

# Religious Visitation Constraints on the Noncustodial Parent: The Need for National Application of a Uniform Compelling Interest Test

KEVIN S. SMITH\*

*"Train a child in the way he should go, and when he is old he will not turn from it."  
Proverbs 22:6 (NIV)*

## INTRODUCTION

Human experience and history show few personal commitments as influential, both on individuals and on the societies in which they live, as devotion to one's religion and devotion to one's child.<sup>1</sup> Religious commitments have led many to sacrifice their lives and endure incredible suffering for their faiths,<sup>2</sup> and nature provides few ties as strong as the bond between parent and child.<sup>3</sup> In a dispute between divorced parents involving both religious and visitational issues, the combination of these two emotionally charged commitments can create some of the toughest issues a court must face.<sup>4</sup> The Supreme Court of North Dakota echoed this sentiment when it said, "Few areas of dispute in child custody and visitation cases are more fraught with difficulty than those involving differences in the religious beliefs of the divorced parents."<sup>5</sup> Pennsylvania's Superior Court made a similar observation, opening one of its religion/custody opinions with words from Leo Pfeffer, a "[v]enerable advocate for religious liberty":

Few areas of litigation are more difficult for dispassionate and disinterested judicial determination and more likely to evoke strong and passionate reactions by the protagonists, to cause the general public to take sides, and to incite acrimonious debate

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\* J.D. Candidate, 1996, Indiana University School of Law-Bloomington; B.S., 1992, Indiana University. The Author gives special thanks to Steven T. McFarland and Randy Beck for their guidance, mentorship, and the project which inspired this Note; to Professor Daniel O. Conkle for his learned advice and lucid instruction; to my wonderful wife Maggie for her love and scholarly insight; and to Christ, the ultimate mentor, teacher, motivator, and friend.

1. See Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REF. 879, 905 (1992).

2. See, e.g., ERNLE BRADFORD, *THE SWORD AND THE SCIMITAR: THE SAGA OF THE CRUSADES* 233 (1974) (stating that "the dream of creating the kingdom of God upon earth . . . drove millions of men to leave their homes and endure incredible suffering on their pilgrimage towards the Holy Land"); JOSH MCDOWELL, *MORE THAN A CARPENTER* 61 (1977) (indicating that of the original 12 (post-crucifixion) Christian apostles, 11 died horrible martyr's deaths: six were crucified, two died by the sword, one died by arrows, one was stoned, and one died by a spear thrust). See generally HERBERT B. WORKMAN, *THE MARTYRS OF THE EARLY CHURCH* (Charles H. Kelly ed., 1913); RICHARD WURMBRAND, *IN GOD'S UNDERGROUND* (1968).

3. See ALICE S. ROSSI & PETER H. ROSSI, *OF HUMAN BONDING: PARENT-CHILD RELATIONS ACROSS THE LIFE COURSE* 251-52 (1990).

4. JEFF ATKINSON, *HANDLING RELIGIOUS ISSUES IN CUSTODY AND VISITATION DISPUTES* 12 (1992). Atkinson states:

Few issues touch as deeply as the right of a parent to raise his or her children and the right to engage in the religious practices of one's choice. Those issues come together when parents dispute the religious training of their children. Courts must balance the best interest of the child with the constitutional rights of the parents.

*Id.* at 13; see also Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1348 (1994) (describing disputes between parents over their children's religious upbringing as "unusually intense").

5. *Hanson v. Hanson*, 404 N.W.2d 460, 463 (N.D. 1987).

among religious groups than the area of litigation involving religious consideration in the upbringing of children.<sup>6</sup>

Success of the custodial parent in cases involving religion and visitation disputes often leads to court-ordered restriction of the noncustodial parent regarding his<sup>7</sup> engagement of the children in religious worship or instruction during his visitation.<sup>8</sup> Such a restriction may place the noncustodial parent on the horns of an extreme emotional dilemma, since he may perceive his choice as between obeying a court order and obeying his god. Such a restriction also implicates the most basic of his constitutionally protected parental and religious liberties.

Most states interpret the custodial parent's responsibilities to include determination of the children's religious upbringing.<sup>9</sup> What this interpretation of custodial responsibility means for the noncustodial parent, however, is not as uniform.<sup>10</sup> Currently, jurisdictions differ on what rights noncustodial parents should enjoy in the religious upbringing of their children.<sup>11</sup> Some courts hold that the noncustodial parent has relatively few rights in this area.<sup>12</sup> Others recognize that he *does* have constitutionally protected rights, but differ on the appropriate degree of protection those rights should receive.<sup>13</sup> How a court addresses these issues directly affects how noncustodial religious visitation constraints will be imposed as a remedy for disputes between divorced spouses over the religious upbringing of their children.

This Note explores the current application of noncustodial religious visitation constraints among the several states and the constitutionality of those applications. Part I discusses the constitutionally protected rights of parents in the religious upbringing of their children as recognized in two Supreme Court cases. A state can infringe upon this important parental right only when the state's purpose is "compelling." Part II examines the levels of scrutiny applied by the states when reviewing noncustodial religious visitation constraints. The varying levels of scrutiny among the several states lead to vastly different levels of protection afforded the noncustodian's constitutional freedoms. Part III argues that the disparate treatment of noncustodial constitutional freedoms among

6. *Zummo v. Zummo*, 574 A.2d 1130, 1132 (Pa. Super. Ct. 1990) (quoting Leo Pfeffer, *Religion in the Upbringing of Children*, 35 B.U.L. REV. 333, 333 (1955)).

7. For clarity's sake, and since the 90% of the noncustodial parents in the United States are fathers, Sanford L. Braver et al., *A Longitudinal Study of Noncustodial Parents: Parents Without Children*, 7 J. FAM. PSYCHOL. 9, 9 (1993), this Note will use "he" when referring to the general noncustodial parent and the general person, and "she" when referring to the general custodial parent. However, the author recognizes that noncustodial mothers are affected to the same degree as noncustodial fathers when laws or court rulings restrict their right to influence the religious upbringing of their children.

8. See Annotation, *Child Custody and Visitation—Religion as a Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th §§ 13-14.5, at 1020-28 (1983 & Supp. 1995) [hereinafter *Child Custody and Visitation*].

9. See UNIF. MARRIAGE AND DIVORCE ACT § 408 (1974); Gary N. Skoloff, *Divorce Poses Peculiar Problems for a Child's Religious Rearing*, NAT'L L.J., Dec. 1, 1986, at 23. Examples of states that give the custodial parent the "right" to determine the religious upbringing of her child include: California, see *In re Marriage of Murga*, 163 Cal. Rptr. 79, 82 (Ct. App. 1980); Colorado, see *In re Marriage of Oswald*, 847 P.2d 251, 253 (Colo. Ct. App. 1993); Illinois, see ILL. ANN. STAT. ch. 750, para. 5/608(a) (Smith-Hurd 1993); Indiana, see *Johnson v. Nation*, 615 N.E.2d 141, 145-46 (Ind. Ct. App. 1993) (citing IND. CODE § 31-1-11.5-21(b) (1993)); Maryland, see *Kirchner v. Caughey*, 606 A.2d 257, 263 (Md. 1992); Minnesota, see *Andros v. Andros*, 396 N.W.2d 917, 924 (Minn. Ct. App. 1986) (citing MINN. STAT. ANN. § 518.003, subd. 3(a) (West 1984)); Montana, see MONT. CODE ANN. § 40-4-218 (1995); Nebraska, see *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990); New York, see *De Luca v. De Luca*, 609 N.Y.S.2d 80, 81 (App. Div. 1994), *Bentley v. Bentley*, 448 N.Y.S.2d 559, 560 (App. Div. 1982); Wisconsin, see *Lange v. Lange*, 502 N.W.2d 143, 146 (Wis. Ct. App.) (citing WIS. STAT. ANN. § 767.001(2)(a), (2)(m) (West 1993)), *review denied*, 505 N.W.2d 137 (Wis. 1993), *cert. denied*, 114 S. Ct. 1416 (1994).

10. Skoloff, *supra* note 9, at 23.

11. *Id.*

12. See *infra* part II.B.

13. See *infra* part II.A.

the different states necessitates clear Supreme Court guidance to rectify the disparities. Supreme Court precedent and procedure provide valid grounds for a grant of certiorari in a noncustodial religious visitation constraint case to provide such guidance. Part IV argues that current law, just reasoning, and near-national consensus mandate the application of a strict, well-defined version of the Supreme Court's "compelling interest" test to religious restrictions placed upon noncustodial visitation.

### I. INTERESTS OF THE PARENT AND THE STATE

It is inherent in human nature to "want what is best" for one's children. This innate desire includes not only providing for their immediate physical needs, but also teaching one's children invaluable lessons about life that will benefit them when they are old enough to make decisions on their own. For the parent who believes that adherence to a particular religious faith is the basis for an individual's daily well-being and possibly eternal life, "what is best" for his children necessarily includes instructing them in the tenets of the parent's faith. Professor Carl Schneider describes this interest in the following way:

[P]arents commonly and passionately want to bring up their children in their own religion. They want to do so because part of their concern for their child is a concern for its welfare, and nothing more touches that welfare to a believing parent than the condition of the child's eternal soul. They also may believe that the child's temporal happiness is to be found in the solace of their faith and the guidance of their God. . . . [F]or some parents an integral part of practicing their religion is raising their children in it.<sup>14</sup>

The Supreme Court has held that the U.S. Constitution protects a parent's desire to raise his children in his religion. This protection arises out of the combination<sup>15</sup> of both the First Amendment's protection of religious free exercise,<sup>16</sup> and the Fourteenth Amendment's protection of familial liberty<sup>17</sup> and privacy.<sup>18</sup> This protection is not absolute, however, and the Court has found certain circumstances under which important state interests justifiably can override these fundamental constitutional rights. In determining when circumstances warrant protecting or overriding these rights, the Supreme Court historically has balanced the parental and state interests against one another, considering the "weight" of each. The balancing of these sometimes competing interests is best exemplified by two cases: *Prince v. Massachusetts*<sup>19</sup> and *Wisconsin v. Yoder*.<sup>20</sup>

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14. Schneider, *supra* note 1, at 885.

15. See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990); see also *Zummo v. Zummo*, 574 A.2d 1130, 1138 (Pa. Super. Ct. 1990) ("The Constitutionally recognized parental authority over the upbringing of children is augmented by the Free Exercise and the Establishment Clauses of the First Amendment with regard to the religious upbringing of children." (citing *Smith*, 494 U.S. at 881)).

