

The Uses and Abuses of Religion in Child Custody Cases: Parents Outside the Wall of Separation

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The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . [F]orce []or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.¹

INTRODUCTION

On March 29, 2008, a sixteen-year-old girl living at the Yearning for Zion (YFZ) ranch telephoned the Texas Department of Family Protective Services (DFPS) claiming that she had been physically and sexually abused. The YFZ ranch in west Texas is used as a residential and spiritual compound by members of the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), an offshoot of the Mormon Church which practices polygamy. By the following Saturday, state authorities had raided the compound, and DFPS removed 468 children. After it was determined that some of the children had been sexually and physically abused (and that the rest were at risk of such abuse), DFPS was quickly awarded temporary custody of all of the removed children.²

This episode exposes a growing problem for judges all over the country: What role should religion play in child custody cases? Is it possible to design a standard for gauging whether certain religions are better than others with respect to a child’s well-being?³ These questions are important in many divorces—where both parents usually want to be involved in the child’s upbringing. And when parents have different religious beliefs, the differences can lead to religiously driven custody disputes.⁴

When courts discriminate against one parent on the basis of her religion, it is likely out of a fear that the parent’s unusual religious practices might harm the child’s future development and social adaptability. This practice has affected religious minorities for centuries,⁵ but it is not confined to the past. Parents today are penalized in custody

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1. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

2. *In re Tex. Dep’t Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008) (per curiam).

3. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (articulating the *Lemon* test for assessing whether a state program has violated the Establishment Clause).

4. *See, e.g., Neela Banerjee, Religion Joins Child Custody Cases, to Judges’ Unease*, N.Y. TIMES, Feb. 13, 2008, at A1, available at <http://www.nytimes.com/2008/02/13/us/13custody.html>; Paul Jones, *The Persecution Rests*, BEAST (Buffalo), Mar. 29, 2006, at 10, available at <http://www.buffalobeast.com/96/subgenius.custody.htm>.

5. *See, e.g., Shelley v. Westbrooke*, 37 Eng. Rep. 850, 851 (Ch. 1817) (giving the infamous example of Percy Bysshe Shelley—who was one of the first fathers in English legal

proceedings for being too religious,⁶ not religious enough,⁷ or for belonging to an unpopular religious sect.⁸ Furthermore, because of the domestic relations exception to federal jurisdiction, there is no national uniformity regarding the constitutionality of such discrimination.⁹ But even though there is a general taboo against taking family law cases, it is not unheard of for the Supreme Court to hear appeals in child custody cases.¹⁰ The current situation with religion in custody disputes cries out for the Court to intervene.

Indeed, a little more than two years ago, Professor Eugene Volokh examined a similar dilemma in child custody disputes but argued that parental protections would generally be strongest if examined under the Free Speech Clause.¹¹ Although he acknowledged that the Religion Clauses were implicated in his thesis that the “best interests of the child” standard was unduly speech-restrictive,¹² Professor Volokh ultimately thought that “the Free Speech Clause is probably a more important

history to lose custody of his children for his atheism); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1341, at 588–89 (12th ed. 1877) (commenting on how fathers should lose their parental rights for holding “atheistical or irreligious principles”); see also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (Richmond, J.W. Randolph 1853) (“A father’s right to the custody of his own children being founded in law on his right of guardianship, this being taken away, they may of course be severed from him, and put, by the authority of a court, into more orthodox hands. This is a summary view of that religious slavery . . .”).

6. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 636 & n.19 (2006).

7. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2005_08_28-2005_09_03.shtml (Aug. 29, 2005, 15:16 EST) (collecting cases).

8. Volokh, *supra* note 6, at 636 & n.20 (citing *O’Rielly v. O’Rielly*, No. 31-39-82, 1995 Conn. Super. LEXIS 977, at *4, *9 (Conn. Super. Ct. Mar. 28, 1995), which ruled that “[u]nder no circumstances shall the children have any contact with the entity known as Miracle of Love, its members or participants,” because the court believed the group to be a cult, and *Jones v. Jones*, No. 49D01-0305-DR-000898, slip op. at 4 (Marion County Super. Ct. Feb. 13, 2004) *rev’d in part*, 832 N.E. 2d 1057, 1061 (Ind. Ct. App. 2005), available at <http://www.law.ucla.edu/volokh/custody/jones.pdf>, which ordered the parents “to take such steps as are needed to shelter [the child] from involvement and observation of these non-mainstream religious beliefs and rituals”).

9. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 25, at 161 (6th ed. 2002) (“[T]he Supreme Court announced that federal courts cannot hear child-custody cases, making the sweeping statement that ‘the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” (quoting *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890))).

10. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (finding a constitutional right of parents to rear their children and striking down a Washington law allowing any third party to petition for visitation rights over the parents’ objections); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that private racial prejudices and the possibility of social injury to children were impermissible bases for a court to consider under the Equal Protection Clause when making child custody decisions); *Caban v. Mohammed*, 441 U.S. 380, 381 (1979) (overturning on equal protection grounds a New York law that permitted unwed mothers, but not unwed fathers, to block the adoption of their children).

