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## PARENT-CHILD SPEECH AND CHILD CUSTODY SPEECH RESTRICTIONS

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### I. INTRODUCTION

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

Two years later, Harriet committed suicide. 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.<sup>1</sup>

Percy Shelley was also an avowed atheist—and the Court of Chancery mostly relied on this, not on his infidelity or unreliability. 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 to do the same. Twenty years later, Justice Joseph Story likewise wrote that a father could lose his rights for "atheistical and irreligious principles."<sup>2</sup>

Shelley's case may look like something out of another time and place. That time and place, it turns out, is 2001 Mississippi, where the state supreme court upheld an order giving a mother custody partly because she took the child to church more often than the father did, thus providing a better "future religious example."<sup>3</sup> Presumably

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<sup>1</sup> *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817). *Shelley* is generally seen as a landmark case, though two cases, *Rex v. Delaval*, 3 Burr. 1413 (K.B. 1763), and *Blisset's Case*, Loft's Rep. 748 (K.B. 1773), anticipated it. See Henry H. Foster & Doris Jonas Freed, *Life With Father: 1978*, 11 FAM. L.Q. 321 (1978).

<sup>2</sup> JOSEPH STORY, 2 EQUITY JURISPRUDENCE § 1341 (1836)

<sup>3</sup> *Blevins v. Bardwell*, 784 So. 2d 166, 175 (Miss. 2001). For other Mississippi cases considering the parents' comparative religiosity in the child custody analysis, see, e.g., *Staggs v. Staggs*, 2005 WL 1384525 (Miss. App.); *Brekeen v. Brekeen*, 880 So. 2d 280, 282 (Miss. 2004); *Turner v. Turner*, 824 So. 2d 652, 655-56 (Miss. App. 2002); *Pacheco v. Pacheco*, 770 So. 2d 1007, 1011 (Miss. App. 2000); *Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999); see also *Johnson v. Gray*, 859 So. 2d

an outright atheist would be at even more of a disadvantage in a Mississippi child custody dispute. And if he wasn't denied custody, he might be ordered to take the child to church each week, as a Mississippi court ordered in 2000, reasoning that "it is certainly to the best interests of [the child] to receive regular and systematic spiritual training."<sup>4</sup> Arkansas, Louisiana, Michigan, Minnesota, Pennsylvania, South Carolina, South Dakota, and Texas courts also authorize judges to favor more religious parents over the less religious or the irreligious;<sup>5</sup> there are similar cases in 1970s Iowa, Nebraska, North Carolina, and New York.<sup>6</sup>

Likewise, through the past decades, parents have had their rights limited or denied partly based on their racist views,<sup>7</sup> advocacy of Communism,<sup>8</sup> Nazi sympa-

1006, 1014-15 (Miss. 2003) (discussing the father's taking the child to church, and the mother's only having recently started going to church, as relevant to the "stability of [the] home environment").

<sup>4</sup> *McLemore v. McLemore*, 762 So. 2d 316 (Miss. 2000) (upholding such an order); *see also* *Hodge v. Hodge*, 188 So. 2d 240 (Miss. 1966) (approving of a similar order); *Johns v. Johns*, 918 S.W.2d 728 (Ark. App. 1996) (upholding an order that a father take a child to church, partly on the grounds that weekly church attendance—rather than just the every-two-weeks attendance that the child would have had if he went only with his mother—provides superior "moral instruction"). The father in *Johns* wasn't legally obliged to attend the services himself, but was allowed to drop the child off at church; 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.

<sup>5</sup> *See* Ark. Sup. Ct. admin. order no. 15 (enacted 1999) (mandating the consideration of factors including "religious training and practice"); *Johns*; *Peacock v. Peacock*, 903 So.2d 506, 513-14 (La. App. 2005); *Pahal v. Pahal*, 606 So. 2d 1359, 1362 (La. App. 1992), *interpreting* LA. STAT. ANN. CIV. CODE art. 134(b) (noting as one of the best interests factors "The capacity and disposition of each party to give the child . . . spiritual guidance"); *Ulvund v. Ulvund*, 2000 WL 33407372 (Mich. Ct. App.); *Mackenzie v. Cram*, 1998 WL 1991050 (Mich. Ct. App.); *Jimenez v. Jimenez*, 1996 WL 33347958 (Mich. Ct. App.); *Johnston v. Plessel*, 2004 WL 384143 (Minn. Ct. App.); *In re Storlein*, 386 N.W.2d 812 (Minn. Ct. App. 1986); *McAlister v. McAlister*, 747 A.2d 390, 393 (Pa. Super. Ct. 2000); *Thomas v. Thomas*, 739 A.2d 206, 213 (Pa. Super. Ct. 1999); *Gancas v. Schultz*, 683 A.2d 1207 (Pa. Super. Ct. 1996); *Scheeler v. Rudy*, 2 Pa. D. & C. 3d 772, 780 (Com. Pl. 1977); *Shainwald v. Shainwald*, 395 S.E.2d 441, 446 (S.C. App. 1990); *Hulm v. Hulm*, 484 N.W.2d 303, 305 & n.\* (S.D. 1992); *In re Davis*, 30 S.W.3d 609 (Tex. Ct. App. 2000); *Snider v. Grey*, 688 S.W.2d 602, 611 (Tex. Ct. App. 1985); *In re F.J.K.*, 608 S.W.2d 301 (Tex. Ct. App. 1980). The *Gancas* court, for instance, reversed a lower court's transfer of custody from the mother to the father, based partly on the 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." 683 A.2d at 1213.

<sup>6</sup> *See In re Marriage of Moorhead*, 224 N.W.2d 242, 244 (Iowa 1974); *Ahlman v. Ahlman*, 267 N.W.2d 521, 523 (Neb. 1978); *Dean v. Dean*, 232 S.E.2d 470, 471-72 (N.C. Ct. App. 1977); *Robert O. v. Judy E.*, 90 Misc.2d 439, 442 (N.Y. Fam. Ct. 1977). *But see, e.g., Placencia v. Placencia*, 3 S.W.3d 497 (Tenn. Ct. App. 1999) (holding that a parent's religiosity should not be considered); *Welker v. Welker*, 129 N.W.2d 134 (Wis. 1964) (same); *Maxey v. Bell*, 41 Ga. 185 (1870) (same).

<sup>7</sup> *See, e.g., Lundstrom v. Lundstrom*, 2005 WL 646661, \*6 (Minn. Ct. App.); *Tipton v. Aaron*, 2004 WL 1344916 (Ark. Ct. App. 2004); *Boarman v. Boarman*, 459 S.E.2d 395, 398 (W. Va. 1995); *Burnham v. Burnham*, 304 N.W.2d 58, 61 (Neb. 1981); Report of Material Facts, *Vilakazi v. Maxie*, Mass. Probate Ct. No. 479549 (Aug. 7, 1975), available at <http://www.law.ucla.edu/volokh/custody/vilakazi1.pdf>, at 4, *aff'd*, 371 Mass. 406 (1976); *see also* *Dansby*

thies,<sup>9</sup> advocacy of pacifism and disrespect for the flag,<sup>10</sup> advocacy of polygamy,<sup>11</sup> defense of the propriety of homosexuality,<sup>12</sup> defense of adultery,<sup>13</sup> advocacy of (or

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v. Dansby, 2004 WL 1465757 (Ark. Ct. App.) (Pittman, J., dissenting) (taking the view that courts should consider the fact that a parent's "child-rearing philosophy promoted racial tolerance" as a factor in favor of that parent and against the intolerant one); Harner v. Harner, 479 A.2d 583, 588 (Pa. Super. Ct. 1984) (expressing "disapprov[al] of [the father's] prejudices" against blacks and women, but upholding the lower court's award of custody to the father because "the lower court had the same concern and, consequently, thoroughly considered this factor in reaching its decision" that on balance the father would still be a better parent); Rial v. Rial, 2003 WL 21805303, \*2 (Tenn. Ct. App.) (noting but not discussing claims that a father's "racist remarks and attitudes" were against the child's best interests); Upton v. Upton, 1996 WL 397706, \*2 (Conn. Super. Ct.) (likewise); Bill Morlin, *Racist Seeks More Time With Kids*, SPOKESMAN REVIEW (Spokane), Feb. 3, 2002 (discussing a mother's claims that the being taught militant racism was against the children's best interests; the case has since apparently settled, see e-mail from Kate Wilko, Stanford Law Library to author, reporting on a conversation with the District Court in Kootenai County, Idaho). In *Boarman*, for instance, the court upheld the denial of custody to the father based partly on the father's "expression of racial, ethnic and gender comments," and noted that the father "prais[ed] Adol[f] Hitler" to the children. In *Vilakazi*, the court denied custody and visitation rights to the mother because she "was instructing the child . . . to develop a psychology completely adverse to white people," Report of Material Facts, *supra* at 3.

<sup>8</sup> See Eaton v. Eaton, *described in Woman's Red Creed Costs Her Children*, N.Y. TIMES, Jan. 30, 1936, at 1, col. 4 (awarding the father custody on the grounds that "he has a right" to make sure that the children "be religiously trained in his own faith and brought up as Americans," and conditioning the mother's visitation on her not trying to "instill her atheistic and communistic beliefs"), *aff'd on other grounds*, 191 A. 839 (N.J. Err. & App. 1937) (dismissing the mother's beliefs as "irrelevant"); Donaldson v. Donaldson, 231 P.2d 607 (Wash. 1951) (discussing a court order barring plaintiff "from educating . . . the child to become a communist or teaching him a disbelief in . . . God" and ordered plaintiff "to teach the child love and respect for the United States of America," but reversing it on other grounds); Ehrenpreis v. Ehrenpreis, 106 N.Y.S.2d 568 (N.Y. Super. 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 the cases on procedural grounds); DOROTHY M. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW 245-46 (1984) (discussing two cases in which Willebrandt, a former Assistant Attorney General, argued that parents' Communist sympathies or affiliations cut against the parents' fitness under the "best interests" test; in both cases, the 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).

<sup>9</sup> See Reimann v. Reimann, 39 N.Y.S.2d 485 (N.Y. Sup. Ct. 1942).

<sup>10</sup> See Cory v. Cory, 161 P.2d 385 (Cal. Ct. App. 1945) (reversing such a decision); Jackson v. Jackson, 309 P.2d 705 (Kan. 1957) (reversing such a decision); see also Kennard v. Kennard, 179 A. 414, 417-18 (N.H. 1935) (reversing a decision denying visitation based on father's supposed pro-German sympathies and disloyalty during World War I).

<sup>11</sup> Shepp v. Shepp, 821 A.2d 635 (Pa. Super. Ct. 2003). See also *In re Black*, 283 P.2d 887 (Utah 1955) (upholding the state's removing children from an intact polygamous family, and returning them only on the condition that they would not be taught polygamy).

<sup>12</sup> See, e.g., Hogue v. Hogue, 147 S.W.3d 245 (Tenn. Ct. App. 2004) (discussing a lower court order that barred a father from "exposing the child to . . . his gay lifestyle," including "by telling his son he was gay," and reversing it as unconstitutionally vague); *Ex parte J.M.F.*, 730 So. 2d 1190, 1195 (Ala. 1998) (taking a child away from the mother partly because the mother and her lesbian partner have taught the child that "girls can marry girls," have said that "they would not discourage

inadequate condemnation of) nonmarital sex,<sup>14</sup> fundamentalism,<sup>15</sup> teaching of relig-

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the child from adopting a homosexual lifestyle,” and have “presented [their homosexual relationship] to the child as the social and moral equivalent of a heterosexual marriage”); *In re Marriage of Pleasant*, 628 N.E.2d 633 (Ill. Ct. App. 1993) (reversing a lower court custody order that was based in part on a child’s being exposed to gay- and lesbian-themed political activities, such as a gay pride parade); *J.L.P. v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982) (upholding an order conditioning a homosexual father’s visitation rights on his not “tak[ing] the child to a church at which a large proportion of the congregation are homosexuals or . . . to ‘gay activist social gatherings,’” and warning of greater restrictions “[i]f the father persists in his vehement espousal to the child of the ‘desirability’ of his chosen lifestyle . . . and that results in harm to the child”); *In re Jane B.*, 85 Misc. 2d 515 (N.Y. Super. Ct. 1976) (giving a lesbian mother visitation rights only on the condition that she not involve the children “in any homosexual activities or publicity”); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. 1974) (upholding an order giving a homosexual father visitation rights on the condition that he “not permit any of his children to be exposed to or take part in any activities or publicity concerning the homosexual civil rights movement”); see also *Schuster v. Schuster*, 585 P.2d 130, 134-36 (Wash. 1978) (Rossellini, J., dissenting) (taking a similar view); *Ulvund v. Ulvund*, 2000 WL 33407372 (Mich. Ct. App.) (counting, as a factor affecting the child’s best interests, 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,” which supports the trial court’s finding that the father—who was “extensively involved in his church”—had a greater “capacity . . . to provide . . . religious training”);

<sup>13</sup> See *Bunim v. Bunim*, 83 N.E.2d 848 (N.Y. 1949); see also *Murray v. Murray*, 220 So.2d 790 (La. App. 1969) (denying a “To 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,” speaking here specifically of the impropriety of adultery).

