# "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

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Interfaith marriages[1] have increased at a tremendous rate over the past thirty years.[2] Simultaneous with this increase has been a rapid increase in the American divorce rate.[3] Because religion sits at the core of many basic attitudes and values, one predictable consequence of this contemporaneous rise in the rates of interfaith marriage and divorce has been an increasing number of disputes over the religious upbringing of children who fall victim to the divorce of an interfaith couple.[4] As a result, increased attention has been focused on the concept of "spiritual custody."

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1 Interfaith or "mixed" marriages are those between persons of different religions. The cases focused upon in this Comment deal with marriages between Jews and Christians as well as conflicts that arise when spouses are members of different Christian faiths or practice different forms of Judaism. *See infra* notes 63-65 and accompanying text.

2 Current studies estimate that up to 40% of Jewish people currently marry outside of their faith as opposed to approximately 6% during the 1950s. *See* J. PETSONK & J. REMSEN, THE INTERMARRIAGE HANDBOOK 9, 381 n.1 (1988); Johnson, *Struggle For Custody Of Children's Faith Becomes Nightmare,* N.Y. Times, Dec. 11, 1988, at A1, col. 1, A48, col. 3 [hereinafter *Struggle For Custody*]. The number of Catholics who choose to marry persons of other religions has also increased dramatically, moving from an estimated 20% in the mid-fifties to nearly 50% in 1986. *See* Maloney, *Behind Rise In Mixed Marriages,* U.S. NEWS & WORLD REP., Feb. 10, 1986, at 70.

3 It is now estimated that over fifty percent of all marriages will end in divorce. *See* Martin & Bumpass, *Recent Trends in Marital Disruption,* DEMOGRAPHY, Feb. 1989, at 37, 37.

4 The divorce rate for Jewish-Christian couples has been estimated at nearly six times the rate for Jewish-Jewish couples and nearly twice the overall U.S. rate. *See* J. PETSONK & J. REMSEN, *supra* note 2, at 399 n.1; *see also* Schwarzman v. Schwarzman, 88 Misc. 2d 866, 872, 388 N.Y.S.2d 993, 997 (N.Y. Sup. Ct. 1976) ("When one of these differences [in the marriage] is religious, experience teaches us that there is a greater potential for destruction of the marriage than for most other factors."); Annotation, *Constitutional Principles Applicable to Award or Modification of Custody of Child - Supreme Court Cases,* 80 L.Ed.2d 886, 888 (1986) ("The notorious bitterness and ruthlessness displayed by the contending parties in child custody disputes stem, in part, from the fact that such cases directly affect some of the values and relationships which we hold most dear . . . .").

Spiritual custody awards occur when judges, utilizing the broad discretion offered by the "best interests of the child" standard,[5] grant physical custody of a child to one parent, but determine that the child's best interests will be served if she is raised in the noncustodial parent's religion.[6] The court thus prohibits the custodial parent from passing her religion on to her child. The spiritual custody concept was recently invoked in the case of *Simms v. Simms*[7] in Denver, Colorado. In *Simms,* the judge awarded "spiritual custody" of two children, aged four and six, to their Jewish father despite the fact that physical custody would remain with the girls' Roman Catholic mother and her new husband.[8] The court noted that the children had been "raised consistently until the separation . . . as Jews and that it has caused them a certain amount of unhappiness and confusion when they were required to attend Catholic services . . . with their mother . . . ."[9] The court decided that the "children would be emotionally harmed by an attempt to raise them in both religions."[10] Thus, the court ruled that although physical custody would be granted to the Catholic mother, it would be "in the best interests of the[ ] two children to be raised in the Jewish faith, and the only way that's going to be accomplished is for the court to grant [the father] custody for the purposes of determining religious training."[11]

Due to the rapid increase in interfaith marriages, the *Simms* case has received nationwide attention.[12] Although the award was unu-

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5 Every state has accepted the idea that child custody awards are to be made in a manner that promotes the best interests of the child. This standard leaves judges with a great deal of discretion to structure child custody awards in whatever fashion they feel is appropriate. *See infra* notes 76-90 and accompanying text.

6 Throughout this Comment, the terms custodial parent and noncustodial parent are used. The term custodial parent refers to the parent who receives primary physical custody of the child; in other words, the parent the child lives with the majority of the time. The other parent is referred to as the noncustodial parent.

7 No. 87DR3301 (Dist. Ct., Denver County, Colo. Dec. 29, 1987). The *Simms* decision has been appealed.

8 *Id.* slip op. at 11.

9 *Id.* slip op. at 10.

10 *Id.* slip op. at 11.

11 *Id.* The court in *Simms* did not specify the details of the religious custody award: it did not delineate the rights of the father nor the limits on the mother. Nevertheless, in November 1988, Mrs. Boeke (the former Mrs. Simms) was found to be in contempt of court for taking the children to daily Mass and was issued a ten-day suspended jail term. *See Struggle for Custody, supra* note 2, at A48, col. 4.

12 The *Simms* case has received front page coverage in *The New York Times, see Struggle For Custody, supra* note 2, and was presented to national television audiences as a feature story on *Nightline, see Nightline,* (ABC television broadcast, December 29, 1988); *The Phil Donahue Show, see The Phil Donahue Show: Bizarre Custody Cases*

sual, it was not unprecedented.[13] The broad judicial discretion afforded by the best interests standard combined with basic societal changes[14] has led to a more flexible judicial approach to child custody questions. This judicial flexibility raises the possibility that spiritual custody awards may occur more frequently in the years to come.

Numerous constitutional issues arise in a spiritual custody award.[15] This Comment analyzes the first amendment free exercise

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(Multimedia Entertainment television broadcast, Jan. 3, 1989); and *The Reporters. See The Reporters,* (Fox television broadcast, Jan. 7, 1989).

[13] *See, e.g.,* Vazquez v. Vazquez, 443 So. 2d 313, 314 (Fla. Dist. Ct. App. 1983) (finding that trial court acted within its discretion when it awarded custody of children to Baptist mother but ordered mother to keep children in Catholic schools); Stern v. Stern, 40 Ill. App. 2d 374, 378, 382-84, 188 N.E.2d 97, 98, 100-01 (1963) (upholding an order directing a minor child to be raised in the Jewish faith despite the fact that custody was awarded to his Lutheran mother); Gottlieb v. Gottlieb, 31 Ill. App. 2d 120, 121-26, 135-37, 175 N.E.2d 619, 621-22, 626-27 (1961) (holding that an agreement between divorcing parties to raise their children in the Jewish faith could not be modified by custodial parent to permit a child to enroll in Catholic school); Spring v. Glawon, 89 A.D.2d 980, 981, 454 N.Y.S.2d 140, 141-42 (1982) (denying mother the right to enroll her children in parochial schools following a motion by their Jewish father); Grayman v. Hession, 84 A.D.2d 111, 112, 446 N.Y.S.2d 505, 506 (1961) (holding that a mother violated a divorce decree by not bringing up child in the orthodox Jewish faith); Gluckstern v. Gluckstern, 31 Misc. 2d 58, 59, 220 N.Y.S.2d 623, 623-24 (N.Y. Sup. Ct. 1961) (supporting an antenuptial agreement which stipulated that a child will be brought "up in the Orthodox Jewish faith," despite objections of a custodial Christian Scientist mother).

[14] Society's changing perceptions about traditional male/female roles has resulted in an increased recognition of the rights of fathers. In an effort to recognize and expand the parental role for all parties, joint and shared custody awards have become increasingly common. *See infra* notes 95-99 and accompanying text.

[15] Spiritual custody awards have an impact upon the constitutional rights of both custodial and non-custodial parents as well as the children themselves. While this Comment focuses on the free exercise rights of custodial parents, spiritual custody awards also raise issues of religious establishment, freedom of speech, freedom of association, and family privacy due to the state mandated restrictions on parental rights to communicate their religious beliefs to their child.

Although this Comment focuses on the free exercise aspects of spiritual custody awards, an argument can also be made that these awards violate the three pronged establishment clause test established in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the three part *Lemon* test, which has been accepted as the standard for evaluating establishment clause claims, governmental action constitutes an establishment of religion unless it can be shown that:

1) The action has a secular purpose;
2) The principal or primary effect of the action neither advances nor inhibits religion; and
3) The action "[does] not foster 'an excessive government entanglement with religion.' "

*Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

By choosing a religion for the child and interfering with the custodial parent's choices for the child's day to day activities, spiritual custody awards arguably violate all three prongs of the *Lemon* test. *Cf.* Zucco v. Garrett, 150 Ill. App. 3d 146, 156, 501

implications of the spiritual custody concept. It argues that the concerns justifying state intervention into family life and religion under the guise of the child's best interests are satisfied when a physical custodian is selected for the child. Therefore, absent a specific showing of physical or demonstrable psychological harm to a child, spiritual custody awards that infringe upon the free exercise rights of the custodial parent fail to satisfy the strict scrutiny test governing such state action. The Comment begins by examining the free exercise clause and the standards of review used by the Supreme Court when violations are alleged. In doing so, it identifies characteristics that are common to situations in which the Court has found "compelling needs" sufficient to justify free exercise infringement. Part II turns to family law and demonstrates how the best interests doctrine has been used to justify spiritual custody awards. Part III applies the Supreme Court's free exercise review standards to the spiritual custody context. It argues that the nebulous best interests standard is too broad to qualify as a compelling need that would justify infringement of a custodial parent's free exercise rights. The Comment concludes by identifying specific underlying goals of the best interests standard, and offers an analytical framework that would limit judicial discretion when spiritual custody issues arise.

## I. THE FREE EXERCISE CLAUSE

Freedom of religion is among the most sacred of American constitutional protections. As Justice Jackson once noted, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[16] The importance of this principle can be traced directly to the United States' historical roots as a country founded by refugees fleeing religious persecution.[17]

N.E.2d 875, 881 (1986) (holding that the first and second prongs of the *Lemon* test were violated when lower court considered fact that father regularly attended church and mother did not in reaching its custody decision).

