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Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights

James G. Dwyer†

The scope, weight, and assignment of parental rights have been the focus of much debate among legal commentators. These commentators generally have assumed that parents should have some rights in connection with the raising of their children. Rarely have commentators offered justifications for attributing rights to persons as parents, and when they have done so they have failed to subject those justifications to close scrutiny. This Article takes the novel approach of challenging parental rights in their entirety. The author explores the fundamental questions of what it means to say that individuals have rights as parents, and whether it is legitimate to do so. In defining existing parental rights, the Article focuses on parental rights in religious contexts, because it is in this arena that the notion of parental rights takes on its strongest form. The author contrasts parental rights with other individual rights that receive protection under our legal system. He concludes that the claim that parents should have child-rearing rights is inconsistent with certain principles underlying all other individual rights recognized in our society. After demonstrating this theoretical shortcoming of the notion of parenting rights, the Article challenges the soundness of the commonly advanced justifications of parental rights. The author concludes that all of the proffered justifications for parents' rights are unsound, and recommends a substantial revision of the law governing child-rearing. The author proposes that children's rights, rather than par-

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ents' rights, serve as a basis for protecting the legal interests of children. The law should confer on parents only a child-rearing privilege, limited to actions that do not harm the child's interests. Such a privilege, coupled with a broader set of children's rights, satisfies parents' legitimate interests in child-rearing while providing children with a more appropriate level of protection than they receive under the current legal approach.

INTRODUCTION

Parents' rights play a prominent role in any discussion of the law relating to child-rearing. For those who would have the State use its power and resources to improve the lives of children, parental rights constitute the greatest legal obstacle to government intervention to protect children from harmful parenting practices and to state efforts to assume greater authority over the care and education of children. Legal commentators, whatever their views on the proper distribution of child-rearing authority between parents and the State, universally assume that parents should have some rights with respect to the raising of their children.¹ They debate only what the scope of those rights should be,² how to balance them against state interests or children's interests and rights,³ who should have them,⁴ and when people who have them should lose all or some of them.⁵

1. This Article deals exclusively with child-rearing rights—rights to direct the life of a child in one's custody—which are distinct from child-bearing rights—rights to conceive and give birth to a child. The latter raise discrete issues in addition to some of those discussed below in relation to child-rearing rights. See, e.g., Onora O'Neill, *Begetting, Bearing, and Rearing*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 25 (Onora O'Neill & William Ruddick eds., 1979) [hereinafter *HAVING CHILDREN*]. Custody rights also differ somewhat from child-rearing rights. Custody rights concern entitlement to formal recognition as the principal child-rearer, rather than entitlement to engage in particular practices or to make particular decisions regarding a child's upbringing. Custody rights are often at issue in divorces and in abuse or neglect proceedings. They are also at issue when biological parents seek to reclaim children from adoptive parents, as happened recently in highly publicized cases in Iowa, Illinois, and Florida. See *infra* note 20. The arguments of this Article apply equally against claims of parental custody rights.

2. See, e.g., Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 526-29 (1989); Paul Schwartz, Note, *Parental Rights and the Habituation Decision for Mentally Retarded Children*, 94 YALE L.J. 1715 (1985).

3. See, e.g., Elizabeth J. Sher, Note, *Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157 (1983); Ronald A. White, Note, *Divorce: Restricting Religious Activity During Visitation*, 38 OKLA. L. REV. 284 (1985).

4. See, e.g., John L. Hill, *What Does It Mean To Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Kathryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405 (1988); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209 (1978); Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts*, 27 J. FAM. L. 585 (1988-89).

5. See, e.g., Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983); David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992); Nancy B. Shernow, Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677 (1988).

Those who do pause to consider why parents should have any child-rearing rights at all uniformly point to justifications that they believe to be compelling, but fail to subject those supposed justifications to careful scrutiny. The usual justifications for parental rights fall into three categories, based on the interests they invoke: 1) children's interests in intimate relationships and in receiving care from those who know them best and care most about them; 2) parents' interests in intimate relationships and in molding a new life in accordance with their ideals; and 3) society's interests in pluralism and in the family as an essential building block of democratic culture.⁶

This Article takes a step back from debates over the scope, balancing, and attribution of parental rights to ask at a fundamental level what it means to say that individuals have rights as parents, and whether it is legitimate to do so. As a starting point, I closely examine judicial treatment of parental child-rearing rights and contrast this with judicial treatment of other legal rights. Through this analysis, it becomes apparent that the claim that parents should have child-rearing *rights*—rather than simply being *permitted* to perform parental duties and to make certain decisions on a child's behalf in accordance with the *child's* rights—is inconsistent with principles deeply embedded in our law and morality. Specifically, there is in our legal culture an inherent limitation on the permissible scope of individual rights, confining them to protection of a right-holder's personal autonomy and *self-determination*. This limitation on legal rights embodies the moral precept that no individual is *entitled* to control the life of another person, free from outside interference, no matter how intimate the relationship between them, and particularly not in ways inimical to the other person's temporal interests.