11. Volokh, *supra* note 6, at 631.

12. *Id.* at 662–70.

protection for the [parent's] speech than the Religion Clauses."¹³ In so concluding, Professor Volokh's article did not exhaustively examine the specific approaches courts will often employ in religiously motivated custody disputes.¹⁴ This Essay picks up where Professor Volokh's work left off with respect to religious custody disputes—going into the constitutional implications of the specific approaches courts use in such cases.

The status quo in religious child custody cases has created a patently unconstitutional situation: Government actors are explicitly conditioning judicial decisions against certain parents based on their religious practices. And unlike the indirect social coercion that has already been recognized as a violation of the Establishment Clause,¹⁵ some state courts have directly coerced parents to attend church more or less often!¹⁶ Such coercion obviously violates the Establishment and Free Exercise Clauses of the First Amendment.¹⁷ Courts—arms of the government—are directing individuals as to what churches they should (or should not) be attending and to how often they should practice their faith.

As there is no uniform national law on such matters, most state courts will apply one of three legal approaches when deciding child custody cases: (1) the “actual or substantial harm” analysis; (2) a “risk of harm” analysis; or (3) a “no harm required” custodial preference test.¹⁸ Each allows judges to inject personal prejudices against one parent's religious beliefs as compared to the other. But when dealing with the fundamental-liberty interest of religious faith, courts should seek to implement the least constitutionally offensive approach so as not to exceed their lawful mandate.¹⁹

13. *Id.* at 644.

14. *See id.* at 718–20.

15. *See Lee v. Weisman*, 505 U.S. 577, 592–93 (1992); *Engel v. Vitale* 370 U.S. 421, 431 (1962); *see also* Volokh, *supra* note 6, at 666–67.

16. *See, e.g.,* Volokh, *supra* note 7 (“In 2000, [a Mississippi court] ordered a father to take the child to church each week . . . reasoning that ‘it is certainly to the best interests of [the child] to receive regular and systematic spiritual training.’” (omission in original) (quoting *McLemore v. McLemore*, 762 So. 2d 316, 320 (Miss. 2000))).

17. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 5 (1947) (“This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

18. Linda Robayo, *Child Custody and Religion*, NOLO.COM, <http://www.nolo.com/article.cfm/ObjectID/7F24EF5E-1495-441C97E83C5961B7238E/catID/AC0903D2-C845-40E8-850E1DCEDDEA5778/118/246/236/ART/>.

19. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“[A] State's interest in universal education [of children], however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect

This Essay argues for the exclusive use of the actual or substantial harm test when assessing the secondary effects of a parent's religiosity on her children. Although the other two approaches might have merit in specific situations, both are far too likely either to be abused by courts or to allow courts to dictate the religious practices of a parent vis-à-vis her child. Because such consequences do more constitutional harm than good, it would be preferable for courts to narrow their inquiry into each parent's religious practices and simply determine whether such practices might actually or substantially harm the child.²⁰

Part I of this Essay reviews the three approaches to awarding child custody based on religious practices. Part II discusses why applying the actual or substantial harm approach is the least constitutionally offensive and is thus the most appropriate model for courts to follow when assessing a parent's religious practices in relation to the child.

I. THE LEGAL STANDARDS APPLIED IN RELIGIOUS CUSTODY CASES

In normal child custody proceedings, a court considers the "best interests of the child" in determining which parent should be awarded custody.²¹ When making such a determination, a court must consider several germane factors, such as:

- (1) the wishes of the child's parents; (2) the wishes of the child; (3) the interaction and interrelationship of the child with the parents, siblings, and other persons who may significantly affect the child's best interests; (4) the child's adjustment to his home, school, and community; and, (5) the mental and physical health of all individuals involved.²²

When religion is involved, these factors are reduced to one of three (or some combination of these three) approaches: the "actual or substantial harm" analysis, a "risk of harm" analysis, and the "custodial preference" analysis.²³

A. The Actual or Substantial Harm Approach

Under the actual or substantial harm standard, a court will restrict a parent's parental rights only if and when that parent's religious practices have caused an actual

to the religious upbringing of their children . . .").

20. *But see* Mitchell A. Tyner, *Religious Freedom Issues in Domestic Relations Law*, 8 B.Y.U. J. PUB. L. 457, 475–76 (1994) (arguing that courts should only be able to weigh religion in custody disputes by examining whether its effects are harmful to the children); Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1642–44 (1998) (proposing that a parent's religious practices should only be restricted when an actual harm, and not just a substantial risk of harm, has been found).

21. *See, e.g.*, Volokh, *supra* note 6, at 637 ("All this is done under the rubric of the 'best interests of the child' standard, the normal rule applied in custody disputes between two parents: and this standard leaves family court judges ample room to consider a parent's ideology.").