For a detailed analysis of the establishment clause issues that may arise in child custody cases, see generally Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984) (arguing that to avoid establishment clause violations, courts should only consider religion in custody disputes if the child has personal religious convictions).

[16] Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[17] *See* Everson v. Board of Educ., 330 U.S. 1, 8-15 (1947) (discussing history of religious persecution in Europe and the American colonies and the desires of the founding fathers to prevent religious oppression).

The significance placed by the founding fathers on religious freedom as an underlying American philosophical tenet is articulated in the first amendment, the first sentence of which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[18] This principle has been extended to the states via the due process clause of the fourteenth amendment,[19] and encompasses both legislative and judicial action.[20]

The section of the first amendment dealing with religious freedom consists of two separate and distinct clauses: the establishment clause and the free exercise clause.[21] Separate bodies of law have developed around each clause.[22] Section A examines the analytical framework employed by the Supreme Court in free exercise cases. Section B identifies common characteristics of state objectives that the Court has found sufficiently compelling to justify infringement of

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18 U.S. CONST. amend. I.

19 *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-40 (1987) (holding that Florida's denial of unemployment compensation benefits to an employee discharged because of her refusal to work certain hours for religious reasons "violate[d] the Free Exercise Clause of the First Amendment, applicable to the states through the Fourteenth Amendment"); *Everson*, 330 U.S. at 17 (holding that a New Jersey township board of education could authorize reimbursement of funds expended by parents in busing their children to religious and other private schools); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the fourteenth] amendment embraces the liberties guaranteed by the first amendment."). *But see* R.A. Goldwin & A. Kaufman, *Preface* to HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? at xiv (R.A. Goldwin & A. Kaufman eds. 1987) (noting that some scholars have questioned whether the authors of the fourteenth amendment intended it to be utilized to apply the first amendment to the states).

20 *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has . . . acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.")

21 *See supra* note 18 and accompanying text.

22 A recurring problem in constitutional law is the inherent tension between the two religion clauses. Decisions which inhibit state action as violative of the establishment clause (school prayer prohibitions for example) may impact negatively upon an individual's ability to practice their religion. At the same time, governmental action designed to allow individuals to pursue their religious beliefs (expending government funds for military chaplains) could be construed as state sponsorship of religion. *See* Thomas v. Review Bd., 450 U.S. 707, 719 (1980) (acknowledging the existence of a "tension between the two Religion Clauses"); Abington School Dist. v. Schempp, 374 U.S. 203, 309 (1963) ("[T]here are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."). *But see* Baker, Jr., *The Religion Clauses Reconsidered: the* Jaffree *Case*, in THE ASSAULT ON RELIGION: COMMENTARIES ON THE DECLINE OF RELIGIOUS LIBERTY 38-39 (R. Kirk ed. 1986) (arguing that the Supreme Court has created the tension by applying separate criteria for analysis of the two clauses).

these rights. This analysis will enable us to place spiritual custody awards in their proper constitutional context.

### A. *Strict Scrutiny Review*

Free exercise rights are not unlimited. Courts have often drawn a distinction between the right to have religious beliefs and the right to act upon them. The so-called belief/action dichotomy was first drawn in *Reynolds v. United States,*[23] which is generally considered the "first major 'free exercise' case"[24] and is still used today.[25]

The early cases following *Reynolds* only protected religious *beliefs,* leaving government with a great deal of latitude to regulate individual action.[26] This government power was greatly reduced in *Cantwell v. Connecticut.*[27] The *Cantwell* Court, in holding that a statute prohibiting unlicensed solicitation of religious contributions infringed upon free exercise rights, implied that strict judicial scrutiny must be applied to state actions that limit an individual's religious *acts.* The Court found that the asserted governmental objective of preventing fraud and preserving the public peace could be achieved by less restrictive means,[28] and that the statute must be "narrowly drawn."[29] The Court went on to note that "the power to regulate must be so exercised as not . . . [to] unduly . . . infringe [upon] the protected freedom."[30]

The stiffening standard of judicial review alluded to in *Cantwell*

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[23] 98 U.S. 145 (1878). The *Reynolds* Court affirmed a Mormon's conviction for polygamy despite his contention that his actions were compelled by his religious beliefs. The Court held that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166.

[24] G. GUNTHER, CONSTITUTIONAL LAW 1510 (11th ed. 1985).

[25] *See, e.g.,* Bowen v. Roy, 476 U.S. 693, 702 (1986); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963).

[26] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1183 n.33. (2d ed. 1988).

[27] 310 U.S. 296 (1940).

[28] *See id.* at 304-07.

[29] *Id.* at 311.

[30] *Id.* at 304. When viewed with other cases in which the Court struck down statutes requiring permits for religious solicitation, *see* Murdock v. Pennsylvania, 319 U.S. 105, 114-17 (1943); Schneider v. State, 308 U.S. 147 (1939), *Cantwell* "establish[ed] a basic principle: The government's secular purpose must be tightly linked to the burden the government imposes on religion; if the government can approximately attain its goal without burdening religion, then it must follow that path, regardless of how compelling the goal may be." L. TRIBE, *supra* note 26, § 14-13, at 1253.

was expressly set forth in *Sherbert v. Verner.*[31] In *Sherbert,* a Seventh Day Adventist who refused to work on her Sabbath day, Saturday, was denied unemployment compensation on the grounds that she would not accept suitable work. The Court reversed the South Carolina Supreme Court's ruling that the claim denial was permitted,[32] finding the state action to be violative of the free exercise clause.[33] Justice Brennan, writing for the majority, set forth a strict scrutiny test for free exercise review. Brennan found that in order to determine if the state action was allowable, it was necessary to "consider whether some *compelling* state interest . . . justifies the substantial infringement of appellant's First Amendment right."[34] Justice Brennan went on to state that even if such a compelling interest existed, a "substantial infringement" of the appellant's free exercise rights would not be justified unless the state "demonstrate[d] that *no* alternative forms of regulation would combat such abuses without infringing First Amendment rights.[35]

Courts and commentators consistently have restated Justice Brennan's test as one that upholds state action infringing upon an individual's right to practice religion only if the state meets the burden of proving that the action is the least restrictive means of achieving a compelling state end (or interest). The least restrictive means/compelling ends test has become the accepted standard for free exercise review.[36]

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31 374 U.S. 398 (1963).

32 *Id.* at 401-02. The South Carolina Supreme Court had specifically held that the "appellant's ineligibility infringed on constitutional liberties upon the appellant's freedom of religion . . . ." *Id.* at 401.

33 *See id.* at 410.

34 *Id.* 374 U.S. at 406 (emphasis added).

35 *Id.* at 407 (emphasis added).

36 *See, e.g.,* Hobbie v. Unemployment Comm'n, 480 U.S. 136, 141 (1987) (noting that infringements upon religious practice are to be subject to strict scrutiny and can be upheld only by proof of a compelling interest by the state); *In re* Marriage Of Gove, 117 Ariz. 324, 327, 572 P.2d 458, 461 (Ariz. Ct. App. 1977) (stating that whereas the freedom to believe is absolute, the state may regulate the exercise of religion if a compelling state interest exists); Fisher v. Fisher, 118 Mich. App. 227, 231, 324 N.W.2d 582, 584 (1982) (stating that a state can deny the exercise of religious freedom only if the state shows the existence of an overriding interest of the highest order and that the least intrusive means of achieving that interest are used). For alternative formulations of the strict scrutiny text, see notes 43-47 and accompanying text.

The precise contours of the strict scrutiny test set forth by Justice Brennan, namely, that state action which infringes upon an individual's freedom to practice her religion must be the least restrictive means of achieving a compelling state end, *see infra* note 36 and accompanying text, has become the topic of debate in recent years. Arguments have been made that in recent cases the Court has not always applied the

The Court's hesitancy to interfere with the free exercise rights of families is exemplified by *Wisconsin v. Yoder,*[37] in which the Court upheld the rights of Amish parents to keep their children out of school in derogation of a state statute.[38] In *Yoder,* the Court accepted the Amish parent's contention that the state law compelling school attendance until their children reached the age of sixteen violated their free exercise rights.[39] In reaching their decision, the Court took a narrow view of the state's asserted compelling need—namely, to educate its citizens in order to allow them to become "self-reliant and self-sufficient participants in society."[40] The Court examined closely the objectives behind the alleged state purpose and found that the state did not meet the strict standard of demonstrating that their action was the least restrictive means to a compelling end.[41] The Court stated that although a minimum level of education may be necessary, the state did not prove that it was compelling that Amish children receive a high school education.[42] In order to satisfy

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strict scrutiny model, but has instead utilized a variety of levels of scrutiny in different situations. *See infra* notes 44-49 and accompanying text.

37 406 U.S. 205 (1972). *Yoder* illustrates the limits of the state power of *parens patriae* in religious areas. It shows that parents are given autonomy over the religious training of their children. Therefore, inhibitions of the free exercise rights of children will be construed as an interference with the free exercise rights of their parents. *See infra* note 62 and accompanying text.

38 *See id.* at 234.

39 *See id.* at 230-31.

40 *Id.* at 221.

41 *See id.* at 236. Although the opinion by Chief Justice Burger did not expressly employ the language of *Sherbert,* the sum and substance of his analysis was consistent with the least restrictive means to a compelling end standard. Chief Justice Burger stated that "[t]he essence of all that has been said and written about [the free exercise clause] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

42 *See id.* at 221-27. One might argue that the state could have characterized as compelling its need to have uniform standards that would result in a strong school system. Under an incidental effects analysis, *see infra* notes 47-49 and accompanying text, such an argument might have led to a different result. In U.S. v. Lee, 455 U.S. 252 (1982), the Court denied the claims of Amish employers that their free exercise rights should exempt them from paying social security taxes. The Court held that the maintenance of "the fiscal vitality of the social security system" satisfied the government's burden of demonstrating a compelling interest. *Id.* 455 U.S. at 258-59.