<sup>14</sup> See *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998); see also *Anderson v. Anderson*, 736 So. 2d 49 (Fla. Ct. App. 1999) (reversing judge’s refusal to transfer custody to the father, partly because the judge didn’t properly consider the mother’s letting her boyfriend run a pornographic Web site from home; the court suggested that, even though the materials weren’t accessible to the child, the operation of the site “evinced 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”). This was also the implicit premise behind the cases that penalized parents for letting their lovers stay overnight while the children were at the house; the courts reasoned that such behavior would send the message that immoral behavior was proper. See, e.g., *Walker v. Walker*, 559 S.W.2d 716 (Ark. 1978) (extramarital sex); *L.H.Y. v. J.M.Y.*, 535 S.W.2d 304 (Mo. Ct. App. 1976) (post-divorce sex); *Tucker v. Tucker*, 91 P.2d 1209 (Utah 1996) (extramarital sex). Note, though, that decisions based on parents’ sexual conduct, as opposed to speech defending such conduct—or absence of speech criticizing such conduct—likely do not pose First Amendment problems, see *infra* note 71, though some such restrictions (especially those not involving adultery) may pose an analogous constitutional problem under *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>15</sup> See *Collier v. Collier*, 14 Phila. 129 (Pa. Ct. Common Pleas 1985) (giving father only weekend custody, partly because of his fundamentalist lifestyle and attitudes—such as “disapprov[ing] 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 (Mo. 1978) (suggesting that under the “best interests” tests a court may consider whether a parent “would refuse to permit the child to attend a school class where evolution is taught”); *Stolarick v. Novak*, 584 A.2d 1034 (Pa. Super. Ct. 1991) (reversing trial court decision that denied custody to the fundamentalist father because he was raising the children “in a sterile world with very rigid precepts”); see also *In re Marriage of Epperson*, 107 P.3d 1268, 1277 (Mont. 2005) (Rice, J., specially concurring).

ions that make it hard for children to “fit in the western way of life in this society”<sup>16</sup> or that are “non-mainstream,”<sup>17</sup> and teaching of religious intolerance.<sup>18</sup> 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?”<sup>19</sup>—a question that could equally apply to parents’ teaching their children the propriety of refusing to fight in unjust wars,<sup>20</sup> 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,<sup>21</sup> which leaves family court judges ample room to consider a parent’s ideology.<sup>22</sup>

Courts have also ordered parents not to swear in front of their children,<sup>23</sup> and to install Internet filters.<sup>24</sup> They have also considered, as a factor in the custody decision, parents’ swearing,<sup>25</sup> exposing their children to R-rated movies,<sup>26</sup> exposing their

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<sup>16</sup> *Mendez v. Mendez*, 527 So.2d 820, 821, 823 (Fla. Ct. App. 1987) (Baskin, J., dissenting).

<sup>17</sup> *Jones v. Jones*, 2005 WL 1965913 (Ind. Ct. App.) (reversing such a lower court order, which was aimed at the Wicca religion).

<sup>18</sup> *In re Marriage of Epperson*, 107 P.3d 1268, 1274-75 (Mont. 2005); *Frank v. Frank*, 833 A.2d 194, 199 (Pa. 2003).

<sup>19</sup> *Shepp v. Shepp*, 832 A.2d 1064 (Pa. 2003) (allowing appeal).

<sup>20</sup> *See Gillette v. United States*, 401 U.S. 437 (1971) (holding that refusal to serve in what one sees as an 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 the conscientious objector exemption).

<sup>21</sup> 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 the tests in various states, which mostly come down to parental unfitness, and which require more than just a showing that a change of custody would be in the child’s best interests).

<sup>22</sup> 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(f); McDaniel v. Garrett*, 661 S.W.2d 789 (Ky. Ct. App. 1983); LA. STAT. ANN. CIV. CODE art. 134(f); MICH. CONSOL. LAWS ANN. § 722.23(f); *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983); N.D. CENT. CODE 14-09-06.2(f); 10 OKLA. STAT. ANN. § 5(k).

For more on how the best interests standard, even when honestly applied, may justify these decisions, see *infra* note 56 and text accompanying notes 55-56.

<sup>23</sup> *Van Koevering v. Van Koevering*, 375 N.W.2d 759 (Mich. Ct. App. 1985).

<sup>24</sup> *Bowe v. Bowe*, 2000 WL 1683392, \*4 (Conn. Super. Ct. 2000).

<sup>25</sup> *Kiser v. Kiser*, 2005 WL 1415612 (Ky. Ct. App.); *George v. George*, 1998 WL 1989958, \*4 (Mich. Ct. App.).

<sup>26</sup> *See, e.g., Wiley v. Wiley*, 2005 WL 1501608 (Wash. Ct. App.) (discussing a 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 the grounds that the parties had later agreed to a narrow order that merely required such material to be kept in “locked rooms and password-protected computers”; the children were aged 7 and 10 at the time of the initial order, and 9 and 12 at the time of the appellate decision); *Markell v. Markell*, 2000 WL 34201486, \*5, \*7 (Pa. Ct. Com. Pl.) (expressly finding that the father had let his 11- to 13-year-old children watch “Fight Club,” “There’s Something About Mary,” and “Blade,” which the court concluded “[t]he children are too young to see”; expressly finding that the children didn’t see “South Park” and “The General’s Daughter,” which the court said “should not be seen at ages 11, 12, and 13”; but ultimately concluding that, be-

children to pornography,<sup>27</sup> and exposing their children to photos of men in women's clothing.<sup>28</sup> 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 demonstrated to be harmful to the child."<sup>29</sup> "[W]hat is immoral

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cause of the 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.*, 2004 WL 2532299, \*8 (N.Y. Fam. Ct.) (noting the mother's having "little concern with regard to issues such as appropriate dress, age appropriate movies and/or music and age appropriate parental controls"; the court took the view that the 12-year-old daughter's seemingly sexually dangerous behavior—corresponding with a 20-year-old man online and traveling alone by bus to meet him—flowed from these aspects of the mother's parenting).

For other custody decisions in which a parent's having shown "inappropriate" movies to their children was counted against him or her, see *Osmanagic v. Osmanagic*, 872 A.2d 897, 899 (Vt. 2005) (5-year-old child, "age-inappropriate sex and horror movies"); *In re Davis*, 579 S.E.2d 521 (N.C. Ct. App. 2003) (8-year-old child, "'R' rated or scary movies"); *In re Hill*, 937 S.W.2d 384 (Mo. Ct. App. 1997) (4-year-old child, "R-rated movie"); *Breckner v. Coble*, 921 S.W.2d 624 (Mo. Ct. App. 1996) (10- and 12-year-old children, "R rated and violent movies"); *Perkins v. Perkins*, 646 So. 2d 43 (Ala. Civ. App. 1993) (9-year-old child, "five 'R' rated movies" that contained "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); *In re Marriage of Athy*, 428 N.W.2d 310, 312 (Iowa Ct. App. 1988) (7- and 9-year-old children, "vulgar HBO movies"); *Impullitti v. Impullitti*, 415 N.W.2d 261, 264 (Mich. Ct. App. 1987) (11-year-old child, "two R-rated movies"). For more details on the movies involved in *Perkins* and *Breckner*, see *infra* note 271.

<sup>27</sup> See, e.g., *Alitz v. Peterson*, 2002 WL 31425413, \*3 (Iowa Ct. App.); *In re Cameron C.*, 723 N.Y.S.2d 796, 796 (App. Div. 2001); *Koons v. Koons*, 1994 WL 808603, \*2 (N.Y. Sup. Ct.); see also *Wiley* (discussing a 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," which was based partly on the children's having found some photos that the father had taken of nude models, and partly on the children seeing the 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 *Reno v. ACLU*, 521 U.S. 844, 866 (1997) (striking down a ban on the 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, 638 (1968) (upholding a 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 Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780 (3rd Cir. 1990) (rejecting the 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, especially 692-700 (2003) (discussing this issue); John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 333, 335 (1979) (likewise).

<sup>28</sup> *Pulliam v. Smith*, 501 S.E.2d 898, 901 (N.C. 1998).

<sup>29</sup> *Alaniz v. Alaniz*, 867 S.W.2d 54, 57 (Tex. App. 1993); *In re Marriage of Knighton*, 723

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, or abortion.”<sup>30</sup> Presumably constitutionally protected speech, if seen as an “illegal” or “immoral” “belief[]” or “teaching[],” could be considered, just as constitutionally protected abortions might be.<sup>31</sup> Many judges and juries are doubtless reluctant to use the best interests standard this way, especially where religious or political teaching is involved.<sup>32</sup> But others are quite willing.

In a second category of cases, courts restrict custody or visitation based partly on a parent’s having said bad things about another parent, or order a parent not to say such things.<sup>33</sup> Sometimes, the parent’s speech might seem like simple badmouthing, perhaps even constitutionally unprotected slander.<sup>34</sup>

But at other times, the restrictions are based on 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.<sup>35</sup> Parents have lost rights based

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S.W.2d 274, 278 (Tex. App. 1987). *Cf.* *Gattas v. Gattas*, 1985 WL 4138, \*4 (Tenn. Ct. App.) (considering whether “the teachings received by [the daughter] in her come are morally correct” as part of the best interests analysis).

<sup>30</sup> *Alaniz*, 867 S.W.2d at 57.

<sup>31</sup> *Cf. also* *Peck v. Peck*, 2005 WL 1634963 (Tex. Ct. App.) (enjoining the 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; the challenger apparently waived any freedom of intimate association argument, *id.* at n.7, which would have probably included the *Lawrence* argument).

<sup>32</sup> *See infra* text accompanying notes 59-60.

<sup>33</sup> *See, e.g.,* *Schutz v. Schutz*, 581 So. 2d 1290 (Fla. 1991) (upholding custody order, and describing it as requiring “a good faith effort to take those measures necessary to restore and promote the frequent and continuing positive interaction (e.g., visitation, phone calls, letters) between the children and their father and to refrain from doing or saying anything likely to defeat that end”); *Joye v. Schechter*, 460 N.Y.S.2d 992 (Fam. Ct. 1983). 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.

<sup>34</sup> *See, e.g.,* *Ex parte Aguilera*, 768 S.W.2d 425 (Tex. App. 1989); *Dickson v. Dickson*, 529 P.2d 476 (Wash. Ct. App. 1974).

<sup>35</sup> *See In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (reversing such an order, but leaving open the possibility that the order may be reentered if the trial court finds that “the child’s emotional development [would be] significantly impaired” by the absence of the order); *see also* *Johnson v. Schlotman*, 502 N.W.2d 831, 837 (N.D. 1993) (Levine, J., concurring) (concluding that if the 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”). 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



partly on telling their children that the other parent was damned to Hell,<sup>36</sup> or on otherwise criticizing the other parent's religion.<sup>37</sup> 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.<sup>38</sup>

Some 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 12-year-old daughter that her ex-husband, who had raised the daughter from birth, wasn't the girl's biological father.<sup>39</sup> And some court orders prohibit the 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.<sup>40</sup>

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.<sup>41</sup> The cases generally rest on the theory—

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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.

<sup>36</sup> See *Kirchner v. Caughey*, 326 Md. 567 (1992).

<sup>37</sup> See *In re Marriage of Swofford*, 737 P.2d 1319 (Wash. Ct. App. 1987) (affirming award of custody to the mother, based in part on the father's belonging to a church that had essentially excommunicated the mother); see also *Peterson v. Peterson*, 474 N.W.2d 862 (Neb. 1991) (barring mother from saying anything to the 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").

<sup>38</sup> See *Wang v. Wang*, 896 P.2d 450 (Mont. 1995) (Leaphat, J., dissenting) (reasoning that because the father's church teaches "that men must be allowed to make all the decisions" and that the disobedient mother "is possessed by demons and . . . is a lesser, subservient human being," the 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"); *Roberts v. Roberts*, 2002 WL 725513 (Va. Cir. Ct.) (denying visitation to the father and noting that while the mother "encourages the children to be whatever they want to be," the father "tells [the daughter] women cannot do what men do," but focusing on the conflict that such divergent teachings supposedly cause rather than on the harmfulness of the father's teaching as such). Cf. *Harner v. Harner*, 479 A.2d 583, 588 (Pa. Super. Ct. 1984) (expressing "disapprov[al] of [the father's] prejudices" against women, but upholding the lower court's award of custody to the father because "the lower court had the same concern and, consequently, thoroughly considered this factor in reaching its decision" that on balance the father would still be a better parent);

<sup>39</sup> *In re Marriage of J.H.M.*, 544 S.W.2d 582 (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.*, 158 Misc.2d 665 (N.Y. Sup. Ct. 1993) (considering but rejecting a request to order a father not to tell a child that the mother has cancer).

<sup>40</sup> See, e.g., *Franyutti v. Franyutti*, 2003 WL 22656879, \*4 (Tex. Ct. App.); *In re Marriage of Stutz*, 556 N.E.2d 1346 (Ind. Ct. App. 1990). But see *Saxon v. Saxon*, 428 S.E.2d 376, 378 (Ga. App. 1993) (rejecting such a proposed restriction).

