# PARENT-CHILD SPEECH AND CHILD CUSTODY SPEECH RESTRICTIONS

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*The "best interests of the child" test—the normal rule applied in custody disputes between two parents—leaves family court judges ample room to consider a parent's ideology. Parents have had their rights limited or denied partly based on their advocacy of atheism, racism, homosexuality, adultery, nonmarital sex, Communism, Nazism, pacifism and disrespect for the flag, fundamentalism, polygamy, and religions that make it hard for children to "fit in the western way of life in this society."*

*Courts have also penalized or enjoined speech that expressly or implicitly criticizes the other parent, even when the speech has a broader ideological dimension. One parent, for instance, was ordered to "make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic," because the other parent was homosexual. Another mother was stripped of custody partly because she accurately told her 12-year-old daughter that her ex-husband, who had raised the daughter from birth, wasn't in fact the girl's biological father.*

*Courts have also restricted a parent's religious speech when such speech was seen as inconsistent with the religious education that the custodial parent was providing. The cases generally rest on the theory (sometimes pure speculation, sometimes based on some evidence in the record) that the children will be made confused and unhappy by the contradictory teachings, and will be less likely to take their parents' authority seriously.*

*This article argues these restrictions are generally unconstitutional, except when they're narrowly focused on preventing one parent from undermining the child's relationship with the other. But in the process the article makes several observations that may be helpful whether or not readers endorse this proposal: (1) The best interests test lets courts engage in a wide range of viewpoint-based speech restrictions. (2) The First Amendment is implicated not only when courts issue orders restricting parents' speech, but also when courts make custody or visitation decisions based on such speech. (3) Even when the cases involve religious speech, the Free Speech Clause is probably a stronger barrier to the judge's penalizing the speech than are the Religion Clauses. (4) If parents in intact families have First Amendment rights to speak to their children, without the government's restricting the speech under a "best interests" standard, then parents in broken families gener-*

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*ally deserve the same rights. (5) Parents in intact families should indeed be free to speak to their children—but not primarily because of their self-expression rights, or their children's interests in hearing the parents' views. Rather, the main reason to protect parental speech rights is that today's child listeners will grow up into the next generation's adult speakers. (6) Attempts to allow restrictions only when the speech imminently threatens likely psychological harm (or even causes actual psychological harm) to children may seem appealing, but will likely prove unhelpful.*

## INTRODUCTION

Percy Bysshe Shelley was a poet and a cad. He married his wife, Harriet Westbrooke, when she was 16, but left her for Mary Wollstonecraft Godwin three years later. When Shelley left Harriet, their daughter was a year old, and Harriet was pregnant with their son.

Two years later, Harriet drowned herself. When Shelley decided to raise the children himself, Harriet's parents refused to turn them over, and Shelley went to court. Though fathers had nearly absolute rights under then-existing English law, Shelley became one of the first fathers in English history to lose custody of his children.[1]

Percy Shelley was also an avowed atheist—and the Court of Chancery mostly relied on his views, not on his infidelity or unreliability, in denying him custody.[2] Shelley shouldn't be put in charge of the children's education, the Lord Chancellor reasoned: Shelley endorsed atheism and sexual freedom, and would teach his children the same values. Twenty years later, Justice Joseph Story likewise wrote that a father could lose his rights for "atheistical[ ] or irreligious principles."[3]

Shelley's case may look like something out of another time and place. That time and place, it turns out, is 2005 Michigan, where a modern Shelley might be denied custody based partly[4] on his "not regularly attend[ing] church and present[ing] no evidence demonstrating any willingness or capacity to attend to religion with [his chil-

[1] Shelley v. Westbrooke, 37 Eng. Rep. 850, 851 (Ch. 1817). *Shelley* is generally seen as a landmark case in the evolution away from unchallenged paternal custody, *see, e.g.*, Henry H. Foster & Doris Jonas Freed, *Life With Father: 1978*, 11 FAM. L.Q. 321, 325–26 (1978), though several cases anticipated it. *See* Rex v. Delaval, 97 Eng. Rep. 913, 913–15 (K.B. 1763) (suggesting that if father were involved with arranging eighteen-year-old daughter's "prostitution" as "kept mistress," he ought not regain custody of his daughter); *Blisset's Case*, 98 Eng. Rep. 899, 899–900 (K.B. 1773) (denying father's right to custody because he was bankrupt, abusive, and failed to support his family); Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1384–87 (1999) (citing some other pre-*Shelley* cases denying father's right to custody on various grounds).

[2] *Shelley*, 37 Eng. Rep. at 851.

[3] JOSEPH STORY, 2 EQUITY JURISPRUDENCE § 1341 (1836).

[4] In most modern custody cases, courts are asked to consider a wide range of factors, and the constitutionally suspect factor—be it race, religion, or speech—is only one. But restricting parental custody based even partly on parents' speech or religiosity implicates the First Amendment, for reasons discussed in the text accompanying notes 104–07.

dren],"[5] or having a "lack of religious observation."[6] It's 1992 South Dakota, where Shelley might have been given custody but only on condition that he "will agree to present a plan to the Court of how [he] is going to commence providing some sort of spiritual opportunity for the [children] to learn about God while in [his] custody."[7] It's 2005 Arkansas, 2002 Georgia, 2005 Louisiana, 2004 Minnesota, 2005 Mississippi, 2006 New York, 2005 North Carolina, 1996 Pennsylvania, 2004 South Carolina, 1997 Tennessee, 2000 Texas, and, going back to the 1970s and 1980s, Alabama, Connecticut, the District of Columbia,

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[5] Underhill v. Garcia, No. 261651, 2005 WL 3304120, at *2 (Mich. Ct. App. Dec. 6, 2005) (reversing award of custody to mother, giving as one factor in father's favor that "[father] regularly took [son] to church and Sabbath school, taught [him] how to pray and read him Bible stories, while [mother] testified that she did not regularly attend church and presented no evidence demonstrating any willingness or capacity to attend to religion with [son]"); Reed v. Lewandowski, No. 260372, 2005 WL 2291850, at *4 (Mich. Ct. App. Sept. 20, 2005) (upholding award of custody to mother and giving as one factor in mother's favor that "[mother] attended church regularly and brought the child with her," whereas father "did not attend church" but only "tried to teach the child about religion at home").

[6] Evans v. Evans, No. 261591, 2005 WL 3116506, at *2 (Mich. Ct. App. Nov. 22, 2005) (noting father's "lack of religious observation" as weighing against him, though concluding that on balance other factors made up for this). MICH. COMP. LAWS § 722.23(b) (1993) provides that courts applying the "best interests of the child" test should consider, among other things, "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." Many Michigan decisions interpret this as preferring parents who would provide a more religious upbringing over parents who would provide an irreligious or a less religious upbringing (and not just as mandating considerations of child's own expressed religious preference, *see infra* note 203, or maintaining continuity of religious or irreligious upbringing). *E.g.*, *In re* Barlow, 273 N.W.2d 35, 44 (Mich. 1978) (treating § 722.23(b) as implementing view that, even for children who are too young to have preexisting religious training, "consideration of religious factors serves to promote values highly prized in our society"). For fourteen Michigan cases (from 1996 to 2005) where a trial or appellate court cited in the prevailing parent's favor the parents' comparative religiosity or willingness to raise child religiously, see *infra* Appendix, pp. 722–24.

[7] Hulm v. Hulm, 484 N.W.2d 303, 305 & n.* (S.D. 1992) (upholding trial court order that imposed such requirement as condition of mother's getting custody); *see also id.* at 306 (Henderson, J., dissenting) (arguing that father should have been awarded custody, and beginning his list of reasons by stating that mother "[d]id not want the child baptized," "[d]id not attend church," and "[w]anted child to choose a religion, years hence," while father did want child baptized, did attend church "and took child to church," and "thought the little girl needed religious instruction now"); Hanks v. Hanks, 334 N.W.2d 856, 860–61 (S.D. 1983) (Henderson, J., concurring in part and dissenting in part) ("I am also troubled by the indifference of the mother and stepfather towards the religious upbringing of these children. [The children] do not go to church. Appellee and stepfather have indicated that religion is of very little importance to the children. There is little effort made on the part of the mother and her new husband to give these children a religious upbringing. . . . Religious instruction is missing. This void affects their attitude towards traditional values. . . . [T]he trial court failed to enter any findings of fact or conclusions of law with respect [to this]. This is error.").

Iowa, Montana, and Nebraska.[8] In 2000, the Mississippi Supreme Court ordered a mother to take her child to church each week, reasoning that "it is certainly to the best interests of [the child] to receive regular and systematic spiritual training";[9] in 1996, the Arkansas Supreme Court did the same, partly on the grounds that weekly church attendance, rather than just the once-every-two-weeks attendance that the child would have had if he went only with the other parent, provides superior "moral instruction."[10]

Likewise, through the past decades, parents have had their rights limited or denied based partly on their racist speech,[11] advocacy of Communism,[12] Nazi sympathies,[13] advocacy of pacifism and disrespect

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[8] For over seventy cases from all these jurisdictions (from 1970 to the present) in which a trial or appellate court cited in the prevailing parent's favor the parents' comparative religiosity or willingness to raise child religiously, see *infra* Appendix, pp. 722–33; over twenty-five of the cases are from 2000 to the present, and over fifteen more are from the 1990s. For cases holding that a parent's lack of religiosity generally ought not be a factor in custody decisions, see Placencia v. Placencia, 3 S.W.3d 497, 502 (Tenn. Ct. App. 1999); *In re* Marriage of Oswald, 847 P.2d 251, 253 (Colo. Ct. App. 1993); Burrows v. Brady, 605 A.2d 1312, 1317 (R.I. 1992); Elbert v. Elbert, 579 N.E.2d 102, 110 (Ind. Ct. App. 1991); Eastes v. Eastes, 590 S.W.2d 405, 408 (Mo. Ct. App. 1979); Wilson v. Wilson, 473 P.2d 595, 598–99 (Wyo. 1970); Welker v. Welker, 129 N.W.2d 134, 138 (Wis. 1964); Maxey v. Bell, 41 Ga. 183, 185–86 (1870).

[9] McLemore v. McLemore, 762 So. 2d 316, 320 (Miss. 2000) (quoting and endorsing reasoning of *Hodge v. Hodge*, 188 So. 2d 240, 240 (Miss. 1966), which approved similar order).

[10] Johns v. Johns, 918 S.W.2d 728, 731 (Ark. Ct. App. 1996). The father was allowed to drop the child off at church, and thus wasn't legally obliged to attend the services himself; but this means the order gave the father the choice of either attending a church service that he objected to, or having his time with his child reduced because of his nonchurchgoing ways. *See* Carrico v. Blevins, 402 S.E.2d 235 (Va. Ct. App. 1991) (overturning similar condition because it "compels [the noncustodial parent] to attend church or to relinquish a portion of her limited visitation time").

[11] *See, e.g.*, McCorvey v. McCorvey, No. 05-174, 2005 WL 2863915, at *7–*9 (La. Ct. App. Nov. 2, 2005) (discussing trial court order that barred father from making "any racial . . . slurs . . . in the presence of the child," noting that trial judge's reason for order was "that it was in the best interest of the child to be reared in an atmosphere of respect for all cultures and of tolerance for diversity, where that is the reality of our American society into which she is growing," and upholding contempt citation based on father's violation of this order). For five other cases in which a trial or appellate court cited in the prevailing party's favor the other party's racist speech, see *infra* Appendix, p. 733.

[12] For five cases from 1936 and the 1950s in which a trial or appellate court noted parent's Communism as factor or potential factor against parent's custody claim, barred parent from teaching child Communism, or decided against parent when parent's Communism was urged as a factor against parent, see *infra* Appendix, p. 734.

[13] Reimann v. Reimann, 39 N.Y.S.2d 485, 485 (Sup. Ct. 1942) (denying custody to father because he had been "contaminated with the germ of Nazism which makes him totally unfit to rear and guide the destiny of any living thing, far less an impressionable and susceptible child of tender years"); *see also* Kennard v. Kennard, 179 A. 414, 417–18 (N.H. 1935) (reversing decision denying visitation based on father's supposed pro-German sympathies and disloyalty during World War I).

for the flag,[14] advocacy of polygamy,[15] defense of the propriety of homosexuality,[16] defense of adultery,[17] advocacy of (or inadequate condemnation of) nonmarital sex,[18] teaching of fundamentalism,[19] teaching of "non-mainstream" religions,[20] teaching of religious intol-

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[14] Cory v. Cory, 161 P.2d 385, 386 (Cal. Ct. App. 1945) (reversing such a decision); Jackson v. Jackson, 309 P.2d 705, 710 (Kan. 1957) (same).

[15] Shepp v. Shepp, 821 A.2d 635, 637 (Pa. Super. Ct. 2003), *appeal allowed*, 832 A.2d 1064 (Pa. 2003); *see also In re* Black, 283 P.2d 887, 892 (Utah 1955) (upholding state's removing children from intact polygamous family, and returning them only on condition that they would not be taught polygamy).

[16] For six cases in which a trial or appellate court decision restricted pro-homosexuality or homosexuality-themed speech by parent, or counted such speech against the parent in the custody decision, see *infra* Appendix, p. 735.

[17] *See* Bunim v. Bunim, 83 N.E.2d 848, 849 (N.Y. 1949) (denying custody to mother largely because she "here, in open court, has stated her considered belief in the propriety of indulgence, by a dissatisfied wife such as herself, in extramarital sex experimentation," and "[i]t cannot be that 'the best interests and welfare' of those impressionable teen-age girls will be 'best served' by awarding their custody to one who proclaims, and lives by, such extraordinary ideas of right conduct"); *see also* Murray v. Murray, 220 So. 2d 790, 794 (La. Ct. App. 1969) (noting that "[t]o serve the best interest of the child, it is absolutely essential that the party having custody . . . [teach the child] both by word and example the principles of decency and commonly acceptable moral principles," specifically of impropriety of adultery).

[18] *See* Pulliam v. Smith, 501 S.E.2d 898, 904 (N.C. 1998) (upholding transfer of custody to mother, partly because "failing and refusing to counsel the children against" "the regular commission of sexual acts in the home by unmarried people," "while acknowledging this conduct to them" is "detrimental to the best interest and welfare of the two minor children"); *see also* Anderson v. Anderson, 736 So. 2d 49, 53 & n.1 (Fla. Dist. Ct. App. 1999) (reversing trial judge's refusal to transfer custody to father, partly because judge didn't properly consider mother's letting her boyfriend run pornographic website from home, and suggesting that even though materials weren't accessible to child, operation of site "evince[d] contempt for the law"—though there was no mention of its being unprotected obscenity—"disrespect for women and disregard for committed relationships and thus permeate[d] the environment . . . whether or not the child sees it"); *infra* note 92 (discussing and distinguishing cases penalizing parents for letting lovers stay overnight while children were present).

[19] *See* Collier v. Collier, 14 Phila. 129, 144, 149 (Pa. Ct. Common Pleas 1985) (giving father only weekend custody, partly because of his fundamentalist lifestyle and attitudes—such as "disapprov[al] of most popular music as 'satanic'"—which were seen as likely to lead to "serious problems for the children in adolescence"); Waites v. Waites, 567 S.W.2d 326, 333 (Mo. 1978) (suggesting that under "best interests" test court may consider whether parent "would refuse to permit the child to attend a school class where evolution is taught"). *But see* Stolarick v. Novak, 584 A.2d 1034, 1036 (Pa. Super. Ct. 1991) (reversing trial court decision that denied custody to fundamentalist father because he was raising children "in a sterile world with very rigid precepts"); *In re* Marriage of Epperson, 107 P.3d 1268, 1277 (Mont. 2005) (Rice, J., specially concurring) (noting that lower court's custody decision may have been inappropriately influenced by court's view that parties' fundamentalist religion "had 'screwball aspects' and was 'off beat'").

[20] *See* Decree of Dissolution of Marriage, Jones v. Jones, No. 49D01-0305-DR-00898, at 4 (Feb. 13, 2004), *available at* http://www.law.ucla.edu/volokh/custody/jones.pdf (directing parents "to take such steps as are needed to shelter [the child] from involvement and observation of these non-mainstream religious beliefs and rituals") *rev'd*, 832 N.E.2d 1057, 1061 (Ind. Ct. App. 2005); *see also* Mendez v. Mendez, 527 So. 2d 820, 821, 823 (Fla. Dist.

erance,[21] and attendance with their children at churches that recognize same-sex marriage.[22] The Pennsylvania Supreme Court is now reviewing the polygamy advocacy case, framing the question as, "To what extent can the courts limit parents from advocating religious beliefs that, if acted upon, would constitute criminal conduct?"[23]—a question that could equally apply to parents' teaching their children the propriety of refusing to fight in unjust wars,[24] the propriety of civil disobedience, and the like.

All this is done under the rubric of the "best interests of the child" standard, the normal rule applied in custody disputes between two parents:[25] and this standard leaves family court judges ample room to consider a parent's ideology.[26] For instance, in a country where half the public thinks that it's *necessary* "to believe in God in order to be moral and have good values," has an unfavorable view of "[a]theists, that is, people who don't believe in God," and wouldn't vote for a political candidate who didn't believe in God even if he had been nominated by their own party,[27] it makes sense that some judges would think that it's against the child's best interests for a parent to raise the child without religion.

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Ct. App. 1987) (Baskin, J., dissenting) (taking view that lower court's denial of custody to Jehovah's Witness was based on expert evidence that being raised as Jehovah's Witness would make it hard for children to "fit in the western way of life in this society"); *cf.* O'Rielly v. O'Rielly, No. 31 39 82, 1995 Conn. Super. LEXIS 977, at *4, *9 (Mar. 28, 1995) (ordering that "[u]nder no circumstances shall the children have any contact with the entity known as Miracle of Love, its members or participants"; court characterized Miracle of Love as "cult").

[21] *E.g.*, *In re* Marriage of Epperson, 107 P.3d 1268, 1274–75 (Mont. 2005); Frank v. Frank, 833 A.2d 194, 199 (Pa. Super. Ct. 2003) (directing "that each party will impress upon the children the need for religious tolerance and not permit any third party to attempt to teach them otherwise").

[22] *E.g.*, J.L.P. v. D.J.P., 643 S.W.2d 865, 872 (Mo. Ct. App. 1982).

[23] Shepp v. Shepp, 832 A.2d 1064, 1064 (Pa. 2003).

[24] *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (holding that refusal to serve in what one considers unjust war, when one's conscientious objection is only to serving in unjust wars and not in all wars, is illegal and not exempted by conscientious objector exemption).

[25] A parent can generally lose custody to a nonparent only if the parent is found to be unfit, a much more demanding standard. *See, e.g.*, Watkins v. Nelson, 748 A.2d 558, 565–67 (N.J. 2000) (summarizing tests in various states, which mostly come down to parental unfitness, and which require more than just showing that change of custody would be in child's best interests).

[26] This is especially clear in states that expressly list a parent's "moral fitness" as one of the factors to be considered in determining best interests. *See, e.g.*, FLA. STAT. ANN. § 61.13(3)(f) (1997); LA. CIV. CODE ANN. art. 134(6) (1999); MICH. COMP. LAWS ANN. § 722.23(f) (2002); N.D. CENT. CODE § 14-09-06.2(1)(f) (2004); McDaniel v. Garrett, 661 S.W.2d 789, 790 (Ky. Ct. App. 1983); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983). For more on how the best interests standard, even when honestly applied, may justify these decisions, see *infra* note 74 and text accompanying notes 73–74.

[27] *See infra* note 85 for citations to the surveys.

Courts have also ordered parents to reveal their homosexuality to their children,[28] or to conceal it.[29] They have ordered parents not to swear in front of their children,[30] and to install Internet filters.[31] They have also considered, as a factor in the custody decision, parents' swearing;[32] exposing their children to R-rated movies,[33] a gun-themed magazine,[34] unfiltered Internet access,[35] photos of men in women's

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[28] *See* DeLong v. DeLong, No. WD 52726, 1998 WL 15536, at *3 (Mo. Ct. App. Jan. 20, 1998) (discussing such lower court order), *aff'd in part and rev'd in part sub nom.* J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998) (concluding that appeal was moot).

[29] *See* Hogue v. Hogue, 147 S.W.3d 245, 254 (Tenn. Ct. App. 2004) (reversing such order).

[30] *See* Van Koevering v. Van Koevering, 375 N.W.2d 759, 760 (Mich. Ct. App. 1985).

[31] Decree of Dissolution of Marriage, Jones v. Jones, No. 49D01-0305-DR-00898, at 3 (Feb. 13, 2004), *available at* http://www.law.ucla.edu/volokh/custody/jones.pdf, *aff'd in relevant part*, 832 N.E.2d 1057, 1061 (Ind. Ct. App. 2005); Bowe v. Bowe, No. FA 990424189, 2000 WL 1683392, at *4 (Conn. Super. Ct. Oct. 13, 2000).

[32] *In re* J.B.A., 914 So. 2d 654, 658 (La. Ct. App. 2005); Kiser v. Kiser, No. 2003-CA-002525-ME, 2005 WL 1415612, at *2–*3 (Ky. Ct. App. June 17, 2005); R.J. v. M.J., 880 So. 2d 20, 26 (La. Ct. App. 2004); Sturgis v. Sturgis, 792 So. 2d 1020, 1023 (Miss. Ct. App. 2001); George v. George, No. 205262, 1998 WL 1989958, at *4 (Mich. Ct. App. Sept. 15, 1998); E.A.L. v. J.L.W., 662 A.2d 1109, 1114 (Pa. Super. Ct. 1995).

[33] *See, e.g.*, Wiley v. Wiley, No. 31061-9-II, 2005 WL 1501608, at *2 (Wash. Ct. App. June 21, 2005) (discussing trial court order that "prohibited materials rated over PG-13 in nature and video games rated 'T' or above from being kept in either household," and setting it aside on grounds that parties had later agreed to narrow order merely requiring such material to be kept in "locked rooms and password-protected computers"; children were age seven and ten at time of initial order, and nine and twelve at time of appellate decision); Markell v. Markell, No. 805 OF 1993, 2000 WL 34201486, at *5, *7 (Pa. Ct. Com. Pl. June 28, 2000) (finding that father had let his eleven- to thirteen-year-old children watch *Fight Club*, *There's Something About Mary*, and *Blade*, which court concluded "[t]he children are too young to see"; stating that *South Park* and *The General's Daughter* "should not be seen at ages 11, 12, and 13," though finding that father hadn't let children see them; and ultimately concluding that, because of father's other good qualities, "the film issue was simply 'one photo in the album' and should not be controlling in this case"); *see also In re* Guy M. v. Yolanda L.-F., No. V-06599-03/04A, 2004 WL 2532299, at *8 (N.Y. Fam. Ct. Nov. 8, 2004) (giving father custody based in part on mother's having "little concern with regard to issues such as appropriate dress, age appropriate movies and/or music and age appropriate parental controls"; court took view that twelve-year-old daughter's seemingly sexually dangerous behavior—corresponding with twenty-year-old man online and traveling alone by bus to meet him—flowed from these aspects of mother's parenting). For seven other cases counting against a parent the parent's having shown "inappropriate" movies to a child, see *infra* Appendix, p. 736.

[34] *See* Excerpt of Court Proceedings, Wiley v. Wiley, No. 31061-9-II, at 14 (Wash. Ct. App. June 25, 2003) (expressing judge's concerns about "this gun magazine" being available to children). The magazine was apparently *Special Weapons: Weapons of the Special Forces*. E-mail from Scott Horenstein, lawyer in *Wiley v. Wiley*, to June Kim, UCLA Law Library (Sept. 21, 2005) (on file with the *New York University Law Review*); e-mail from Devin Theriot-Orr, lawyer in *Wiley v. Wiley*, to June Kim, UCLA Law Library (Sept. 14, 2005) (on file with the *New York University Law Review*).

[35] *In re* Guy M., 2004 WL 2532299, at *8 (giving father custody based in part on mother's not filtering daughter's Internet access).

clothing,[36] music with vulgar sexual content,[37] and pornography;[38] and viewing pornography and keeping it in a place where the children might access it.[39] Likewise, Texas law leaves custody decisions to juries, and lets jurors consider a parent's religious "beliefs, teachings, or practices" as part of the best interests inquiry, if the jurors conclude that those "beliefs, teachings, or practices [are] illegal, immoral, or . . . harmful to the child[ ]."[40] "[W]hat is immoral or harmful" is to be "left to the jury to apply community standards," and may include "gambling, playing a lottery, drinking to excess, homosexual conduct,

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[36] Pulliam v. Smith, 501 S.E.2d 898, 901 (N.C. 1998) (awarding exclusive custody to mother after noting that father's male partner "keeps in the bedroom he shares with the [father] pictures of 'drag queens,'" and that pictures are accessible to children).

[37] McCorvey v. McCorvey, No. 05-174, 2005 WL 2863915, at *14 (La. Ct. App. Nov. 2, 2005) (restricting father's visitation based partly on his allowing his child to listen to music "by the group 'Outkast' and [telling] her that the song 'Hey Ya' is a 'good song' in spite of the fact that the song advocates sex in the back of a car using explicit, sexual, slang terminology unfit for a child and offensive to the sensibilities of many adults"); *In re Guy M.*, 2004 WL 2532299, at *8 (citing mother's exposing daughter to "age [in]appropriate . . . music" as factor in denying mother custody).

[38] *E.g.*, Alitz v. Peterson, No. 01-1690, 2002 WL 31425413, at *3 (Iowa Ct. App. Oct. 30, 2002); *In re* Cameron C., 723 N.Y.S.2d 796, 797 (App. Div. 2001); Koons v. Koons, 1994 WL 808603, at *2 (N.Y. Sup. Ct. Dec. 13, 1994); *see also* Order, *Wiley v. Wiley*, No. 99-3-01543-3, at 2 (Oct. 1, 2003) (ordering that "the parties shall cause to have removed from their home all material that is rated over PG in nature, including but not limited to tapes, magazines, photos, paraphernalia"); Wiley v. Wiley, 2005 WL 1501608, at *8 (noting that lower court later orally changed this to order "prohibit[ing] materials rated over PG-13 in nature and video games rated 'T' or above from being kept in either household," and noting that order was based partly on children's having found some photos that father had taken of nude models, and partly on children's having seen father's *Maxim* magazine). The courts' theory for why sexually themed material is harmful has not been clear, but I take it that the courts' judgments have partly flowed from the notion that such material may convey messages about sex that could lead the child into dangerous behavior, such as early sex. Parents in intact families probably have a constitutional right to show their children sexually themed material (though perhaps not material that's obscene for adults). *See infra* note 334.

[39] E.A.L. v. J.L.W., 662 A.2d 1109, 1115 (Pa. Super. 1995) (reversing trial court's change of custody from grandparents back to mother, partly because "mother and stepfather regularly view 'dirty' movies," and "[t]here was evidence that these films are physically available to the children"); *see also* Stephenson v. Stephenson, 847 So. 2d 175, 180–81 (La. Ct. App. 2003) (upholding grant of physical custody to mother, partly because father "periodically possesses and views pornographic magazines and internet websites, although he claims that [the son] was never exposed to such material," a matter that court seemed to classify as relevant to father's "moral fitness").

[40] Alaniz v. Alaniz, 867 S.W.2d 54, 57 (Tex. App. 1993); *see also In re* Marriage of Knighton, 723 S.W.2d 274, 278 (Tex. App. 1987) (stating that "one's religious beliefs, teachings, and practices, per se, are not grounds for depriving a parent of his or her children unless the teaching and practice of such beliefs are illegal or immoral"); *cf.* Gattas v. Gattas, 1985 WL 4138, at *4 (Tenn. Ct. App. Dec. 5, 1985) (considering whether "the teachings received by [the daughter] in her home are morally correct" as part of best interests analysis).

or abortion."[41] Constitutionally protected speech, if seen as an "illegal, immoral, or . . . harmful" "belief[ ]" or "teaching[ ]," could therefore also be considered, just as constitutionally protected abortions might be.[42] Many judges and juries are doubtless reluctant to use the best interests standard this way, especially where religious or political teaching is involved.[43] But others may be quite willing.

In a second category of cases, courts restrict custody or visitation based partly on one parent's having said bad things about the other parent, or order a parent not to say such things.[44] Sometimes, the parent's speech might seem like simple badmouthing, perhaps even constitutionally unprotected slander.[45] But the restrictions can also limit a parent's expressing broader viewpoints that also expressly or implicitly condemn the other parent. One parent, for instance, was ordered to "make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic," because the other parent was homosexual.[46] Parents have had their rights reduced based, in part, on their having told their

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[41] *Alaniz*, 867 S.W.2d at 57.

[42] *Id.*; *cf.* Peck v. Peck, 172 S.W.3d 26, 33 n.6 (Tex. App. 2005) (enjoining parents from letting "unrelated adult[s] of the opposite sex with whom [a parent] has or might have an intimate or dating relationship to remain overnight in the same residence or temporary lodging while in possession of the child," even though after *Lawrence v. Texas*, 539 U.S. 558 (2003), nonmarital intimate relationships are likely constitutionally protected; challenger apparently waived any freedom of intimate association argument, 172 S.W.3d at 34 n.7, which would have probably included *Lawrence* argument).

[43] *See infra* text accompanying notes 77–78.

[44] *See, e.g.*, Schutz v. Schutz, 581 So. 2d 1290, 1292 (Fla. 1991); Neilson v. Neilson, No. 54390-3-I, 2005 WL 3105606, at *6 (Wash. Ct. App. Nov. 21, 2005). Of course, a court might restrict a parent's speech both because it thinks it conveys a dangerous ideology and because it thinks it would undermine the child's relationship with the other parent. The three categories are just a convenient way of presenting the cases; they aren't intended to be mutually exclusive.

[45] *See, e.g.*, Dickson v. Dickson, 529 P.2d 476, 478–79 (Wash. Ct. App. 1974) (finding "clearly defamatory" father's insistence that mother was still married to him and that she was insane); *see also Ex parte* Aguilera, 768 S.W.2d 425, 426–27 (Tex. App. 1989) (describing incidents where grandmother told child that "stepmother had AIDS and that she should not hug or kiss her, nor . . . eat at the [father's] residence," though ultimately finding that since comments could not be attributed to mother, she was not in violation of court order not to make derogatory remarks about ex-husband).

[46] *In re* E.L.M.C., 100 P.3d 546, 563 (Colo. Ct. App. 2004) (reversing this order, but leaving open possibility that order may be reentered if trial court finds that "the child's emotional development [would be] significantly impaired" by absence of order); *see also* Johnson v. Schlotman, 502 N.W.2d 831, 837 (N.D. 1993) (Levine, J., concurring) (concluding that if father had "poisoned the children's minds and hearts [against the lesbian mother] with his unyielding, uncharitable intolerance of homosexuality, a change of custody would be required to protect the children's best interests"). See *infra* note 296 for more factual details on *In re E.L.M.C.*

children that the other parent was destined for damnation,[47] or otherwise criticizing the other parent's religion.[48] A court could likewise restrict a father's teaching his children that women must be subservient to men, since such speech might undermine the mother's authority.[49]

These restrictions may seem viewpoint-neutral, on the theory that they evenhandedly protect any parent from speech that may alienate the child from that parent, no matter what ideology the speech expresses. But this is quite unlikely to be true. I don't think, for instance, that courts would or should order a mother to stop teaching her child that racism is wrong, even if the father is racist and the condemnations of racism implicitly place the father in a bad light. If this is so, yet courts do order a mother to stop teaching her child that homosexuality is wrong, when the father is gay, then the courts' action is indeed viewpoint-based: Certain viewpoints may be taught even

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[47] *See* Kirchner v. Caughey, 606 A.2d 257, 264 (Md. 1992) (noting that lower court had issued an order constraining father's rights to take daughter to church—apparently based partly on father's having told daughter that her mother "has not been 'saved' and is therefore destined for eternal damnation"—and noting that "inculcation of dogma inconsistent with the religious training she receives at the direction of her mother" or that "otherwise produce[s] additional unwarranted conflict in this child's mind" may indeed be prohibited); *see also* Kendall v. Kendall, 687 N.E.2d 1228, 1231, 1235–36 (Mass. 1997) (upholding order that father "not take the children to religious services where they receive the message that adults or children who do not accept Jesus Christ as their lord and savior are destined to burn in hell").

[48] For five other cases in which a trial or appellate court decision restricted religious criticisms of the other parent, or counted such speech against the parent in the custody decision, see *infra* Appendix, pp. 738–39.