Some commentators have argued that *Lee* suggests a loosening of the strict scrutiny test. Laurence Tribe has noted that "[t]o the degree that the state's interest is defined to include the program as a whole, the state will find it easier to present a compelling interest, and thereby to pass its first hurdle." L. TRIBE, *supra* note 26, § 14-13, at 1261. This analysis is suspect. *Yoder* can be distinguished from *Lee* in that the *Yoder* Court was satisfied that allowing the Amish children to leave school two years earlier would not harm the system. *See Yoder,* 406 U.S. at 222-26, 235-36 (describing the long history and peculiar characteristics of the Amish which qualified

the strict scrutiny standard, the Court demanded that the state establish specific problems that would occur if the Amish were to practice their religion as they desired. Absent a specific showing of demonstrable harm, the Court refused to accept the state's "highly speculative" argument that the children would leave the Amish community and be ill equipped for life.[43]

While *Yoder* plainly demonstrates that specific objectives must be shown to withstand an allegation of free exercise infringement, recent cases have led to the suggestion that the Court has relaxed its free exercise standard of review.[44] While the Court may have relaxed its scrutiny of free exercise issues in certain instances, it would be a gross exaggeration to suggest that the Court has abandoned strict scrutiny in the free exercise context. Although the precise contours of the Court's strict scrutiny language have varied periodically, the *Sherbert* strict scrutiny test was expressly affirmed by the Court in *Hobbie v. Unemployment Commission,*[45] when the Court stated that "infringements [upon free exercise] must be subject to strict scrutiny and could be justified only by proof by the State of a

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them for the exemption). The court specifically stated that "few other religious groups or sects could make" the required showing to allow an exemption from the public school system. *Id.* at 236.

Even if one accepts the contention that *Lee* represents a loosening of the *Sherbert* standard, such a development should have no impact on the review of a spiritual custody award. There is no systematic effect with these awards as they are unique to the parties involved in a given dispute. For further discussion of suggestions that the standard of review for free exercise claims has been loosened, see *infra* notes 44-49 and accompanying text.

43 *Yoder,* at 224.

44 For examples of cases in which the Court found no free exercise violations, see Lyng v. N.W. Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1327 (1988) (allowing the federal government to harvest timber and build roads in area traditionally used for Indian worship); Bowen v. Roy, 476 U.S. 693, 711-12 (1986) (rejecting claim that requiring a Native American to give a social security number for his daughter as a prerequisite to eligibility for public assistance programs was a free exercise violation); Goldman v. Weinberger, 475 U.S. 503, 510 (1985) (upholding military dress codes prohibiting the wearing of visible religious headgear); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 306 (1985) (rejecting exemption for religious group from minimum wage and labor laws); Bob Jones Univ. v. United States, 461 U.S. 574, 604-05 (1983) (rejecting tax-exempt status for discriminatory racially religious university).

Tribe suggests that there has been an "unconfessed readjustment of the free exercise test." L. TRIBE, supra note 26, § 14-13, at 1260. He classifies the new test as a "required showing . . . that an unusually important goal can be achieved only through uniform enforcement of the regulation in question . . . ." *Id.* § 14-13, at 1251. Tribe's analysis here in some ways stresses the semantic more than the substantive. He draws his language of "an unusually important goal" from a dissent by Justice O'Connor in *Goldman. Id.* § 14-12, at 1242 n.1.

45 480 U.S. 136 (1987).

compelling interest."[46] At best, rather than abandoning strict scrutiny, the Court appears to be moving towards a modified level of scrutiny in certain free exercise cases. This approach was utilized in *Lyng v. N.W. Indian Cemetery Protective Association.*[47] In *Lyng,* American Indians claimed that their free exercise rights would be infringed upon by the construction of highways and the harvesting of timber on federally owned land that the Indians historically had used for religious purposes. Justice O'Connor, writing for the majority, accepted the precedents of *Sherbert* and *Yoder,* but refused to apply a strict scrutiny test to the free exercise claim. The Court held that situations involving the:

> incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs [do not] require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[48]

Justice O'Connor thus seems to be suggesting a two-tiered level of scrutiny for free exercise claims. Under this theory, strict scrutiny would continue to apply when governmental action *directly* restricts an individual's right to free exercise, but a lesser standard of review would be utilized when the alleged infringement could be classified as an "incidental effect."[49] Spiritual custody awards place a *direct* burden on the custodial parent's right to exercise her religious beliefs. Strict scrutiny thus is the appropriate standard for review to determine if such awards are permissible. It is therefore necessary to examine whether a compelling state interest can be identified.

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[46] *Id.* at 141. In a concurring opinion, Justice Powell wrote "[t]his Court's decision last term in *Bowen v. Roy* did nothing to undercut the applicability of *Sherbert* . . . . *Id.* at 147 (Powell, J., concurring) (citation omitted).

[47] 108 S. Ct. 1319 (1988).

[48] *Id.* at 1326 (citations omitted).

[49] *Id.*; *see also* L. TRIBE, supra note 26, § 14-13, at 1262-63 (arguing that strict scrutiny will be applied in cases where the state action compels an individual to choose between his religious obligations and "the enjoyment of government benefits . . . or . . . avoidance of a government burden like criminal prosecution" while a looser level of judicial review will be applied in situations where "government measures . . . are not triggered by the religious choice in question, but burden religious activity only in a manner ancillary to an undeniably secular choice").

### B. *Compelling Interests—Common Characteristics*

The Court has found state interests of a magnitude sufficient to justify infringement of individuals' free exercise rights in a variety of circumstances. Despite religious objections, federal and state governments and courts have been allowed to:

1) Prohibit children from engaging in religious solicitation.[50]
2) Require mandatory military dress codes.[51]
3) Require religious groups to follow minimum wage and other labor laws.[52]
4) Prohibit parades/marches on public roads without a license.[53]
5) Prohibit the growing and use of marijuana.[54]
6) Prohibit polygamy.[55]
7) Require blood transfusions for a child.[56]
8) Restrict individual's rights to practice their religion in child custody battles to promote the "best interests of the child."[57]

One could argue, after analyzing the state interests described above, that the state objectives courts have found to be compelling are narrowly drawn specific ends which either: (a) promote public health; (b) prevent physical harm; or (c) prevent acts which the state would classify as morally depraved.

It is inherently difficult to classify an amorphous objective as compelling. Therefore, constitutional applications of strict scrutiny review require the identification of precise state objectives.[58] Among the state interests identified above, protecting the "best interests of the child" is certainly the vaguest. This standard's lack of

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50 *See* Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944).

51 *See* Goldman v. Weinberger, 475 U.S. 503, 507-10 (1985).

52 *See* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 304-06 (1985).

53 *See* Cox v. New Hampshire, 312 U.S. 569, 576-58 (1940).

54 *See, e.g.,* Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463 (D.C. Cir. 1989); People v. Torrwa, 133 Cal. App. 3d 265, 276-77, 184 Cal. Rptr. 39, 46 (1982). *But see* People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821 (1964) (allowing the use of peyote by Navajos because peyote was such an integral part of the religion that to ban its use amounted to a ban on the practice of that religion); L. TRIBE, *supra* note 26, § 14-13, at 1269 & nn.105-07 (discussing pro and con arguments of courts allowing individuals to use illegal drugs based on free exercise claims).

55 *See* Reynolds v. United States, 98 U.S. 145 (1879).

56 *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 502-05 (W.D. Wash. 1967), *aff'd,* 390 U.S. 598 (1968).

57 *See infra* note 67 and accompanying text.

58 *See generally* L. TRIBE, *supra* note 26, § 14-13, at 1252 ("[T]he *Cantwell* Court was requiring . . . the use of 'a statute narrowly drawn to define and punish specific conduct . . . .' "); *id.* § 14-13, at 1269 ("If the harm is ill-defined . . . an exemption [from state power to restrict activity] must be granted.").

specificity has caused it to be the subject of a great deal of criticism.[59] While states undeniably have interests in protecting children, it is often difficult to identify what constitutes the child's best interests. While "[c]ertain widely recognized harms—such as physical injury—can be prevented even at the cost of infringing religious freedom . . . the state cannot impose its ideal of the 'best possible life' as a way of justifying intrusion upon the religious autonomy of a citizen."[60] Therefore, it is important to probe the underlying objectives of the "best interests" standard in order to identify specific goals that are consistent with previously identified compelling interests. The extent to which the best interests standard can be used to justify the free exercise restrictions that accompany a spiritual custody award can then be determined.

## II. SPIRITUAL CUSTODY

Spiritual custody debates have occurred for many years.[61] The

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[59] *See infra* notes 80, 125 and accompanying text.

[60] L. TRIBE, *supra* note 26, § 14-13, at 1258 (footnote omitted).

[61] Spiritual custody issues arise primarily in two contexts. The first occurs when the parents are unable to agree on the child's religion and the court unilaterally decides to make the award in the child's best interests. *See, e.g.*, Simms v. Simms, No. 87DR3301, transcript at 11 (Dist. Ct. Denver County, Colo. Dec. 29, 1987); Stern v. Stern, 40 Ill. App. 2d 374, 188 N.E.2d 97 (1963); Grayman v. Hession, 84 A.D.2d 111, 446 N.Y.S.2d 505 (1982). In the second context, spiritual custody questions arise when the court is asked to enforce an antenuptial agreement, a private contract which the parents entered into after their separation, wherein they stipulated to their respective rights and responsibilities. *See* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 90, 432 N.E.2d 765, 766, 447 N.Y.S.2d 893, 894 (1982); Perlstein v. Perlstein, 76 A.D.2d 49, 51-52, 429 N.Y.S.2d 896, 898 (1980); Hackett v. Hackett, 150 N.E.2d 431, 432 (Ohio Ct. App. 1958).

