Religion and Child Custody

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And he said unto them, Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's.


I.

In this Essay, I want to reflect on some problems at the intersection of religion, law, and the family. Specifically, I will explore the ways courts may consider a parent's religiously motivated behavior in making decisions about the custody of children. More precisely still, I will ask two questions. First, may a court refuse to award custody because of a parent's religiously motivated behavior in a dispute between a natural mother and a natural father? Second, when should a court agree to resolve a dispute between divorced parents over the religious upbringing of their children? These are topics of quiet but growing importance, for as rates of interreligious marriage and of divorce have risen, so has the incidence of these disputes. Furthermore, these problems raise telling questions about the tension between discretion and rules in law, about the discords between religion and law, about the meaning of pluralism in American life, and about the usefulness of rights discourse in American law.

* Professor of Law, University of Michigan. A version of this Essay was first presented at the Fourth Annual Symposium on Law, Religion, and Ethics at Hamline University, October 25, 1991, and at the University of Michigan Journal of Law Reform Symposium, Preservation of Minority Cultures (February 15, 1992). I am grateful to the symposium participants for their helpful responses to what I said there. I am also glad to thank John H. Garvey, Douglas Laycock, Stephen L. Pepper, Kent D. Syverud, and Carol A. Weisbrod for their thoughtful comments on an earlier draft of this piece. For the reasons described in Richard A. Posner, Goodbye to the Bluebook, 53 U. CHI. L. REV. 1343 (1986), I do not adhere to all of the rules in THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (15th ed. 1991).
Before I begin, let me say a few words about the scope of this Essay. It is indeed an essay, and not a systematic survey of the field. Such surveys have already been ably conducted.\(^1\) To replicate them would be wasteful and ridiculous excess. Nor have I formally analyzed the constitutional doctrines that might be summoned up in these cases. Rather than trekking through the aridities of the Supreme Court's constitutional formulae, I have preferred to inquire into how a culturally various liberal democracy ought to handle these conflicts.\(^2\) Finally, I do not seek and doubt the existence of any unequivocally correct answers to these perplexing and sometimes tragic dilemmas. I will be content if I can identify the components of these conflicts and explain why they are not only perplexing, but may be unresolvable.

II.

One of the most frequent and troubling contexts in which religious issues arise in custody disputes is where one parent (in today's world, usually the father) claims that his wife's religious beliefs lead her to behave in ways which would harm the child were she given custody. To this claim, the mother generally responds that to rely on religiously based behavior in denying her custody would violate her free exercise rights. How ought public policy understand that argument?

This question is most often discussed in terms of *Quiner v. Quiner*,\(^3\) a case which states with unusual thoroughness the standard arguments against considering the effects of religious


\(^3\) 59 Cal. Rptr. 503 (Ct. App. 1967).
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beliefs in denying someone custody. We will therefore use Quiner as a basis for our discussion.4

Linnea and Edward Quiner were both members of a fundamentalist Protestant sect called the Plymouth Brethren. However, Mrs. Quiner belonged to a particularly strict subsect called the Exclusive Brethren. The Exclusive Brethren do “not affiliate with any outside organization” of any kind, vote or participate in “civic, political or governmental activities,” use any form “of public or private entertainment,” or read anything except the Bible. Their children “are discouraged, if not forbidden as sinful, from participating in all forms of extracurricular activity.” Nor may their children “visit or play with other children in their homes, or in their own homes or elsewhere,” except school.5

Further, the Exclusive Brethren “dissociate” themselves from all who are not Exclusive Brethren, including “Open Brethren” like Mr. Quiner. Mrs. Quiner said that she “would teach [her son] to love his father as a son and as his father and to respect him in every way and to obey him. I would not teach him to hate his father at all.”6 However, she “admitted she would keep him away from his father if she could,” and she agreed that “children within the religious group are taught that others outside the religious group [including Mr. Quiner] are unclean.”7

The trial court held that the Quiners’ child John Edward (who was around two years old at the time of the trial) should be placed in his father’s custody.8 It observed that “mental welfare” was part of the child’s best interests and that that term “includes the opportunities for intellectual, character and

4. By choosing Quiner as my starting point, I do not, of course, mean to suggest that it represents the approach of every American jurisdiction. At least one court has reached quite the opposite result. In Burnham v. Burnham, 304 N.W.2d 58 (Neb. 1981), the Nebraska Supreme Court reversed a trial court and denied custody to a mother who was a member of the Tridentine Catholic Church on the grounds that several of her beliefs might “have an adverse impact on Jaime: (1) The belief that she [Jaime] is illegitimate; (2) The willingness of Carolyn [the mother] to cut Jaime out of her life if she disobeys the rules of the Tridentine Church; and (3) The racist views held by Carolyn and, apparently, by her church.” Id. at 61. However, as Professor Beschle reports, “Burnham is unusual.” Beschle, supra note 1, at 401. Quiner represents a probably preponderant attitude, although courts have enunciated a variety of formulae for dealing with this kind of case. For a survey of them, see id. at 396-406.

5. 59 Cal. Rptr. at 525 (trial court opinion).

6. Id. at 505 (quoting testimony of Mrs. Quiner).

7. Id. at 504–05.

8. Id. at 504.
personality growth, and the development of those social graces and amenities without which one cannot live comfortably or successfully in a complex, integrated society.\textsuperscript{9} It concluded that "the intellectually blighted social microcosm of the Exclusive Brethren in which John Edward would be forcibly [sic] confined . . . is more than likely to retard his mental growth and personality development, would be inimical to his welfare, and would severely handicap him in later years in his struggle to achieve his goals of social and economic attainment."\textsuperscript{10} It was also concerned that the "wholesome relationship between Edward and his son that is now growing" might "begin to deteriorate and finally be destroyed as John Edward is taught to believe that his father is an evil sinner to be shunned."\textsuperscript{11}

The appellate court reversed. It said it was "sensitive to the revelation . . . that custody in the mother may breed in John Edward a lack of religious and filial rapport with his father and the father's parents, and may possibly breed definite antipathy to his father and his paternal grandparents."\textsuperscript{12} It agreed "that this probability is not for the best interests of John Edward."\textsuperscript{13} However, it said, "The fact that judged by the common norm, it may be logically concluded that custody in the father is for the child's best interests, does not warrant us in taking custody away from the mother when such an order must be bottomed on our opinion that the mother's religious beliefs and teachings, in their effect on the child, are and continue to be contrary to the child's best interests."\textsuperscript{14} The court concluded that it had to reverse the trial judge in the absence of evidence "which will sustain a finding that there is actual impairment of physical, emotional and mental well-being contrary to the best interests of the child."\textsuperscript{15}

One might well feel some intuitive attraction to the appellate court's result. Child-custody questions are decided according to the best interests of the child. If Mrs. Quiner's religious understandings were correct, nothing was as crucial to her son's interests than that he should be raised in her religion.