[49] *See* Bartsch v. Bartsch, No. 4-633/03-1809, 2005 Iowa App. LEXIS 180, at *10–*11 (Mar. 16, 2005) (discussing trial court decision that denied father physical custody partly because father's church taught that "men are superior to women [and] that women should not hold positions in the church," but disapproving of trial court's analysis); Roberts v. Roberts, 60 Va. Cir. 49, 59–60 (2002) (denying visitation to father and noting that while mother "encourages the children to be whatever they want to be," father "tells [the daughter] women cannot do what men do," but focusing on conflict that such divergent teachings supposedly cause rather than on harmfulness of father's teaching as such), *aff'd*, 586 S.E.2d 290 (Va. Ct. App. 2003); *In re* Wang, 896 P.2d 450, 454 (Mont. 1995) (Leaphat, J., dissenting) (reasoning that because father's church teaches "that men must be allowed to make all the decisions" and that disobedient mother "is possessed by demons and . . . is a lesser, subservient human being," teachings may "contraven[e] . . . the court's directive that both parents will foster love and respect for the other parent and will do nothing which will estrange [the child] from the other parent or injure the child's opinion of the other parent"); *cf.* Harner v. Harner, 479 A.2d 583, 588 (Pa. Super. Ct. 1984) (disapproving of father's prejudices against women, but upholding lower court's award of custody to father because "the lower court had the same concern and, consequently, thoroughly considered this factor in reaching its decision" that on balance father would still be better parent).

when they implicitly criticize the other parent, but others may not be.[50]

Some other restrictions in this category have been based on a parent's revealing facts that undermine the child's relationship with the other parent, for instance when a mother accurately told her twelve-year-old daughter that her ex-husband, who had raised the daughter from birth, wasn't the girl's biological father.[51] And some court orders prohibit a parent from telling the children anything about such orders, presumably on the theory that such discussions are likely to remind the children about tension between the parents, or are likely to be accompanied by explicit or implied criticism of the other parent.[52]

In a third category of cases, some courts have restricted a parent's religious speech when such speech was seen as inconsistent with the religious education that the custodial parent was providing.[53] The cases generally rest on the theory—sometimes pure speculation, sometimes based on some evidence in the record—that the children

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[50] *See infra* Part II.B.5.b.

[51] *In re* Marriage of J.H.M., 544 S.W.2d 582, 585 (Mo. Ct. App. 1976). Such a statement need not alienate the daughter from the father, but in this case it apparently did. *See also* Stephanie L. v. Benjamin L., 602 N.Y.S.2d 80, 81, 84 (Sup. Ct. 1993) (considering but rejecting request to order father not to tell child that mother had cancer).

[52] *See, e.g.*, Racsko v. Racsko, No. FA000158251S, 2003 Conn. Super. LEXIS 2186, at *33 (Aug. 1, 2003) (issuing such order); Franyutti v. Franyutti, No. 04-02-00786-CV, 2003 WL 22656879, at *4 (Tex. App. Nov. 12, 2003) (noting that trial court had issued similar order); Stutz v. Stutz, 556 N.E.2d 1346, 1353 (Ind. Ct. App. 1990) (same). *But see* Saxon v. Saxon, 428 S.E.2d 376, 377–78 (Ga. Ct. App. 1993) (rejecting trial court's judgment that mother's discussing divorce case with child justified transfer of custody to father).

[53] *E.g.*, *In re* A.G.R., 815 N.E.2d 120, 125–26 (Ind. Ct. App. 2004); Behnke v. Green-Behnke, No. A03-1039, 2004 WL 376984, at *4 (Minn. Ct. App. Mar. 2, 2004); Jean R. v. Susan H., Nos. V-00002-01,191, 2003 WL 141048, at *8 (N.Y. Fam. Ct. Jan. 2, 2003); Murphy v. Murphy, No. CO-95-1363, 1996 WL 70978, at *3 (Minn. Ct. App. Feb. 20, 1996); LeDoux v. LeDoux, 452 N.W.2d 1, 5 (Neb. 1990); *In re* S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 679 (Fam. Ct. 1989), *aff'd sub. nom.* Lebovich v. Wilson, 547 N.Y.S.2d 54 (App. Div. 1989); *In re* Marriage of Tisckos, 514 N.E.2d 523, 529 (Ill. App. Ct. 1987); Funk v. Ossman, 724 P.2d 1247, 1249 (Ariz. Ct. App. 1986); Andros v. Andros, 396 N.W.2d 917, 922–23 (Minn. Ct. App. 1986); Bentley v. Bentley, 448 N.Y.S.2d 559, 559 (App. Div. 1982); Morris v. Morris, 412 A.2d 139, 147 (Pa. Super. Ct. 1979); Lange v. Lange, 502 N.W.2d 143, 147 (Wis. Ct. App. 1993); Baker v. Baker, No. 03A01-9704-GS-00115, 1997 WL 731939, at *4 (Tenn. Ct. App. Nov. 25, 1997); Kendall v. Kendall, 687 N.E.2d 1228, 1232 (Mass. 1997); MacLagan v. Klein, 473 S.E.2d 778, 787 (N.C. Ct. App. 1996), *overruled on other grounds by* Pulliam v. Smith, 501 S.E.2d 898, 900 n.1 (N.C. 1998); Lebovich v. Wilson, 547 N.Y.S.2d 54, 55 (App. Div. 1989); Margaret B. v. Jeffrey B., 435 N.Y.S.2d 499, 501 (Fam. Ct. 1980); *see also* DiMartino v. DiMartino, No. FA910043006S, 1999 Conn. Super. LEXIS 1196, at *8 (May 7, 1999) (aiming to prevent "potential conflict concerning the religious upbringing of the children" by ordering parents who have joint custody to continue to raise children Catholic, unless parents and children all agree otherwise). *But see* cases cited *infra* note 77 (taking view that such restrictions violate Free Exercise Clause unless there is evidence that noncustodial parent's religious teaching is likely to cause imminent harm to child).

will be made confused and unhappy by the contradictory teachings, and will be less likely to take their parents' authority seriously.[54] In one case, for instance, a court ordered "that each party will impress upon the children the need for religious tolerance and not permit any third party to attempt to teach them otherwise,"[55] though it's not clear how such a vague order could be enforced.[56]

Are these speech restrictions constitutional? In Part III, I argue that they generally aren't, except when they're narrowly focused on preventing one parent from undermining the child's relationship with the other; and the observations that lead to this proposal will, I hope, be useful even to readers who don't agree with the proposal itself. Here is a brief summary:

1. As described above, the best interests test leaves courts free to make custody decisions based on parents' speech, and to issue orders restricting their speech. Courts have taken advantage of this freedom and will surely do so again, especially if their right to do so is expressly upheld against constitutional challenge. And this willingness of courts to disfavor a broad range of parental ideologies—depending on the time and place, atheist or fundamentalist, racist or pro-polygamist, pro-homosexual or anti-homosexual—should lead us to take a hard look at the doctrine that allows such results.[57]

2. This broad range of parental speech that courts have restricted under the "best interests of the child" standard should give pause to

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[54] *See, e.g.*, *Morris*, 412 A.2d at 146. Some state statutes expressly give the custodial parent the power to decide the religious upbringing of the children. *See* ARIZ. REV. STAT. ANN. § 25-410 (2000); COLO. REV. STAT. ANN. § 14-10-130 (2004); 750 ILL. COMP. STAT. ANN. 5/608 (1999); IND. CODE ANN. § 31-17-2-17 (1999); KY. REV. STAT. ANN. § 403.330 (1999); MO. REV. STAT. § 452.405 (2000); MONT. CODE ANN. § 40-4-218 (2005); WASH. REV. CODE ANN. § 26.10.170 (2005). *Compare* Funk v. Ossman, 724 P.2d 1247 (Ariz. Ct. App. 1986) (interpreting statute giving custodial parent such powers as not displacing best interests test) *with* Wright v. Walters, No. 2004-CA-000804-ME, 2005 WL 1490991, at *1 (Ky. Ct. App. June 24, 2005) (interpreting similar statute as categorically allowing custodial parent to veto noncustodial parent's taking child to church of denomination different from custodial parent's); *In re* A.G.R., 815 N.E.2d 120, 125–26 (Ind. Ct. App. 2004) (holding that because "[t]he custodial parent enjoys the right to determine the religious training of his or her minor children," noncustodial parent may be ordered not to engage in behavior with children—such as celebration of holidays—that is inconsistent with custodial parent's religious teachings, and relying on *In re* K.R.H., 784 N.E.2d 985, 992–93 (Ind. Ct. App. 2003) (citing IND. CODE ANN. § 31-17-2-17 (1999))).

[55] Frank v. Frank, 833 A.2d 194, 199 (Pa. Super. Ct. 2003) (affirming this order).

[56] *Compare* Hogue v. Hogue, 147 S.W.3d 245, 246 (Tenn. Ct. App. 2004) (holding that order barring father from "exposing the child to . . . his gay lifestyle" was impermissibly vague) *with* Marlow v. Marlow, 702 N.E.2d 733, 737 (Ind. Ct. App. 1998) (upholding against vagueness challenge order barring father from exposing child to "any social, religious or educational functions sponsored by or which otherwise promote the homosexual lifestyle").

[57] *See infra* Part I.B.

those who advocate exempting such child custody speech restrictions from constitutional scrutiny.[58] If, for instance, preferences for nonracist parents are constitutionally permissible, on the theory that parents' First Amendment rights don't apply to child custody decisions, then preferences for religious parents—motivated by judges' sincere beliefs that a religious upbringing is in the child's best interests—would likewise be rendered constitutional.

3. The First Amendment is implicated not only when courts issue orders restricting parents' speech, but also when courts make custody or visitation decisions because of what parents have said to the child, or are likely to say to the child. And just as the Equal Protection Clause bars child custody decisions that discriminate based on race,[59] so the First Amendment presumptively bars child custody decisions that discriminate based on a parent's constitutionally protected speech.[60] This is why I use the term "child custody speech restrictions" as shorthand for both categories; just as in other fields, "speech restriction" covers not only injunctions against speech but also burdens—such as taxes or damages awards—based on the speech.[61]

4. Even when the parents' speech is religious, the Free Speech Clause is probably a more important protection for the speech than the Religion Clauses are,[62] though nearly all the scholarship and most of the litigation has neglected the Free Speech Clause.[63]

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[58] *See, e.g.*, *infra* notes 228, 234 and 260, and more generally the sources discussed in Part II.B.2.

[59] Palmore v. Sidoti, 466 U.S. 429 (1984).

[60] This presumption can be rebutted, however, when the speech consists of non-ideological statements that interfere with the child's relationship with the other parent, *see infra* Part III.C.

[61] *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (treating content-based tax as equivalent to restriction on speech); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (treating damages liability as involving restriction on speech); Speiser v. Randall, 357 U.S. 513, 521 (1958) (treating viewpoint-based tax as involving restriction on speech).

[62] *See infra* Parts I.C–I.D.

[63] For the two most insightful works on the Religion Clauses question in child custody, see Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383 (1989), and Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J. L. REFORM 879 (1992). But, like nearly all other works on the subject, these don't discuss the Free Speech Clause question, even though most of the religion cases involved religious speech. The only articles that I've found that extensively discuss the Free Speech Clause issue are a few casenotes focusing on *Schutz v. Schutz*, 581 So. 2d 1290 (Fla. 1991), which are limited to the orders banning disparagement of the other parent (and mandating praise of other parent) involved in *Schutz*. *See, e.g.*, Laurel S. Banks, Schutz v. Schutz, 31 U. LOUISVILLE J. FAM. L. 105 (1992–93); David L. Ferguson, Comment, Schutz v. Schutz: *More than a Mere "Incidental" Burden on First Amendment Rights*, 16 NOVA L. REV. 937 (1992).

5. If parents in intact families have First Amendment rights to speak to their children, without legal prohibitions on speech that is supposedly against the child's "best interests," then parents in split families generally deserve the same rights, except when the speech undermines the child's relationship with the other parent.[64]

6. Parents in intact families should indeed be free to speak to their children—but not primarily because of the parents' self-expression rights, or their children's interests in hearing the parents' views. Rather, the main reason is that today's child listeners will grow up into the next generation's adult speakers. That next generation is entitled to hear a broad range of ideas, without government interference, and restrictions on ideological parent-child speech are a powerful way for today's majorities or elites to entrench their ideas, and to block their ideological rivals from being heard in the future. The First Amendment is a necessary check on this entrenchment.[65]

7. It may seem appealing to protect speech generally, but to withdraw that protection when the speech imminently threatens psychological harm to the child. But such an approach will likely prove unhelpful: It's hard for courts to reliably predict whether speech will cause harm, to reliably determine whether certain existing harm was indeed caused by speech (as opposed to by the breakup itself, or by the other parent's condemnation of the speech), and to weigh the present upset caused by certain teachings against the teachings' potential long-term benefits.[66]

8. Though this proposal would be a substantial change to modern child custody law's "best interests of the child above all" framework, I think judges can be persuaded to accept it. The Supreme Court has constrained the best interests test under the Equal Protection Clause by barring family courts from considering the parents' interracial relationships even when public hostility to such relationships may affect the child's best interests.[67] Many lower courts have constrained the best interests test under the Free Exercise Clause by barring restrictions on religious teachings (even when the restrictions might be justified using plausible speculation about the child's best interests) unless the teachings threaten imminent harm; the American Law Institute has endorsed this test.[68] There should be room to impose similar constraints in the name of the Free Speech Clause and the Establishment Clause as well.

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64 *See infra* Part II.B.2.

65 *See infra* Part II.A.

66 *See infra* Part II.B.4.

67 Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

68 *See infra* note 77.

# I
# CHILD CUSTODY SPEECH RESTRICTIONS

## *A. The Family Law Rules: An Overview*

When parents separate, a family court may decide which parent gets custody. "Custody" is the right to control important decisions in the child's life—such as, for instance, which school the child goes to[69]—and usually the right to spend the majority of the time with the child.

The court may also provide for joint legal custody, under which both parents have a right to participate in making decisions about the child, though one parent may be given more time with the child. Or the court may give custody to one parent, but provide for visitation by the other parent, for instance stating that the other parent can have the child stay with him every other weekend.[70] The court may also revisit its original decision later, if one parent shows that there has been a substantial change in circumstances.[71]

The custody and visitation provisions may also provide that one or the other parent must or must not do or say certain things. Such orders can be enforced through the threat of reducing or denying custody or visitation rights, or through the threat of punishment for contempt of court.[72]

All these custody and visitation decisions are generally made under the "best interests of the child" standard;[73] and it's natural to consider parents' speech as being relevant to the child's best interests.

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[69] One important decision—whether the child will move to another part of the country—raises its own complex constitutional questions, dealing with the right to travel. *See, e.g., In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985/1986). These questions are outside the scope of this Article.

[70] *See* 1 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 5-2 (2d ed. 2004).

[71] *See* Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986).

[72] *See* ATKINSON, *supra* note 70, at § 5-24; *see, e.g.*, Marcus v. Marcus, 902 So. 2d 259, 262 (Fla. App. 2005) (acknowledging possibility of contempt sanctions in such cases, though stressing that any order that is to be enforced using contempt sanctions must be precisely worded); Schutz v. Schutz, 581 So. 2d 1290, 1292 (Fla. 1991) (noting trial court's threat of contempt in such case); *Ex parte* Aguilera, 768 S.W.2d 425, 426–27 (Tex. App. 1989) (noting trial court's contempt judgment, which included jail sentence, but reversing it because order may not have in fact been violated).

[73] *See, e.g.*, Harner v. Harner, 479 A.2d 583, 585–86 (Pa. Super. Ct. 1984) ("[T]he sole criterion in child custody decisions is the best interests and welfare of the child."); Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986) (holding that same test applies to changes in custody, so long as moving party shows substantial changes in circumstances); *In re* Jane B., 380 N.Y.S.2d 848 (Sup. Ct. 1976) (applying best interests test to change in custody); Willis v. Willis, 775 N.E.2d 878 (Ohio Ct. App. 2002) (likewise). Total denial of visitation, however, requires a finding of parental unfitness, not just a finding that denial of visitation is in the child's best interests. *See* ATKINSON, *supra* note 70, at § 5-2; James G. Dwyer, *A*

A judge who focuses solely on the child's interests might reasonably conclude that it's better for a child to be raised, for instance, by a nonracist parent rather than a racist one. The judge may conclude that this wouldn't just be better for the child's character—in the sense that it's better for a person to be kind than cruel—but would also better prevent future tangible harms: A racist child may be likelier than a nonracist to get into fights or commit other crimes, and will likely find it harder to study and work effectively in our increasingly racially mixed society.[74] And since the standard of appellate review for such orders is generally abuse of discretion,[75] a court of appeals will often be reluctant to set aside these sorts of reasonable, if debatable, assumptions.[76]

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*Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 933–34 & n.253 (2003).

[74] To further illustrate this, imagine that you had to apply a "best interests of the child" standard as a private person: Say you were asked by a dying friend to choose a new parent for her child, and you felt obligated to consider only the child's best interests. Would you be indifferent to whether a prospective parent was a racist, or an advocate of violent revolution? I doubt it—most of us would consider the likely education that the prospective parent would provide as a critical factor in deciding what would be in the child's best interests. *Cf.* McCorvey v. McCorvey, No. 05-174, 2005 WL 2863915, at *11 (La. Ct. App. Nov. 2, 2005) (discussing and upholding trial court order that barred father from making "any racial . . . slurs . . . in the presence of the child," and noting that trial judge's reason for order was "that it was in the best interest of the child to be reared in an atmosphere of respect for all cultures and of tolerance for diversity, where that is the reality of our American society into which she is growing").

[75] *E.g.*, Bienenfeld v. Bennett-White, 605 A.2d 172, 184 (Md. Ct. Spec. App. 1992); Hudema v. Carpenter, 989 P.2d 491, 497 (Utah Ct. App. 1999); Marriage of Littlefield, 940 P.2d 1362, 1366 (Wash. 1997).

[76] If, however, this Article is correct to view these restrictions as raising First Amendment problems, then this standard of review would have to change, even if speech that is against a child's best interests forms a new exception to First Amendment protection. The Supreme Court has consistently held that certain procedural safeguards must accompany even substantively valid speech restrictions. One such safeguard is independent judicial review: Under *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), appellate courts can't just turn over vague phrases such as "actual malice" or "incitement" or "best interests of the child" to factfinding trial courts, and then defer to the factfinders' conclusions about what constitutes unprotected libel, incitement, or speech that is against the child's best interests. Rather, courts must "conduct[ ] an independent review of the record both [(1)] to be sure that the speech in question actually falls within the unprotected category and [(2)] to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." Id. at 505. Thus, while appellate courts in speech restriction cases generally aren't supposed to reevaluate the historical facts found by the trial court, including whether the witnesses were telling the truth, they are supposed to exercise their independent judgment in applying the legal test—whether the actual malice test, the incitement test, or the best interests test—to the facts. *See* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2437–38 (1998) (citing cases applying *Bose* rule not just to determinations of whether speech can be restricted as libel, but also to determinations of whether it can be restricted as obscenity, incitement, negligent publication of criminal solicitation, interference with administration of justice, and more); Eugene

Some judges may prefer not to consider a parent's ideology in the best interests decision. They might think such consideration offends free speech principles, whether or not it actually violates the Constitution. Or they may think such inquiries are likely to yield much heat and little light, as each parent argues about what the other supposedly believes and plans to teach. Judges may also prefer not to restrict parental speech because they think such orders may be too hard to enforce—perhaps because enforcement would mean calling children to testify against their parents, which might hurt the children more than the order would help them.

Yet other judges may plausibly think that the benefits of considering a parent's likely future teachings outweigh the costs. In some states, appellate courts have imposed one limit on such decisions: They have held that trial judges may restrict parents' religious teachings only if there's evidence that the teachings are not merely against the child's "best interests," but are causing or are likely to cause substantial emotional harm to the child.[77] But this limitation hasn't been adopted by all states,[78] and in any event doesn't extend to nonreligious speech, because the limitation has been developed under the Religion Clauses.

Finally, while most of the orders that I describe come in the wake of divorces, they need not. Unmarried biological parents have

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Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1018–21 (1996) (same).

[77] *E.g.*, Quiner v. Quiner, 59 Cal. Rptr. 503, 510 (Ct. App. 1967); *In re* Marriage of Oswald, 847 P.2d 251, 253 (Colo. Ct. App. 1993); Mesa v. Mesa, 652 So. 2d 456, 457 (Fla. Dist. Ct. App. 1995); Osier v. Osier, 410 A.2d 1027, 1030 (Me. 1980); Kirchner v. Caughey, 606 A.2d 257, 261 (Md. Ct. App. 1992); Felton v. Felton, 383 N.E.2d 606, 610 (Mass. 1981); Chandler v. Bishop, 702 A.2d 813, 818 (N.H. 1997); *In re* Marriage of Shore, 734 N.E.2d 395, 403 (Ohio Ct. App. 1999); Zummo v. Zummo, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990); Bentley v. Bentley, 448 N.Y.S.2d 559, 560 (App. Div. 1982); Munoz v. Munoz, 489 P.2d 1133, 1135 (Wash. 1971); *see also* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12 (2002) (endorsing this view).

[78] For cases upholding restrictions on a noncustodial parent's teaching religious views that are inconsistent with the custodial parent's, without any need to show likely harm from the noncustodial parent's speech, see *infra* Appendix, p. 739. For cases where courts awarded custody based partly on a parent's speech, with no finding of likely harm from the speech, see *supra* notes 5–10 (citing cases where court preferred religious parents over irreligious ones); *supra* notes 11–22 (citing cases where court considered parents' other ideological beliefs as part of "best interests" analysis); *see also* Shepp v. Shepp, 821 A.2d 635, 637 (Pa. Super. Ct. 2003) (finding parent's religious speech harmful simply because it advocated that child engage in illegal conduct—polygamy—several years in future, even while citing an earlier case that required evidence of "a substantial threat of present or future physical or emotional harm to the particular child"), *appeal allowed*, 832 A.2d 1064 (Pa. 2003); *Shepp*, 821 A.2d at 640–41 (Johnson, J., dissenting) (noting that there was "no competent evidence of a substantial threat or harm to the child" in case).

parental rights when they have helped raise the child.[79] Unmarried couples can adopt a child together, or jointly raise one partner's biological child; this is not uncommon among gay and lesbian couples. And some states recognize the "psychological parent" doctrine, which gives someone whom the child has seen as a parent—for instance, a stepparent who has helped raise the child—continuing rights even when the person's relationship with the legal parent dissolves.[80] Child custody disputes may arise among these parents,[81] as well as married ones. Because of this variety of relationships, I use the terms "intact couples" and "split couples" instead of "married couples" and "divorced couples."

### *B. How the Free Speech Clause Is Implicated*

Most reported First Amendment claims raised in child custody speech restriction cases, and nearly all First Amendment articles on the subject, have involved only the Religion Clauses.[82] This, I think, has been something of a mistake. First, this neglects restrictions on nonreligious speech. Second, it neglects an important source of protection even for religious speech: Religious speech is speech, entitled to Free Speech Clause protection as well as Free Exercise Clause protection,[83] and such free speech protection for religious speech is at least as broad (and perhaps even broader) than that provided by the Religion Clauses.[84]

#### *1. Child Custody Speech Restrictions as Presumptively Unconstitutional Content-Based Speech Restrictions*

All the restrictions discussed in the Introduction may be quite consistent with—even dictated by—the "best interests" standard. A court's application of the standard may be controversial in some cases: Some might think, for instance, that teaching a child the propriety of polygamy isn't really against the child's best interests. Many might

[79] *E.g.*, Caban v. Mohammed, 441 U.S. 380, 394 (1978); MacLagan v. Klein, 473 S.E.2d 778, 781 (N.C. Ct. App. 1996), *overruled on other grounds by* Pulliam v. Smith, 501 S.E.2d 898, 900 n.1 (N.C. 1998). Custodial unmarried parents, generally single mothers, have the same constitutional rights as other parents.

[80] *E.g.*, *In re* E.L.M.C., 100 P.3d 546, 553 (Colo. Ct. App. 2004).

[81] *E.g.*, *id.*; V.C. v. M.J.B., 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999) (finding that former partner of biological mother was entitled to visitation with, but not custody of, children).

[82] For a discussion of why I focus here on the First Amendment constraints on child custody decisions, rather than any constraints that might emerge from the substantive due process parental rights cases, see *infra* text accompanying notes 188–92.

[83] *See infra* note 89.

[84] For more on the precise scope of the protection offered by the Religion Clauses, see *infra* Parts I.C and I.D.

think the same about teaching atheism or teaching the propriety of homosexuality. Yet a court that takes a different view of what is best for children[85] may feel required by the "best interests" test to prefer (all else being equal) parents who won't teach the propriety of atheism, homosexuality, or polygamy over those who will.[86]

At the same time, all these restrictions—however permissible as a matter of substantive family law—would presumptively violate the Free Speech Clause.[87]

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[85] Many Americans are troubled by homosexuality and atheism: Half the public thinks that "homosexual relations" are "morally wrong." Half the public thinks that it's *necessary* "to believe in God in order to be moral and have good values." Half the public has an unfavorable view of "[a]theists, that is, people who don't believe in God"; only 25% have an unfavorable view of Muslims, and only 7% have an unfavorable view of Jews. Half the public wouldn't vote for a political candidate who didn't believe in God even if he had been nominated by their own party; only 38% took this view as to Muslim candidates, and only 10% as to Jewish candidates. Another poll that omitted the "your party" qualifier reported that 69% of respondents wouldn't even *consider* voting for a political candidate who didn't believe in God.

It seems likely that many of those who take these views would think that teaching children the propriety of homosexuality and of atheism would be against the children's best interests. And what many Americans believe, many judges likely believe, too.

*See* Gallup Survey, May 2–5, 2005, question 21, available in LEXIS, NEWS database, RPOLL file ("(Next, I'm going to read you a list of issues. Regardless of whether or not you think it should be legal, for each one, please tell me whether you personally believe that in general it is morally acceptable or morally wrong.) How about . . . homosexual relations?"; 44% responded "morally acceptable," 52% "morally wrong"); Pew Research Center Survey, Dec. 1–16, 2004, question 225, available in LEXIS, NEWS database, RPOLL file ("[T]ell me whether the first statement or the second statement comes closer to your own views—even if neither is exactly right. . . . It is not necessary to believe in God in order to be moral and have good values. It is necessary to believe in God in order to be moral and have good values . . . ."; 46% said "not necessary," 51% said "necessary"); Pew Research Center Survey, July 7–15, 2005, question 34, available in LEXIS, NEWS database, RPOLL file ("Now thinking about some specific religious groups . . . . [i]s your overall opinion of . . . Atheists, that is, people who don't believe in God very favorable, mostly favorable, mostly unfavorable, or very unfavorable?"; 7% said very favorable, 28% said mostly favorable, 22% said mostly unfavorable, 28% said very unfavorable); *id.*, questions 31 & 33 (asking the same as to "Muslim Americans" and Jews); Pew Research Center Survey, June 24-July 8, 2003, question 56, available in LEXIS, NEWS database, RPOLL file ("If your party nominated a generally well-qualified person for president who happened to be . . . an Atheist, would you vote for that person?"; 46% responded "Yes," 50% "No"); *id.*, questions 54 & 55 (asking the same as to Muslims and Jews); Fox News Survey, June 23–24, 1999, question 37, available in LEXIS, NEWS database, RPOLL file ("Would you consider voting for a political candidate who did not believe in God?"; 26% responded "Yes," 69% "No").

[86] *See, e.g.*, Harner v. Harner, 479 A.2d 583, 586 (Pa. Super. Ct. 1984) ("The sole criterion in child custody decisions 'is the best interests and welfare of the child.'").

[87] Challenges to these restrictions couldn't be brought in federal court, *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992), but federal constitutional defenses can certainly be raised in state court. *See, e.g.*, Zummo v. Zummo, 574 A.2d 1130, 1132, 1138 (Pa. Super. Ct. 1990) (concluding order prohibiting father from taking children to non-Jewish religious services during visits violated his constitutional rights under Free Exercise and Establish-

a. Court orders that parents *not say certain things* to their children, on pain of punishment for contempt or of losing all or part of their custody or visitation rights, are speech restrictions. Such restrictions are permissible if they cover only speech that falls within one of the Free Speech Clause exceptions, for instance knowingly false statements of fact;[88] but child custody speech restrictions often involve speech that's outside those exceptions. This is true whether or not the speech is religious: Both religious speech and nonreligious speech are generally protected by the Free Speech Clause,[89] though restrictions on religious speech justified by its religiosity may also violate the Free Exercise Clause.[90]

b. Court orders that parents *not expose their children to certain speech* by others—for instance that they not give them religious books or take them to religious sermons[91]—are likewise speech restrictions.[92] When a parent chooses to take a child to a particular church,

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ment Clauses), and the U.S. Supreme Court can consider the issue on certiorari from a state appellate court, *e.g.*, Palmore v. Sidoti, 466 U.S. 429, 431–32 (1984).

[88] *See, e.g.*, Dickson v. Dickson, 529 P.2d 476 (Wash. Ct. App. 1974) (upholding injunction prohibiting ex-husband from falsely claiming that his wife was insane, though also upholding other restraints on expression of opinion). Permanent injunctions, entered after a trial on the merits, shouldn't be seen as any more troubling than other kinds of speech restrictions. *See generally* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169–71 (1998). *But see* D'Ambrosio v. D'Ambrosio, 610 S.E.2d 876, 884–85 (Va. Ct. App. 2005) (holding that injunction against making "defamatory comments" to "third parties" about wife was vague and overbroad without clarifying why injunction was vague and overbroad, given that defamation law is generally constitutional; perhaps this was because injunction might be read as covering true defamatory statements as well as false ones).

[89] For cases directly and indirectly supporting this point, see *Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Rosenberger v. Rector*, 515 U.S. 819, 831 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

[90] *See infra* Part I.C.1.

[91] *E.g.*, Feldman v. Feldman, 874 A.2d 606, 614 (N.J. Super. Ct. App. Div. 2005) (upholding order barring noncustodial mother from sending children to Catholic classes, where father was raising child as Jewish).

[92] Sometimes, child custody decisions may burden nonexpressive conduct, but do so because of its message. For instance, say that a court orders a parent not to let a lover sleep in the same bed with the parent when children are present. The court's concern may be the message that the children will pick up from the sleeping arrangements: that extramarital sex is proper, see *Tucker v. Tucker*, 91 P.2d 1209 (Utah 1996); *Walker v. Walker*, 559 S.W.2d 716 (Ark. 1978), that non-marital sex is proper, see *L.H.Y. v. J.M.Y.*, 535 S.W.2d 304 (Mo. Ct. App. 1976), or that homosexual sex is proper, see *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998). But the conduct that the court's action restricts might not be intended to convey a message: While some parents may have lovers sleep over precisely to communicate something to their children, much of the time their main motive would be affection, company, sex, convenience, or saving rent. In such situations, the conduct would probably not be treated as expressive, and no First Amendment issue would arise. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (holding that conduct is treated as

he is communicating certain religious messages to the child, though through an intermediary. Such indirect speech is constitutionally protected.[93]

c. Court orders that parents *say certain things* to children, for instance that a parent urge the children to maintain a good relationship with the other parent,[94] reveal his own homosexuality,[95] "teach the child love and respect for the United States of America,"[96] or "impress upon the children the need for religious tolerance,"[97] are speech compulsions, which under First Amendment law are treated the same way as speech restrictions.[98] The same would apply if the

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expressive when "[a]n intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it").

If, however, a parent does something precisely to send a message, the children perceive it as sending the message, and the court restricts the conduct or reduces the parent's rights based on the conduct precisely because of that message—and not because of any noncommunicative harms that the conduct causes—then the same First Amendment doctrines I describe here would apply. *See id.* Moreover, some such restrictions (especially those not involving adultery) may pose a constitutional problem under the sexual autonomy right recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), even if they don't pose a problem under the First Amendment.

[93] *See, e.g.*, *Cantwell*, 310 U.S. at 303 (holding that playing recording to passers-by is constitutionally protected, though recording contained material spoken by someone other than defendant); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1016, 1017 n.284 (1996) (making similar argument as to parents who "indirectly" speak to children "through the speech of schools, teachers, home tutors, or other educational intermediaries"). If a court restricts the conduct for reasons unrelated to the content of the message—for instance, because the ritual is somehow physically dangerous—then the restriction is content-neutral, and more easily justifiable. But this is rare: The restrictions are generally based on the supposed harm flowing from the communicative content of the religious ritual, for instance the child's becoming confused or the other parent's religious teaching being undermined.

[94] *E.g.*, Schutz v. Schutz, 522 So. 2d 874, 875 (Fla. Dist. Ct. App. 1988), *rev'd in part and aff'd in part*, 581 So. 2d 1290 (Fla. 1991).

[95] DeLong v. DeLong, No. WD 52726, 1998 WL 15536, at *3 (Mo. Ct. App. Jan. 20, 1998) (discussing such order), *aff'd in part and rev'd in part sub nom.* J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998) (concluding that appeal was moot).

[96] Donaldson v. Donaldson, 231 P.2d 607, 608 (Wash. 1951) (discussing such order but reversing it on other grounds).

[97] Frank v. Frank, 833 A.2d 194, 199 (Pa. Super. Ct. 2003) (upholding such order).

[98] Riley v. Nat'l Fed. of the Blind, 487 U.S. 781, 796–97 (1988). There might be some exceptions to this general principle: For instance, the government routinely compels us to engage in various factual statements to it—to file tax returns, to testify, to answer census questionnaires, in some situations to report crimes that we witness, and so on—even though it couldn't restrict our speaking to it about these subjects. But as a general matter, compelled affirmations, especially affirmations of opinion, are indeed treated the same as speech restrictions.