The incongruity between parents' rights and established principles regarding the nature and inherent limitations of individual rights compels us to seek other moral and/or legal principles to support and legitimize this anomalous set of rights. Absent such justification, we might be forced to conclude that parents' rights, like the plenary rights of husbands over their wives in an earlier age, ultimately rest on nothing more than the ability of a politically more powerful class of persons to enshrine in the law their domination of a politically less powerful class, and on an outmoded view that members of the subordinated group are not persons in their own right. Thus, after demonstrating the theoretical difficulties associated with the

6. See Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1017 (1988). Commentators have also advanced arguments from natural law, see, e.g., Mary V. Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393 (1970), but these are becoming increasingly less common and are "not very well received today," McCarthy, *supra* at 984. I do not directly address natural law arguments in this Article, but I do consider whether states should give deference to parents' religious views of their parental role. Nor do I directly address the view that children are the property of their parents. Almost no one seriously maintains this position today, although the language of some court decisions may still reflect such a view. William Ruddick, *Parents and Life Prospects*, in *HAVING CHILDREN*, *supra* note 1, at 123, 127.

notion of parents' rights, this Article challenges the empirical and normative premises underlying the justifications typically offered in support of parental rights, and the reasoning that proceeds from these premises.

Concluding from this analysis that all of the proffered justifications for parents' rights are in fact unsound, I recommend a substantial revision of the law pertaining to child-rearing. I propose that children's rights, rather than parents' rights, be the legal basis for protecting the interests of children.⁷ I propose further that the law confer on parents simply a child-rearing *privilege*, limited in its scope to actions and decisions not inconsistent with the child's temporal interests. Such a privilege, coupled with a broader set of children's rights, is sufficient to satisfy parents' legitimate interests in child-rearing.⁸

As this proposal suggests in making the case against parental rights, I draw importantly on the distinction between a right and a privilege. In doing so, I follow Wesley Hohfeld's seminal work on the description of legal relations.⁹ Hohfeld urged the legal community to confine the use of the term "right" to what he called "claims," which entail corresponding duties in other persons of non-interference (a negative claim) or assistance (a positive claim). Thus, a parent has a "negative claim-right" against the State with respect to a given action when the State is under a duty owed to the parent not to interfere with the parent's performance of that action. A parent has a "positive claim-right" against the State when the State is under a duty owed to the parent to provide some form of assistance to the parent. The parental rights of primary concern in this Article are parents' negative

7. Among the most important of these interests is a child's interest in enjoying an intimate relationship with her parents, free from any state intervention that would entail greater costs than benefits for the child. It is widely believed that state intrusion into the family in and of itself takes a significant psychological and emotional toll on the child. Goldstein, Freud, and Solnit emphasized this consideration in their influential work on legal advocacy on behalf of children. JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). Other scholars have contended that these writers overstated and failed to support adequately their concern about state intervention. See, e.g., Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1762-66 (1987); Michael S. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 667-71 (1980); see also Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 589-92 (1992) (citing evidence of correlation between family isolation from the community and child abuse). In addition, little if any consideration or study has been given to the possibly beneficial effects of state intervention on the parent-child relationship—for example, greater respect by parents for the children in their care and a greater appreciation by both parents and children that parents are not entitled to do whatever they want to their children. This Article assumes that state intervention in the family is potentially costly for children, and that this too must be considered in deciding whether the State should intervene to protect a child from harmful parental practices and decisions.

8. Part III suggests a principled means for distinguishing between legitimate parental interests and morally illegitimate parental desires. In brief, the former are consistent with the child's temporal interests, while the latter entail the sacrifice of the child's temporal interests in order to satisfy the parents' wishes. Parts II and III demonstrate that even legitimate parental interests cannot properly give rise to parental child-rearing rights.

9. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-36 (1913).

claim-rights against state interference in their child-rearing practices and decision-making.¹⁰

Hohfeld rejected use of the term "right" to refer to what he called a "privilege," which is simply the absence of any duty to refrain from a given activity. If, for example, I allow my neighbor to borrow my shovel, she then enjoys a privilege to take and use it; she is no longer under a duty to me not to take and use my shovel. This privilege does not entail any claim against me should I interfere in her use of the shovel or take it away from her.¹¹

Similarly, a parental privilege, unaccompanied by any parental rights, would merely legally *permit* parents to engage in the types of behavior normally associated with child-rearing, e.g., housing, feeding, clothing, teaching, or disciplining a child. It would thus simply exempt parents from

10. Judges and, to a much greater extent, the general public sometimes use the term "right" very loosely to refer to anything that a person is not prohibited from doing (i.e., privileges) as well as to refer to Hohfeldian claim-rights. As the analysis below reveals, the "rights" that the courts have accorded parents clearly include claim-rights and not merely privileges. If, by "parental rights," courts and the public meant nothing more than a legal privilege to carry out parenting responsibilities, there would be less reason to object to the concept. However, insofar as the term "right" conveys a sense of entitlement, its use would remain morally problematic in connection with child-rearing authority. See discussion *infra* Part II.