16. "Congress shall make no law . . . prohibiting the free exercise [of religion.]" U.S. CONST. amend. I; see *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

17. See *Pierce v. Society of Sisters*, 268 U.S. 510, 533-35 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the same general principle).

18. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

19. 321 U.S. 158 (1944).

20. 406 U.S. 205 (1972).

In *Prince v. Massachusetts*, a custodial aunt who had taken her minor niece with her to sell religious literature on a sidewalk was arrested for violating state child labor laws.<sup>21</sup> Both the aunt and child considered such activity a religious duty of eternal significance.<sup>22</sup> The Supreme Court first addressed the guardian's side of the balance. The Court referred to her parental interests in raising the child "in the way [s]he should go," particularly in the area of religion, as "sacred private interests, basic in a democracy."<sup>23</sup> The Court further stated, "[T]he 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."<sup>24</sup> However, the Court found that such activity might cause emotional excitement and psychological or physical injury to a child,<sup>25</sup> and that the state, as *parens patriae*,<sup>26</sup> had a right to "guard the general interest in youth's well-being"<sup>27</sup> and protect against such dangers.<sup>28</sup> In this circumstance, the Court found the balance between the parent's and state's competing interests weighed in favor of the state.

In *Wisconsin v. Yoder*,<sup>29</sup> however, the Court found the balance between the state and parental interests to tip in favor of the parents' constitutional freedoms. In *Yoder*, Amish parents challenged a Wisconsin law that required compulsory school attendance through the age of sixteen. The parents claimed that this requirement substantially burdened their religious and parental liberties because their Amish beliefs prevented them from allowing their children to attend public school beyond the eighth grade. The Court held that in this case the state's interest in insuring child education through the age of sixteen was *not* an interest that outweighed the parents' constitutional rights.<sup>30</sup>

To summarize, in situations where the state<sup>31</sup> imposes some form of burden on a parent's constitutional freedom to raise his children in his religion, judicial balancing—of the state's interest and the parent's interest—determines which interest is more substantial.<sup>32</sup> Cases involving religious visitation constraints on a noncustodial parent pose just such a situation. The question arises, then, as to what state interests should outweigh a noncustodial parent's interests in influencing the religious upbringing of his children. The states appear to answer this question differently, and because of these different answers, the same parental constitutional freedoms receive disparate levels of protection around the country.

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21. *Prince*, 321 U.S. at 158.

22. *Id.* at 163.

23. *Id.* at 164, 165.

24. *Id.* at 166.

25. *Id.* at 170.

26. *Parens patriae* generally means the sovereign power of guardianship over persons under "disability," such as minors. BLACK'S LAW DICTIONARY 114 (6th ed. 1990).

27. *Prince*, 321 U.S. at 166.

28. *Id.* at 169.

29. 406 U.S. 205 (1972).

30. *Id.* at 234.

31. The actions of state courts and judicial officers in their official capacity have long been held to constitute state action governed by the Fourteenth Amendment, and thus subject to review by the Supreme Court when they violate constitutionally protected freedoms. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880).

32. R. Collin Mangrum, *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?*, 24 CREIGHTON L. REV. 445, 470 (1991) (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) ("[T]he Court has recognized that the right to rear one's biological children with whom a nurturing relationship has been established can only be overridden by a powerful countervailing state interest."). In 1990, the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), held that a generally applicable, neutral law having the incidental effect of burdening a person's religion would not be subjected to a balancing test to determine its validity. However, the Court also indicated that a state action burdening other constitutional rights in addition to a claimant's religious free exercise would be held to a balancing test. *Id.* at 881.

## II. THE ISSUE OF RELIGIOUS CONSTRAINTS ON NONCUSTODIAL VISITATION AMONG THE SEVERAL STATES

Most jurisdictions have decided a case involving a dispute between divorcing parents over the religious upbringing of their child or children.<sup>33</sup> The issue has been a relatively recent phenomenon, primarily because of the rapid increase in the divorce rate coupled with the simultaneous growth over the last thirty years in the number of interfaith marriages.<sup>34</sup> The *parens patriae* interest, like that recognized in *Prince*, underlies the "best interests of the child" standard used in some form by every state in deciding custodial disputes.<sup>35</sup> Under this standard, courts consider all relevant factors affecting the children of a divorce in light of what the court feels would be in the children's "best interests."<sup>36</sup> Jurisdictions have split, however, over the appropriate standard courts should use in balancing the children's best interests and the noncustodian's constitutional freedoms.

### *A. The Majority Rule: Restriction Only After a Substantial and Imminent Showing of Harm*

While acknowledging that the paramount concern in custody issues is the best interests of the child, the majority of states uphold restrictions on a noncustodial parent's religious and parental rights only when there is a clear and affirmative showing that exposure to the parents' conflicting religions will cause substantial harm to the children.<sup>37</sup> The Washington Supreme Court first enunciated this standard in *Munoz v. Munoz*:<sup>38</sup>

[T]he rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not . . . restrain any person having custody or visitation rights from taking the children to a particular church, *except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child*. . . . [W]here the trial court does not follow the generally established rule of noninterference in religious matters in child custody cases without an affirmative showing of compelling reasons for such action, we are of the opinion that this is tantamount to a manifest abuse of discretion.<sup>39</sup>

In *Munoz*, a Mormon mother was granted sole custody of the children of her marriage. As part of the divorce decree, the father, a Roman Catholic, was specifically prohibited "from taking the children to any Catholic Church services or to any instructional classes sponsored by the Catholic Church" during his visitation period "until such time as the parties may mutually agree that this would be permissible."<sup>40</sup> The court reversed this

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33. See *Child Custody and Visitation*, *supra* note 8, §§ 1-16.

34. Jordan C. Paul, Comment, "You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." *The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583, 583 (1989).

35. Mangrum, *supra* note 32, at 471; see also Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 28 U. RICH. L. REV. 53, 79 n.143 (1994) (citing statutes from 44 states that provide the "best interest of the child" as the most important consideration in child custody issues).

36. See Cunningham, *supra* note 35, at 77.

37. Mangrum, *supra* note 32, at 482; see also *Zummo v. Zummo*, 574 A.2d 1130, 1154-55 (Pa. Super. Ct. 1990) (citing cases employing this standard); ATKINSON, *supra* note 4, at 9 ("The near-universal rule is that a parent, regardless of custodial status, is entitled to expose the child to his or her religion unless it is shown that the child will be harmed.")

38. 489 P.2d 1133 (Wash. 1971).

39. *Id.* at 1135 (emphasis added).

40. *Id.* at 1134.

order, finding that there was no evidence that the children would suffer harm from exposure to both parents' religious beliefs.<sup>41</sup> In doing so, the court specifically rejected the notion that "duality of religious beliefs, per se, creates a conflict upon young minds."<sup>42</sup>

The standard enunciated in *Munoz* may be the rule applied in most jurisdictions, but its vague and ambiguous language hardly ensures a consistent level of protection for the noncustodial parent's rights. First, "general welfare of the child" can mean many things. Does *everything* affecting the general welfare of a child warrant infringement upon a noncustodial parent's constitutional freedoms? Second, if in fact harm is shown, what level of causation between the harm and the conflicting religions must the custodial parent demonstrate to establish a "clear affirmative showing"? Although most states quote some form of this language when deciding the validity of religious restrictions on noncustodial parents, the ambiguity of the language has led to varying answers to the questions just posed. Most of the states quoting the *Munoz* standard, or something similar, require a strong showing of both harm and causation before upholding restrictions on a noncustodial parent's constitutional freedoms.<sup>43</sup> A minority of jurisdictions, however, require a lesser showing of harm and causation to justify noncustodial religious restrictions.

### 1. Strong Showing of Harm and Causation Required

The first issue that the *Munoz* standard raises is what "effects" on the "general welfare of [a] child,"<sup>44</sup> or harms, warrant restriction of the noncustodial parent's constitutional freedoms. Many courts citing *Munoz* interpret its words to mean more than mere "stress." The Pennsylvania case of *Zummo v. Zummo*<sup>45</sup> is a good example. In this case, the mother was Jewish and the father was Roman Catholic.<sup>46</sup> Pursuant to their original agreement, the parents had raised their children in the Jewish faith. In fact, the children had attended no religious service outside of the Jewish faith before the separation of their parents. After the separation, however, the father desired occasionally to take his children to a Catholic Mass during his visitation.<sup>47</sup> As part of the divorce decree, the court ordered the father to refrain from taking the children to Mass during his visitation periods. The superior court reversed this part of the lower court's order, finding that the only justifiable reason for restricting the noncustodian's constitutional freedom is substantial harm to the children, and that no such showing was made by the custodian.<sup>48</sup>

In its analysis of the *Munoz* standard, the *Zummo* court emphasized:

[W]hile the harm involved may be *present or future harm*, the *speculative possibility of mere disquietude, disorientation, or confusion arising from exposure to "contradictory" religions would be a patently insufficient "emotional harm" to justify*

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41. *Id.* at 1135-36.

42. *Id.* at 1136.

43. See Mangrum, *supra* note 32, at 486.

44. *Munoz*, 489 P.2d at 1135.

45. 574 A.2d 1130.

46. *Id.* at 1141.

47. *Id.* The father also refused to take one of his children to bar mitzvah training during his visitation period, but the court upheld the lower court's order that he do so. *Id.* at 1158. Discussion of this part of the case is not relevant to the issue of this Note, however, which addresses *prohibitions* placed upon the noncustodian's religious and parental freedoms, not mandatory *accommodations* of the custodian's equivalent rights.

48. *Id.* at 1157.

