the First Amendment Establishment and Free Exercise Clauses (as well as their state equivalents) that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs.

nize, to some extent, the validity of these agreements, believing that "agreements in regard to the religious upbringing of a child are desirable and should be encouraged."\textsuperscript{198} New York courts are particularly amenable to such agreements, and will enforce them "to the extent that they provide for the best interests and welfare of the child," subject to modification when "confronted with appropriate evidence that the welfare of the child is not best served by the premarital agreement of the parents."\textsuperscript{198}

What should be the general rule concerning antenuptial agreements dealing with a child's religious upbringing? From a therapeutic standpoint, these agreements should be encouraged, for they force interfaith couples to consider their differences and bring them into the open \textit{before} childbirth, thereby minimizing the trauma to the child.\textsuperscript{197} From a legal standpoint, the courts should weigh the terms of the agreement as one factor influencing the welfare of the child. Pre-marital contracts often serve as excellent indicators not only of the original intent of the parties but also provide the decision maker a barometer of the degree of continuity in a child's religious environment. However, these antenuptial agreements should in no sense be binding or determinative—the court should follow the "spiritual caregiver" rule and consider the evidence within these antenuptial agreements only as support for, or reasons against, the presumption in favor of the spiritual custodian.

\begin{itemize}
  \item[b. Minors, Religion, and Constitutional Rights]
  
  "Notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children."\textsuperscript{198} In fact, "[c]onstitutional rights do not

\begin{footnotesize}
\textsuperscript{195} Wagshal v. Wagshal, 238 A.2d 903, 907 (Md. 1968); see also, Stern v. Stern, 188 N.E.2d 97 (Ill. App. Ct. 1963); Sina v. Sina, 402 N.W.2d 573 (Minn. Ct. App. 1987); Annotation, Religion as Factor in Child Custody and Visitation Cases, supra note 148, § 15(b) and cases cited therein.


\textsuperscript{197} See McGoldrick & Preto, supra note 62, at 355-61; Mayer, supra note 13, at 146.

\end{footnotesize}
mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. Following this principle, the Supreme Court has found that a minor has the benefit of the Fourteenth Amendment’s guarantee of procedural due process, the Fourth Amendment’s prohibition against unreasonable searches and seizures, a Fourteenth Amendment liberty interest in not being confined unnecessarily for medical treatment, a Fourteenth Amendment right to an abortion, and a First Amendment right to freedom of expression. However, the Court has long “recognized that the State has somewhat broader authority to regulate the activities of children than of adults.”

Given what little guidance the Court has provided with respect to a child’s constitutional rights, would recognition of a minor’s free exercise right support the “spiritual caregiver” rule? Given that minors do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” one would believe that this principle should extend to support a minor’s free exercise of religion in his or her home. If a court cannot impede upon one’s freedom of conscience, it seems logical to conclude that this proscription is as viable for minors as adults. Operating under this premise, would the “spiritual caregiver” rule violate the child’s free exercise rights?

With respect to constitutional autonomy, a child who is the subject of a custodial award is in a precarious situation. When a court is awarding legal custody to an adult, the best interests of the child are paramount; ironically, however, the child is at the mercy of the court, and his or her wishes will “count” only to the extent the judge is willing to take them into consideration. If the child wants to live with the mother, and the court believes the best interests of the child warrant custody with the father, the child must succumb. The minor will face a similar indeterminacy with respect to religious environment—under existing law of the majority of states, the parent who obtains legal custody will determine the child’s religious upbringing,

203. Danforth, 428 U.S. at 74-75.
205. Danforth, 428 U.S. at 74.
206. Tinker, 393 U.S. at 506.
207. See supra notes 163-74 and accompanying text.
despite a child's particular preference.\textsuperscript{208} Thus, in the context of a custodial proceeding, the child's individual constitutional rights become subsumed under a collective general welfare-best interests standard.

Need this always be the case?

In order to avoid arrogating to itself unconstitutional authority to declare orthodoxy in determining religious identity, courts only recognize a legally cognizable religious identity when such an identity is asserted by the child itself, and then only if the child has reached sufficient maturity and intellectual development to understand the significance of such an assertion. Though no uniform age of discretion is set, children twelve or older are generally considered mature enough to assert a religious identity, while children eight and under are not. With those ranges as a starting point, judges exercise broad discretion on a case by case basis in determining whether a child has sufficient capacity to assert for itself a personal religious identity.\textsuperscript{209}

Let's assume that for those minors deemed mature enough to have formed an independent religious identity, the court will take this into account. Will the preference be absolute? Just as a parent's constitutional right to free exercise may be limited by a "compelling" state interest, so will the free exercise right of a minor. Hence, even with the asserted identity of a mature minor, unless the minor is emancipated,\textsuperscript{210} his or her constitutional right will be but a preference expressed to the court, whose "compelling" interest is the welfare of the child.\textsuperscript{211}

Given these conclusions, is there any benefit at all to recognizing a free exercise right in a minor, regardless of whether he or she has formed a religious identity? There is one possible benefit.\textsuperscript{212} If

