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WHAT DOES FRIEDA YODER BELIEVE?

Emily Buss^{*}

In his dissent in *Wisconsin v. Yoder*, the case upholding Amish parents' right to withdraw their children from high school for religious reasons, Justice Douglas challenged the Court's focus on the rights of parents.¹ In his view, "if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections."² To ascertain the child's desires, Douglas suggested that the State should simply ask her what she thinks.³ While I share Douglas's view that the *Yoder* decision is deficient in its account of children's rights, I think Douglas's cure is worse than the disease. We should have no confidence that the State, in interjecting itself into a child's development of a religious identity with its clumsy, uninvited questions, will further the rights of children, let alone improve their lives.

In the three decades since its publication, Douglas's dissent has served as a beacon for those calling for the recognition of children's rights independent of the rights of their parents.⁴ While the implications of his argument extend to any

^{*} Assistant Professor of Law, University of Chicago Law School. My thanks to participants in the Law and Philosophy Workshop at the University of Chicago Law School for their helpful comments on the topic, to Erynne Ross, whose class presentation and paper assisted me in analyzing minors' rights in the abortion context, and to Yael Karabelnik and Christopher Snell for their helpful research assistance. The Arnold and Frieda Shure Research Fund and the Max Rheinstein Research Fund in Family Law provided support for this research.

¹ See *Wisconsin v. Yoder*, 406 U.S. 205, 241-49 (1972) (Douglas, J., dissenting).

² *Id.* at 242.

³ See *id.* at 244, 246 n.4 (noting that "[o]n the important and vital matter of education, I think the children should be entitled to be heard" and calling for the "canvassing [of] the views of all school-age Amish children").

⁴ See, e.g., David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 1478 (1998) (exempting Justice Douglas's dissent in *Yoder* from his general criticism of the law's undervaluation of children); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1587 (1996) (citing Justice Douglas's dissent in support of her argument that children should be represented by counsel in judicial proceedings affecting their interests); Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Right of Minors*, 68 N.Y.U. L. REV. 597, 630 (1993) (citing Justice Douglas's dissent to support her argument for expanding mature minors' abortion rights); Leslie A. Fithian, Note, *Forcible Repatriation of Minors: The Competing Rights of Parent and Child*, 37 STAN. L. REV. 187, 204 (1984) (citing Justice Douglas as the first Supreme

context in which parents and children disagree on important matters directly affecting the conduct of their lives, the issues are presented particularly starkly in the context of religion. Parents' rights receive enhanced protection from State interference in this context because controlling religious upbringing is considered one of the core aspects of parenting.⁵ I therefore choose as my focus the particular question of whether and to what extent we should afford children the opportunity to make religious choices that conflict with the views of their parents.

The facts of *Yoder* are exotic (the Amish believe they are obligated to hold themselves apart from modern society in all aspects of life), but the questions Douglas raises are applicable in any case in which parents seek to avoid the application of a law to their children on the basis of the parents' religious convictions. Moreover, the same basic issues arise in the much more mundane context of divorce where parents are divided on questions of religious upbringing and one parent asks the court to intervene to compel the other parent to engage, or refrain from engaging, in particular religious education or practices. In this context, parents sometimes ask the court to consider the religious beliefs of the child in making its decision.⁶ How the court responds will again be affected by whether it concludes that the child has independent relig-

Court Justice to press for the recognition of children's rights independent of their parents and calling for a recognition of such rights in the context of forcible repatriation); Patrick Henigan, Note, *Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Rights of Parents*, 62 BROOK. L. REV. 1261, 1290 (1996) (citing Justice Douglas's dissent to support the contention that students should be given access to information regarding gay and lesbian services, despite opposition of parents); see also *In re Green*, 292 A.2d 387, 391 (Pa. 1972) (citing Douglas's dissent as authority for its decision to remand a case considering a mother's refusal to consent to a medical procedure for her child to allow the trial court to take testimony on the child's viewpoint).

⁵ See *Yoder*, 406 U.S. at 214 (describing the "traditional interest of parents with respect to the religious upbringing of their children," as fundamental and noting that the State's interest must be particularly strong to justify an intrusion on "the interests of parenthood [when] combined with a free exercise claim"); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("The parent's conflict with the State over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters."). In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 881-82 (1990), the Court suggested that the right protected in *Yoder* was a "hybrid" of two fundamental rights, the right of parents to direct their children's education, and the right of free exercise, which, joined together were entitled to more protection than a free exercise claim standing alone.

⁶ See, e.g., *Martin v. Martin*, 123 N.E.2d 812 (N.Y. 1954) (per curiam) (considering mother's motion to modify the custody order based on her son's testimony about his preference not to be educated in a religious school).

ious rights and what efforts it is willing to make to elicit the child's religious views.

In this paper, I will consider two questions; first, whether children should be afforded rights of religious exercise independent of their parents; and, second, what approach the State should take in bringing children's religious views to light. I will address these two questions both as they arise in *Yoder* and in the custody context. After discussing the courts' consideration of children's interests in these contexts, and then the courts' consideration of children's constitutional rights in a range of other contexts, I will tentatively conclude that affording children free exercise rights independent of, and therefore even when in conflict with, their parents, can be justified under current doctrine. I will go on to argue, however, that the State will do more harm than good if it plays an active role in eliciting children's religious views. Drawing on my view of the strengths and weaknesses of the judicial bypass procedure for minors developed by the Supreme Court in the abortion context, I will suggest an approach to both classes of cases which strikes a balance between the recognition of children's religious rights on the one hand and the avoidance of destructive intervention by the State in a child's ongoing process of development on the other.

I. PROTECTING CHILDREN'S INTERESTS WITHOUT REGARD TO THEIR RIGHTS

A. *Parents' Claims Against the State*

The traditional analysis applied to cases in which parents assert a free exercise right to avoid the application of a law affecting the upbringing of their children looks to the sincerity and centrality of the parents' religious beliefs, and the strength of the State's interest in the law's universal application.⁷ Where a court determines that the parents' beliefs are sincerely held and that the imposition of the State's requirement would significantly compromise the exercise of those beliefs, the court is required to exempt parents from that imposition, unless the State demonstrates that its interests are compelling and the requirement in question is narrowly tai-

⁷ See *Yoder*, 406 U.S. at 214 (asserting that the strength of a State's interest in universal education should be balanced against the free exercise rights of parents to control the religious upbringing of their children).

lored to achieve those interests.⁸ As described here, and as discussed in *Yoder* and numerous other court decisions, this analysis is framed as a conflict between the State and the parents.⁹ The balancing test does not mention the child.