<sup>41</sup> See, e.g., *Behnke v. Green-Behnke*, 2004 WL 376984 (Minn. Ct. App.); *Jean R. v. Susan H.*, 2003 WL 141048 (N.Y. Fam. Ct.); *In re Marriage of Murphy v. Murphy*, 1996 WL 70978 (Minn. Ct. App.); *Ledoux v. Ledoux*, 452 N.W.2d 1 (Neb. 1990); *In re S.E.L. v. J.W.W.*, 541 N.Y.S.2d 675, 679

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 be less likely to take their parents’ authority seriously.<sup>42</sup> In one case, a court actually 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,”<sup>43</sup> though it’s not clear how such a vague order could be enforced.<sup>44</sup>

Are these speech restrictions constitutional? In Part IV, I’ll 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. But the observations that lead to this proposal should, I think, prove more interesting to readers than the proposal itself. Here is a brief summary:

1. As I 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. The losers vary depending on which ideology is disfavored at the time in that place: Sometimes they are atheistic and sometimes fundamentalist, sometimes racist and sometimes pro-polygamist, sometimes pro-homosexual and sometimes anti-homosexual. But whoever the losers are, these cases should lead us to take a hard look at this doctrine. And though child custody speech restrictions on ideological speech aren’t routine, upholding them may lead them to become more common.<sup>45</sup>

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.<sup>46</sup> Just as the Equal Protection Clause bars child custody decisions

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(N.Y. Fam. Ct. 1989), *aff’d sub. nom.* Lebovich v. Wilson, 547 N.Y.S.2d 54, 55 (App. Div. 1989); *In re Marriage of Tiskos*, 514 N.E.2d 523 (Ill. Ct. App. 1987); Funk v. Ossman, 724 P.2d 1247 (Ariz. Ct. App. 1986); Andros v. Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986); Bentley v. Bentley, 86 A.D.2d 926 (N.Y. App. Div. 1982); Morris v. Morris, 412 A.2d 139 (Pa. Super. Ct. 1979); Lange v. Lange, 502 N.W.2d 143 (Wis. Ct. App. 1993); Baker v. Baker, 1997 WL 731939 (Tenn. App.); Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997); MacLagan v. Klein, 473 S.E.2d 778 (N.C. Ct. App. 1996), *disapproved as to other matters*, Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998); Lebovich v. Wilson, 547 N.Y.S.2d 54 (App. Div. 1989); Margaret B. v. Jeffrey B., 435 N.Y.S.2d 499 (N.Y. Fam. Ct. 1980).

<sup>42</sup> 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. § 25-410; COLO. REV. STAT. ANN. § 14-10-130; 750 ILL. COMP. STAT. ANN. 5/608; IND. CODE § 31-17-2-17; KY. REV. STAT. § 403.330; VERNON’S ANN. MO. STAT. 452.405; MONT. CODE ANN. 40-4-218; REV. CODE WASH ANN. 26.10.170. Compare Funk v. Ossman, 724 P.2d 1247 (Ariz. App. 1986) (interpreting such a statute as not displacing the best interests test) with Wright v. Walters, 2005 WL 1490991 (Ky. Ct. App.) (interpreting such a statute as categorically allowing the custodial parent to veto the noncustodial parent’s taking the child to a church of a denomination different from the custodial parent’s).

<sup>43</sup> Frank v. Frank, 833 A.2d 194, 199 (Pa. 2003) (affirming this order).

<sup>44</sup> Cf. Hogue v. Hogue, 147 S.W.3d 245 (Tenn. Ct. App. 2004) (reversing on vagueness grounds an order that barred a father from “exposing the child to . . . his gay lifestyle”).

<sup>45</sup> See *infra* Part II.B.

<sup>46</sup> See *id.*

that discriminate based on race,<sup>47</sup> so the First Amendment presumptively bars child custody decisions that discriminate based on a parent's constitutionally protected speech.<sup>48</sup>

3. Even when the parents' speech is religious, the Free Speech Clause is probably more important than the Religion Clauses,<sup>49</sup> though nearly all the scholarship and most of the litigation has neglected the Free Speech Clause.<sup>50</sup>

4. 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 broken families generally deserve the same rights, except when the speech undermines the child's relationship with the other parent.<sup>51</sup>

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 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. 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.<sup>52</sup>

6. It may seem appealing to protect speech but only if it doesn't imminently threaten likely psychological harm to the children, but such an approach will likely prove unhelpful.<sup>53</sup>

## II. CHILD CUSTODY SPEECH RESTRICTIONS

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

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<sup>47</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>48</sup> The exception for nonideological statements that interfere with the child's relationship with the other parent, *see infra* Part IV.C, represents the rare situation in which this presumption is rebutted.

<sup>49</sup> *See infra* Parts II.C-II.D.

<sup>50</sup> 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. REF.* 879 (1992). But, like nearly all other works on the subject, these don't discuss the Free Speech Clause question, even though many 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 that are focused on *Schutz v. Schutz*, 581 So.2d 1290 (Fla. 1991), and that are thus limited to the orders banning disparagement of the other parent (and mandating praise of the 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).

<sup>51</sup> *See infra* Part III.B.2.

<sup>52</sup> *See infra* Part III.A.

<sup>53</sup> *See infra* Part III.B.4.

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<sup>54</sup>—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 to spend 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.

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 are generally enforced through the threat of reducing or denying custody or visitation rights, though they could also be punished as contempt of court.

All these custody and visitation decisions are generally made under the “best interests of the child” standard;<sup>55</sup> and it’s natural to consider parents’ speech as being relevant to the child’s best interests. 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. And 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.<sup>56</sup> And since the standard of appellate review for such orders is generally abuse of discretion,<sup>57</sup> a court of appeals will often be reluctant to set aside such a reasonable, even if debatable, assumption.<sup>58</sup>

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<sup>54</sup> 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. These questions are outside the scope of this article. *Cf., 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).

<sup>55</sup> *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.’”).

<sup>56</sup> 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.

<sup>57</sup> *See, e.g., Hudema v. Carpenter*, 989 P.2d 491 (Utah Ct. App. 1999); *Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997); *Bienenfeld v. Bennett-White*, 605 A.2d 172 (Md. Ct. Spec. App. 1992).

<sup>58</sup> If, however, this article is correct to say that these restrictions as raising First Amendment problems, then this might 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),

Some judges may prefer not to consider a parent's politics 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 psychological or emotional harm to the child.<sup>59</sup> But this limitation has been developed under the Religion Clauses, and hasn't been extended to nonreligious speech; and not all states adopt such a rule.<sup>60</sup>

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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 libel or 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 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 law—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, (1998) (discussing this in more detail); *id.* at 2437-38 (citing cases applying the *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 the administration of justice, and more); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996) (discussing the matter further).

<sup>59</sup> See, e.g., *Kirchner v. Caughey*, 606 A.2d 257 (Md. Ct. App. 1992); *Osier v. Osier*, 410 A.2d 1027 (Me. 1980); *Munoz v. Munoz*, 489 P.2d 1133 (Wash. 1971); *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967).

<sup>60</sup> 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 *A.G.R. ex rel. Conflenti v. Huff*, 815 N.E.2d 120, 125-26 (Ind. Ct. App. 2004); *Wright v. Walters*, 2005 WL 1490991 (Ky. Ct. App.); *Behnke v. Green-Behnke*, 2004 WL 376984 (Minn. Ct. App.); *Feldman v. Feldman*, 874 A.2d 606, 614 (N.J. Super. Ct. App. Div. 2005); *Lange v. Lange*, 502 N.W.2d 143 (Wis. Ct. App. 1993).

For cases in which a custody decision was made based partly on a parent's speech, with no finding of likely harm from the speech, see *Shepp v. Shepp*, 821 A.2d 635 (Pa. Super. Ct. 2003) (finding a parent's religious speech harmful simply because it advocated that the child engage in illegal conduct—polygamy—several years in the future), *appeal allowed*, 832 A.2d 1064 (Pa. 2003); cases cited *supra* notes 3, 5, and 6 (preferring religious parents over irreligious ones); cases cited *supra* notes 7-

A parent can also come to court after custody has been determined, and ask that custody be changed or new restrictions be imposed. The parent can't just relitigate an earlier decision by pointing to some small changes in circumstances, but must show a substantial change. Nonetheless, the standard remains the best interests of the child.<sup>61</sup> A court may change custody based on a parent's speech, or restrict the parent's speech, if it concludes that some substantial change in circumstances has made this change or restriction be in the child's best interests.<sup>62</sup>

Finally, while most of the orders that I describe come in the wake of divorces, they need not. Unmarried biological parents also have parental rights when they have helped raise the child.<sup>63</sup> An increasing number of states recognizes the "psychological parent" doctrine, under which someone whom the child has seen as a parent—for instance, a stepparent who helped raise the child—may have continuing rights even when the person's relationship with the legal parent dissolves.<sup>64</sup>

Unmarried couples can also adopt a child together, or jointly raise one partner's biological child; this is not uncommon among gay and lesbian couples. When the partners separate, a child custody dispute may arise.<sup>65</sup> Because of this variety of relationships, I will use the terms "intact couples" and "broken couples" instead of "married couples" and "divorced couples."

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

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

All the restrictions discussed in Part I 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 think the same about atheism, or the propriety of homosexuality. Yet a court that takes a different view of the facts would be free to consider such speech under the best interests test.<sup>66</sup>

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16 (considering parents' other ideological beliefs as part of the "best interests" analysis).

<sup>61</sup> See *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986).

<sup>62</sup> See *Willis v. Willis*, 775 N.E.2d 878 (Ohio App. 2002); *In re Jane B.*, 380 N.Y.S.2d 848 (N.Y. Sup. Ct. 1976).

<sup>63</sup> See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1978); *MacLagan v. Klein*, 473 S.E.2d 778 (N.C. Ct. App. 1996), *disapproved as to other matters*, *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998). Custodial unmarried parents, generally single mothers, have the same constitutional rights that any other parents do.

<sup>64</sup> See, e.g., *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004).

<sup>65</sup> See, e.g., *id.*; *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004); *V.C. v. M.J.B.*, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999).

<sup>66</sup> See, e.g., *Harner v. Harner*, 479 A.2d 583, 586 (Pa. Super. Ct. 1984) ("The sole criterion in

At the same time, all these restrictions—however permissible as a matter of substantive family law—would presumptively violate the Free Speech Clause.<sup>67</sup>

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;<sup>68</sup> 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.<sup>69</sup>

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<sup>70</sup>—are likewise speech restrictions.<sup>71</sup> When a parent chooses to take a child

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child custody decisions ‘is the best interests and welfare of the child.’”).

<sup>67</sup> Challenges to these restrictions couldn't be brought in federal court, *see* *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), but federal constitutional defenses can certainly be raised in state court, *see, e.g., Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990), and the Supreme Court can finally resolve the issue on certiorari to a state appellate court, *see, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>68</sup> *See, e.g., Dickson v. Dickson*, 529 P.2d 476 (Wash. Ct. App. 1974) (upholding injunction prohibiting the ex-husband from falsely claiming that his wife was insane, though also upholding other restraints on the 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* 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 an injunction against making “defamatory comments” to “third parties” about the wife was “vague and overbroad”; the court wasn't clear on why the injunction was vague and overbroad, given that defamation law is generally constitutional, but perhaps this was because the injunction would literally cover true defamatory statements as well as false ones).

<sup>69</sup> *See* *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>70</sup> *See, e.g., Feldman v. Feldman*, 874 A.2d 606, 614 (N.J. Super. Ct. App. Div. 2005).

<sup>71</sup> 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, which is that nonmarital sex (or, depending on the case, homosexual sex) is proper. 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 (1989) (holding that conduct is treated as 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

to a particular church, he is communicating certain religious messages to the child, though using an intermediary. Such indirect speech is fully constitutionally protected.<sup>72</sup>

c. Court orders that parents *say certain things* to children, for instance that they urge the children to maintain a good relationship with the other parent,<sup>73</sup> are speech compulsions, which under First Amendment law are treated the same way as speech restrictions.<sup>74</sup> The same would apply if the court ordered parents to expose their children to certain speech by others, for instance to take them to church.<sup>75</sup>

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.<sup>76</sup> So does a tax based on the content of one's speech.<sup>77</sup> The same

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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.*

<sup>72</sup> *See, e.g.,* Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that playing a recording to passers-by is constitutionally protected, though the recording contained material spoken by someone other than the defendant); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1016, 1017 n.284 (1996) (making a similar argument as to parents who “indirect[ly]” 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.

<sup>73</sup> *See, e.g.,* Schutz v. Schutz, 522 So.2d 874 (Fla. Ct. App. 1988), *rev'd part in aff'd in part*, 581 So.2d 1290 (Fla. 1991).

<sup>74</sup> *See, e.g.,* Riley v. Nat'l Fed. of the Blind, 487 U.S. 781 (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 50, at 115, reasons that “[c]learly, it is within the court's power to suppress speech or expressive conduct in certain circumstances . . . [but] this is quite different than an attempt to force expression of some sort[, which] . . . 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 some speech restrictions are constitutional, the Court has never held that speech restrictions are subject to a less demanding test than speech compulsions.

<sup>75</sup> This happened in, *e.g.,* McLemore, cited *supra* note 4; Colley v. Colley, 606 N.Y.S.2d 796 (N.Y. App. Div. 1994); Johns v. Johns, 918 S.W.2d 728 (Ark. App. 1996).

<sup>76</sup> *See, e.g.,* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); NAACP v. Claiborne Hardware, 458 U.S. 886, 915 (1982); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

<sup>77</sup> *See, e.g.,* Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987); Speiser v. Randall, 357 U.S. 513 (1958); *see also* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a law requiring newspapers that criticize a political candidate to publish responses, partly on the



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 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. A typical "best interests of the child" decision will thus be based on many factors, including ones that have nothing to do with speech.<sup>78</sup> But if the court considers a parent's speech, the speech might well be the factor that changes the result—for instance, if the nonspeech 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.)<sup>79</sup>

And 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 facing a difficult custody battle, and you had heard that some judges 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?<sup>80</sup> For these reasons, the Court has indeed held that judgments based even in part on speech require First Amendment scrutiny.<sup>81</sup>

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grounds that the law "exact[s] a penalty on the basis of the content of a newspaper").