22. George L. Blum, Annotation, *Religion as Factor in Visitation Cases*, 95 A.L.R. 5th 533, 553 (2002).

23. *See* Robayo, *supra* note 18.

or substantial harm to the child.²⁴ Thus, courts applying this test will usually encounter one parent attempting to prove that the other's religious activities are so detrimental to the child's welfare that these activities have already harmed the child's physical or psychological development.²⁵ This approach prevails in states such as California, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, Massachusetts, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Rhode Island, Utah, Vermont, and Washington.²⁶ However, a parent who tries to prove that the other parent's faith is outside of the mainstream will usually fail to meet the actual or substantial harm standard because this more exacting standard is meant to be carefully applied and sensitive to the constitutional implications of favoring certain religious faiths over others.

If one parent simply exposes the child to a different religion—even a religion that the other parent considers to be peculiar and abnormal—this will usually not be enough to show that actual or substantial harm has been done to the child's psyche. For example, in *Munoz v. Munoz*, the Washington Supreme Court ruled that exposing a child to dissimilar religions (Mormonism and Catholicism) is not, in itself, harmful to a child's well-being; thus, the exposure did not warrant the court's restriction of the parent's religious practices.²⁷ Any court that tries to prohibit a parent from taking her child to church or advocating her beliefs to her child, in the absence of any impartial demonstration that the exposure is harmful to the child's health and safety, will violate the Religion Clauses.

In a similar vein, mere exposure to another parent's religious rituals or traditions is not necessarily harmful enough to satisfy the actual or substantial harm analysis. In *Pater v. Pater*, for instance, the Supreme Court of Ohio held that the religious practices of a parent restricting her child's social activities—which separated the child from his friends and were against the local community's mores—would not be enough to justify judicial intervention, unless such customs were actually harmful to the child's physical or mental welfare.²⁸ *Pater* involved a divorce proceeding where one parent alleged that the recent conversion of the other to the Watchtower Bible and Tract Society (the Jehovah's Witnesses) would have a deleterious effect on their child's acculturation to normal society,²⁹ and it is not hard to imagine instances where other religious conversions might present a similar dispute.³⁰

24. *See id.*

25. *See id.*

26. *Id.*

27. 489 P.2d 1133, 1136 (Wash. 1971) (“We are not convinced, in absence of evidence to the contrary, that duality of religious beliefs, per se, creates a conflict upon young minds. Because of their young ages, it is doubtful that the children in this case sufficiently understand the religious teachings to be concerned about any conflicting beliefs.”).

28. 588 N.E.2d 794, 799 (Ohio 1992).

29. *See id.* at 796–97.

30. *See* Many A. Brachear, *Satanist Puts Faith in System*, CHI. TRIB., July 9, 2008, at C3, available at http://newsblogs.chicagotribune.com/religion_theseeker/2008/07/satanist-puts-f.html (“Meyer's ex-wives say he also has turned their children's lives upside down since he joined the Church of Satan—an organization that eschews spirituality and celebrates man's selfish desires. One of Meyer's ex-wives is citing his religious affiliation as the main reason an Indiana judge should restrict his visitation time to allow his three youngest daughters to attend

In *Pater*, the lower courts awarded custody to the Catholic father instead of the Jehovah's Witness mother—going so far as to deny her visitation rights “because ‘the child would be less likely to receive proper medical attention, obtain a college education, or participate in social activities’ if [she] were to be granted custody.”³¹ The Supreme Court of Ohio overruled this decision and explained that under the actual or substantial harm standard:

1. A parent may not be denied custody of a child on the basis of the parent's religious practices unless there is probative evidence that those practices will adversely affect the mental or physical health of the child. Evidence that the child will not be permitted to participate in certain social or patriotic activities is not sufficient to prove possible harm.
2. A court may not restrict a non-custodial parent's right to expose his or her child to religious beliefs, unless the conflict between the parents' religious beliefs is affecting the child's general welfare.³²

While this approach is very accepting of different parents' religious beliefs, it should be noted that the actual or substantial harm standard does treat religiously inspired physical acts or verbal intimidation towards a child much more seriously than it treats the introduction of a child to a different religion or religious practices.

Consequently, under the actual or substantial harm standard, verbal threats or physical acts against a child will normally be enough for a court to abridge parental rights—even if those acts are religiously motivated. The case of *Kendall v. Kendall* is illustrative of this principle.³³ In *Kendall*, the Massachusetts Supreme Judicial Court held that a parent's verbal threats or physical acts against a child—even if grounded in that parent's religious beliefs (in this case, an objection to Orthodox Jewish religious traditions)—would be sufficient to justify a court in ordering restrictions on both his free exercise and parental rights.³⁴ Similarly, a parent's physical actions (in this case, the cutting-off of a son's payes (the earlocks worn by Orthodox Jewish men)),³⁵ or intimidating threats to the children stating that anyone outside of that parent's religious faith was “damned to go to hell,”³⁶ could cause sufficiently serious psychological harm to the children so as to violate the actual or substantial harm test.³⁷ Hence, the Massachusetts court barred the offending parent from advocating his religion, praying,

Christian church.”).