\textsuperscript{9} 59 Cal. Rptr. at 527 (trial court opinion).
\textsuperscript{10} Id. at 532 (trial court opinion).
\textsuperscript{11} Id. at 526 (trial court opinion).
\textsuperscript{12} Id. at 513.
\textsuperscript{13} 59 Cal. Rptr. at 513–14.
\textsuperscript{14} Id. at 518.
\textsuperscript{15} Id. at 516.
The court's result is appealingly responsive to this possibility. In addition, the trial court had perhaps been unsympathetic to Mrs. Quiner's religious beliefs, and its opinion thus was perhaps open to the reading that the court was officially judging their merits. Such a judgment is, I would suppose, uncontroversially outside the scope of a court's authority, just as a ruling that Mrs. Quiner's religious understandings were correct would have been. Nevertheless, I will argue that the appellate court's reasoning was unpersuasive and that its doctrinal position was not sound.

The court deployed several arguments. At their rhetorical epicenter was the accusation that Mrs. Quiner had been "punished" for her religious views: "Deprivation of the custody of a child is not a 'slender' punishment: it is a heavy penalty to pay for the exercise of a religious belief, neither illegal nor immoral." I believe, however, that the court both misunderstood what a punishment is and what custody cases are about.

A punishment is intended as a judgment of someone who has done something wrong. It seeks to condemn behavior, to prevent its repetition, and to deter others from emulating it. As James Fitzjames Stephen memorably wrote, a punishment "is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment .... [T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence ...." A ruling in a custody case, on the other hand, has no such damnifying intentions. A divorce court must choose which of two parents is to have custody of their child. In doing so, it does not decide which is the better or more deserving person. Rather, it must apply the "best interests of the child" test. That is, it must decide which parent the child would be better off with. That decision is not intended as a judgment of either parent. Not infrequently, a court must choose between two admirable people, and wishes to condemn neither. Sometimes the more admirable person—sometimes even the more admirable parent—would be the less successful custodian, perhaps because the child has closer relations with the less

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16. *Id.* at 517 (citation omitted). For another such characterization, see Mangrum, *supra* note 1, at 30.

17. 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (Burt Franklin 1964) (1888).
admirable parent. No praise or blame is intended in the circumstance. The dissent in *Quiner* was thus right when it said, "The judgment of the trial court is neither designed, intended nor operative as a penalty upon appellant . . . ." 18 Under the trial court's decision, Mrs. Quiner did not get what she wanted, and she surely was made deeply unhappy, but not because she was penalized.

Even if it did not penalize Mrs. Quiner, the *Quiner* trial court's conclusion would still be inappropriate if it represented a decision that one religion was inferior to another. 19 This is clearly what the appellate court thought the trial court had done. The appellate court said, "Precisely because a court cannot know one way or another, with any degree of certainty, the proper or sure road to personal security and happiness or to religious salvation . . . , evaluation of religious teaching and training and its projected as distinguished from immediate effect . . . upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations." 20 No one, I think, doubts that a secular court should not "entangle" itself with religion to the extent of deciding which religion is better. But a custody court is not trying to identify the road to salvation. On the contrary, it must disavow any such foolhardiness. But it can say that one religion's secular effects are less desirable than the secular effects of the other parent's ideology or religion. It is trying to choose between the two available roads to "personal security and happiness" in the secular sense of those terms. This is what the best-interest inquiry is all about.

The appellate court's characterization of the trial court's ruling as a punishment, and indeed the former's very holding, apparently arose from its implicit assumption that Mrs. Quiner had some kind of a right to raise her child in the religion she preferred. The appellate court, in other words, seemed to understand the trial court's result as denying Mrs. Quiner her right to custody for religious reasons. But I believe that the appellate court was mistaken in assuming that, as against Mr. Quiner, Mrs. Quiner had a right to custody of their child. To

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18. 59 Cal. Rptr. at 519 (Herndon, J., dissenting).
19. For the suggestion that this was the court's intent in *Quiner*, see, e.g., Beschle, *supra* note 1, at 401.
20. 59 Cal. Rptr. at 516.
see why that assumption was incorrect as the appellate court understood it, let us examine the reasons we attribute rights to parents.

The first basis for attributing to parents a right to raise their child in whatever religion they choose is that doing so generally benefits parents. More particularly, the argument is that, often for explicitly theological reasons and usually for emotional reasons, parents commonly and passionately want to bring up their children in their own religion. They want to do so because part of their concern for their child is a concern for its welfare, and nothing more touches that welfare to a believing parent than the condition of the child’s eternal soul. They also may believe that the child’s temporal happiness is to be found in the solace of their faith and the guidance of their God. Further, parents want their children to be good people, a goal which for many parents is inextricably bound up with religion. Yet further, parents yearn to perpetuate their own lives through their children, by seeing their children carry on their beliefs and customs. Finally, for some parents an integral part of practicing their religion is raising their children in it. “And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord.”

Ordinarily, all these arguments combine to provide a widely accepted basis for deferring to parental religious decisions even where we have strong secular reasons to doubt their wisdom and to regret their consequences. However, when divorcing parents disagree about their child’s religious status, these arguments apply equally to both parents’ preferences. And we have no basis for deciding which parent’s interests to prefer. The interests are the same interests. The two parents have the same claim to advance those interests. Mrs. Quiner may have had a right to control her child’s religious upbringing; but Mr. Quiner had the same right. To put the point crudely, the two rights cancelled each other. As between the Quiners, neither had a claim to custody which gave one but not the other a presumptive right to custody.

A second basis for attributing rights to parents is that doing so is generally good for their children. We assume that parents know what is best for their children because they love and know them best. Further, we are willing to believe that it is

good for children to be raised in a religion, yet a liberal state is barred from making any such decision for children. To put the point rather differently, children may have powerful religious interests, but they are usually thought incompetent to assert them. Neither may the state assert them. Parents, however, are commonly taken to be their children’s "next friend," and thus to be the most suitable people to identify and pursue their children’s religious claims.

The problem with this second basis of parental rights in the custody context resembles the problem with the first basis. In custody battles, the two parental "experts" disagree about what religion is best for their children, and we have to choose between them. Yet we are barred from deciding on the basis of which religion is preferable. We have only our standard secular categories to consult. If we refrain from using those standards fully because of a fear of interfering with one parent’s prerogatives, we interfere with the prerogatives of the other parent.