<sup>78</sup> See, e.g., the Comingore case discussed in note 8 *supra*, where Comingore's Communism was one basis for the argument that the children would be better off with her ex-husband.

<sup>79</sup> See Beschle, *supra* note 50, at 397 (making this point).

<sup>80</sup> Consider, for instance, the advice given by one lawyer, 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 be aware of the attitude of the other side, and evaluate, often, how it can affect your case." James Whalen, *Child Custody and Divorce: Free Legal Advice*, <http://www.childcustody.net/29.html>.

<sup>81</sup> See, e.g., NAACP v. Claiborne Hardware, 458 U.S. 886, 915 (1982); Street v. New York, 394 U.S. 576, 590 (1969); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1976) (holding that when protected speech is a "motivating factor" in a government decision—even when other factors are also present—the decision is unconstitutional unless the government shows that it would have reached the same decision without considering the speech).

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 (1947); see also Wisconsin v. Mitchell, 508 U.S. 476 (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

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.<sup>82</sup> 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.<sup>83</sup> And second, they 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.<sup>84</sup>

Finally, 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,"<sup>85</sup> or mandates "that each party will impress upon the children the need for religious tolerance and

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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.

<sup>82</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>83</sup> 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 precisely of the content of the speech. This scenario, in which 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 "willfully obstruct[ed] the recruitment or enlistment service of the United States, to the injury of the service or the United States." *See, e.g.*, *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). Cases such as *Cohen v. California*, 403 U.S. 15, 16 n.1 (1971), *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940), *Terminiello v. City of Chicago*, 337 U.S. 1, 2 n.1, 3 (1949), *Edwards v. South Carolina*, 372 U.S. 229, 234-37 (1963), and *Hess v. Indiana*, 414 U.S. 105, 105 n.1 (1973), which upheld the protection of offensive speech, 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. 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 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 (Fla. 1991) (wrongly applying *United States v. O'Brien* analysis to child custody speech restrictions, even though such an analysis should only be applicable to content-neutral restrictions); *Borra v. Borra*, 756 A.2d 647, 651 (N.J. Super. 2000) (likewise); *Banks*, *supra* note 50, at 115 (approving of the *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 50, at 951 (likewise).

<sup>84</sup> *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (striking down a content-neutral speech restriction on the grounds that it didn't leave open ample alternative channels, since it kept people from effectively reaching the audience they wanted to reach).

<sup>85</sup> *Hogue v. Hogue*, 147 S.W.3d 245 (Tenn. Ct. App. 2004).

not permit any third party to attempt to teach them otherwise.”<sup>86</sup> But it may also be true for the “best interests” test generally, when it’s applied to parental speech in deciding custody.<sup>87</sup> 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 matters 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.”<sup>88</sup>

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<sup>89</sup> and when it’s too vague to be tolerated.<sup>90</sup> My

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<sup>86</sup> Frank v. Frank, 833 A.2d 194, 199 (Pa. 2003).

<sup>87</sup> For more on the test’s vagueness, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); 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*, 39 LAW & CONTEMP. PROBS. 226 (1975).

<sup>88</sup> 408 U.S. 104, 108-09 (1972).

<sup>89</sup> “Condemned to the use of words, we can never expect mathematical certainty from our language,” *Grayned, id.* at 110, and this understandably leads the Court to tolerate some degree of vagueness.

<sup>90</sup> 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 an attorney disciplinary rule was unconstitutionally vague as applied); *Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548, 578-79 (1973) (considering a void-for-vagueness challenge to a restriction on government employee speech, though concluding that the rule was not impermissibly vague); *Arnett v. Kennedy*, 416 U.S. 136, 159-64 (1974) (plurality) (same); *id.* at 164 (Powell, J., concurring in part and concurring in the result in part) (agreeing with the plurality on this); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) (holding that a restriction on government employee speech was unconstitutionally vague); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) (applying the doctrine to discipline of a public university professor); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 312 (D.N.H. 1994)

sense is that the best interests standard 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<sup>91</sup>), 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””—and thus as rebutting the argument that the restriction is a suitably narrow means of serving an overriding government interest in protecting children.<sup>92</sup>

## 2. 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 percentage of 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,<sup>93</sup> 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 legislatures and higher courts can mandate in cases generally. Say that a case considers a parent's racism in denying the parent custody under a best interests standard; and say 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

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(likewise); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182, 1184 (6th Cir. 1995) (applying the doctrine to disciplinary rules that restrict speech at a public university); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (same). 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 sovereign.” 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. See *infra* p. 41 & note 193.

<sup>91</sup> See *Grayned*, 408 U.S. at 108-09 (noting that one of the three concerns raised by vague statutes is specific to speech restrictions); *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (holding that statutes which don't restrict speech can only be held unconstitutionally vague when they are vague as applied to this particular challenger's conduct).

<sup>92</sup> *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

<sup>93</sup> But see *Jones v. Jones*, 2005 WL 1965913 (Ind. Ct. App.) (describing a lower court order, issued by the court contrary to the desires of both parents, barring the parents from exposing the child to “non-mainstream religious beliefs and rituals,” specifically the Wicca religion, and reversing it because Indiana law prohibited such orders when neither parent requested such an order).

best interests.<sup>94</sup>

State appellate courts will 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.<sup>95</sup> Such a decision is logically plausible: After all, being taught racism is indeed against a child's best interests. It's legally permissible: The Supreme Court has just approved decisions that protect children against such speech. And it's 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 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, polygamy, or pro-gay-rights speech, this hostility is likely to be shared by many judges and lawyers. When they hear allegations of such speech, they may often naturally 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 apparently become nearly boilerplate, on the theory that such criticism is always against the child's best interests.<sup>96</sup> Likewise, restrictions on gay parents' custody were common when homosexuality was more condemned than it is today.<sup>97</sup>

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

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<sup>94</sup> See, e.g., sources cited *infra* note 194.

<sup>95</sup> 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. Cf., e.g., MONT. CODE ANN. § 40-4-212 (1975) (providing a list of factors for the courts to consider in the best interests analysis, though not mentioning speech).

<sup>96</sup> See, e.g., *Stephanie L. v. Benjamin L.*, 158 Misc. 2d 665, 667 (N.Y. Sup. Ct. 1993) (so noting).

<sup>97</sup> See, e.g., *In re Jane B.*, 380 N.Y.S.2d 848 (N.Y. Sup. Ct. 1976); for a more recent (though relatively rare in the last ten years) case, see *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998).

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.<sup>98</sup>

We have seen this, for instance, in the growth of hostile environment harassment law.<sup>99</sup> In the early 1970s, claims that sexually themed jokes, pinups, or artwork violated Title VII or other antidiscrimination laws were largely unheard of.<sup>100</sup> I suspect that if you had forecast such a theory then to employers and employment lawyers, you'd have been greeted with skepticism.

But once courts accepted the theory that speech could be actionable because it created a hostile environment based on sex, religion, or race, plaintiffs' lawyers brought more cases, and got still more favorable caselaw out of them. 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,<sup>101</sup> 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.

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.<sup>102</sup>

Hostile environment cases are actually not that easy for plaintiffs to win, but the victories that have happened have understandably 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 pri-

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<sup>98</sup> See, e.g., Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). 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.

<sup>99</sup> See, e.g., Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000).

<sup>100</sup> Cf. N.Y. TIMES, Apr. 24, 1964 (quoting Rep. William M. McCulloch, the ranking minority member of the House Judiciary Committee and a backer of the Civil Rights Act, as saying that "The bill does not permit the Federal Government in any way to interfere with freedom of the press and freedom of speech.").

<sup>101</sup> 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 the leading cases that have shaped hostile environment speech restrictions).

<sup>102</sup> See, e.g., Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, *supra* note 99, at 305-10.

vate 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 unsubstantive satirical attack on Jerry Falwell.<sup>103</sup> Successful claims under the intentional infliction of emotional distress tort were uncommon. State courts had generally defined the tort quite narrowly.<sup>104</sup> 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 Hustler piece, "public discourse would probably suffer little or no harm."<sup>105</sup>

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 be disabused of that assumption; likewise for judges who had been reluctant to let such claims prevail. And future victories would lead still more lawyers to bring such lawsuits.

Nor does any of this require metaphors about slippery slopes or camel's noses.<sup>106</sup> 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 start using it. That some 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.<sup>107</sup> 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 start 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.<sup>108</sup>

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<sup>103</sup> 485 U.S. 46, 51 (1988). See also, e.g., *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (rejecting liability under the interference with business relations tort for speech that urges a boycott, though such cases had been fairly rare).

<sup>104</sup> See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

<sup>105</sup> 485 U.S. at 55.

<sup>106</sup> See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003), for an explanation of why such metaphors sometimes do reflect the real world.

<sup>107</sup> About 25% of all children under age 18 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>.

<sup>108</sup> See *supra* note 8, noting some 1950s cases in which a parent's Communist leanings were indeed considered in child custody decisions.

*C. How the Free Exercise Clause Is Implicated*

Most of the First Amendment litigation about child custody speech restrictions, and nearly all the First Amendment scholarship, has involved only the Religion Clauses. This, I think, has been something of a mistake. First, religious speech is speech, which is entitled to Free Speech Clause protection as well as Free Exercise Clause protection.<sup>109</sup> And second, the Religion Clauses generally provide no more secure protection—and sometimes less secure protection—for the speech than the Free Speech Clause does.

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.<sup>110</sup> These rulings single out religious speech for special treatment, precisely because of its religiosity. They may restrict the speech only because the restriction is in the child's best interests, or because 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, in which 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.<sup>111</sup> Since *Employment Division v. Smith*,<sup>112</sup> the Free

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<sup>109</sup> See cases cited *supra* note 69.

<sup>110</sup> See *supra* note 41.

<sup>111</sup> Parents' religious teachings are 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.

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 83, at 1298-1300 (discussing this in more detail). But this doesn't matter much, since the Free Exercise Clause scrutiny would in any case be no greater than what the Free Speech Clause also mandates.

*Behnke v. Green-Behnke*, 2004 WL 376984 (Minn. App.), took a different view:

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.



Exercise Clause has generally not been read as mandating religious exemptions from neutral, generally applicable rules. 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.”<sup>113</sup> So restrictions on 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.<sup>114</sup>

## 2. Restrictions on religious speech under a “best interests” standard

Other decisions enjoin a parent’s speech, or decide to alter custody or visitation rights based on a parent’s 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.<sup>115</sup> The ideology might happen to be religious, 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.<sup>116</sup>

There is a possible exception to the *Smith* rule: *Smith* held that in “hybrid situation[s],” where “the Free Exercise Clause [is raised] in conjunction with other consti-

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*Id.* (paragraph breaks deleted). This, I think, is incorrect; 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*.

<sup>112</sup> 494 U.S. 872 (1990).

<sup>113</sup> *Id.* at 876. See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (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.”).

<sup>114</sup> *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 a child to participate in religious services, and communicating religious values to a child through those services—for special burden precisely because of its religiosity. See also *In re Marriage of Murphy v. Murphy*, 1996 WL 70978, \*3 (Minn. Ct. App.) (making the same error). Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (concluding that rearing a child in one’s religion is part of religious practice).

<sup>115</sup> See *supra* note 7.

<sup>116</sup> 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 this view, though not discussing the hybrid rights exception, or the free speech issue).

tutional protections, such as freedom of speech,” extra Free Exercise Clause scrutiny might still be required even when the government action is religion-neutral. This exception is notoriously uncertain in scope, and questionable in its justification. Its problems have been amply discussed elsewhere,<sup>117</sup> 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 religious speech is protected by the Free Exercise Clause, the protection would be no greater than that given to the speech under the Free Speech Clause.<sup>118</sup> The official test would be strict scrutiny under either provision, but free speech strict scrutiny has generally been seen as “strict in theory, fatal in fact,”<sup>119</sup> and free exercise strict scrutiny as “strict in theory, feeble in fact.”<sup>120</sup> 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.<sup>121</sup> Some state statutes also provide similar protection.<sup>122</sup> But these too would protect religious speech no more than the Free Speech Clause would, since they likewise generally call for strict scrutiny. And even if the legislature 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

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<sup>117</sup> See, e.g., *Kissinger v. Board of Trustees of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2244-45 (1993) (Souter, J., concurring); 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).

<sup>118</sup> See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)

<sup>119</sup> See 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 the “strict in theory, fatal in fact” line, though as to equal protection rather than free speech); 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).

<sup>120</sup> See 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).

<sup>121</sup> ALA. CONST. Art. I, § 3.01; *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind. 2001); *Fortin v. Roman Catholic Bishop*, 871 A.2d 1208 (Me. 2005); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Reid v. Kenowa Hills Public Schools*, 680 N.W.2d 62 (Mich. Ct. App. 2004); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *St. John’s Lutheran Church v. State Compensation Insurance Fund*, 830 P.2d 1271 (Mont. 1992); *In re Browning*, 476 S.E.2d 465 (N.C. Ct. App. 1996); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996).

<sup>122</sup> See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 & n.6 (1999).

under the federal Free Speech Clause.<sup>123</sup>

### 3. Restrictions on religiously motivated conduct

Finally, when a court restricts religiously motivated conduct rather than speech, 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.<sup>124</sup> 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 or nonobservant parents<sup>125</sup> violate the Establishment Clause for two reasons. First, they pressure parents to participate in religious practice or 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. For many parents, this is among the most potent of threats.