In fairness to the *Yoder* analysis, however, the test can be more fully described as a means of assessing the State's and the parents' competing claims to decide what practices best serve children's interests. The parents' interest in controlling the child's religious upbringing is driven, in large part, by the parent's concern for the child's religious and more general well-being,¹⁰ and the State's interest in circumscribing that control rests on its own interest in facilitating children's healthy and successful development.¹¹ Although these may not be the only interests the parties are seeking to protect in the litigation,¹² the child's interests clearly play a central role in both parties' positions.

While the majority in *Yoder* does account for children's interests in this indirect manner, Justice Douglas is correct in noting the lack of any attention to children's rights.¹³ The majority's balancing test considers the competing contentions of surrogates, who take positions on the child's behalf, but it

⁸ *Id.* at 221 (outlining the balancing test applied by the majority in *Yoder*).

⁹ *See, e.g.,* *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (asking whether the *Arkansas Home School Act* interferes with plaintiff parents' free exercise rights and if so, whether the infringement is justified as serving a compelling State interest).

¹⁰ *See Yoder*, 406 U.S. at 209 (noting that Amish parents believed that sending their children to high school would endanger their children's salvation as well as their own); *see also* Stephen Gilles, *Liberal Parentalism and Children's Educational Rights*, 26 CAP. U. L. REV. 9 (1997) (advancing a theory of "liberal parentalism" which calls for broad deference to parental decision making on matters of upbringing, based on the view that "parents are more likely than the State or its agents faithfully to discover and pursue the child's welfare").

¹¹ *See Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (describing the State's interests that weigh against the recognition of parental free exercise claims as "the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens").

¹² *See Yoder*, 406 U.S. at 209, 221 (noting testimony indicating that Amish parents feared that allowing Amish children to go to school would threaten their own salvation and the survival of the Amish community, and noting that States' interests in their children's education was tied to societal interests in maintaining an effective government and avoiding dependence).

¹³ The majority opinion expressly eschews any consideration of the scope of children's religious rights, or rights to attend school against their parents' wishes, concluding that the issue was not properly before the Court in this case, which challenged the validity of their fathers' criminal convictions. *See id.* at 230-31. The majority does suggest, however, that a State practice of deferring to a child's educational and religious wishes in the face of her parent's religious opposition "would give rise to grave questions of religious freedom." *Id.* at 231-32.

fails to take account of the child's own assessment of her religious interests.¹⁴ The recognition of independent rights of children would require, at a minimum, a recrafting of the balancing test to account for their own religious views.

B. Parents Claims Against Each Other

In the custody context, the State's involvement in the religious conflict is once removed. Here, again, we have parents with views about the proper religious upbringing for their children and, again, these views reflect their assessment of some combination of their children's interests and their own. Again, parental implementation of these views is resisted, but in this case the resistance comes from the other parent. In custody cases, courts in most states are expressly charged with resolving disputes between parents in a manner that serves children's best interests,¹⁵ but this best interest mission has been interpreted to be qualified by parents' constitutional rights of free exercise.¹⁶ This qualification can be viewed as an interpretation of best interests (that is, deference to parents' religious beliefs serves children's best inter-

¹⁴ It could be argued that the battle over control of children's upbringing is really a battle over how best to prepare the child to exercise her rights independently as an adult. See Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 126 (William Alken & Hugh LaFollette eds., 1980) (calling for the recognition of a child's "right to an open future," the right to have options preserved until the child is old enough to choose among them). In this battle, the State seeks to increase the child's knowledge and skills to prepare her for a range of possible careers and ways of life, whereas the Amish parents seek to give her the skills and sense of religious identity that will enable her to embrace the Amish Order through adult baptism. However, this is simply another way of conceding that religious exercise rights are not rights afforded to children.

¹⁵ See, e.g., ALASKA STAT. § 25.20.060 (MICHIE 1996); UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987). Although some states have recently substituted a "primary caretaker" presumption for the undefined best interest standard, see, e.g., *Rhodes v. Rhodes*, 449 S.E.2d 75 (W. Va. 1994), this presumption only guides the court's assignment of primary custodial responsibilities. It does not resolve subsidiary questions, such as the extent to which the court should exercise control over the religious activities to which either parent exposes the child, which are presumably still governed by the best interest standard.

¹⁶ See, e.g., *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. 1990) ("[I]n order to justify restrictions upon parent's rights to inculcate religious beliefs in their children, the party seeking the restriction must demonstrate by competent evidence that the belief or practice of the party to be restricted actually presents a substantial threat of present or future physical or emotional harm to the particular child"); *In re Marriage of Hadeen*, 619 P.2d 374, 380 (Wash. App. 1980) (citing *Yoder* for the proposition that parents' religious beliefs and practices cannot influence custody determinations absent a showing that such beliefs and practices threaten the child's health or safety).

ests), or a limited exception to the application of the rule (deference to parents' religious beliefs is compelled by the Constitution even if such deference might not serve children's interests, absent some affirmative showing of harm).

In the custody context, as in *Yoder* and its progeny, courts have not focused on the question of whether children have separately cognizable rights of religious exercise.¹⁷ The custody courts have, however, paid more attention to the question of children's views than in cases in which the contest is framed as one between the parents and the State.¹⁸ This greater attention to children's views is due in part to parents' urging, where those views are expected to bolster a parental position,¹⁹ and in part to the conventions of custody litigation, where courts have long recognized the value of soliciting children's views,²⁰ and legislatures are increasingly requiring this input.²¹ When parents turn to the State for assistance in resolving how to allocate decision-making about their children's upbringing between them, they have declared their inability to serve as the surrogate champion of their children's interests without State assistance. Where the parents disagree in their interpretations of their children's interests, the views of the children sometimes become an important source of information in resolving the dispute.²²

¹⁷ See, e.g., *Zummo*, 574 A.2d at 1149-50 (noting that, because the children asserted no independent religious rights, the court need not resolve whether they had any such rights).

¹⁸ See, e.g., *Andros v. Andros*, 396 N.W.2d 917, 921 (Minn. Ct. App. 1986) (reporting that children had disclosed to the judge in chambers their view that they did not wish to go to their father's faith healing meetings); *S.E.L. v. J.W.W.*, 541 N.Y.S.2d 675, 679-80 (N.Y. Fam. Ct. 1989) (describing child's statements about her religious wishes, made to testifying expert).

¹⁹ See, e.g., *Goodman v. Goodman*, 141 N.W.2d 445 (Neb. 1966) (noting mother's "heavy" reliance, in pressing for modification of custody order, on a "slight preference expressed by the children for their mother's custody and religion"); *Martin v. Martin*, 123 N.E.2d 812 (N.Y. 1954) (per curiam) (considering mother's motion to modify custody judgment supported by testimony of son). Cf. Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1047 (1988) (noting that judicial interviews with children about custody issues, more generally, were usually requested by one of the parents' attorneys).