An argument can be made that the constitutional issue at stake differs in the two situations. The degree of court infringement is arguably less severe when it is enforcing a private contract as opposed to taking unilateral action. Many courts, however, have held that antenuptial contracts are not subject to the ordinary protections of contract law. In *Hackett,* the court refused to support the Protestant wife's promise to raise the children as Catholic per the terms of a privately-arranged separation agreement. In holding that the provisions of the antenuptial agreement related to the children's religious training were unenforceable, the court used a best interests type of rationale and stated:

> To suggest that the agreement will only be enforced if the child's temporal welfare is not thereby prejudiced is meaningless; it is inevitable that, if an unwilling parent is forced by a court of law to rear his child in a religion in which he disbelieves, the child will suffer. . . . [T]he courts . . . should not be party to the injustice by enforcing the contract against a third party maleficiary.

*Hackett,* 150 N.E.2d at 439 (quoting Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 363 (1955)). For other courts which have refused to uphold such

issue has arisen in custody battles between: Agnostics and those with religious beliefs;[62] Jews and Christians;[63] members of different Christian faiths;[64] and individuals who practice different forms of Judaism.[65] The spiritual custody concept historically has received

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clauses, see, e.g., Stanton v. Stanton, 213 Ga. 545, 547-50, 100 S.E.2d 289, 292-93 (1957) (concluding that contract provision cannot override judicial discretion to make decisions that will further the best interests of the child); Lynch v. Uhlenhopp, 248 Iowa 68, 72-73, 78 N.W.2d 491, 494, 496, 500 (1956) (holding such clauses void for indefiniteness, uncertainty, and constitutional violations); Jenks v. Jenks, 385 S.W.2d 370, 377 (Mo. Ct. App. 1964) (concluding that contract provisions cannot override judicial discretion to make decisions that will further the best interests of the child).

Even those cases which do support the enforcement of such agreements subject such enforcement to the limits of the best interest standard. New York courts have shown a willingness to support such contracts. *See, e.g.,* Perlstein v. Perlstein, 76 A.D. 2d 49, 53, 429 N.Y.S.2d 896, 899 (1980) ("That parents may contract to have their children brought up in observance of a certain religious lifestyle is well established in this State."); Gluckstern v. Gluckstern, 31 Misc. 2d 58, 59, 220 N.Y.S.2d 623, 623-24 (N.Y. Sup. Ct. 1961) (supporting an antenuptial agreement which stipulated that a child will be brought "up in the Orthodox Jewish faith," despite objections of a custodial Christian Scientist mother); Shearer v. Shearer, 73 N.Y.S.2d 337, 358 (N.Y. Sup. Ct. 1947) (holding that a Protestant wife's agreement to raise children as Catholic is an enforceable contract). Yet, even New York courts will not enforce the contracts unless the judge determines that such enforcement promotes the best interests of the child. *See, e.g.,* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94-96, 447 N.Y.S.2d 895, 895-96, 432 N.E.2d 765, 768 (1982) (supporting enforcement of antenuptial agreement but noting that "[t]he standard ultimately to be applied remains the best interests of the child"); Spring v. Glawon, 89 A.D.2d 980, 981, 454 N.Y.S.2d 140, 142 (1982) (stating that " 'where the parents, by agreement, have imposed reasonable restraints upon the custodial parent in the upbringing of the child, those restraints will be enforced *unless* it can be demonstrated . . . that enforcement would not be in the best interest of the child' " (emphasis added)); Schwarzman v. Schwarzman, 88 Misc. 2d 866, 874, 388 N.Y.S.2d 993, 998 (N.Y. Sup. Ct. 1976) ("Ante-nuptial agreements regarding religious rearing of children are enforceable *to the extent that they provide for the best interests and welfare of the child.*" (emphasis added)).

Courts are thus, in effect, using one standard by employing the best interests analysis regardless of whether an antenuptial agreement exists. Therefore, for purposes of this Comment, no distinction based on the existence or nonexistence of an antenuptial agreement will be drawn when analyzing the constitutionality of using the child's best interest as a standard of review in awarding spiritual custody.

62 *See* Robert O. v. Judy E., 90 Misc. 2d 439, 395 N.Y.S.2d 351 (N.Y. Fam. Ct. 1977).

63 *See, e.g.,* Funk v. Ossman, 150 Ariz. 578, 579-80, 724 P.2d 1247, 1248-49 (Ariz. Ct. App. 1986); Gottlieb v. Gottlieb, 31 Ill. App. 2d 120, 123-24, 175 N.E.2d 619, 621 (1961); Schwarzman v. Schwarzman, 88 Misc. 2d 866, 868-69, 388 N.Y.S.2d 993, 995 (N.Y. Sup. Ct. 1976).

64 *See, e.g.,* Vazquez v. Vazquez, 443 So. 2d 313, 314 (Fla. Dist. Ct. App. 1983); Esposito v. Esposito, 41 N.J. 143, 144-45, 195 A.2d 295, 296 (1963); Hackett v. Hackett, 150 N.E.2d 431, 434 (Ohio Ct. App. 1958).

65 *See, e.g.,* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 90-91, 432 N.E.2d 765, 766-67, 447 N.Y.S.2d 893, 894-95 (1982); Perlstein v. Perlstein, 76 A.D.2d 49, 429 N.Y.S.2d 896 (1980).

only limited support. Most courts have held that the custodial parent retains the right to determine the child's religious upbringing.[66] In doing so, however, the courts have based their decisions on the nebulous theory of the child's best interests. Based upon this broad rationale, numerous courts have given the noncustodial parent control over the child's religious upbringing despite the objections of the custodial parent.[67] These decisions limit the custodial parent's right to pass her religion on to her children. Barring a demonstration that they represent the least restrictive means of achieving a compelling state end, such decisions unconstitutionally infringe upon the custodial parent's free exercise right.[68] It is important, therefore, to determine whether the state's asserted end of promoting the child's best interests may properly be classified as compelling.

### A. *Parental Autonomy and Judicial Intervention*

An examination of the spiritual custody concept must begin with an analysis of the basis for judicial intervention into family life. As a

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[66] *See, e.g.*, Lynch v. Uhlenhopp, 248 Iowa 68, 81, 78 N.W.2d 491, 499 (1956) (" 'The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child.' " (citation omitted)); Jenks v. Jenks, 385 S.W.2d 370, 377 (Mo. Ct. App. 1964) ("Considerations of the most practical kind . . . dictate that . . . the duty of attending to the details of the child's rearing be delegated to a custodian, and . . . that the custodian be vested . . . with that degree of discretion upon which the expeditious exercise of authority invariably depends."); Esposito v. Esposito, 41 N.J. 143, 146, 195 A.2d 295, 297 (1963) ("Custody normally carries with it full control of the child's religious upbringing."); *see also* Mangrum, *Exclusive Reliance On Best Interest May Be Unconstitutional: Religion As A Factor In Child Custody Cases*, 15 CREIGHTON L. REV. 25, 53 (1981) ("American courts have held that the custodial parent has discretionary control over the religious training of the child . . . ."); Strickman, *Marriage, Divorce and the Constitution*, 15 FAM. L.Q. 259, 337 (1981) ("The normal practice in state courts has been to leave the religious upbringing of a child wholly within the hands of the custodial parent."); Annotation, *Religion as Factor in Child Custody and Visitation Cases*, 22 A.L.R. 4th 971, 977 (1983) (stating that "most . . . courts seem to . . . make the choice of custodian on strictly nonreligious grounds and then to commit to the custodian so chosen the right to control the child's religious education").

[67] *See, e.g.*, Simms v. Simms, No. 87DR3301, transcript at 11 (Dist. Ct. Denver County, Colo. Dec. 29, 1987); Vazquez v. Vazquez, 443 So. 2d 313, 314 (Fla. Dist. Ct. App. 1983); Stern v. Stern, 40 Ill. App. 2d 374, 376-78, 380-84, 188 N.E.2d 97, 98, 100-101 (1963); Gottlieb v. Gottlieb, 31 Ill. App. 2d 120, 121-27, 175 N.E.2d 619, 620-622, 627 (1961); Spring v. Glawon, 89 A.D.2d 980, 980-81, 454 N.Y.S.2d 140, 141-142 (1982); Grayman v. Hession, 84 A.D.2d 111, 111-12, 446 N.Y.S.2d 505, 506 (1982); Perlstein v. Perlstein, 76 A.D.2d 49, 51-52, 429 N.Y.S.2d 896, 898-99 (1980); Gluckstern v. Gluckstern, 31 Misc. 2d 58, 59-60, 220 N.Y.S. 2d 623, 624 (N.Y. Sup. Ct. 1961).

[68] See *supra* notes 36-49 and accompanying text.

general principle, parents have the freedom to raise their children as they see fit. This freedom includes the right to educate and expose children to religion in accordance with the parents' own beliefs.[69] Although constitutional protection extends to a "parent in . . . his or her relationship with and authority over the child,"[70] this protection breaks down when there is a divorce and a battle for the custody of children ensues. As one commentator has noted, "[c]hild custody contests *necessitate* state mediation to determine which parent will be chiefly responsible for raising the child."[71] The state thus utilizes its power under the theory of "*parens patriae* to intervene in family affairs where the physical or mental well-being of the child is imminently and substantially threatened."[72]

As a result of the need to find a caretaker for the child, "[t]he state is thrust into the role of mediator by necessity" in child custody cases.[73] In theory, "[c]ustody "'embraces the sum of . . . rights with respect to rearing a child . . . . It includes the right to . . . make decisions regarding his care and control, education, health and religion.' "'[74] The necessity of finding a home for a child who is not

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[69] The Supreme Court has held that parents' rights to raise, educate, and choose the religious training for their children are protected under the theory of substantive due process as provided in the fifth and fourteenth amendments. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972) (protecting the "fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children"); Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a state may not compel children to salute the flag in school when it conflicts with their parents' religious beliefs because such action invades "the sphere of intellect and spirit" which the first amendment protects); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (discussing parents' fundamental right to "direct the upbringing and education of children under their control").

[70] *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1313 (1980) [hereinafter *Developments in the Law*].

[71] Note, *The Religious Upbringing of Children After Divorce*, 56 NOTRE DAME L. REV. 160, 164 (1980) (emphasis added).

[72] Mangrum, *supra* note 66, at 65. For further discussion of the state's power to intrude into family life under the doctrine of *parens patriae*, see *Developments in the Law*, *supra* note 70, at 1326; Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 734-36 (1977).