Even the threat of having to miss one’s high school graduation, the Court has held, is impermissibly coercive.<sup>126</sup> Likewise, lower courts have held that it’s impermissibly coercive to threaten prisoners with loss of extra family visitation privileges if they don’t participate in religiously based Alcoholics Anonymous programs.<sup>127</sup> The same must apply to the threat of losing custody of one’s children, or of getting less visitation time with them.

Second, the Establishment Clause generally forbids even noncoercive discrimination against people because of their irreligiousness.<sup>128</sup> The exception to this rule—the government may sometimes exempt religious objectors but not secular objectors

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<sup>123</sup> See Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 610-17 (1999).

<sup>124</sup> *Levitsky v. Levitsky*, 190 A.2d 621 (Md. 1963) (religiously motivated refusal of blood transfusions); *Peterson v. Peterson*, 474 N.W.2d 862 (Neb. 1991) (religiously motivated beating).

<sup>125</sup> See *supra* notes 3, 5, and 6.

<sup>126</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>127</sup> See, e.g., *Griffin v. Coughlin*, 88 N.Y.2d 674 (1996).

<sup>128</sup> See, e.g., *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Ed.*, 330 U.S. 1 (1947). See generally Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1706-27 (1984) (discussing this at greater length).

from generally applicable laws<sup>129</sup>—is inapplicable here.

## 2. Coerced church attendance

Orders that parents take their children to church<sup>130</sup> also violate the Establishment Clause. They are coercive; *Lee v. Weisman* holds that even having to be in the audience at a prayer is impermissible coercion, so surely having to go to church is too. They endorse religion, since their premise is that religiosity is better than irreligiosity.<sup>131</sup> And they advance religion by explicitly providing religious institutions with new attendees. Such coercion, endorsement, and advancement of religion are all unconstitutional.<sup>132</sup>

## 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”<sup>133</sup> may also violate the Establishment Clause. Such orders require courts to decide which views are consistent with some 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.”<sup>134</sup> 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.<sup>135</sup> Likewise, lower courts have struck down laws pro-

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<sup>129</sup> See *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *But see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

<sup>130</sup> See *supra* note 4.

<sup>131</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (“[T]he prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’”). 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* (Miss. 2000), “convey[s] a message that religion . . . 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.

<sup>132</sup> *Allegheny*; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>133</sup> See *Lange v. Lange*, 502 N.W.2d 143 (Wis. Ct. App. 1993); *Poole v. Poole*, 670 N.W.2d 143 (Wis. Ct. App. 2003); *Bentley v. Bentley*, 448 N.Y.S.2d 559 (N.Y. App. Div. 1982).

<sup>134</sup> *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). See, e.g., *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) (arguing that this doctrine prevents civil courts from enforcing orders that ban one parent from teaching a religion that’s contrary to the other’s).

<sup>135</sup> See, e.g., *Presbyterian Church* (holding that courts are forbidden from engaging in “interpretation of particular church doctrines and the importance of those doctrines to the religion”); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

hibiting the mislabeling of food as kosher, because enforcement of such laws requires government agencies to decide the religious question of what is kosher.<sup>136</sup>

In many child custody cases, the parties may agree that their religions are pretty different: For instance, a Jehovah's Witness noncustodial parent may freely concede that his teachings are inconsistent with the Catholic custodial parent's. In this respect, these cases may differ from disputes about church orthodoxy or kashruth, in which both side generally claim to be orthodox 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 Judaism to be inconsistent with the visiting parent's Jews for Jesus teachings, but the Jews for Jesus member may disagree. A relatively ecumenical Christian faced with an order that he not "educat[e] the children in religious doctrine that is contrary to the Lutheran doctrine which the children have been taught"<sup>137</sup> 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 an 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.<sup>138</sup> 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.

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<sup>136</sup> *Ran-Dav's County Kosher, Inc. v. State*, 129 N.J. 141 (1992); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445 (E.D.N.Y. 2000).

<sup>137</sup> *See Lange v. Lange*, 502 N.W.2d 143, 146 n.2 (Wis. 1993); Carolyn R. Wah, *The Custodial Parent's Right to Control Religious Training: Absolute or Limited?*, 9 AM. J. FAM. L. 207, 213 (1995) (noting the problems with courts resolving what's "contrary to [a denomination's doctrine]").

<sup>138</sup> *See, e.g., Marjorie G. v. Stephen G.*, 592 N.Y.S.2d 209 (N.Y. Sup. Ct. 1992) (noting that, unlike in 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); *In re Marriage of Minix*, 801 N.E.2d 1201 (Ill. Ct. App. 2003) (declining to restrict a noncustodial parent from taking children to religious services, on the grounds that there was no evidence that the two rival denominations—the Unity Church and Pentecostalism—were materially different, and distinguishing an earlier case on the grounds that in that case "we were presented with evidence of the dichotomy between the two religions at issue [Catholicism and Protestantism]").

#### 4. The irrelevance of the secular purposes

Finally, note that the bans on religious coercion, endorsement of religion, preference for religion, and decisionmaking 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 only to those people who believe they'll be punished after death for lying might help promote honesty.<sup>139</sup>

Or perhaps not—people disagree about many such factual predictions. But under the Establishment Clause caselaw, it's not necessary to resolve this disagreement. Whether or not coercive, religion-endorsing, religion-preferring, or doctrine-deciding means are effective, the government must serve its goals by other means.<sup>140</sup>

#### *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 from the traditional rules: Even restrictions that might otherwise be constitutional, 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.<sup>141</sup>

Second, some cases have struck down speech restrictions without applying strict scrutiny;<sup>142</sup> and the Court's doctrine makes clear that other restrictions are unconsti-

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<sup>139</sup> See, e.g., *Atwood v. Welton*, 7 Conn. 66 (1828) (taking this view).

<sup>140</sup> See, e.g., *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) (so arguing).

<sup>141</sup> 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 Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, *supra* note 119, at 2421-24. But these conditions aren't satisfied here.

<sup>142</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (holding a ban on cross-burning to be unconstitutional, at least as applied to speech that isn't intended to threaten people, without applying strict scrutiny); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (holding the intentional infliction of emotional distress tort inapplicable as 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

tutional even though they would probably pass strict scrutiny.<sup>143</sup> 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,<sup>144</sup> the government was seen as acting in a special role that justified extra deference,<sup>145</sup> or something else.<sup>146</sup> 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.<sup>147</sup> 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,<sup>148</sup> and to the Free Exercise Clause.

(1984) (striking down a content-based restriction on reproductions of American currency without applying strict scrutiny); *cf.* *American Booksellers' Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1986) (striking down a viewpoint-based restriction on pornography without applying strict scrutiny).

<sup>143</sup> See Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, *supra* note 119, at 2425-38 (giving examples).

<sup>144</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (upholding restrictions on child pornography because, among other reasons, child pornography was of very slight constitutional value). Before about 1980, the Court didn't 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 (1973) (1973) (upholding the obscenity exception, which is justified more by the perception that obscenity lacks First Amendment value, and by the 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 (1967) (holding that intentional lies are unprotected, even when they aren't defamatory but are simply offensive to their subjects).

<sup>145</sup> See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (1991) (upholding restrictions on lawyer speech because the government was seen as having more power to regulate speech by licensed lawyers than by the public at large).

<sup>146</sup> See, e.g., *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (upholding enforcement of promises not to speak, because such promises waived First Amendment rights); *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985) (upholding copyright law, partly because the First Amendment ought not be read as rendering useless half of the Copyright/Patent Clause).

<sup>147</sup> See Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, *supra* note 141; Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141.

<sup>148</sup> The anticoercion test and the principle that the government may not decide matters of religious doctrine have been seen as categorical. See *Lee v. Weisman*, 505 U.S. 577 (1992); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). Yet when the government is running prisons and the military, the government must make decisions about religious doctrine, for instance when deciding whether a particular denomination is sufficiently part of

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.<sup>149</sup> There are no mighty oaths that the Justices can swear to foreclose themselves from creating new exceptions in the future.

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?

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

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

##### 1. Generally

Before getting to child custody speech restrictions, let's consider a form of parental speech that the law nearly never restricts: parental speech within intact families. You are free to teach your child racism, Communism, or the propriety of adultery or promiscuity. No judge will decide whether your teachings confuse the child, cause

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mainstream Protestantism that a chaplain of that denomination would fill the institution's needs for a Protestant chaplain. Cf. *Duffy v. State Personnel Bd.*, 232 Cal. App. 3d 1 (1991) (upholding prison agency's decision to hire as Catholic chaplains only those approved by the Roman Catholic Church, rather than by the Ecumenical Catholic Church); *Turner v. Parsons*, 620 F. Supp. 138 (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 the government to "officially recognize[]" which endorsing bodies can authoritatively speak for the 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, and can presumably carve out others as well. See *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

<sup>149</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (recognizing child pornography as a new exception).



him nightmares, or risk molding him into an immoral person.<sup>150</sup> No judge will enjoin the speech, or transfer custody to other people whose teachings will be more in the child's best interest.<sup>151</sup>

Part of this stems from the substantive due process right to control the upbringing of one's child, which the Court has recognized ever since *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.<sup>152</sup> Parents have considerable power to rear children how

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<sup>150</sup> Government officials will rarely learn about such teachings, but rarely isn't never: A child could, for instance, talk at school about views that his parents had taught him.

<sup>151</sup> Extremely cruel verbal criticism might possibly contribute to a finding of parental unfitness; but I've seen only a few cases in which such criticism was a substantial factor, *In re Day*, 2003 WL 21517343 (Ohio Ct. App.); *In re Julie M.*, 81 Cal. Rptr. 2d 354 (Cal. Ct. App. 1999); *In re Shane T.*, 453 N.Y.S.2d 590 (Fam. Ct. 1982), and in all of them the speech—parents' repeatedly calling their children "slut," "whore," "bitch," or "fag" to their face—would probably fit under the rubric of fighting words, which are seen as lacking constitutional value, see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In one other case, *In re B.L.*, 824 A.2d 954 (D.C. 2003), the court noted that a mother "was verbally abusive with [her child], calling him names such as 'stupid' and 'dumb,'" but the court's analysis focused mainly on physical abuse and the mother's "mental incapacity caused by alcohol abuse." *In re Shane T.* suggests that broader speech restrictions may be permitted: "[T]o constitute abuse, mere words are sufficient provided that their effect on the child" causes substantial pain (for instance, emotional distress that yields physical manifestations such as stomach upset). But I've seen no cases in which a parent was found to be unfit chiefly or even largely based on non-fighting-words speech—e.g., warnings of eternal damnation, or harsh condemnation of a child's actions—that yields emotional pain with physical manifestation.

To my surprise, I've run across a few cases in which a court has, in finding parental unfitness, noted the parents' exposing the child to R-rated movies or even vulgar music. See *In re Pappas*, 2005 WL 1242087, ¶¶ 9, 13 (Ohio App.) (noting the 8-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 led the child to be "pre-occupied with his parents' health problems and [with] being their caregiver instead of their child"); *Yvette H. v. Superior Court*, 2005 WL 39765, \*5 (Cal. Ct. App.) (noting that the mother "had allowed the children . . . to watch inappropriate 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," and that the mother let another child, who was apparently nine, "listen to music with terrible language"); *In re P.R.*, 2002 WL 745567, ¶ 4 n.2 (Ohio App.) (noting that the mother "would watch R-rated movies with the children in the room because she did not understand what 'R' stood for"); *A.M. v. Lamar County Dep't of Human Resources*, 848 So. 2d 258 (Ala. Civ. App. 2002) (noting that "the father watched R-rated movies with inappropriate subject matter for children while they were present"). These cases strike me as quite troubling, and they fortunately do not seem to be the norm; my hope is that the courts relied on the many nonspeech problems present in each of the cases, rather than on the parents' decisions about which movies or music their children would see and hear. (For an explanation of why these decisions remain troubling if they are founded even partly on otherwise protected speech, and why courts should generally exclude the otherwise protected speech from the analysis and decide based on the nonspeech conduct, see text accompanying notes 78-81.)

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 the school curriculum must include certain subjects, the law generally does not mandate or forbid particular viewpoints or forbid the teaching of particular subjects.

<sup>152</sup> 262 U.S. 390 (1923); 268 U.S. 510 (1925).

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.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup>

So 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.<sup>156</sup>

We secure such rights partly because we expect, with good reason, that parents will generally be benevolent despots. Human biology makes this so.<sup>157</sup> Biology also

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<sup>153</sup> See Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 303-04 (noting the Court’s lack of clear guidance on this, and the Court’s unwillingness to mandate strict scrutiny or a similarly demanding standard for testing restrictions on parental rights); *Doe v. Heck*, 327 F.3d 492, 518-20 (7th Cir. 2003) (likewise); see also David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000) (arguing that the Court ought not impose strict scrutiny in such cases).

<sup>154</sup> See, 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).