In addition, the parental rights that rest on the good those rights do children are weakened on divorce because some of our assumptions about parental decisions for children are shaken by the divorce. We fear that divorcing parents will have become so absorbed in their hostilities with each other that their concern for their children may be temporarily diminished and that they might even use their children in their battles. We may assume before a divorce that "each spouse teaches love and respect for the other, if for no reason other than the teaching of such love and respect is for the best interest of the child." But in a divorce, the spouses have often lost those feelings for each other and no longer teach them to their children.

Our third basis for attributing rights to parents is that doing so indirectly promotes pluralism, "that is, society’s interest in social and ideological diversity." By protecting parents’ choices about how to live, parental-rights doctrine helps maintain a pool of different cultural communities. It does so by allowing people to live as they wish without interference and to perpetuate their beliefs by teaching them to the next generation.

22. 59 Cal. Rptr. at 515.
23. Schneider, supra note 21, at 160.
According people like Mrs. Quiner a right to control the religious upbringing of the Quiners' children might promote pluralism better than failing to do so. Failing to do so could somewhat disadvantage members of some heterodox religions in some custody disputes. This could make membership in such religions marginally less attractive and make it marginally less likely that children will be brought up in them. However, the injury to any social pluralism-interest from failing to accord Mrs. Quiner a right to decide how her child is to be raised is likely to be sharply limited. Relatively few children will be involved in these cases. Most divorcing parents will roughly agree about religion, and most divorcing parents (the conventional estimate is 90%) work out some settlement on their own. Further, even if people like Mrs. Quiner do not have the kind of right the court seems to attribute to them, they may still win a custody dispute, as I will suggest in a moment. Finally, custody disputes do not pose a choice between a heterodox religion and some state orthodoxy: The choice must be between the heterodox religion and whatever views the other parent espouses. Mr. Quiner, it should be recalled, was himself a member of another sect of the Plymouth Brethren.

Attributing rights to parents on "pluralism" grounds is justified on the basis of a general social interest. On this view, Mr. Quiner's claim does not directly offset Mrs. Quiner's as it did with respect to the two other bases for parental rights. Nevertheless, we ought not promote that social interest without seeing whether it conflicts with the claims of people like Mr. Quiner. Can we serve society's pluralism interests without improperly disserving his interests? I doubt that we can. A brief discussion of the effects of the Quiner rule may help show why.

24. The reasoning in Quiner and some other cases which assume that the member of the heterodox religion has a right to custody seems to have been influenced by the mother's "presumptive right" to custody under the tender-years doctrine, which held that mothers should have custody of young children. However, that theory is now widely rejected, is constitutionally dubious at best, and conflicts with much current thinking about what is good for children. Even when Quiner and its confreres were decided, the doctrine was nothing more than a generalization about what is good for a child. There was nothing in the generalization that had to prevent courts from asking whether the generalization was true in any particular case. Thus the presumption did not have to be, and should not have been, understood as creating the kind of right the Quiner court assumed existed.
Far from being "neutral," the Quiner test disadvantages parents who are not members of what we may call other-worldly sects. Members of such separatist sects tend to be governed in all aspects of their lives by their religion. Excluding religiously based behavior from consideration in custody disputes involving a member of an other-worldly sect excludes almost everything from consideration. The tendency of the Quiner rule, then, is to eliminate all evidence that might weaken the claim of the unworldly parent while accepting any evidence that tends to weaken the other parent’s claim. The (relatively) worldly parent is comparatively disadvantaged at least in this sense: if someone did the things Mrs. Quiner did for non-religious reasons, they would count against her; because Mrs. Quiner had religious reasons, they were not counted against her. She is “immunized” by her religious views; he is not. Finally, whatever logic may require, I think the psychological effect of the Quiner attitude is to lead courts to avoid letting the unworldly parent lose. All these factors, I think, help account for the paucity—perhaps even the absence—of cases in which the court adopts the Quiner principle and also denies custody to the member of the other-worldly sect. Once again, in short, we find that the Quiner rule is defensible only if the interests of Mr. Quiner are ignored.

I have been suggesting that the Quiner court’s opinion makes sense only on the assumption that Mrs. Quiner had a right to control her child’s upbringing. I have reasoned that while the Quiners together no doubt had such a right against the state, she had no such right against her husband. My arguments, I think, further allow us to see why the Quiner court was mistaken when it relied on the following argument: “We assume that if the parties had remained married, . . . there could be no doubt that intervention by the state in John Edward’s upbringing would not receive hospitable consideration in any court.”25 True enough, as far as it goes. But the Quiners’ decision to get divorced required the court to choose between them on the basis of the upbringing of their child, a requirement that, short of child abuse or neglect, is not present in the case of the undivorced couple. In addition, as I suggested above, the now-hostile relations of the parents make us doubt some of the reasons we ordinarily have for not intervening in an

25. 59 Cal. Rptr. at 514.
intact family. For both those reasons the state may—even must—"intervene" during the Quiners' divorce even though it could not do so during the marriage.

How, then, should a court treat a case like Quiner? I do not see any wholly satisfactory principle. However, I would propose that a court treat such cases no differently from the other custody cases it considers. It should look to everything that might affect the child's best interests. It should consider all the behavior and attitudes that might affect a parent's qualities as a guardian, without looking into the religious or ideological basis for them. I think I would adopt this test knowing that it will not measure all that is in the child's best interest, because much that affects that interest cannot, as the Quiner court insists, be evaluated by a secular court. But I would adopt it on the grounds that we cannot afford to exclude any factors that are within the capacity of a secular court to comprehend and because I think it treats both parties as fairly as a secular court can reasonably manage.

To be sure, there must be some discomfort in evaluating even the secular behavioral consequences of religious beliefs. Nevertheless, it is hardly new law that courts may attempt to do so. A standard, if not entirely happy, citation is Reynolds v. United States. Another example comes from the law of divorce: One spouse's religious beliefs cannot give the other grounds for divorce, but that spouse's behavior may do so even if it is religiously motivated. And as to children, the Supreme Court said in Prince v. Massachusetts, "Acting to guard the general interest in youth's well being, the state as parens patriae may well restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." Finally, the principle that courts should look only at the secular aspects of a dispute that is essentially over religion is standard in cases in which courts try to resolve church disputes over

26. 98 U.S. 145 (1878).
29. Id. at 166 (footnotes omitted).
property by looking as much as possible to secular issues, even though such decisions may have large spiritual consequences.\textsuperscript{30}

For that matter, even \textit{Quiner} does not wholly reject considering religiously-motivated behavior. It employs this standard: "Evidence must be produced which will sustain a finding that there is actual impairment of physical, emotional and mental well-being contrary to the best interests of the child."\textsuperscript{31} This standard is intended to exclude "projected as distinguished from immediate effect[s]" of parental behavior.\textsuperscript{32}