²⁰ See Scott et al., *supra* note 19, at 1046-47 (reporting results of a study of Virginia judges indicating that "the vast majority of judges reported that they routinely attempted in some way to get information about older children's wishes" and 65% even solicited this information about children as young as six); see also *Margaret B. v. Jeffrey B.*, 435 N.Y.S.2d 499 (1980) (noting that the record reveals that the children do not wish to participate in their father's religion, and that these wishes are a factor to be considered by the court).

²¹ See Scott et al., *supra* note 19, at 1039 ("Increasingly, judges are directed by statute to solicit and consider the child's wishes.").

²² See *id.* at 1040 (noting that children's input may improve decision making on custodial issues).

But this common consideration of children's viewpoints in the custody context does not amount to affording independent rights to children, for courts generally ignore these viewpoints in cases where the parents agree.²³ Even where parents are no longer functioning as a single family unit, the courts defer to the parents' presentation of a unified front on any particular custody-related matter.²⁴ If a child possessed independently recognized rights of free exercise, she could press the court to consider her religious views, regardless of whether her parents had reached agreement about her religious education and exposure.

II. CHILDREN'S RIGHT OF FREE EXERCISE

A. Children's Rights Under the Constitution

In *In re Gault* the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."²⁵ In a series of cases that followed over the next two decades, the Court declared repeatedly that children, as well as adults, have constitutional rights.²⁶ The extent to which these rights would be recognized when they conflicted with those of their parents, however, was and remains far less clear. Indeed, in most of the cases in which bold declarations about children's rights are made, children's interests and views are indistinguishable from those of their parents.²⁷

²³ See Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 *TEMPLE L. REV.* 1585, 1599-1600 (1995) (describing a child's lack of opportunity for input where parents settle their custody dispute out of court).

²⁴ See *id.* (noting that courts will defer to terms agreed to by parents even if those terms reflect a parent's willingness to compromise her child's interests to obtain some unrelated favorable concession).

²⁵ 387 U.S. 1, 13 (1967).

²⁶ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only as one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

²⁷ In *Tinker*, the children's protest of the Vietnam conflict was consistent with the views and actions of their parents. See 393 U.S. at 504 ("Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the plan . . . to wear black armbands" to show their opposition to the U.S. involvement in Vietnam). In *Gault*, the Court grouped the child's interest in liberty and the parent's interest in custody together, and even suggested that the constitutional rights it recognized were shared between parent and child. See 387 U.S. at 42 (discussing "the right to counsel which [the mother] and her juvenile son had").

In contrast, in cases where assertions of children's constitutional rights are directly or indirectly at odds with those of their parents, children have commonly failed to secure separate constitutional protection.²⁸ In *Parham v. J.R.*, a case where this conflict may have been posed most starkly, the Supreme Court determined that whatever liberty interests were implicated for a child by the threat of State confinement in a mental hospital were "inextricably linked with the parents' interest in and obligation for the welfare and health of the child."²⁹ For this reason, the Court concluded that the private interests weighed in its *Mathews v. Eldridge* due process balancing analysis³⁰ should include "a combination of the child's and the parent's concerns."³¹ Once parents' and children's interests were elided, the Court had little difficulty concluding that the child's due process rights were not violated by placing control of psychiatric commitment decisions in the hands of the child's parents and admitting medical personnel.³²

The one notable exception to this parent-deferential approach to the recognition of children's constitutional rights is the Court's analysis of a minor's right to obtain an abortion, an approach set out most thoroughly in *Bellotti v. Baird*.³³ In *Bellotti*, the Court considered the constitutionality of abortion regulations that required a minor to secure parental consent before obtaining an abortion. Building upon an earlier ruling recognizing a minor's constitutional right to secure an abortion,³⁴ the plurality opinion in *Bellotti* suggested three reasons

²⁸ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1988) (concluding that child lacks a liberty interest in maintaining filial relationship with biological father where that interest conflicts with legal father's constitutionally protected parental interest); *In re Kirchner*, 649 N.E.2d 324, 339 (Ill. 1995) (concluding that the child had no protected liberty interest in maintaining relationship with foster parents where such a relationship would interfere with the biological father's exercise of his parental rights). While the constitutional rights of parents were not at issue in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), one interpretation of the Court's different approach to the reach of First Amendment protection in *Hazelwood* and *Tinker* is that the views of parents and children were aligned in *Tinker* and at least potentially at odds in *Hazelwood*. Indeed, one of the grounds for censoring the student article on divorce was that the principal "believed that the student's parents should have been given an opportunity to respond to . . . remarks [about them] or to consent to their publication". 484 U.S. at 263.

²⁹ 442 U.S. 584, 600 (1979).

³⁰ See generally 424 U.S. 319, 335 (1976) (explaining that "the specific dictates of due process generally requires consideration of three distinct factors").

³¹ *Parham*, 442 U.S. at 606.

³² See *id.* at 616.

³³ 443 U.S. 622 (1979) (invalidating a Massachusetts statute which required minors to obtain parental consent before undergoing an abortion).

³⁴ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72-75 (1976)

to justify some circumscription of this and other constitutional rights when applied to children: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."³⁵ Although the plurality did not provide a clear account of how these three considerations motivated its decision, it is clear that the pressing nature of the abortion decision³⁶ and the minor's potentially impaired decision-making capacity³⁷ both played a large role in its articulation of an entitlement to some form of alternative procedure whereby a minor could avoid obtaining her parent's consent by seeking authorization for an abortion from a neutral, State-sponsored decision maker (generally a judge).³⁸ The State-sponsored decision maker must authorize an abortion, the Court directed, if either (1) the minor demonstrated that she was sufficiently mature and informed to make her own decision, or (2) the decision maker was convinced that an abortion would serve the interests of the minor, despite her immaturity.³⁹

I will return to this "judicial bypass" procedure, and the considerations that undergird it, later in this piece. For now, suffice it to note that the process established in *Bellotti* is *sui generis*. It is the only context in which the Court has called for the establishment of a State-operated mechanism to facilitate the exercise of minors' constitutional rights independent of their parents' support or even knowledge.

B. Children's Independent Religious Exercise

Children's rights of religious exercise are asserted in in-

(holding that a state could not give a parent absolute veto power over a minor's abortion decision).

³⁵ *Bellotti*, 443 U.S. at 634.

³⁶ See *id.* at 642 (noting that a primary difference between a minor's options in the context of abortion, and other areas of decision-making, is that, unlike in those other areas where exercising the option can be postponed until adulthood, "[a] pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy").

³⁷ See *id.* at 640 (noting that "[a]s immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a state reasonably may determine that parental consultation . . . is particularly desirable with respect to the abortion decision").