[73] *Developments in the Law*, *supra* note 70, at 1326.

[74] I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW 463 (1986) (citations omitted). In analyzing custody issues, courts and commentators sometimes draw a distinction between physical and legal custody. Physical custody refers to the responsibility that accompanies the party with whom the child lives. In other words, "[t]he person with legal custody has the full bundle of decisionmaking rights with regard to the child." *Id.* at 464. Recently, courts have become increasingly flexible in structuring custody awards. Whereas in the past custody was almost automatically awarded to the mother, it is no longer uncommon for fathers to seek and receive custody of their children. In addition, the concept of joint custody, where the parents share responsibility for the child, has received increasing support.

capable of caring for herself can easily be categorized as a compelling state interest because it has a direct impact on the physical well-being of a citizen. A court thus is justified when it moves into the normally protected zone of child-rearing to protect a child who has become the innocent victim of a family breakdown. When a court enters an area that ordinarily enjoys fundamental protection, however, it is presumed that it will proceed cautiously and narrowly in its actions. The court's goal should be to restore the child to the most normal situation possible.[75]

### B. *The Best Interests Standard*

The basic theory underlying the best interests standard, the "universal[ ]"[76] standard for custody decisions, is that the interests of the child take precedence over the interests of any other party involved in the dispute. This theory contrasts with previous ideas that the parents' interests were paramount. The doctrine evolved from the recognition that "children are not chattels to be disposed of according to the wishes of their parents or anyone else, but that they are intelligent moral beings, and as such their welfare and their hap-

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Expanding judicial creativity in this area raises the possibility of an increase in spiritual custody awards. *See infra* notes 87-89, 94-96 and accompanying text.

[75] *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-34, 37-38 (1979) (discussing the need to provide stability for the child as quickly as possible after a divorce and recommending total decisionmaking authority regarding childrearing conditions be placed with the custodial parent to "safeguard the child's need for [stability and] continuity of relationships").

[76] *See* Strickman, *supra* note 66, at 327. The "best interests" standard has developed under state laws and has been generally accepted by state courts. *See, e.g., In re* Marriage Of Short, 698 P.2d 1310, 1312 (Colo. 1985) (stating that the "overriding concern in any custody proceeding must be the welfare and best interests of the child"); Asch v. Asch, 164 N.J. Super. 499, 505, 397 A.2d 352, 355 (1978) (stating that it "is axiomatic that the court should seek to advance the best interests of the child where her parents are unable to agree on the course to be followed"); Grayman v. Hession, 84 A.D.2d 111, 112, 446 N.Y.S. 2d 505, 506 (1982) (noting that it "is well settled that the best interests of the child are the foremost consideration in a custody proceeding").

The extent to which the Court would be bound by the best interests standard, however, is open to debate. In *Developments in the Law, supra* note 70, at 1327, the authors argue that "[g]iving the best interests standard any general constitutional content appears to be impossible" and thus "constitutional protection of parental interests in custody of, companionship with, and authority over the child may be the key to recognition of affirmative constitutional rights for each parent in a custody dispute." *Id.* at 1329. Strickman also raises the question and concludes that although it remains a consideration, there is "nothing in the Constitution demanding" that the best interests doctrine be the ultimate standard for consideration. Strickman, *supra,* at 329.

piness is a matter of first consideration."[77] As a result, bright line tests such as the common law paternal preference[78] and the "tender years" doctrine[79] no longer serve as the basis for custody decisions.

The best interests of the child doctrine, however, is vague and indeterminate. This lack of precision has allowed the doctrine to become "a phrase ready-made to justify the court's delving into virtually any area of the parents' lives, and to support any conclusion it finally draws."[80] As a result, the test fails to provide the narrowly tailored specific objective that is normally required of a compelling state interest.[81] In many ways the best interests standard merely begs the question as to how the court should settle child custody disputes. As one court stated, "[t]he only absolute in the law governing custody of children is that there are no absolutes."[82]

Many states, including eight states that have adopted the Uniform Marriage and Divorce Act ("UMDA"),[83] have strengthened the

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77 M. PLOSCOWE, H. FOSTER & D. FREED, FAMILY LAW 882 (1972) (quoting 2 W. NELSON, DIVORCE AND ANNULMENT 212-14 (1945)).

78 *See* Mangrum, *supra* note 66, at 31-43 (describing the common law rule whereby a father had a vested right in his children that was superior to all the claims of all other parties, and noting modern departures from the early common law).

79 Under the tender years doctrine, there is a presumption that young children are best served by placing them with their mothers. A father needs to overcome a heavy burden of proof to receive custody of his children. *See* I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 74, at 476-77. Although the tender years doctrine has generally been supplanted by the best interests test, it is not completely dead and is still occasionally considered by some courts. *See* Duran v. Weaver, 495 So. 2d 1355, 1357 (Miss. 1986) (stating that the tender years doctrine is "one factor to be considered in child custody cases").

80 Comment, *supra* note 72, at 735; *see also* Mangrum, *supra* note 66, at 30 (criticizing the "completely discretionary" use of the standard); Strickman, *supra* note 66, at 333 (stating that "[i]n custody disputes, a trial court is dealing in the nether world of the 'best interests of the child,' where judicial techniques are most suspect for their inability to project accurately the impact of subtle environmental factors on the emotional health of human beings"); *Developments in the Law, supra* note 70, at 1327 ("[I]t is virtually impossible to predict the effect of particular childrearing practices upon the child. Most commentators have thus recognized that the best interests standard is usually indeterminate in the contested custody context."); Note, *supra* note 71, at 165 ("Critics insist that the standard is so inconsistently applied that it is no more than 'a cloak for judicial discretion and intuition.' " (quoting Miller, *Joint Custody,* 13 FAM. L.Q. 345, 354 (1979))).

81 *See supra* notes 49-60 and accompanying text.

82 Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93, 432 N.E. 2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).

83 *See* ARIZ. REV. STAT. ANN. §§ 25-311 - 25-339 (1976 & Supp. 1988); COLO. REV. STAT. § 14-2-101-113 (Parts I, II), § 14-10-101-133 (Parts III, IV) (1987 & Supp. 1988); ILL. ANN. STAT. ch. 40 ¶¶ 101-802 (Smith-Hurd 1980 & Supp. 1989); KY. REV. STAT. ANN. §§ 403.010, 403.110-403.350 (Baldwin 1984 & Supp. 1988); MINN. STAT. ANN. §§ 518.002-518.66 (West Supp. 1989); MO. ANN. STAT. §§ 452.300-452.415

best interests standard by codifying it in a variety of statutory forms.[84] In an effort to limit the discretionary nature of the best interests standard, the UMDA lists specific factors that a judge may consider in making her award.[85] In addition, section 408 of the UMDA specifically attempts to limit a judge's potential to interfere with the day to day decisions of the custodial parent under the best interests standard. The section entitled "Judicial Supervision" provides:

> Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care and religious training, unless the court . . . finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.[86]

The comment following this section indicates a preference for family privacy and states that "the custodial parent should be . . . the person responsible for post-divorce decisions concerning the upbringing of the child." The comment goes on to recommend that, absent an antenuptial agreement, there should be no court intervention in the custodial parent's decisions in raising the child unless such "decision would 'endanger the child's physical health or significantly impair his emotional development'—a standard patently more onerous than the 'best interest' test."[87]

In formulating this section, the drafters of the UMDA demonstrated that they were keenly aware of the potential danger for abuse of judicial discretion left open under the best interests standard. The position taken by the UMDA directly opposes the burdensome court interference that accompanies a spiritual custody award, instead suggesting that the compelling end facing a court in a custody situation is the need to place the child. Once this specific goal is

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(Vernon 1986 & Supp. 1989); MONT. CODE ANN. §§ 40-4-101 - 40-4-221 (1987); WASH. REV. CODE ANN. § 26.09.010 -26.09.902 (1986 & Supp. 1989).

84 *See* Mangrum *supra* note 66, at 43-44.

85 These factors include: 1) the wishes of the parents; 2) the wishes of the child; 3) interaction with family members or others significantly affecting the child's well-being; 4) the child's adjustment to home school and community and; 5) the mental and physical health of all pertinent individuals. *See* UNIFORM MARRIAGE & DIVORCE ACT § 402 U.L.A. (1987). A few states expressly list religion or spiritual well-being as a factor which a judge may consider in determining the child's best interests. *See* ALASKA STAT. § 25.24.150(c)(1) (1983); HAW. REV. STAT. § 571-46(5) (1985); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1976).

86 UNIFORM MARRIAGE & DIVORCE ACT § 408 U.L.A. (1987).

87 UNIFORM MARRIAGE & DIVORCE ACT § 408 comment U.L.A. (1987).

accomplished, there is less justification for continued judicial interference with family decisions. When judicial decisions have an impact on highly protected constitutional zones, as spiritual custody awards do, the need to limit judicial involvement becomes particularly cogent. Despite its efforts, however, the UMDA does not solve the problem of unlimited judicial discretion in the name of the child's best interests. In addition to the fact that it has only been adopted by eight states,[88] the UMDA allows judicial intervention when an antenuptial agreement exists.[89] Moreover, because courts are used to exercising wide discretion under the best interests standard, the limited judicial discretion urged in the comment following section 408 has often been ignored. The *Simms* spiritual custody award, for example, was issued in Colorado, a state that has expressly adopted the UMDA.[90] Thus, while they may be helpful, statutory standards do not offer a panacea of protection from the wide potential for judicial discretion implied under the best interests standard.

The best interests standard has provided courts with a broad mantle to consider religious questions when an interfaith marriage ends in divorce. Although courts generally are sensitive to the possible constitutional issues that may arise in these instances, they consistently have been willing to use the best interests doctrine to justify the consideration of religious issues in child custody disputes.[91]

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[88] *See supra* note 78.

[89] *See infra* note 61 and accompanying text.