<sup>155</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>156</sup> See, e.g., ALASKA STAT. § 47.10.141 (2004) (providing for police help in returning runaway minors); CAL. WEL. & INST. CODE § 601 (2004) (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”); MODEL PENAL CODE § 3.08 (providing that parents’ use of force is justified when done for “the purpose of safeguarding or promoting the welfare of the minor”); MINN. STAT. ANN. § 609.06 subd. 1(6) (2003) (exempting reasonable force used by parents from criminal assault law); MINN. STAT. ANN. § 609.255 subd. 2 (2003) (defining false imprisonment to exclude conventional parental restraint of children); MODEL PENAL CODE § 212.4 (outlawing “entic[ing] any child under the age of 18 from the custody of its parent”); *L.M. v. State*, 610 So. 2d 1314 (Fla. Ct. App. 1992) (ordering, as condition of juvenile’s probation, that he obey his mother); *Brekke v. Wills*, 125 Cal. App. 4th 1400, 1404 (2005) (upholding an injunction barring a 16-year-old girl’s ex-boyfriend—who had apparently been a bad influence—from contacting her, partly on the grounds that the injunction helped protect “plaintiff’s exercise of her fundamental right as a parent to direct and control her daughter’s activities”).

<sup>157</sup> I say “biology” rather than just “psychology” to highlight the fact that this is likely a result of

makes children need despots to govern them until some (disputed) age. And 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. I think this generally suffices to justify parental rights.<sup>158</sup>

a. Self-expression

Nonetheless, parental despotism and children's immaturity undercuts 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. Many parents would sacrifice all their other free speech rights in exchange for this one: They write no law review articles, they publish no Weblogs, they don't even talk much about politics or morals to 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.<sup>159</sup>

Yet our self-expression rights are necessarily limited by the legitimate interests of our listeners. As the Court has said, “no one has a right to press even ‘good’ ideas on an unwilling recipient.”<sup>160</sup> Deceiving or coercing listeners is likewise generally thought of as making self-expression unjustified.<sup>161</sup>

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 parents' power to make children hear the parents' views, and parents' power 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.<sup>162</sup> And the usual mecha-

our genetic makeup and not just social conditioning. ROBERT WRIGHT, *THE MORAL ANIMAL* 58-59, 103-104 (1994). Of course, some parents abuse their children horribly, but this is the exception. The rule is that parents expend a tremendous amount of time, money, and effort for the sake of helping their children.

<sup>158</sup> See, e.g., Gilles, *supra* note 72, at 940.

<sup>159</sup> 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 72 and accompanying text.

<sup>160</sup> See *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (upholding a law that banned senders from mailing material to people who had already demanded that the mailings stop).

<sup>161</sup> See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 997-99 (1978).

<sup>162</sup> 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.”).

nisms that listeners use to protect themselves from potentially harmful or deceptive speech—skeptical judgment and access to other viewpoints—are often missing with children.<sup>163</sup>

Of course, we shouldn't overstate the practical scope of parental power, especially over older children. To transplant Edmund Burke's words, "Despotism itself is obliged to truck and huckster. The Sultan gets such obedience as he can."<sup>164</sup> 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.<sup>165</sup>

b. Listeners' interests

Likewise, consider free speech rights as means of protecting listeners' interests in hearing. First Amendment law rightly prohibits the government from restricting our receiving information, whether the advocacy of certain ideologies, the fact that our fathers weren't actually our biological fathers, or pictures of men in drag.<sup>166</sup>

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<sup>163</sup> I therefore agree to a limited extent with Professor 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, 1433 & 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.

<sup>164</sup> Edmund Burke, *Speech on Conciliation with the Colonies*, Mar. 22, 1775.

<sup>165</sup> Consider, for instance, a court's 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 child greater freedom in his or her pursuit of religious enlightenment" (or atheism). See *Bonjour v. Bonjour*, 592 P.2d 1233, 1239-40 (Alaska 1979) (noting that this is permissible); *In re Vardinakis*, 289 N.Y.S. 355 (N.Y. Fam. Ct. 1936) (following such an approach); *Fritzinger v. Fritzinger*, 67 Pa. D. & C. 4th 271, 276-77 (Pa. Ct. Com. Pl. 2004) (likewise); *Hunter v. Hunter*, 2005 WL 1469465, \*10 (Tenn. Ct. App.) (likewise); Beschle, *supra* note 50, at 399 (discussing the issue).

Generally, reducing a speaker's rights because his audience dislikes his speech is unconstitutional. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). 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 indeed be constitutional: 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.

<sup>166</sup> See *First Nat'l Bank of Boston*, 435 U.S. 765 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring).

As adults, we can generally sensibly decide whether to accept moral claims and what weight to place on facts—at least we’re good enough at this that we doubt that government-imposed speech restrictions will improve our decisionmaking. 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.<sup>167</sup> 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.<sup>168</sup>

Children’s cognitive limitations thus make paternalism towards children potentially justifiable, even if paternalism towards adults is improper.<sup>169</sup> This paternalism towards children is usually exercised by parents, with legal help, when the speech comes from outsiders.<sup>170</sup> 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 choose, 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

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<sup>167</sup> See *supra* note 39 and accompanying text for a discussion of this case.

<sup>168</sup> But see *infra* text accompanying notes 237-238, which questions whether the mother’s statement can indeed be objectively described as harmful.

<sup>169</sup> 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.” *American Amusement Machine 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 16- or 17-year-olds.

<sup>170</sup> For instance, parents who don’t want their children to listen to go to religious or political events can physically keep them from going, see *supra* note 156. 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*, 125 Cal. App. 4th 1400, 1404 (2005) (upholding an injunction barring a 16-year-old girl’s ex-boyfriend—who had apparently been a bad influence—from contacting her, partly on the grounds that the injunction helped protect “plaintiff’s exercise of her fundamental right as a parent to direct and control her daughter’s activities”).

an aspect of the religious observer's autonomy;<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup> The parents' 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 at least 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 (what is 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.<sup>174</sup>

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<sup>171</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *id.* at 411-12 (Douglas, J., concurring).

<sup>172</sup> See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>173</sup> This may be why the argument in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), relied not just on the Free Exercise Clause but also on the parental rights cases, *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.

<sup>174</sup> Not entirely, of course—many adult children have moved far from the ideologies taught by their parents. But many remain deeply influenced by their parents' teachings. See, e.g., Douglas L. Flor & Nancy Flanagan Knapp, *Transmission and Transaction: Predicting Adolescents' Internalization of Parental Religious Values*, 15 J. FAMILY PSYCH. 627, 635 (2001); M. Kent Jennings, Laura Stoker & Jake Bowers, *Politics Across Generations: Family Transmission Reexamined*, Inst. Gov. Stud. Pap. WP2001-15, <http://repositories.cdlib.org/igs/WP2001-15> (2001); Raphael Ventura, *Family Political Socialization in Multiparty Systems*, 34 COMP. POLI. STUDIES 666 (2001); Tamar Liebes, Elihu Katz, Rivka Ribak, *Ideological Reproduction*, 13 POLI. BEHAVIOR 237 (1991). Cf. John Alford, Carolyn Funk & John R. Hibbing, *Are Political Orientations Genetically Transmitted?*, 99 AM. POLI. SCI. REV. 153 (2005) (arguing that some parent-child transmission of political beliefs may stem not

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.<sup>175</sup> It's why some critics of school choice programs urge that the government continue to fund only public schools, in which it can teach supposedly unifying or beneficial values.<sup>176</sup>

But 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 kids 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 unacceptably risk cementing existing orthodoxies and suppressing valuable but unpopular ideas. The Court's recurring judgment that speech restrictions that interfere with robust public debate are unconstitutional<sup>177</sup> is especially apt here.

Custody or visitation decisions that turn on a parent's speech can also have a more immediate effect. If your public statements 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 child 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."<sup>178</sup>

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from parents' beliefs or statements but rather from the genetic transmission of certain mental traits, though agreeing, pp. 163-64, that parents' beliefs and statements do have a significant effect).

<sup>175</sup> See, e.g., LLOYD P. JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925*, at 205-15 (1987).

<sup>176</sup> See, e.g., Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, § 6, at 28 (arguing that school choice programs will undermine "common values"); Kerry Mazzoni, *Court Decision Puts Vouchers*, 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 G. 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 Brotherhood, the KKK or the multitude of other extremist organizations?").

<sup>177</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>178</sup> *Police Dep't v. Mosley*, 408 U.S. 92 (1972), quoting ALEXANDER MEIKLEJOHN, *POLITICAL*

“Under the First Amendment there is no such thing as a false idea.”<sup>179</sup> Because the marketplace 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 its own speech). And Religion Clauses cases say this 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.”<sup>180</sup> “No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . .”<sup>181</sup>

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.<sup>182</sup>

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”<sup>183</sup>—because government is an untrustworthy judge of which ideas are false and dangerous. All of us, the argument goes, are fallible: “Realiz[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.”<sup>184</sup> 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.<sup>185</sup>

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

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<sup>179</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>180</sup> *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

<sup>181</sup> *Everson v. Board of Ed.*, 330 U.S. 1 (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. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982).

<sup>182</sup> *See, e.g., Whitney v. California*, 274 U.S. 357 (1927) (making this argument about revolutionary advocacy); *Dennis v. United States*, 341 U.S. 494, 517-55 (1951) (Frankfurter, J., concurring) (making this argument about Communist 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* (1993) (making this argument about racist advocacy).

<sup>183</sup> *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

<sup>184</sup> *Id.*

<sup>185</sup> *See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 435 (1996).



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 this skepticism of government claims that speech is dangerous should extend. Even Holmes conceded that when speech threatens “immediate interference” with the law, and thus “makes it immediately dangerous to leave the correction of evil counsels to time,” the government may restrict it.<sup>186</sup> 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 more harm.

### B. Parent-Child Speech in Broken 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, I think, would doubt that parents have broad First Amendment rights to speak to their children.<sup>187</sup>

This consensus probably reflects an incompletely theorized agreement.<sup>188</sup> The judges likely don’t have a fully developed or broadly shared theory explaining their

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<sup>186</sup> *Abrams*.

<sup>187</sup> *But see* James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 1000-02 & n.97 (2001) (arguing that “there is no underlying constitutional right [of parents] to teach racism or sexism to children” in either a public or private school, though suggesting that for practical reasons parents should remain free to teach the child such views at home); 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). *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, 535 (1925), but *Pierce* was decided during an era in which speech urging illegal conduct was generally seen as unprotected, *see, e.g., Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>188</sup> *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

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 broken 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.<sup>189</sup> 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 continue 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 broken 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 broken families? Let me begin by pointing to some possible distinctions that, I think, ultimately don't work.

## 2. Intact families and broken ones—some unsound claims of difference

### a. Surrender of parental rights

Some argue that parents in broken 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."<sup>190</sup>

The parental right to live with a child, and to control the child's upbringing, must indeed yield in some measure when the family is broken. The child can't physically be in two separate households at once; and if the parents are hostile enough to each

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<sup>189</sup> See, e.g., Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (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.

<sup>190</sup> *Morris v. Morris*, 412 A.2d 139 (Pa. Super. Ct. 1979).

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' rights to speak to their children (and to practice their religions by speaking to them) can still be fully exercised after the family is broken. They are individual rights, and can be exercised by either parent acting alone. 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.<sup>191</sup>

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 or other rights);<sup>192</sup> it's presumptively equally true for First Amendment rights to speak to one's children. Perhaps there's some specific reason why such speech restrictions are required, a matter I turn to below. 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 in exchange for a divorce.<sup>193</sup>

b. Best interests above all

Child custody speech restrictions also can't be justified simply by arguing that

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<sup>191</sup> 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 63 and accompanying text. And, second, the right to marry is a constitutional right, *Zablocki v. Redhail*, 434 U.S. 374 (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.

<sup>192</sup> *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>193</sup> For the same reason, the cases in which the government acts as employer, public school educator, subsidizer, controller of military or the prisons, and the like, *see* EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 359-450 (2d ed. 2005) are inapposite. The premise of those cases is generally that the government is controlling its own property (real estate, public schools, a government paycheck or subsidy), or controlling a prison or military community whose "law is that of obedience" to the government rather than liberty from the government, *see Parker v. Levy*, 417 U.S. 733 (1974). Children are not seen and ought not be seen as the government's property, to be disposed of using whatever speech-restrictive conditions the government pleases. Parents are not seen and ought not be seen as the government's employees, accountable to their supervisors for doing the job the way the supervisors want it done. Nor, for the reasons I gave above, is it wise to treat childrearing as a zone in which the "law is that of obedience" to government command.

protecting a child's best interests is so important that it trumps any First Amendment rights.<sup>194</sup> Parent-child speech is protected 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 broken 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 broken.

c. Government action justifying more government action

One possible "something more" is the custody order's being 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 given her custody. 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.<sup>195</sup> 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.<sup>196</sup>

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<sup>194</sup> See, e.g., *Marriage of Geske v. Marcolina*, 642 N.W.2d 62, 70 (Minn. App. 2002) ("the 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 (N.J. Super. Ct. Ch. Div. 2000) (same); *Baker v. Baker*, 1997 WL 731939 at \*7 (Tenn. Ct. App.) (same); *In re J. S. & C.*, 324 A.2d 90 (N.J. Super. Ct. 1974) (barring a father from "involv[ing] the children in any homosexual related activities or publicity," and rejecting his First Amendment defense on the 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 the same view in response to a Free Exercise Clause argument).

<sup>195</sup> See *supra* Part III.A.

<sup>196</sup> *But see* *Morris v. Morris*, 412 A.2d 139 (Pa. Super. Ct. 1979) (taking such a view).

## d. Need to decide accurately

Another possible “something more” is that in broken 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.<sup>197</sup>

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 of trouble) adjusting to being raised by the father. But the father would raise her to be tolerant, which will likelier 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.<sup>198</sup> 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 decisionmaking 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*,<sup>199</sup> in which 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.”<sup>200</sup> Giving custody to the interracial 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 classification.”<sup>201</sup> 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

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<sup>197</sup> 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.