Banks, *supra* note 63, at 117, reasons that courts have the "power to suppress speech or expressive conduct in certain circumstances," but not "to force expression of some sort," since orders compelling expression "would be an infringement on a person's right not to speak and not to associate, rights the First Amendment ensures." Yet the First Amendment ensures the right to speak at least as much as it ensures the right not to speak. While

court ordered parents to expose their children to certain speech by others, for instance, by taking them to church.[99]

d. Court decisions that *reduce or eliminate a parent's custody or visitation rights* because of what the parent is likely to say or teach to the children are likewise speech restrictions. Civil liability based on the content of one's speech presumptively violates the First Amendment, unless the speech falls within a First Amendment exception.[100] So does a tax based on the content of one's speech.[101] The same must apply to the far greater burden of losing part of one's parental rights based on the content of one's speech.

e. Court decisions that *reduce or eliminate a parent's custody or visitation rights* because the parent fails to convey certain ideologies to the children—for instance, because the parent doesn't teach the children any religion, or doesn't involve them in organized religious education—likewise implicate the First Amendment: They involve a burden (diminution in parental rights) based on failure to speak, and are therefore presumptively unconstitutional speech compulsions.

f. Court decisions implicate the Free Speech Clause if they are *based even in part on speech*. In the litigation process, each parent has an incentive to identify all the supposedly suboptimal things the other parent does to the child, whether teaching the child supposedly harmful views, not spending enough time with the child, not involving him in the right activities, or what have you; the court then has to consider all these factors. In some states, courts are also given a long list of factors that they must themselves systematically consider,[102] and are allowed to appoint guardians ad litem or child advocates who may provide a detailed report about the parents' qualities.[103]

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some speech restrictions are constitutional, the Court has never held that speech restrictions are subject to a less demanding test than speech compulsions.

[99] For examples of such orders, see *McLemore* and *Johns*, discussed *supra* in notes 9 & 10 and accompanying text.

[100] *E.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886, 916 n.51 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (taking same view).

[101] *E.g.*, Arkansas Writers' Project v. Ragland, 481 U.S. 221, 227–28 (1987); Speiser v. Randall, 357 U.S. 513, 518 (1958); *see also* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (striking down law requiring newspapers that criticize political candidates to publish responses, partly on grounds that law "exacts a penalty on the basis of the content of a newspaper").

[102] *E.g.*, MICH. COMP. LAWS § 722.23 (1993) (providing list of such factors); cases cited *supra* notes 5–7 (systematically considering factors, including factor (b), which has been interpreted to refer to parents' willingness to take child to religious services).

[103] *E.g.*, MICH. COMP. LAWS § 722.24(2) (1999); MINN. STAT. ANN. § 518.165 subdiv. 2a (Supp. 2006).

A typical "best interests of the child" decision will thus be based on many factors, including ones that have nothing to do with speech.[104] But if the court considers a parent's speech, the speech might well be the factor that changes the result—for instance, if the non-speech factors lean slightly in one parent's direction but that parent's speech tips the balance towards the other parent. If speech never made a difference, then there'd be no reason for courts to consider it. When courts consider it, there is presumably some reason to think that it's relevant, which is to say that it might in some situations affect the outcome.[105]

And many parents who know that certain speech might make a difference in their custody battles are likely to be deterred by this risk. Say you were a parent expecting a difficult custody battle, and you had heard that some judges—not necessarily all judges, but some—had considered parents' teaching of certain views as a factor in their custody decisions. Would you express those views to your children? Or would you reasonably conclude that the safer course is to remain quiet, to the children and perhaps even to others, so as not to give the other parent ammunition and not to give a family court judge an item to count against you?[106] And this may happen even if the risk of a court's using your speech against you in the custody decision is small; risk-averse parents may be deterred even by small risks, especially when the harm (loss of custody) is so grave. For these reasons, the

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104 See, for example, the *Comingore* case discussed in Appendix p. 735 *infra*, where Comingore's Communism was one basis for the argument that the children would be better off with her ex-husband.

105 *See* Beschle, *supra* note 63, at 397–98 (making similar point in context of religious factors).

106 Consider, for instance, the advice given by one lawyer when speaking about the danger of parents' showing themselves to be atheists or otherwise uncommitted to the child's religious upbringing: "Many, many custody cases are won and lost by one point, one factor, and you should be aware that a careless attitude toward this issue can cost you the whole case. You need to have a reasonable attitude toward religion . . . and evaluate . . . how it can affect your case." James Whalen, Child Custody and Divorce: Free Legal Advice, http://www.childcustody.net/29.html (last visited Mar. 27, 2006). *See also, e.g.*, Elbert v. Elbert, 579 N.E.2d 102, 110–11 (Ind. Ct. App. 1991) (admonishing judge for having "expressed a preference for [parents'] practicing religious beliefs through church attendance [with their children]," and noting danger that "attorneys who practice in [the judge's] court may fashion their cases and advise their clients to alter their religious practices—or their representation of their practices—to conform to this judge's guidelines for raising children in their religion"); People *ex rel.* McGrath v. Gimler, 60 N.Y.S.2d 622, 626–27 (Sup. Ct. 1946) (discussing what seems like strategic—and likely short-lived—decision by mother to change her daughter's religious upbringing in order to make her custody case more appealing to court); Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1720–21 (1984) (describing concern that parents may change religious behavior to gain advantage in custody determinations).

Court has indeed held that judgments based even in part on speech require First Amendment scrutiny.[107]

The restrictions also can't be sustained as "time, place, or manner restrictions," content-neutral restrictions that leave open ample alternative channels, which are generally constitutional if they pass a weak form of intermediate scrutiny.[108] First, the child custody speech restrictions I describe are based on the content of the speech and the harms that supposedly flow from this content.[109] And second, they

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[107] *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886, 915–16 (1982) (concluding that, because "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment," liability couldn't be imposed based on combination of nonviolent speech and some violent conduct); Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1976) (holding that government decision to fire employee is unconstitutional when protected speech is "motivating factor" for firing, even when other factors also exist, unless government shows it would have reached same decision without considering speech); Street v. New York, 394 U.S. 576, 590 (1969) (concluding that even if nonspeech parts of petitioner's conduct were constitutionally unprotected, petitioner's conviction couldn't stand when "[the] record [was] insufficient to eliminate the possibility . . . that appellant was convicted for both his [First Amendment-protected] words and his [unprotected] deed").

Of course, in all litigation, speech can be introduced as *evidence* of some element of the offense, such as the defendant's intent. Even clearly protected speech, such as pro-Nazi speech or racist speech, could be introduced as evidence when the question is whether a defendant in a treason case acted with the intent to help the Nazis, or a defendant in a hate crime case selected the victim based on the victim's race. Haupt v. United States, 330 U.S. 631, 642 (1947); Wisconsin v. Mitchell, 508 U.S. 476, 486 (1993). Likewise, a person's speech could be used as evidence in deciding whether he indeed committed a specific assault, or whether he acted deliberately. More controversially (and outside this Article's scope), a parent's speech opposing medical treatment may be used as evidence of whether the parent is likely to refuse to provide such treatment to his children, *see, e.g.*, Klamo v. Klamo, 564 N.E.2d 1078, 1080 (Ohio Ct. App. 1988). But when speech is considered as part of the test—such as the best interests test—rather than introduced as evidence of some other conduct, the First Amendment is indeed implicated.

[108] Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).

[109] The best interests test under which these restrictions are imposed is speech-neutral on its face: It applies to speech and conduct alike, so long as it affects the best interests of the child. But this can't make the restrictions content-neutral, because the best interests test is applied to the parents' speech based on the content of the speech. This scenario, where a facially speech-neutral law is applied to speech because of its content, has arisen often. The World War I era prosecutions for antidraft advocacy, which are now treated as having been unconstitutional, involved speech-neutral bans on conduct that obstructed recruitment or enlistment efforts by the armed services. *See, e.g.*, Debs v. United States, 249 U.S. 211, 214–15 (1919); Frohwerk v. United States, 249 U.S. 204, 206 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919). Cases such as *Hess v. Indiana*, 414 U.S. 105, 105 n.1 (1973), *Edwards v. South Carolina*, 372 U.S. 229, 234–37 (1963), *Cohen v. California*, 403 U.S. 15, 16 n.1 (1971), *Terminiello v. City of Chicago*, 337 U.S. 1, 2 n.1, 3 (1949), and *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940), involved speech-neutral "breach of the peace" laws. The interference with business relations tort in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), and the intentional infliction of emotional distress tort in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), were likewise speech-neutral. Yet when, as in these cases, a facially speech-neutral law applies to speech precisely because of what it says, the law is not treated as a content-neutral time, place, or manner restriction. I discuss

entirely prohibit, on pain of loss of rights, a certain kind of speech to a particular listener, and thus fail to leave open ample alternative channels for the parent to express his views to the child.[110]

### 2. *The Presumptive Unconstitutional Vagueness of Many Child Custody Speech Restrictions*

Parent-child speech restrictions may also be unconstitutionally vague. This is clearest for vaguely crafted speech-restrictive orders, for instance an order that bars a father from "exposing the child to . . . his gay lifestyle,"[111] or mandates "that each party will impress upon the children the need for religious tolerance and not permit any third party to attempt to teach them otherwise."[112] But it may also be true for the "best interests" test generally, when it's applied to parental speech in deciding custody.[113] As *Grayned v. City of Rockford*, the Court's leading elaboration of the void-for-vagueness doctrine, pointed out,

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy mat-

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this point at length in Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

*Compare* Schutz v. Schutz, 581 So. 2d 1290, 1292–93 (Fla. 1991) (wrongly applying *United States v. O'Brien* analysis to child custody speech restrictions, though such analysis should apply only to content-neutral restrictions); Borra v. Borra, 756 A.2d 647, 651 (N.J. Super. Ct. Ch. Div. 2000) (same); Banks, *supra* note 63, at 116 (approving *Schutz* analysis) *with In re* Marriage of Olson, 850 P.2d 527, 532 (Wash. Ct. App. 1993) (properly treating restrictions such as those in *Schutz* as content-based); Ferguson, *supra* note 63, at 951 (same).

[110] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56–57 (1994) (striking down content-neutral speech restriction on grounds that it didn't leave open ample alternative channels, since it kept people from effectively reaching their intended audiences).

[111] Hogue v. Hogue, 147 S.W.3d 245, 247 (Tenn. Ct. App. 2004) (reversing such order on vagueness grounds).

[112] Frank v. Frank, 833 A.2d 194, 199 (Pa. Super. Ct. 2003) (affirming such order with little discussion, and without considering whether it was unconstitutionally vague).

[113] For more on the test's vagueness, see generally David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (advocating for presumption in favor of parent who is primary caretaker); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11–16 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226 (exploring desirability of adopting less discretionary legal standards in custody disputes).

> ters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[114]

The best interests test, as applied to speech, jeopardizes all three of these values. It leaves parents who are about to break up, are breaking up, or have broken up with little guidance on what speech they are free to engage in without risking their access to the child. It risks judges' deciding based on their own subjective judgment of what speech is or is not in the child's "best interests," a judgment that may be colored by their agreement or disagreement with the religious or political viewpoints that the parent expresses. And it pressures cautious parents to steer far wide of any speech that they think a judge might later condemn.

The void-for-vagueness doctrine is itself vague: The Court has never made clear just when a statute is clear enough[115] and when it's too vague to be tolerated.[116] My sense is that the best interests stan-

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[114] 408 U.S. 104, 108–09 (1972).

[115] "Condemned to the use of words, we can never expect mathematical certainty from our language," *id.* at 110, and this understandably leads the Court to tolerate some degree of vagueness.

[116] The void-for-vagueness doctrine applies in civil cases as well as criminal ones. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1048–51 (1991) (holding that attorney disciplinary rule was unconstitutionally vague as applied); Arnett v. Kennedy, 416 U.S. 134, 159–64 (1974) (plurality) (holding employment protection standard not impermissibly vague in regulating speech of federal employees); *id.* at 164 (Powell, J., concurring in part and concurring in result in part) (agreeing with plurality on this); Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 576–79 (1973) (considering void-for-vagueness challenge to restriction on government employee speech, though concluding that rule was not impermissibly vague); Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04 (1967) (holding that restriction on government employee speech was unconstitutionally vague); Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 970 (9th Cir. 1996) (holding college sexual harassment policy was unconstitutionally vague as applied to professor with provocative teaching style); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1183–84 (6th Cir. 1995) (finding public university's discriminatory harassment policy void for vagueness); Silva v. Univ. of N.H., 888 F. Supp. 293, 312–13 (D.N.H. 1994) (ruling that discipline of professor for defying university's sexual harassment policy violated First Amendment's notice requirement); Doe v. Univ. of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989) (finding university "never articulated any principled way to distinguish sanctionable from protected speech" in its discrimination policy). The penalty of losing custody of one's children, or getting less custody rights than one otherwise would, is at least as severe—and as likely to deter—as the loss of a job, discipline by the state bar, or discipline by a university.

The void-for-vagueness doctrine doesn't apply to the government as funder, *see* NEA v. Finley, 524 U.S. 569, 588–89 (1998), but the *Finley* holding by its terms applies only "when the Government is acting as patron"—distributing "subsidies"—"rather than as

dard is likely too vague when it's applied to speech (though not to other conduct, given that the vagueness doctrine is more forgiving when the challenged law doesn't affect speech[117]), but it's impossible to be certain which way the courts will decide on this. Yet in any event, as the Court has made clear, the vagueness of a speech restriction must also be seen as increasing the restriction's potential breadth—precisely because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' "[118]—and thus as rebutting the argument that the restriction is a suitably narrow means of serving an overriding government interest in protecting children.[119]

### 3. *The Potential Scope of Child Custody Speech Restrictions*

The "harmful ideology" restrictions with which this Article began—the restrictions on atheism, racism, Communism, and so on—seem to be imposed in a fairly small fraction of all child custody cases. This might be so precisely because many judges are hesitant to restrict people's ideological advocacy, or to diminish people's parental rights because of their ideological advocacy. Because of this, and because such restrictions tend to be imposed only when one of the litigants asks for them,[120] the restrictions may seem like poor tools for the government to systematically restrict dissenting speech.

But what one judge can do in one case, many judges can do in many cases—and should do, if they believe that the first judge's reasoning is sound. Likewise, legislatures and higher courts can mandate such decisions in cases generally.

Imagine, for instance, that a case considers a parent's racism in denying the parent custody under a best interests standard, and that

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sovereign," *id.* at 589. The right of access to one's own child is not a government "subsid[y]" or "patron[age]"; the government's actions restricting such access are clearly exercises of its sovereign power. *Id*; *see infra* Part II.B.2.a & note 231.

117 *See* United States v. Mazurie, 419 U.S. 544, 550 (1975) (observing that statutes that don't restrict speech can only be held unconstitutionally vague when they are vague as applied to this particular challenger's conduct); Grayned v. City of Rockford, 408 U.S. 104, 108–09 (noting that one of three concerns raised by vague statutes is specific to speech restrictions).

118 *Grayned*, 408 U.S. at 109.

119 *See* Reno v. ACLU, 521 U.S. 844, 874–79 (1997) (holding that statute seeking to protect minors from harmful material on Internet suppresses large amount of constitutionally protected adult speech and is thus too broad).

120 *But see* Decree of Dissolution of Marriage, Jones v. Jones, No. 49D01-0305-DR-00898, at 4 (Feb. 13, 2004), *available at* http://www.law.ucla.edu/volokh/custody/jones.pdf (ordering, contrary to desires of both parents, that "the parents are directed to take such steps as are needed to shelter [the son] from involvement and observation of . . . non-mainstream religious beliefs and rituals," referring specifically to parents' Wicca religion), *rev'd*, 832 N.E.2d 1057, 1061 (Ind. Ct. App.) (holding that Indiana law prohibited such orders when neither parent had requested this).

the Supreme Court upholds this decision against a First Amendment challenge, perhaps on the theory that there's a compelling interest in serving a child's best interests.[121] State appellate courts would then be free to decide that, as a matter of law, a parent's racism should indeed be weighed as a factor, perhaps even heavily weighed.[122] Such a decision would be logically plausible: After all, being taught racism is indeed against a child's best interests. It would be legally permissible: By hypothesis, the Supreme Court has just approved decisions that protect children against such speech. And it would be morally appealing: Why not strike a blow for equality, and for the best interests of children, by reminding lower courts that they should consider parents' racism as part of the best interests analysis? Some appellate judges might not take this view, but others may.

As such appellate decisions become well-known, through coverage by the mass media or by family lawyer publications, they'll naturally affect lawyers' behavior. Lawyers will look for such speech in their cases, since it could help their clients' cause. Even if the client doesn't much care about the other parent's ideology, the lawyer and the client may be willing to use the issue as a means of influencing the custody decision (either directly or as a bargaining chip to get a better settlement). And parents who are going through a messy breakup, or even envision the possibility of a breakup, may learn from the media or from their lawyers that the prudent course is to avoid the disfavored speech.

Moreover, if there is broad social hostility to Nazi, Communist, racist, pro-polygamy, pro-gay-rights speech, or atheistic speech, this

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121 *See, e.g.*, *infra* note 234.

122 State legislatures might also step in, for instance by enacting statutes that explicitly list a parent's racist speech as a factor to consider in the best interests analysis. Even if the Supreme Court's hypothetical decision approving child custody speech restrictions allows only "best interests" tests, and not express prohibitions on speech, a legislative decision to specify a parent's racist speech as a best interests factor will focus lawyers' and judges' minds on this issue, and thus increase the likelihood that claims of racist parental speech will be brought and considered.

Note, for example, the abundance of Michigan cases that favor parents who are willing to take their children to church and otherwise educate them religiously. *See supra* notes 5 & 6. I suspect that this partly flows from the relevant Michigan statute's provision of a list of "best interests" factors, which includes "The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MICH. COMP. LAWS § 722.23(b) (1993). Once this factor was expressly articulated, and once the Michigan Supreme Court made clear that the factor justifies a preference for religious upbringing generally (and not just preference for respecting mature children's own religious beliefs, or for maintaining stability of religious or irreligious upbringing), *see supra* note 6, lawyers, guardians ad litem, and judges became comfortable focusing on it as a routine part of their child custody cases.

hostility is likely to be shared by many judges and lawyers. When they hear allegations of such speech, they may think, "That's awful—there must be something I can do about it." This, too, will tend to turn individual decisions into broader practices.

General tests like the "best interests" test in fact often lead judges to produce specific rules or presumptions. In some jurisdictions, orders not to criticize the other parent have seemingly become nearly boilerplate, on the theory that such criticism is always against the child's best interests.[123] Likewise, restrictions on gay parents' custody were common when homosexuality was more widely condemned than it is today.[124]

For a while, novel restrictions may remain rare, because lawyers and judges are unused to their availability. Law is a conservative field: Sometimes things aren't done just because they haven't been done. But once a tipping point is reached, and enough decisions are made and publicized, those decisions can start a cascade—each new decision makes the principle more familiar and more plausible to lawyers and judges in the next case.[125]

We have seen this, for instance, in the growth of hostile environment harassment law.[126] In the early 1970s, claims that sexually themed jokes, pinups, or artwork violated Title VII or other antidiscrimination laws were largely unheard of.[127] I suspect that if you had at that time forecast the increase in such Title VII claims, employers and employment lawyers would have greeted your prediction with skepticism.

But once courts accepted the theory that speech could be actionable because it created a hostile environment based on sex, religion,

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123 *See, e.g.*, Stephanie L. v. Benjamin L., 158 Misc. 2d 665, 667–68 (N.Y. Sup. Ct. 1993).

124 *See, e.g.*, DeLong v. DeLong, No. WD 52726, 1998 WL 15536, at *6, *11 (Mo. Ct. App. Jan. 20, 1998) (observing that Missouri appellate courts throughout 1980s in practice applied "per se rule" that homosexual parents couldn't get custody of their children, but rejecting this rule), *aff'd in part and rev'd in part sub nom.* J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998).

125 *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999). Nor can the Court easily reverse course once the restrictions become common, if it has upheld them when they were rare. If one parent is entitled to get custody based on the other's speech so long as such cases are isolated, it's hard under traditional individual rights principles to conclude that he would lose this entitlement when lots of other people bring similar claims in their custody proceedings.

126 *See generally* Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000).

127 *Cf. Excerpts from Statement Explaining Rights Bill*, N.Y. TIMES, Apr. 24, 1964, at 23 (quoting Rep. William M. McCulloch, then ranking minority member of House Judiciary Committee and backer of Civil Rights Act, as saying, "The bill does not permit the Federal Government in any way to interfere with freedom of the press and freedom of speech.").

or race, plaintiffs' lawyers brought more cases, and got still more favorable caselaw. There has been no change to the statutory standard: As with the best interests standard, the statute says nothing about speech. The shift has mostly been driven by private litigation that led courts to create a potentially broad "hostile environment" standard,[128] followed by more litigation that yielded court decisions fulfilling this potential. And a legal culture that has been understandably hostile to sexually, religiously, and racially offensive speech has helped push judges and lawyers in this direction, as well.

The result is conventional wisdom that certain kinds of speech are too legally dangerous to allow in workplaces. Employer policies now routinely ban such speech (though, as with all bans, these are imperfectly enforced), and employment lawyers routinely recommend such bans.[129]

Hostile environment cases are not easy for plaintiffs to win, but the victories that have happened have had a powerful deterrent effect on risk-averse employers. Whether this is good or bad, it shows the speech-restrictive force of regimes enforced through privately initiated litigation. And it shows how today's isolated decisions can become tomorrow's rules.

These concerns help explain why the Court has been rightly concerned about private litigation as a restraint on speech, even when the lawsuits seemed unusual, and the defendants unsavory. Consider *Hustler Magazine v. Falwell*, which unanimously reversed an intentional infliction of emotional distress verdict that was based on *Hustler*'s vitriolic and largely nonsubstantive satirical attack on Jerry Falwell.[130] Successful claims under the intentional infliction of emotional distress tort were uncommon. State courts had generally defined the tort quite narrowly.[131] Liability under this tort based on public speech, such as magazine articles, was unprecedented. And the Court's opinion stressed that if it were possible to limit liability to the

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128 The EEOC has brought a few of these cases, but very few. *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 628–33 (1997) (discussing leading cases that have shaped hostile environment speech restrictions).

129 *See, e.g.*, Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, *supra* note 126, at 305–10.

130 485 U.S. 46, 49–50, 57 (1988); *see also, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982) (rejecting liability under interference with business relations tort for speech urging boycott, though such cases had been fairly rare).

131 *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("The cases thus far decided have found liability . . . only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.").

*Hustler* piece, "public discourse would probably suffer little or no harm."[132]

But if Falwell had won, the tort would have become a ready weapon in any savvy media lawyer's arsenal. More cases would have been brought, and more would have been won. Lawyers who had been reluctant to bring intentional infliction of emotional distress claims based on speech, because they assumed that the First Amendment forbade such claims, would have been disabused of that assumption; likewise for judges who had been reluctant to let such claims prevail. And future victories would have led still more lawyers to bring such lawsuits.

Nor does any of this require metaphors about slippery slopes or camel's noses.[133] This is just the normal way the legal system works, and is supposed to work. When a precedent is set and a legal rule is articulated, lawyers and lower court judges are supposed to use it. That a restriction is rare is no reason to uphold it, since upholding it may often make it much less rare.

Finally, divorces and child custody battles are more common today than in the past.[134] This increases the potential number of parents who might be restricted or deterred by child custody speech restrictions. And it also increases the number of cases that may set the potential precedents that I describe, and thereby cause a cascade of other cases as lawyers and judges learn more about the availability of the restriction. In a future McCarthy-like era, where some ideology faces broad social hostility, child custody speech restrictions could thus become much more routine than they were in the original, pre-divorce-revolution McCarthy era.[135]

### *C. How the Free Exercise Clause Is Implicated*

Restrictions on religious speech may also implicate the Free Exercise Clause as well as the Free Speech Clause.

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[132] Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

[133] See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003), for an explanation of how such metaphors sometimes do reflect the real world.

[134] About twenty-five percent of all children under age eighteen have parents who are divorced, separated, or have never been married. *See* U.S. CENSUS BUREAU, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002, at 16, *available at* http://www.census.gov/prod/2003pubs/p20-547.pdf.

[135] *See infra* Appendix, p. 734, noting some 1950s cases where a parent's Communist leanings were indeed considered in child custody decisions.

### 1. *Restrictions on Inconsistent Religious Teachings*

Some court decisions bar noncustodial parents from teaching the child religious views that are contrary to those taught by the custodial parent.[136] These rulings single out religious speech for special treatment, precisely because of its religiosity. They may restrict the speech only when the restriction is found by the court to be in the child's best interests, or when it seems likely to cause psychological harm. But the decisions nonetheless treat religious instruction as different from other sorts of speech, and subject to special scrutiny by courts. I've seen no cases, for instance, where the courts restrict a parent's politically liberal teachings because the custodial parent is conservative, or otherwise focus on the conflict in the parents' nonreligious ideologies.

Such a targeted restriction presumptively violates the Free Exercise Clause as well as the Free Speech Clause.[137] *Employment Division v. Smith* generally holds that the Free Exercise Clause doesn't mandate religious exemptions from neutral, generally applicable rules.[138] But the Clause does presumptively bar the government from singling out religious practice for special burdens.

As *Smith* itself held, "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban [certain] acts [including proselytizing and assembling with others for a worship service] only when they are engaged in for religious reasons, or only because of the religious belief that they display."[139] So restrictions that single out religious speech because of the harms that supposedly flow from its religiosity are presumptively barred by the Free Exercise Clause as well as by the Free Speech Clause.[140]

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136 *See supra* note 53 and accompanying text.

137 Parents' religious teachings to their children are often part of the practice of their religion. Many religious parents feel compelled to teach their religion to their children, in the sense that they see failure to do so as a sort of sin. Many others feel at least motivated to do so, in the sense that they see it as something that God wants them to do. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 219 (1972). That the restrictions are ostensibly entered under a facially religion-neutral "best interests" or "likely harm" test doesn't, I think, change the analysis, because the alleged harm to the child's best interests flows from the religiosity of the speech. *See* Volokh, *Speech as Conduct*, *supra* note 109, at 1298–1300 (discussing this in more detail). But this matters little, since the Free Exercise Clause scrutiny would in any case be no greater than what the Free Speech Clause also mandates.

138 494 U.S. 872 (1990).

139 *Id.* at 877; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . regulates or prohibits conduct because it is undertaken for religious reasons.").

140 *Andros v. Andros*, 396 N.W.2d 917, 924 (Minn. Ct. App. 1986), was thus mistaken to reason that deliberately restricting a visiting parent's ability to take a child to church without the custodial parent's permission "affects neither appellant's religious beliefs, nor his right to practice his religion." Such a restriction singles out a religious practice—taking

### 2. *Restrictions on Religious Speech Under a "Best Interests" Standard*

Other decisions enjoin a parent's religious speech, or alter custody or visitation rights based on a parent's religious speech, without regard to the religiosity of the speech. A court might, for instance, deny a parent custody because that parent will teach the children racist ideology.[141] The ideology might happen to be religious,[142] but the court's order may flow from the ideology's racism, not its religiosity: The court would likely have issued the same order even had the parent been teaching racism for secular reasons.

In such a situation, the basic *Smith* rule holds that the Free Exercise Clause wouldn't be implicated. The best interests standard is a rule of general applicability, which doesn't single out religion for special burdens; and it's being applied here for reasons unrelated to whether the parent's behavior is religious.[143]

There is a possible exception to the *Smith* rule: *Smith* noted that in "hybrid situation[s]," where "the Free Exercise Clause [is raised] in conjunction with other constitutional protections, such as freedom of speech," extra Free Exercise Clause scrutiny might still be required

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a child to participate in religious services, and communicating religious values to a child through those services—for a special burden precisely because of its religiosity. *See also* Murphy v. Murphy, No. CO-95-1363, 1996 WL 70978, at *3 (Minn. Ct. App. Feb. 20, 1996) (making same error).

Likewise, *Behnke v. Green-Behnke*, No. A03-1039, 2004 WL 376984 (Minn. Ct. App. Mar. 2, 2004), was mistaken when it reasoned:

> Appellant argues that the district court violated her right to freely exercise her religion . . . by ordering that during her visitations with the children she "not initiate or discuss with the children matters relating to church attendance or religious beliefs." . . . A law of general application that is not intended to regulate religious beliefs or conduct does not contravene the Free Exercise Clause if it incidentally infringes on religious practices. *See* [*Employment Div. v. Smith*]. . . . Minn. Stat. § 518.003, subd. 3(a) (2002), confers on respondent, as the children's sole legal custodian, the exclusive "right to determine the child[ren]'s upbringing, including education, health care, and religious training." This provision is a valid law of general application that regulates neither religious beliefs nor conduct; the provision's purpose is to secure the custodial parent's right to choose the religion of the children.

*Id.* at *8–*9 (paragraph breaks deleted). A law that specifically governs children's religious training, and that is applied to restrict a noncustodial parent's religious teachings precisely because of their religiosity, is not a law of general applicability within the meaning of *Smith*.

141 *See supra* note 11.

142 *E.g.*, Burnham v. Burnham, 304 N.W.2d 58, 61 (Neb. 1981) (concluding that mother's racist religious beliefs would harm daughter's wellbeing).

143 *See* Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 How. L.J. 205, 250 (1996) (taking view that best interests standard is religion-neutral and thus doesn't violate Free Exercise Clause, though not discussing hybrid rights exception or free speech issue).

even when the government action is religion-neutral.[144] This exception is notoriously uncertain in scope, and questionable in its justification. Its problems have been amply discussed elsewhere,[145] and I won't go into them here.

Suffice it to say, though, that even if the "hybrid situation" exception applies, and courts conclude that the Free Exercise Clause mandates strict scrutiny of content-based yet religion-neutral speech restrictions when those restrictions are applied to religious speech, the protection would be no greater than what the Free Speech Clause provides.[146] The official test would be strict scrutiny under either provision, but free speech strict scrutiny has generally been seen as "'strict' in theory and fatal in fact,"[147] and free exercise strict scrutiny as "strict in theory but feeble in fact."[148] So the Free Exercise Clause would in any event add little to what the Free Speech Clause provides.

Some state constitutions' religious freedom clauses have been interpreted as protecting religiously motivated conduct—which would include attempts to teach religious views—even against religion-neutral rules.[149] Some state statutes also provide similar protection.[150] But these too would protect religious speech no more than the Free

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[144] 494 U.S. at 881–82.

[145] *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564–71 (1993) (Souter, J., concurring); Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993).

[146] *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654–55 (1981).

[147] Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (coining "'strict' in theory and fatal in fact" line, though in context of equal protection rather than free speech); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996) (describing how strict scrutiny in free speech cases has indeed generally been fatal in fact).

[148] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).

[149] ALA. CONST. art. I, § 3; Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–81 (Alaska 1994); City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443, 450 (Ind. 2001); Fortin v. Roman Catholic Bishop, 871 A.2d 1208, 1227 (Me. 2005); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235–36 (Mass. 1994); Reid v. Kenowa Hills Pub. Sch., 680 N.W.2d 62, 68–69 (Mich. Ct. App. 2004); State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1277 (Mont. 1992); *In re* Browning, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000); Hunt v. Hunt, 648 A.2d 843, 852–53 (Vt. 1994); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992); State v. Miller, 549 N.W.2d 235, 240–41 (Wis. 1996).

[150] *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 & n.6 (1999).

Speech Clause would, since they likewise generally call for strict scrutiny. And even if legislatures or courts wanted to provide more protection for religious speech than for secular speech, they probably wouldn't be allowed to: Such preferential treatment of religious speech would be impermissible content discrimination under the federal Free Speech Clause.[151]

### 3. *Restrictions on Religiously Motivated Conduct*

Finally, when a court restricts religiously motivated conduct rather than speech,[152] the state religious freedom clauses, similar state statutes, and a possible "hybrid" of the Free Exercise Clause and the parental rights doctrine might do more than the Free Speech Clause does. This, though, is outside the scope of this Article, which focuses on child custody speech restrictions.

## *D. How the Establishment Clause Is Implicated*

Some child custody speech restrictions may also violate the Establishment Clause.

### 1. *Favoritism for Religion*

Custody decisions favoring religious parents over atheist, agnostic, or nonobservant parents[153] violate the Establishment Clause for two reasons. First, they pressure parents to participate in religious practice or to profess religious belief. They don't threaten parents with jail for not going to church, but they do threaten them with a decreased chance of getting custody of their children—a potent threat to most parents.

Even the threat of having to miss one's high school graduation, the Court has held, is impermissibly coercive.[154] Likewise, lower courts have held that it's impermissibly coercive to offer prisoners extra family visitation privileges on condition that they participate in religiously based Alcoholics Anonymous programs.[155] The same applies to the threat of losing custody of one's children, or of getting

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151 *See generally* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 610–17 (1999).