[90] Simms v. Simms, No. 87DR3301, transcript at 8-9 (Dist. Ct. Denver County, Colo. Dec. 29, 1987). Although one might argue that Colorado's adoption of the UMDA dictates a different result, a heavy burden is placed on a party who tries to overturn a trial court's finding of fact under the best interests standard. *See, e.g.*, Brown v. Alabama Dept. of Pensions & Security, 473 So. 2d 533, 534 (Ala. Civ. App. 1985) ("In child custody cases . . . [the trial] court's decision is presumed to be correct and will not be set aside on appeal, unless it is shown to be plainly and palpably wrong."); Gratrix v. Gratrix, 652 P.2d 76, 79 (Alaska 1982) (stating that "child custody determinations are among the most difficult in the law and . . . trial courts are vested with broad discretion" and in "reviewing a superior court's ruling . . . we will apply the 'clearly erroneous' standard").

[91] In the case of *In re* Marriage of Heriford, 586 S.W.2d 769 (Mo. Ct. App. 1979), the court stated:

> No area in the realm of decisions in child custody cases is more fraught with difficulty than where differences in religious beliefs of the parents exist. The courts have shown a constitutional reluctance and, indeed refused, to be placed in a position of deciding the merits or validity of conflicting religious differences between parents. Rather, they have applied to such a situation the so firmly rooted principle of what is in the best interests of the children involved . . . .

*Id.* at 772.

Religion and its effects on children have been raised in a variety of contexts including questions regarding:

— Whether a parent's religious practices or lack thereof can preclude custody.[92]
— The religious rights of and restrictions on the noncustodial parent.[93]
— The religious rights of and restrictions on the custodial parent.[94]

As interfaith marriage and divorce rates rise, courts will deal with those issues more frequently. When viewed in conjunction with a number of rapid societal changes, the best interests standard may encourage courts to play a more creative role when deciding custody matters.

Joint custody awards offer one example of a trend towards increasingly flexible custody decisions. As the number of mothers working outside the home has risen, there has been an expanding judicial recognition of fathers' rights.[95] This has led to the growth of joint custody awards which have "been described as a 'small revolution . . . in child custody law.' "[96] Joint custody awards can take many forms.[97] The central idea behind the concept is that parents

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[92] *See, e.g.*, Bonjour v. Bonjour, 592 P.2d 1233, 1236, 1242-43 (Alaska 1979); *In re* Marriage of Short, 698 P.2d 1310, 1313 (Colo. 1985); Osier v. Osier, 410 A.2d 1027, 1029 (Me. 1980).

[93] *See, e.g., In re* Marriage of Mentry, 142 Cal. App. 3d 260, 262, 268-69, 190 Cal. Rptr. 843, 844, 849-50 (1983); Felton v. Felton, 383 Mass. 232, 232-33, 418 N.E.2d. 606, 606-07 (1981); Sina v. Sina, 402 N.W.2d 573, 575-76 (Minn. Ct. App. 1987).

[94] *See, e.g., Simms*, transcript at 11-12; Grayman v. Hession, 84 A.D.2d 111, 111-12, 446 N.Y.S.2d 505, 506 (1982); Stern v. Stern, 40 Ill. App. 2d 374, 376-78, 380-84, 188 N.E.2d 97, 98, 100-01 (1963).

[95] *See* Caban v. Mohammed, 441 U.S. 380, 389-94 (holding that a statute which gave unmarried mothers more rights regarding adoption of children than unmarried fathers violates the Equal Protection Clause); I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 74, at 886-89 (discussing the increasing judicial recognition of the rights of unwed fathers); *see also* Comment, *The Tender Years Presumption: Do the Children Bear the Burden?*, 21 S.D.L. REV. 332, 337-50 (1976) (arguing that the tender years doctrine is unconstitutional).

[96] I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 74, at 540 (quoting Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 (1984)).

[97] Four primary types of joint custody awards have been identified:

1) *long-term block time*, with children spending alternate years with each parent or school year with one parent and vacation months with the other;
2) *short-term block time*, with children spending alternate weeks, months or days with each parent or splitting weeks or days with the parents;
3) *bird's nest*, where children stay in the same home and the parents move in and out for various time periods; and

will share both physical and legal custody of the children.[98] When parents share legal custody of the child "decision-making with regard to major facets of the child's life is shared by the joint custodians. This means that *both* parents decide major issues concerning the child's future such as education, major health care and religion."[99]

Joint custody awards, however, can lead to judicial infringement on the rights of the custodial parent. For example, a Florida statute authorizes courts to divide parental responsibility among the parties to promote the child's best interests.[100] Although the statute does not expressly refer to religion,[101] the court in *Vazquez v. Vazquez*[102] used it to carve out a spiritual custody award.[103] The court held that the statute's presumption in favor of joint custody authorized it to

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4) *free access*, with the children free to move from one parental home to the other at will.

I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 74, at 540 (emphasis in original).

98 *See supra* note 66 and accompanying text for discussion of the distinction between physical and legal custody.

99 I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 74, at 541 (emphasis in original).

100 FLA. STAT. § 61.13(2)(b)(2) (Supp. 1988) reads in part: "The Court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child." The statute further states:

a. In ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or *may divide those responsibilities between the parties based on the best interests of the child.* Areas of responsibility may include primary residence, education, medical and dental care, and any other responsibilities which the court finds unique to a particular family.

b. The court *shall order* "sole parental responsibility, with or without visitation rights, to the other parent when it is in the best interests of" the minor child.

*Id.* at § 61.13(2)(b)(2)(a)-(b) (emphasis added).

Florida offers one of the most presumptuous joint custody statutes. This statute presumes that joint custody may perhaps be in the child's best interests even if the parents do not consent to such an agreement and gives the judge a wide range of discretion in structuring an award. A challenger to such a judicial award must meet a heavy burden of proof.

Other states have codified the joint custody concept with varying degrees of judicial presumption. They have generally supplemented the best interests rule. Although some state statutes grant judges discretionary authority to hold that joint custody awards are in a child's best interests, most commonly allow such awards only if the parents agree to them, in the belief that parental cooperation is critical for these situations to work. Florida is not the only state, however, that does not require parental agreement. *See* I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 74, at 555-59.

101 *See* FLA. STAT. § 61.13(2)(b)(2)(a) (Supp. 1988).

102 443 So. 2d 313 (Fla. Dist. Ct. App. 1983).

103 *See id.* at 314.

determine that despite the objections of their custodial Baptist mother, the best interests of the children (including a daughter about to enter the first grade) would be served if they were given a Catholic education.[104] When courts utilize the flexibility afforded by the best interests standard in such a manner, their actions must be carefully evaluated to ensure that they are not infinging upon a parent's first amendment rights.

## III. Spiritual Custody and the Free Exercise Clause

### A. *Standard of Review*

Although historically spiritual custody awards have not been common, the nebulous nature of the best interests test combined with the increasing rates of divorce, interfaith marriage, and societal changes discussed above suggest that the incidence of such awards could increase in the near future. When examining the free exercise implications of these awards, strict scrutiny must be applied as spiritual custody awards place a *direct* burden on the custodial parents right to exercise her religious beliefs.[105] In the *Simms* case, the custodial parent was found to be in contempt of court and received a suspended jail sentence because she practiced her religion at home and brought her two young daughters with her to a Catholic church.[106] It is difficult to imagine a more direct governmental restriction on an individual's right to freedom of religious exercise. In order to satisfy the requirements of strict scrutiny review, it is important to probe the underlying objectives of the best interests standard. This makes it possible to determine the extent to which the best interests standard can be used to justify the free exercise restrictions that accompany a spiritual custody award. By recognizing the underlying goals, it is possible to identify specific goals that are consistent with the types of state interests that courts have found compelling.

### B. *Are The Child's Best Interests Compelling?*

The best interests of the child standard is vague and undefinable. The test is purposefully broad in order to avoid judicial inflexibility in a complex area. However, "the so-called test is so broad as to offer no sure guide to many if not most decisions unless it is bro-

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104 *Id.*

105 *See supra* notes 47-49 and accompanying text.

106 *See Struggle For Custody, supra* note 2, at A48, col. 4.

ken down into component parts."[107] Therefore, to allow the best interests standard to rise to the level of compelling, one must determine precisely what the court is attempting to accomplish by using it. Although the test itself is undefinable, it is possible to ascertain its goals.

As previously discussed, the justification for state intervention in normally protected family zones lies in the breakdown of the family unit.[108] As one commentator has noted, "[c]hild placement laws are society's response to the 'success' or 'failure' of a family in providing its children with an environment which adequately serves their needs."[109] Courts use the best interests standard in an effort to restore normalcy to the environment of a child whose family life has become unsettled as a result of a divorce. Thus, in seeking to protect:

> the welfare of minor children as it is affected by the dissolution of their parents' civil marriage union[, t]he care and protection of [the] children [becomes] a matter of utmost state concern . . . . Those best interests include inherent rights to proper and necessary support and custody and general well-being, and are matters to which the court's protective function most vitally applies.[110]

This need to provide protection and support for a child whose home has been destroyed by divorce is the compelling state interest which initially allows courts to infringe upon ordinarily protected constitutional rights under the best interests standard. The authors of *Beyond the Best Interests of the Child*[111] argue that current judicial practices and standards in the custody area are inadequate, as they tend to "run contrary to the often professed purpose of the decisions themselves—to serve the best interests of the child."[112] The authors conclude that in order to satisfy the asserted goal of making the child's interest supreme, we must attain the underlying objective of restoring a normal home environment for the child.[113] This requires

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107 H. FOSTER, JR., D. FREED & M. PLOSCOWE, FAMILY LAW 899 (2d ed. 1972).

108 *See supra* notes 69-75 and accompanying text.

109 J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 75, at 3-4.

110 Fisher v. Fisher, 118 Mich. App. 227, 232, 324 N.W.2d 582, 584 (1982).

111 J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 75.

112 *Id.* at 7.