31. *Pater*, 588 N.E.2d at 797.

32. *Id.* at 795.

33. 687 N.E.2d 1228 (Mass. 1997).

34. *Id.* at 1235–36 (“[T]he United States Constitution[] permit[s] limitations on individual liberties where there exists a compelling interest. . . . Promoting the best interests of the children is an interest sufficiently compelling to impose a burden on the defendant's right to practice religion and his parental right to determine the religious upbringing of his children. . . . [T]he divorce judgment is limited in scope and imposes a minimal burden on the defendant's right to practice religion by requiring only that he limit sharing certain aspects of his beliefs with his children. The divorce judgment imposes no additional limitations on the defendant's individual ability to practice his religion.” (citations omitted)).

35. *Id.* at 1233–34.

36. *Id.* at 1233.

37. *Id.* at 1235–36.

or studying the Bible with his children, if those religious practices would continue to cause the children emotional distress.³⁸

B. The Risk of Harm Approach

Not all states allow courts to employ the actual or substantial harm standard when deciding cases where custody issues collide with parents' religious practices. Courts in states such as Montana, North Carolina, and Pennsylvania apply the risk of harm standard to these situations when one parent seeks to limit the other parent's religious pursuits.³⁹ But unlike the actual or substantial harm standard, a parent does not need to show any actual or substantial harm to the child to prevail under the risk of harm test. Instead, she only needs to show a risk that the child *might* be harmed in some manner in the future.⁴⁰

The best example of the risk of harm approach is *MacLagan v. Klein*.⁴¹ In that case, a family court restricted a mother's espousal of the Christian religion to her daughter.⁴² On appeal, the North Carolina Court of Appeals affirmed the trial court's determination that the father, who was Jewish, should have sole decision-making authority on his daughter's religious upbringing.⁴³ The court based its conclusion on evidence indicating that the mother attempted to advocate Christianity to her daughter. "[I]ntroduc[ing the daughter to] activities at the Edenton United Methodist Church, [has caused] the child [to] experience[] stress and anxiety as a result of her exposure to two conflicting religions which have had a detrimental effect on her emotional well-being."⁴⁴ Under the risk of harm standard, even exposure to the other parent's religion that might interfere with the child's religious identity could be said to adversely affect the child's general welfare. Based on this concern, that the child might suffer some indeterminate future harm, courts can use the risk of harm approach to limit a parent's religious and parental rights.

On the one hand, every decision that a judge makes regarding a child's well-being is a calculation of one parent's risk of harm toward the child compared to the other parent's risk. From this standpoint, the risk of harm standard is related to the actual or substantial harm analysis mentioned above.⁴⁵ On the other hand, cases like *MacLagan* demonstrate how easy it is under the risk of harm approach for courts to consider conjectural injury as if it were actually occurring. Thus, were this standard extended to its logical conclusion, courts would be perfectly justified in assessing whether one parent's religious practices might present an undue risk of interference with the child's religious attitudes and beliefs as a whole.⁴⁶

38. *Id.*

39. *See* Robayo, *supra* note 18.

40. *Id.*

41. 473 S.E.2d 778 (N.C. Ct. App. 1996).

42. *Id.* at 786–87.

43. *Id.*

44. *Id.* at 787.

45. *See supra* notes 18–26 and accompanying text.

46. *See, e.g.,* *Morris v. Morris*, 412 A.2d 139, 146 (Pa. Super. Ct. 1979) (prohibiting a father from taking his daughter with him on door-to-door religious solicitations because the inconsistency between her parents' religious beliefs might cause her to disregard religion in

C. The No Harm Required Custodial Preference Approach

In a handful of other states, such as Arkansas, Minnesota, and Wisconsin, courts mechanically apply neither an actual or substantial harm analysis, nor the risk of harm test.⁴⁷ Rather than assess whether certain religious customs might harm the child at all, the courts in these states have attempted to simplify the process by adopting the rule that the parent with legal custody should have *exclusive* control over the child's religious upbringing.⁴⁸ That is, if there is disagreement between the two parents about their child's religion, a court will normally side with the custodial parent and restrict the noncustodial parent's religious activity. Such courts do not believe that interfering with the noncustodial parent's religious exercises would violate her rights to free exercise, because her constraints will only operate during the limited time period in which she is visiting with her child (whereas she is perfectly free to practice her religion outside of that time).⁴⁹

One example of the constitutional problems that can arise when courts use the custodial preference standard is when a court forces one parent to follow the religious practices of the other in relation to the child. For example, in *Johns v. Johns*, an Arkansas court sided with the custodial parent's religious beliefs when a father argued to the court that the mother (who had been given custody of the children) was preventing him from visiting his children.⁵⁰ The mother was disallowing the children to visit with their father due to his reluctance to bring them to church and Sunday school.⁵¹ To rectify this situation, the court required the father to begin bringing his children to church in order for him to retain his visitation rights.⁵² On appeal, the Arkansas Court of Appeals affirmed, holding that the lower court's order did not impermissibly abridge the father's free exercise rights.⁵³ Thus, under the custodial

general, as well as the fact that such religious solicitations would probably (although not necessarily) result in some emotional anguish for the child).