152 *See* Levitsky v. Levitsky, 190 A.2d 621, 625–26 (Md. 1963) (discussing restriction on parent's religiously motivated decisions not to authorize blood transfusions for children); Peterson v. Peterson, 474 N.W.2d 862, 869–70 (Neb. 1991) (discussing custody change justified by parent's religiously motivated beating of children).

153 *See generally supra* notes 5–10 and accompanying text.

154 Lee v. Weisman, 505 U.S. 577, 595 (1992).

155 *E.g.*, Griffin v. Coughlin, 88 N.Y.2d 674, 677 (1996).

less visitation time with them, based on one's unwillingness to teach them religion.[156]

Second, the Establishment Clause generally forbids even non-coercive discrimination against people because of their irreligiousness.[157] The exception to this rule—the government may sometimes exempt religious objectors but not secular objectors from generally applicable laws[158]—is inapplicable here.

### 2. *Coerced Church Attendance*

Orders that parents take their children to church also violate the Establishment Clause. Such orders are coercive: Even having to be in the audience at a prayer is impermissible coercion,[159] so surely having to go to church is too. Such orders endorse religion, since their premise is that religiosity is better than irreligiosity.[160] And they advance religion by explicitly providing religious institutions with new attendees. Such coercion, endorsement, and advancement of religion are all unconstitutional.[161]

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156 For a brief discussion of how these coercive pressures operate, see *supra* note 106.

157 *E.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Everson v. Bd. of Ed., 330 U.S. 1, 15–16 (1947). *See generally* Note, *supra* note 106, at 1706–27 (1984) (discussing discrimination against irreligious parents).

158 *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding statute barring government from imposing substantial burdens on religious exercise of persons confined to institutions); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding exemption of religious organizations from prohibition against employment discrimination on basis of religion).

159 *See* Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring in the judgment, writing for three Justices) (treating "government pressure to participate in a religious activity" as a form of "government coercion" that "is sufficient . . . to prove an establishment clause violation"); *id.* at 641–42 (Scalia, J., dissenting, writing for four Justices) (characterizing coerced attendance at church as Establishment Clause violation); Griffin v. Coughlin, 673 N.E.2d 98, 106 (N.Y. 1996) (interpreting *Lee* as "condemning State compulsion to attend or participate in a religious practice"); DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397, 413 (2d Cir. 2001) (likewise).

160 Surely a court's decision that parents should be ordered to take their child to church because "it is certainly to the best interests of [the child] to receive regular and systematic spiritual training," *McLemore v. McLemore*, 762 So. 2d 316, 320 (Miss. 2000), runs afoul of the ruling in *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989), that "the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion [including religious belief as opposed disbelief] is favored or preferred.'" The chief exception to the *Allegheny* rule, *Marsh v. Chambers*, 463 U.S. 783 (1983)—which upheld the practice of hiring legislative chaplains—rests on the "unique history" of the practice, which dates back to the very Congress that ratified the First Amendment, *id.* at 791.

161 *See Allegheny*, 492 U.S. at 592–94; *see generally* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

### 3. *Courts Deciding Which Religious Teachings Are Inconsistent with Other Teachings*

Orders that require parents not to teach things that are inconsistent with the other parent's religious teachings[162] likely also violate the Establishment Clause. Such orders require courts to decide which views are consistent with a religion and which aren't, and "the First Amendment forbids civil courts" from engaging in "the interpretation of particular church doctrines and the importance of those doctrines to the religion."[163] Courts generally may not decide, for instance, whether a church is remaining true to orthodox teachings, even when a will leaves property to the church on that condition.[164] Likewise, lower courts have struck down laws prohibiting the mislabeling of food as kosher, because enforcement of such laws requires government agencies to answer the religious question of what is kosher.[165]

In many child custody cases, the parties may agree that their religions are different: For instance, a Jehovah's Witness noncustodial parent may freely concede that his teachings are inconsistent with the Catholic custodial parent's. These cases may thus differ from disputes about church orthodoxy or kashruth, where both sides generally claim to be orthodox enough or kosher enough. Perhaps the Establishment Clause shouldn't forbid the court from accepting an *uncontested* assertion that two religions are different, though the Free Speech Clause and Free Exercise Clause would still presumptively bar the court from restricting speech based on this judgment. The Court has never confronted this question.

But in some cases, the parties may hotly contest whether their religions are inconsistent: A Jewish custodial parent, for instance, may believe the visiting parent's Jews for Jesus teachings to be inconsistent with the Judaism that the custodial parent is teaching, but the Jews for Jesus member may disagree. A relatively ecumenical Christian faced with an order that he not "educat[e] the children in

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[162] *See, e.g.*, Bentley v. Bentley, 448 N.Y.S.2d 559, 559 (App. Div. 1982); Lange v. Lange, 502 N.W.2d 143, 147 (Wis. Ct. App. 1993); Poole v. Poole, 670 N.W.2d 557, ¶ 1 (Wis. Ct. App. 2003).

[163] Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); *see also* Zummo v. Zummo, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) (arguing that this doctrine prevents civil courts from enforcing orders that ban one parent from teaching religion contrary to other parent's).

[164] *E.g.*, *Presbyterian Church*, 393 U.S. at 450; Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 106–07 (1952).

[165] *See, e.g.*, Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1342 (4th Cir. 1995); Commack Self-Service Kosher Meats, Inc. v. Rubin, 106 F. Supp. 2d 445, 454–55 (E.D.N.Y. 2000); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1363–64 (N.J. 1992).

religious doctrine that is contrary to the Lutheran doctrine which the children have been taught"[166] might find little contradiction in various Protestant teachings. A Christian who is more focused on the importance of theological details might find a great deal of contradiction.

Moreover, in practice the test would likely end up being not just technical inconsistency but substantial inconsistency, so that, for instance, taking a child to a Conservative Jewish synagogue when the child is generally being raised as a Reform Jew would be permitted, but taking a Jewish child to a Catholic church would not be.[167] And when the degree of inconsistency is at issue, even parents of admittedly different religions may well disagree about the magnitude of the difference, and courts would have to make this theological decision—a decision that the Establishment Clause bars them from making.

### 4. *The Irrelevance of the Secular Purposes*

Finally, note that the bans on religious coercion, endorsement of religion, preference for religion, and decision-making about religious doctrine apply even when the government action serves worthy secular ends. Inquiring into a church's doctrine may let courts better enforce the wishes of testators who leave property to a church only so long as the church remains orthodox. Compulsory prayer might make children more moral. Forcing criminals to attend Alcoholics Anonymous might reduce addiction and thus crime. Limiting oath taking

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166 *Lange*, 502 N.W.2d at 145 n.2; *see also* Carolyn R. Wah, *The Custodial Parent's Right to Control Religious Training: Absolute or Limited?*, 9 AM. J. FAM. L. 207, 213 (1995) (noting problems with courts resolving what's "contrary to [a denomination's doctrine]").

167 *See, e.g.*, *In re* Marriage of Minix, 801 N.E.2d 1201, 1204–07 (Ill. App. Ct. 2003) (declining to restrict noncustodial parent from taking children to religious services, on grounds that there was no evidence that two rival denominations—Unity Church and Pentecostalism—were materially different, and distinguishing earlier case on grounds that in that case court was "presented with evidence of the dichotomy between the two religions at issue [Catholicism and Protestantism]"); Peric v. Peric, No. 259222, 2005 WL 2090787, at *1 (Mich. App. Aug. 30, 2005) (noting trial court's apparent judgment that Catholic and Orthodox religions are quite similar, and that therefore father should be given credit for "continuing the child's [religious] education" by sending child to Catholic kindergarten, though child had been raised Orthodox); Marjorie G. v. Stephen G., 592 N.Y.S.2d 209, 211 (Sup. Ct. 1992) (noting that, unlike other cases where "the issue concerned a conflict between two different religions or two severely disparate denominations of one religion," this case "involves merely a sectarian dispute between the two most corresponding branches of the same religion," Reform and Conservative Judaism); Douglas v. Wright, 801 A.2d 586, 593–94 (Pa. Super. Ct. 2002) (upholding "trial court's finding that the Methodist religion has the same fundamental theology as the Lutheran religion," and thus upholding trial court's legal conclusion that court order giving certain rights to Methodist grandparents did not improperly interfere with custodial father's "right to make decisions concerning religion").

only to those people who believe they will be punished after death for lying might help promote honesty.[168]

Or perhaps not—people disagree about many such factual predictions. But under the Establishment Clause case law, it is not necessary to resolve this disagreement. Whether or not coercive, religion-endorsing, religion-preferring, or religious-doctrine-interpreting means are effective, the government must serve its goals by other means.[169]

### *E. The Limits of the Existing Doctrine*

We've seen a lot of doctrine in the last few pages; and the doctrine shows that there are serious constitutional problems here.

Yet this analysis can't be the end of the story. The standard First Amendment doctrine was created in controversies far removed from child custody speech restrictions. The Court has never had to consider the special issues raised by parent-child speech, or by conflicts between parents. There's no reason to conclusively presume that the rules developed in the other fields should apply entirely to this one.

Free Speech and Free Exercise Clause doctrines offer an escape clause from the traditional rules: Even restrictions that might otherwise be unconstitutional, it is sometimes said, are permissible if they are "narrowly tailored" to a "compelling government interest." But this is not a very helpful formulation. First, it doesn't tell us how to decide whether an interest in serving a child's best interests is compelling enough to justify speech restrictions or religious classifications.[170]

Second, some cases have struck down speech restrictions without applying strict scrutiny,[171] and the Court's doctrine makes clear that other restrictions are unconstitutional even though they would prob-

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168 *See* Atwood v. Welton, 7 Conn. 66 (1828) (taking such view).

169 *See, e.g.*, Zummo v. Zummo, 574 A.2d 1130, 1134 (Pa. Super. Ct. 1990) (so reasoning).

170 The requirement that a law be "narrowly tailored" to the compelling interest may help resolve the matter if a restriction is empirically unnecessary to serve an interest, or is clearly underinclusive with regard to that interest. *See, e.g.*, Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, *supra* note 147, at 2421–24. But these conditions aren't satisfied here.

171 *See, e.g.*, Virginia v. Black, 538 U.S. 343, 345 (2003) (finding ban on cross-burning unconstitutional, at least as applied to speech that is not intended to threaten people, without applying strict scrutiny); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) (holding intentional infliction of emotional distress tort unconstitutional when applied to otherwise protected speech on matters of public concern about public figures, without applying strict scrutiny); Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984) (striking down content-based restriction on reproductions of American currency without applying strict scrutiny); *cf.* Am. Booksellers' Ass'n v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1986) (striking down viewpoint-based restriction on pornography without applying strict scrutiny).

ably pass strict scrutiny.[172] Some speech is thus protected *even when* restricting it is necessary to serve a compelling government interest. But the strict scrutiny test doesn't explain when this should happen.

Third, some cases have upheld speech restrictions without applying strict scrutiny, because some special factors were present: The speech was seen as being of unusually low value,[173] the government was seen as acting in a special role that justified extra deference,[174] or something else.[175] Again, the strict scrutiny test tells us little about when this may happen.

Strict scrutiny in free speech cases, it seems to me, is a distraction—it suggests that there's somehow a formal test for deciding when an exception from protection should be created; but there can be no such test.[176] Rather, after speech is found to be protected under existing doctrine, there's always the question whether the doctrine ought to be modified—whether a new justification for upholding a speech restriction should be recognized. The same applies to the Establishment Clause, though some of the rules there purport to be absolute, with no room for exceptions,[177] and to the Free Exercise Clause.

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[172] *See, e.g.*, Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, *supra* note 147, at 2425–38 (giving examples of such restrictions).

[173] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 762 (1982) (upholding restrictions on child pornography because, among other reasons, child pornography was of very slight constitutional value). Before about 1980, the Court did not routinely apply strict scrutiny to speech restrictions, and some restrictions that it upheld and that it continues to endorse today would likely be unconstitutional if tested under strict scrutiny. *See, e.g.*, Miller v. California, 413 U.S. 15, 23–24 (1973) (upholding obscenity exception as justified more by perception that obscenity lacks First Amendment value and by historical exclusion of pornography from free speech protection than by proof that obscenity law is necessary to avoid harmful behavior); Time, Inc. v. Hill, 385 U.S. 374, 389–90 (1967) (holding that intentional lies are unprotected, even when not defamatory, but simply offensive to their subjects).

[174] *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1057–58 (1991) (upholding restrictions on lawyers' speech, on grounds that government has more power to regulate speech by licensed lawyers than by public at large).

[175] *See, e.g.*, Cohen v. Cowles Media, 501 U.S. 663, 670–71 (1991) (upholding enforcement of promises not to speak, because such promises waived First Amendment rights); Harper & Row v. Nation Enters., 471 U.S. 539, 560 (1985) (upholding copyright law, partly because First Amendment ought not be read as rendering useless half of Copyright/Patent Clause).

[176] *See, e.g.*, Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, *supra* note 147 (elaborating on this criticism); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141 (same).

[177] The anticoercion test and the principle that the government may not decide matters of religious doctrine have been seen as categorical, with no exceptions for coercions of religious practice or decisions about religious doctrine that serve compelling government interests. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969). Yet when the government is running prisons and the military, the government must make decisions

Free speech maximalists might resist the recognition of such new justifications for restricting speech, and often rightly so. But the Supreme Court always has the option of recognizing these justifications: It has recognized plenty in the past, and there's no reason to think that the current justifications (such as those that underlie the incitement, false statements of fact, obscenity, and fighting words doctrines) exhaust the possible list.[178]

The debate has to be about whether each particular new justification ought to be accepted—not over whether in principle such new justifications are generally possible. And, as I noted above, strict scrutiny isn't a terribly helpful tool for channeling this debate. Some restrictions have been rightly accepted even without a showing that they are narrowly tailored to a compelling government interest, and others have been rightly rejected even when they are so tailored.

We should therefore step back from the complex body of First Amendment law, and ask: How are parent-child speech, and restrictions on such speech, different from other sorts of speech and other restrictions? What special reasons are there to restrict the speech, and what special reasons to allow it? Which conventional First Amendment principles remain relevant to deciding what the legal rule ought to be, and which ones ought not apply?

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about religious doctrine, for instance when deciding whether a particular denomination is sufficiently part of mainstream Protestantism that a chaplain of that denomination would fill the institution's needs for a Protestant chaplain. *Cf.* Duffy v. State Personnel Bd., 283 Cal. Rptr. 622, 628 (Ct. App. 1991) (upholding prison agency's decision to hire as Catholic chaplains only those approved by Roman Catholic Church, rather than by Ecumenical Catholic Church); Turner v. Parsons, 620 F. Supp. 138, 140 (E.D. Pa. 1985) (upholding Veterans Administration's decision to hire only chaplains who "have an ecclesiastical endorsement from the officially recognized endorsing body of his denomination," which naturally requires government to "officially recognize[ ]" which endorsing bodies can authoritatively speak for denomination). The principle that the government may not prefer religious people or institutions to irreligious ones has also been articulated without a "strict scrutiny" exception, though the Court has expressly carved out an exception for accommodations of religious practice, Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding statute that allowed government to impose substantial burden on inmates' religious practice only if it passed strict scrutiny); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987), and can presumably carve out other exceptions as well.

178 *See, e.g.*, New York v. Ferber, 458 U.S. 747, 756 (1982) (recognizing child pornography as new exception).

## II
## PARENT-CHILD SPEECH, IN INTACT FAMILIES AND OUTSIDE THEM

### *A. Parent-Child Speech in Intact Families*

To better analyze child custody speech restrictions imposed when a couple splits, it's helpful to first ask: To what extent does the First Amendment protect parental speech within intact families—and why exactly is that speech protected?

#### *1. The Law's Tolerance for Such Speech*

In practice, the law almost never restricts parental speech in intact families. You are free to teach your child racism, Communism, or the propriety of adultery or promiscuity. Judges won't decide whether your teachings confuse the child, cause him nightmares, or risk molding him into an immoral person.[179] Judges won't enjoin the speech, or transfer custody to other people whose teachings will be more in the child's best interest.

I've seen a few exceptions—cases in which judges have terminated parental rights based in part on the parents' constitutionally protected speech, such as insults,[180] exposing the children to R-rated movies[181] or vulgar music,[182] or even racist statements.[183] I've also

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[179] This stems from more than just the government's lack of information about what parents are teaching. A child could, for instance, talk at school about views that his parents had taught him; yet the government generally wouldn't be allowed to restrict the parents' teachings, even if it concludes the teachings are against the child's best interests.

[180] *See, e.g.*, *In re* Julie M., 81 Cal. Rptr. 2d 354, 355 (Ct. App. 1999) (finding abuse partly based on mother's calling daughter "slut," but focusing mainly on nonverbal abuse); *In re* B.L., 824 A.2d 954, 955–56 (D.C. 2003) (noting that mother "was verbally abusive with [her child], calling him names such as 'stupid' and 'dumb,'" but focusing mainly on physical abuse and mother's "mental incapacity caused by alcohol abuse"); *In re* Shane T., 453 N.Y.S.2d 590, 593 (Fam. Ct. 1982) (finding abuse largely based on father's repeatedly calling son "fag," "faggot," and "queer"); *In re* Day, No. CA2002-09-073, 2003 WL 21517343, at *1 (Ohio Ct. App. July 7, 2003) (finding abuse partly based on mother's repeatedly calling daughter "slut," "whore," and "bitch," and partly based on physical abuse). Such speech would probably fit under the rubric of fighting words, which are seen as lacking constitutional value and thus aren't constitutionally protected, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). The fighting words doctrine is generally justified by the danger that the listener may start a fight with the speaker, and this justification usually doesn't apply when the listener is a small child and the speaker is the parent. Nonetheless, the broader rationale of *Chaplinsky* still supports allowing such speech to be restricted: The words are of "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," *Chaplinsky*, 315 U.S. at 572, even if the social interest here relates to protecting children from emotional trauma rather than to preventing fights.

[181] *E.g.*, Yvette H. v. Superior Court, No. E036862, 2005 WL 39765, at *5 (Cal. Ct. App. Jan. 7, 2005) (noting that mother "had allowed the children . . . to watch inappropriate

seen one case in which the court said that "mere words" may constitute child abuse "provided that their effect on the child" causes "substantial pain," such as emotional distress that yields physical manifestations such as stomach upset.[184] The words actually involved in that case were personal insults—a father calling the child "fag," "faggot," and "queer"—but the test is facially broad enough to potentially cover even warnings of eternal damnation, or harsh but justified condemnation of a child's actions. Yet these cases are extremely rare, and all but one[185] has involved a great deal of other harmful conduct on the parents' part.

I think that terminating parents' rights based even partly on their constitutionally protected speech should be impermissible: If the other conduct is harmful enough by itself to justify taking away the child, then the court should rely solely on that constitutionally unprotected conduct. If the other conduct is not harmful enough, the court ought not let constitutionally protected speech make the difference.[186] Nonetheless, the egregious other conduct in those cases, and the rarity of such cases more generally, suggests that the broad rule is one of respect for parents' free speech rights, without an inquiry into whether the parents' speech is immoral, harmful, or against the child's best interests.[187]

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movies to a point where [one child], who was then six years old, reported that he was scared to sleep because of a movie that he had watched with his mother and brother"); *In re* R.A.S., 321 N.W.2d 468, 471 (N.D. 1982) (noting that mother "has allowed [her nine-year-old-son] to watch an R-rated movie containing profanity and nudity"); *In re* Pappas, No. 2005-CA-00060, 2005 WL 1242087, ¶ 9, 13 (Ohio Ct. App. May 23, 2005) (noting eight-year-old child's nightmares that were supposedly "attributable to watching horror movies with his parents," and also noting that "the mother discusses both parents' medical conditions with him," which caused child to be "pre-occupied with his parents' health problems and [with] being their caregiver instead of their child").

182 *Yvette H.*, 2005 WL 39765, at *5 (relying partly on mother's letting nine-year-old child "listen to music with terrible language").

183 See *In re* Bianca W.F., 1999 Conn. Super. LEXIS 1807, at *9–*10 (July 12, 1999), where the court ordered that three children be removed from their parents' custody partly based on the following:

> Of grave concern is the father's use of racial slurs or derogatory racial references with [the Department of Children and Families], occasionally during the phone calls with the children. Such racial comments obviously have no place in American society. To the extent that the father has used such comments in the presence of the children, they constitute a continuing form of neglect of the children's educational and moral needs.

184 *In re* Shane T., 453 N.Y.S.2d at 593.

185 The exception is *In re Shane T.*

186 *See supra* notes 104–07.

187 Parents are also compelled to teach their children, by sending them to school. But even there, parents can choose a wide range of schools (if, of course, they can afford them); and while a private school's curriculum must include certain subjects, the law generally

This practice partly stems, I suspect, from the substantive due process right to control the upbringing of one's child, which the Court has recognized ever since *Meyer v. Nebraska*[188] and *Pierce v. Society of Sisters*.[189] Parents have considerable power to rear children how they like, not just speak to them. But the *Pierce/Meyer* rights have fairly modest force. The Supreme Court has never clearly articulated when they can be restrained.[190] Lower courts have often assumed that various reasonable restrictions on such rights would be permissible, and that such restrictions need not be judged under the "strict scrutiny" test.[191] And those rights are sometimes restricted to prevent not just physical harm, but even the possibility of emotional, psychological, and educational harm to the child: Consider, for instance, laws that ban child labor, even under the parent's supervision.[192]

Thus, the protection of parental speech appears to be broader and more secure than the protection of parental conduct. Does this make sense, and if so, why?

### 2. *The Speaker's Legally Enforced Despotism, and the Captive, Immature, and Vulnerable Listener*

Parental rights are unusual individual rights in our legal system: They are individual rights to control another person's liberty of movement, property, speech, and nearly everything else. They are rights to be despots, to exercise nearly absolute power over another person—and to do so with government assistance in maintaining one's despotism.[193]

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does not mandate or forbid particular viewpoints or forbid the teaching of particular subjects.

188 262 U.S. 390, 399 (1923).

189 268 U.S. 510, 534–38 (1925).

190 *See, e.g.*, Doe v. Heck, 327 F.3d 492, 519 (7th Cir. 2003) (noting Court's lack of clear guidance on limits of substantive due process parental rights doctrine); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 303 (same); *see also* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 525, 527 (2000) (arguing that Court ought not impose strict scrutiny in substantive due process parental rights cases).

191 *E.g.*, Vibbert v. Vibbert, 144 S.W.3d 292, 294–95 (Ky. Ct. App. 2004); Douglas County v. Anaya, 694 N.W.2d 601, 607 (Neb. 2005).

192 *See* Prince v. Massachusetts, 321 U.S. 158, 168–70 (1944) (upholding such law).

193 *See, e.g.*, MODEL PENAL CODE § 212.4 (outlawing "entic[ing] any child under the age of 18 from the custody of its parent"); *id.* § 3.08 (providing that parents' use of force is justified when done for "the purpose of safeguarding or promoting the welfare of the minor"); ALASKA STAT. § 47.10.141 (2004) (providing for police help in returning runaway minors); CAL. WELF. & INST. CODE § 601 (2005) (threatening children "who persistently or habitually refuse[ ] to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian" with being adjudged "ward[s] of the court"); MINN. STAT. ANN. § 609.06 subdiv. 1(6) (2005) (exempting reasonable force used by parents from criminal assault law); *id.* § 609.255 subd. 2 (2005) (defining false imprisonment to exclude con-

We secure such rights partly because we expect, with good reason, that parents will generally be benevolent despots. Human biology makes this so.[194] Biology also makes children need despots to govern them until some (disputed) age. Human experience (and possibly biology) suggests that parents are usually almost certain to be much more benevolent despots to their own children than even the most devoted bureaucrats would be. And human experience, coupled with most parents' far greater emotional stake in the children's well-being than even the best and brightest government officials will possess,[195] suggests that parents will also usually (though not always) serve their children's best interests better than government agents will. I think this generally suffices to justify parental rights.[196]

a. Self-Expression

Nonetheless, parental despotism and children's immaturity undercut some of the rationales for a free speech principle. For instance, consider the speaker's right to self-expression. Parents generally very much want to express themselves to their children, and for many, religious speech to their children is a critical part of their religious practice.[197] Many parents would sacrifice all other free speech rights in exchange for this one: They write no law review articles, they publish no Weblogs, they don't even discuss politics or morals with friends—but they care passionately about teaching what they think are the right ideas to their children. And for many parents, religious speech to their children is a critical part of their religious practice.

Yet the legitimate interests of our listeners necessarily limit our rights to self-expression. As the Court has said, "no one has a right to

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ventional parental restraint of children); Brekke v. Wills, 23 Cal. Rptr. 3d 609, 613 (Ct. App. 2005) (upholding injunction barring sixteen-year-old girl's ex-boyfriend, whom mother considered bad influence, from contacting her, partly on grounds that injunction helped protect "[mother's] exercise of her fundamental right as parent to direct and control her daughter's activities"); L.M. v. State, 610 So. 2d 1314 (Fla. Dist. Ct. App. 1992) (ordering, as condition of juvenile's probation, that he obey his mother).

194 I say "biology" rather than just "psychology" to highlight the fact that this is likely a result of our genetic makeup and not just social conditioning. *See* ROBERT WRIGHT, THE MORAL ANIMAL 57–59, 103–04 (1994) (arguing that evolution has selected for genes that cause parents to want to help their children). Of course, some parents abuse their children horribly, but this is the exception. The norm is that parents expend a tremendous amount of time, money, and effort in helping their children.

195 Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 132 (2000).

196 *E.g.*, *id.* at 132–33; Gilles, *supra* note 93, at 940.

197 Some parents deliver the speech themselves, and others select which third-party speech (by religious leaders or others) to expose their children to; both forms of speech are equally protected. *See supra* note 93 and accompanying text.

press even 'good' ideas on an unwilling recipient."[198] Coercing listeners is likewise generally thought of as making self-expression unjustified.[199]

One's children are sometimes indeed unwilling listeners—literally a captive audience. Parents have remarkable power over their children, for psychological, economic, and legal reasons. The law supports the power of parents both to make children hear the parents' views and to considerably insulate children from hearing contrary views.

Even if the children are willing, even eager, to hear from their parents, it's hard to see how they've made any mature choice to be willing.[200] And the usual mechanisms that listeners use to protect themselves from potentially harmful or deceptive speech—skeptical judgment and access to other viewpoints—are often missing with children.[201]

Of course, we shouldn't overstate the practical scope of parental power, especially over older children. "Despotism itself is obliged to truck and huckster. The Sultan gets such obedience as he can."[202] But this legally enforced parental power does exist. It makes the parent-child relationship different from the relationship that speakers usually have with listeners. And it makes legal intervention to prevent speech that harms the listeners more appealing.[203]

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198 *See* Rowan v. Post Office Dep't, 397 U.S. 728, 736–37 (1970) (upholding law banning senders from mailing material to people who had demanded that mailings stop).

199 *E.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 997–98 (1978).

200 *See* Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) ("When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. . . . [A] State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.").

201 I therefore agree to a limited extent with James Dwyer, who generally argues against parents' having broad self-expression rights to shape their children's education. *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1432–33 & n.266 (1994). I also agree to some extent with Barbara Bennett Woodhouse, who argues against a notion that parents have inherent "possessive individualism" rights to control their children. *See, e.g.*, Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1809–44 (1993). But, as I argue below, I think parents' rights to teach their views to their children should remain protected for reasons other than pure self-expression or quasi-ownership of their children.

202 3 EDMUND BURKE, THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 57 (1815) (quoting Burke's *Speech on Conciliation with the [American] Colonies*, Mar. 22, 1775).

203 Consider, for instance, a court favoring a parent because a mature child prefers to be raised in that parent's religion, for instance when "a fifteen-year-old child is a devout adherent to a particular religion" (or is a devout atheist) and "one parent will provide the

b. Listeners' Interests

Likewise, consider free speech rights as a means of protecting listeners' interests in hearing. First Amendment precedents rightly prohibit the government from restricting our receiving information.[204] As adults, we can generally sensibly decide whether to accept moral claims and what weight to place on facts—or at least we're good enough at this that we doubt that government-imposed speech restrictions will improve our decision-making. As free adults, we are entitled to decide such things for ourselves, even if paternalistic government officials are skeptical of our competence. And as citizens, we need to have our information unfiltered by the government so that we can freely decide whether to keep our governors in power or to replace them.

Yet we have little reason to take the same view about children, especially younger ones. Children are less able than adults to sift the good from the bad, and to place the proper weight on facts. Perhaps, for instance, it was right for the court to condemn a mother's telling her daughter that her father was in fact not her biological father:[205] An adult child could sensibly evaluate this fact, and maybe benefit from knowing the truth about her origin (though she might also regret having learned it), but it doesn't follow that a 12-year-old would equally benefit.[206]

Children's cognitive limitations thus make paternalism towards children potentially justifiable, even if paternalism towards adults is

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child greater freedom in his or her pursuit of religious enlightenment" (or atheism). Bonjour v. Bonjour, 592 P.2d 1233, 1239–40 (Alaska 1979) (noting that this is permissible); *In re* Vardinakis, 289 N.Y.S. 355, 359 (Fam. Ct. 1936) (following similar approach); Fritzinger v. Fritzinger, 67 Pa. D. & C.4th 271, 276–77 (Ct. Com. Pl. 2004) (same); Hunter v. Hunter, No. M2002-02560-COA-R3-CV, 2005 WL 1469465, at *10 (Tenn. Ct. App. June 21, 2005) (same); Beschle, *supra* note 63, at 399 (discussing issue).

Generally, reducing a speaker's rights because his audience dislikes his speech is unconstitutional. *E.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."). But here the audience—the child—is by law turned over to a speaker's custody and control. Taking into account a mature child's beliefs when making a custody decision should therefore be permissible: It wouldn't involve the government making any judgment about the merits or demerits of any religious views. It wouldn't systemically interfere with any religion's overall ability to convey its views to future generations. And the parent has no legitimate self-expression claim that would override the mature child's preference for the speech environment provided by the other parent.

[204] *E.g.*, First Nat'l Bank of Boston, 435 U.S. 765, 791 & n.31 (1978); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756–57 (1976).

[205] See *supra* note 51 and accompanying text for a discussion of this case.

[206] *But see infra* text accompanying notes 291–92 (questioning whether mother's statement can indeed be objectively described as harmful).

improper.[207] This paternalism towards children is usually exercised by parents, with legal help, when the speech comes from outsiders.[208] Yet when potentially harmful speech comes from the parents themselves, parents' evaluations will obviously be biased, which makes government intervention more justifiable. When child listeners lack the capacity to make a mature choice, and parental paternalism is inadequate, government paternalism may be better than leaving children to make bad choices.

Likewise, these considerations also weaken the case for religious freedom protection of speech towards one's children. Religious freedom is generally defended as an aspect of the religious observer's autonomy;[209] yet this autonomy can't justify a power to involve the unconsenting, such as a child who really would rather not go to church, or a child who's angered by one parent's teaching ideas that contradict the other parent's. Nor is it clear why religious freedom rights should cover speech to listeners who are too immature to meaningfully consent, especially where the religious teachings might end up harming those listeners.[210]

Parents' rights to control the rearing of their children thus need extra justification from an independent parental rights doctrine, or from the instrumental goals of the Free Speech Clause.[211] The par-

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[207] The paternalism can't be unlimited, because of the danger that such paternalism may interfere with the marketplace of ideas for adults, and that it will be exercised in improperly discriminatory ways; I discuss this in the next subsection. Moreover, the child's own rights as a listener may become important as the child gets older—as Judge Posner argues, eighteen-year-old voters "must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise." Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576–77 (7th Cir. 2001). But it seems to me that Judge Posner's argument, apt as it might be for older teenagers, becomes weaker when the child is younger, less mature, and further away from the voting age. And child custody speech restrictions generally involve younger children, not sixteen- or seventeen-year-olds.

[208] For instance, parents who do not want their children to listen to the speech presented at religious or political events can physically keep them from going to those events. *See supra* note 193. Likewise, some laws bar children from buying certain sexually themed materials, though the laws let parents get those materials for children if the parents think the materials are suitable, *see* Ginsberg v. New York, 390 U.S. 629, 638 (1968). *See also* Brekke v. Wills, 23 Cal. Rptr. 3d 609, 613 (Ct. App. 2005) (upholding injunction barring sixteen-year-old girl's ex-boyfriend, whom mother considered bad influence, from contacting her, partly on grounds that injunction helped protect "[mother]'s exercise of her fundamental right as a parent to direct and control her daughter's activities").

[209] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404–06, 411–12 (1963) (Douglas, J., concurring).

[210] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that parents' religious freedom doesn't let them involve their children in sales of religious literature, because such child labor is ostensibly harmful).

[211] This may be why the argument in *Wisconsin v. Yoder*, 406 U.S. 205, 232–33, 243 (1972), relied not just on the Free Exercise Clause but also on the parental rights cases,

ents' own religious autonomy rights don't suffice to protect practices that involve not just the willing parents but also their children, who may be unwilling or who may be incapable of exercising a mature will in the matter.