This attempt to cabin a court's examination of the secular effects of religious beliefs seems to me unconvincing. I find it puzzling to exclude "projected as distinguished from immediate effect[s]," since the whole point of a custody decision is to decide what will happen to the child in the future, a future often ranging into many years.\textsuperscript{33} The requirement of demonstrating actual, immediate harm is thus inappropriate in a custody hearing, particularly since the situation in which the child will be living (with only one parent) will not really have been established by the time of most trials. The inappropriateness of the test is demonstrated by \textit{Quiner} itself. The court acknowledged, "There is no evidence, and indeed it may have been too early to accumulate any evidence, that the doctrine of separation had in any manner affected the child's physical, emotional or mental well-being."\textsuperscript{34} This is plausible enough, since the boy was hardly more than two years old at the time of the trial and had been in the father's custody for two years by the time of the appellate court decision. \textit{Quiner} seems to anticipate that a later court would readily change the custody order if any such evidence developed.\textsuperscript{35} But in fact courts are

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\item \textsuperscript{30} E.g., Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).
\item \textsuperscript{31} \textit{Quiner}, 59 Cal. Rptr. at 516.
\item \textsuperscript{32} \textit{Id.} To similar effect is another often-cited test: "[T]he court must make a threshold factual determination that the child's temporal well-being is immediately and substantially endangered by the religious practice in question and, if that threshold determination is made, second, the court must engage in a deliberate and articulated balancing of the conflicting interests involved, to the end that its custody order makes the least possible infringement upon the parent's liberty interests consistent with the child's well-being." Osier v. Osier, 410 A.2d 1027, 1030 (Me. 1980).
\item \textsuperscript{33} Indeed, the tender-years presumption on which the \textit{Quiner} court cheerfully relied, 59 Cal. Rptr. at 508, is exactly such a projection.
\item \textsuperscript{34} \textit{Quiner}, 59 Cal. Rptr. at 518.
\item \textsuperscript{35} \textit{Id.} at 517-18.
\end{itemize}
appropriately reluctant to alter custody once it has been established. In short, the dissent again had the better of the argument when it said (perhaps too emphatically) that courts "should be permitted to exercise such judgment to the end that crippling injuries may be prevented rather than being limited to attempting to correct them after the fact." 36

The test I propose is certainly unsatisfactory in some ways. In particular, it may tend to somewhat disadvantage parents who are members of particularly unworldly sects. It must always be hard for the world to understand, evaluate, and deal with unworldly people, and the world's judges may thus regard the situation of a child in an unworldly home less sympathetically than is just. My test would similarly disadvantage children who would be spiritually or even secularly better off brought up in such sects. Nevertheless, the test seems to me less problematic than these criticisms may make it appear.

A primary defense of my test is, as I have already argued, the absence of any satisfactory alternative. Further, the disadvantage to the unworldly parent should not be exaggerated. For instance, she gets the benefit of the things her religion does to strengthen her ties with her children and to make them happier and better. 37 In addition, the unworldly parent finds important protection in the fact that my test requires courts to look at everything that affects the child's best interests as a whole, not just at the parts affected by religion. At least in current thinking, the child's emotional relationship with its parents will be crucial to his best interests. Unhappily, it seems to be a fault of cases of the Quiner sort that these crucial factors are regularly lost track of in the heat of the dispute over how the court should treat religiously motivated behavior. Finally, we ought not over-dramatize the danger that judges may lack sympathy for the heterodox religions these cases involve. True, there is evidence of such a judicial attitude, particularly in a few of the trial court opinions. But there is much more

36. 59 Cal. Rptr. at 522 (Herndon, J., dissenting). Or, as another court put it: "Given the necessarily uncertain nature of psychological evaluation and diagnosis and the potential for severe future psychological impairment to result from practices which do not have present demonstrable effects upon the child, we conclude that evidence of beliefs or practices which are reasonably likely to cause present or future harm to the child is admissible in a custody proceeding." In re Marriage of Short, 698 P.2d 1310, 1313 (Colo. 1985).

37. For an investigation of "possible secular purposes and effects that might support the use of religion as an element in child custody and adoption determinations," see Beschle, supra note 1, at 406–16.
substantial evidence, including the appellate court opinion in Quiner, that courts have been aware of just that danger and have leaned over backwards to avoid it.\textsuperscript{38}

\textsuperscript{38} As I said earlier, this Essay is not intended as an exercise in constitutional analysis, but rather seeks to ask what good public policy in these cases would be. Nevertheless, I think I may owe a word of explanation about Palmore v. Sidoti, 466 U.S. 429 (1984), since it might seem to present so precisely analogous a problem as to dictate a plain result in cases like Quiner. In Palmore, a girl's parents sought a divorce, and the mother won custody of her. Thereafter, the father sought to have that decision modified on the grounds that the mother was living with (and later married) a Black man. The trial court granted the father's request on the ground that, in the Florida town in which the mother lived, the child would soon suffer from "social stigmatization" because of her mother's marriage. The United States Supreme Court reversed, saying that the "effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody." \textit{Id.} at 434.

I do not think that Palmore substantially undercuts the arguments I have made, if indeed it undercuts them at all. For one thing, that case is, at best, only slightly on point. Palmore seems in large part to have been a statement that courts may not give effect to racial prejudice by recognizing its consequences in custody cases. Factually, the whole problem in Palmore was that people would treat the child badly because they disapproved of her mother's husband's race. In contrast, relatively little of the problem in Quiner involved reflected social disapproval of Mrs. Quiner. Rather, that case had to do with the isolation from society and from his family that Mrs. Quiner would require of her child.

Suppose, though, that social disapproval of Mrs. Quiner's religion had been a more prominent part of the case. It is not obvious that social disapproval of a religion should be treated in the same way as social disapproval of interracial marriage. Given the special status of race in American history and constitutional law, the latter disapproval is hard to countenance. But disapproval of one religion is often instinct in approval of another religion. Religions regularly claim an exclusive insight into truth and regularly condemn those who reject that insight. "He that is not with me is against me: and he that gathereth not with me scattereth abroad." Implicit in religious freedom, therefore, is freedom to disapprove of the religion of others.

In any event, Palmore's rationale is obscure and leaves many unanswered questions. For one thing, the Court may have fallen into the same error into which the Quiner court fell. The Court asked whether the "possible injury" to the child was a "permissible consideration\[\] for removal of an infant child from the custody of its natural mother." \textit{Id.} at 433. The Palmore Court, like the Quiner court, seemed to assume that the mother had some kind of a right against the father to custody. But Palmore, like Quiner, was a custody case, and neither parent had a better claim than the other. The only factor that might have given the mother in Palmore a stronger claim than the father was that the case involved a request to modify custody, not an initial custody decision. But it is not clear that that fact ought to have constitutional weight.