47. See, e.g., *Johns v. Johns*, 918 S.W.2d 728, 730 (Ark. Ct. App. 1996); *Lange v. Lange*, 502 N.W.2d 143, 144 (Wis. Ct. App. 1993); *Andros v. Andros*, 396 N.W.2d 917, 923–24 (Minn. Ct. App. 1986) (citing MINN. STAT. § 518.003, subd. 3(a) (1984)); see also Kevin S. Smith, Note, *Religious Visitation Constraints on the Noncustodial Parent: The Need for National Application of a Uniform Compelling Interest Test*, 71 IND. L.J. 815, 825–27 (1996). Additionally, there are many state statutes that grant custodial parents the power to choose the religious upbringing and practices of their children. See Volokh, *supra* note 6, at 643 n.54 (citing state codes and cases mandating and applying the custodial preference test).

48. See Volokh, *supra* note 6, at 642 n.53 (citing cases from states applying the custodial preference standard).

49. Cf. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a father has no absolute right to expose his children to his religious practices).

50. 918 S.W.2d at 729–30.

51. *Id.* at 729–30.

52. *Id.* at 730 (“[T]he Defendant, Randy Johns, is hereby Ordered to see that the children attend Sunday School and Church while they are in his custody during his visitation.”).

53. *Id.* at 731 (“Appellant’s freedom of religion claim is without merit. The chancellor did not order him to attend religious services, but rather that he see that his children did so in order to maintain consistency in the religious regimen that their mother has set for them. Therefore, no limitation has been placed on appellant’s freedom of religion. Because the chancellor’s order imposes no duty on him to attend, appellant is free to attend or not attend the services with the children.”).

preference approach, arms of the state can actually force a parent to attend religious services that she does not believe in.⁵⁴

But in another way, the custodial preference approach can be helpful for courts when both parents have been awarded joint legal custody (which is a practice that a majority of states now currently employ unless doing so might harm the child), because courts treat such custodial arrangements as equaling two religions that each parent must respect. The case of *Zummo v. Zummo*,⁵⁵ where a divorced couple's dispute about their children's religious education was resolved by the court ordering the Catholic father to bring his children to both Jewish and Catholic religious services, is a good example of the advantages of the joint custodial preference approach.⁵⁶ Under this derivative approach, each parent has the parental and free exercise right to expose his or her religious practices to his or her children:

Both parents have rights to inculcate religious beliefs in their children. Accordingly, the trial court may constitutionally accommodate the mother's rights with a directive of the type imposed here, which essentially carves out a time period each Sunday during which the mother has the right to custody and control of the children.⁵⁷

Nevertheless, the troublesome aspect of government compulsion (that is, a government official ordering a parent to implement a religious practice that is not her own) is still present within this compromise.⁵⁸

II. WHY THE ACTUAL OR SUBSTANTIAL HARM APPROACH IS THE BEST STANDARD FOR COURTS TO APPLY IN RELIGIOUS CUSTODY CASES

Among the three commonly used approaches to resolve religious custody disputes,⁵⁹ the actual or substantial harm standard is the only one where courts can be said to act neutrally toward either parent's religion or nonreligion. This is because the actual or substantial harm approach's restrictions are not related to the religiosity of the parent's practices. Rather, the test is designed to accomplish the "secular purpose" of limiting the secondary effects of a religious practice's harm to children.⁶⁰ In contrast, both the risk of harm and custodial preference approaches require courts to delve into the religious tenets of each parent—forcing a parent to limit the practice of her religion even if there might not be any real harm to the child at all.⁶¹

54. *Cf.* Volokh, *supra* note 6, at 667 ("Such orders . . . [A]dvance religion by explicitly providing religious institutions with new attendees.").

55. 574 A.2d 1130 (Pa. Super. Ct. 1990).

56. *Id.* at 1141–42.

57. *Id.* at 1157 (emphasis in original).

58. *See supra* note 53 and accompanying text.

59. *See supra* Part I.

60. *Cf.* *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state law requiring mandatory vaccinations for smallpox; as long as there was a legitimate secular purpose for the law, such as public health, religious objections to the neutral law should yield); *Reynolds v. United States*, 98 U.S. 145 (1878) (ruling that a polygamist's religious duty was not a constitutional defense to an otherwise valid criminal indictment).