### 3. *Despotism Is Better Left Decentralized*

So parental speech is to some extent different from other speech. Yet in two important respects it's similar.

#### a. Protecting Public Debate from Government Control

First, government restrictions on parental speech can seriously interfere with public debate (metaphorically called "the marketplace of ideas"). We as American adults and voters receive a rich mix of speech from many sources—from fundamentalists and atheists, from gay rights supporters and gay rights opponents, from racists, sexists, and egalitarians. And we hear these views in large part because these speakers' parents taught them views decades ago that shaped the speakers' speech today.[212]

The ability to control parent-child speech would be a powerful tool for entrenching the current political majority's or elite's beliefs in the next generation. This, of course, is why current majorities routinely battle for control of the public school curriculum. It's why majorities in the 1920s enacted laws banning private schools and other private education programs.[213] It's why some critics of school choice programs urge that the government continue to fund only public

*Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). If the right to practice your own religion is to include the right to control a third party's behavior, there must be something more than the Free Exercise Clause in play.

[212] Though many adult children have moved far from the ideologies taught by their parents, many others remain deeply influenced by their parents' teachings. *E.g.*, Douglas L. Flor & Nancy Flanagan Knapp, *Transmission and Transaction: Predicting Adolescents' Internalization of Parental Religious Values*, 15 J. FAM. PSYCHOL. 627, 635 (2001); M. Kent Jennings, Laura Stoker & Jake Bowers, *Politics Across Generations: Family Transmission Reexamined* 16 (Inst. Governmental Studies Papers Working Paper No. 2001-15, 2001), *available at* http://repositories.cdlib.org/igs/WP2001-15; Tamar Liebes, Elihu Katz & Rivka Ribak, *Ideological Reproduction*, 13 POL. BEHAV. 237 (1991); Raphael Ventura, *Family Political Socialization in Multiparty Systems*, 34 COMP. POL. STUD. 666 (2001); *cf.* John Alford, Carolyn Funk & John R. Hibbing, *Are Political Orientations Genetically Transmitted?*, 99 AM. POL. SCI. REV. 153, 163–64 (2005) (arguing that some parent-to-child transmission of political beliefs may stem partly from genetic transmission of certain mental traits, though agreeing that parents' beliefs and statements also have significant effect).

[213] *See, e.g.*, LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825–1925, at 205–15 (1987).

schools, in which it can teach supposedly unifying or beneficial values.[214]

The power to control not only schools but also the speech the children hear at home would be greater still. At least parents faced with the public school near-monopoly can send their children to private schools; and if they don't have the money for that, or if they can't find a private school that shares their views, they can at least teach their children at home to question what they're taught at school. Government power to coercively restrict parental speech, on top of its power to engage in its own speech in public schools, would tend to cement existing orthodoxies and suppress potentially valuable but unpopular ideas. The Court's recurring judgment that speech restrictions that interfere with robust public debate are unconstitutional[215] is especially apt here.

Custody or visitation decisions that turn on a parent's speech can also have a more immediate effect on public debate among adults. If your statements to the public or to your acquaintances are Communist or racist or atheist, the court may infer that you'd teach the same views to your children; and the more vocal you are, the likelier the court is to draw such an inference. So if you know that courts may deny you custody or visitation if they think you'll teach the children such things, you may well stay quiet to outside listeners as well as to your children.

b. Equality of Ideas

The government generally may not discriminate among people based on the ideas that they have espoused or are likely to espouse. Free Speech Clause cases say this about ideas generally: "[T]here is an 'equality of status in the field of ideas.'"[216] "Under the First Amendment there is no such thing as a false idea."[217] Because the market-

[214] *See, e.g.*, Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, § 6 (Magazine), at 28 (arguing that school choice programs will undermine "common values"); Kerry Mazzoni, *Court Decision Puts*, OAKLAND TRIBUNE, July 7, 2002 ("California schools are on the right track. Vouchers would set them back, to the detriment of our most needy children and of our shared values in a democratic society."); George J. Lloyd, Letter to the Editor, ARIZ. REPUBLIC, Mar. 22, 2005, at 5 ("If Jim Jones, David Kores[ ]h or the Baghwan Shree Rajneesh had set up their own schools using vouchers, would the use of vouchers have been OK? Would vouchers be OK if your tax dollars were funding schools for Islamic extremists, the Arian [sic] Brotherhood, the KKK or . . . other extremist organizations?").

[215] *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964) (describing principle that debate on public issues is constitutionally protected).

[216] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[217] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

place of ideas must operate free from government coercion, the government must treat all ideas as equally valuable (at least in its coercive regulation of private parties, rather than in its own speech). Religion Clauses cases take the same view about religious ideas: The government may not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community";[218] "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ."[219]

Of course, some kinds of ideas, even the profession of some religious beliefs, may cause unusual harms. Some parental speech, for instance, might hurt children, by leading them into dangerous behavior, confusing them, frightening them, or alienating them from one parent. In principle, one might argue, ideas that have different effects need not be treated identically. This has in fact been the recurring argument against protecting Communist ideas, revolutionary ideas, racist ideas, and the like.[220]

The theoretical claim for equal treatment must therefore be supplemented with a pragmatic assertion: The government must treat ideas equally even if some seem harmful—even "fraught with death"[221]—because government is an untrustworthy judge of which ideas are false and dangerous. All of us, the argument goes, are fallible: "[R]ealiz[ing] that time has upset many fighting faiths" should make us "believe even more than [we] believe the very foundations of [our] own conduct that . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."[222] And government decisionmakers tend to overestimate the harm of ideas they dislike, perhaps because those ideas come from political enemies, contradict the decisionmakers' religious beliefs, or risk undermining the decisionmakers' place in the social order.[223]

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218 County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

219 Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947). Even if the Establishment Clause is read as allowing the government to endorse some religious views in its own speech, the government may not discriminate among private parties based on their religious views. *E.g.*, Larson v. Valente, 456 U.S. 228, 252 (1982).

220 *See, e.g.*, Dennis v. United States, 341 U.S. 494, 529–55 (1951) (Frankfurter, J., concurring) (making this argument about Communist advocacy); Whitney v. California, 274 U.S. 357, 369 (1927) (making this argument about revolutionary advocacy); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* MARI J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 17–51 (1993) (making this argument about racist advocacy).

221 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

222 *Id.*

223 Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 434–35 (1996).

I suspect most of us will see evidence of such error or prejudice in some of the examples with which this article began. We could also easily imagine some view we think is worthy—perhaps one we've taught to our own children—being viewed as "against the child's best interests" by some officials, or by a majority of the public.

The question, of course, is how far we should take this skepticism of government claims about the supposed harmfulness of speech. Even Holmes conceded that some speech threatens "immediate interference" with the law and thus "makes it immediately dangerous to leave the correction of evil counsels to time"; when speech poses such a danger, he reasoned, the government may indeed restrict the speech.[224] Perhaps we must likewise accept the risk of error and restrict speech when it threatens serious though longer-term harms to children, who may not be exposed to proper corrective influences until it's too late.

Nonetheless, it seems to me there is good reason to be skeptical here. Time has indeed upset fighting faiths related to atheism, homosexuality, and more; and there's little reason to think that judges today or tomorrow would do a much better job than judges of the past in deciding which parent-child speech should be suppressed and which shouldn't be. Government power to make such decisions is dangerous to public debate—and it's especially tempting to majorities and elites who are looking for a way to mold public opinion in generations to come. Allowing free parental speech may cause harm, but, as with most other dangerous speech, allowing restrictions on such speech is likely to cause greater harm.

### *B. Parent-Child Speech in Split Families*

#### *1. The Intact Family Analogy*

So far, I've given reasons why parent-child speech in intact families indeed deserves full constitutional protection, though the standard self-expression and value-to-listeners arguments don't quite apply there. But whether or not my argument is right, I suspect that most courts would indeed agree on the result. Few judges would doubt that parents have broad First Amendment rights to speak to their children.[225]

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[224] *Abrams*, 250 U.S. at 630.

[225] *But see* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 134–35, 162, 179 (1998) (defending prohibition on "sexist instruction" and "schooling that inculcates sexist views" at private schools); *id.* at 158 (suggesting that even parents themselves "might justifiably be proscribed from expressing sexist views in the presence of children in a way that damages children's self-esteem"); James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 1000–02 & n.97 (2001)

This consensus probably reflects an incompletely theorized agreement:[226] Judges likely don't have a fully developed or broadly shared theory explaining their position. But if there is an agreement here, then the agreement offers a good starting point for analyzing the neighboring area of parent-child speech rights in split families, by considering the similarities and differences between these two kinds of speech.

After all, the broad modern protection for free speech is itself incompletely theorized. The Court has been famously uninterested in deciding which rival theory of the Free Speech Clause (democratic self-government, self-expression, search for truth, and so on) is the true foundation of free speech doctrine.[227] Justices aren't as excited by foundational theories as we scholars tell them they should be. Justices tend to operate by analogy, by appeal to intuitions about the cases that come before them, and by judgments about whether a particular holding in this case would likely lead to troubling results in the future.

Reasoning by analogy from an agreed-on but undertheorized case is risky. If we aren't sure why the precedent is right, we can't be positive that the new case is analogous to the precedent, since we can't know whether the differences are relevant or not. Yet courts routinely engage in such undertheorized analogies, and are likely to keep doing so as long as there's no consensus on the theory. Whatever one thinks about exactly why parent-child speech restrictions in intact families are unconstitutional, if courts are likely to find them unconstitutional then the analogy between them and restrictions in split families will be important.

So let's assume that parents in intact families have broad rights to speak to their children free of government restraint. What does this say about restrictions on parent-child speech in split families? Let me begin by pointing to some possible distinctions that ultimately don't work.

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(arguing that "there is no underlying constitutional right [of parents] to teach racism or sexism to children" in either public or private school, though suggesting that for practical reasons parents should remain free to teach child such views at home). *Pierce v. Society of Sisters* suggested that the government might have the power to bar private schools from teaching things that are "manifestly inimical to the public welfare," 268 U.S. 510, 534 (1925), but *Pierce* was decided during an era in which speech urging illegal conduct was generally seen as unprotected, *e.g.*, Gitlow v. New York, 268 U.S. 652, 667 (1925).

226 *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739–42 (1995) (describing agreement without theory in general).

227 Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1217 (1983). Some argue that the Free Speech Clause ought not be reduced to one theory, *see id.* at 1251–52, but the Court hasn't expressly opined on this theoretical question either.

### 2. *Intact Families and Split Ones—Some Unsound Claims of Difference*

#### a. Surrender of Parental Rights

Some argue that parents in split families lose some of their constitutional rights: "In matters of custody, the family unit has already been dissolved, and that dissolution is accompanied by a weakening of the shield constructed against state intervention. A parent cannot flaunt the banner of religious freedom and family sanctity when he himself has abrogated that unity."[228]

Each parent's right to live with a child, and to control the child's upbringing, must indeed yield in some measure when the parents split up. The child can't physically be in two separate households at once; and if the parents are hostile enough to each other, they can't make joint decisions about the child's life.

But it doesn't follow that parents' First Amendment rights must likewise yield. Parents' individual rights to speak to their children (and to practice their religions by speaking to them) can still be fully exercised after the parents break up. The parent may no longer be able to rely on the sanctity of the family as a unit, but he may rely on the sanctity of his own constitutional rights. The government must intervene to some extent when a family breaks up, but there's no inherent reason that it must intervene in the parents' speech.

Nor has the parent's conduct somehow waived the right. First, child custody speech restrictions may be imposed on a parent even when the family's unity was abrogated by the other parent: The law here doesn't distinguish the leaving parent from the one who gets left.[229]

Second, even when a parent seeks the divorce, it hardly follows that the government may require the parent to waive his constitutional rights as a condition of getting that divorce. That's true for First Amendment rights generally (or for that matter Fourth Amendment

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[228] Morris v. Morris, 412 A.2d 139, 143 (Pa. Super. Ct. 1979) (citation omitted).

[229] One reader suggested that the parent's decision to marry—for which, unlike for a divorce, it takes two to tango—justifies the eventual restriction on the parent's speech rights at divorce. But, first, child custody speech restrictions can be imposed even if the separating parents have never married, *see supra* note 79 and accompanying text. And, second, the right to marry is a constitutional right, Zablocki v. Redhail, 434 U.S. 374, 374–91 (1978); even if the government could demand the waiver of free speech rights as a condition of getting certain benefits, surely it can't demand the waiver of free speech rights as a condition of getting the marriage license to which the parent is constitutionally entitled.

or other rights);[230] it's presumptively equally true for First Amendment rights to speak to one's children.

The government does have some extra power to impose speech restrictions as a condition of government-provided benefits, such as a government paycheck, access to government property, or some other government subsidy.[231] But parents are not employees whom the state hires to raise their children.[232] Children are not the government's property to be disposed of using whatever speech-restrictive conditions the government pleases.

When a couple breaks up, the government must decide how to allocate the custody of the children—but when the government does this, it is reducing the parents' preexisting rights, not granting them some benefit. Such a government decision doesn't inherently include the power to demand that parents who want to keep as much of their custodial rights as possible must in exchange waive their Equal Protection Clause rights,[233] their Establishment Clause rights, their Free Exercise Clause rights, or their Free Speech Clause rights.

Perhaps there's some specific reason why some child custody speech restrictions are constitutional, much as some other restrictions imposed by the government as sovereign (rather than as employer or subsidizer) are constitutional. But there needs to be a reason other than just that the family is no longer intact, or that the government may demand a surrender of constitutional rights as part of a custody decision.

### b. Best Interests Above All

Child custody speech restrictions also can't be justified simply by arguing that protecting a child's best interests is so important that it trumps any First Amendment rights.[234] Parent-child speech is pro-

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230 *E.g.*, FCC v. League of Women Voters, 468 U.S. 364, 399–401 (1984) (holding that government may not require subsidy recipients to waive their First Amendment rights as condition of getting subsidy).

231 See, e.g., EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 359–77, 400–49 (2d ed. 2005) (describing these doctrines).

232 Foster parents might be analogized to government employees, because they are indeed being hired to care for children; but children's natural parents are not government workers, before a divorce or after.

233 *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that courts may not consider parent's new interracial relationship when deciding custody questions, even when relationship might lead to child's being teased or ostracized and thus might be against child's best interests).

234 *See, e.g.*, Marriage of Geske v. Marcolina, 642 N.W.2d 62, 70 (Minn. Ct. App. 2002) ("[T]he best interests of children can be a compelling state interest justifying a prior restraint of a parent's right of free speech."); Borra v. Borra, 756 A.2d 647, 651 (N.J. Super. Ct. Ch. Div. 2000) (same); Baker v. Baker, No. 03A1-9704-GS-00115, 1997 WL 731939, at

tected in intact families *even when* it may undermine the child's best interests. And this is so even though parental teaching of bad ideologies in intact families can sometimes be more harmful than the same speech in split families: If the parents are divorced, one parent might counteract whatever harmful ideology the other parent is teaching, or at least each parent's authority might be decreased because the parent has less time with the child. But if the parents are still together, they're more likely to teach the child the same message; the child will be even more within their ideological control; and the child's best interests would be even more hurt by the bad teachings.

Thus, proponents of child custody speech restrictions must say something more: They need to explain why the same interest that is inadequate to restrict speech in intact families becomes adequate when the family is split.

### c. Government Action Justifying More Government Action

One possible "something more" is that the custody order is government action that facilitates the divorcing parent's potentially harmful speech. If a divorcing mother has six days a week to teach the child some bad idea, she has it because the court has assigned her exclusive custody during those six days. Perhaps a court therefore also has the power to mitigate that damage, by restricting what a parent does with her legally enforced custody rights.

Yet the intact family's power to teach the child certain things, and to keep others from teaching the contrary, is also buttressed and amplified by the law. The legal system takes affirmative steps to protect the parent's rights to control who can speak to the child.[235] Just as the law secures to one divorcing parent certain custodial powers, so it secures to an intact family even broader powers. Yet the intact family's First Amendment rights are constitutionally protected; and there's no reason to think that those rights vanish just because the parents separate.[236]

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*7 (Tenn. Ct. App. Nov. 25, 1997) (same); *In re* J.S. & C., 324 A.2d 90, 95, 97 (N.J. Super. Ct. Ch. Div. 1974) (barring father from "involv[ing] the children in any homosexual related activities or publicity," and rejecting his First Amendment defense on grounds that "[t]he welfare of the child is the . . . controlling consideration in determining the question of visitation and custody of a minor child," and "[t]he legal rights . . . of either parent . . . must yield, if opposed to what the court . . . regards the welfare of the child to be"); *see also* Kendall v. Kendall, 687 N.E.2d 1228, 1235 (Mass. 1997) (taking same view in response to Free Exercise Clause argument).

235 *See supra* Part II.A.

236 *But see* Morris v. Morris, 412 A.2d 139, 143, 146 (Pa. Super. Ct. 1979) (taking view that when "the family unit has . . . been dissolved," parents' First Amendment rights disappear).

d. Need to Decide Accurately

Another possible "something more" is that in split families, the judge has been called in, and some custody decision must be made. The court should therefore make the most accurate decision it can, the argument would go, by considering all the relevant evidence, including the parent's likely future speech.[237]

Consider an example: The mother has been a girl's primary caregiver, but is planning to teach the daughter racist views. The father hasn't been the primary caregiver, so the daughter would have some trouble (though not a vast amount) adjusting to being raised by the father. But the father would raise her to be tolerant, which will likely make it easier for her to live a well-adjusted and law-abiding life, perhaps make her a happier child, and definitely make her a better person.

If a judge were to consider all the facts, he might well find that the child's best interests would be better served by giving the father custody.[238] If, however, the First Amendment barred the judge from considering the mother's likely future speech, then the mother would get custody. Such a First Amendment rule would thus lead the judge to make a decision that's not in the child's best interests.

But while accurate decision-making is usually good, the government must sometimes sacrifice some such accuracy, at least so long as the sacrifice doesn't yield very grave harms. Consider *Palmore v. Sidoti*,[239] where the Court held that the Equal Protection Clause barred family courts from considering a parent's new interracial relationship in the "best interests" analysis. The Court acknowledged that "a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."[240] Giving custody to the interracially involved parent may thus have been against the child's best interests. But the Court nonetheless held that "[t]he effects of racial prejudice, however real, cannot justify a racial classifi-

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237 Note that this reasoning only extends to the custody decision, and not to speech-restrictive orders, since a court has no obligation to issue any such orders.

238 Consider the thought experiment from *supra* note 74, in which a hypothetical dying friend asks you to select someone to raise his children. Even if you focus only on the likelihood that the child would grow up happy, and set aside any independent desire that the child grow up moral, you would likely conclude that being raised racist may lead the child into behavior—such as racially motivated crime, inability to work productively with people of other races, social blunders that lead to ostracism or lost jobs, and so on—that is likely to decrease his happiness.

239 466 U.S. 429 (1984).

240 *Id.* at 433.

cation."[241] The Constitution, in the Court's view, required that courts refuse to consider certain evidence, even when that evidence was relevant to the best interests inquiry.

We see this in other contexts, too. The privilege against self-incrimination in criminal cases requires the exclusion of relevant evidence, though this exclusion may make factfinding at trial less accurate. The same is true, more controversially, as to the Fourth Amendment and *Miranda* exclusionary rules. Similarly, the Establishment Clause has been read to bar courts from evaluating religious doctrine when interpreting bequests—for instance, in administering a bequest to a church "so long as it shall continue to adhere to orthodox Lutheran doctrine"—though this makes it harder (sometimes impossible) for courts to accurately implement the testator's intentions.[242]

Finally, while excluding speech from the analysis is likely to lead to some suboptimal results, it's unlikely to lead to the downright awful ones: If our hypothetical mother is likely to be physically abusive or neglectful, and not merely racist, then the custody decision will go against her even if her constitutionally protected speech is excluded from the best interests analysis.

True, excluding the speech may risk some harm to the daughter, for instance by making her more likely to get into fights, or potentially reducing her educational and employment prospects. Yet this is a risk we tolerate for children being raised by intact families. The parent's constitutional rights, and society's constitutional interests in preserving parent-child speech from government restriction, justify protecting parents' speech rather than focusing solely on the children's best interests. The situation should be no different when the family is split.

### e. Conflict Among Parents

A similar argument goes as follows: Parents' speech rights rest on the assumption that parents will jointly discover and do what's in the child's best interests. When there's a disagreement about this, however, the government must step in to arbitrate.

Yet parents in intact families often also disagree about what's best for the child. Sometimes the parents in an intact family resolve their disagreements by genuinely deliberating, and finding a better solution together than either would have suggested separately. But sometimes one parent simply defers to the other because of habit, per-

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[241] *Id.* at 434.

[242] Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969).

sonality style, or cultural (or subcultural) gender roles, or just because the deferred-to parent feels strongly about the issue and the deferring parent is tired of arguing about it. And sometimes the parents' disagreement is never fully resolved,[243] and the child has to witness the resulting tension.

We have no reason to think that the resulting decisions are necessarily going to be the best possible ones for the child. Indeed, we should assume that many parents in intact families will err, whether or not they agree with each other. On balance, we expect that most parents will make decisions that are good enough, and likely better in the aggregate than what family cops would make instead. But the same is true of parents in split families who are deciding on their own what to say to their children. If the First Amendment requires the legal system to tolerate suboptimal parental decisions about what to teach children in intact families, it should do the same as to split families.[244]

Nor is it enough to reason that divorce often makes parents selfish or irrational, and leads them to do things based on a desire to harm the other parent rather than on a sincere judgment about what's best for the children.[245] Parents in intact families are often selfish and irrational with regard to their own children, and parents in split families are often reasonable and giving.

Perhaps there might be extra reason to worry about parents' rationality when it comes to criticisms of the other parent, with whom they have just parted; and in that situation, as I argue on page 697,[246] there are independent reasons why some restrictions might be constitutional. But outside this area, a parental breakup provides no extra reason to doubt parents' competence to choose what to say to their children.

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243 *See* Schneider, *supra* note 63, at 904.

244 *Zummo v. Zummo*, 574 A.2d 1130, 1140 (Pa. Super. Ct. 1990), puts it well:

> Parents in healthy marriages may disagree about important matters; and, despite serious, even irreconcilable, differences on important matters, the government could certainly not step in, choose sides, and impose an orthodox uniformity in such matters to protect judicially or bureaucratically determined "best interests" of the children of such parents. Rather, intervention is permitted only upon a showing of a substantial risk of harm to the child in absence of intervention, and that the intervention proposed is the least intrusive means adequate to prevent the harm. We find no reason to treat such disagreements between divorced parents differently. As harm to the children is the basis of the governmental justification for intervention, we cannot see how the marital status of the parents should affect the degree of harm to the child required to justify governmental intervention.

245 *See* Schneider, *supra* note 63, at 899 (expressing such view, though ultimately concluding that, for practical reasons, courts should still generally stay out of parent-child speech in split families).

246 *See infra* Part II.B.3 and accompanying text.

f. Government Intervention in Divorce Reducing the Marginal Cost of Further Intervention

Some argue that we don't want the government to intervene in intact families because such intervention is too harmful to such families, and to their children—"[t]he remedy would be worse than the disease."[247] But, the argument goes, once at least one of the parents has called in the courts and some intervention is therefore inevitable, the extra level of government intrusion "adds no disruption to a family that has already broken up."[248]

Yet this isn't quite right. Even in intact families, we distinguish types of intervention: Laws restricting child abuse, child labor, and the like do indeed intrude on parental decision-making, but they're allowed. But laws restricting what parents in an intact family teach their children are forbidden, because restricting parental speech is more intrusive than restricting parental beating or even parental decisions about the child's employment.

Likewise, when a family is split, the government must step in, and this inevitably involves some intrusion and disruption. But government decisions that restrict a parent's speech are even more intrusive—and even more disruptive to an honest relationship between the parent and the child—than is the government's decision about who is to have custody that is based solely on the parents' nonspeech conduct.[249]

g. Protecting the Other Parent's Ability to Control What the Child is Taught

Parents are legally empowered not just to teach their children, but to keep others from teaching the children things the parents dislike. Of course, no parent can keep the child completely insulated

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[247] *See* Elster, *supra* note 113, at 15–16 (speaking specifically about intervention that blocks parents from "giv[ing] the child a very strict religious upbringing that, for all practical purposes, preempts the child's later choice of religion," in order to "ensure the child's autonomy in religious (or political) matters").

[248] *Id.* at 16.

[249] To the extent that the worrisome intrusion and disruption is caused by problems of proof—for instance, by the children's being called to testify about what one or another parent is teaching them, and being traumatized by this testimony—these problems apply to both intact and split families. In both situations, the evidence that the children are being taught views that are supposedly against their best interests will usually appear in the first instance without testimony: A child may, for instance, say something racist or pro-Communist or atheistic at school, a shocked teacher will ask the child where he heard this, and the child may freely say that he heard it at home. (In the split family, the other parent may play the role of the shocked teacher.) Yet in both situations, further judicial decision-making about the child's best interests will typically require the child to testify about what he has been taught.

from contrary speech, especially as the child gets older. Yet much teaching requires time and repetition. By controlling which school or church children go to, influencing which children and adults they spend time with, and influencing which media they read and watch, parents can substantially control their children's moral and ideological influences.

In intact families, both parents have the right to teach their children what each of them pleases. But in split families, one parent may want to stop the other parent from, for instance, teaching a child a religion or political ideology that differs from what the first parent is teaching.[250] The parent may argue—as one New Jersey appellate court actually held—that "[i]t is implicit in protecting the primary caretaker's right to raise and educate his children in his chosen religion to prevent others from simultaneously educating the same children in an alternate religion."[251]

Yet while many parents sincerely want to stop the other parent from teaching the child certain views, it's hard to see why this desire should be given the force of law. When two people have a child together, each must reasonably expect that the child will be exposed to the other's teachings, including teachings that might change over time.[252] There's no reason why the breakup should increase one parent's control rights relative to what they were before the breakup, and thus decrease the other parent's speech rights.[253]

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[250] *E.g.*, McCorvey v. McCorvey, No. 05-174, 2005 WL 2863915, at *7–*9 (La. Ct. App. Nov. 2, 2005) (discussing trial court order that—at mother's behest—barred father from making "any racial . . . slurs . . . in the presence of the child" (emphasis omitted), noting that trial judge's reason for order was "that it was in the best interest of the child to be reared in an atmosphere of respect for all cultures and of tolerance for diversity, where that is the reality of our American society into which she is growing," and upholding contempt citation based on father's violation of this order).

[251] Feldman v. Feldman, 874 A.2d 606, 614 (N.J. Super. Ct. App. Div. 2005) (using this reasoning to justify order barring noncustodial parent from taking child to weekly religious classes).

[252] Martin Weiss and Robert Abramoff argue that "The right to direct a child's religious upbringing includes not only the right to teach the child what *to* believe, but also, the right to teach the child what *not* to believe." Martin Weiss & Robert Abramoff, *The Enforceability of Religious Upbringing Agreements*, 25 J. MARSHALL L. REV. 655, 711 (1992). But it doesn't follow that the indubitable right to teach a child not to believe in some doctrine (religious or political) includes the right to legally force the other parent to stop teaching that doctrine.

[253] I set aside here situations where the parents have explicitly entered into an agreement restricting one or both parents' speech—usually religious speech—whether before the marriage, during the marriage, or as part of the divorce. For discussions of whether these agreements should be enforceable, see, for example, Leo Pfeffer, *Religion in the Upbringing of Children*, 35 B.U. L. REV. 333, 360–64 (1955); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children*

Nor is there reason to presume that being taught different ideologies will materially harm the child's interests.[254] It's true that such inconsistency might suggest to the children that "morals and standards [are] something that can be debated between two people as important as a mother and a father."[255] But in practice, I suspect, most everyday moral matters—not lying, not stealing, and the like—are going to be largely agreed on by both parents. And when "morals and standards" are indeed debated, the specific subjects, such as which religion is right, what to think about premarital sex or abortion, or whether certain music is un-Godly, will generally be debatable. Debate about morals and standards, even among important people, is a fact of life in our society. It's not clear that children are better off shielded from this fact rather than exposed to it.

Neither is the opposite clear: Maybe children would do better if their early lives are spent assuming that parents always know best, rather than being exposed to ideological or religious disagreements between the parents. But in the absence of strong reason to think that exposure to moral disagreement is materially harmful,[256] the First Amendment should leave each parent free to speak, in split families no less than in intact ones.

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*Should Be Enforceable*, 47 DUKE L.J. 971, 975 (1998); and Weiss & Abramoff, *supra* note 252.

Some have argued that when parents raise a child in one religion before a divorce, this should be seen as a legally enforceable implied agreement to keep raising the child the same way. *See, e.g.*, Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121, 1135–36 (1991). Implied contracts should be inferred, though, only when a reasonable person would understand the party's behavior as making a promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1979). And given how many people change their minds at times, either about parenting or about religion, a reasonable person wouldn't understand a parent's raising a child one way as a promise to continue this approach forever. Accommodations of the other parent's preferences and tentative judgments about what's best for the child at a particular time shouldn't be lightly turned into legally binding long-term obligations. *See* Zummo v. Zummo, 574 A.2d 1130, 1144–48 (Pa. Super. Ct. 1990) (concluding that even express prenuptial contracts related to child's religious upbringing ought not be enforceable).

254 *See, e.g.*, Mesa v. Mesa, 652 So. 2d 456, 457 (Fla. Dist. Ct. App. 1995) (refusing to presume that parents' teaching children two different religions will be harmful); Felton v. Felton, 418 N.E.2d 606, 610 (Mass. 1981) (same); Chandler v. Bishop, 702 A.2d 813, 818–19 (N.H. 1997) (same); *Zummo*, 574 A.2d at 1157 (same); Munoz v. Munoz, 489 P.2d 1133, 1135 (Wash. 1971) (same). *But see* Weiss & Abramoff, *supra* note 252, at 710–20 (arguing contrary, though in my view *Zummo* analysis is more persuasive).

255 Morris v. Morris, 412 A.2d 139, 146 (Pa. Super. Ct. 1979) (using this as argument to support restricting noncustodial parent from teaching child religious beliefs different from custodial parent's).

256 See *infra* Part II.B.4 for a discussion of the advantages and disadvantages of such case-by-case harm determinations.

Of course, many religious parents care about a deeper harm: harm to the child's soul. They fear that being exposed to the wrong religion may lead the child into theological error, or even damnation. And they may also fear that exposure to a conflicting religion will undermine the child's capacity for any firmly held faith. "Have faith in this belief" is often an appealing message. "Have faith in this belief—no, have faith in this one instead" probably tends to lead to absence of faith in either.[257] Even those religious people who see the theological value of doubt and questioning by adults may think that people should consider whether to doubt after a childhood of faith, rather than start out with doubt as children.

Nonetheless, this sort of harm is not one that a secular legal system should take into account. Giving intact families broad control over their children may incidentally give them the power to raise their children in a faith, relatively free from criticism of that faith. But under the Establishment Clause, the government can't act for the purpose of protecting faith or preventing spiritual harm[258]—especially, given the Free Speech Clause, when acting this way requires restricting one parent's speech.[259]

h. "Best Interests of the Child" Determinations as Free from Constitutional Restrictions

Finally, Professor James Dwyer argues that "[T]he state should be viewed in [best interests of the child] cases as stepping outside the bounds of the Constitution . . . to the extent of being freed from the restrictions ordinarily generated by the constitutional rights of others . . . .":

> [I]n making decisions about children's relationships, the state should be viewed as acting as an agent for the child, in its parens patriae role as protector of dependent individuals whose interests would otherwise go unprotected—that is, as a fiduciary . . . [that] exercises on behalf of the principal rights as extensive as those ordi-

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257 Scott M. Myers, *An Interactive Model of Religiosity Inheritance: The Importance of Family Context*, 61 AM. SOC. REV. 858, 863 (1996) (providing some evidence that children of mixed-faith households are more likely to become irreligious adults than are children of same-faith households); *see also* Hart M. Nelsen, *The Religious Identification of Children from Interfaith Marriages*, 32 REV. RELIGIOUS RES. 122, 127–30 (1990) (same).

258 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (holding that government may not act with purpose of furthering any religious belief, or religious belief generally); *see also Zummo*, 574 A.2d at 1152 (precluding courts from considering children's presumed interests in stability of religious beliefs as part of custody determination).

259 *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25–26 (1989) (White, J., concurring in the judgment) (concluding that preference for religious speech over nonreligious speech violated First Amendment); *id.* at 28–29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (same).