*encroachment by the government upon constitutional parental and religious rights of parents, even in the context of divorce. . . .*

. . . [S]tress is not always harmful, nor is it always to be avoided and protected against. *The key, is not whether the child experiences stress, but whether the stress experienced is unproductively severe.*<sup>49</sup>

Like *Zummo*, the North Dakota case of *Hanson v. Hanson*<sup>50</sup> also indicates that stress or confusion alone is not enough to satisfy *Munoz*. In this case, the mother and father had been Roman Catholics and had raised their children as such. Subsequently, the father became a member of the Pentecostal Apostolic Church, and five years later the couple divorced.<sup>51</sup> The divorce court granted custody to the mother and prohibited the father “from taking the children to any church or church services other than the church to which the children belong[ed].”<sup>52</sup> The court based this prohibition upon findings that the father had “attempted to press his new faith upon the children, thus causing them stress,”<sup>53</sup> and that the change which the children noticed in their father was “‘disturbing’” to them.<sup>54</sup> Such a disturbance is understandable, since the father told his children that he now believed “‘the Catholic church believes in cannibalism,’” and that “‘the Catholic church . . . taught false doctrine.’”<sup>55</sup>

The Supreme Court of North Dakota reversed, however, finding that the evidence presented did not rise to the level needed to justify a religious restriction on a noncustodial parent, as determined by most jurisdictions<sup>56</sup> that have faced this issue:

While we recognize the trial court’s concern that [the father’s] attempts “to press his new faith upon the children” could possibly strain their relationship, the evidence in this case [fell] short of the clear and affirmative showing of physical or emotional harm to the children required to justify the religious restrictions placed upon [the father’s] visitation rights.<sup>57</sup>

As part of its reasoning, the court analogized to other cases which it felt were similar to the facts and issues presented in its case, finding them to require a strong showing of harm arising from the children’s exposure to the conflicting religions to justify noncustodial religious restrictions. One case the court cited was *Felton v. Felton*,<sup>58</sup> which reversed a judgment forbidding visitation by the father unless he, a Jehovah’s Witness, refrained from instructing the children in his religion. The *Felton* court held that general testimony that the child was upset or confused was insufficient to support the trial court’s findings of a deleterious effect on the children.<sup>59</sup> A second case cited by the court was *Robertson v. Robertson*,<sup>60</sup> which reversed an order prohibiting a noncustodial Jehovah’s Witness father from “teaching or expressing to [the children] certain religious doctrines

49. *Id.* at 1155 (emphasis added).

50. 404 N.W.2d 460 (N.D. 1987).

51. *Id.* at 462.

52. *Id.* (quoting lower court findings).

53. *Id.* at 464 (quoting lower court findings).

54. *Id.* (quoting mother’s testimony as to what the father had told his children).

55. *Id.* (quoting mother’s testimony).

56. *Id.* at 463 (citing cases, commentaries, and law review materials).

57. *Id.* at 465; see also *Compton v. Gilmore*, 560 P.2d 861, 863 (Idaho 1977) (finding that a five-year-old daughter’s “exhibit[ion] of ‘strange,’ ‘unusual,’ and ‘aggressive behavior’” after religious indoctrination by the father during visitation was insufficient to justify interference with his visitation rights).

58. 418 N.E.2d 606 (Mass. 1981).

59. *Id.* at 610.

60. 575 P.2d 1092 (Wash. Ct. App. 1978).

during visitation periods.”<sup>61</sup> The *Robertson* court concluded that the mother’s affidavit, which stated that the teachings of the Jehovah’s Witnesses “‘confus[ed] and alarm[ed]’” the children and had a “‘detrimental and confusing impact upon [their] welfare’”<sup>62</sup> was insufficient to support a showing that the conflicting beliefs “affected the general welfare of the children.”<sup>63</sup>

After finding a sufficient degree of harm to justify a “compelling” *parens patriae* interest, most courts citing *Munoz* further require a strong causal link between the conflicting parental beliefs and the harm caused to the child before they will uphold noncustodial religious restrictions on visitation. The Maryland case of *Kirchner v. Caughey*<sup>64</sup> provides a good example of this strong causation requirement interpreted within the meaning of *Munoz*:

The “clear and affirmative showing” of which the *Munoz* Court spoke means something more than general testimony of a parent that the child is “confused” or “upset” by conflicting religious practices. . . . A factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required—mere conclusions and speculations will not suffice.<sup>65</sup>

*Pater v. Pater*<sup>66</sup> provides what is arguably the strongest reading of the causation language in *Munoz*. In this case, the Ohio Supreme Court reversed and remanded a visitation restriction prohibiting a noncustodial mother from teaching or exposing her child to her religion. In doing so, the court said the following concerning the evidence needed to justify upholding the restriction:

This rule [from *Munoz*] has been adopted to protect both parents’ right to expose their children to their religious beliefs, a right that does not automatically end when they are divorced. The courts should not interfere with this relationship between parent and child unless a child is exhibiting genuine symptoms of distress that are caused by the differences in the parents’ religious beliefs. . . . *Because a divorce is a stressful event for a child, a court must carefully separate the distress caused by that event from any distress allegedly caused by religious conflict.*<sup>67</sup>

Not all jurisdictions implementing a strict interpretation of the *Munoz* rule find in favor of the noncustodial parent. When they do not, however, the showing of both harm to the child and the link between that harm and the parent’s religion is quite persuasive. The Arizona case of *Funk v. Ossman*<sup>68</sup> is such a case. In *Funk*, two psychologists testified that manifestations of undue stress in a child were traceable to his being raised in both of his parents’ religions, Catholicism and Judaism. One of the psychologists, who was also the child’s mother, testified that this stress was manifesting itself in encopresis,<sup>69</sup> a bowel control problem caused by psychological disturbance, which ceased when the boy was taken out of his bar mitzvah training pending the outcome of the hearing. As a remedy, the court prohibited the father from taking the child to the bar mitzvah training, but noted that the child could still attend Jewish services, Jewish summer camp, and celebrat

61. *Hanson*, 404 N.W.2d at 464.

62. *Id.* (quoting *Robertson*, 575 P.2d at 1093).

63. *Id.* The *Hanson* court also cited *Munoz v. Munoz*, which is discussed at length *supra* part II.A.

64. 606 A.2d 257 (Md. 1992).

65. *Id.* at 262 (citations omitted).

66. 588 N.E.2d 794 (Ohio 1992).

67. *Id.* at 801 (emphasis added).

68. 724 P.2d 1247 (Ariz. Ct. App. 1986).

69. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 747 (1986) (unabridged) (defining “encopresis” as involuntary defecation of psychic origin).



Jewish holidays with his father.<sup>70</sup> In this case, the harm actually manifested itself in a tangible way, the evidence linking the harm to the conflicting religions was extremely strong and supported by experts who had personally interviewed the child, and the remedy was “narrowly tailored” to only restrict the activity directly linked to the tangible harm.

## 2. Lesser Showing of Harm and Causation Required

Although the majority of jurisdictions applying *Munoz*, or a similar test,<sup>71</sup> read these tests to require a strong showing of harm and causation to justify infringement on a noncustodial parent’s constitutional freedoms,<sup>72</sup> at least one jurisdiction, Nebraska, does not. In *LeDoux v. LeDoux*,<sup>73</sup> a couple, who were married as Roman Catholics, were divorcing after the husband’s subsequent conversion to a Jehovah’s Witness.<sup>74</sup> The custody determination granted the father visitation but restricted his ability to expose his children to any religion other than Catholicism. The court also mandated that he allow his children to engage in any activities permitted by the Catholic religion, even if his own religion prohibited such activities.<sup>75</sup> The lower court based its decision in part on the testimony of a certified psychologist who had counseled the oldest of the couple’s two children. The psychologist stated that the boy was experiencing severe stress after visits with his father, and that this stress had manifested itself in bedwetting and “the equivalent of a nightmare.”<sup>76</sup> He attributed the stress to the boy’s aversion to being with his father, and concluded that the father’s religion was one of the factors causing the aversion.<sup>77</sup> The Nebraska Supreme Court affirmed this decision, finding that the restriction was justified because the harm, which arose in part from the father’s religious indoctrination, “pose[d] an immediate and substantial threat to [the] child’s temporal well-being,”<sup>78</sup> and that the restriction was “narrowly tailored”<sup>79</sup> to eliminate that threat.<sup>80</sup>

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70. *Funk*, 724 P.2d at 1251.

71. Maine employs different language than most jurisdictions reviewing noncustodial visitation constraints, but the practical effect of this analysis is similar to that found in a narrow application of the *Munoz* standard:

[T]he divorce court, where it finds that a particular religious practice poses an *immediate and substantial threat* to the child’s well-being, . . . may make an order aimed at protecting the child from that threat. . . . In fashioning the appropriate order, the court should adopt a means . . . that makes the *least possible intrusion* upon the constitutionally protected interests of the parent.

*Osier v. Osier*, 410 A.2d 1027, 1030-31 (Me. 1980) (citations omitted) (emphasis added). The “substantial and immediate threat” language of *Osier* encompasses both the grave harm and the causal link requirements embodied by *Munoz*. The “substantial” requirement addresses the degree of harm; the “immediate” requirement addresses the temporal proximity between the harm and its cause, indirectly encompassing *Munoz*’s “clear and affirmative showing” requirement, since only those harms clearly perceived to be within the immediate future would satisfy this requirement. Finally, *Osier*’s “least possible intrusion” requirement also indirectly addresses the “clear and affirmative showing” requirement of *Munoz*, since the court cannot fashion a narrow restriction without having a good idea of the harm to which it is directed.

72. Mangrum, *supra* note 32, at 482; see *supra* part II.A.1. Other cases strongly interpreting this general rule are *In re Marriage of Mentry*, 190 Cal. Rptr. 843 (Ct. App. 1983); *Felton v. Felton*, 418 N.E.2d 606 (Mass. 1981); *Khalsa v. Khalsa*, 751 P.2d 715 (N.M. Ct. App. 1988); and *Robertson v. Robertson*, 575 P.2d 1092 (Wash. Ct. App. 1978).

73. 452 N.W.2d 1 (Neb. 1990).

74. *Id.* at 3.

75. *Id.* at 4-5.

76. *Id.* at 4.

77. *Id.*

78. *Id.* at 5.

79. *Id.*

80. The court cites *Osier v. Osier*, 410 A.2d 1027 (Me. 1980), for the test it enunciates here, and not *Munoz*, although *Munoz* is cited in the opinion. The *Osier* test is substantially similar to the *Munoz* test, however, and is thus not given separate consideration in this Note. The *Osier* test is set forth *supra* note 71.