\textsuperscript{208} See supra note 148 and accompanying text.
\textsuperscript{210} Zummo, 574 A.2d at 1149.
\textsuperscript{211} If the custody determination is considered a law of general applicability, then under the standard announced in Employment Division v. Smith, 494 U.S. 872 (1990), the court need not even recognize the minor's mature religious identity under the Free Exercise Clause.
\textsuperscript{212} "Possible" refers to the tenuous constitutional precedent for this discussion. In \textit{Yoder}, the Court left unresolved the issue whether children had constitutional rights pertaining to religious education which could be asserted against parents. Compare the majority's hesitancy, 406 U.S. at 231-32, with Justice Douglas' firm belief in this principle, 406 U.S. at 241-46 (Douglas, J., dissenting in part). In \textit{Parham}, a majority in dicta strongly suggested such a right would not exist, 442 U.S. 603-04.
every minor who was the subject of a custody award had an explicit free exercise right, this would provide additional constitutional support for a "spiritual caregiver" rule. When giving the presumption of religious custody to the spiritual caregiver, a court will not be acting on the basis of empirical evidence demonstrating the harm to the child's temporal welfare if his or her religious environment were disrupted. Instead, the court would be proceeding on the presumption that the only way a minor will in all probability develop, at some point in the future, a positive religious identity of his or her own free choice, is if the child continues to be raised in the healthiest possible religious environment until emancipation. So understood, such a recognition of a minor's First Amendment right to the free exercise of religion will, if nothing else, identify symbolically both the true rationale behind, and beneficiary of, the "spiritual caregiver" rule.

V. CONCLUSION: "LORD PROTECT MY CHILD"

He's young and on fire,
Full of hope and desire
In a world that's been raped and defiled.
If I fall along the way,
And can't see another day,
Lord, Protect My Child.
There'll be a time I here tell
When all will be well
When God and man will be reconciled.
But until men lose their chains
And righteousness reigns,
Lord, Protect My Child. 213

Suzanne LaFollette has written that "when one hears the argument that marriage should be indissoluble for the sake of children, one cannot help wondering whether the protagonist is really such a firm friend of childhood." 214 Ironically, divorce at the end of the twentieth century may be remembered as both a form of liberation for adults and a means of disassociation for children. In spite of the growing tolerance of, and even appreciation for, alternative lifestyles and various nontraditional families, the weight of the sociological,

anthropological, and psychological research, as we have seen, indicates that continuous contact with a nucleus of significant others is vital to socialization and self-efficacy in child development. Unfortunately, the focus on enhancing the subjective well-being of the adult in contemporary relationships has overshadowed the need to deal with the devastation the collapse of the nuclear family has heaped upon the unemancipated generation. And worse, our legal system has heightened the tumult surrounding dissolution by emphasizing its adversarial nature instead of nurturing its capacity for compassionate transition.

Increasing numbers of children growing up in dysfunctional families—is this the legacy our generation must inherit? This is not an exercise in hyperbole but a sad reality we as a society must confront. In our rush to free ourselves from Victorian bonds, in our zeal to sate the passions of the id, children have become casualties of our revolution. And the legal system has facilitated the decline, paradoxically, by expanding the frontier of our civil liberties.

Rather than serve as an indictment of our state of affairs, this brief excursion can act as a catalyst for social and legal evolution. Liberation from our repressed notions of patriarchal society is a positive accomplishment of the American Enlightenment. However, we must now reconstruct what we have deconstructed, and synthesize the openness toward nontraditional family structures with the fundamental, inherently human need for collective validation, the symbiosis of membership in and enrichment of the community.

If what a large proportion of modern American society is confronting is a crisis of meaning, spirituality can play a central role in filling this existential void. But the rapture of which we speak is not a purely personal, transcendental epiphany. Rather, it is a socio-cultural phenomenon which, to be realized, requires an integration into an expanding set of concentric circles around the self, each circle a component in the development of a sense of self-efficacy, each move out a sign of increased socialization and self-actualization.

Children, as we have seen, are experiencing this disconnectedness, especially those who must undergo some family transformation. And this loss of subjective well-being is heightened in the exogamous family, for the social tensions which all must confront are inflamed, and even acted out, through ethnic and religious differences. To prevent the animosity and discord that peaks at separation and dissolution, the least the parents, and the law, can give these children is an innate sense of self, a spiritual continuity which will empower their personality through a difficult period of adjustment. This can be ac-
accomplished, consonant with both the social science literature on religious development and the constitutional protections of religious freedom and family privacy, through the adoption by the states of the following Uniform Spiritual Caregiver Act.

UNIFORM SPIRITUAL CAREGIVER ACT

SECTION 1. DEFINITIONS. For the purposes of this Act—

(a) "Spiritual Caregiver" is that parent who will have exclusive responsibility for, and control over, the development of the religious environment of the child at issue;

(b) "Principal Spiritual Custodian" is that parent whose faith most closely resembles the religious upbringing the child at issue has had prior to dissolution;

(c) "Primary Caregiver" is that parent who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, has been primarily responsible for fulfilling the child's psychological and physical needs.

SECTION 2. LEGAL DETERMINATION OF SPIRITUAL CAREGIVER. In every proceeding in which legal custody of a minor child is at issue, the court shall make a separate and distinct determination as to the child's spiritual caregiver, guided by the following:

(a) REBUTTABLE PRESUMPTIONS. In cases of divorce, the court will presume the spiritual caregiver is the principal spiritual custodian. If the child's religious identity resembles neither parent, the court will presume that the primary caregiver is the spiritual caregiver.

(b) CONDITIONS FOR REBUTTAL. Whichever presumption in subsection (a) applies, it shall be rebuttable upon presentation of evidence of other factors, including the preference of the child if judged to be mature enough to have formed a religious identity, which indicate selecting the principal spiritual custodian (or primary caregiver) as the spiritual caregiver is against the best interests of the child.

Adoption of this Uniform Spiritual Caretaker Act will not be a universal panacea for the plethora of ills which plague the child in contemporary society. It will, however, increase the likelihood that the child thrust into family transition will not become permanently displaced, but instead will be empowered with sufficient ego strengths—a positive sense of self, an enhanced self-efficacy—to nurture social integration and transform the child from the role of victim of the post-modern family to that of its champion.