> narily held by private individuals in comparable contexts. . . . [T]he relationship rights of adults among themselves . . . [are not] qualified in any way by others' interests in avoiding the effects of bigotry or in feeling unconstrained in practicing a religion, or by progressive societal aims that presumably would benefit all, such as race and gender equality . . . . Adults are entitled to choose not to associate with others for any reason, including a desire to avoid adverse societal reactions or an aversion to others' religious beliefs and practices.
>
> If the state is acting simply as agent for private individuals—namely, children—when it creates statutes to govern parentage or termination of parent-child relationships or when it determines who will have custody of a particular child after a divorce, is it not free to act on the same basis, with the same, solely "self"-regarding attitude? Is it not, in fact, required to do so? Surely if a private party were acting in a similar fiduciary role for a child, that private decision maker would not be constrained by interests of third parties in non-discrimination or religious freedom or required to act so as to advance social equality for disadvantaged groups, but would rather be expected to think only of the child's welfare.[260]

This approach leads Professor Dwyer to reject *Palmore v. Sidoti*,[261] and presumably to reject any First Amendment objection to the application of a best interests standard as well. A judge would thus be free to disfavor a parent who holds widely disliked political or religious views, since as a fiduciary the judge would presumably consider the child's likely "desire to avoid adverse societal reactions."[262] A judge would even be free to consider which parents' likely teachings will better promote a child's "self-esteem"[263]—or presumably which parents' ideology is most likely to mold the child into a wealthy, healthy, and law-abiding citizen.

In fact, the judge would presumably be *obligated* to consider the parent's religious and ideological views in making his choices. A who-am-I-to-say agnosticism is no option for a fiduciary; a fiduciary selecting who will educate a child must pay close attention to the candidates' likely teachings. If a judge thinks that growing up with Catholic doctrines of universal original sin is bad for a child's self-esteem,[264] then he must favor the atheist parent over the Catholic (all

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[260] JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 8 (forthcoming 2006) (draft on file with the *New York University Law Review*).

[261] *Id.* at 5–6.

[262] *Id.* at 7.

[263] *Id.* at 20.

[264] *See, e.g.*, ROBERT H. SCHULLER, SELF-ESTEEM: THE NEW REFORMATION 67–68 (1982) (arguing that concept of "original sin" creates "negative self-image" and is therefore spiritually and psychologically harmful); Laura Gomez, *Phil Donahue*, LIFE, Oct. 1987, at

else being equal). If he thinks that a religious upbringing is more likely to keep the child away from crime, drugs, unwanted pregnancy, and sexually transmitted disease, then he must favor the religious parent over the atheist. If the judge thinks that growing up disliking one's own country will lead to social ostracism, and to the loss of the happiness and meaning that many people feel from being part of a national community, then he must prefer the patriotic parent. After all, the judge is "expected to think only of the child's welfare." And if *Palmore v. Sidoti* is to be reversed, and racial discrimination allowed—even mandated—if that's what it takes to protect the child's welfare (against, for instance, "ridicule" or other "negative societal reactions"[265]), then the same would be true as to religious and political discrimination.

Moreover, it's hard to see how Professor Dwyer's proposal would be easily limited to split families. The state's "parens patriae role as protector of dependent individuals whose interests would otherwise go unprotected"[266] applies to all children. And as Part II.B.2.b noted, children in intact families may be especially vulnerable to misguided teachings from their parents. When both your mother and father are in accord, and are teaching you the same unsound views, you may be more harmed than if your father is leading you into error but your mother is at least trying to lead you out. The "fiduciary" approach is thus a recipe for broad state control over what views children are taught—not just in government-run schools, but in private schools and perhaps in private homes[267]—in the name of serving children's best interests.

For the reasons discussed in Part II.A.3, I think that this approach would be a mistake. We have good reason to distrust government judgments about the merits of various religions and ideologies, and to fear the coercive homogenization of public opinion that the approach would yield. Professor Dwyer urges that we follow "Kant's maxim that persons be treated as ends in themselves, not as mere means to the ends of others" to the conclusion "that decisions about children's relationships should be based solely on what is best for them, rather

21, 22 ("If you start the human animal's life out with the notion that he's got original sin, you're creating an unnecessary barrier to his development, which has at its center the concept of self-esteem.") (quoting television talk show host Phil Donahue's criticisms of Catholic teachings); *cf.* DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS, supra note 225, at 158 (treating risk of "damage [to] children's self-esteem" as an adequate reason to restrict parental speech, though focusing on damage flowing from "sexist views" rather than from views about original sin).

265 DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN, *supra* note 260, at 7, 22.

266 *Id.* at 6.

267 *See* Professor Dwyer's arguments quoted *supra* note 225.

than what will advance the self-fulfillment of other persons or what is best for society as a whole."[268] But First Amendment doctrine rightly assumes that the government's judgments about the merits of various ideas will often be mistaken (even when they are well-intentioned);[269] and in any event First Amendment law does privilege the societal interest in protecting the marketplace of ideas over the government's power to protect various private interests.[270] And fortunately, not only the First Amendment but also *Palmore v. Sidoti* stand in the way of Professor Dwyer's proposal.

### 3. *Intact Families and Split Ones—A Real Difference: Speech That Interferes with the Child's Relationship with the Other Parent, and with the Other Parent's Parental Rights*

Yet there is one important difference between intact families and split families: In split families, one parent is considerably more likely to try to make the child dislike the other parent;[271] and if the first parent is the custodial parent, the other parent might have little opportunity to counteract such teachings.

What's more, such speech isn't simply against the child's best interests: It also undermines the other parent's parental rights, and it does so partly through the court's action in giving the first parent custody. Say that a noncustodial parent (for convenience, let's use the more common scenario and say he is the father) has access to the children only rarely, perhaps once a week if he lives in the same city, or even more rarely if he lives elsewhere. And say that the remaining time the custodial parent—in our scenario, the mother—is telling the children how bad the father is, so that the children refuse to see the father or so "'hate[ ], despise[ ], and fear[ ]' him"[272] that visitation is pointless.

The father has lost any meaningful ability to interact with his children, a loss that has arisen from a combination of the mother's speech (purely private action) and the court's action in giving the mother cus-

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[268] DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN, *supra* note 260, at 22.

[269] Abrams v. United States, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting).

[270] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (holding that public figure's interest in protection from severe, outrageously inflicted emotional distress must yield to First Amendment interest in protecting marketplace of ideas); NAACP v. Claiborne Hardware, 458 U.S. 886, 912 (1982) (holding likewise as to business owners' interest in protection from intentional interference with business relations); Florida Star v. B.J.F., 491 U.S. 524, 532–33 (1989) (holding likewise as to rape victims' privacy interest).

[271] Naturally, this may happen even in intact families, but in such situations it seems likely that the parents will quickly break up, or are already on the way to doing so.

[272] Schutz v. Schutz, 581 So. 2d 1290, 1291 (Fla. 1991). *Schutz* is the leading case that upholds such an order against a First Amendment challenge.

tody (government action). A court may well want to try to counteract some of the original custody order's harmful effects, by ordering the mother to say good things about the father, by ordering her to stop saying bad things about the father, or by increasing the father's visitation rights to give him more of a chance to undo the damage.[273]

In principle, this shift to a focus on the other parent's rights runs against the standard logic of child custody law. "[T]he *sole* criterion in child custody decisions," the cases tell us, "is the best interests and welfare of the child."[274]

But perhaps focusing on the other parent's rights is actually more helpful here. Though parents ought to sacrifice much for their children, in intact families the parents' rights are legally foremost: The courts don't intervene to restrict parents' speech rights simply because they think the speech is against the child's best interests. Parental rights trump the best interests test. Likewise, maybe in a custody dispute it should take parental rights plus the child's best interests, rather than best interests standing alone, to trump the other parent's speech rights and parental rights.

In most free speech cases, this sort of "countervailing constitutional interests" argument is weak.[275] We may generally speak even if our speech undermines others' enjoyment of their rights: For instance, people have a Free Speech Clause right to urge a boycott of a newspaper, so as to pressure the newspaper to fire a columnist, even though this speech is intended to stop others from exercising their own free speech rights.

Likewise, people have a Free Speech Clause right to criticize religions and their adherents, speak out against the war effort, urge racial, religious, or sexual discrimination, and so on. Though such speech may undermine constitutional "values," such as religious freedom, the

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273 *See, e.g.*, Heausler v. Heausler, 466 So. 2d 793, 794–95 (La. Ct. App. 1985) (increasing visitation rights of father in order to undo damage done by mother to father-child relationship); *see also In re* Marriage of Gersovitz, 779 P.2d 883, 884 (Mont. 1989) (upholding award of custody to mother because she seemed to be parent who was less likely to interfere with other parent's access to child); *In re* Marriage of Murphy, 737 P.2d 1319, 1322 (Wash. Ct. App. 1987) (shifting from joint custody to maternal custody because father was trying to set child against mother, and noting "the right of each parent to expect" that other parent "encourage a good and loving relationship between the child and the [ ] parent").

274 *E.g.*, Harner v. Harner, 479 A.2d 583, 585–86 (Pa. Super. Ct. 1984) (emphasis added). One could also argue that speech that alienates a child from the other parent is much more harmful than speech that teaches the child bad moral values, so that there's a compelling interest in restricting the former even if not in restricting the latter; but I'm not sure that this is in fact so.

275 For an extended discussion of this—which the next two paragraphs only sketch—and for citations, see Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223 (1996).

war power, or equality, it doesn't literally violate constitutional rights (since constitutional rights can generally be violated only by the government). There's no real conflict between constitutional provisions in such cases, only an argument that restricting a constitutional right is justified by some interest that echoes a right constitutionally protected against government suppression, or echoes a constitutionally granted federal power—and the Court has generally rejected this argument.

Nonetheless, here the custodial parents' unparalleled influence over their children—flowing from the parent's physical control over the child, the parent's ability to block rival views, the child's emotional dependence on the parent who has the bulk of the physical custody, and the child's lack of emotional and intellectual maturity—makes a difference. When we say things that try to persuade adults to boycott a speaker, resist a war, condemn members of some religion, or discriminate, the listeners are making their own voluntary and presumptively mature choice to act on that speech. But when a custodial parent says things that lead the child to hate or fear the visiting parent, the child can't be treated as making a similarly voluntary and mature choice. The visiting parent's rights are being rendered meaningless by the custodial parent's speech, not by the child's independent judgment. And the court that grants custody ought to be able to remedy this.

### *4. Preventing Psychological Harm to the Child*

#### a. The Argument in Favor of Such Restrictions

So far, I've generally argued that parents in split families, like parents in intact families, ought to remain free to say things to their children even if the court thinks the speech isn't in the child's best interests. Yet what if the speech seems likely to cause imminent psychological harm, not just eventual harmful behavior? What if there's evidence that it's already causing upset or anxiety?

It's harder for judges to resist these claims of imminent damage, and perhaps they shouldn't resist them: Just as the normal protection for advocacy of illegal conduct is lifted when the harmful result is imminent, perhaps the same should happen here, and perhaps even for speech in intact families. Maybe, in the language of strict scrutiny, preventing imminent likely psychological harm is a "compelling government interest" that justifies restricting even parent-child speech.[276]

[276] *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002), hold that preventing psychological harm to children is a compelling interest that justifies restricting sexually themed (but not legally obscene) speech to children; but these cases don't discuss whether the same rule would apply to

In recent years, a psychological harm test—often framed as requiring evidence that the speech be "likely to cause physical or emotional harm to children"[277]—has gained ground, though as a broadening of constitutional protection relative to the "best interests" test in split family cases, rather than a narrowing relative to the near-absolute protection in intact family cases.[278] Requiring some evidence of likely psychological harm to the child, such as some current symptoms of anxiety, anger, or conflict, might reserve speech restrictions for those times when they seem especially likely to materially benefit the child. But deciding whether speech is likely to cause psychological harm, or even whether it has caused psychological harm, is harder than it might seem, for two reasons.

b. The Limits of Harm Analysis—Predictions of Future Harm, and Causation of Present Harm

To begin with, deciding whether speech is *likely* to cause harm, even imminent harm, is a highly subjective matter. Judges might assert that changing custody "may cause instability amongst the children" because of "conflict in religious beliefs between the two homes";[279] that teaching different religious views is harmful because it teaches that "morals and standards [are] something that can be debated between two people as important as a mother and a father";[280] or that teaching children "conflicting . . . religious beliefs" will "reduc[e] the children to a totally confused, psychologically disastrous state."[281] But it's impossible to tell with any certainty whether this is likely to be so.[282]

This is true even if these predictions are supported by psychiatric opinion. Child psychology is far from an exact science. Scientific

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parent-child speech, or to speech that isn't sexually themed. The Supreme Court has suggested that restrictions on sexually themed speech would be unconstitutional if applied to material that parents give their children. *See infra* note 334.

277 Leppert v. Leppert, 519 N.W.2d 287, 291 (N.D. 1994).

278 *E.g.*, *In re* Marriage of Oswald, 847 P.2d 251, 253 (Colo. Ct. App. 1993); Chandler v. Bishop, 702 A.2d 813, 817 (N.H. 1997); Bentley v. Bentley, 448 N.Y.S.2d 559, 560 (App. Div. 1982); *In re* Marriage of Shore, 734 N.E.2d 395, 403 (Ohio Ct. App. 1999); *see also* Beschle, *supra* note 63, at 423 (urging such an approach). The test has, however, been applied only to religious freedom claims, and not in all cases even there. See *infra* Appendix, p. 739 for examples of cases that don't apply the test.

279 Spencer v. Spencer, 270 N.E.2d 72, 74 (Ill. 1971).

280 Morris v. Morris, 412 A.2d 139, 146 (Pa. Super. Ct. 1979); *see supra* text accompanying notes 255–56.

281 LeDoux v. LeDoux, 452 N.W.2d 1, 6 (Neb. 1990) (Grant, J., concurring).

282 *See* Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1642–44 (1998) (arguing that courts should only restrict parents' religious practices when actual harm, not just substantial risk of harm, is shown).

studies might yield accurate generalizations about how most children react to various situations, but they tell us little about the true cause of a particular child's anger or anxiety. This is especially so when the psychologist might find the teachings backward, mistaken, or inconsistent with his personal childrearing style: Even well-intentioned psychologists' or judges' decisions about whether some speech is likely to cause "emotional harm" can easily be clouded by their hostility to the views the speech expresses.[283] And while some subjectivity is inevitable in any child custody decisions, it is especially troublesome when the judge is evaluating—and restricting parents' rights based on—First Amendment-protected speech.[284]

This subjectivity in large measure remains even if courts insist on evidence of past or present concrete symptoms, such as tantrums, nightmares, bedwetting, or "decline in . . . motivation and academic performance."[285] The symptoms are naturally troubling, but they're also ambiguous.

They might be caused by a parent's speech to the child. But they might instead be caused by the divorce, or by post-divorce conflict that is unrelated to the parent's speech. They might be caused by the other parent's strenuous objections to the speech, rather than by the speech itself.[286] Or they might have nothing to do with disagreement

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283 *See* Schneider, *supra* note 63, at 901–02 (discussing this point).

284 *See, e.g.*, City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 763–64 (1988) (noting that leaving government decisionmakers with broad discretion to make speech-restrictive decisions generally violates First Amendment, among other things because it leaves decisionmakers free to engage in viewpoint discrimination).

285 Kendall v. Kendall, 687 N.E.2d 1228, 1234 (Mass. 1997) (attributing child's "decline in . . . motivation and academic performance" to father's disapproval of child's Jewish religious practices); *see* Pulliam v. Smith, 501 S.E.2d 898, 904 (N.C. 1998) (citing "confusion" and being "emotionally distraught" as evidence that homosexuality of father will "likely create emotional difficulties for the two minor children"); *see also* LeDoux v. LeDoux, 452 N.W.2d 1, 4–5 (Neb. 1990) (attributing child's bedwetting, nightmares, and "maladjustment" to "involuntary exposure to disparate religions"); Baker v. Baker, No. 03A1-9704-GS-00115, 1997 WL 731939, at *6 (Tenn. Ct. App. Nov. 25, 1997) (attributing "[children's] stomach problems, changes in the children's attitudes, and difficulties in disciplining the children" to conflict resulting from father's religious teachings being inconsistent with those of mother).

286 *See, e.g.*, *LeDoux*, 452 N.W.2d at 12 (Shanahan, J., dissenting) (concluding that child's bedwetting and nightmares stemmed not from father's Jehovah's Witness teachings, which were contrary to mother's Catholic teachings—as majority and psychologist who testified at trial had concluded—but rather from trauma of divorce, mother's "distaste or dislike for Jehovah's Witnesses doctrine and her intense indoctrination of the children," and mother's telling child that father "was not 'supposed to'" expose him to Jehovah's Witnesses teachings).

Compare, outside the speech context, *Knotts v. Knotts*, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998), where the court upheld the award of custody to the father based partly on the conclusion that "[the mother's] current [lesbian] relationship impacted negatively upon her oldest child . . . . Specifically, [the child] was diagnosed with major depression and pre-

between the parents. Psychologists' testimony that a child's problems flow from certain religious or ideological teachings, rather than from the many other stressors in the child's life, thus deserves skepticism—especially given the possibility that the psychologist is subconsciously affected by his own substantive disagreement with the teachings.

c. The Limits of Harm Analysis—What's Harmful and What's Beneficial?

Besides the "cause" in "the speech is likely to cause psychological harm," let's also consider the "harm." Sometimes emotional pain may seem harmful in the short run but be beneficial in the long run; sometimes it may be an inevitable side effect of proper childrearing.[287] Confronting a relative's or a pet's death may cause nightmares, but may help children learn how to deal with loss. Even if learning conflicting religious views from parents causes confusion and anxiety, or suggests to the children that "morals and standards [are] something that can be debated between two people as important as a mother and a father,"[288] it might also teach valuable lessons about the limits of parents' knowledge, the diversity of moral and religious views, the need to evaluate arguments for oneself, and so on.

Some might argue that these lessons are better learned later, and others that the lessons are better learned earlier. But when there is such disagreement, it's hard to say with any confidence that the speech would ultimately do more harm than good, even if it does seem to cause short-term problems.

Moreover, sometimes the costs and benefits of the speech might be hard to measure and compare. This is most obvious when the benefits consist, in the parents' view, of an increased chance of salvation. But the problem remains even if courts ignore such purely spiritual benefits.[289]

Say that a mother teaches her daughter that premarital sex is shameful and dirty, and thinking lustful thoughts is slutty and con-

scribed Prozac, based at least in part upon her mother's relationship with another woman." *Id.* at 966. The court went on to say in a footnote, "However, we acknowledge that the impetus of the child's psychological problems may emanate from [the father]'s negative statements about lesbianism. To the extent that [the father] contributed to his daughter's sickness by belittling the mother, such conduct is not condoned." *Id.* at 966 n.2. Yet the court never explained why the daughter's depression should indeed be seen as being caused by the mother's conduct rather than the father's.

287 "[S]ome pain is inherent in being a person, in being a child, and in growing up." Schneider, *supra* note 63, at 902–03.

288 Morris v. Morris, 412 A.2d 139, 146 (Pa. Super. Ct. 1979); *see supra* text accompanying notes 255–56.

289 *See, e.g.*, Leppert v. Leppert, 519 N.W.2d 287, 291 (N.D. 1994) (taking view that purely spiritual benefits must be ignored).

temptible. A psychologist says this is making the daughter feel guilty and depressed, and will likely interfere with her future romantic relationships; the father agrees. The mother says that such teaching is the best way to prevent unwanted pregnancy, disease, and heartbreaking sexual exploitation. What's harmful, she says, is teaching sexual liberality; teaching aversion to sex is beneficial, at least for this girl, whose tendencies she has observed for years.

How is a judge to decide who is right? The question isn't just hard the way that figuring out which witnesses are lying is hard. Rather, it seems unresolvable through an objective, rational decision-making process. We make such decisions as parents because we must, generally relying on a hodgepodge of intuitions, prejudices, and pop psychology. But it's hard to see how a judge can make such a decision under the standards of rationality and objectivity by which judges must generally abide.

Or say a mother truthfully tells a twelve-year-old daughter that the daughter's legal father is not actually her biological father.[290] The daughter becomes in some measure estranged from the man, which many might see as harmful to her.[291]

But, the mother says, relationships based on falsehood are morally worthless, even if temporarily pleasing: Her daughter's life would in the long run be better if she followed Solzhenitsyn's injunction to "live not by the lie,"[292] in the personal as well as the political, and learned it as young as possible. This view may well be wrong; perhaps it would have been better for the mother to wait until the daughter was grown. Yet can the legal system sensibly make such a decision?[293]

Perhaps the "likely psychological harm" test isn't always so hard to apply, and its benefits outweigh its problems. But when we consider whether to adopt the test, the difficulty of applying it accurately and impartially should cut against it.

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290 *See In re* Marriage of J.H.M., 544 S.W.2d 582, 585 (Mo. Ct. App. 1976) (condemning disclosure of this information to child).

291 Perhaps the daughter should have ignored this, since the man had raised and loved her as his own, but people sometimes put great stock in the biological bond.

292 This was Solzhenitsyn's instruction for a moral life, though not necessarily for a happy one. *See* Aleksandr Solzhenitsyn, *Live Not by the Lie*, *in* THE DEMOCRACY READER 207 (Diane Ravitch & Abigail Thernstrom eds. 1992) (originally Samizdat-published in 1974 under the Russian title "Жить не по лжи").

293 Some may suspect that the mother's statement came from spite and not philosophy; but it's hard to tell, especially since the two may be intertwined. People are good at sincerely feeling that their emotional impulses are actually driven by high moral principle.

### 5. *Child Custody Speech Restrictions as (Sometimes) Less Threatening Tools for the Government*

So far, I've argued that there's generally little reason to treat speech in split families differently from speech in intact families. I have assumed that speech in intact families is categorically protected, and I haven't returned to the question of why (and therefore to what extent) such speech should be protected.

But if Part II.A is right, then parent-child free speech rights rest on somewhat different grounds than other speech rights. Because of children's greater vulnerability, lesser maturity, and legal captivity to their parents, I have argued, the parents' interest in self-expression and the child's interest in learning more information are less forceful here. The main reasons to protect parent-child speech are (1) the need to maintain government impartiality among citizens' ideologies and religions, (2) the fear that government action will be influenced by prejudice against an ideology, or the majority's or elites' desire to entrench their own political views by suppressing rival views, and (3) the danger that restrictions on parent-child speech will handicap certain ideas in the marketplace, both in this generation and the next. If this is right, these reasons may affect which parent-child speech should be protected, and which can lose protection without much danger to these free speech values.

#### a. Non-Ideological Speech that Interferes with Children's Relationship with the Other Parent

Parents may strongly want to express themselves by criticizing the other parent. They may want to warn the children away from a relationship that will (in the parent's view) only cause the children pain. They may want to justify to the children their own actions in leaving the other parent, or their actions in insisting on limiting the other parent's custody or visitation rights. They may feel they need to tell their children the truth, simply because the truth should be told, and because they want themselves and their children to be the sorts of people who value the truth.

Yet Part II.A suggests that these self-expression rights, which are important for speech among adults, are less applicable to parents' speech to their young children. And the stronger reasons for protecting parent-child speech don't really apply here. It's quite unlikely that a father's persuading a son that his mother is untrustworthy or immoral will produce ideas that the son can later, as an adult, spread to other listeners. Restricting this speech will probably not impair public debate about any issues.

Such restrictions also generally don't involve the government's discriminating among speech based on the political ideas or religious views that the speech expresses; and the restrictions aren't useful tools for the government to repress such political or religious ideologies. So restricting such non-ideological speech that interferes with the children's relationship with the other parent seems to pose little danger to free speech generally.[294]

b. Ideological Speech that Interferes with Children's Relationship with the Other Parent

Sometimes a child's relationship with a parent may be undermined by the other parent's religious, political, or moral teachings: "Anyone who doesn't embrace Jesus will burn in Hell."[295] "Homosexuality is a sin." "We're all the same, regardless of skin color, and those who don't see that are racists and bad people." "Religion, especially belief in miracles that contradict the scientific evidence—such as the Virgin Birth, the Resurrection, or the parting of the Red Sea—is superstitious folly." The children respond: "But, daddy, isn't mommy [non-Christian / homosexual / racist / religious]? Does that mean she [will burn in Hell / is a sinner / is bad / is stupid]?" The father says, whether with enthusiasm, reluctance, or feigned reluctance, "Well, I guess that must be true."

Here, restricting the speech will interfere with the parent's ideological teachings: Consider, for instance, an order that a parent "make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic."[296] And this interference will in turn interfere with the spread of these ideas to society generally.

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294 *Cf. In re* Paternity of G.R.G., 829 N.E.2d 114, 125 (Ind. Ct. App. 2005) (upholding order "preventing parents from discussing their disputes with their child" because order "does not restrain speech that is protected as a contribution to the 'marketplace of ideas'"). Because such orders are likely to arise only in split families, this proposal doesn't involve treating speech in a split family differently from speech in an intact family, and thus doesn't run afoul of the objections discussed in Part II.B.2. If parents in an intact family are alienating the children from the other parent, the likely result is a break-up; and even if "don't criticize the other parent in front of the children" orders were available in intact families, they would probably just hasten the breakup.

295 *E.g.*, Kendall v. Kendall, 687 N.E.2d 1228, 1231 (Mass. 1997).

296 *In re* E.L.M.C., 100 P.3d 546, 563 (Colo. Ct. App. 2004). The children in *E.L.M.C.* had been raised by a lesbian couple; the couple broke up, and the biological mother became devoutly Christian, and opposed to homosexuality. Her ex-partner was awarded joint custody under the "psychological parent" doctrine, since even though she wasn't a legal parent, she had raised the child, and the child treated her as a parent; but the issue could arise even among biological parents or adoptive parents, without the need for recourse to the psychological parent doctrine.

Moreover, as the Introduction suggested, such restrictions probably won't be imposed in ideologically neutral ways. A court may bar a parent from teaching the child that homosexuality is wrong, because the other parent is homosexual. But it doesn't seem likely that the court would bar a parent from teaching the child that racism is wrong, even if the other parent is racist. This distinction may be justifiable under a pure "best interests" test that's unconstrained by the First Amendment, if one thinks, as I do, that racism is wrong but homosexuality isn't. Still, if parents will be allowed to teach moral principles that implicitly criticize the other parent, but only if judges think the principles are right and important, then judges will be discriminating between viewpoints and rejecting the principle that "there is an equality of status in the field of ideas."[297]

In some situations, these restrictions won't be very effective tools for government control: For instance, only a small fraction of parents is homosexual, so orders that restrict those parents' ex-partners from teaching children anti-homosexual views would do little to drive anti-homosexual views from public debate.

But strident criticisms of majority sentiments (e.g., strident atheism, or teaching of religious views that condemn all other religions) would be especially vulnerable to such restrictions. They would more often be requested, because the other parent would be especially likely to belong to the criticized majority. And the judge is more likely to accept them, because he is also likely to be part of the criticized group, and to take a dim view of those who criticize it.

c. Teaching Religious Views that Are Inconsistent with Those that the Custodial Parent Is Teaching

If a father is barred from teaching a child Muslim views because the mother (who has custody) is teaching Lutheranism, the child may be less likely to grow up to spread Muslim views, and more likely to spread Lutheran views. If the custodial parent is Muslim and the other parent Lutheran, the effect may be the opposite. So if courts impartially rule that custodial parents may bar the other parents from teaching the child contrary religious views, and if courts ignore the parents' religions in the initial custody decisions, these effects on public debate should mostly cancel out.

The restrictions will, however, likely have a different aggregate effect: If both parents are free to teach their own conflicting views to their children, the children may be more likely to embrace either agnosticism or latitudinarian religious beliefs, and less likely to accept

297 *See supra* Part II.A.3.b.

a devout exclusive faith.[298] But if the restrictions are upheld, and one parent can block the other parent from teaching a rival faith, the children may be more likely to accept a single devout religious belief system. This aggregate effect will likely not be terribly large; still, the restrictions are likely to have some effect on the religious demographics of the country, and thus on how popular various religious ideas are in the next generation.

d. Teaching Ideologies that Are Supposedly Against the Child's Best Interests

Restricting parents from teaching children supposedly harmful ideologies—whether by denying or decreasing the custody or visitation rights the parents get, or by ordering parents not to teach children certain things—poses serious First Amendment problems. Such restrictions inherently involve government discrimination against certain ideas, threaten to interfere with public debate, and are particularly useful tools for the government to handicap the spread of ideologies it dislikes.

The restrictions may seem less threatening because they require parental action before they are triggered, and because they are relatively rare today. But as Part I.B.3 argued, if the restrictions are constitutionally validated, they can quickly become more frequent, as family lawyers learn that the restrictions are available and can be useful weapons in the custody battle. And as social movements hostile to certain ideas—hostile to a future version of Communism, atheism, racism, sexism, or what have you—gain force, and the movements' partisans realize that child custody speech restrictions are useful weapons in the broader ideological battle,[299] the restrictions will become still more popular.

There is, of course, one limit to such restrictions, so long as they are just child custody speech restrictions: Even if they become pervasive in child custody cases, they will only operate in split families. Par-

[298] *See supra* note 257. This systematic effect may not reflect either parent's preferences, because each seeks to instill religiosity, not agnosticism or doubt. But each religious parent might, even knowing this possible effect, nonetheless decide to teach his own child his preferred faith. A Catholic father, for instance, might prefer to teach his child Catholicism while the mother teaches Judaism, rather than just deferring to the mother and letting her teach Judaism without contradiction; though this may increase the likelihood that the child will become agnostic (not the father's preferred outcome), it will also increase the likelihood that the child will become Catholic.

[299] Consider the Dorothy Comingore case, in which a prominent anti-Communist got involved in a custody case involving a prominent actress with Communist sympathies, and used those sympathies as an argument against giving the actress custody of her children. *See infra* Appendix, p. 735.

ents in intact families who are confident that their family will stay intact will still be able to safely teach the disfavored ideology to their children, since they needn't worry that their teachings will be used against them should the family break up. The ideology thus wouldn't be extirpated in the next generation: Some children of intact families in which it was taught would still likely spread it, and of course other people could come to accept it as adults.

But legal restrictions on the spread of ideologies are dangerous even if each restriction is not a complete ban. If the law could reduce the number of advocates of, say, atheism or feminism or Catholicism by twenty-five percent, that would surely affect the marketplace of ideas, even if many atheists, feminists, or Catholics remain.

And restrictions on particular ideologies don't arise randomly. They tend to flow from broader social, political, or religious movements that are critical of the ideology, and that try to repress the ideology in a variety of ways. The anti-Communist restrictions of the 1950s are classic examples, but the same is true of restrictions on racist or sexist advocacy in recent decades, and restrictions on civil rights advocacy during the 1960s.[300] If a restriction on expressing a particular ideology is upheld because it has only a modest effect on the ideology, then other restrictions could likewise be upheld on the same theory. And the aggregate effect of these restrictions—firing government employees who accept an ideology, denying custody to parents who seem likely to teach it, pressuring private employers and educational institutions to restrict it, and so on—can be far from modest.[301]

Finally, it's not clear that ideological restrictions limited to child custody disputes will stay limited. *Pierce* and *Meyer* show that the government sometimes wants to interfere with parents' teaching their children even when there is no dispute between parents. *Shelley* and some other custody cases have involved a sole surviving parent losing custody to others, generally the child's relatives.[302]

One scholar has suggested that it may be constitutional to bar private, parent-selected schools from teaching children sexist and racist views, on the theory that such views may potentially be

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[300] *See, e.g.*, Volokh, *Speech as Conduct*, *supra* note 109, at 1309.

[301] *Cf. id.* at 1309–10 (discussing this in greater detail).

[302] *E.g.*, *Ex parte* Agnello, 72 N.Y.S.2d 186, 193 (Sup. Ct. 1947); *see also In re* Black, 283 P.2d 887, 892 (Utah 1955) (stripping married couple of their rights to raise their children and returning children only on condition that parents agree not to teach children that polygamy was proper); Reimann v. Reimann, 39 N.Y.S.2d 485, 485 (Sup. Ct. 1942) (finding both parents unfit, father on basis of his Nazi sympathies and mother on basis of her having committed adultery).

harmful,[303] and that even parents themselves "might justifiably be proscribed from expressing sexist views in the presence of children in a way that damages children's self-esteem."[304] A court ordered that three children be removed from their parents' custody partly based on the father's "racial slurs or derogatory racial references," which the court said "obviously have no place in American society" and "constitute a continuing form of neglect of the children's educational and moral needs."[305] And people understandably worry that racist or pro-terrorist families may convey the same views to their children.[306]

True, there is a psychologically appealing line between restrictions imposed at one parent's request and restrictions imposed against both parents' will. The tendency to distinguish these two scenarios might thus restrain any slippage from one to the other. Still, many of the arguments supporting child custody speech restrictions, for instance that there's a compelling government interest in promoting a child's best interests, or in preventing psychological harm to the child from a parent's speech, would also apply to restrictions imposed on intact families.[307] Validating such arguments in one context may thus indeed have an effect in other contexts.

e. Using Modes of Expression that Are Supposedly Against the Child's Best Interests

This leaves the cases where courts decrease a parent's custody or visitation rights for using profanity around children or for exposing children to R-rated movies (whether the rating flows from violence, sexual content, or profanity), vulgar and sexually suggestive music, or sexually themed pictures and movies; and cases where courts actually bar a parent from engaging in or tolerating such speech.[308] These restrictions probably don't have much of an effect on the marketplace of ideas, but they might have some.

Sexually themed materials tend to carry a message of openness to casual sexuality (or, in some contexts, openness to sexual practices

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303 *See* Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, *supra* note 225, at 1000–01.