Although the facts of this case may seem similar to those in *Funk*,<sup>81</sup> the level of scrutiny used to analyze the *LeDoux* restriction was arguably much lower. The harm experienced by the child was just as significant (encopresis vs. bedwetting), but the causation linking the harm to the parent's conflicting religions was much weaker. First, all of the harm in *Funk* was directly traceable to the child's formalized religious training; when the training stopped, he appeared less anxious and more open.<sup>82</sup> In *LeDoux*, however, distinguishing the stress coming from the conflicting religions and the stress coming from other sources, particularly the divorce itself, was much more difficult.<sup>83</sup> The psychologist in *LeDoux* stated that the ultimate source of the stress came from the boy's feelings about his father, and that the father's religion contributed to that stress.<sup>84</sup> There was no mention of the need to discover how much the disparate religions contributed to the stress,<sup>85</sup> nor any showing that the restriction would have any significant effect in relieving the stress, unlike the restriction in *Funk*. Second, there is evidence that the majority implicitly assumed that exposure to disparate religions would be harmful to the children per se: the psychologist, upon whose testimony the court relied in upholding the religious restriction, only found stress manifested in the older of the two children.<sup>86</sup> The restriction, however, proscribed discussion of the father's religion with both children, showing the court's apparent assumption that if one child was adversely affected, the other child necessarily would be adversely affected. This would not be a satisfactory showing of a "substantial and immediate harm" to the younger child, since the mother introduced no evidence of harm to the younger child. In contrast, the Washington Court of Appeals once noted: "Each case must be decided on its own facts, as every child is different."<sup>87</sup> Finally, the closing remarks of the opinion most clearly show the majority's failure to truly comprehend the burden on the father's religious and parental rights. In defending the contention that the trial court's order was "narrowly tailored," the majority stated, "The appellant is free to discuss beliefs of the Jehovah's Witnesses with his children so long as they are consistent with the Catholic religion."<sup>88</sup> Since the Jehovah's Witnesses believe that their movement is the only true faith,<sup>89</sup> and that all teachings and

81. See *supra* text accompanying notes 68-70.

82. *Funk v. Ossman*, 724 P.2d 1247, 1251 (Ariz. Ct. App. 1986).

83. First, the psychologist testified that the boy's anger at his father could be the result of difficulty in adjusting to the divorce and the boy's blaming his father for leaving. *Id.* at 9. Second, the psychologist testified that "from a relational standpoint, [the boy] felt that being with his father was not a lot of fun," and that his father "did the things he wanted to do, not the things that [the boy] wanted to do." *Id.* Finally, the psychologist "expressed the opinion that 'the wetting experiences were reflecting the stress that [the boy] was feeling for being with his father . . . when he hadn't seen Dad for some time for overnight.'" *Id.* at 10. As one commentator notes: "[I]t was not and possibly could not have been clear . . . that reducing the exposure of [the] child to one religion would end the problem." Schneider, *supra* note 1, at 902.

84. *LeDoux*, 452 N.W.2d at 4.

85. The court stated:

In Dr. Rizzo's words, [the child's] stress is serious. The fact that the involuntary exposure to disparate religions was but one factor in the source of [the child's] stress does not detract from the trial court's conclusion that these religious differences have and will continue to have a deleterious effect on [the two children].

*Id.* at 5. But see *Pater v. Pater*, 588 N.E.2d 794, 801 (Ohio 1992) ("Because a divorce is a stressful event for a child, a court must carefully separate the distress caused by that event from any distress allegedly caused by religious conflict.").

86. *LeDoux*, 452 N.W.2d at 5.

87. *In re Marriage of Jensen-Branch*, 899 P.2d 803, 808 (Wash. Ct. App. 1995). Justice Fahmbruch's concurrence in *LeDoux* would appear to disagree with the Washington Court of Appeals: "Because of the magnitude and intensity of the conflict, it not only likely will, but inevitably will, detrimentally affect the general welfare of the younger child." *LeDoux*, 452 N.W.2d at 6 (Fahmbruch, J., concurring).

88. *LeDoux*, 452 N.W.2d at 5.

89. See FRANK S. MEAD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 120 (1990).

interpretations contrary to those taught by the Witnesses are "suspect and unreliable,"<sup>90</sup> such a statement only shows the court's ignorance of the severity of the burden its restriction places on the father's freedoms.

"[W]hen a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order . . . narrowly tailor[ed] . . . so as to result in the least possible intrusion upon the constitutionally protected interests of the parent."<sup>91</sup> Although the Nebraska Supreme Court's decision, at first glance, seems to adequately protect the noncustodial parent's rights, the court's opinion shows that strong language alone cannot protect a parent from a weak interpretation and application of that language.

### *B. The Minority Rule: The Exclusive "Right" of Custodial Parent*

A minority of states do not apply a *Munoz*-type analysis when reviewing the legality of religious constraints on noncustodial visitation. They decline to use such a standard because they interpret the custodial parent's "right" to influence the religious upbringing of her children as exclusive, precluding any action on the part of the noncustodian which would undermine that right. Finding such exclusivity dooms the noncustodian's challenge to the religious visitation constraint, since by definition he has no right to influence the religion of his children.

The Minnesota case of *Andros v. Andros*<sup>92</sup> is a good example of this minority view. In this case, divorced parents sharing joint custody<sup>93</sup> had disputes over whether the father should include the children in his religious worship services during his scheduled visitation. Because of the disputes, the mother filed for sole custody,<sup>94</sup> which the court granted, despite the fact that the children were *not* experiencing any harm from their parents' conflicting theologies.<sup>95</sup> The court modified the father's visitation schedule to preclude him from taking the children to his church services<sup>96</sup> and the father appealed, claiming infringement of his First Amendment freedom. As part of his claim he requested that the court analyze the restriction under the "compelling state interest" test.<sup>97</sup> The court declined, stating that, "The court's modification of visitation affects neither appellant's religious beliefs, nor his right to practice his religion"<sup>98</sup> because his "freedom to exercise his religious beliefs remains exactly the same as before."<sup>99</sup> Apparently, the court failed to realize that "for some parents an integral part of practicing their religion is raising their

90. *Id.* at 122.

91. *LeDoux*, 452 N.W.2d at 5 (citations omitted).

92. 396 N.W.2d 917 (Minn. Ct. App. 1986).

93. "Joint custody involves both parents sharing responsibility and authority with respect to the children." BLACK'S LAW DICTIONARY, *supra* note 26, at 267.

94. A parent given sole custody has sole responsibility for "[t]he care, control and maintenance of a child." *Id.*

95. *Andros*, 396 N.W.2d at 920.

96. *Id.*

97. *Id.* at 924. The "compelling state interest" test requires that a state action substantially infringing upon a person's religious freedom serve a "compelling governmental interest" and be "the least restrictive means of furthering that . . . interest." Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

98. *Andros*, 396 N.W.2d at 924.

99. *Id.* at 923.

children in it,<sup>100</sup> and that the Supreme Court has recognized this aspect of religious and parental freedom as embodied within the Constitution.<sup>101</sup>

Although the court appeared to base its decision on a psychologist's testimony that "exposure of the children to hostilities between their parents [would] likely cause emotional damage in the future,"<sup>102</sup> there was some indication that a Minnesota statute giving the custodial parent "exclusive" control over the children's religious upbringing substantially influenced the decision. At one point the court wrote, "The [lower] court's order *properly [gave]* respondent, not appellant, *exclusive* control of the children's religious training. It is settled law in Minnesota that the *custodial parent* of minor children *has control* of the children's religious upbringing."<sup>103</sup> Had the Minnesota court not interpreted this statute to grant the custodian an exclusive right to influence the child's religious upbringing, the court might have required a more substantial showing to justify the restriction of the noncustodial parent's visitation. After all, the children were *not currently suffering any harm*,<sup>104</sup> and any possibility of future harm was speculative at best and was expected to arise, if at all, more from general conflict between the parents than from their conflicting religions per se.<sup>105</sup>

Wisconsin is another state that finds the custodial parent's rights concerning the children's religious upbringing to be exclusive, as exemplified by *Lange v. Lange*.<sup>106</sup> The noncustodial father in this case had spoken often and persuasively to his minor children about his religion, and they in turn had accepted his religion and rejected their mother's. The custodial mother petitioned for and won an order prohibiting the father from further proselytizing to the children. The court granted the restriction on the grounds that "[i]f the custodial parent wishes, the non-custodial parent is excluded from participating in the choice [of what religion the children will follow]."<sup>107</sup> The restriction proscribed the father from "imposing" his views of religion on his children. To insure his compliance, the court required a social services employee to "supervise" his visits.<sup>108</sup>

Although *Andros* and *Lange* find exclusive control over the religious upbringing of the children belonging to the custodial parent, the two cases have very distinct differences. First, unlike *Andros*,<sup>109</sup> the court in *Lange* did not try to justify its restriction by any

100. Schneider, *supra* note 1, at 885.

101. Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944).

102. *Andros*, 396 N.W.2d at 922.

103. *Id.* at 923-24 (citing MINN. STAT. § 518.003, subd. 3(a) (1984)) (emphases added).

104. *Id.* at 920.

105. See *supra* text accompanying note 102.

106. 502 N.W.2d 143 (Wis. Ct. App.), *review denied*, 505 N.W.2d 137 (Wis. 1993), *cert. denied*, 114 S. Ct. 1416 (1994).

107. *Id.* at 146.

108. The order of the family court read in part:

"[The father] is awarded reasonable visitation supervised by a proper person approved by the Clark County Department of Social Services. . . . At such time as it is shown that [the father's] visitation can occur without him imposing his fundamentalist religious views on the children, then the Court may remove such restriction. If [the father] continues to impose his religious views on the children, [the mother] can then petition the Court for further restrictions."

*Id.* at 144 (quoting order of family court).