113 *See generally id.* at 49-53 (discussing the need to advance a child's interests by providing her with a continuous psychological parent). The authors argue that:

> our capacity to predict is limited. No one . . . can forecast just what experiences, what events, what changes a child, or for that matter his adult custodian, will actually encounter. Nor can anyone predict in detail how the unfolding development of a child and his family will be reflected in the

"continuity of relationships."[114] In order to ensure continuity, custody decisions normally should not contain any contingencies. Custody decisions which require "continuing jurisdiction by the court . . . such as a requirement to send a child to religious school . . . prompt[ ] interruption by disappointed parties who claim violation [of the custodial parent's obligation to abide by the condition]."[115] Thus, in order to satisfy the state's compelling interest in helping the child regain a normal lifestyle "[o]nce it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions . . . she wishes to raise the child."[116]

The authors of *Beyond The Best Interests of the Child,* by combining psychoanalytic and legal theory, help identify the goals underlying the best interests standard. Specifying the objectives helps identify state interests that are sufficiently narrow to be characterized as compelling without running afoul of the standards set by the Supreme Court. This helps to clarify the vague judicial doctrine which has surrounded child custody decisions.

The destruction of a home brings the state into a normally protected family zone. Once this occurs, the state has two specific interests in the restoration of a stable home for the child: providing the child with caretakers and fostering a sense of stability. The two part analysis set forth below emphasizes these specific state objectives and should be employed when examining the impact of a court's custody award on the constitutional rights of the child's parents.

The first step of the analysis recognizes that it is necessary for the state to enter a family's life and find a home for the child following a divorce. In order to promote day to day stability, the parent who receives primary physical custody must presumptively have the right to make daily decisions regarding the child, unfettered by court intervention. These may include exposing the child to the custodial parent's religion. At this point, any infringement on the rights of a noncustodial parent does not constitute a free exercise violation in

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> long run in the child's personality and character formation. Thus the law . . . [should not try] to do the impossible—guess the future and impose on the custodian special conditions for the child's care . . . . In the long run, the child's chances will be better if the law is less pretentious and ambitious in its aim, that is, if it confines itself to the avoidance of harm and acts in accord with a few, even if modest, generally applicable short-term predictions.

*Id.* at 51-52 (footnotes omitted).

114 *Id.* at 31.

115 *Id.* at 37.

116 *Id.* at 38.

that the state action supporting the custodial parent in her choice satisfies the strict scrutiny test.[117] The circumstances surrounding a divorce and the underlying psychological basis for the best interests standard create conditions which make the state's interest in finding a stable home for the child compelling. Unlike the amorphous criterion of the best interests standard, the need to provide the child with a home and a sense of continuity is specific and is consistent with other types of state interests that the Supreme Court has categorized as compelling. Specifically, this need is consistent in that it: a) promotes the public health[118]; b) protects state citizens from physical harm; and c) prevents moral depravity.[119] Once the home is found for the child, however, this compelling state interest is satisfied and parental autonomy within the home must be restored. If the state then wishes to justify infringement upon the custodial parent's protected constitutional free exercise right via a spiritual custody award, a second and separate constitutional analysis must be performed.[120]

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117 An argument may also be made that the infringement of the noncustodial parent's right is only incidental. The court is not directly restricting the noncustodial parent's free exercise rights. Instead, circumstances that accompany the placement of the child with the custodial parent mean that the child might be brought up in a religion that runs counter to the noncustodial parent's beliefs. Under the analysis set forth in Lyng v. N.W. Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988), it becomes difficult for the noncustodial parent to successfully assert a free exercise violation. *See supra* notes 47-49 and accompanying text.

118 Public health is provided by ensuring that there are caretakers for those who are incapable of caring for themselves.

119 Children who are not provided with a home could fall victim to a variety of morally depraved individuals and circumstances.

120 Although most courts have been able to justify almost any decision under the broad best interests blanket, at least one court has alluded to a two step analysis in determining the constitutionality of religious limitations when applied to a child custody situation. In Fisher v. Fisher, 118 Mich. App. 227, 324 N.W.2d 582 (1982), a court faced with a noncustodial father's demand that his children receive "Bible-based" "Christian education and training," *id.* at 231, 324 N.W.2d at 584, recognized the competing interests of first amendment protections and the state's interest in promoting the best interests of the child. The court recognized that "[w]hen state action results in a denial of one's legitimate exercise of religious freedom, the state must show an overriding interest of the highest order to justify the action." *Id.* at 231, 324 N.W.2d at 584 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972). It held that " '[a] state's interest is compelling when the end that it achieves is so vital to society that its essentiality overrides the loss of the protected religious right.' " *Id.* at 231, 324 N.W.2d at 584 (quoting M.I. v. A.I., 107 Misc. 2d 663, 667, 435 N.Y.S.2d 928, 931 (N.Y. Fam. Ct. 1981)). The court went on to employ a "constitutional balancing test to determine if there is a compelling state interest to which defendant's full exercise of his religious convictions may be subordinated." *Id.* at 232, 324 N.W.2d at 584. The court acknowledged that "[i]t is difficult to conceive of a more compelling or vital state interest than the welfare of minor children as it is affected by the dissolution of their parents' civil marriage union." *Id.* While the court utilized

In order to justify a restriction on the custodial parent's free exercise rights, the party seeking the infringement must demonstrate a separate and specific compelling end and show that the means selected are the least intrusive way of satisfying it. When a parent's religious beliefs pose a threat of physical harm to her child, courts have been willing to exercise their broad discretionary powers to promote the child's best interests.[121] This is consistent with other Supreme Court decisions that support the state's compelling interest in protecting its citizens from physical harm.[122] As a result, little controversy attaches to state court orders limiting the rights of a custodial parent whose religious beliefs threaten the child with physical harm.[123] A more vexing problem arises when a court's intrusion into

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traditional doctrine in stating that the "controlling consideration in such disputes shall be the best interests of the children," it also identified the underlying goals of "the care and protection of children [as a] matter of utmost state concern." *Id.* The court then in effect performed a two part analysis. It first determined that the best way to satisfy the compelling end of providing care and protection of the children was to give physical custody to the mother. Once this compelling state interest was satisfied, the court determined that another compelling interest would have to be shown to justify further infringement. The court held "[o]nce the purely secular decision of custody is made, the court may not interfere with the religious practices of either the custodial or noncustodial parent *unless* . . . those practices threaten the children's well being." *Id.* at 234, 324 N.W.2d at 585 (emphasis added).

121 *See e.g.*, Stapley v. Stapley, 15 Ariz. App. 64, 67, 70-71, 485 P.2d 1181, 1184, 1187-88 (1971) (holding that a Jehovah's Witness mother may lose custody of her children partly based on her refusal to abide by court order regarding potential blood transfusions and her violation of a statute prohibiting the taking of children out on door-to-door religious solicitations); Levitsky v. Levitsky, 231 Md. 388, 398, 190 A.2d 621, 626 (1963) ("Where . . . there is a serious danger to the life or health of a child as a result of the religious views of a parent, . . . this may bar custody by the parent holding such views, or may call for protection against such views by an appropriate order.").

122 *See supra* notes 50, 52, 53, 56, 57 and accompanying text.

123 Controversy does exist regarding the burden of proof which the contesting party must bear. Courts are divided on the question whether the standard should be a showing of actual harm, a substantial likelihood of harm, or merely a reasonable probability of harm. *See In re* Marriage Of Mentry, 142 Cal. App. 3d 260, 269, 190 Cal. Rptr. 843, 850 (1983) (stating that "the decision to intervene must . . . be conditioned upon a clear affirmative showing of harm or likely harm to the child"); Felton v. Felton, 383 Mass. 232, 233-34, 418 N.E.2d 606, 607 (1981) ("harm to the child from conflicting religious instructions or practices . . . should not be simply assumed or surmised; it must be demonstrated in detail"); Short v. Short, 698 P.2d 1310, 1313 (Colo. 1985) ("[E]vidence of a party's religious beliefs is relevant and admissable in a custody proceeding if it is shown that such beliefs or practices are reasonably likely to cause present or future harm to the physical or mental development of the child.").

This Comment takes the position that the strict scrutiny standard used by the Supreme Court in free exercise cases demands a showing of actual harm or a substantial likelihood thereof. One set of commentators has argued a similar position, noting that:

the custodial parent's free exercise zone is justified by an allegedly "compelling" state interest in promoting the child's best interests on the basis of speculative psychological or emotional harm.[124] One commentator has noted that "[i]n custody disputes, a trial court is dealing in the nether world of 'the best interests of the child,' where judicial techniques are most suspect for their inability to project accurately the impact of subtle environmental factors on the emotional health of human beings."[125]

When a court bases its decision on such a broad and undefinable category, it fails to fulfill the requirements necessary to categorize the state objective as compelling.[126] The question of religious upbringing is very different from the need to find a home for the child or protect the child from harm. Those latter needs would be characterized as compelling state interests even if the parents had

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> "inquiry into a parent's religious attitudes is constitutionally permissible . . . when the exercise of the parent's religion poses a threat of actual harm to the child. Because such inquiry risks infringing upon the parent's first amendment free exercise clause right, courts should find substantial evidence indicating that the parent's religious practices are currently resulting in or will imminently result in detriment to the child's mental or physical well being . . . ."

*Developments in the Law, supra* note 70, at 1339-40 (footnotes omitted).