304 DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS, *supra* note 225, at 158.

305 *In re* Bianca W.F., 1999 Conn. Super. LEXIS 1807, at *9–*10 (July 12, 1999).

306 *See, e.g.*, Mallorre Dill, *creativebriefs*, ADWEEK, Oct. 8, 2001, at 24 (discussing public service advertisements created by Anti-Defamation League that "show how parents who pass on intolerant messages to their children are fueling the cycle of racism"); Gary Moresky, Letter to the Editor, SEATTLE TIMES, June 9, 1994, at B7 ("You want to leave moral instruction entirely to the family? Fine, let the racist parents teach their children to become racists, and let the Jew haters and gay haters and immigrant haters raise more bigots, while the schools remain mute.").

307 *See supra* Part II.B.2.

308 *See supra* notes 30–39 and accompanying text.

that the court sees as deviant). We see this even in some of the justifications given by courts that consider the parents' involvement in pornography: When a court concludes that a mother's letting her boyfriend run a pornographic Web site from home was a factor against the child's best interests, because operation of the site "evince[d] . . . disrespect for women and disregard for committed relationships" (even if the child never saw the materials on the site),[309] that's a judgment about the viewpoint conveyed by the pornography business's wares. When a judge gives custody to a father because the mother—an Italian porn star turned politician—is "a lifelong pornographer and has exposed [the child] to pornography and to pornographers in a manner that is contrary to his welfare,"[310] this likely rests on the belief that a child exposed to the mother's pornography-friendly circle would learn the view that sexual libertinism and consumption of pornography was proper.

Likewise, when a court frowns on a father's letting his child see pictures of "drag queens,"[311] the reason for the judge's concern is likely to be precisely that the pictures tend to carry a message of openness to cross-dressing or possibly to homosexuality.[312] Many violent movies—though probably not the pure entertainment slasher movies—tend to overtly or subtly criticize pacifism and endorse violence, at least when committed in self-defense, war, or what the movie labels as legitimate revenge; think *Dirty Harry*, *Rambo*, or the many revenge fantasy films. The same is true of gun-themed magazines.[313]

Parents may deliberately also convey messages to their children precisely by their tolerance of these sorts of speech. Letting a child watch sexually suggestive, sexually explicit, or violent movies is one way to convey a message that sexual and violent images are no big deal. Such a parenting style is also a way of conveying a message that children—or at least this particular child—should be treated as mature and responsible, and that parents ought not censor what the children watch. The same would be true of parents who decide to provide unfiltered Internet access.[314] Likewise, teaching a child by

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309 Anderson v. Anderson, 736 So. 2d 49, 53 n.1 (Fla. Dist. Ct. App. 1999).

310 Koons v. Koons, 1994 WL 808603, at *2 (N.Y. Sup. Ct. Dec. 13, 1994).

311 Pulliam v. Smith, 501 S.E.2d 898, 901 (N.C. 1998).

312 I suspect that if this message was absent—perhaps if these were photos of Tony Curtis and Jack Lemmon from *Some Like It Hot*—the judge would have had little concern about the pictures.

313 *See supra* note 34 (describing case in which judge limited father's visitation rights based on father's having left various items, including gun-themed magazine, in places where children could see them).

314 *See, e.g.*, Bowe v. Bowe, No. FA990424189, 2000 WL 1683392, at *4 (Conn. Super. Ct. Oct. 13, 2000) (ordering parents to install Internet filters); *In re* Guy M. v. Yolanda L.-

example that swearing is acceptable is a way to convey the message that societal taboos against supposedly vulgar behavior are bunk.

Of course, while parents could use such material to convey certain ideas to their children, we shouldn't automatically assume that most parents do use this material this way. Most casual profanity, for instance, won't carry much of an ideological message. Jackets that read "Fuck the Draft" (profanity in the service of politics) and George Carlin's "Seven Dirty Words" gag (profanity in the service of conveying ideas about profanity) are exceptional uses of profanity; the normal uses are more mundane. Likewise, many R-rated movies, especially horror movies, don't bear much of a distinctive ideological message.

And even when the material has an ideological message, a parent's exposing the child to the material often doesn't involve much of a thought-through choice to convey that message. The child may discover the parent's library, without the parent's consciously deciding to show it to the child. The parent may let the child watch the household's premium cable channels or get material from the Internet, with little thought about the content. Or the child may sit in the living room while the parent is watching a movie, without the parent's deliberating about what message the parent wants to send to the child using this movie.

Moreover, while these sorts of restrictions can interfere with parents' teaching ideas to their children, they interfere with this teaching a lot less than do restrictions that are expressly focused on particular ideologies. A parent who is barred from showing a child pictures of men in women's clothes, or movies that treat sex frankly and unashamedly, can still communicate his views about sex to the child. A parent who's expressly ordered not to teach the child the propriety of homosexuality or sexual libertinism—or who knows that he risks loss of custody if he teaches the child these ideas—would be much more thoroughly constrained. As *Cohen v. California* reminds us, the way that an idea is conveyed is indeed an important part of the idea;[315] restrictions on certain modes of expression (profane, R-rated, sexually themed) thus do indeed restrict the teaching of ideas. But they impose a considerably smaller restriction than do restrictions that expressly target a particular ideology.

F., No. V-06599-03/04A, 2004 WL 2532299, at *8 (N.Y. Fam. Ct. Nov. 8, 2004) (giving father custody based in part on mother's not filtering daughter's Internet access).

[315] 403 U.S. 15, 21 (1971).

## III
## A PROPOSAL

Armed with the above observations, I offer a tentative proposal. As the Introduction suggested, child custody speech restrictions can be divided into:

1) restrictions on (1.1) speech that conveys ideas that courts consider harmful or (1.2) speech that uses forms—profanity, graphic violence, or sexually themed content—that courts consider harmful,
2) restrictions on speech that hurts the child's relationship with the other parent, whether the speech is (2.1) non-ideological or (2.2) has an ideological component, and
3) restrictions on teaching religious views that are inconsistent with the custodial parent's teachings.

The categories can be subdivided further, but this is a good first cut.[316] And for each such restriction, we can identify four possible constitutional results, though again there could be variations on these:

a) Legislatures or courts may implement this as a per se restriction, to be imposed even without any "best interests" finding.[317]
b) Courts are free to consider the factor in the "best interests" analysis.
c) Courts may consider the factor only if there's evidence that the speech is likely to cause psychological harm (or some similar formulation).
d) Courts may not consider the factor at all.

Naturally, any restriction in categories (c) or (d) could only be imperfectly enforced, since judges engaged in the subjective "best interests" inquiry can often silently consider factors that they aren't supposed to consider; but presumably many judges would pay attention to the constitutional rule that higher courts have announced.

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316 Good as a matter of what is consistent with First Amendment limitations; courts may conclude that orders not to say certain things are unusually hard to enforce, and thus refuse to enter them even if they are constitutionally permissible.

Child custody speech restrictions could also be divided based on whether they prohibit speech, mandate speech, allot custody based on speech, and so on. For reasons mentioned in Part I.B.1, though, those kinds of restrictions are more similar to each other than different.

317 *See, e.g.*, Wright v. Walters, No. 2004-CA-000804-ME, 2005 WL 1490991, at *1 (Ky. Ct. App. June 24, 2005) (categorically allowing custodial parent to veto noncustodial parent's taking child to church of denomination different from custodial parent's, with no "best interests" inquiry required); *cf.* MICH. COMP. LAWS ANN. § 722.25(2), (3) (2005) (categorically denying custody rights to certain sex offenders).

One can then create this table representing the possible options, which also includes as benchmarks some nonspeech factors whose treatment is well-established:

| | |
|---|---|
| Parent has seriously abused child | (a) Probably constitutional to have even a per se ban on custody, at least when only one of the parents is at fault |
| Most of a parent's other nonspeech behavior | (b) Constitutional to consider under a best interests analysis |
| Parent's interracial relationship | (d) May not be considered |
| (1.1) Parent's ideological teachings | ? |
| (1.2) Parent's profanity, exposure of the child to R-rated movies, exposure of the child to sexually themed music or pictures, and the like | ? |
| (2.1) Parent's non-ideological speech that hurts relationship with the other parent | ? |
| (2.2) Parent's ideological speech that hurts relationship with the other parent | ? |
| (3) Parent's religious teachings that are inconsistent with the other parent's | ? |

Let me summarize how I suggest these boxes should be filled in.

### *A. Restrictions on Supposedly Harmful Ideological Advocacy*

Courts should be barred from imposing restrictions that are based on the view that learning certain ideas is against the child's best interests. Such restrictions, I have argued, are potentially powerful and dangerous tools for handicapping certain views in public debate. The restrictions thus violate the First Amendment even if we set aside (as I think we largely should) parents' self-expression interests and the children's interests as hearers.

Nor should the standard "best interests" ideology—"The sole criterion in child custody decisions 'is the best interests and welfare of the child' "[318]—stand in the way here. Just as the Court in *Palmore v. Sidoti* ruled that the Equal Protection Clause bars considering a parent's interracial relationship even if the relationship is relevant to a child's best interests,[319] so the First Amendment should bar considering a parent's political or religious ideology. This is so in intact families, and it should likewise be so in split families.

Finally, protecting the speech only so long as it isn't likely to cause psychological harm may seem appealing, in split families and

[318] *E.g.*, Harner v. Harner, 479 A.2d 583, 585–86 (Pa. Super. Ct. 1984).
[319] 466 U.S. 429, 433 (1984).

perhaps in intact ones as well. But, as Part II.B.4 suggested, there is little reason to think that judges and psychiatrists can reasonably and fairly make such decisions, especially as to unpopular political or religious views.

I acknowledge that this proposal, as well as those I note below, calls for departures from modern child custody law's "best interests of the child above all" framework. But, as I noted in the Introduction,[320] courts have already limited the best interests test under the Equal Protection Clause (to bar best interests decisions based on the parents' interracial relationships) and the Free Exercise Clause (to limit certain restraints on a parent's religious practice, unless some imminent harm to the child can be shown). It should be possible to persuade courts to likewise use the Free Speech Clause to constrain judicial discrimination that's based on parents' ideologies.

### *B. Restrictions on Supposedly Harmful Non-Ideological Speech, Such as Profanity, R-Rated Movies, and Sexually Suggestive Materials*

Courts should also generally be barred from restricting parents' exposure of children to profanity,[321] R-rated movies,[322] *Maxim* magazine,[323] gun-themed magazines,[324] pictures of drag queens,[325] "age [in]appropriate music,"[326] and the like. As I discussed above,[327] such restrictions are less dangerous to public debate, but they still often include a viewpoint-based component (especially when the speech expresses viewpoints that are seen as libertine).[328] They are also unfairly unpredictable in ways that may violate the void-for-vagueness doctrine:[329] For instance, given the vast range of opinion on which movies are suitable for children, parents have no way of predicting

320 *See supra* text accompanying notes 67–68.

321 *See supra* notes 30, 32.

322 *See supra* note 33.

323 Wiley v. Wiley, No. 31061-9-II, 2005 WL 1501608, at *1 (Wash. Ct. App. June 21, 2005).

324 *See supra* note 34.

325 Pulliam v. Smith, 501 S.E.2d 898, 901 (N.C. 1998).

326 *In re* Guy M. v. Yolanda L.-F., No. V-06599-03/04A, 2004 WL 2532299, at *8 (N.Y. Fam. Ct. Nov. 8, 2004); *see also* McCorvey v. McCorvey, No. 05-174, 2005 WL 2863915, at *14 (La. Ct. App. Nov. 2, 2005) (restricting father's visitation based partly on his allowing daughter to listen to music by "the group 'Outkast' and [telling] her that the song 'Hey Ya' is a 'good song' in spite of the fact that the song advocates sex in the back of a car using explicit, sexual, slang terminology unfit for a child and offensive to the sensibilities of many adults").

327 *See supra* Part II.B.5.e.

328 *See supra* Part II.B.5.e.

329 *See supra* text accompanying notes 111–19.

whether certain movies are legally safe for them to show.[330] (The "R" rating, for instance, simply represents a judgment by the Motion Picture Association of America that children shouldn't be allowed to see a movie without a parent's presence, not any broadly accepted social judgment that children shouldn't see the movie at all.)

Moreover, while I'm skeptical that parents' self-expression rights alone are enough to justify protecting speech that is actually likely to harm children,[331] I'm also skeptical that in most of these cases the speech is provably harmful, or even clearly against the child's best interests. Rather, the judge's decisions seem likely to be driven often by the judge's own parental style, taste, and sense of propriety. When a judge faults a parent for exposing a child to "five 'R' rated movies" that contained what the judge characterized as "explicit sex and extreme violence," and "state[s] that the movies really upset him and that neither he nor any member of his family watched movies like the ones the child had seen,"[332] an observer may wonder whether the judge's movie-watching habits, and those of his family, are particularly good bases for a legal judgment.

Such gut feelings surely justify parents' own childrearing decisions—most of our childrearing is based on guesswork. And maybe gut feelings may justify "best interests" decisions by courts generally. But they shouldn't be enough to justify restrictions on speech, even mostly non-ideological speech that contributes relatively little to public debate.

My skepticism extends even to restrictions justified by the visible immediate effects of the restricted speech, such as nightmares supposedly caused by scary movies.[333] Most of us have been frightened by some movies as children. We generally experience no lasting trauma from it. This sort of occasional fear is likely an inherent part of

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330 The child custody decision will in any event often be a crapshoot that turns on the judge's subjective preferences about childrearing practices. But allowing it to be a crapshoot based on the content of the speech that parents show to children poses additional constitutional problems. *See supra* note 117.

331 *See supra* Part II.A.2.a.

332 Perkins v. Perkins, 646 So. 2d 43, 44 (Ala. Civ. App. 1993), *rev'd on other grounds*, 646 So. 2d 46 (Ala. 1994) (involving a nine-year-old child). For more details on the movies involved in *Perkins*, see *infra* Appendix, p. 737.

333 *See* Helm v. Helm, No. 01-A-01-9209-CH00365, 1993 WL 21983, at *1 (Tenn. Ct. App. Feb. 3, 1993) (addressing mother's complaint that there were "a couple times that I've called and there's been movies on like Terminator II and Cobra and very violent shows," that she had tried to "keep [the child] from watching scary movies, because he would have nightmares and wake up, you know, in the middle of the night," and that she did not "think an R-rated movie is something a five-year-old or six-year-old should be watching").

growing up in a world full of frightening things, whether in entertainment or in life.

So it seems to me that, for all these reasons—the restrictions' vagueness, their viewpoint discrimination, their burden on parental self-expression, and the unlikelihood of their preventing substantial harm to the children—such restrictions should be unconstitutional, just like more overtly viewpoint-based restrictions are unconstitutional. Perhaps their lesser effect on public debate might justify some lower standard, for instance one that allows the restriction if there's real evidence of harm (notwithstanding Part II.B.4's criticisms of the harm test). But at least such restrictions shouldn't be imposed based solely on the judge's assumption that pictures of men in women's clothing, R-rated movies, magazines devoted to guns, or *Maxim* magazine are bad for children to see.[334]

### C. *Restrictions on Speech That Undermines the Child's Relationship with the Other Parent*

Restrictions on non-ideological speech ("your mother is a whore" or "your father's new wife is a whore") justified by the interest in protecting the child's relationship with the other parent should generally be constitutional. They seem unlikely to materially interfere with public debate, and likely to protect both the children's best interests and the other parent's rights; and if framed as injunctions, they can be crafted in a way that is clear enough to comply with the void-for-vagueness doctrine.[335] The restrictions do burden parents' desire to express themselves, and may deny information to the children; but, as Part II.A.2 argued, these concerns shouldn't play as much of a role here as they do with adult speech.

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[334] *See id.* (taking apparently skeptical view of parent's complaints about other parent exposing child to R-rated movies). Parents probably even have the right to show their children material that's protected for adults but "obscene-as-to-minors," and thus supposedly valueless as to minors. *See* Reno v. ACLU, 521 U.S. 844, 865 (1997) (striking down ban on unrestricted Internet posting of sexually themed material in part because "neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute"); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (upholding prohibition on sales of sexually themed material to minors but stressing that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children"); Fabulous Assoc., Inc. v. Pa. Pub. Util. Comm'n, 896 F.2d 780, 788 (3rd Cir. 1990) (rejecting government's claimed interest in shielding children from pornography even when their parents are willing to let them see it); Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671, 692–700 (2003) (discussing this issue); John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 333, 335 (1979) (same). But in any event, nothing in the doctrine suggests that parents lack the right to expose their children to merely R-rated movies.

[335] *See supra* text accompanying notes 111–19.

The restrictions should, however, be tailored to allow ideological teachings that don't expressly mention the other parent, even when the ideology condemns some behavior that the other parent happens to engage in or some beliefs that he holds. Restricting such ideological teachings would have some effect on public debate; and it would generally require courts to discriminate among viewpoints, for instance letting parents criticize racists even when the other parent is a racist, but not letting them criticize Catholics when the other parent is Catholic.[336]

Moreover, while such restrictions may protect the other parent's relationship with the children, it seems to me (though here I am less certain) that narrower restrictions may do the job well enough. We as adults recognize that people may have traits or beliefs we disapprove of, yet still be generally good people. Children can likewise be taught this, and often are taught this.

Many a mother who genuinely loves her husband, but disapproves of his racism, may teach her children that racism is bad, and may even feel more of a need to do so precisely because the children are especially likely to learn otherwise by looking at her husband's actions. When the children ask her if this means their father is bad, too, she can tell them that he's a good person who has some bad habits, like all of us do; and that the kids should emulate his many good traits but not his few bad ones. Likewise, a father who says, "anyone who doesn't embrace Jesus will go to Hell," "homosexuality is a sin," "racists are bad people," or "religion is superstitious folly,"[337] and whose children then ask, "Does that mean mommy will go to Hell / is a sinner / is a bad person / is stupid?," can respond with something positive: "Mommy is a good person who loves you very much, and while she's wrong about this, I'm sure she'll come to the right path eventually."[338]

Such subtle requirements may not be easy to set forth or to enforce, especially when the family is split and each parent is not emotionally inclined to defend the other parent to the children. A flat "Don't say anything that is expressly or implicitly critical of the other parent" or "Don't express any anti-homosexual views" may seem relatively enforceable. A more nuanced "Don't make any non-ideological statements critical of the other parent, don't use the other parent as an

336 *See supra* Part II.B.5.b.

337 *See supra* Part II.B.5.b.

338 "Mommy is a good person, and she loves you very much" may not be the father's sincere view, but I think—as I described in the previous subsection—that compelling parents to tell children non-ideological things they don't want to say, and restricting them from saying non-ideological things they do want to say, is sometimes justifiable.

example for any of your ideological teachings, and if the children ask you whether the other parent is bad, tell them 'no' and sound credible" may seem like a recipe for endless future debates. Nonetheless, it seems to me that on balance courts should try to narrow their injunctions as much as possible, rather than completely banning parents from teaching their moral views whenever those views might cast the other parent in a bad light.

Here, there may be more room for looking at whether the speech is likely to cause serious psychological harm. The harm inquiry's drawbacks still remain, but they may be less dangerous here: Because these restrictions are less likely to systematically suppress some ideology, errors in determining harm will be less costly. But I still think that on balance the harm inquiry is too flawed to be helpful even here.

### *D. Restrictions on Speech That Contradicts the Custodial Parent's Religious Teachings*

Restrictions on the teaching of conflicting religions to children are unlikely to dramatically affect public debate, if they are applied evenhandedly. Their chief effects are likely (1) to strengthen relatively devout religious ideologies, by making it more likely that children will learn such ideologies from their parents with no interference from the other parent, and (2) to correspondingly weaken more agnostic, latitudinarian, or doubting approaches to religion, since these approaches seem likely to flow (often without the parents' so intending) from the teaching of rival religious views to children.[339] But these effects seem likely to be quite modest.

Such restrictions, however, pose Establishment Clause problems, because they require courts to determine which teachings are religiously incompatible enough with the custodial parent's. For instance, an order that a father not "expose or permit himself or any other person to expose the minor children of the parties to any religious practices or teachings that are inconsistent with the [Catholic] religious teachings espoused by the [mother]"[340] requires a court to decide which teachings are "inconsistent" with Catholicism—a question that may often be hotly contested, and that can only be resolved by making judgments about religious doctrine, something courts are generally barred from doing.[341]

Similar problems arise with judgments that the visiting parent may not, for instance, teach children Catholicism when the custodial

339 *See supra* Part II.B.5.c.

340 LeDoux v. LeDoux, 452 N.W.2d 1, 4–5 (Neb. 1990) (Shanahan, J., dissenting).

341 *Id.* at 11; *supra* Part I.D.3.

parent teaches them Judaism, based on "judicial notice" that "the practice of Judaism and that of Roman Catholicism cannot be squared. To accept and adhere to the teachings of one necessarily requires a rejection of the other."[342]

Doubtless most Jews and Catholics would agree that one can't simultaneously adhere to all the teachings of Judaism and all of Catholicism. But few Jews adhere to all the teachings of Judaism (or even of the particular type of Judaism that they see themselves as following), and few Catholics adhere to all the teachings of Catholicism. They focus on what they think are the most important tenets of the religion, and feel free to depart from those tenets that they see as unimportant.

And the question whether the most important parts of Judaism and the most important parts of Catholicism can "be squared," in the sense that a person can find spiritual meaning in both, will likely yield much less consensus. This may help explain why the appellate court in the case I quoted rejected the order, concluding that "the extent to which Judaism may be 'reconcilable' with Christianity involves theological and philosophical issues far beyond our ken or cognizance. It would be impermissible for [a court] to determine orthodoxy in either religion, let alone . . . compare orthodox beliefs in one to those of the other to make a *judicial* determination of the reconcilability of Judaism and Christianity or of any other religions."[343]

Moreover, such restrictions do not seem inherently necessary to prevent harm to the child, or even to serve the child's best interests. As Part II.B.4 discussed, it's plausible that children may benefit from being taught just one religion—but it's also plausible that they may benefit from being taught two. One's judgments about this likely turn on how valuable one thinks faith is relative to doubt, a subject that civil courts are barred by the Establishment Clause from considering.

Even if one focuses purely on the child's secular interests, by asking whether a child is likely to feel confused by rival teachings or to see them as undermining his parents' authority,[344] the matter remains unclear. Learning to deal with confusion caused by contradictory views from authoritative sources may itself be valuable. There seems to me to be little reason to assume, as a categorical matter, that such conflicting teachings are against the child's best interests. And there's

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[342] Zummo v. Zummo, 574 A.2d 1130, 1153 (Pa. Super. Ct. 1990) (quoting lower court's judgment, and reversing it based partly on Establishment Clause concerns discussed in text).

[343] *Id.* at 1154.

[344] *See supra* note 255 and accompanying text.

also reason to doubt that a judge can reliably make such a judgment in any individual case.

Nor is there reason to have much confidence in a test that allows such orders only if there's evidence of likely psychological harm. Such evidence, as I've argued above, is likely to be very hard for courts to accurately evaluate.[345]

And where such necessarily subjective judgments are involved, even a well-intentioned judge may find more likelihood of psychological harm where an unpopular or unfamiliar religion is involved than where a more common one is involved. Many mainstream religions require some tradeoff of present pleasure for future happiness (in this life or the next); I suspect, however, that few courts would find psychological harm from being taught to embrace those tradeoffs. Likewise, many mainstream religions teach doctrines or bloody stories—about damnation, divine wrath, sex, and so on—that can make children fearful or confused; but I suspect that few courts would find psychological harm from such teachings, even if the children seem upset by them. What counts as "psychological harm" and what doesn't, even when one limits the harm to that which supposedly flows from disagreement between two religions, is thus likely to turn on intuitive judgments that are particularly likely to be influenced by sympathy or hostility to one or the other faith.

## CONCLUSION

We can only expect so much from law. In Shelley's England, where atheism was broadly loathed, and free speech and religious equality were not viewed the way they are in America today, it's only natural that courts would act as the Lord Chancellor acted. Today, I hope many courts would be willing to bar discrimination against irreligious parents;[346] but even so, a judge who deeply believes that "[i]t is necessary to believe in God in order to be moral and have good values"[347] may find it hard to ignore one parent's devoutness and the other's atheism, no matter what the legal rules command him to do. Under the vague "best interests of the child" standard,[348] a judge can usually give a plausible excuse for giving either parent custody,

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345 *See supra* Part II.B.4.

346 See, for example, state court cases cited *supra* note 8, which have done exactly that.

347 *See supra* note 85, noting that half of Americans believe this; *see also* cases cited in the Appendix, pp. 722–33, in which courts cited parties' comparative religiosity or willingness to raise child religiously as a factor in the prevailing party's favor.

348 *See supra* note 113 (arguing that test is too vague); Buss, *supra* note 190, at 308 (arguing likewise, though acknowledging it "may well be the best the court can offer" in resolving parents' child custody disputes).

whatever the judge's real reasons might be.[349] The same goes for legal rules that bar judges from considering race, sexual orientation, or speech in the child custody decision.

Yet we can expect something. When the next period of intense hostility to some ideology arrives, the foes of that ideology will likely take advantage of all the lawful tools at their disposal, much as the anti-Communists did in the 1950s.[350] Most of these foes will likely be decent people, with the best intentions for the country, for the welfare of children, and for stopping the spread of vile ideas to the next generation. They may well feel constrained by existing legal rules, and if parent-child speech is securely protected before that time, the protections may persist. This, I take it, is why the Court thought that its decision in *Palmore v. Sidoti*,[351] which barred family court judges from considering public hostility to a parent's interracial relationships as a factor in the best interests analysis, was worth rendering: Though some judges could deliberately evade the decision, and others may subconsciously resist it, some others would follow it even if they disagree with it.

But there's little reason to think that, in a future time of broad hostility to some ideology, judges will be in the mood to coin new protections. If parent-child speech—at least in split families, which will likely remain a large fraction of all families—is unprotected now, it will remain unprotected then. And it will be a tempting target for systematic restriction.

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349 Elster, *supra* note 113, at 28; Pfeffer, *supra* note 253, at 366.

350 *Cf.* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985) (discussing how doctrines developed during relatively tolerant times may be useful for constraining future bursts of repression).

351 466 U.S. 429, 433 (1984).

## APPENDIX

### A. *Cases in Which a Trial or Appellate Court Cited in the Prevailing Party's Favor the Parties' Comparative Religiosity or Willingness to Raise Child Religiously*

In all the cases noted in the lettered lists below, the party who was noted as providing the more religious upbringing (or who wasn't noted as providing the less religious one) prevailed.

#### *1. Michigan*

a) Underhill v. Garcia, No. 261651, 2005 WL 3304120, at *2 (Mich. Ct. App. Dec. 6, 2005) (noting that "[father] regularly took [son] to church and Sabbath school, taught [him] how to pray and read him Bible stories, while [mother] testified that she did not regularly attend church and presented no evidence demonstrating any willingness or capacity to attend to religion with [son]");
b) Reed v. Lewandowski, No. 260372, 2005 WL 2291850, at *4 (Mich. Ct. App. Sept. 20, 2005) (noting that "[mother] attended church regularly and brought the child with her" whereas father "did not attend church" but only "tried to teach the child about religion at home");
c) Deboe v. Deboe, No. 246083, 2003 Mich. App. LEXIS 2379, at *17 (Mich. Ct. App. Sept. 18, 2003) (noting mother's "continu[ing] to attend church with the children" and absence of "evidence that [father] took any initiative to take the children to church or to maintain their religious education"; court pointed to no evidence that continuity of preexisting religious education, as opposed to mere presence of religious education, was important in this case);
d) Sharrow v. Davis, Nos. 244043, 245117, 2003 WL 21699876, at *3 (Mich. Ct. App. July 22, 2003) (noting that "[father] never attended church and his older children were not baptized," that "[father] felt [the children] should experience many religions and choose one when they were older," and that though "[mother] did not attend church regularly, she attended periodically and would take all of the children with her");
e) Goodrich v. Jex, No. 243455, 2003 WL 21362971, at *1 (Mich. Ct. App. June 12, 2003) (noting "that [father] has a greater capacity and willingness to continue to take the parties' daughters to church and related activities," and that trial court had been "concerned with [mother's] belief that her minor daughters are capable of making their own decisions whether to attend church");
f) Boot v. Boot, No. 227262, 2001 WL 766115, at *2 (Mich. Ct. App. Jan. 30, 2001) (noting that "[mother] often attended church with the children" while father "had not demonstrated that he provided the children with any moral or religious training");
g) Riley v. Downs, No. 224314, 2000 WL 33399796, at *4 (Mich. Ct. App. Dec. 1, 2000) (noting that "[mother] played an active role in [son's] behavioral, religious and academic training and . . . [father] was uninvolved in [son's] academic progress and did not encourage him to attend church");
h) Beebe v. Beebe, No. 226125, 2000 WL 33403012, at *4 (Mich. Ct. App. Nov. 3, 2000) (noting that "[mother] described her religious activities, while [father] testified that he did not go to church with the children regularly");
i) Root v. Smith, No. 222266, 2000 WL 33534021, at *3 (Mich. Ct. App. Feb. 18, 2000) (noting "[father]'s regular church attendance");
j) Mackenzie v. Cram, No. 206807, 1998 WL 1991050, at *2 (Mich. Ct. App. July 10, 1998) (similar);
k) Hulbert v. Hulbert, No. 203673, 1998 WL 1991609, at *2 (Mich. Ct. App. May 26, 1998) (similar);
l) Beaton v. Beaton, No. 202753, 1998 WL 1993003, at *1 (Mich. Ct. App. Feb. 3, 1998) (similar);

m) Jimenez v. Jimenez, No. 190805, 1996 WL 33347958, at *4 (Mich. Ct. App. Dec. 6, 1996) (similar);
n) Bielaska v. Orley, No. 173666, 1996 WL 33324080, at *32 (Mich. Ct. App. July 19, 1996) (similar).

*See also* Evans v. Evans, No. 261591, 2005 WL 3116506, at *2 (Mich. Ct. App. Nov. 22, 2005) (noting father's "lack of religious observation" as weighing against him, though concluding that on balance other factors made up for this); Carson v. Carson, 401 N.W.2d 632, 635–36 (Mich. Ct. App. 1986) (quoting trial court as opining that it "was a little bit distraught in finding that there was no particular affiliation [held by either parent] with a church," because "[p]robably 95 percent of the criminals that I see before me come from homes where there's no . . . established religious affiliation," but concluding that because neither party was religious, "both parties [were] equal" under this factor); Michael A. Robbins, *Child Custody Questionnaire*, http://www.michaelarobbins.com/Child.shtml (Michigan family lawyer noting, as information for prospective litigants, that one "factor[ ] which judges sometimes consider" in custody cases is "regular church attendance"); James Whalen, *Child Custody and Divorce: Free Legal Advice*, http://www.childcustody.net/29.html (Michigan family lawyer writing about the danger of parents' showing themselves to be atheists or otherwise uncommitted to the child's religious upbringing: "Many, many custody cases are won and lost by one point, one factor, and you should be aware that a careless attitude toward this issue can cost you the whole case. You need to have a reasonable attitude toward religion, and be aware of the attitude of the other side, and evaluate, often, how it can affect your case.").

*2. Arkansas*

a) Woods v. Jones, No. CA04-1341, 2005 Ark. App. LEXIS 484, at *6, *12 (Ark. Ct. App. June 22, 2005) (noting father's taking child to church, and quoting favorably trial court's ruling that stated, "Whether the child goes to church or not is not controlling but it is something the court should take into consideration");
b) Sims v. Stanfield, No. CA98-1040, 1999 WL 239888, at *3–*4 (Ark. Ct. App. Apr. 21, 1999) (noting that lower court based award of custody to father partly on father's having "'rekindled' a relationship with his church," "regularly attend[ing] services," and providing "a Christian home," but declining on procedural grounds to review this);
c) Digby v. Digby, 567 S.W.2d 290, 293 (Ark. 1978) (noting that mother "offered no evidence as to any religious affiliations or church attendance on the part of the [children] while they were in her custody");
d) Moore v. Smith, 499 S.W.2d 634, 637 (Ark. 1973) (noting that "[father] was a member of [a] church, attended with reasonable regularity, and . . . [brought] his son with him");
e) Plum v. Plum, 478 S.W.2d 882, 883 (Ark. 1972) (noting that "[father] did not attend church and would not require his children to attend").

*See also* Ark. Sup. Ct. Admin. Order No. 15, 346 Ark. 536, 545 (2001) (mandating consideration of factors in child custody including "religious training and practice"); Opinion of the Attorney General, No. 2001-356, 5 (Ark. Jan. 17, 2002) (noting that *Digby*, *Moore*, and *Plum* "have at least mentioned religious beliefs and practices as bearing on custody and visitation determinations," and inferring from those cases, plus from *Johns*, discussed *supra* note 10, and other pre-1970 cases, that "a court may consider and mention religious beliefs and practices in deciding child custody cases, although the consideration of religion may only be undertaken in the course of determining the best interests of the child"); Cousins v. Smith, 491 S.W.2d 587, 590 (Ark. 1973) (noting that "[p]erhaps the matter of greatest concern is the contrast in church attendance habits in these homes," namely that "[t]he children are taken regularly by their mother, but [father] depended upon his sister to take them when she had them, and neither he nor his present wife has attended church since their marriage," but upholding order retaining custody with father because other factors outweighed this one).