109. See *supra* text accompanying notes 102-05.

principle of harm to the children,<sup>110</sup> even when it was shown that the majority of other jurisdictions do so. The court stated:

The dissent concludes that the state can protect [the mother's] exclusive right to choose the religion of the children only if they have been emotionally harmed by [the father] imposing his views on them. The health of the children is an outrageous price to pay for that protection. . . . To the extent that other jurisdictions have implicitly set that price, we reject their decisions. This state need not require harm to the children before protecting [the mother's] rightful choice.<sup>111</sup>

Thus, in Wisconsin the only justification needed for restricting a noncustodial parent with religious beliefs that differ from the custodian is simply that his children *subscribe to his beliefs* and reject the custodian's. This fact is seen in the court's test for determining when the father has illegally "imposed" his beliefs on his children: "Whatever its dictionary meaning, 'impose' . . . means that [the father] must not cause the children to reject the religion [the mother] chooses for them."<sup>112</sup>

Second, because its justification does not rely on harm, the restriction in *Lange* is much more intrusive than the restriction in *Andros*. In *Andros*, the father is no longer able to take his children to church with him, but the holding says nothing of what he can say to the children while he is with them.<sup>113</sup> He apparently can still speak to them about his faith and why he believes in it. In *Lange*, however, the father arguably cannot even share his beliefs with his children, even though the court said that the restriction "[did] not absolutely prohibit religious discussion"<sup>114</sup> between the father and his children. The court order, in theory, rests upon the father's actions: the father cannot "cause his children to reject their mother's choice of religion."<sup>115</sup> As a practical matter, however, the court order is only violated when the children react a certain way to what he says. Even if the father merely tells his children why he believes the way he does, if the children like what they hear and reject the mother's views, the father, by the court's definition, has "caused" the children to reject their mother's religion. Therefore, if the father ever wants to enjoy unmonitored visitation with his children, he will most likely avoid the subject of religion altogether.

### III. THE LACK OF UNIFORMITY IN TREATMENT OF NONCUSTODIAL PARENTS' RELIGIOUS AND FAMILIAL FREEDOMS AS A PROBLEM DESERVING SUPREME COURT ATTENTION AND CORRECTION

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110. The only discussion of harm by the appellate court in *Lange* appears in a reiteration of the lower court's findings: "The [father's] religious beliefs concerning the role of females is detrimental to the children and the children are confused by the different religious teachings of the parties." *Lange*, 502 N.W.2d at 145. If these are the only "harms" found by the court, then it is clear why the court could not apply a *Munoz*-type analysis and still uphold the restriction. As to the "confusion," mere confusion is not enough to justify curtailment of a parent's constitutional liberties. As to the father's "beliefs concerning the role of females," although the judiciary might have the constitutional duty to eradicate outmoded gender stereotypes from state and federal actions, see *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1425 (1994), the courts most certainly do not have such a duty concerning the thoughts and ideas of the general public, nor in dictating to parents what view of gender roles they shall teach to their children. Such "thought policing" on the part of the judiciary would stink of an Orwellian abuse of power, and seems clearly unconstitutional under any definition. Thus, neither of these "harms" would satisfy the *Munoz* test; to uphold the noncustodial restriction, the court had to find another peg on which to hang its opinion—the mother's custodial "right."

111. *Lange*, 502 N.W.2d at 148.

112. *Id.* at 146.

113. See *supra* text accompanying notes 96-99.

114. *Lange*, 502 N.W.2d at 147.

115. *Id.* (emphasis added).

Part II described the various levels of scrutiny used in various states to review religious constraints on noneustodial visitation. Of the three levels of scrutiny shown, the most problematic is the minority rule,<sup>116</sup> simply because it fails even to acknowledge the important constitutional rights of the noncustodial parent.<sup>117</sup> Even jurisdictions that recognize these rights, however, balance them against a broad *parens patriae* interest expressed in vague and ambiguous language, such as "general welfare of the child,"<sup>118</sup> such that the protection is in reality only as strong as the court applying it decides it should be.<sup>119</sup> In short, the constitutional freedoms of noncustodial parents receive varying levels of protection among the different jurisdictions. The Supreme Court should recognize this disparity and remedy it through a grant of certiorari to a noncustodial religious visitation constraint case so as to guarantee a more uniform treatment of these federally guaranteed freedoms.<sup>120</sup> Defining the parameters of state *parens patriae* protection is by definition a matter left up to each individual state. However, the Supreme Court has previously granted certiorari to a case in which a state, in the exercise of its *parens patriae* power, violated a parent's constitutional rights, holding that the parent's federal constitutional rights superseded the application of this state-determined doctrine. In *Palmore v. Sidoti*<sup>121</sup> the Florida District Court of Appeals upheld<sup>122</sup> a trial court decision to remove custody of a child from a white mother to a white father because of the mother's subsequent marriage to an African-American man. The trial court, motivated by its *parens patriae* interests, found that due to the adverse social ramifications that the mother's marriage would have for the child, changing custody to the father would be in the child's best interests.<sup>123</sup> The Supreme Court overturned this ruling, holding that a change of custody premised upon protecting a child from the societal racial prejudice that might occur due to her mother's interracial marriage violated the mother's Fourteenth Amendment Equal Protection rights.<sup>124</sup> Through this holding, the Court recognized the mother's Equal Protection rights as more important than the right of the state, as *parens patriae*, to protect one of its children from probable psychological harm.<sup>125</sup> Surely racial prejudice, social stigmatization, and malicious labeling could conceivably cause at least as much, if not more, psychological harm to a child than her exposure to conflicting religious doctrines. If this hypothesis is correct, and if a parent's right to share his religion with his child is as constitutionally important as his right to be free from racial discrimination, then equity mandates the protection of the noncustodial parent's religious and parental freedoms from a state's *parens patriae* authority to the same degree as his Equal Protection rights. In view of *Palmore*, the Court should not be averse to granting

116. See *supra* part II.B.

117. See Mangrum, *supra* note 32, at 460 (arguing that an interpretation of the custodial parent's right to determine the children's religion as an exclusive right would "jeopardize the constitutional rights of the noncustodial parent"); Schneider, *supra* note 1, at 900 (arguing that an interpretation of exclusivity in the general premise that the custodial parent has the "right" to determine the children's religion is "not good policy").

118. See *supra* text at note 39.

119. Compare *Pater v. Pater*, 588 N.E.2d 794, 801 (Ohio 1992) with *LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990).

120. These types of cases are not rare. In 1994, certiorari was denied for Wisconsin's controversial *Lange v. Lange*, 502 N.W.2d 143 (Wis. Ct. App.), *review denied*, 505 N.W.2d 137 (Wis. 1993), *cert. denied*, 114 S. Ct. 1416 (1994), discussed *supra* part II.B.

121. 466 U.S. 429 (1984).

122. The court of appeals affirmed without opinion, thus precluding review by the state supreme court. *Id.* at 431.

123. *Id.*

124. *Id.* at 433.

125. See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 26 (1987); see also Mangrum, *supra* note 32, at 472-73.

certiorari to dictate how much protection the noncustodial parent's combined substantive Due Process and Free Exercise rights enjoy when balanced against a state's *parens patriae* interest.

In addition to the precedent set by *Palmore*, there are valid procedural and policy grounds for granting certiorari to a case involving a religious constraint on noncustodial visitation. In terms of a strong procedural justification, a manual on Supreme Court practice states that the Court often grants certiorari in cases where varying interpretations of a uniform rule by different jurisdictions cause profoundly differing results as to a particular constitutional freedom.<sup>126</sup> In this instance the "uniform rule" receiving profoundly varying application is that governing the custodial parent's "right" to determine the religious training of her child.<sup>127</sup> As a strong policy argument, Professor Daniel O. Conkle advances the notion that in cases where an individual right "evoke[s] intense and passionate feelings,"<sup>128</sup> the Court should act as an arbiter of a national morality, galvanizing the nation by "nationalizing our governmental policies concerning controversial individual rights."<sup>129</sup> Professor Conkle argues further that "[t]he need for both intranational fairness and international leadership has led the American morality to demand consistent *national* standards for the protection of individual rights, standards beneath which no state or locality can be permitted to fall."<sup>130</sup>

The Court has valid precedential and policy rationales for granting of certiorari to a religious visitation constraint case. Without it, courts will not receive clear indication of what state interests can and cannot outweigh the right of a noncustodial parent to engage in religious discourse and practice with his children. If the Court allows different interpretations of the rule concerning the custodial "right" to determine the religion of the child to continue, then the concept of "unalienable rights"<sup>131</sup> equally available to *all*

126. See ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 167 (1978).

127. Compare *Lange v. Lange*, 502 N.W.2d 143, 146 (Wis. Ct. App.), *review denied*, 505 N.W.2d 137 (Wis. 1993), *cert. denied*, 114 S. Ct. 1416 (1994) (stating the custodial parent's right to choose the religion of the child as "exclusive" and that the noncustodial parent has "no right to participate in the choice") with *Pater v. Pater*, 588 N.E. 2d 794, 801 (Ohio 1992) (stating that both parents have a "right to expose their children to their religious beliefs" and that this right "does not automatically end when they are divorced"). Certainly the states have the right to protect the children within their jurisdictions, but they do not have the right to deny a noncustodial parent his constitutionally protected freedoms, if in fact the noncustodian enjoys such rights after divorce. Whether or not he does, however, is a matter for the Supreme Court to decide, not each individual state.

128. Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 28 (1985). According to Conkle:

On moral issues such as these, there are no differing local conditions sufficient to justify differing local answers, and local "experimentation" is hardly well-suited to moral inquiry. Moreover, although the prevailing moral values of our citizenry may well differ by state or region, the pluralistic benefits of federalism are outweighed in this sphere by the interests of our national political community, a community that is growing closer together every day. The issues simply are too important to America, and too basic to each of our citizens, to be subject to geographic disparity. They cry out for *national* resolution, which the Supreme Court can provide through the recognitions of nonoriginalist constitutional rights.

*Id.* at 29 (citations omitted) (emphasis in original).

129. *Id.*; see also CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 75 (1969) ("In policing the actions of the states for their conformity to federal constitutional guarantees, the Court represents the whole nation, and therefore the whole nation's interest in seeing those guarantees prevail, in their spirit and in their entirety." (footnotes omitted)).

130. Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 634 (1985) (emphasis in the original).

131. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Arguably few freedoms fall more squarely within the meaning of the words "life, liberty and the pursuit of happiness," *id.*, than does the right of a parent to teach his children about his religion.

Americans *because* they are Americans, of freedoms that transcend state borders and unite us as a common nation, is selective at best and hollow otherwise.

#### IV. NONCUSTODIAL RELIGIOUS VISITATION RESTRICTIONS AND THE SUPREME COURT'S COMPELLING INTEREST TEST

Once the Court grants certiorari to a noncustodial religious visitation constraint case, it will need to dictate the proper standard for balancing the competing state and parental interests. There are three strong arguments for why that standard should be the compelling interest test, which dictates that a court must find the noncustodial restraint the "least restrictive means" of achieving a "compelling governmental interest." First, current federal constitutional law mandates such a heightened standard. Second, strong policy reasons justify such a standard. Third, near-national consensus among the states supports such a standard.