Second, Palmore's methodology was notably obscure. The Court started off by stating the usual "compelling state interest" test. Next it conceded that "granting custody based on the best interests of the child is indisputably a substantial governmental interest." \textit{Id.} at 433. But then it quickly concluded that the possible injury to the child was not a permissible consideration. What happened to the compelling-state-interest test? The point of that test is presumably to make otherwise impermissible considerations permissible where the government interest is strong enough. If, on the other hand, considering this kind of injury to the child is flatly and always impermissible, why open by invoking the compelling-state-interest test?

\textit{Palmore} might be read as being about the possibility that social prejudice may distort a court's attempt to gauge accurately the effect of racial hostility on a child. The Court, for instance, quoted a passage which speaks of officials "bowing to the hypothetical effects of private racial prejudice." \textit{Id.} (quoting Palmer v. Thompson, 403 U.S. 217, 260–61
How would my test work out in Quiner? What should the trial court have done? Unfortunately, we know far too little about the case to answer those questions thoroughly. However, we can say something. In particular, several of the factors the trial court looked to do seem to me to count against Mrs. Quiner.

First, living as separately from the world as John Edward Quiner was expected to do might well, as the trial court noted, limit his chances of prospering in the world, and could actively reduce his happiness. For one thing, as Leo Pfeffer wrote, "It is a plausible supposition that children reared in unpopular, extreme or fanatical faiths are likely to be less happy and less well adjusted socially than those brought up in the faiths accepted by the community." To be sure, this is rather a speculative argument. But neither is it implausible to think, for example, that children made to isolate themselves every day in school and out will have troubled and anxious relations with other children.

(1971) (White, J., dissenting)). Such a reading would have some real plausibility at least in social-policy terms. The difficulty with this reading, though, is that the Court ultimately does not seem to have intended it. Thus, for instance, the opinion closed by saying that the "effects of racial prejudice, however real, cannot justify" this racial classification. Id. at 434.

Third, it is not entirely clear that the child's best interest ought to have been ignored in Palmore. Assuming, as the Court seems to have done, that the trial court was right about the injury to the child, is it proper to make that child suffer to promote the general social principles with which the Court is concerned? The Court noted that it had earlier overturned a statute prohibiting Blacks from buying houses in white neighborhoods. The statute purported to "promote the public peace by preventing race conflicts." Id. (quoting Buchanan v. Warley, 245 U.S. 60, 81 (1917)). But the damage that statute was intended to prevent was of a relatively diffuse and general kind which would be suffered by society at large. The injury in Palmore was a relatively concrete and specific injury to be suffered by an identifiable person, and, worse, a person too young to protect herself easily or possibly even to understand what was happening to her.

In the end, perhaps Palmore is best understood as resembling Shelley v. Kraemer, 334 U.S. 1 (1948). Shelley was a response to the special history of race in American life. It has survived despite its severe conceptual difficulties because it was such a response. ("Writing for the Court, Chief Justice Vinson did not satisfactorily articulate the reasoning that underlay Shelley's holding; courts and commentators have characteristically viewed Shelley with suspicion." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1711–12 (1988)). But it has generally not been extended.


40. Some courts that have considered this kind of situation have argued that it is positively beneficial. As one court remarked in a Jehovah's Witnesses case: "We are not unaware that deviation from the normal often brings ridicule and criticism. We reject, however, the notion that it is necessarily the basis for implanting neuroses. Criticism is the crucible in which character is tested. Conformity stifles the intellect fathering decadency." Smith v. Smith, 367 P.2d 230, 233 (Ariz. 1961).
Somewhat more substantially, we might legitimately worry that John Edward would receive less education than he needed to prosper in the world. Perhaps if he chose to live outside of the world, his modest education might not concern us. But eventually he might well abandon his mother's beliefs. To be sure, the Court rejected this kind of argument in *Wisconsin v. Yoder*. But there the Court had special reasons (however convincing) to believe that the substitute education the Amish offered their children would suffice.

Second, the trial court may have had some reason to fear that Mrs. Quiner would give too little attention to her child, since she was apparently devoting a great deal of time to religious activities. That court also reasonably feared that she would have to separate herself from her son if he failed to join the sect when that became possible (which could be as early as five or six years old) or if he left it. It is hardly unheard of for religions to ask much of their adherents: "Verily I say unto you, There is no man that hath left house, or parents, or brethren, or wife, or children, for the kingdom of God's sake, Who shall not receive manifold more in this present time, and in the world to come life everlasting." But a secular court may still ask whether such devotion is good for the abandoned brethren, wives, and children.

The third, and I think most consequential, problem with Mrs. Quiner's claim was the possibility that, had the child lived with her, he might easily (probably) have been alienated from his father, a result we may reasonably think would injure the boy (and, for that matter, the father). Perhaps, as the appellate court thought, this was not a certainty, but the dissent's concern is reasonable enough: "Appellant's suggestion that her son could 'love and obey' his father although unable to eat with him and although taught constantly to be on guard lest

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42. In addition, as Pfeffer also observed, "Our culture values literacy high and the community has a strong interest in the development of an educated citizenry, and therefore a correspondingly strong interest that children shall not be brought up in a religion which precludes participation in secular education." Pfeffer, supra note 39, at 339 (citations omitted).
43. The dissent noted that Mrs. Quiner testified that she devoted "six nights per week and practically all day every Sunday" to her religious observances. Quiner, 59 Cal. Rptr. at 533 (Herndon, J., dissenting). The dissent suggested that that schedule "leaves practically no time for her to spend in the normal activities of mother and child in training, recreation and otherwise attending to her child's needs." Id.
44. *Id.* at 522 & n.3 (trial court opinion).
he be contaminated by his father's spiritual uncleanliness, is semantically a contradiction in terms, and emotionally, an esoteric subtlety far beyond the grasp of a mind more mature than this unfortunate child's."\textsuperscript{45}

Along similar lines, the trial court might legitimately consider, as courts regularly do, how willing each parent was to make visitation easy for the other. As the dissent noted, both Mrs. Quiner and her apparently strong-minded father (with whom Mrs. Quiner was living) "candidly admit that [Mr. Quiner] would not be welcome in their home and that they would prevent all visitation if they were legally permitted to do so."\textsuperscript{46} In view of the intractable difficulty of enforcing visitation rights and of the determination of some custodial parents adamantly to impede visitation, there is something to be said, \textit{ceteris paribus}, for giving custody to the parent most likely to cooperate with visitation.

All this being said, however, it does not ineluctably follow that Mr. Quiner should necessarily have won. As the appellate court insisted, there was no way of knowing to a certainty just how Mrs. Quiner would in fact have acted over the years had she obtained custody. More significantly, there is much we do not know about the two parents. Most particularly, we know little about the quality of the emotional relations between each of them and their son. Those relations are ordinarily thought critical to any custody claim, and we would need to know much more about them before we could reach a sustainable result in \textit{Quiner}. Mrs. Quiner's ties to her son and his to her might very well have easily outweighed all the supposed secular drawbacks of her religious views.