3. *Georgia*

a) Todd v. Casciano, 569 S.E.2d 566, 570 (Ga. Ct. App. 2002) (noting that father "attend[s] church regularly").

4. *Louisiana*

a) *In re* J.B.A., 914 So. 2d 654, 659 (La. Ct. App. 2005) (noting that prevailing grandparents "attend church and, when the boys are with them, the boys attend church and Sunday school");
b) Brown v. Brown, 877 So. 2d 1228, 1232 (La. Ct. App. 2004) (noting that "[mother] never sa[id] any time that she was interested in these children making and attending church services");
c) Crowson v. Crowson, 742 So. 2d 107, 111–13 (La. Ct. App. 1999) (noting that son's "only exposure to organized religion" was through father, who "attends church with [the son] and helps him say his prayers at night," and that mother "no longer attends services" since divorce);
d) Pahal v. Pahal, 606 So. 2d 1359, 1362 (La. Ct. App. 1992) (noting father's "commitment to provid[ing] religious education for the child");
e) Tweedel v. Tweedel, 484 So. 2d 260, 262 (La. Ct. App. 1986) (noting that "The child attends church regularly with the mother and receives religious instruction. The father testified that he has not brought the child to church because the child did not want to go and that he would not force the child to go to church.");
f) Morgan v. Huddlestone, 430 So. 2d 304, 305 (La. Ct. App. 1983) (noting that "[the son] attended the Episcopal Church with his mother on a regular basis, but that he did not attend church with his father during visitation periods," and that "In fact, the boy was unable to tell the judge his father's religion");
g) Quinn v. Quinn, 412 So. 2d 649, 655 (La. Ct. App. 1982) (noting that "With the father the child would be in a religious, churchgoing environment," while mother "did not attend church with the father and child while they lived together").

*See also* LA. CIV. CODE ANN. art. 134(2) (1994) (noting as one of best interests factors "[t]he capacity and disposition of each party to give the child . . . spiritual guidance"); Peacock v. Peacock, 903 So. 2d 506, 513–14 (La. Ct. App. 2005) (concluding that both parents are "on equal footing" as to "spiritual guidance" factor because "[t]hey both provide her with spiritual guidance, sending her to church and going with her"); Hoskins v. Hoskins, 814 So. 2d 773, 778 (La. Ct. App. 2002) (noting that "[t]he mother argues that she is the better moral influence for [child] because she regularly attends church and the father does not," but disregarding this because "the mother's regular church attendance is a relatively recent occurrence" and because "her alleged adherence to her religious faith—which disapproves of gambling—has not prevented her or the stepfather from spending considerable time and money at casinos"); *id.* at 780 (Peatross, J., dissenting) (arguing that, though "the majority . . . is correct in its statement concerning the mother's gambling activities and church attendance, the fact remains that the mother takes the child to church, thus providing spiritual guidance," while "father . . . does not go to church"); Deason v. Deason, 759 So. 2d 219, 221 (La. Ct. App. 2000) (noting that "the mother and her family are more involved in organized religious activity" and that "[t]he father only casually attends churches of his religious denomination, while the mother is a member and regularly attends one specific church of her religious denomination," but ultimately holding in favor of father because of other factors); Lirette v. Lirette, 483 So. 2d 1142, 1144 (La. Ct. App. 1986) (citing positively father's role in providing religious upbringing, in course of rejecting mother's request to transfer physical custody to her, but ultimately remanding for consideration of whether parents should get joint custody).

5. *Minnesota*

a) Johnston v. Plessel, No. A03-581, 2004 WL 384143, at *5 (Minn. Ct. App. Mar. 2, 2004) (noting that "[w]ith respect to the children's religious training, the children

participate in religion classes and attend church with mother twice a week," while "[f]ather does not attend church");

b) *In re* Marriage of Storlein, 386 N.W.2d 812, 813 (Minn. Ct. App. 1986) (upholding grant of custody to mother, where lower court cited as one factor in her favor that mother "is a religious person who attends church on a regular basis" and who "would probably provide more constant attention to the children's religious education and training than would [father]," while father "was not a member of any organized religion and did not attend church services").

6. *Mississippi*

a) Staggs v. Staggs, No. 2004-CA-00443-COA, 2005 WL 1384525, at *6 (Miss. Ct. App. May 24, 2005) (noting that "[w]hile [father] is an agnostic and testified that religion is not important to him, [mother] testified that religion is very important to her");

b) *In re* Guardianship of J.N.T., 910 So. 2d 631, 634 (Miss. Ct. App. 2005) (noting that losing party "does not attend church and it seems she does not really care for the institution of marriage," while "[the prevailing party] and his wife attend church");

c) Davidson v. Coit, 899 So. 2d 904, 911 (Miss. Ct. App. 2005) (noting father's "regularly tak[ing] the children to church");

d) Mixon v. Sharp, 853 So. 2d 834, 840 (Miss. Ct. App. 2003) (noting as factor in favor of father's "moral fitness" that he "is a Sunday school teacher at his church, and until recently, was a church officer");

e) Turner v. Turner, 824 So. 2d 652, 655 (Miss. Ct. App. 2002) (noting that "[father] has consistently taken the child to church," while "[t]here has been little religious training shown by the mother");

f) Blevins v. Bardwell, 784 So. 2d 166, 175 (Miss. 2001) (noting that mother took child to church more often than father did, thus providing better "future religious example");

g) Pacheco v. Pacheco, 770 So. 2d 1007, 1010–11 (Miss. Ct. App. 2000) (noting that "[father] took his daughter to church with him," while "there was no evidence as to religious activity taking place with [mother] and her daughter since the separation");

h) Weigand v. Houghton, 730 So. 2d 581, 587 (Miss. 1999) (noting chancellor's "weighing heavily" as factor in mother's favor that "mother has seen that [the son] is taken to church and undergone religious training, along with the entire family" and that "[the son's] best interest would be served by providing religious training").

*See also* Johnson v. Gray, 859 So. 2d 1006, 1014–15 (Miss. 2003) (discussing father's taking child to church, and mother's only having recently started going to church, as relevant to stability of home environment); Jerome v. Stroud, 689 So. 2d 755, 759 (Miss. 1997) (noting chancellor's "admonish[ing] the parents to take the children to church, no matter which one, just as long as the children were being taken to a church").

7. *New York*

a) W.L. v. A.E., 2006 WL 940629, *7 (N.Y. Fam. Ct. Mar. 27, 2006) (noting that mother "neglected the children's religious education");

b) *In re* Graci, 590 N.Y.S.2d 377, 379 (App. Div. 1992) (noting that mother "takes the children to church; [father] does not," and concluding "that [mother] demonstrated a greater ability to provide for the religious upbringing of the children").

8. *North Carolina*

a) Karger v. Wood, No. COA05-251, 2005 N.C. App. LEXIS 2609, at *10 (N.C. Ct. App. Dec. 6, 2005) (noting that "[mother] and the minor child attend church regularly," while "[father] does not take the minor child to church");

b) Dean v. Dean, 232 S.E.2d 470, 471 (N.C. Ct. App. 1977) (noting in prevailing father's favor "[mother's] failure to take [the son] to church and Sunday School was jeopardizing [the son's] spiritual values").

*9. Pennsylvania*

a) Gancas v. Schultz, 683 A.2d 1207, 1213–14 (Pa. Super. Ct. 1996) (reversing lower court's transfer of custody from mother to father, based partly on lower court's "fail[ure] to consider 'all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being,'" and in particular that while "[m]other . . . takes [daughter] to church whenever [daughter] is with her," "[f]ather, an admitted agnostic, does not attend church");

b) E.A.L. v. J.L.W., 662 A.2d 1109, 1115 (Pa. Super. Ct. 1995) (reversing trial court's order changing custody from grandparents back to mother, partly because "The record does not support [trial court's] finding that mother has attempted to involve her children in religious instruction. She testified that she took them to church once and the children did not like it. There was no evidence that she has subsequently taken them to church.");

c) Myers v. Myers, 14 Phila. 224, 256–57 (Com. Pl. 1986) ("Although the issue of religion is not controlling in a custody case, the religious training of children is a matter of serious concern and is a factor that should be considered in rendering a custody decision. 'A proper religious atmosphere is an attribute of a good home and it contributes significantly to the ultimate welfare of a child.' Where it appears that the religious training of the children will cease upon placement in a given custodial setting, courts lean in favor of the religious-minded contestant."), *aff'd without op.*, 520 A.2d 68 (Pa. Super. Ct. 1986);

d) Scheeler v. Rudy, 2 Pa. D. & C.3d 772, 780 (Com. Pl. 1977) (awarding custody to mother, noting as factor in her favor that she often took children to church, while father rarely did, that "[t]his court has often noted the absence of any regular church attendance in the pre-sentence reports of those who have been convicted of some crime, which appear on our desk," and that "a religious education and upbringing can have a substantial effect upon the outlook and attitudes of a child, and in turn upon the life of the adult he or she will become").

*See also* Thomas v. Thomas, 739 A.2d 206, 213 (Pa. Super. Ct. 1999) (reversing custody order partly because "the trial court failed to consider Mother's and Father's religions, their relationships with the children, their mental and physical status, or other factors which legitimately affect the children's physical, intellectual, moral and spiritual well-being," citing *Gancas*); McAlister v. McAlister, 747 A.2d 390, 393 (Pa. Super. Ct. 2000) (same, citing *Thomas*, though noting that trial court stated "that Father takes the children to church on the weekends"); Sauer v. Sauer, 14 Phila. 335, 343–44 (Com. Pl. 1986) (stating that, though religion "is not determinative," it "is an important matter and should be given some consideration in child custody disputes," and noting that "Where both parents demonstrate their desire to promote the religious education of the child, each in his or her own faith, the court shall assume a neutral stance as to the issue," which suggests that when only one parent demonstrated such a desire, that would be considered in the parent's favor).

*10. South Carolina*

a) Latimer v. Farmer, 602 S.E.2d 32, 36 (S.C. 2004) (noting that "Father has taken the responsibility for the moral upbringing of Child by taking her to church and reading her Bible stories");

b) Kisling v. Allison, 541 S.E.2d 273, 276, 278 (S.C. Ct. App. 2001) (noting that "A child's regular attendance in a house of worship arguably suggests the child lives in a home where moral development is fostered," that though "Mother and Step-Father are members of a church . . . the family's attendance 'varies,'" that "Father and Step-Mother are active members and leaders of their church," and that "[t]hey

stimulate [daughter's] spiritual development by encouraging daily Bible reading and devotionals");
c) Pountain v. Pountain, 503 S.E.2d 757, 761 (S.C. Ct. App. 1998) (upholding denial of custody to father whom court described as "agnostic," and stating that "Although the religious beliefs of parents are not dispositive in a child custody dispute, they are a factor relevant to determining the best interest of a child");
d) Driggers v. Hayes, 212 S.E.2d 579, 579 (S.C. 1975) (noting that prevailing grandparents have given child "religious training");
e) Mathis v. Johnson, 188 S.E.2d 466, 468 (S.C. 1972) (noting that prevailing parties provided for "religious advancement" of child).

*Cf.* Shainwald v. Shainwald, 395 S.E.2d 441, 446 (S.C. Ct. App. 1990) (upholding award of custody to father partly because "the father is concerned with the religious and educational development of his children," though noting that "the record leaves much to be desired in terms of the sincerity of his religious commitment and especially the regularity of church attendance").

*11. Tennessee*

a) Davidson v. Davidson, No. 02A01-9607-CH-00173, 1997 Tenn. App. LEXIS 557, at *2–*3 (Tenn. Ct. App. Aug. 12, 1997) (discussing unappealed order granting custody to father, which gave, among its findings of fact and conclusions of law, that "The mother was not taking the children to church" while "The children were attending church on a regular basis while with the father");
b) Fenley v. Fenley, No. 03A01-9604-CH-00121, 1996 Tenn. App. LEXIS 488, at *6 (Tenn. Ct. App. Aug. 19, 1996) (discussing trial court order directing that child would be with father each Sunday so he could take her to church, which was based on trial court's view of "the spiritual needs of this child," but reversing order on unrelated grounds);
c) Sutherland v. Sutherland, 831 S.W.2d 283, 286–87 (Tenn. Ct. App. 1991) (noting that "The mother is very involved with church and teaches in the Sabbath school. She takes [the son] with her to church when she has him for visitation. On the other hand, the father is not very involved in church activities.");
d) Jones v. Lesure, No. 76, 1991 Tenn. App. LEXIS 52, at *5 (Tenn. Ct. App. Feb. 5, 1991) (noting that "[mother] and her husband regularly take [daughter] to church to ensure that she receives the proper religious training");
e) Smith v. Smith, No. 80-301-II, 1990 Tenn. App. LEXIS 152, at *3 (Tenn. Ct. App. Mar. 7, 1990) (upholding change of custody to father, and noting as factor in his favor that "father takes the children to church");
f) Sprague v. Sprague, No. 84, 1986 Tenn. App. LEXIS 2947, at *5 (Tenn. Ct. App. Mar. 14, 1986) (noting that "[t]he father at no time testified . . . that he would see that [the children] attended religious services or otherwise gain proper instruction and growth").

*See also* Cease v. Cease, 1981 Tenn. App. LEXIS 463, at *10, *22–*23 (Tenn. Ct. App. Nov. 6, 1981) (awarding custody of one of children to father, but stressing that "[r]eligious training for children is vital" and that this factor cut in favor of mother, who "has been attending church regularly" rather than father, who hasn't been).

*12. Texas*

a) *In re* Davis, 30 S.W.3d 609, 614–15 (Tex. App. 2000) (noting that "the older girl [had] reached an age of importance in the exercise of religious beliefs" but that mother didn't attend church);
b) Snider v. Grey, 688 S.W.2d 602, 611 (Tex. App. 1985) (noting "neglect in the religious training [of the child] by the father");
c) Dunker v. Dunker, 659 S.W.2d 106, 109 (Tex. App. 1983) (noting father's ability "to instill in the child a sense of morals and religious upbringing");

d) *In re* F.J.K., 608 S.W.2d 301 (Tex. App. 1980) (noting "the mother's neglect of the children's religious upbringing," and "[a]n atheistic philosophy [being] . . . discussed by the new husband to some extent with the daughter, prompting her to advise her nursery school teacher that she was 'not a Christian or a Jew but an atheist'").

*13. Alabama*

a) Lipsey v. Lipsey, 450 So. 2d 1095, 1097 (Ala. Civ. App. 1984) (noting that father "was the parent most concerned with the children's care and religious nurture" and that father "takes [the children] to church and attempts to instill in them proper moral values");
b) Firestone v. Parker, 451 So. 2d 329, 330 (Ala. Civ. App. 1984) (noting that "the father takes the child to church, but there is no indication that the mother does so");
c) Sanders v. Sanders, 435 So. 2d 123, 124 (Ala. Civ. App. 1983) (noting that mother "took [the children] to church regularly and the father did not take them to church");
d) Reaves v. Reaves, 399 So. 2d 311, 312–13 (Ala. Civ. App. 1981) (noting that father and stepmother "attend church regularly and take the child with them," and "the child had become adjusted to a wholesome home environment with church, school, and neighborhood ties");
e) Roberson v. Roberson, 370 So. 2d 1008, 1010–11 (Ala. Civ. App. 1979) (noting that mother and stepfather "attend[ ] church regularly" with children);
f) Frazier v. Frazier, 342 So. 2d 1320, 1321 (Ala. Civ. App. 1977) (noting that father "takes [the children] to church and Sunday School on Sundays and Wednesdays");
g) Gould v. Gould, 316 So. 2d 210, 213–14 (Ala. Civ. App. 1975) (noting that mother and stepfather "go with the children to church each Sunday");
h) Woodard v. Woodard, 244 So. 2d 595, 597–98 (Ala. Civ. App. 1971) (noting that father "carried the child to church regularly").

*14. Connecticut*

a) Gallo v. Gallo, 440 A.2d 782, 786 & n.4 (Conn. 1981) (noting that "[father] had made no effort to have [son] receive any religious education, although the boy has demonstrated to his mother through his inquiries an interest in his Creator and the church Sunday School"). The child was nine at the time of oral argument in the Connecticut Supreme Court, and thus likely younger still at the time of the custody decision, so it's hard to see the decision as a neutral attempt to accommodate a mature child's own religious preference, *see supra* note 203.

*15. District of Columbia*

a) Fitzgerald v. Fitzgerald, 464 A.2d 110, 111 (D.C. 1983) (quoting trial court, which had awarded custody to father, as reasoning that "the [mother] had not seen fit to expose the child to any kind of institutional training whereby morals—and, as the defendant puts it, the church is an excellent institution which can help to train in morals," while "[t]he [father] has done that, and, while the Court certainly has no brief for any particular kind of religious exposure, it is satisfied that religious exposure does assist parents in moral training"); *id.* at 112 (noting that father's "regularly attend[ing] church, an institution which assists in moral training, and tak[ing] his child along" "properly can enter a custody determination," but remanding to trial court to "hear evidence bearing upon the needs and adjustment of this child and make findings on other relevant factors including those listed in the statute").

*16. Iowa*

a) *In re* Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974) (noting that father "attaches some significance to the children's religious education and training");
b) Carey v. Carey, 211 N.W.2d 342, 345 (Iowa 1973) (noting father's "conscientious efforts to further [children's] church attendance and religious education," which court stressed was "a permissible consideration");
c) McNamara v. McNamara, 181 N.W.2d 206, 209 (Iowa 1970) (noting that "father conscientiously adheres to religious teachings and would apparently rear his children in the same manner").

*17. Montana*

a) Wilson v. Wilson, 590 P.2d 1136, 1139 (Mont. 1979) (noting father's "regular church attendance and his willingness to assist the children in their moral and spiritual development").

*18. Nebraska*

a) Ahlman v. Ahlman, 267 N.W.2d 521, 523 (Neb. 1978) (noting that mother "had failed to provide religious training for the children").

*B. Cases in Which a Trial or Appellate Court Cited in the Prevailing Party's Favor the Other Party's Racist Speech*

1) McCorvey v. McCorvey, No. 05-174, 2005 WL 2863915, at *7–*9 (La. Ct. App. Nov. 2, 2005) (discussed *supra* in note 11);
2) Lundstrom v. Lundstrom, No. A04-1309, 2005 WL 646661, at *6 (Minn. Ct. App. Mar. 22, 2005) (noting father's "us[ing] racist language in front of the children");
3) Tipton v. Aaron, No. CA 03-932, 2004 WL 1344916 (Ark. Ct. App. June 16, 2004) (noting that "[mother's] child-rearing philosophy promotes racial tolerance, while [father's] does not");
4) Boarman v. Boarman, 459 S.E.2d 395, 398, 400 (W. Va. 1995) (noting father's "expression of racial, ethnic and gender comments," and father's "prais[ing] Adol[f] Hitler" to children);
5) Burnham v. Burnham, 304 N.W.2d 58, 61 (Neb. 1981) (noting "racist views held by [mother] and, apparently, by her church");
6) Report of Material Facts, Vilakazi v. Maxie, Mass. Probate Ct. No. 479549 (Aug. 7, 1975), *available at* http://www.law.ucla.edu/volokh/custody/vilakazi11.pdf, at 3, 4, *aff'd*, 357 N.E.2d 763 (Mass. 1976) (upholding total denial of custody and visitation rights to mother based partly on her "instructing the child . . . to develop a psychology completely adverse to white people").

*See also* Dansby v. Dansby, No. CA 03-741, 2004 WL 1465757 (Ark. Ct. App. June 30, 2004) (Pittman, J., dissenting) (taking view that courts should consider parent's "child-rearing philosophy [that] promoted racial tolerance" as factor in favor of that parent and against intolerant one); Rial v. Rial, No. M2002-01750-COA-R3-CV, 2003 WL 21805303, at *2 (Tenn. Ct. App. Aug. 7, 2003) (noting but not discussing claims that father's "racist remarks and attitudes" were against child's best interests); Upton v. Upton, FA 940064828, 1996 WL 397706, at *2 (Conn. Super. Ct. July 1, 1996) (similar); Harner v. Harner, 479 A.2d 583, 588 (Pa. Super. Ct. 1984) (expressing "disapprov[al] of [the father's] prejudices" against blacks, but upholding lower court's award of custody to him because "the lower court had the same concern and, consequently, thoroughly considered this factor in reaching its decision," so that on balance father would still be better parent).

*C. Cases Involving Parent's Communism*

1) *See* Eaton v. Eaton, *described in Woman's Red Creed Costs Her Children*, N.Y. TIMES, Jan. 30, 1936, at 1 (awarding father custody on grounds that "he has a right"

to make sure that children "be religiously trained in his own faith and brought up as Americans," and conditioning mother's visitation on her not trying to "instill her atheistic and communistic beliefs"), *aff'd on other grounds*, 191 A. 839, 839 (N.J. 1937) (dismissing mother's beliefs as "irrelevant");

2) Donaldson v. Donaldson, 231 P.2d 607, 608 (Wash. 1951) (discussing court order barring plaintiff "from educating . . . the child to become a communist or teaching him a disbelief in . . . God" and ordering plaintiff "to teach the child love and respect for the United States of America," but reversing it on other grounds);
3) Ehrenpreis v. Ehrenpreis, 106 N.Y.S.2d 568, 571 (Sup. Ct. 1951) (asking rhetorically whether "this court has no power to put an end to the communistic nurturing of a young American or to remove him from the influence and surroundings of a communist home," but disposing of case on procedural grounds);
4) DOROTHY M. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW 244–46 (1984) (discussing two cases where former Assistant Attorney General Willebrandt argued that parents' Communist sympathies or affiliations cut against parents' fitness under "best interests" test; in both cases, other parent indeed got custody); *Attorneys Clash in Comingore Custody Contest*, L.A. TIMES, Oct. 23, 1952, at 32 (describing one of the cases); *Red Issue Raised in Fight Over Actress' Children*, L.A. TIMES, Oct. 22, 1952, at 2 (same).

*D. Cases in Which a Trial or Appellate Court Decision Restricted Pro-Homosexuality or Homosexuality-Themed Speech by Parent, or Counted Such Speech Against the Parent in the Custody Decision*

1) Hogue v. Hogue, 147 S.W.3d 245, 247 (Tenn. Ct. App. 2004) (discussing lower court order that barred father from "exposing the child to . . . his gay lifestyle," including "by telling his son he was gay," and reversing it as unconstitutionally vague);
2) *Ex parte* J.M.F., 730 So. 2d 1190, 1195 (Ala. 1998) (taking custody away from mother partly because mother and her lesbian partner taught child that "girls can marry girls," said "they would not discourage the child from adopting a homosexual lifestyle," and "presented [their homosexual relationship] to the child as the social and moral equivalent of a heterosexual marriage");
3) Marlow v. Marlow, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998) (upholding court order barring visiting father from taking children to "any social, religious or educational functions sponsored by or which otherwise promote homosexual lifestyle");
4) Decision Letter, Hertzler v. Hertzler, Civ. No. 24-269, July 21, 1994 (Kautz, J.), at 4 (explaining limitation of mother's rights to consist only of twelve supervised visits per year, based partly on mother's "participat[ing] in '[same-sex] commitment' ceremony with the children" and "attend[ing] a 'gay rights/pride' public function with the children"), *aff'd on other grounds*, 908 P.2d 946, 950, 952 (Wyo. 1995) (upholding lower court's limitation of mother's rights "in spite of" rather than "because of" lower court's finding that "homosexuality is inherently inconsistent with families");
5) J.L.P. v. D.J.P., 643 S.W.2d 865, 872 (Mo. Ct. App. 1982) (similar to *Marlow*);
6) *In re* Jane B., 380 N.Y.S.2d 848, 860 (N.Y. Sup. Ct. 1976) (similar);
7) *In re* J.S. & C., 324 A.2d 90, 97 (N.J. Super. 1974) (similar).

*See also* Schuster v. Schuster, 585 P.2d 130, 134–35 (Wash. 1978) (Rossellini, J., dissenting) (arguing that mother's advocacy of her homosexual lifestyle should result in awarding children to father); Ulvund v. Ulvund, No. 224566, 2000 WL 33407372, at *3 (Mich. Ct. App. Aug. 22, 2000) (counting as factor in father's favor that "although [the lesbian mother] attends church, she will eventually have to deal with the conflict between church doctrine and her choice of a homosexual lifestyle," while father—who was also "extensively involved in his church"—"will be more readily able to raise the child in his religion"). *But see In re* Marriage of McKay, No. C6-95-1626, 1996 WL 12658, at *3 (Minn. Ct. App. Jan. 16, 1996) (reversing lower court visitation limitation that was based in part on

child's being exposed to gay- and lesbian-themed political activities); *In re* Marriage of Pleasant, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (similar to *McKay*).

### *E. Cases in Which a Trial or Appellate Court Decision Cited in the Prevailing Party's Favor the Other Parent's Exposing Child to "Inappropriate" Movies*

1) Osmanagic v. Osmanagic, 872 A.2d 897, 899 (Vt. 2005) (faulting parent for exposing five-year-old child to "age-inappropriate sex and horror movies");
2) *In re* Davis, No. COA02-1189, 2003 WL 21030420, at *1 (N.C. Ct. App. May 6, 2003) (likewise for allowing eight-year-old child to watch "'R' rated or scary movies");
3) *In re* Hill, 937 S.W.2d 384, 389 (Mo. Ct. App. 1997) (likewise for exposing four-year-old child to "R-rated movie");
4) Breckner v. Coble, 921 S.W.2d 624, 626 (Mo. Ct. App. 1996) (likewise for exposing ten- and twelve-year-old children to "R rated and violent movies"); *cf.* E-mail from June Kim to the author, Aug. 15, 2005, summarizing a conversation between June Kim and Betty Pace, the lawyer for the mother in *Breckner* (reporting that judge wasn't concerned about particular R-rated movies, but rather that father had about a thousand videos, and let children view whatever they wanted, including R-rated movies; rating was apparently more important to judge than individual titles);
5) Perkins v. Perkins, 646 So. 2d 43, 44 (Ala. Civ. App. 1993) (likewise for exposing nine-year-old child to "five 'R' rated movies" containing "explicit sex and extreme violence"; "[t]he trial judge stated that the movies really upset him and that neither he nor any member of his family watched movies like the ones the child had seen"), *rev'd on other grounds*, 646 So. 2d 46 (Ala. 1994); *cf.* E-mail from Kathryn Harwood (the lawyer for the mother in *Perkins*) to June Kim at the UCLA Law Library (Aug. 5, 2005) (recalling that one of the R-rated movies was *Backdraft*, the Ron Howard-directed movie about firefighters);
6) *In re* Marriage of Athy, 428 N.W.2d 310, 312 (Iowa Ct. App. 1988) (noting lower court order awarding custody to mother partly based on father's exposing seven- and nine-year-old children to "vulgar HBO movies," but reversing and instead finding that presumption of joint custody hadn't been rebutted);
7) Impullitti v. Impullitti, 415 N.W.2d 261, 264 (Mich. Ct. App. 1987) (faulting parent for letting eleven-year-old child watch "two R-rated movies").

*See also* Wiley v. Wiley, No. 31061-9-II, 2005 WL 1501608, at *2 (Wash. Ct. App. June 21, 2005) (discussing trial court order that "prohibited materials rated over PG-13 in nature and video games rated 'T' or above from being kept in either household," and setting it aside on grounds that parties had later agreed to narrow order merely requiring such material to be kept in "locked rooms and password-protected computers"; children were seven and ten years old at time of initial order, and nine and twelve at time of appellate decision); Markell v. Markell, No. 805 OF 1993, 2000 WL 34201486, at *5, *7 (Pa. Ct. Com. Pl. June 28, 2000) (finding that father had let his eleven- to thirteen-year-old children watch *Fight Club*, *There's Something About Mary*, and *Blade*, which court concluded "[t]he children are too young to see"; stating that *South Park* and *The General's Daughter* "should not be seen at ages 11, 12, and 13," though finding that the father hadn't let the children see them; and ultimately concluding that, because of father's other good qualities, "the film issue was simply 'one photo in the album' and should not be controlling in this case"); Guy M. v. Yolanda L.-F., No. V-06599-03/04A, 2004 WL 2532299, at *8 (N.Y. Fam. Ct. Nov. 8, 2004) (noting mother's having "little concern with regard to issues such as appropriate dress, age appropriate movies and/or music and age appropriate parental controls"; court took view that twelve-year-old daughter's apparently sexually dangerous behavior—corresponding with twenty-year-old man online and traveling alone by bus to meet him—flowed from these aspects of mother's parenting).

*F. Cases in Which a Trial or Appellate Court Decision Restricted Religious Criticisms of the Other Parent, or Counted Such Speech Against the Parent in the Custody Decision*

1) *Ex parte* Snider, No. 1040397, 2005 WL 3082278, at *9 (Ala. Nov. 18, 2005) (emphasis added) (upholding order barring mother from engaging in "religious training which would . . . be disparaging or critical of in any way [sic] the beliefs of the Father," and not just from criticizing father personally);
2) Rieker v. Rieker, No. A-98-013, 1999 Neb. App. LEXIS 68, at *14 (Feb. 23, 1999) (instructing trial court to enjoin father "from making comments to [his son] which disparage [the mother's] religion");
3) Kirchner v. Caughey, 606 A.2d 257, 264 (Md. 1992) (noting that lower court had restricted father's taking child to church, apparently based partly on father's having told daughter that her mother was damned to Hell, and holding that "inculcation of dogma inconsistent with the religious training she receives at the direction of her mother," or that "otherwise produce[s] additional unwarranted conflict in this child's mind," may be prohibited);
4) Peterson v. Peterson, 474 N.W.2d 862, 872 (Neb. 1991) (barring mother from saying anything to children that "in any way contradicts, disparages, or questions the validity of the father's religion or of those with whom he or the children associate");
5) Kor v. Pagano, No. 35 86 50, 1990 Conn. Super. LEXIS 444, at *5–*6 (June 7, 1990) (ordering mother "to do or say nothing that would disparage, depricate [sic] or diminish Mr. Kor's religion, nor to permit others to do so");
6) *In re* Marriage of Murphy, 737 P.2d 1319, 1321–22 (Wash. Ct. App. 1987) (affirming award of custody to mother, based in part on father's belonging to church that had essentially excommunicated mother).

*G. Cases Upholding Restrictions on a Noncustodial Parent's Teaching Religious Views That Are Inconsistent with the Custodial Parent's, Without Any Need to Show Likely Harm from the Noncustodial Parent's Speech*

1) Wright v. Walters, No. 2004-CA-000804-ME, 2005 WL 1490991, at *1 (Ky. Ct. App. June 24, 2005) (holding that trial court should have barred noncustodial parent from taking child to non-Catholic church, because custodial parent was Catholic and "as sole custodian she has exclusive authority to determine [the child's] religious upbringing");
2) Feldman v. Feldman, 874 A.2d 606, 614 (N.J. Super. Ct. App. Div. 2005) (upholding order barring noncustodial mother from sending children to Catholic classes, where father was raising child as Jewish, because "[a]llowing the non-custodial parent to formally educate the children in a second religion, through [formal Catholic] classes, as here, runs contrary to the right that the primary caretaker has to educate the children in the religion of his choice");
3) Behnke v. Green-Behnke, No. A03-1039, 2004 WL 376984, at *9 (Minn. Ct. App. Mar. 2, 2004) (holding that trial court could bar noncustodial parent from engaging in "religious discussions that might cause the children to reject [custodial parent's] choice of religion," because custodial parent has "the exclusive 'right to determine the child[ren]'s upbringing, including education, health care, and religious training'");
4) Lange v. Lange, 502 N.W.2d 143, 145 n.2 (Wis. Ct. App. 1993) (upholding order barring father, who was noncustodial parent, from "taking the children to his religious services and activities, educating the children in religious doctrine that is contrary to the Lutheran doctrine which the children have been taught, and telling the minor children that the petitioner's religious beliefs and teachings are wrong");
5) Siegel v. Siegel, 122 Misc. 2d 932, 934 (N.Y. Sup. Ct. 1984) (holding that mother, who had custody, "is entitled to an order declaring that the child . . . shall be raised in the religion chosen by the . . . mother, and in this regard, the [father] shall not bring the infant child to a religious service other than that chosen by his mother").

*Cf. also* A.G.R. *ex rel.* Conflenti v. Huff, 815 N.E.2d 120, 125–26 (Ind. Ct. App. 2004) (upholding order "specifically prohibit[ing] Father from encouraging or allowing [the child] to participate in holiday-related activities, such as giving and receiving gifts and trick-or-treating," because mother's Jehovah's Witness religion, in which child was being raised, prohibits such activities, and because "[t]he custodial parent [here, the mother] enjoys the right to determine the religious training of his or her minor children").