³⁸ The Court made clear that the alternative procedure need not be judicial in nature. See *id.* at 643 n.22 ("We do not suggest . . . that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or office.").

³⁹ See *id.* at 643-44 (outlining the conditions under which a minor could obtain an abortion under a parental consent scheme).

numerable cases, but in the vast majority of them, the children's interests identified match the parents' interests, or indeed, the parents are the actual motivating force behind the litigation. Parents, litigating on their own behalf and as next friend for their children, argue that curricular offerings,⁴⁰ condom distribution policies,⁴¹ compulsory education requirements,⁴² and the like violate their children's free exercise rights, as well as their own. Where children's religious beliefs are in harmony with those of their parents, the case presents no struggle for control, and the courts, in resolving the matter, need not worry too much about precisely whose right is at issue. Where, however, this commonality of beliefs is lacking, whether or not children have free exercise rights independent of their parents' rights could be outcome determinative.

There is reason to expect that children, particularly adolescents, will frequently perceive themselves to be at odds with their parents on matters of religious exercise.⁴³ These disagreements, however, have not been pressed in litigation.⁴⁴ This lack of litigation is presumably a product of practical and legal constraints (children lack the resources, knowledge and procedural mechanisms to assert independent claims in litigation) and of children's disinclination to press their disagreements in the courts. The lack of litigation, however, does not suggest that recognizing minors' independent free exercise rights would be inappropriate, but rather, that if recognized, such rights might nevertheless be exercised sparingly. I will consider the implications of this prediction after first briefly addressing the appropriateness of recognizing such rights.

⁴⁰ See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (claiming that assigned textbooks violated the free exercise rights of parents and their children).

⁴¹ See, e.g., *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995) (asserting that condom distribution programs violated the free exercise rights of parents and children).

⁴² See e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting) (noting that the parents' motion to dismiss in the trial court "asserts, not only the religious liberty of the adults, but also that of the children as a defense to the prosecutions").

⁴³ See Elizabeth Ozorak, *Social and Cognitive Influences on the Development of Religious Beliefs and Commitment in Adolescence*, 28 J. FOR THE SCI. STUDY OF RELIGION 448 (1984) (reporting a study finding that among children in the ninth to eleventh grades, twenty three percent listed a different religious preference from the religion of their parents).

⁴⁴ Such claims may be made more frequently in litigation than is apparent from published judicial decisions. Much litigation involving family disputes is resolved by lower courts without a published opinion.

Bellotti can be read to support the recognition of children's rights independent of their parents where (1) children would be particularly burdened by being required to wait until adulthood to exercise their rights, and (2) where children's capacities are sufficient to exercise the rights in question. Relying on these considerations, an argument can be made for the recognition of children's free exercise rights. First, although requiring children to put off the practice of their chosen faith until adulthood would not have the same dramatic physical consequences as requiring a minor to "put off" the abortion decision, the burden imposed on a child could nevertheless be profound. Religious convictions demand immediate adherence. Most who believe they are commanded by God to follow certain practices and embrace certain beliefs do not feel at liberty to postpone the fulfillment of these most important obligations. Moreover, children who choose to articulate a separate religious identity from that of their parents will generally have reasonably advanced decision-making skills, for the development of a distinct religious identity generally occurs, not coincidentally, when their capacity for reasoned decision making roughly matches that of adults.⁴⁵

I leave to another day a more careful consideration of whether, and to what extent, children are entitled to free exercise protections where their religious views clash with those of their parents. Presently, I set out only a skeleton of an argument to justify my tentative conclusion that such rights should be recognized in order to move on to the focus of my inquiry in this piece: even assuming children have religious rights of their own, what role should the State play in facilitating children's exercise of those rights?

III. THE ROLE OF THE STATE IN FACILITATING CHILDREN'S RELIGIOUS EXERCISE

A. *State Action*

In the context of adult claims of right, the State facilitates the free exercise of religion by getting out of the way. The constitutional protection is only a protection against state

⁴⁵ See ADRIAN FURNHAM & BARRIE STACEY, *YOUNG PEOPLE'S UNDERSTANDING OF SOCIETY* 123 (noting the correlation of development of cognitive skills, particularly the ability to think in abstractions, with the development of religious beliefs); Carol A. Markstrom, *Religious Involvement and Adolescent Psychosocial Development*, 22 *J. OF ADOLESCENCE* 205 (1999) (noting the connection between acquisition of capacity for abstract thinking and development of spiritual identity).

interference.⁴⁶ The assumption underlying this construction of the right is that, absent state interference, adults will be able to exercise their religion as they please.

We cannot, of course, make the same assumption about children. Children are in a relationship of dependence with their parents, and parents exercise considerable control over their children's actions. Parents' authority over their children is clearly facilitated by the State. Through its laws, parents are authorized to limit their children's movement, make medical⁴⁷ and educational choices⁴⁸ on their children's behalf, and even use moderate physical violence against their children, so long as it is for a proper purpose.⁴⁹ Children, in turn, are incapacitated by the State: their authority to act on their own behalf is narrowly circumscribed by the law's prohibition of child labor⁵⁰ and the voidability of their contracts.⁵¹ They do not have authority to choose with whom they will live, and the law gives preference to custodial claims by their

⁴⁶ The First Amendment prohibits congressional action prohibiting the free exercise of religion, and the Fourteenth Amendment is construed to apply the same prohibition to the states. See U.S. CONST. amend. I, asserting in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; U.S. CONST. amend. XIV, declaring in part that:

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

It should be noted that in many contexts state interference is even permitted, so long as the interference derives from the application of a facially neutral law or policy. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

⁴⁷ Parents' authority to grant or withhold consent to their children's medical treatment was recognized at common law, see, e.g., *Zoski v. Gaines*, 260 N.W. 99 (Mich. 1935) (holding surgeon liable for conducting surgery on child at the direction of city physician without parent's consent), and is now commonly provided by statute, see, e.g., MISS. CODE ANN. § 41-41-3 (1999) (authorizing parents to consent to their minor children's medical treatment and allowing minors to provide their own consent in only limited circumstances).

⁴⁸ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down state statute mandating public school attendance for all children as a violation of parents' right to direct the upbringing and education of their children).

⁴⁹ See MODEL PENAL CODE § 3.08 (authorizing the use of force by a parent where "the force is used for the purpose of safeguarding or promoting the welfare of the minor"); RESTATEMENT (SECOND) OF TORTS § 147 ("A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.").

⁵⁰ See, e.g., 29 U.S.C. § 203 (1994) (prohibiting employment, under most circumstances, of a minor under the age of sixteen).