In defending the rule I propose and in essaying some comments on the correct result in \textit{Quiner} I do not mean to suggest that it will be easy for a court to evaluate fair-mindedly the lives members of other-worldly religions lead. The trial court in \textit{Quiner} was clearly dubious and perhaps uncharitable about Mrs. Quiner's household. But hear from another witness, Edmund Gosse, who wrote a wonderful memoir of his youth among the Plymouth Brethren:


\textsuperscript{46} 59 Cal. Rptr. at 521 (Herndon, J., dissenting).
It is so generally taken for granted that a life strictly dedicated to religion is stiff and dreary, that I may have some difficulty in persuading my readers that... we were always cheerful and often gay.... My Father and Mother lived so completely in the atmosphere of faith, and were so utterly convinced of their intercourse with God, that, so long as that intercourse was not clouded by sin, to which they were delicately sensitive, they could afford to take the passing hour very lightly. They would even, to a certain extent, treat the surroundings of their religion as a subject of jest, joking very mildly and gently about such things as an attitude at prayer or the nature of a supplication...

... The mere fact that I had no young companions, no story books, no outdoor amusements, none of the thousand and one employments provided for other children in more conventional surroundings, did not make me discontented or fretful, because I did not know of the existence of such entertainments. In exchange, I became keenly attentive to the limited circle of interests open to me.47

Neither, on the other hand, should the life of other-worldly sects be romanticized. Gosse concludes his book in a much more anguished tone:

Let me speak plainly. After my long experience, after my patience and forbearance, I have surely the right to protest against the untruth (would that I could apply to it any other word!) that evangelical religion, or any religion in a violent form, is a wholesome or valuable or desirable adjunct to human life.... It sets up a vain, chimerical ideal, in the barren pursuit of which all the tender, indulgent affections, all the genial play of life, all the exquisite pleasures and soft resignations of the body, all that enlarges and calms the soul, are exchanged for what is harsh and void and negative.48

In sum, there is no easy way out for us when we confront cases like _Quiner_. Courts must somehow resolve custody

48. _Id._ at 246.
disputes between divorcing parents, even when those disputes involve a parent's religious beliefs. We cannot specially defer to one parent’s religiously motivated preferences without illegitimately depreciating the other parent’s preferences, however motivated. We are thus thrown back on the secular standard by which we judge all custody disputes—the best interest of the child. As we have seen, the child’s best interest will sometimes be affected by parental behavior which has religious roots. This should not deter courts from considering how that behavior will affect the child. Courts doing so will not, however, be evaluating the parent’s religious beliefs; they will be evaluating only the secular effect of those beliefs. Such courts will be swayed by things seen and unseen. Some of them will no doubt judge the behavior of the unworldly harshly; others will no doubt judge it sentimentally. But I can think of no satisfactory rule that might prevent them from doing so. What we must work toward here, as elsewhere in the law of child custody, are courts that try as diligently and earnestly as possible to encourage parents to agree on their own to custody arrangements they would find satisfactory and that try, when all else fails, to decipher the child’s best interests as thoughtfully and decently as possible.\footnote{In brief, I am saying that we will have to rely more than we might like on judicial discretion. For an extended, if studiously guarded, defense of judicial discretion in custody decisions, see Carl E. Schneider, \textit{Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard}, 89 Mich. L. Rev. 2215 (1991).}

III.

We have been looking at cases in which courts have tended, with some exceptions, to labor to avoid examining religiously motivated behavior. We now turn to cases in which they almost seem eager to do just the opposite. These are cases in which courts try to regulate conflicts over religion between the custodial and the non-custodial parent after divorce.

We will begin our discussion of this problem by examining \textit{LeDoux v. LeDoux}.\footnote{452 N.W.2d 1 (Neb. 1990).} We will do so because it is one of the most sympathetic cases for judicial intervention to settle a post-divorce conflict over religion. It presents a regularly recurring problem—the possibility that a child is being injured by each parent's insistence on practicing and teaching his or her own religion.
Edward and Diane LeDoux were married in 1977 in a Roman Catholic church. Their children, Andrew and Peter, were baptized as Catholics, and Andrew attended a parochial school. In 1985, however, Mr. LeDoux became a Jehovah's Witness. In 1987, Ms. LeDoux began proceedings which led to a divorce. She was awarded custody of their children. The trial court found "that exposing the minor children to more than one religious practice would have a deleterious effect upon the minor children." Mr. LeDoux thus received a court order which directed him "not to '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 religious teachings espoused by Mrs. LeDoux being the Catholic religion by which the children are being raised.'" The Nebraska Supreme Court found "ample evidence to conclude that the stress Andrew was experiencing posed an immediate and substantial threat to his well-being," and it thus affirmed the trial court's order.

The court had its reasons. They rested primarily on the ground that Andrew was suffering from the tension between his parents over religion. The principal evidence for that theory came from "Dr. Joseph L. Rizzo, a certified clinical psychologist who had counseled Andrew." He "indicated that conflicts in the Catholic and Jehovah's Witnesses religions were an obvious contributing factor to the stress felt and manifested by Andrew. Dr. Rizzo testified that Andrew was quite uncomfortable and fearful about visits with his father." After each of several visits, "Andrew [then about six] wet himself and had the equivalent of a nightmare." The psychologist felt that "the religious aspect would be a part of it." He also believed "that Andy is diagnosable of having a maladjustment problem currently. Yes, he is under stress. Yes, it is serious. It is not the most serious, but it is significant."

51. Id. at 4.
52. Id. at 4–5.
53. Id. at 5.
54. 452 N.W.2d at 3.
55. Id.
56. Id. at 4.
57. Id. (quoting testimony of Dr. Rizzo).
58. 452 N.W.2d at 4 (quoting testimony of Dr. Rizzo).
In short, there was in *LeDoux* a real argument that Andrew was directly suffering from the effects of Mr. LeDoux's assertion of his interest in teaching his child his religion. The court in *LeDoux* was surely correct in believing that at some point a parent's interests—even though they are interests in religion—are outweighed by the interests of her children. But what standard ought to be used to identify that point?\(^5\)

Courts deciding cases like *LeDoux* tend to use the same standard in these disputes that they use in custody decisions, namely, the best-interest standard. That standard is, of course, quite tolerant of judicial intervention, since it seems to invite courts to try to optimize the child's circumstances. As I argued earlier, courts should be more willing to intervene in divorced families than in intact families: We assume parents in the latter families work together for the good of their child. We are afraid that in the former families the parents' dislike for each other may distract them from the child's good and may make them willing to use the child to hurt each other. To put the point differently, we accord parents rights because we assume they are the best decision-makers for their own children. But people in and after a divorce are often wrapped up in a battle with each other, and they may only too easily lose sight of their children's interests. Thus using a relatively accommodating standard for judicial intervention in post-divorce families has some appeal.