124 In a number of cases courts have held that it would be in the best interests of the children to be raised in the religion of the noncustodial parent without giving any reasons more precise than the fact that the children, ranging from ages four through twelve, had previously received limited amounts of exposure to the noncustodial parent's religion and that to permit a change might be disruptive to the child. *See* Simms v. Simms, No. 87DR3301, transcript at 9-11, 17 (Dist. Ct. Denver County, Colo. Dec. 29, 1987); Vazquez v. Vazquez, 443 So. 2d, 313, 314 (Fla. Dist. Ct. App. 1983); Stern v. Stern, 40 Ill. App. 2d 374, 377-78, 382-83, 188 N.E.2d 97, 98, 100-101 (1963); Gottlieb v. Gottlieb, 31 Ill. App. 2d 120, 123-27, 136-37, 175 N.E.2d 619, 621-22, 627 (1961); *see also* Spring v. Glawon, 89 A.D.2d 980, 980-81, 454 N.Y.S.2d 140, 141-42 (1982) (holding that where parties agreed prior to divorce that the express permission of both parties would be required before commencing a religious upbringing of child, court would enforce this against custodial parent); Perlstein v. Perlstein, 76 A.D.2d 49, 56, 429 N.Y.S. 2d 896, 901, (1980) (holding that where divorcing parties have agreed that a child shall be raised in a particular religious tradition, the custodial parent has the burden of showing that the guidelines are detrimental to the child to justify not following them); Gluckstern v. Gluckstern, 31 Misc. 2d 58, 60, 220 N.Y.S.2d 623, 624 (N.Y. Sup. Ct. 1961) (holding that a mother who tried to violate divorce agreement by thwarting the father's efforts to raise their child in the Orthodox Jewish faith was in contempt of court).

A problem arises in these situations as in general it is unlikely that children of such young ages could be deemed to have developed true religious needs. *See infra* notes 133-34 and accompanying text.

125 Strickman, *supra* note 66, at 333.

126 *See supra* notes 50-60 and accompanying text (describing characteristics common to state interests which courts have identified as compelling).

not been divorced. In contrast, absent a showing that the parents religious beliefs may lead to abandonment of a child or demonstrable harm, a court would never consider intervening in even the most heated dispute between married parents regarding the religion they choose for their child. This is even more true if the demand by one party for such an infringement is based solely upon opinions as to which religion will be more psychologically beneficial for the child. Such decisions are made in the privacy of the home. "Proposed interventions in the privacy of the family that would not conceivably be entertained by the courts during marriage . . . are not suddenly tenable simply because the parents have become separated or divorced."[127] "No end of difficulties would arise should judges try to tell parents how to bring up their children."[128] Judicial projections of psychological harm fail to rise to the level of compelling:

> [p]recisely because a court cannot *know* one way or another, with any degree of certainty, the proper or sure road to personal security and happiness . . . . [As a result,] a valuation of religious teaching and training and its projected as distinguished from immediate effect . . . upon the physical, mental, and emotional well being of a child, must be forcibly kept from judicial determinations . . . . If a court has the right to weigh the religious beliefs or lack of them of one parent against those of the other, for the purpose of making a precise conclusion as to which one is for the best interests of the child, we open a Pandora's box which can never be closed.[129]

Some courts thus have recognized that there should be a "salutary judicial disinclination to interfere with family privacy without [a separate and specific showing of] a compelling need."[130] Courts recognizing that "there is no magic in phrase[s like] 'welfare of the child' "[131] have argued that "the attainment of that object requires the observance of principles considerably more practical and less nebulous than a mere declaration of beneficent purpose."[132] Courts that justify infringement upon the free exercise rights of custodial

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127 *In re* Marriage Of Mentry, 142 Cal. App. 3d 260, 268, 190 Cal. Rptr. 843, 849 (1983).

128 Schwarzman v. Schwarzman, 88 Misc. 2d 866, 873, 388 N.Y.S.2d 993, 998 (N.Y. Sup. Ct. 1976) (quoting People *ex rel.* Sisson v. Sisson, 271 N.Y. 285, 287, 2 N.E.2d 660, 661 (N.Y. 1936).

129 Zucco v. Garrett, 150 Ill. App. 3d 146, 155, 501 N.E.2d 875, 880-81 (1986) (quoting Quiner v. Quiner, 59 Cal. Rptr. 503, 516-17 (Cal. Ct. App. 1967)) (emphasis in original).

130 *Marriage of Mentry,* at 266, 190 Cal. Rptr. at 847.

131 Jenks v. Jenks, 385 S.W.2d 370, 377 (Mo. Ct. App. 1964).

132 *Id.*

parents based purely upon evidence of speculative psychological harm fail to satisfy the compelling needs test.[133]

There may be occasions where parties can demonstrate that there is a psychological basis for an action that does infringe upon the free exercise rights of the custodial parent. If the noncustodial parent can demonstrate specific factors that pose a danger to either the public health or morality,[134] the compelling state interest requirement could be satisfied. A showing of a specific psychological need on the part of the child for the custodial parent's religion could qualify as such a compelling state interest. One example might be if the child herself demonstrated that she had already developed actual religious needs.[135] In such a case, the child would have to be of sufficient maturity to comprehend the significance of the choice. The problem for the court becomes one of line-drawing in determining when an individual child possesses the ability to make a reasoned choice of this nature.[136] Another example is when a parent demonstrates that a specific psychological problem may be associated with

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[133] Numerous courts have held that speculative psychological harm is an insufficient basis for limiting the free exercise rights of a noncustodial parent. These courts have held that a noncustodial parent has the right to expose her child to her religion absent a specific clear and affirmative showing of demonstrable harm. Absent such a showing, the party seeking the limitation fails to demonstrate a sufficiently compelling state interest to justify interference with the free exercise rights of a noncustodial parent. *See, e.g.*, Felton v. Felton, 383 Mass. 232, 233, 418 N.E.2d 606, 607 (1981); Compton v. Gilmore, 98 Idaho 190, 192, 560 P.2d 861, 863 (1977); Robertson v. Robertson, 19 Wash. App. 425, 427-28, 575 P.2d 1092, 1093 (1978). When one considers the logic and goals underlying the best interests standard, *see supra* notes 116-24 and accompanying text, the state's interest in limiting the rights of the custodial parent is even less compelling when based solely upon speculation regarding potential emotional harm.

[134] *See supra* notes 50-60 and accompanying text. The state's interest in protecting the overall health of its citizenry is enhanced when it promotes a mentally healthy populace. Specific problems must be identified, however, when such an objective is subjected to a strict scrutiny test.

[135] *See* Note, *supra* note 15, at 1727-32 (arguing that a court may consider the religious preferences of a mature child in a custody decision without violating the establishment clause); *see also* Note, *supra* note 71, at 171 ("Once a child is old enough to form some reasoned judgment regarding his parents' creeds, most courts take the child's judgment into consideration in awarding custody." (footnote omitted)).

[136] In Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979), the Alaska Supreme Court upheld the constitutionality of a statute stating that to determine the best interests of the child for custody purposes "the court shall consider . . . the physical, emotional, mental, *religious* and social needs of the child." *Id.* at 1236 (quoting ALASKA STAT. § 09.55.205, subsequently renumbered to ALASKA STAT. § 25.24.150 (1980)) (emphasis added). The court held that it was constitutional "for a court to take account of the actual religious needs of a child in awarding custody." *Id.* at 1239. The court "stress[ed], however, that a court must make a finding that the child has actual, not presumed, religious needs . . . . By actual religious needs, we refer to

the custodial parent's choice of religion.[137] If, in this case, there were factors that prevented the noncustodial parent from caring for the child on a full time basis, a judicial decree limiting the free exercise rights of the custodial parent may prove to be the "least intrusive means" of satisfying the compelling state ends. Only in these limited situations may a spiritual custody award be granted without violating the free exercise protections established by the Constitution.

## CONCLUSION

Spiritual custody awards have a direct impact upon the most sacrosanct of personal and legal values. Although such awards have been uncommon in the past, the increasing incidence of divorce and interfaith marriages will undoubtedly bring this issue before the courts on a more routine basis in the future. While the traditional doctrine employed in settling child custody issues, the best interests of the child standard, offers a sound and admirable objective, its broad and indeterminate nature leaves open the possibility of unwise and unconstitutional abuses of judicial discretion in the spiritual custody realm. If courts wish to consider such awards without improperly infringing upon the free exercise rights of custodial parents,

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the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it." *Id.* at 1239-40.

The court noted the difficulty of determining when a minor is sufficiently mature to form such a preference. While allowing that this "will . . . vary from case to case and will not always correspond to the minor's chronological age," the court stated a "belie[f] that, under ordinary circumstances, an average fifteen year old will be of sufficient intellectual and emotional development to warrant a court in giving serious consideration to the child's expressed needs with respect to religion." *Id.* at 1240 n.14. The court further stated that:

> before [a child] can properly be classified as having religious needs, the child must be of sufficient age to have developed some understanding of religion and its place in his or her life. We note favorably . . . one court's holding that children aged three, five, and seven are not of sufficient maturity to form an intelligent opinion on so complex a subject as religion or their needs with respect to it.

*Id.* at 1240 n.14 (referring to Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 137 A.2d 618 (N.J. Super. Ct. Ch. Div. 1958)).

[137] In Funk v. Ossman, 150 Ariz. 578, 724 P.2d 1247 (1986), the anxiety of a child, whose divorced Jewish father and Lutheran Mother were battling over his religious training, "manifested itself in a psychosomatic problem, soiling his pants (encopresis)." *Id.* at 582, 724 P.2d at 1251. Such a demonstrable detrimental effect on the child is more precise than a general claim that a child would be psychologically harmed and thus provides a better basis for classification as a compelling interest.

they must recognize the underlying goals of the best interests standard and employ a two-step analysis.

The need to find a home for a child whose life has been ravaged by divorce constitutes a compelling state interest that is consistent with Supreme Court standards for subrogating a parent's free exercise rights. Once a suitable home is found for the child, however, a separate analysis must be employed to justify any infringement upon the custodial parent's free exercise rights. Unless it can be shown that the restrictions implied by a spiritual custody award are the least intrusive means that satisfy the state's specific compelling interest in preventing physical or actual and demonstrable psychological harm to the child, a spiritual custody award will unconstitutionally infringe upon the custodial parent's free exercise rights.

CLYDE W. SUMMERS

The editors of the *University of Pennsylvania Law Review* take great pleasure in dedicating this issue to Clyde W. Summers, the Jefferson B. Fordham Professor of Law Emeritus. As the following selections evidence, Professor Summers has had a profound effect on the course of the law both in his personal life and as a result of his prodigious scholarship. Professor Summers has been a visionary in the field of labor law, challenging and shaping the law through his unique insight. The *Law Review* wishes him well in his future endeavors.