61. *See, e.g.*, Rick Laney, *Mom's Religion Dominates Custody Hearing*, DAILY TIMES

A. How the Risk of Harm Standard Can Be Easily Manipulated

Although the risk of harm approach is facially neutral toward different religions,⁶² it will inevitably involve an evidentiary assessment by courts as to whether certain religious practices are too detrimental to the child's well-being. Courts applying this standard will often discuss their duty to remain impartial between different religions,⁶³ but in practice, it is rare for a court applying a risk of harm analysis not to delve into the benefits or detriments of a parent's unpopular or extreme religious practices.⁶⁴ Therefore, even though courts will always claim to strictly monitor the free exercise implications of their rulings, they are not truly using a strict scrutiny analysis.⁶⁵

For instance, in *Burnham v. Burnham*,⁶⁶ the Nebraska Supreme Court considered a mother's racist religious beliefs in its evaluation of whether her religion would present an undue risk to her child's future psychological welfare.⁶⁷ Even though the child had not been harmed by his mother's religious beliefs, the Nebraska Supreme Court did not hesitate to use the mother's religion against her when making its custody determination:

Although by holding these [racist] views [the mother] has not disqualified herself from being a fit and proper person to have custody of her child, we must take all factors into consideration in determining what is in [the child's] best interests. . . .

We feel that [the mother's] religious beliefs, if continued in regular practice . . . will have a deleterious effect . . . upon the well-being of the child herself.

(Maryville, Tenn.), Oct. 10, 2007, at A1, available at <http://www.thedailytimes.com/article/20071010/NEWS/71009023> ("According to Jo Anne White, what was supposed to be a standard child custody hearing turned into an almost hourlong 'Bible study' in the courtroom in spite of the repeated protests of her attorney, Kevin W. Shepherd.").

62. See, e.g., Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L.J. 205, 250 (1996).

63. E.g., *In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985) (holding that courts may not rule on the comparative merits or demerits of different religions); *Osteraas v. Osteraas*, 859 P.2d 948 (Idaho 1993) (ruling that courts should avoid comparing one parent's religion to the other's in the context of custody disputes); *Goodman v. Goodman*, 141 N.W.2d 445, 448 (Neb. 1966) ("The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs.").

64. See, e.g., *Burnham v. Burnham*, 304 N.W.2d 58, 60–62 (Neb. 1981).

65. Cf. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) ("While in other constitutional areas the compelling state interest test is fairly characterized as "strict" in theory and fatal in fact, in the religion cases the test is strict in theory but feeble in fact." (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))). It should also be noted that avoiding this manipulability could address Professor Volokh's concern that "the Free Exercise Claus . . . add[s] little to what the Free Speech Clause provides." Volokh, *supra* note 6 at 665.

66. 304 N.W.2d 58 (Neb. 1981).

67. *Id.* at 61.

Accordingly, we find that it would be in the best interests of [the child] to place her in the permanent custody of her father⁶⁸

Thus, even though courts realize that they should not prefer one parent's religion over the other, the risk of harm standard implicitly allows a court to morph the unpopularity of certain religious tenets into the possibility that such religious views might later be emotionally harmful to the child's upbringing.

This potentiality is especially troubling when examining such practices under the Establishment Clause. Although there are many examples of courts favoring a religious parent over a nonobservant parent,⁶⁹ these practices will invariably pressure some parents to engage in certain religious practices or beliefs. And like the possibility of threatening criminal punishment for irreligion, a court's threatening of a parent with a decreased chance of gaining custody over her child is a very menacing prospect.⁷⁰ Yet courts persist in applying this approach in spite of the Establishment Clause's prohibition on governments from discriminating against people based on their religious beliefs (or the lack thereof).⁷¹

Unlike the basic malleability and inherent favoritism that is impliedly allowed under the risk of harm approach, the actual or substantial harm standard demands greater evidence that a parent's religious practice has done harm to the child before custody rights can be taken away.⁷² This does not mean that there should be an overly strict evidentiary requirement of substantial harm (as courts should not have to wait until a child has suffered serious harm before they can intervene).⁷³ Instead, the actual or substantial harm standard demands clear evidence that a religious practice would actually (rather than possibly) cause the child harm before a court can constitutionally act to abridge a parent's rights under the Religion Clauses.⁷⁴ In this way, the actual or substantial harm approach provides the proper factors for courts to balance when deciding whether a parent's religious practices should adversely affect her parental rights.

68. *Id.* at 61–62.

69. *See supra* note 7 and accompanying text.

70. *Cf. Note, The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1720–21 (1984) (showing how parents alter their religious behavior in anticipation of a court's custody decision).

71. *See, e.g.,* *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947); *see also Note, supra* note 70, at 1706–27 (describing courts' regular discrimination against nonreligious parents).

72. *See, e.g., Kendall v. Kendall*, 687 N.E.2d 1228, 1233 (Mass. 1997) (“We adhere to the line of cases requiring clear evidence of substantial harm. Application of the strict requirements in those cases comports with the protections of religious freedoms historically preserved under the . . . Constitution.”).