The obvious alternative standard is the one used in child abuse and neglect cases, which in recent years has tended to become a fairly high standard, thus, making intervention more difficult. This standard, however, can let go by some pretty clearly harmful things. This may be tolerable under our ordinary assumptions about "intact" families, but it may seem less wise when we are dealing with post-divorce families.

Nevertheless, the court's order in *LeDoux* seems to me problematic. Its problems begin to emerge as we examine its basis. In part, the order appeared to rest on the conventional doctrine that the custodial parent controls the child's religious upbringing. That doctrine may be a good general principle, particularly against the claims of anyone other than the non-custodial parent. It certainly reflects the reality that the

\(^5\) Note, however, that courts often intervene without bothering to state a standard.
custodial parent will have the most contact with and control over the child and thus be able to exert the most influence on the child's religion.

However, I think that the doctrine is not good policy if it means the custodial parent (again, usually the mother) can recruit judicial power to prevent the non-custodial parent from seeking to influence his child's religious views even where that effort is not clearly causing acute harm. Here, as in the category of cases we just discussed, the interests of both parents need to be accommodated. Even after divorce, the non-custodial parent (for simplicity's sake, the father) continues, and presumably should continue, to have an interest in his child and to be responsible for its support. It is thus hard to see why his interest in the child's religion (which we outlined above and which may be of urgent personal importance to him) should end with the marriage.

Not only does the father's interest argue against facile judicial intervention in religious disputes after divorce. So does the standard principle that courts should avoid making decisions about families where they can be avoided. Courts must make decisions about custody because the child's family cannot make a necessary decision. On the other hand, questions about what the non-custodial parent does during visitation regarding religion may not need to be resolved. And where they need not be, they should not be.

Thus, I believe that the very accommodating best-interest standard should be used only to decide who should have custody and should not be used in deciding whether a court should resolve a dispute over religion between divorced parents. The best-interest standard is always troublesome because it ignores parental interests; it is particularly troublesome here because it is likely to ignore the non-custodial parent's interest. It has often been criticized for its imprecision and because of the discretion it gives judges; here, it makes intervention markedly too easy.60

In the end, I am not sure that a really good standard can be articulated, and perhaps the best we can hope is to cultivate a judicial attitude. I would prefer that that attitude be one of great reluctance to try to settle disputes over religion after custody decisions have been made. If I were to adopt a

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60. For a lengthy discussion of the problems with and the usefulness of the best-interest standard, see Schneider, supra note 49.
standard, it would be at least as restrictive of intervention as that in *Felton v. Felton*.\(^61\) *Felton* seems to require some kind of "'factual showing, not mere conclusions and speculations," of a substantial injury to the child.\(^62\)

I favor a reluctance to intervene because I suspect that in these cases the best may be the enemy of the good, that the judicial eagerness to prevent all harms to children after divorce may lead courts to intervene where intervention is unwise and unprofitable. Let me try to amplify the reasons for my doubts about intervention. First, courts are poorly situated to gather, analyze, and evaluate evidence about such conflicts. To start with, much depends on evaluations of people's psychological states. We might resist such evaluations for several reasons. For one thing, much of the evidence is likely to be from psychologists and psychiatrists, whose profession may not provide a strong enough basis for any such judgments and whose services as expert witnesses can too easily be acquired. Furthermore, as a gentle reference to Sigmund Freud should suggest, one might also suspect that some psychiatrists are professionally unsympathetic with religion. In these religion cases, at least, one too often encounters signs of such an attitude. In one case, for example, the Jewish father had remarried and become "extremely devout and orthodox."\(^63\) However, the psychiatrist dismissed his desire that his daughter be brought up Jewish as simply "predicated on an unconscious selfish motivation."\(^64\) Similarly, the psychologist's comment in *LeDoux* is disquieting: "'There's no doubt in my mind that Andy is very angry with his father and that truly the issue of religion could become an unnecessary stumbling block.'"\(^65\) Unnecessary on what principle?

In addition, evaluations of people's situations in these cases seem to evoke some rather casual, even cavalier, "common sense" reactions. Consider, for instance, the concurrence's view in *LeDoux*: "I do not see how one parent with one set of religious beliefs and one parent with a different, conflicting


\(^{62}\) *Id.* at 611 (quoting appellate court opinion).


\(^{64}\) *Id.*

\(^{65}\) *LeDoux*, 452 N.W.2d at 9 (Shanahan, J., dissenting) (quoting testimony of Dr. Rizzo). I see such language and the judicial susceptibility to it as quite consonant with the trends away from moral and toward psychologic discourse that I describe in Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).
set of religious beliefs can raise their minor children with full training and instruction in each parent's beliefs without reducing their minor children to a totally confused, psychologically disastrous state."\textsuperscript{66} Similarly confident, sweeping, and suspect is the assurance of the court in yet another of these cases: "[I]t is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects."\textsuperscript{67}

In short, I think it will often be hard for a court to ascertain with real precision the psychological nature of a dispute between divorced parents and thus hard for a court to deal with such a dispute well. Consider \textit{LeDoux}. It was not and possibly could not have been clear there that religion was the cause of the tensions between the parents or that reducing the exposure of their child to one religion would end the problem. Was Andrew's being "very angry" with his father due only to the conflict over religion? If he was angry that his father's religious conversion had "caused" the divorce, would that anger have dissipated had his father obeyed the court's order? Was Andrew simply reflecting his mother's anger at Mr. LeDoux? Was Ms. LeDoux angry at her ex-husband because of his religious views, because he was teaching their children those views, because those views led to the divorce, or because of reasons quite unrelated to his views? Would that anger have dissipated had Mr. LeDoux obeyed the court's order? Could Andrew's distress have been alleviated in some less drastic way?\textsuperscript{68}

No doubt the psychologists and courts are right in saying that the children in these cases are or soon might be in pain. But some pain is inherent in being a person, in being a child,

\textsuperscript{66} 452 N.W.2d at 6 (Grant, J., concurring).
\textsuperscript{68} As to some of these last questions, the following may be relevant: "On cross-examination, Dr. Rizzo admitted that Diane LeDoux could have imparted some of her strong feelings and objections to [Mr. LeDoux's] religion to Andrew, 'but I think also clearly some of this could be childlike misperceptions on Andy's part himself.'" \textit{LeDoux}, 452 N.W.2d at 4 (quoting testimony of Dr. Rizzo).