##### *A. Current Law Mandates the Review of Noncustodial Religious Visitation Constraints Under the Compelling Interest Test*

Until 1990, Supreme Court precedent prevented any state or federal law or policy from "burden[ing] the exercise of sincere religious belief unless [that law or policy] was the least restrictive means of attaining a particularly important ('compelling') secular objective."<sup>132</sup> This was known as the "compelling interest test." The 1990 case of *Employment Division v. Smith*<sup>133</sup> cast some doubt upon the continued viability of this test, however. The *Smith* decision held that a neutral law of general application which infringed upon a claimant's religious freedom need not satisfy the compelling interest test.<sup>134</sup> The opinion indicated, however, that whenever a general law or policy infringed a claimant's religious freedom *and another constitutional freedom*, then the state action would be reviewed under the compelling interest test.<sup>135</sup> The paradigm example used by the Court to exemplify one of these "hybrid" situations was state infringement upon a parent's free exercise right and his right to direct the upbringing of his children.<sup>136</sup> Therefore, there is strong precedential support for the application of a compelling interest test to noncustodial religious visitation constraints.

Besides judicial precedent, there is also congressional support for the application of the compelling interest test to noncustodial religious visitation constraints. In 1993, Congress passed the Religious Freedom Restoration Act,<sup>137</sup> which requires that state action substantially infringing upon a person's religious freedom serve a "compelling governmental interest" and be "the least restrictive means of furthering that . . . interest."<sup>138</sup> The Act specifically states that its purpose is "to restore the compelling

132. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

133. 494 U.S. 872 (1990).

134. *Id.* at 881.

135. *Id.* at 881-82.

136. Cunningham, *supra* note 35, at 66 (citing *Smith*, 494 U.S. at 881).

137. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488-89 (1993) (codified as amended 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

138. 42 U.S.C. § 2000bb-1.



interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .<sup>139</sup> From these judicial and legislative considerations, one can conclude that court-ordered restriction of a noncustodial parent's right to instruct his children in his religion must be reviewed under the compelling interest test enunciated in the Supreme Court's pre-*Smith* jurisprudence.

*B. Strong Policy Reasons Warrant Application of the  
Compelling Interest Test to Noncustodial Religious  
Visitation Constraints*

There are two important policy reasons for applying the compelling interest test to noncustodial religious visitation constraints. One is to promote constitutional equity between the divorced parents. The other is to protect the welfare of the children involved.

Although Supreme Court precedents speak only of "parents'" rights in the area of religion and the upbringing of children,<sup>140</sup> there are valid policy reasons for why *both* parents, and not just the legal and physical custodian of the children, should receive the protection of the compelling interest test. The noncustodial parent does not lose his constitutionally protected interests<sup>141</sup> in raising his children simply because his marriage has ended.<sup>142</sup> His familial relationship with his wife has died, not his familial relationship with his children. Although the custodial parent may have physical custody, she does not necessarily have a stronger interest in the children's religious upbringing.<sup>143</sup> Professor R. Collin Mangrum notes, "[T]he noncustodial parent's very sense of self-worth and autonomy is threatened by constraints which restrict nurturing and training experiences with the child."<sup>144</sup> Unless some form of harm to the children is shown to arise from exposure to their parents' conflicting religions, there is no justifiable "custodial rights" ground for depriving a noncustodial parent of a meaningful spiritual relationship with his children.

A second policy reason for analyzing a noncustodial religious visitation constraint under the heightened scrutiny of the compelling interest test is that the children, and not just the noncustodial parent, may be adversely affected by the restriction. Some psychologists suggest such a restriction would hinder the children's already limited relationship with their noncustodial parent by barring participation with that parent in something that is extremely important to him.<sup>145</sup> A 1993 study supports this rationale:

139. *Id.* § 2000bb (citations omitted). *But cf.* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONTANA L. REV. 39 (1995) (arguing that the Religious Freedom Restoration Act is unconstitutional). Even if RFRA is unconstitutional, however, such an act arguably reflects the desire of the majority of Americans to protect religious freedom to a degree greater than the Supreme Court is willing, and such a mandate regarding individual liberty should be given heightened consideration by the Supreme Court. *Id.* at 79-90. For an article defending RFRA's constitutionality, see Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONTANA L. REV. 145, 152-70 (1995). In any event, one could still make the "hybrid exception" argument under *Smith*.

140. *Smith*, 494 U.S. at 881 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

141. The interests of a parent to "bring up" his child religiously are "sacred private interests, basic in a democracy," *Prince v. Massachusetts*, 321 U.S. 158, 164, 165 (1944), and are "of the highest order," *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

142. *Pater v. Pater*, 588 N.E.2d 794, 801 (Ohio 1992); *Zummo v. Zummo*, 574 A.2d 1130, 1139-40 (Pa. Super. Ct. 1990); ATKINSON, *supra* note 4, at 5; *Schneider*, *supra* note 1, at 900.

143. *See* Mangrum, *supra* note 32, at 477; *cf. supra* text accompanying note 14.

144. Mangrum, *supra* note 32, at 477.

145. *Id.* at 462-64.

A large number of noncustodial parents . . . feel disenfranchised, that they have no input into how their children are raised, that the usual rights of parents are withdrawn from them, that they become in effect parents without children. When this happens, withdrawal from obligations of parenthood, financial support, and an emotional relationship with the child appears likely to follow.<sup>146</sup>

A 1980 empirical study advises against severely restricting the visitation relationship, finding that the children's continuing relationship with both parents following divorce is of "primary importance."<sup>147</sup> A 1990 study concludes that "the more time a child spends with the noncustodial parent the better the overall adjustment of the child."<sup>148</sup> This fact is particularly true when the noncustodian is the father, as pointed out in a 1988 study:

Fathers appear to have important unique, as well as overlapping, contributions to make to their children's development . . . that are too often denied the child after divorce . . .

These observations . . . would suggest the need for greater scrutiny of . . . awarding sole physical custody and control to mothers while severely delimiting the father's role and influence on the child after divorce.<sup>149</sup>

Finally, Professor Mangrum notes that "the child's moral development and . . . self worth are directly threatened whenever an historical loving relationship is severed or limited in a way that precludes continued development."<sup>150</sup> Therefore, exacting scrutiny should be applied to noncustodial religious visitation constraints not only because of how they burden parental rights, but also as a protective measure for the children who would suffer from the damage such restrictions might cause to the noncustodial parent/child relationship.

### *C. Near-National Consensus Supports Application of the Compelling Interest Test to Noncustodial Religious Visitation Constraints*

A third argument for applying the compelling interest test to noncustodial religious visitation constraints is that nearly all of the states which have reviewed these restrictions already employ the effective equivalent of a compelling interest test. As shown in Part II.A, the majority of state courts will only uphold these restrictions after a clear and affirmative showing of substantial and imminent harm accruing to children from their divorced parents' conflicting religious beliefs.<sup>151</sup> Because of the state's important *patria*<sup>152</sup> interest in protecting the welfare of its children, removing a "substantial threat" to the children would qualify as a "compelling" state interest. Also, by requiring the showing of that harm to be clearly and affirmatively linked to the conflicting parental

146. Braver et al., *supra* note 7, at 20 (emphasis added).

147. Ronald A. White, Note, *Divorce: Restricting Religious Activity During Visitation*, 38 OKLA. L. REV. 284, 285 n.7 (1985).

148. Lise M.C. Bisnaire et al., *Factors Associated with Academic Achievement in Children Following Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 67, 75 (1990); see also Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119, 127 (1988).

149. Kelly, *supra* note 148, at 134 (citation omitted).

150. Mangrum, *supra* note 32, at 477.

151. *Id.* at 483; Skoloff, *supra* note 9, at 23. For an interesting observation on how the requirement of a strong showing of harm to justify religious visitation constraints is supported by the separation of powers principle, see Lupu, *supra* note 4, at 1347-51.

152. See *supra* note 26.

religions, the courts are effectively adhering to the requirement that the means chosen to satisfy the state's compelling interest be the "least restrictive" possible. If it can be shown that the substantial harm is traceable to the parents' conflicting beliefs, then the least restrictive means possible to alleviate the harm will be restricting one of the parents.

Supreme Court Justices have often allowed near-national consensus on an interpretive issue of interpretation to influence their decision to uphold or strike down a certain state practice or interpretation of a rule. In *Schall v. Martin*<sup>153</sup> the Court stated, "The fact that a practice is followed by a large number of states is . . . plainly worth considering in determining whether the practice "offends" some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.""<sup>154</sup> The Court in *Harper v. Virginia Board of Elections*<sup>155</sup> justified its decision to strike down the use of a poll tax by noting that only "a handful" of States used a poll tax at that time.<sup>156</sup> Justice Harlan supported his dissenting position in *Poe v. Ullman*,<sup>157</sup> a case which upheld a state statute criminalizing the use of contraceptives, by finding "conclusive" the fact that no state except for Connecticut had made the use of contraceptives a crime.<sup>158</sup> The plurality opinion in *Griffin v. Illinois*<sup>159</sup> supported its decision to strike down a state policy of not providing a free trial transcript to indigent defendants by stating that "many" states provided this type of aid, and only "a few" did not.<sup>160</sup> Following these examples, the Court should find the overwhelming consensus surrounding the review of noncustodial religious visitation constraints to be strong support for protecting noncustodial constitutional freedoms by the compelling interest test.

#### V. THE ELEMENTS OF THE COMPELLING INTEREST TEST MUST BE NARROWLY DEFINED TO AVOID JUDICIAL SUBJECTIVITY AND LACK OF UNIFORMITY

The elements of the compelling interest standard must be adequately and narrowly defined to avoid the judicial subjectivity and lack of uniform protection currently existing among the jurisdictions. Otherwise, this standard would be just as unclear as that enunciated originally in *Munoz*,<sup>161</sup> and the problem of the same constitutional freedoms receiving different levels of protection would persist.

##### A. The "Compelling" State Interest

For a noncustodial religious restriction to be "compelling," it must be shown that the noncustodial parent's involvement of his children in his religion poses a substantial risk of "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."<sup>162</sup> In defining harm, the Supreme Court should follow the majority of states

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153. 467 U.S. 253 (1984).

154. *Id.* at 268 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

155. 383 U.S. 663 (1966).

156. *Id.* at 666 n.4.

157. 367 U.S. 497 (1961).

158. *Id.* at 554-55 (Harlan, J., dissenting).