73. *Cf. Morris v. Morris*, 412 A.2d 139, 146 (Pa. Super. Ct. 1979) (“[W]e cannot accept an argument that the absence of present harm constricts the court's power to act. Were this the case, we would have to allow the psychological harm to [the child] to progress to a mentally crippling point before action could be taken.”). *But cf. Drobac, supra* note 20, at 1642–44.

74. *See, e.g., Peterson v. Peterson*, 474 N.W.2d 862, 869–70 (Neb. 1991) (dealing with custody changes in response to one parent's religiously inspired beatings of her children).

B. The Dilemma of Courts Restricting Inconsistent Religious Practices of Parents

When a court applies the custodial preference standard to religious custody disputes, it explicitly bars one parent from fully practicing her own religion by restricting the religious views that parent may expose to her children.⁷⁵ In so doing, such court decisions weigh certain religious practices of a parent and thereby presumptively violate the Free Exercise Clause. This is especially true in the context of the custodial preference standard: there, courts routinely direct the noncustodial parent to subordinate her own religious beliefs to those of the custodial parent—and to instead follow religious practices with which she disagrees.⁷⁶

Although the Court held in *Employment Division v. Smith* that the Free Exercise Clause does not provide for any religious exemptions from “neutral laws of general applicability,”⁷⁷ the Clause does prevent governments from singling out any specific religious beliefs.⁷⁸ Thus, “a State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban [particular] acts only when they are engaged in for religious reasons, or only because of the religious beliefs that they display.”⁷⁹ In applying this reasoning to child custody cases, it would seem that whenever a court restricts a parent’s religious practices because of her individual specific religious beliefs, this restriction would violate the Free Exercise Clause.

Hence, under the *Smith* approach, courts are in error in cases such as *Johns v. Johns*—where they deliberately limited a noncustodial parent’s ability to expose his children to his own religious practices or church.⁸⁰ The court in *Johns* believed that because the noncustodial parent was not personally restricted to practice his individual religious tenets, that fact alone should be adequate to satisfy any free exercise analysis.⁸¹ But such reasoning ignores how many religious parents’ teachings to their

75. See Volokh, *supra* note 6, at 650–52.

76. See, e.g., *Murphy v. Murphy*, No. CO-95-1363, 1996 WL 70978, at *3 (Minn. Ct. App. Feb. 20, 1996) (restricting a father’s visitation rights after the mother with custody left their church and obtained a court order preventing the father from visiting his children on that church’s property even in the presence of other church members); *Andros v. Andros*, 396 N.W.2d 917, 924 (Minn. Ct. App. 1986) (restricting a visiting parent’s religious practice of bringing his child to church with him without the custodial parent’s explicit permission and stating that such compulsion “affects neither appellant’s religious beliefs, nor his right to practice his religion”).

77. 494 U.S. 872, 878–79, 886 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of free exercise jurisprudence contradicts that proposition.”).

78. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . regulates or prohibits conduct because it is undertaken for religious reasons.”).

79. *Smith*, 494 U.S. at 877.

80. See *Johns v. Johns*, 918 S.W.2d 728, 730 (Ark. Ct. App. 1996) (“Finally, appellant argues that although church attendance may well be a positive factor, the constitutional guarantee of freedom of religion found in the First Amendment to the Constitution of the United States means that non-custodial parents may not be compelled to see that their children attend church services and Sunday School during visitation.”).

81. *Id.* at 731 (“Appellant’s freedom of religion claim is without merit. The chancellor did

children are usually considered an essential and unavoidable part of their own religious beliefs. Indeed, there are many religious parents who might feel that it is a spiritual requirement to expose their family members to what they consider to be the true faith, lest they actually commit a sin themselves or violate tenets that they believe are divinely inspired.⁸²

Moreover, court orders for parents to bring their children to church would easily violate the Establishment Clause. These court directives are coercive in the sense that they compel a parent to go to a church espousing doctrines that they do not personally subscribe to.⁸³ Additionally, these orders operate as an implicit endorsement of religion because they rest on the assumption that a child being religious is in some way superior to her being nonreligious.⁸⁴ Both of these effects—the coercion and the endorsement—are unconstitutional in the sense that they create a government-sanctioned religious practice, which is something totally foreign to the original purpose of the Establishment Clause.⁸⁵

The actual or substantial harm standard, however, suffers from none of these serious constitutional deficiencies. Rather, the actual or substantial harm standard enjoys the

not order him to attend religious services, but rather that he see that his children did so in order to maintain consistency in the religious regimen that their mother has set for them. Therefore, no limitation has been placed on appellant's freedom of religion. Because the chancellor's order imposes no duty on him to attend, appellant is free to attend or not attend the services with the children."').

82. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) ("Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others."); *see also* Volokh, *supra* note 6, at 663 n.137.