<sup>198</sup> Consider the thought experiment from note 56, in which a 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.

<sup>199</sup> 466 U.S. 429 (1984).

<sup>200</sup> *Id.* at 433.

<sup>201</sup> *Id.* at 434.

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.<sup>202</sup>

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 child, 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 for 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 broken.

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, personality 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, and the child has to witness the resulting tension.<sup>203</sup>

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.<sup>204</sup> But the same is true

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<sup>202</sup> *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

<sup>203</sup> *See Schneider*, *supra* note 50, at 904.

<sup>204</sup> *Cf. Zummo v. Zummo*, 574 A.2d 1130, 1139-40 (Pa. Super. Ct. 1990).

of parents in broken families who are deciding on their own what to say to their children. If the First Amendment requires the legal system to tolerate suboptimal decisions about what to teach the child in intact families, it's hard to see why it shouldn't require the same as to broken families.

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.<sup>205</sup> Parents in intact families are often selfish and irrational with regard to their own children, and parents in broken 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 49, 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.

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.”<sup>206</sup> 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.”<sup>207</sup>

Yet I don't think this is 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 decisionmaking, but they're allowed. Yet 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 broken, 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

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<sup>205</sup> See Schneider, *supra* note 50, at 899 (taking this view in some measure, though ultimately concluding that, for practical reasons, courts should still generally stay out of parent-child speech in broken families).

<sup>206</sup> See Elster, *supra* note 87, at 15-16 (1987) (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)”).

<sup>207</sup> *Id.* at 16.

who is to have custody that is based solely on the parents' nonspeech conduct.<sup>208</sup>

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 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 broken 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. 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.”<sup>209</sup>

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.<sup>210</sup> 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.<sup>211</sup>

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<sup>208</sup> 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 both to intact families and to broken ones. In both situations, the evidence that the children are being taught views that are supposedly against their best interests will usually come in the first instance without legal 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 broken family, the other parent may play the role of the shocked teacher.) Yet in both situations, further judicial decisionmaking about the child's best interests will typically require the child to testify about what he has been taught.

<sup>209</sup> *Feldman v. Feldman*, 874 A.2d 606, 614 (N.J. Super. App. Div. 2005) (using this reasoning to justify an order barring the noncustodial parent from taking the child to weekly religious classes).

<sup>210</sup> 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 JOHN 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.

<sup>211</sup> At least unless the parties have explicitly entered into such an agreement. Whether these agreements should be enforceable is a separate question, which I won't discuss here. See, e.g., Weiss



Nor is there reason to presume that being taught different ideologies will materially harm the child's interests.<sup>212</sup> 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."<sup>213</sup> 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 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,<sup>214</sup> the First Amendment should lead us to leave each parent free to speak, in broken families no less than in intact ones.

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

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& Abramoff, *supra* note 210 (discussing this question); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971 (1998) (likewise); Leo Pfeffer, *Religion in the Upbringing of Children*, 35 B.U. L. REV. 333, 360-64 (1955) (a leading discussion from an earlier era).

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, 1145-47 (Pa. Super. Ct. 1990) (so arguing, though also concluding that even express prenuptial contracts related to a child's religious upbringing ought not be enforceable).

<sup>212</sup> See *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990); *Munoz v. Munoz*, 489 P.2d 1133 (1971); *Felton v. Felton*, 383 N.E.2d 606 (Mass. 1981); *Chandler v. Bishop*, 702 A.2d 813 (N.H. 1997); *Mesa v. Mesa*, 652 So.2d 456 (Fla. Ct. App. 1995). But see Weiss & Abramoff, *supra* note 210, at 710-20 (arguing the contrary, in my view unpersuasively).

<sup>213</sup> *Morris v. Morris*, 412 A.2d 139, 146 (Pa. Super. Ct. 1979) (using this as an argument to support restricting the noncustodial parent from teaching the child religious beliefs that differ from the custodial parent's).

<sup>214</sup> See *infra* p. 51 for a discussion of courts' deciding about such harm case by case.

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.<sup>215</sup> Even those religious people who see the theological value of doubt and questioning by adults may think that people should come 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 cognizance of. 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 (at least by authority figures). But under the Establishment Clause, the government can't act specifically for the purpose of protecting faith or preventing spiritual harm<sup>216</sup>—especially, given the Free Speech Clause, when acting this way requires restricting one parent's speech.<sup>217</sup>

### 3. Intact families and broken 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, I think, one important difference between intact families and broken families: In the latter, one parent is considerably more likely to try to make the child dislike the other parent;<sup>218</sup> 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 child 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 child how bad the father is, so that the children refuse to see the father or so "'hate[], despise[], and fear[]' him"<sup>219</sup> that

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<sup>215</sup> See Scott M. Myers, *An Interactive Model of Religiosity Inheritance: The Importance of Family Context*, 61 AM. SOC. REV. 858, 863 (1996); Hart M. Nelsen, *The Religious Identification of Children from Interfaith Marriages*, 32 REV. REL. RES. 122 (1990).

<sup>216</sup> See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that the government may not act with the purpose of furthering any religious belief, or religious belief generally); see also *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) (applying this to child custody cases).

<sup>217</sup> See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (White, J., concurring in the judgment) (concluding that preference for religious speech over nonreligious speech violated the First Amendment); *id.* at 28-29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (likewise).

<sup>218</sup> 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.

<sup>219</sup> The quote is drawn from *Schutz v. Schutz*, 581 So. 2d 1290 (Fla. 1991), the leading case that upholds such an order against a First Amendment challenge.

visitation is pointless.

The father has lost any meaningful ability to interact with his children; and this loss has flowed because of a combination of the mother's speech (which is purely private action) and the court's action in giving the mother custody (which is government action). A court may well want to try to counteract some of these harmful effects of its original custody order, 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.<sup>220</sup>

In principle, this shift to a focus on the other parent's rights runs against the standard logic of child custody law. "The *sole* criterion in child custody decisions," the cases tell us, "is the best interests and welfare of the child."<sup>221</sup>

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.<sup>222</sup> 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 it 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 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, only an argument that restricting a constitutional right is justified by some interest that echoes a

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<sup>220</sup> See, e.g., *Siegmund v. Heausler*, 466 So. 2d 793 (La. Ct. App. 1985). See also *In re Marriage of Gersovitz*, 779 P.2d 883 (Mont. 1989) (upholding the award of custody to the mother because she seemed to be the parent who was less likely to interfere with the other parent's access to the child); *In re Marriage of Murphy*, 737 P.2d 1319 (Wash. Ct. App. 1987) (shifting from joint custody to maternal custody because the father was trying to set the child against the mother, and noting "the right of each parent to expect" that the other parent "encourage a good and loving relationship between the child and the [parent]").

<sup>221</sup> E.g., *Harner v. Harner*, 479 A.2d 583, 586 (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.

<sup>222</sup> 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).

right constitutionally protected against government suppression, or echoes a constitutionally granted federal power. And this argument is generally rejected.

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, resist the 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 broken 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 is 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.<sup>223</sup>

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"<sup>224</sup>—has gained ground, though as a broadening of constitutional protection relative to the "best interests" test in broken family cases, rather than a narrowing relative to the

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<sup>223</sup> *Sable Communications v. FCC*, 492 U.S. 115 (1989), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (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 as to parent-child speech, or as 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 the parents give their children. See *supra* note 28 (second paragraph).

<sup>224</sup> *Leppert v. Leppert*, 519 N.W.2d 287, 291 (N.D. 1994).

near-absolute protection in intact family cases.<sup>225</sup> 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 more 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”;<sup>226</sup> 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”;<sup>227</sup> or that teaching children “conflicting . . . religious beliefs” will “reduc[e] the children “to a totally confused, psychologically disastrous state.”<sup>228</sup> But it’s impossible to tell with any certainty whether this is likely to be so.<sup>229</sup>

This is true even if these predictions are supported by psychiatric opinion. Child psychology is far from an exact science. Scientific 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. And 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.<sup>230</sup>

And the same is in large measure true even if courts insist on evidence of past or present concrete symptoms, such as tantrums, nightmares, bed-wetting, or “decline in . . . motivation and academic performance.”<sup>231</sup> The symptoms are naturally trou-

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<sup>225</sup> See, e.g., *Bentley v. Bentley*, 448 N.Y.S.2d 559 (N.Y. App. Div. 1982); *Chandler v. Bishop*, 702 A.2d 813 (N.H. 1997); *In re Marriage of Shore*, 734 N.E.2d 395 (Ohio Ct. App. 1999); *In re Marriage of Oswalt*, 847 P.2d 251 (Colo. Ct. App. 1993); *Beschle*, *supra* note 50, 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 *supra* note 60 for examples of cases that don’t apply the test.

<sup>226</sup> *Spencer v. Spencer*, 270 N.E.2d 72, 74 (Ill. 1971).

<sup>227</sup> *Morris v. Morris*, 412 A.2d 139 (Pa. Super. Ct. 1979). See *supra* text accompanying notes 213-214.

<sup>228</sup> *LeDoux v. LeDoux*, 452 N.W.2d 1, 6 (Neb. 1990) (Grant, J., concurring).

<sup>229</sup> 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 a substantial risk of harm, is shown).

<sup>230</sup> See *Schneider*, *supra* note 50, at 901-02 (discussing this).

<sup>231</sup> See, e.g., *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998) (citing confusion and being “emotion-

bling, 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 itself, 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.<sup>232</sup> Or they might have nothing to do with disagreement between the parents. Psychologists' testimony that a child's problems flow from certain religious or ideological teachings, rather than 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.<sup>233</sup> Confronting a relative's or a pet's death may cause nightmares, but may help children deal with loss in the future. 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,”<sup>234</sup> it might also teach valuable lessons about the limits of parents' knowledge, the diversity of moral and religious views, the need to judge 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,

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ally distraught” as evidence that homosexuality of father will “likely create emotional difficulties for the two minor children”); *Baker v. Baker*, 1997 WL 731939, \*6 (Tenn. Ct. App.) (attributing children's “stomach problems, changes in children's attitudes, and difficulties in disciplining the children” to conflict resulting from their father's religious teachings being inconsistent with those of their mother); *LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990) (attributing child's bedwetting, nightmares, and “maladjustment” to “involuntary exposure to disparate religions”); *Kendall v. Kendall*, 687 N.E.2d 1228, 1234 (Mass. 1997) (attributing child's “decline in . . . motivation and academic performance” to the father's disapproval of the child's Jewish religious practices).

<sup>232</sup> See, e.g., *LeDoux*, 452 N.W.2d at 12 (Shanahan, J., dissenting) (concluding that a child's bedwetting and nightmares stemmed not from the father's Jehovah's Witness teachings, which were contrary to the mother's Catholic teachings—as the majority and a psychologist who testified at trial had concluded—but rather from the trauma of the divorce, the mother's “distaste or dislike for Jehovah's Witnesses doctrine and her intense indoctrination of the children,” and the mother's telling the child that the father “was not ‘supposed to’” expose him to Jehovah's Witnesses teachings).

<sup>233</sup> “[S]ome pain is inherent in being a person, in being a child, and in growing up.” Schneider, *supra* note 50, at 902-03.

<sup>234</sup> See *Morris v. Morris*, 412 A.2d 139 (Pa. Super. Ct. 1979). See *supra* text accompanying notes 213-214.

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.<sup>235</sup>

Say that a mother teaches her daughter that premarital sex is shameful and dirty, and thinking lustful thoughts is slutty and contemptible. A psychologist says this is making the daughter feel guilty and depressed, and will likely interfere with her future relationships; the father agrees. The mother says that such teaching is the best way to prevent unwanted pregnancy, diseases, 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 behavior 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 decisionmaking 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 12-year-old daughter that the daughter's legal father is not actually her biological father.<sup>236</sup> The daughter becomes in some measure estranged from the man, which many might see as harmful to her.<sup>237</sup>

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,"<sup>238</sup> in the personal as well as the political, and learned it as young as possible. I personally disagree with this view, and think the mother should have waited until the daughter was grown. Yet can the legal system sensibly make such a decision?<sup>239</sup>

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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<sup>235</sup> See, e.g., *Leppert v. Leppert*, 519 N.W.2d 287 (N.D. 1994) (taking the view that the purely spiritual benefits must be ignored).

<sup>236</sup> See *In re Marriage of J.H.M.*, 544 S.W.2d 582 (Mo. Ct. App. 1976) (condemning such a statement).

<sup>237</sup> Perhaps the daughter should have ignored this, since the man had raised and loved her as his own, but people do sometimes put great stock in the biological bond.

<sup>238</sup> 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").

<sup>239</sup> 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 less threatening tools for the government

So far, I've argued that there's generally little reason to treat speech in broken 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 III.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 between 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. Nonideological 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 them 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 III.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 political ideas or religious views; and they aren't useful tools for the government to repress such political or religious ideologies. So restricting such nonideological speech that interferes with the children's relationship with the other par-



ent seems to pose little danger to free speech generally.<sup>240</sup>

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."<sup>241</sup> "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."<sup>242</sup> And this interference will in turn interfere with the spread of these ideas to society generally.

Nor will such restrictions likely 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 "best interests" test, 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."<sup>243</sup>

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

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<sup>240</sup> Because such orders are likely to arise only in broken families, this argument doesn't require an explanation of why speech in a broken family should be treated differently from speech in an intact family. 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 break-up.

<sup>241</sup> See, e.g., *Kendall v. Kendall*, 687 N.E.2d 1228 (Mass. 1997).