159. 351 U.S. 12 (1956).

160. *Id.* at 19.

161. See text accompanying and following note 38.

162. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

which, "recognizing the magnitude of the constitutional rights implicated, have required a clear[] demonstration of *substantial* and *imminent* threat to the child's emotional or physical well-being before legitimizing religious visitation restrictions."<sup>163</sup>

There are many things that could arguably fall under the definition of a "substantial and imminent" harm, and the Court would not be able to foresee and list them all. "Substantial threat," however, should *not* encompass mere stress, confusion, or discomfort, whether attributable either to the conflicting religions themselves,<sup>164</sup> or to the children's perceptions of, or participation in, the noncustodial parent's religious beliefs or practices.<sup>165</sup> In order for the state's interest to rise to the level of "compelling," the state should be required to prove that any stress attributable to the parents' religions is "unproductively severe."<sup>166</sup> After all, many things associated with the parent/child relationship, and with life in general, cause some degree of "stress" for children. As Professor Schneider notes:

[S]ome pain is inherent in being a person, in being a child, and in growing up. Parents always do things that make children unhappy, and judging by the prevalence of neurosis, always do things that have lasting harmful effects on children. It can be difficult for a court to tell when things have gone beyond that irreducible baseline and to decide what should be done when they have.<sup>167</sup>

Divorce itself causes an inordinate amount of stress and confusion for a child.<sup>168</sup> The fact that many sources of childhood anxiety go unrestricted leads to the conclusion that mere stress or confusion, by themselves, do not reach a level of harm dictating their elimination at all costs. Given the constitutional importance of the rights burdened by religious visitation restrictions,<sup>169</sup> only a showing of "unproductively severe" stress arising from children's exposure to their parents' religions will adequately and equitably protect these important constitutional rights.

Second, a court should not automatically consider the claim that the custodial relationship has been undermined by the child's acceptance of the noncustodial parent's religion to be a substantial and imminent threat to the child.<sup>170</sup> Only if such a relational tension causes *unproductively severe stress* on the child's emotional health should such an allegation be considered. As Professor Mangrum notes, "The focus must be one of

163. Mangrum, *supra* note 32, at 486 (emphasis added).

164. See *Zummo v. Zummo*, 574 A.2d 1130, 1155 (Pa. Super. Ct. 1990) ("[S]tress is not always harmful, nor is it always to be avoided and protected against. The key, is not whether the child experiences stress, but whether the stress experienced is unproductively severe.").

165. See *Hanson v. Hanson*, 404 N.W.2d 460, 464-65 (N.D. 1987) (indicating that the children's being "disturbed," experiencing "stress," and being "upset" by the noncustodial parent's religious beliefs are not enough to justify restrictions placed upon visitation).

166. *Zummo*, 574 A.2d at 1155.

167. Schneider, *supra* note 1, at 902-03.

168. JOAN B. KELLY & JUDITH S. WALLERSTEIN, *SURVIVING THE BREAKUP, HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 35 (1980); *id.* at 45-47, 49 (indicating that divorce causes children to experience "anxiety," "confusion," "fear," and a "rise in aggression"); Kelly, *supra* note 148, at 123 (stating that "there is converging evidence that children in divorced families . . . experience a disproportionately greater number of social, academic, and psychological adjustment problems"); see also Pater v. Pater, 588 N.E.2d 794, 801 (Ohio 1992) (stating it is difficult to differentiate between stress caused by divorce and religious conflict).

Is a parent's right to divorce more constitutionally important than a parent's right to teach his child his religion? If the justification for subrogating a parent's constitutional rights revolves around eliminating the harm that the exercise of those rights causes to a child, then it would appear so. After all, the magnitude of trauma that divorce causes for children is well documented, but who has ever heard of a court preventing a couple from divorcing because of the severe emotional harm that it would cause on their children?

169. See *supra* text accompanying note 23.

170. Mangrum, *supra* note 32, at 490.

harm to the child, not damage to the preeminence of the custodial parent's control over the child."<sup>171</sup>

Finally, the Court should *not* allow a state to find "compelling" its interest in protecting "the custodial parent's exclusive right to choose the religion [of the children] . . . ." <sup>172</sup> As stated previously,<sup>173</sup> the custodial parent enjoys no greater constitutional interest in the religious upbringing of her children, even when a state statute or judicial precedent indicates otherwise. The Washington Court of Appeals recently recognized this fact in *In re Marriage of Jensen-Branch*:<sup>174</sup> "The constitutional right to free exercise of religion does not allow sole decisionmaking in this area, even if the parents are not capable of joint decisionmaking, if leaving each parent free to teach the children about religion *independently* would not cause actual or potential harm to the children."<sup>175</sup> In examining the necessity of a noncustodial religious visitation restriction, it is the child's welfare, not the custodian's statutory rights, against which a court must balance the constitutional rights of the noncustodian.<sup>176</sup>

### *B. The Least Restrictive Means and a Narrowly Tailored Remedy*

Once the court finds a compelling interest in alleviating "unproductively severe" stress, it must further find that the chosen means of removing that harm are the least burdensome to the noncustodial parent's constitutional freedoms.<sup>177</sup> In order to ensure that the least burdensome alternative is chosen, the Court should first require the showing of a strong causal link, or nexus, between the child's severe stress and the parents' conflicting religions. As discussed previously,<sup>178</sup> children can and do experience stress from a myriad of sources; fairness demands that the custodial parent adequately prove the anxiety's source before a court abridges the noncustodial parent's constitutional freedoms. Once such a causal showing is made, the Court should require a further showing that the remedy selected is narrowly tailored to restrict only those actions causing the severe harm to the child.

#### 1. Strong Proof of Causal Relationship

In order to insure that a noncustodial religious visitation restriction is warranted, courts should be required to find a strong evidentiary link between the child's stress and the parents' conflicting religions before they can abrogate the noncustodian's rights.<sup>179</sup> This link should never be "simply assumed or surmised; it must be demonstrated in detail."<sup>180</sup> Many courts in adjudicating noncustodial religion-based restrictions have rejected the

171. *Id.*

172. *Lange v. Lange*, 502 N.W.2d 143, 146 (Wis. Ct. App. 1993), *review denied*, 505 N.W.2d (Wis. 1993), *cert. denied*, 114 S. Ct. 1416 (1994).

173. *See supra* text accompanying notes 140-44.

174. 899 P.2d 803 (Wash. Ct. App. 1995).

175. *Id.* at 809 (emphasis in original).

176. *See supra* text accompanying note 32.

177. *See supra* note 132 and accompanying text.

178. *See supra* text accompanying notes 164-69.

179. *Kirchner v. Caughey*, 606 A.2d 259, 262 (Md. 1992) ("A factual finding of a causal relationship between the religious practices and the actual or probable harm to a child [should be] required—mere conclusions and speculations will not suffice.").

180. *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass. 1981).

general premise that exposure to conflicting parental religions is intuitively harmful to children.<sup>181</sup> However, this idea still appears to influence some courts, as seen in the concurring opinion of Justice Grant in *LeDoux v. LeDoux*:<sup>182</sup>

I do not see how one parent with one set of religious beliefs and one parent with a different, conflicting set of religious beliefs can raise their minor children with full training and instruction in each parent's beliefs without reducing their minor children to a totally confused, psychologically disastrous state. The trial court . . . was trying to act so that these young children could retain their sanity and survive mentally to an adult age when they could choose their own beliefs.<sup>183</sup>

Because of the important constitutional rights involved,<sup>184</sup> as well as the potential harm that noncustodial restrictions can impose on children,<sup>185</sup> unsubstantiated acceptance of the idea that children are necessarily harmed by exposure to conflicting parental religions is extremely troublesome. Although such exposure may intuitively cause some degree of confusion, it is *not* intuitive that such confusion would rise to the level of "unproductive severity." Professor Ira Lupu notes:

The "confusion" decried by those courts that prohibit the noncustodian to expose his children to his religion is nothing more than the inevitable result of multiple and separate influences on important matters in a child's life. The protection of the possibility of multiple influences is . . . designed to leave the child free to grow into his own, undominated adult self.<sup>186</sup>

A few courts have even stated in dicta that exposure to more than one religion may be *beneficial* to a child:

There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child.<sup>187</sup>

It appears that there is no consensus on whether exposure to conflicting parental religions is generally harmful to children.<sup>188</sup> Therefore, any decision that uses this general premise to justify religious visitation restrictions arguably fails to provide the "clear and affirmative showing of physical or emotional harm to the children required to justify the religious restrictions placed upon [noncustodial] visitation rights."<sup>189</sup>

Another factor that courts should consider when searching for the nexus between the child's anxiety and the parents' conflicting religions is that divorce is an inherently stressful event for children.<sup>190</sup> One study indicates that "[f]or children and adolescents, the separation and its aftermath was the most stressful period of their lives. The family rupture evoked an acute sense of shock, intense fears, and grieving which the children

181. See *Zummo v. Zummo*, 574 A.2d 1130, 1155 (Pa. Super. Ct. 1990) (citing cases).

182. 452 N.W.2d 1 (Neb. 1990).

183. *Id.* at 6 (Grant, J., concurring).

184. See *supra* text accompanying note 23.

185. See *supra* text accompanying notes 145-50.

186. Lupu, *supra* note 4, at 1350-51.

187. *Kirchner v. Caughcy*, 606 A.2d 257, 263 (Md. 1992) (citing *Felton v. Felton*, 418 N.E.2d 606, 607-08 (Mass. 1981)).

188. As Mangrum notes, "If the 'inevitable effect' of exposing children to multiple belief systems always poses an immediate and substantial threat to the well-being of children, then the court has been remiss in not intervening in the countless families where the parents follow conflicting religious beliefs." Mangrum, *supra* note 32, at 450.

189. *Hanson v. Hanson*, 404 N.W.2d 460, 465 (N.D. 1987).