⁵¹ See, e.g., Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967) (describing long recognized practice of allowing minors to void their contractual obligations).

parents, even where strong familial attachments have developed elsewhere.⁵² A strong claim can be made that the State is implicated every time a parent restricts the exercise of a child's fundamental rights. While the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*,⁵³ rejected the argument that the State should be held responsible under the Constitution for offenses committed against a child by his father,⁵⁴ the Court in that case failed to take account of the State's role in confining children to the custody and control of their parents.⁵⁵

Stronger cases for the State's at-least-partial responsibility for the interference with a child's free exercise rights can be made in the two contexts that are the focus of this piece. In cases where a court is asked to determine whether parents should be exempted from the effect of an otherwise applicable law, or how to allocate custodial control between two separating parents, the State is clearly implicated in any interfer-

⁵² States generally give preferential consideration to the claims of parents in private custody disputes, and limit third-party standing dramatically. See, e.g., *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. 1996) (granting a long-absent father custody of children over the objection of the partner of the deceased mother who, despite her multi-year relationship with the children, was determined not to have standing to assert a custodial claim). Moreover, states generally require parents to be proven unfit before the child's interests in a termination of parental rights will even be considered. See, e.g., *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995) (invalidating order terminating father's parental rights and granting father custody of his three-year-old son, whom he had never met, without regard to the child's attachment to adoptive parents, because the state had failed to establish the father's unfitness before terminating his rights). This parental preference has been afforded constitutional protection. See, e.g., *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 846 (1977) (concluding that "[w]hatever liberty interest might otherwise exist in the foster family as an institution [to maintain its relationship with a foster child living in its home for over a year] that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."); cf. *Santosky v. Kramer*, 455 U.S. 745 (1982) (concluding that the due process clause requires parental unfitness to be proven by clear and convincing evidence before parental rights are terminated).

⁵³ 489 U.S. 189 (1989).

⁵⁴ See *id.* at 191.

⁵⁵ In *DeShaney*, the Court conceived the issue presented in purely passive form, asking whether a child's rights were violated where the state failed to step in to prevent harm. See *id.* at 194 (stating the issue involved as "when, if ever, the failure of a state or local government entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights"). The Court's failure to address the role the state played in subjecting the child to his father's control is particularly striking in this case, where the state was involved in authorizing custody, after divorce, to the father, and authorizing return to the father, after the son was removed based on suspicions of abuse. See David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 64-68 (1989) (arguing that the Court overlooked the state's responsibility for placing and maintaining the child in his father's custody).

ence with a child's religious exercise rights that follows from the court's determination.

Where the State steps in to resolve religiously inspired grievances affecting children, the resolution of those grievances constitutes state action which could, in turn, give rise to a free exercise claim asserted by the affected child. Although the Supreme Court has recently exempted from constitutional challenge state actions that are facially neutral toward religion,⁵⁶ the religious focus of the courts' analysis in these cases affecting children will prevent the analysis from being characterized as neutral. Should a child wish to challenge the court's determination that her parents need not send her to school, or her father need not take her to Sunday school, she should be successful in arguing that the determination constituted non-neutral state action.⁵⁷

B. *Ascertaining the Child's Religious Views*

If children have constitutionally protected free exercise rights independent of their parents' rights, and if non-neutral state action occurs in all cases in which the court is called upon to resolve parents' claims of authority to control the religious upbringing of their children, then the State risks interfering with children's free exercise rights every time it resolves such a claim. To avoid inadvertent rights violations, nothing seems more natural than to ascertain the child's religious views, as Justice Douglas proposed.⁵⁸ If such views could be extracted from the child without the child's awareness or involvement, they might well serve not only the court's attempt to protect the child's rights, but also the court's service of the child's best interests. It is my view, however, that such a painless extraction is impossible. While in any individual case this inquiry might facilitate a child's exercise of her rights or the rendering of good decisions on her behalf, these potential benefits are outweighed by the

⁵⁶ See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the grounds the law proscribes (or prescribes) conduct his religion prescribes (proscribes)'" (internal citations omitted)). In *Smith*, the Court distinguished cases such as *Yoder*, which "involved the free exercise clause in conjunction with other constitutional protections." *Id.* at 881-82.

⁵⁷ In *Smith*, the Supreme Court held that a religiously motivated objection to facially neutral laws did not entitle the objector to protection from enforcement under the free exercise clause. See *id.* at 879.

⁵⁸ See generally, *Wisconsin v. Yoder*, 406 U.S. 205, 241-49 (1972) (Douglas, J., dissenting).

considerable risk of harm created by the inquiry. In most cases where the child has religious views that depart from those of her parents, such an inquiry will either yield useless information (inspired by the child's distrust of the process), or traumatic and costly disclosure. Under either scenario, the encounter harms the child.

1. *Frieda Yoder*. Justice Douglas's dissent applied to only two of the three cases consolidated before the Court in *Yoder*, because he noted that "Frieda Yoder has in fact testified that her own religious views are opposed to high-school education," and he therefore "join[ed] the judgment of the Court as to respondent Jonas Yoder [Frieda's father]."⁵⁹ In fact, Frieda was called to testify in open court in front of the entire assemblage of lawyers, judges, and interested onlookers, including her family's minister, who had already testified as to the religious importance of preventing her from attending school after the eighth grade.⁶⁰ Further, she was asked a series of leading questions by counsel for the Amish parents and by counsel for the State.⁶¹ If we are ever to be concerned

⁵⁹ 406 U.S. at 243.

⁶⁰ See Trial Hearing on Attendance of Amish Children at the New Glarus Public Schools at 79, *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Testimony of Reverend Reuben Hirschberger).

⁶¹ See *id.* at 92-95, (Testimony of Frieda Yoder). Examination by [parents' counsel]:

Q: Frieda, I won't ask you many questions, how old are you?

A: 15

Q: Do you believe in the Amish religion?

A: Yes.

Q: Do you want to live according to the way of your people?

A: Yes.

Q: The Amish way?

A: Yes.

Q: Do you live that way now?

A: Yes.

Q: Would your going to high school be against your religious belief, Frieda?

A: Yes.

Q: Are you the daughter of Jonas Yoder?

A: Yes.

That is all.

Cross-examination by [counsel for the state]:

Q: Frieda, you graduated from 8th grade?

A: Yes.

Q: When was that, last spring?

A: Yes.

Q: [Defense counsel] asked you, and I think you said that you wanted to be brought up in the Amish religion, is that right?

A: Yes.

Q: Now Frieda, otherwise you would be able to attend high school physically, if you were free of religion you could attend, you could walk or get there on the bus?

A: Yes.

about adults dominating children and controlling children's articulation of their views, we should be concerned about Frieda's treatment in this case. Asking for her viewpoint was, in all likelihood, a meaningless display. While Frieda may, in fact, have believed precisely what she said, and even believed it with fervent conviction, it is impossible to ascertain whether her words, in fact, reflect such true beliefs. Her words could have been offered, just as easily, as the response that she was required to make by her position in her family and her community.