Some courts argue that conflict between the parents over religion may actively benefit the child. One such court wrote, "There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child." Felton v. Felton, 418 N.E.2d 606, 607–08 (Mass. 1981). Perhaps this is right. However, to rely on this argument in cases like \textit{LeDoux} would be to substitute a rather tenuous hope for some future happiness for the certainty of present unhappiness.
and in growing up. Parents always do things that make children unhappy, and judging by the prevalence of neurosis, always do things that have lasting harmful effects on children. It can be difficult for a court to tell when things have gone beyond that irreducible baseline and to decide what should be done when they have.

Second, even if a court correctly analyzes a child's plight, we may doubt that it will often be able to remedy it. This brings us to a classic and chronic dilemma of family law—the enforcement problem. In these cases, we have a confluence of two core enforcement-problem areas—religion and family life. People have particularly strong motives for following their own preferences in religion, and it is particularly problematic for government to monitor what happens in the privacy of families. Courts will thus often fail to persuade parents who disagree over religion to do what the judge asks. Take those problems in the context of *LeDoux*. How could a court reliably discover exactly what Mr. LeDoux was telling his children about religion? And even if he scrupulously obeyed the literal terms of an order, he and Ms. LeDoux might simply shift the field of their conflict, so that the harms that once came from a battle between parents over religion were instead inflicted in other forums.

In addition, courts will often find themselves unable to formulate satisfactory remedial orders. Recall the order in *LeDoux*, which forbade the father to expose the children to religious practices or teachings inconsistent with Catholicism. Such an order is so rife with possibilities for misunderstanding and varying interpretation that the court seems sadly optimistic in thinking that “[b]ecause appellant has had previous exposure to the Catholic religion, he should not have difficulty in recognizing those beliefs of the Jehovah's Witnesses and Catholic religions which are conflicting.”[^69] Nor would it be a welcome task for a court to try to decide when Mr. LeDoux had violated its order and thus subjected himself to penalties for contempt. Such a decision would necessarily require the court to undertake just those doctrinal and theological inquiries which courts cannot and may not resolve.

Even if all these impediments could be overcome, we would still want to know whether the benefits of judicial activity outweigh its costs. These costs are numerous and onerous.

[^69]: *LeDoux*, 452 N.W.2d at 6.
The financial and emotional burdens of litigation are too well known to need description. This kind of litigation intrudes painfully on the privacy of people whose privacy has already been woefully breached. And it is often said that, especially in our irredeemably adversary system of justice, litigation exacerbates the relations between the parties. In *LeDoux*, for example, the court's order to a father that he not talk to his children about or even expose the children to what was most important to him might only intensify his hostility to his wife, his anxiety over his children, and his bitterness with the legal system.

Quite apart from these practical problems with restraining non-custodial parents in their dealings with their children are the questions about so directly interfering with their interests in practicing and preaching their religion. These concerns are illustrated by cases like *Overman v. Overman*,70 where a court required a non-custodial father to take his son to catechism, and by *Pardue v. Pardue*,71 where a court threatened to change the visitation days of a father who would not take his children to the church of their mother's choice.

I am not suggesting that these are easy cases. Children will sometimes suffer because of their parents' disputes over religion. But we live with such disputes and such consequences between married parents all the time. More important, I have tried to suggest a number of reasons we might doubt that judicial attempts to mediate those conflicts will be successful and might suspect that they will be harmful. One might object at this point that there is a tension between my positions on custody and post-divorce cases, and I would not deny it. My objections to making decisions about a child's welfare in the latter cases will apply as well to custody decisions. But there is a crucial difference between the two categories: Courts *have* to make custody decisions, and to make them as well as possible. Courts do not have to iron out conflicts between custodial and non-custodial parents, unless those conflicts provoke behavior amounting to child abuse. Courts must do what courts must do; they should avoid doing what they can do only badly.

Now that we have completed our brief survey of these two problems in the relation of law and religion, a few closing words are in order. A besetting fault of judicial and scholarly attempts in this area is their conviction that these problems must have some kind of adequate answer. But, like much else in law and life, these issues resist satisfactory solution. Let me speculate briefly about why.

At the beginning of our dilemma is the fact that the dispute between the spouses is an especially recalcitrant one. They are arguing over their own religion and over their children, two of the things most central to their lives and about which they will feel most adamantly. Further, most Western religions, and particularly those typically involved in these cases, stake an exclusive claim to truth and discountenance compromise. It is these things that the parties really care about, that they flatly cannot agree about, that the court may not directly address, and could not solve even if it could address them.

Another quandary lies in the fact that, ultimately, a secular court cannot fully accommodate the desires of someone who wholly rejects secular standards. A court is an instrument of this world, and will be among the things rejected by someone who rejects the things of this world. Such a person is simply using standards which no secular court can adopt, and often the best such a court can do is to strive to be as understanding and accommodating as possible while not compromising the legitimate interests of the other people who are involved in the dispute.

Yet a further perplexity is that these cases are essentially about the interests of children. When courts deal with adults, they rely on the people most affected by the court's decision to define and assert their own interests. Where children are concerned, however, such reliance is generally not possible, because they are too young to determine their own interests. Sometimes this awkwardness is lessened by the relative ease of deciding what the child's interest probably is. It is reasonably uncontroversial to assert, for instance, the child's interest in not being beaten or molested. But in the cases we have considered, the dispute centers around the child's spiritual interests, interests the state is wholly incompetent to define. Normally, of course, we solve this problem by
allowing children's parents to identify those interests. Here, however, their parents disagree precisely on that point.

This leads us to a last puzzle, a puzzle characteristic of rights discourse in family law.\textsuperscript{72} Both the child's parents claim a right to make decisions for their child. And the children arguably have some kind of right to assert their own preferences. Yet, while our vocabulary of rights has ample ways of resolving conflicts between an individual right-holder and the state, it has no way of resolving such conflicts between rights holders. Yet so deeply embedded is rights thinking in the American psyche that the first thought of courts and commentators is to try to cram every legal problem into a rights category. Thus Mrs. Quiner's claims are automatically analyzed in rights terms, with the consequence that Mr. Quiner's interests—and even rights?—are quite lost in the shuffle. And thus Ms. LeDoux's claims are automatically analyzed in terms of the prerogatives of the custodial parent, at whatever cost to Mr. LeDoux's not dissimilar interests.

We should not, then, expect to find any bright-line rule (of the kind announced in Quiner) that will reliably guide courts to correct results in these painful cases. If we soften some of the rigidities of rights thinking in this area, we may find it easier to cope with what is really going on in these cases. And that will be all to the good. But we will still find ourselves relying on fallible judges to make imponderable decisions about tragic choices.

\textsuperscript{72} See Schneider, supra note 21, at 157–58.