<sup>242</sup> See *In re E.L.M.C.*, quoted *supra* note 35.

<sup>243</sup> See *supra* Part III.A.

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 Moslem views because the mother (who has custody) is teaching Lutheranism, the child will be less likely to grow up to spread Moslem views, and more likely to spread Lutheran views. If the custodial parent is Muslim and the other parent Lutheran, the effect will 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 systematic effect: If both parents are free to teach their own conflicting views to the child, the children will be likelier to embrace either agnosticism or latitudinarian religious beliefs, and less likely to accept a devout exclusive faith.<sup>244</sup> But if the restrictions are upheld, and one parent can block the other parent from teaching a rival faith, the children will be more likely to accept a single devout religious belief system. The systematic 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

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<sup>244</sup> See *supra* note 215. 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.

before they are triggered, and because they are relatively rare today. But as Part II.B.2 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,<sup>245</sup> 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 broken families. Parents 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 is not complete. If the law could reduce the number of advocates of, say, atheism or feminism or Catholicism by 25%, 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.<sup>246</sup> 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.<sup>247</sup>

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.<sup>248</sup> One scholar

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<sup>245</sup> Consider the Dorothy Comingore case, in which a prominent actress's Communist sympathies were used as an argument against giving her custody of her children. See *supra* note 8.

<sup>246</sup> See, e.g., materials cited and discussed in Volokh, *Speech as Conduct*, *supra* note 83, at 1309.

<sup>247</sup> Cf. *id.* at 1309-10 (discussing this in more detail).

<sup>248</sup> See, e.g., *Ex parte Agnello*, 72 N.Y.S.2d 186 (Sup. Ct. 1947); *Reimann v. Reimann*, 39 N.Y.S.2d 485 (Sup. Ct. 1942). See also *In re Black*, 283 P.2d 887 (Utah 1955), in which the Utah government

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 harmful.<sup>249</sup> And people understandably worry that racist or pro-terrorist families may convey the same views to their children.<sup>250</sup>

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.<sup>251</sup> 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 fault parents for using profanity around children, exposing children to R-rated movies (whether the rating flows from violence, sexual content, or profanity), or exposing children to sexually themed material, or where courts actually bar parents from engaging in or tolerating such speech.<sup>252</sup> 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 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 "evinced . . . disrespect for women and disregard for committed relationships" (even if the child never saw the materials on the site), that's a judgment about the viewpoint conveyed by the pornography business's wares.<sup>253</sup> Likewise, when a judge gives custody to a father because the mother—an Italian porn star turned politician—is "a lifelong pornographer

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stripped a married couple of their rights to raise their children, returning the children only on condition that the parents agree not to teach the children that polygamy was proper.

<sup>249</sup> See Dwyer, *supra* note 187, at 1000-01.

<sup>250</sup> See, e.g., Mallorre Dill, ADWEEK, Oct. 8, 2001, at 24 (discussing public service advertisements created by the 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.").

<sup>251</sup> See Part III.B.2.

<sup>252</sup> See *supra* notes 23-28 and accompanying text.

<sup>253</sup> Anderson v. Anderson, 736 So. 2d 49 (Fla. Ct. App. 1999).

and has exposed [the child] to pornography and to pornographers in a manner that is contrary to his welfare,” this likely rests on the belief that a child exposed to the mother’s pornography-friendly circle would learn the message that sexual libertinism and consumption of pornography was proper.<sup>254</sup>

Relatedly, a court frowns on a father’s letting his child see pictures of “drag queens,”<sup>255</sup> 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 homosexuality.<sup>256</sup> And many violent movies—though probably not the pure entertainment slasher movies—tend to overtly or subtly endorse violence and criticize pacifism, 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.

Parents may also convey messages to their children precisely by their tolerance of these sorts of speech. Letting a child watch movies that contain sexually suggestive, sexually explicit, or violent 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.<sup>257</sup> Likewise, teaching a child by example that swearing is acceptable is a way to convey the message that societal taboos 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.

Moreover, a parent’s exposing the child to R-rated or pornographic movies often doesn’t even involve much of a deliberate desire to use the movies to convey the parent’s chosen 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

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<sup>254</sup> *Koons v. Koons*, 1994 WL 808603, \*2 (N.Y. Sup. Ct.).

<sup>255</sup> *Pulliam v. Smith*, 501 S.E.2d 898, 901 (N.C. 1998).

<sup>256</sup> 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.

<sup>257</sup> See *In re Guy M. v. Yolanda L.-F.*, 2004 WL 2532299, \*8 (N.Y. Fam. Ct.) (giving a father custody based in part on the mother’s not filtering the daughter’s Internet access); *Bowe v. Bowe*, 2000 WL 1683392, \*4 (Conn. Super. Ct. 2000) (ordering parents to install Internet filters).

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.

And while these sorts of restrictions can interfere with parents' teaching of 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,<sup>258</sup> restrictions on certain modes of expression (profane, R-rated, sexually themed) thus do indeed restrict the teaching of ideas. But they do impose a considerably smaller restriction than do restrictions that expressly target a particular ideology.

#### IV. A PROPOSAL

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

- (1) restrictions on speech that (1.1) conveys ideas that courts consider harmful or (1.2) 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 (2.1) nonideological, or (2.2) with 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.<sup>259</sup> 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.<sup>260</sup>
- (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

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<sup>258</sup> 403 U.S. 15, 21 (1971).

<sup>259</sup> 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 II.B.1, though, those kinds of restrictions are more similar to each other than different.

<sup>260</sup> See, e.g., *Wright v. Walters*, 2005 WL 1490991 (Ky. Ct. App.) (categorically letting the custodial parent veto the noncustodial parent's taking the child to a church of a denomination different from the custodial parent's, with no “best interests” inquiry required).

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.

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 material, and the like	?
(2.1) Parent’s nonideological 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 Dangerous Ideological Advocacy*

Courts should be barred from imposing restrictions on the grounds that learning certain ideas is against the child’s best interests. Such restrictions, I have argued above, 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’”<sup>261</sup>—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,<sup>262</sup> so the First Amendment should bar considering a parent’s political or religious ideology. This is so in intact families, and it should

<sup>261</sup> See, e.g., *Harner v. Harner*, 479 A.2d 583, 586 (Pa. Super. Ct. 1984).

<sup>262</sup> 466 U.S. 429 (1984).

likewise be so in broken families.

Finally, protecting the speech only so long as it isn't likely to cause psychological harm may seem appealing, in broken families and perhaps in intact ones as well. But, as Part III.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.

*B. Restrictions on Supposedly Harmful Nonideological 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, R-rated movies, Maxim magazine,<sup>263</sup> pictures of drag queens,<sup>264</sup> "age [in]appropriate music,"<sup>265</sup> and the like. As I discussed above,<sup>266</sup> 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).<sup>267</sup> They seem likely to turn more on the judge's cultural preferences than on any real likely harm to children. And they are also unfairly unpredictable in ways that may violate the void-for-vagueness doctrine.<sup>268</sup> For instance, given the vast range of opinion on which movies are suitable for children, parents have no way of predicting whether certain movies are legally safe for them to show.<sup>269</sup> (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,<sup>270</sup> 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 and own taste and sense of propriety. When a judge faults a parent for exposing a child to "five 'R' rated movies" that contained "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

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<sup>263</sup> See *Wiley v. Wiley*, 2005 WL 1501608 (Wash. Ct. App.).

<sup>264</sup> *Pulliam v. Smith*, 501 S.E.2d 898, 901 (N.C. 1998).

<sup>265</sup> See *In re Guy M. v. Yolanda L.-F.*, 2004 WL 2532299, \*8 (N.Y. Fam. Ct.).

<sup>266</sup> See *supra* p. 59.

<sup>267</sup> See *supra* p. 59.

<sup>268</sup> See *supra* text accompanying notes 85-92.

<sup>269</sup> 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 91.

<sup>270</sup> See *supra* p. 34.



ones the child had seen,”<sup>271</sup> 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 such gut feelings may justify “best interests” decisions by courts generally. But they don’t seem enough to justify restrictions on speech, even mostly nonideological speech that contributes relatively little to public debate.

My skepticism extends even to restrictions on speech justified by its visible immediate effects, such as nightmares supposedly caused by scary movies.<sup>272</sup> 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 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’ viewpoint-based component, their vagueness, their burden on parental self-expression, and the unlikelihood that they really avoid 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 III.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, or *Maxim* magazine are bad for children to see.<sup>273</sup>

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<sup>271</sup> *Perkins v. Perkins*, 646 So. 2d 43 (Ala. Civ. App. 1993), *rev’d on other grounds*, 646 So. 2d 46 (Ala. 1994). The lawyer for the mother in *Perkins* reports that she recalls that one of the R-rated movies was *Backdraft*, the Ron Howard-directed movie about firefighters, though naturally 10-year-old memories are imperfect. E-mail from Kathryn Harwood to June Kim at the UCLA Law Library, Aug. 5, 2005. The library was also good enough to track down for me details on another cases in which the judge took a parent’s exposing a child to R-rated movies into account. The lawyer for the mother in *Breckner v. Coble*, 921 S.W.2d 624 (Mo. Ct. App. 1996) (involving 10- and 12-year-old children), reports that the judge wasn’t concerned about particular R-rated movies, but rather that the father had about a thousand videos, and let the children view whatever they wanted, including R-rated movies; the rating was apparently more important to the judge than individual titles. E-mail from June Kim to the author, Aug. 15, 2005, summarizing a conversation between June Kim and Betty Pace.

<sup>272</sup> *See Helm v. Helm*, 1993 WL 21983, \*1 (Tenn. Ct. App.) (dealing with a mother’s complaint that “There’s been a couple times that I’ve called and there’s been movies on like Terminator II and Cobra and very violent shows. And when Sean was a baby, I tried my best to keep him from watching scary movies, because he would have nightmares and wake up, you know, in the middle of the night. . . . I don’t think an R-rated movie is something a five-year-old or six-year-old should be watching.”).

<sup>273</sup> *See id.* (seemingly taking a skeptical view of a parent’s complaints about the other parent’s exposing the child to R-rated movies). I set aside the question whether parents 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 supra* note 27 for a brief discussion of the caselaw on this issue (as to

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

Restrictions on nonideological speech (“your mother 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.<sup>274</sup> The restrictions do burden parents’ desire to express themselves, and may deny information to the children; but, as Part III.A.2 argued, these concerns shouldn’t play as much of a role here as they do with adult speech.

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 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.

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. The father who says “anyone who doesn’t embrace Jesus will burn in Hell,” “homosexuality is a sin,” “racists are bad people,” or “religion is superstitious folly,”<sup>275</sup> whose children ask him “Does that mean mommy will burn in 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.”<sup>276</sup>

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intact families), and citations to some articles that touch on it.

<sup>274</sup> See *supra* text accompanying notes 85-92.

<sup>275</sup> See *supra* p. 56.

<sup>276</sup> “Daddy is a good person, and he loves you very much” may not be the mother’s sincere view, but I think—as I described in the previous subsection—that compelling parents to tell children non-

Such subtle requirements may not be easy to set forth or to enforce, especially when the family is broken 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 nonideological statements critical of the other parent, don’t use the other parent as an example for any of your ideological teachings, and if the children ask you whether the other parent is bad, say things that make clear the other parent is a good person” 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 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 children being taught rival religious views.<sup>277</sup> But this effect seems 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]”<sup>278</sup> 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

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ideological things they don’t want to say, and restricting them from saying nonideological things they do want to say, is sometimes justifiable.

<sup>277</sup> See *supra* p. 57.

<sup>278</sup> See *LeDoux v. LeDoux*, 452 N.W.2d 1, 4-5 (Neb. 1990) (Shanahan, J., dissenting).

courts are generally barred from doing.<sup>279</sup>

Similar problems arise with judgments that the visiting parent may not, for instance, teach children Catholicism when the custodial 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.”<sup>280</sup>

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 “[T]he 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.”<sup>281</sup>

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 III.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,<sup>282</sup> 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 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

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<sup>279</sup> See *id.* at 11 (Neb. 1990) (Shanahan, J., dissenting).

<sup>280</sup> *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) (quoting the lower court’s judgment, and reversing it based partly on the Establishment Clause concerns discussed in the text).

<sup>281</sup> *Id.* at 1154.

<sup>282</sup> See *supra* note 213 and accompanying text.

above, is likely to be very hard for courts to accurately evaluate.<sup>283</sup>

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 and 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—about damnation, divine wrath, sex, and so on—or bloody stories 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.

## V. CONCLUSION

We can only expect so much from law. In Shelley’s England, where atheism was viewed much differently than it is today—as were free speech and religious equality—it’s only natural that courts would act as the Lord Chancellor acted. And even if the law bars judges from considering (say) race, sexual orientation, religion, or speech, a judge who’s bent on violating the law can likely get away with it: Under the vague “best interests of the child” standard,<sup>284</sup> a judge can usually give a plausible excuse for giving either parent custody, whatever the judge’s real reasons might be.<sup>285</sup>

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.<sup>286</sup> 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.

But there’s little reason to think that they’ll be in the mood to coin new protections. If parent-child speech—at least in broken 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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<sup>283</sup> See *supra* Part III.B.4.

<sup>284</sup> See sources cited *supra* note 87 (arguing that the test is too vague); Buss, *supra* note 153, at 308 (likewise, though in less detail).

<sup>285</sup> See Pfeffer, *supra* note 210, at 366; Elster, *supra* note 206, at 28.

<sup>286</sup> See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 465 (1985)