190. See *supra* note 168.

found overwhelming."<sup>191</sup> As the Ohio Supreme Court noted, "Because a divorce is a stressful event for a child, a court must carefully separate the distress caused by that event from any distress allegedly caused by religious conflict."<sup>192</sup> It could be that the harm arising out of the conflicting religions is only a small piece of a much larger problem. If that is the case, then the stress attributable to the parents' disparate faiths, after removing the stress attributable to the divorce itself, would not constitute the degree of "harm" necessary justifiably to restrict the noncustodial parent's constitutional freedoms.<sup>193</sup>

Finally, for the causal link to be certain, the "unproductively severe" stress should be manifesting itself in tangible ways, such as the encopresis found in *Funk v. Ossman*,<sup>194</sup> or there should be extremely strong evidence that such harm is imminent.<sup>195</sup> Also, the link should be substantiated by professionals, preferably more than one and not all of the custodian's choosing.<sup>196</sup> If these causal link requirements are met, most would agree that restriction of the noncustodial parent's religious and parental freedoms is not adequately justified.

The direct showing of substantial harm provided by a strong causal link requirement would do more than just provide adequate constitutional grounds for overriding the noncustodian's constitutional freedoms. It would also communicate the harm to the noncustodial parent. This is important, because the actions that religious visitation constraints attempt to restrict occur within the inherently private realm of the noncustodial parent's visitation time, thus making these orders difficult to enforce.<sup>197</sup> Most parents dearly love their children and do not want to hurt them. If shown how his actions are hurting his child, the noncustodian will be more likely to understand and abide by the court's order. It is one thing to *tell* a parent that his actions are hurting his child, but it is quite another thing to *show* him. Also, such a showing may decrease the noncustodian's feeling that "the usual rights of parents are withdrawn from [him]," which

191. KELLY & WALLERSTEIN, *supra* note 168, at 35.

192. *Pater v. Pater*, 588 N.E.2d 794, 801 (Ohio 1992).

193. As Jeff Atkinson notes:

In cases in which the child is allegedly harmed by a parent's religious practices, it is important to try to sort out how much harm is due to a religious dispute per se versus a general emotional conflict between the parent with the child caught in the middle. To the extent that religious practices are not directly tied to the harm, the religious practices should not be enjoined and other remedies should be sought.

ATKINSON, *supra* note 4, at 11.

194. 724 P.2d 1247 (Ariz. Ct. App. 1986); *see also* Paul, *supra* note 34, at 609 ("When a court bases its decision on such a broad and undefinable category [as psychological or emotional harm], it fails to fulfill the requirements necessary to categorize the state objective as 'compelling.'").

195. Professor Julie Shapiro, in discussing custody determinations involving homosexual parents, describes the following factors that courts should consider when applying "nexus" tests:

First, many courts engage in or permit speculation about potential future harm, rather than confining the inquiry to proven harm or even harm which is reasonably likely to occur. This dilutes the essential ingredient of a nexus test—the requirement that the parent[al] conduct cause harm. Second, [the lack of clear definition and limits as to] what counts as "harm" under the nexus test . . . leaves trial judges and the appellate courts free to identify wide-ranging and ill-defined harms . . . without engaging in any careful analysis. By invoking such harms and indulging in unsupported speculation about the likely occurrence, courts can freely [restrict] . . . parents while claiming to employ a nexus test . . .

Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 642 (1996).

196. *E.g.*, *Funk*, 724 P.2d at 1251. Professor Schneider notes that "professional" psychological testimony may not provide a strong enough basis for a judgment because their "services as expert witnesses can too easily be acquired," and they also may be "professionally unsympathetic with religion." Schneider, *supra* note 1, at 901 (supporting these premises with evidence from cases).

197. *See* Schneider, *supra* note 1, at 903 (discussing the "enforcement problem" in religious visitation restriction cases).

may lessen the likelihood that he will “withdraw[] from obligations of parenthood, financial support, and an emotional relationship with [his children] . . . .”<sup>198</sup>

## 2. Narrowly Tailored Restriction Required

If the degree of harm is substantial and its nexus with the parents’ disparate religions is strong, courts must narrowly tailor their restrictions so as not to infringe upon more rights than necessary.<sup>199</sup> Because of the negative consequences that can arise from religious visitation restrictions for both the noncustodial parent<sup>200</sup> and the children,<sup>201</sup> a blanket ban on all religious activities in which a parent may engage his children should be a rare and last resort.

For instance, if the cause of the harm is shown to arise not from the parents’ conflicting doctrines, but from one parent using religion as a means of *disparaging* the other parent’s religion or person, then a restriction should be placed on the *disparaging remarks*, not on the discussion of religion or the participation of the child in the noncustodian’s religious activities. Some courts have found an *affirmative obligation* on the part of the custodial parent “to encourage and nurture the relationship between the child and the noncustodial parent,”<sup>202</sup> and to *refrain* from remarks that would undermine that relationship. In *Schutz v. Schutz*,<sup>203</sup> the Florida Supreme Court affirmed a lower court decision ordering a custodial mother “to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father” and to refrain from doing or saying anything likely to defeat that end.<sup>204</sup> In so holding, the court ruled that the state’s interest as *parens patriae* in promoting a loving relationship between the father and children (and thereby promoting their “best interests”) and its interest in protecting the father’s inherent right to such a relationship with his children overrode any incidental burden on the mother’s First Amendment freedom of speech.<sup>205</sup> In *Stephanie L. v. Benjamin L.*,<sup>206</sup> the court recognized that such speech-restricting court orders are often issued by family courts “usually without objection or even comment,”<sup>207</sup> and that they “appear to be so routine that they are rarely reported.”<sup>208</sup> This court further stated that “case law supports the conclusion that the court has the power, in an appropriate case, to enjoin one or both parents from making statements to a child that are against the ‘best interests’ of the child if the order is narrowly drawn to meet the purpose.”<sup>209</sup>

The dissenting opinion in *LeDoux* describes a good example of when such a limited custodial restriction might have been more effective than a noncustodial religious visitation constraint. The dissent attributes part of the five-year-old child’s stress to his mother’s statement that the Jehovah’s Witnesses “would mess up his mind just like they

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198. Braver et al., *supra* note 7, at 20.

199. A good example of a narrowly tailored remedy is seen in *Funk v. Ossman*, discussed *supra* part II.A.

200. See *supra* notes 14, 142, 144 and accompanying text.

201. See *supra* notes 146-47 and accompanying text.

202. *Schutz v. Schutz*, 581 So. 2d 1290, 1292 (Fla. 1991).

203. *Id.*

204. *Id.* (quoting the lower court opinion).

205. *Id.* at 1293.

206. 602 N.Y.S.2d 80 (App. Div. 1993).

207. *Id.* at 82.

208. *Id.*

209. *Id.* at 668.



messed up the mind of his father."<sup>210</sup> Although a court should not abridge a mother's constitutional freedom to discuss religion with her child, the court could certainly restrict the manner in which the mother discusses it with her child, especially if it, in fact, is the cause of the child's problems. It seems intuitive that the statements, "I think your father's religion is false, and this is why . . ." and, "Watch out, your father's religion will mess up your mind, just like it messed up his" would have profoundly different effects on a child. It is unjust to punish the *noncustodian* for inappropriate statements made by the *custodian*. Mandatory professional counseling for the children, and possibly the parents, may have been a better alternative than the outright restriction on the noncustodial father.<sup>211</sup> Also, Professor Mangrum notes that if this language by the mother did in fact cause a large part of the child's problems,

then the court's ruling [in her favor] encourages any custodial parent who would prefer exclusive control over his or her children to instill anxiety in the children if the noncustodial parent offers any conflicting beliefs or values. By stimulating conflict the custodial parent would enlarge his or her dominion over the child's environment.<sup>212</sup>

By requiring a narrowly tailored remedy, courts will be forced to strictly analyze the strength of the nexus between the alleged harm and the conflicting beliefs, thus further enhancing the effectiveness of the "least restrictive means" requirement. The noncustodial parent's rights will be adequately protected, since only those things *truly* harming the children will be forbidden. Possibly even more important, however, is the benefit that will accrue to the children. A narrowly tailored remedy would not only diminish the harm they experience, but would also protect them from the other problems that sometimes accompany religious visitation constraints, such as depriving children of a close relationship with their noncustodial parent.<sup>213</sup> The causal link is the key to eliminating what truly harms the children, and by requiring a narrowly tailored remedy, the Supreme Court will ensure that the rights and well-being of the noncustodian and the children are best protected.

### CONCLUSION

In child custody controversies the constitutional rights<sup>214</sup> of the noncustodial parent are often overlooked, especially when courts focus mainly on what is "best" for the child involved and when many states ascribe a preference to the custodial parent for determining the religious upbringing of the children.<sup>215</sup> Although many jurisdictions in

210. *LeDoux v. LeDoux*, 452 N.W.2d 1, 9, 12 (Neb. 1990) (Shanahan, J., dissenting). Of course, such a ruling itself would have to be defined specifically in order to avoid vagueness problems. For instance, where is the line drawn between what should be an unprotected "disparaging" remark and what should be a protected discussion of why one parent thinks the other parent's religion is incorrect?

211. Such a remedy was proposed by the Washington Court of Appeals in *In re Marriage of Jensen-Branch*, 899 P.2d 803, 809 (Wash. Ct. App. 1995). The court stated:

If the children truly view the father's religion as the cause of the separation, or the mother's dislike of the father's religion as the cause of the separation, counseling directed to these feelings would seem to be in order and the trial court may wish to take this into account in fashioning the parenting plan . . .

*Id.* at 809.

212. Mangrum, *supra* note 32, at 449.

213. See *supra* note 146 and accompanying text.

214. See Mangrum, *supra* note 32, at 494 (noting noncustodial parental rights find "their foundation in free exercise, establishment, free speech, equal protection, due process, the ninth amendment's residual retention clause, as well as tradition and fundamental notions of intrinsic human rights").

215. See *supra* note 9.

the United States adequately consider and protect the noncustodial parent's constitutional rights, not all do. The fact that the same constitutional freedoms receive grossly differing levels of protection depending upon the state court in which the noncustodian finds himself warrants notice and action by the Supreme Court to supply the proper standards and analyses for these cases. Current law, just policy, and near-national consensus compel the Court to protect the noncustodial parent's constitutional interests, "sacred interests, basic in a democracy,"<sup>216</sup> with a strict, well-defined compelling interest test. Such a test will eliminate harms truly worth eliminating, while leaving two of the religious parent's most important commitments, that to his faith and that to his child, relatively intact. "Any lesser showing would erode the sanctity of family relationships and jeopardize the noncustodial parent's closest opportunity to overcome the fact of mortality, by seeking continuity with his or her children through shared religious experience."<sup>217</sup>

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216. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

217. *Mangrum*, *supra* note 32, at 494.