Let's assume, for a moment, that Frieda wished she could attend high school and that, at least to this extent, she disagreed with the religious views of her parents. Would she seize this opportunity to declare her disagreement with her parents and her church? What would be the consequences to her of making such a declaration? At a minimum she would undermine her familial relationships, and probably her community-wide standing, considerably. And if the State had attempted to act on her disagreement, what could it do to counter her parents' resistance? Would it call out the National Guard to escort her to school? Even if a less aggressive enforcement mechanism was sufficient to get Frieda to school, what effect would this daily reminder of the State's disregard of her parent's authority, and this daily disruption of the family's life patterns, have on Frieda's relationship with her family? Acting on Frieda's solicited viewpoint would, at the very least, be logistically problematic, and, in all likelihood, psychologically destructive.⁶²

Conversely, the State's failure to act after calling for the public declaration could be equally destructive. In addition

Q: While you were in the elementary grades, 1 through 8, did you pass all those grades?

A: No.

Q: You didn't pass all the grades?

A: All except one.

Q: Did you get a diploma from the 8th grade?

A: Yes.

Q: So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of your religion?

A: Yes.

Q: That is the only reason?

A: Yes.

That is all.

Id.

⁶² See Andrew S. Watson, *Children, Families, and Courts: Before the Best Interests of the Child and Parham v. J.R.*, 66 VA. L. REV. 653, 678-79 (1980) (arguing that the State's piecemeal circumscription of parental authority creates significant risks for family functioning).

to the damage done by the declaration itself, Frieda is likely to learn a bitter lesson if she responds with honesty, at great personal risk, and then her view is disregarded.

Alternatively, Frieda might choose to lie, perhaps because she would feel pressured to do so by her family and community, or perhaps because she had a better sense than Justice Douglas of the consequences to her life of declaring her opposition. While such an approach would leave her in control, this control would come at a cost. Feeling forced to declare one's principles falsely inflicts a far greater harm to one's dignity than making a private choice to conceal one's true views. Moreover, perceiving the adults' facile willingness to unquestioningly embrace her forced falsehoods as her true views would surely undermine Frieda's sense that her views were of any real importance.⁶³ She would learn that she had a part to play, and that her performance was successful.

Arguably, the very asking of the question—"Do you share your parents' beliefs, Frieda?"—imposes some harm.⁶⁴ Such a question raises the prospect of intra-family division on the State's time, not on the child's time.⁶⁵ Should Frieda wish to question her family's beliefs, she should be allowed to do so in a context that she identified as comfortable.⁶⁶ The fact that

⁶³ Indeed, the lack of attention shown by the lawyer for the state to the single apparently unexpected answer—that she had not passed every grade—may have sent the message that what she had to say, even about a matter that was probably of some significance to her, was not a matter of much interest to the lawyer or the court. See *supra* note 61.

⁶⁴ This can be compared to the harm anticipated by the Court in *Parham v. J.R.* If the State convened an adversarial proceeding every time a child disagreed with his parent's determination that he needed mental health treatment. See generally 442 U.S. 584 (1978). In that context, the Court worried that the very adversarial nature of the proceeding would undermine parents' authority and effectiveness in facilitating ongoing treatment. *Id.* at 610.

⁶⁵ My closest direct experience with this kind of questioning was in the context of child protection proceedings, during which I would ask my child clients questions such as "Do you want to live with your mother?" The very asking of these questions by a somewhat important looking professional adult appeared to facilitate the alienation between child and parent. In the context of those proceedings, however, division had already been introduced into the family by the allegations of abuse and neglect and, if those allegations were true, by the underlying abuse. Moreover, in many cases, separation of parent and child was inevitable, so the harm caused by divisive questioning was almost certainly reduced, and the benefit of learning something about the child's views almost certainly increased. In the world of Frieda Yoder, however, there was no reason to anticipate family rupture.

⁶⁶ Indeed, many Old Order Amish communities support a tradition of rumspringa ("running around" time) during which older adolescents are allowed to explore non-Amish ways and depart from the traditional restrictions imposed by their religion. See *Its Party Time! An Evening with Amish Youth*, LANCASTER NEW ERA, Aug. 6, 1998 at A1 (describing the tradition of rumspringa). The goal of rumspringa is to give youth, prior to adult baptism, a chance to experiment and question, in the hope that

such opportunities might not be offered to her privately does not justify the State's offering its clumsy, ill-timed assistance. The State is simply too powerful and too disconnected from Frieda and her community to engage in such a delicate inquiry.

2. *Adam Zummo*. In *Zummo v. Zummo*,⁶⁷ the Pennsylvania Superior Court considered the constraints imposed by the constitutional right of free exercise of religion on the authority of a custody court to limit a parent's control over his children's religious upbringing. *Zummo* involved a family composed of a Jewish mother and a Roman Catholic father.⁶⁸ Pursuant to an oral pre-nuptial agreement between the parents, all three children were raised in the Jewish faith.⁶⁹ When the couple divorced, they agreed to share legal custody of the children (then three, four, and eight), and to give primary physical custody to the mother.⁷⁰ They turned to the courts for assistance, however, in resolving their dispute about the father's authority to take the children to Roman Catholic services and his obligation to take them to Jewish Sunday School during his alternate weekend visits.⁷¹

In entering an order circumscribing the father's control of the children's religious education, the trial court stated that the children had been "assiduously" grounded in the Jewish faith and the children should be permitted to continue in "their chosen faith."⁷² While the Superior Court rejected both the conclusion that the children were "assiduously grounded" in Judaism, and that Judaism was their "chosen faith," it appears that, in fact, the record supported the conclusion that their family identity was Jewish,⁷³ but did not support the conclusion that the children had "chosen" Judaism.⁷⁴ There was no evidence to suggest that any of the children had expressed a position about their religious identity, let alone whether it was an identity that they wanted. The Superior Court noted that whether the children had independent religious *rights* was an open question, but a question it need

this experience will eventually lead them back to the Amish practices, more confident for knowing something about the world which they are giving up. See *id.*

⁶⁷ See *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. 1990).

⁶⁸ See *id.* at 1141.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² *Id.* at 1148.

⁷³ See *id.* at 1141 (noting that "[d]uring the marriage, the Zummo family participated fully in the life of the Jewish faith and community . . . they celebrated the Sabbath every Friday night and attended all the high holiday services").