83. *See, e.g., DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 413 (2d Cir. 2001) ("If an afflicted individual has 'no real [state-sponsored] alternative' to the services offered . . . the theoretical choice to avoid the facility does not mitigate any [religious] coercion that might occur there." (citation omitted) (quoting *Lee v. Weisman*, 505 U.S. 577, 598 (1992))); *Griffin v. Coughlin*, 673 N.E.2d 98, 106 (N.Y. 1996) (construing *Lee v. Weisman* as "condemning State compulsion to attend or participate in a religious practice").

84. The Mississippi Supreme Court, for example, ruled that "it is certainly to the best interests of [the child] to receive regular and systematic spiritual training." *McLemore v. McLemore*, 762 So. 2d 316, 320 (Miss. 2000). *But see* *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (noting how "the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religion is favored or preferred'" (emphasis in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985))).

85. *See, e.g., Allegheny*, 492 U.S. at 593–94; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *see also* Letter from Thomas Jefferson to Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in T. JEFFERSON, *THE PORTABLE JEFFERSON* 303 (M. Peterson ed. 1975), available at <http://1stam.umn.edu/archive/historic/pdf/Jefferson's%20letter%20to%20the%20Danbury%20Baptists.pdf> ("Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."').

advantages of the joint-custodial preference approach in the sense that both parents' religious practices must be respected by the courts.⁸⁶ In addition, the actual or substantial harm approach would never require a judge to order one parent to follow the religious wishes of the other. Thus, a court using the actual or substantial harm standard would never need to engage in the complex factual disputes about what religious practices would be inconsistent with the custodial parent's practices.⁸⁷ And there is the additional advantage that the actual or substantial harm approach would never include any action by courts that either compelled or endorsed one religion over another.⁸⁸ Instead, a court would only employ the approach when it must limit a parent's religious practice for having harmful secondary effects upon the child. Accordingly, the actual or substantial harm approach does not limit religious practices per se, but is instead more in accord with the free exercise analysis of *Employment Division v. Smith*.⁸⁹ Courts should therefore apply an objectively neutral analysis of each parent's religion, and only religious practices that would cause an actual or substantial harm to the child should be restricted.

CONCLUSION

Although religious custody disputes such as those at the YFZ ranch are extremely complex, courts would be wise if they refrained from employing either a risk of harm or a custodial preference standard. As the Supreme Court of Texas implicitly did in that case, other state courts should employ a strict actual or substantial harm standard to such situations.⁹⁰ Like the other custody approaches, the actual or substantial harm standard has the benefit of existing for the purely secular purpose of preventing harm to children's physical and emotional well-being. Unlike the other two approaches, however, the actual or substantial harm standard operates to only incidentally affect parents' free exercise rights. Concomitantly, the actual or substantial harm approach avoids the complex issues that arise under the Establishment Clause when courts

86. See *supra* notes 55–57 and accompanying text.

87. See Volokh, *supra* note 6 at 668 (“Orders that require parents not to teach things that are inconsistent with the other parent’s religious teachings . . . [R]equire courts to decide which views are consistent with a religion and which aren’t, and ‘the First Amendment forbids civil courts’ from engaging in ‘the interpretation of particular church doctrines and the importance of those doctrines to the religion.’” (quoting *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969))).

88. See *supra* notes 83–86 and accompanying text.

89. 494 U.S. 872, 878–79 (1990); see also *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (“So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”).

90. Cf. Marci Hamilton, *Why the Texas Supreme Court’s Ruling Regarding the FLDS Mothers Is Significantly More Protective of the Children Involved than the Media Have Painted It to Be*, FINDLAW’S WRIT, June 3, 2008, <http://writ.news.findlaw.com/hamilton/20080603.html> (“[T]he Texas Supreme Court affirmed the state’s Third Circuit appellate court’s ruling that Child Protective Services (CPS) lacked adequate evidence to justify taking all of the children from the FLDS’s Yearning for Zion compound.”).

implicitly endorse particular religious practices, or compel one parent to raise her children under a “government-approved,” but personally disagreeable faith. In the case of the YFZ ranch, even though it might be difficult to establish which children have not been actually harmed by their parent’s religious practices,⁹¹ the actual or substantial harm approach is likely the only legal test that would not exceed a court’s obligations to enforce the Religion Clauses.

91. See, e.g., Marci Hamilton, *Why a Texas Appellate Court Seriously Erred in Concluding that Texas Child Protective Services Should Not Have Rescued All of the Children at the FLDS Compound*, FINDLAW’S WRIT, May 29, 2008, <http://writ.news.findlaw.com/hamilton/20080529.html> (“[T]he decision was poorly timed, for two reasons. First, as the state argues in its pending appeal, the judges should have waited for the soon-to-be released DNA results, which are necessary to learn which children belong to which adults—and thus may also . . . provide evidence regarding which children are the victims of or the result of statutory rape. Given the intense intermarriage practices within the organization, the results will also clarify any questions regarding incest.”).