⁷⁴ See *id.* at 1148.

not address because no such rights had been asserted.⁷⁵ It then went on to conclude that the father could not be prevented from taking the children to Roman Catholic Mass without violating his constitutional right of free exercise.⁷⁶

The consideration of the costs and benefits of soliciting children's religious views shifts, to some extent, in the context of custody disputes. Most significantly, the harm imposed by the court by probing children's views in this context may be considerably reduced. First, the family is already fractured. While calling on the child to take a position could further undermine the various familial relationships, it would not be the original, nor is it likely to be the primary, source of family discord.⁷⁷ Second, because the parents are engaged in a disagreement about the proper religious upbringing for their children, and particularly if the dispute has produced arguments between the parents within the children's hearing, these children are more likely to have considered their own views about how they would, for example, like to spend their weekends. Indeed, in many such cases, both parents will have already probed the children themselves for evidence of a supportive viewpoint. Third, children who are the subject of custody disputes are already involved in litigation that often leads the court to solicit their viewpoint on a range of issues, including where, and with which parent, they prefer to live.⁷⁸

In this context, inquiring into the child's view of his own religious identity may be perceived, by both parent and child, as less intrusive. The original family arrangement has been destroyed, and the family itself has turned to the court for assistance in organizing an alternate arrangement. While the appropriateness of asking children with whom they want to live is hotly debated among psychologists and lawyers,⁷⁹ it is likely that the cost and benefits to children of having their re-

⁷⁵ See *id.* at 1149. The court failed to consider, however, whether it was under any obligation to ask the children for their views.

⁷⁶ See *id.* at 1150.

⁷⁷ Of course, this argument could cut the other way: where children are experiencing the emotional trauma often associated with divorce, they may be especially vulnerable to the emotional harm associated with being called upon to pick sides. See Scott et al., *supra* note 19, at 1041-42 (citing sources contending that soliciting children's viewpoints in custody disputes imposes stress and is potentially psychologically harmful). As I argue later in this piece, an assessment of the risk of trauma associated with asking a child to take a position on religious questions should be tied into the broader assessment of risks associated with asking a child to take a position on other custody-related matters.

⁷⁸ See *supra* notes 19-21 and accompanying text.

⁷⁹ See Scott et al., *supra* note 19, at 1041-42 (citing to sources favoring and opposing the solicitation of and reliance on children's viewpoints in custody proceedings).

ligious views solicited will roughly track the harms and benefits that come with viewpoint solicitation more generally.⁸⁰

C. *The Judicial Bypass Model*

In the abortion context, the Supreme Court went out of its way to suggest a mechanism by which states could be informed of a minor's desire to have an abortion, and could authorize action in conformity with that desire, all without notice to the minor's parents.⁸¹ The judicial mechanism embraced in *Bellotti* demonstrated both the Court's commitment to the recognition and protection of children's constitutional rights, and its willingness to circumscribe those rights in light of children's particular vulnerabilities, impaired decision-making, and dependence upon their parents.⁸² The Court recognized a minor's right to have an abortion, even without parental consent, but allowed states to impose some limits to encourage intra-familial resolution of the issue.⁸³ To accommodate minors whose attempts at intra-familial resolution failed, or who judged an attempt at such a resolution too risky to even venture, the Court required states to develop another means by which a minor could either establish her maturity to make the decision on her own, or convince an authoritative adult that an abortion was in her best interest.⁸⁴

In some sense, the judicial bypass procedure represents a remarkably generous granting of rights to children. A minor who can convince a judge of her maturity, *regardless of age*, can decide, on her own, whether she wants to have an abortion. Even where such maturity cannot be established, the minor is granted the authority to go outside the parental relationship to obtain consent based on considerations of her interests alone. In another respect, however, minors' abor-

⁸⁰ Some courts attempt to minimize the harm and enhance the benefits of soliciting children's views by asking questions designed to illicit indirect evidence of these views rather than asking the child to confront the choices directly. See RICHARD A. GARDNER, *FAMILIAL EVALUATION IN CHILD CUSTODY LITIGATION*, 171-75 (1982) (suggesting lines of questioning that an examiner can pursue to elicit information about the child's custodial preferences indirectly); see also Scott et al., *supra* note 19, at 1047-50 (reporting that many of the surveyed Virginia judges "never asked younger children directly about their preferences. Rather . . . [they] typically attempted to discern preference through indirect questions or through the child's unsolicited comments").

⁸¹ See *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979).

⁸² See *id.* at 634.

⁸³ See *id.* at 637-42.

⁸⁴ See *id.* at 643-44 (requiring states to allow a minor to obtain an abortion without obtaining parental consent by means of an alternative procedure before an authoritative adult).

tion rights are dramatically circumscribed. Unlike the adult woman, who can simply walk into the abortion clinic and arrange for the procedure, a minor must first go through a grueling judicial procedure at which she must announce the fact of her pregnancy and, often, her reasons for seeking to terminate it to an unknown authority figure. She has to endure the possible indignity of being assessed for her maturity through a series of questions.⁸⁵ Many minors have described the judicial bypass procedure as far more traumatic than the abortion itself.⁸⁶ Moreover, the delays imposed by the bypass requirements can push the abortion from a relatively routine procedure to a more medically complex and risky one.⁸⁷

It could be argued that the successful negotiation of the logistically intimidating and emotionally traumatic bypass procedure serves as an effective proxy for a minor's preparedness to take on decision making independent of family members. If the minor makes it through this system she has proved her competence, the authenticity and stability of her decision, and her ability to operate independent of family supports.⁸⁸ A process that demands this much of minors seeking abortions may well be flawed, however, for it will surely screen out many minors who are clear in their desire to have an abortion, but who lack the wherewithal, or the

⁸⁵ See *In re Mary Moe*, 423 N.E.2d 1038, 1040 n.1 (Mass. Ct. App. 1981) (suggesting that the judge's assessment of maturity should consider the minor's tone of voice, expression and demeanor, her understanding of child rearing and its consequences on education and her knowledge of the medical risks involved).

⁸⁶ See *Hodgson v. Minnesota*, 497 U.S. 417, 476 (1990) (quoting district court findings that "the experience of going to court for a judicial authorization produces fear and tension in many minors" who are intimidated by the judicial authority figure and resentful at being forced to share intimate details of their personal lives, and that "[s]ome minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself").

⁸⁷ See Gary Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 AM. PSYCHOLOGIST 79, 80 (1987) (noting that the judicial bypass process introduces delays which, in turn, "increase the medical and psychological risks associated with abortion"); Susanne Yates & Anita Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 AM. J. OF PUB. HEALTH 646, 648 (1988) (documenting delays ranging from one to thirty-nine days between the time a minor contacted a lawyer and the time the hearing was held); see also R. Anthanastou et al., *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortion: A Longitudinal Study*, 5 FAM. PLANNING PERSPS. 227, 227 (1973) (suggesting that the risk that an individual will suffer negative psychological effects from having an abortion may increase in the second trimester).

⁸⁸ Virtually all minors who go through the judicial bypass procedure are found to be mature. See ROBERT H. MNOOKIN, *THE INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 239 (1985) (reporting that of the 1300 pregnant minors who sought authorization for abortions through judicial bypasses between 1981 and 1983, 90% were found to be mature); Yates & Pliner, *supra* note 87, at 647 (finding that only nine out of 477 minors were found to be immature).

fortitude, to endure the judicial bypass process. In the context of teen pregnancy, a system that is so rigorous that it screens out some minors who want abortions but who are afraid to discuss the topic with their families or a judge seems to reflect a foolish allocation of the risk of error.

D. From Abortion to Free Exercise

In the context of children's potential free exercise claims, in contrast, a system that requires considerable initiative on the part of the minor in asserting the claim would reflect a proper allocation of risk. Surely such a system would screen out some legitimate, authentic claims of minors to exercise their religion independent of their parents, but it would also protect children entirely from the intrusive inquiry of the State and from the forced identification of a religious view, translated into a legal claim by an overzealous search for unarticulated rights violations. This, in my view, is the right balance, particularly in light of the fact that religious convictions, in stark contrast to the abortion decision, can be nurtured in private, and acted upon in adulthood. Indeed such a progression in children's development of a spiritual identity is common.⁸⁹

While I am inclined to recognize a child's right of free religious exercise, regardless of whether or not their chosen beliefs and practices conform with those of their parents, I would leave it to children to take the initiative in identifying their religious claims. I would eliminate all procedural obstacles that would prevent children from asserting such claims, either in their own litigation,⁹⁰ or as part of their parents' suits.⁹¹ As in the abortion context, I would ensure that law-

⁸⁹ See generally, Raymond H. Potvin & Che-Fu Lee, *Adolescent Religion: A Developmental Approach*, 43 SOC. ANALYSIS 131 (1982) (reporting results of study suggesting that adolescents' concept of their religion develops from a focus on parent-controlled religious practice to a peer-oriented exploration of beliefs to a re-orientation toward practice once they have embraced a belief system of their own).

⁹⁰ I would favor, for example, eliminating any requirement that a "next friend" or guardian *ad litem* be appointed to represent the minor in litigation. See, e.g., FED. R. CIV. P. 17(c) (requiring the court to appoint a guardian *ad litem* for infants or incompetent persons not otherwise represented).

⁹¹ Children asserting religious interests that conflict with the interests asserted by their parents in litigation should be authorized to intervene as of right. See, e.g., FED. R. CIV. P. 24(a) declaring:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the . . . subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.

yers are available, free of charge, to assist minors who self-identify.⁹² But in my view, other than eliminating these procedural obstacles, the State should do nothing to promote a child's independent religious exercise unless and until the child solicits state aid. Where the child does self-identify and is found by a court to have a valid claim that her religious exercise is being impeded,⁹³ the State may well have a role to play in ensuring that the child's rights are protected. If the child cannot exercise her right without obtaining independence from her parents, the State may be obligated to remove State-imposed obstacles to achieving that independence.⁹⁴ Of course, as with all free exercise claims, the court would consider what State interests are served by maintaining those obstacles to independence.⁹⁵ The classic interest would presumably be the interest in ensuring that children grow up to become healthy, self-sufficient adults, which in some cases would justify maintaining the child's position of dependence, even at the expense of her ability to exercise her religious rights.⁹⁶

⁹² See, e.g., VA. CODE ANN. § 16.1-241(V) (providing that, in bypass proceedings, "[t]he court shall advise the minor that she has a right to counsel and shall, upon her request, appoint counsel for her").

⁹³ The Court would ask the same questions it asks of adults litigants to ascertain the validity of their free exercise claims. Pursuant to *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), it would be required to find that the State action in question was not facially neutral. See *supra* note 58. Second, it would consider whether the objection to the state action in question was motivated by sincerely held religious convictions and whether the litigants' ability to act on those convictions was in fact impeded by the state action. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972) (noting that Amish parents' practices that were at odds with the compulsory attendance law were only entitled to constitutional protection under the Free Exercise clause if religiously grounded, and threatened with serious disruption if the law was enforced against them).

⁹⁴ For example, the State might be obligated to recognize a minor's emancipated status or, more particularly, grant the minor authority to sign a lease, self-register for school, or secure a job, despite general age restrictions to the contrary. This modification of a minor's legal authority to act on her own behalf could be likened to the common practice, in many states, of granting enhanced legal authority to minors who have married or become parents. See, e.g., MISS. CODE ANN. § 41-41-3 (1999) (authorizing married minors to give consent for their own medical treatment and minor parents to consent to the medical treatment of their children). As in those contexts, granting additional legal authority to minors who have decided to assert an independent religious identity can be justified by some combination of necessity (they have taken on additional responsibilities which the additional authority will help them meet) and appropriateness (they have reflected their preparedness to take on these responsibilities).

⁹⁵ See *supra* note 8 and accompanying text.

⁹⁶ If, for example, a twelve-year-old sought the State's assistance in separating from her family to pursue her independent religious convictions, a court might well conclude that the State's interest in ensuring that the child was adequately protected, nurtured and supported was sufficiently compelling to justify denying the

In the custody context I would modify this approach only slightly, by allowing courts to inquire into issues of religious identity, even when not raised by the child, under the same circumstances in which they would inquire more generally into the child's views about other custody issues. Where a clear view emerges as a result of that inquiry that includes an express rejection of one parent's religion, the embracing of the other parent's faith, and an indication of discomfort, rather than simply disinterest, in the activities associated with the rejected religion, courts should limit or prohibit the child's engagement with the rejected religion accordingly. Where the child's views, however, reflect any ambiguity, or lack of strong conviction, courts should only intervene to the extent necessary to ensure that both parents' choices regarding religious upbringing are honored and that the exposure to the two sets of religious beliefs and practices in question does not cause emotional or psychological harm to the child.⁹⁷

IV. CONCLUSION

My proposal is far from utopian. I propose to trade away some amount of protection for a child's right to live and worship according to her conscience in exchange for protection from the State's destructive efforts to facilitate the exercise of such rights. Perhaps implementation of the modified proposal in the custody context, which offers the State a modest opportunity to probe children's religious views in cases where such probing is adjudged to serve the child's interests, would teach us something about children's self-perceptions about religious identity, as well as how to inquire about those perceptions, with minimal intrusion on children's ongoing development.

child's religious claim.

⁹⁷ As noted earlier, this is the basic standard that is currently applied in resolving disputes between separated parents over control of their children's religious upbringing. See *supra* note 16 and accompanying text. As in the context of claims brought by parents seeking protection from the application of state laws, I advocate maintaining the status quo, in the absence of affirmative assertions of religious views by minors.