11. A few additional terms also warrant clarification. The term "liberty" frequently appears in constitutional interpretation. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 793 n.2 (1986) (White, J., dissenting) ("[P]arents have a fundamental liberty to make decisions with respect to the upbringing of their children."), *overruled in nonrelevant part* by *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (noting that the "right to a fair trial is a fundamental liberty"); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) ("[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."). Judith Jarvis Thomson explains that what we commonly mean by a "liberty" is a combination of a privilege and a negative claim-right. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 53-54 (1990). Thomson criticizes Hohfeld's characterization of a liberty as identical to a privilege, based on the implausibility of thinking that when we say someone possesses a liberty to do something, such as travel to another state, all we mean to say is that that person is under no duty not to travel to the other state. We also mean, Thomson insists, that other persons are "under a duty toward him to not interfere with his doing of it in some appropriately chosen set of ways." *Id.* Thus, for example, if a parent has no legal duty to refrain from teaching his child creationism, and the State has a duty not to interfere with his doing so, then the parent possesses a liberty to teach his child creationism.

Hohfeld termed a "power" the legal authority to modify, waive, or abolish a claim-right or privilege. One exercises a power by, for example, releasing a party from a contractual obligation and thereby abolishing one's claim-right against that party. An "immunity," on the other hand, is a protection against someone else changing the nature of one's own claim-rights or privileges. It entails the lack of a power in others with respect to one's claim-rights and privileges. The First Amendment, for example, accords individuals an immunity which prevents Congress from abolishing their liberty to practice their religion.

Finally, packages of claim-rights, privileges, powers, and/or immunities will often attach to persons with respect to a given activity. For example, typically when a person possesses a claim-right against others interfering in her doing some act, she also enjoys the privilege of doing that act—i.e., she is not under a duty to refrain from that act—and she may also enjoy the power to waive that claim-right and an immunity against others extinguishing the claim-right and privilege. For simplicity of exposition, the term "right" is sometimes used in this Article to refer generically to such packages that have a claim-right at their core.

certain duties adults are under with respect to children generally.¹² The privilege would not give parents themselves any legal claims against state efforts to restrict their behavior or decision-making authority. Under the legal regime I propose, such claims would repose only in the child. Parents would be authorized to act as agents for the child and to assert the child's rights against inappropriate state interference with child-rearing practices. From a moral perspective, a parental privilege would not convey or reflect a sense of entitlement to direct a child's life, but instead would represent a benefit contingent upon the fulfillment of attendant responsibilities.¹³

It is important to recognize that this alternative approach would *not* entail doing away with the institution of the family in favor of collectivized child-rearing.¹⁴ Nor would it transfer to the State vastly greater control over child-rearing or enable the State to intervene whenever social workers think a parent is performing less than optimally.¹⁵ Finally, the elimination of parental rights would not entail the "liberation" of children from all parental governance and discipline. If it is true, as virtually everyone believes, that children require some governance and discipline for healthy development, it would be senseless and improper to attribute to children rights against all forms of parental control, or to exclude appropriate discipline from the scope of duties parents owe to their children.

Abrogating parents' rights would, however, substantially alter the way that courts analyze conflicts between parents and the larger community over child-rearing. Rather than balancing parents' rights against state interests in the care and education of children, as presently occurs, judges would decide these conflicts solely on the basis of children's welfare interests. Doing so would be likely, in turn, to alter the precise limits of parental freedom and authority and to shift the boundary between permissible and impermissible state interventions.

12. These duties are embodied in laws such as those prohibiting kidnapping. In the present legal environment, such duties also arise as the corollary to the exclusive right of parents to perform child-rearing functions free from interference by other adults. In the legal regime advocated here, these duties would instead be a corollary to the rights of children to be under the continuous care of a parent, free from interference by other adults.

13. In this light, a parent's role would be analogous to that of a lawyer appointed to represent a child in legal proceedings, such as a custody dispute. The lawyer enjoys the privilege of directing a certain aspect of the child's life—namely, the child's participation as an interested party in the legal proceedings—but herself acquires no rights in the proceedings by virtue of representing the child. The rights the lawyer advances and predicates claims upon are the rights of the child, never her own. There are obvious and important differences between the parent-child relationship and an attorney-client relationship, but the distinctive features of the parent-child relationship constitute no justification for attributing rights to parents. See discussion *infra* Part III.

14. Analogously, the fact that lawyers appointed to represent children do not possess a right to represent those children does not render the practice of child advocacy impossible or unstable. We impute to the children a positive claim-right to legal representation and a negative claim-right against third party interference in that legal representation.

15. For an argument that the threshold of state intervention should be quite high even from an exclusively child-centered perspective, see Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

Under this approach, a community seeking to restrict parents' child-rearing freedom or authority would not need to argue that the interests of the child and of the rest of society outweigh the rights of the parents in a given case. Rather, the State would need only to argue that the harm to the child that non-intervention would allow is greater than the harm to the child that intervention would cause. The latter approach is likely to be more successful in protecting the interests of the child than is the current approach.¹⁶

This Article focuses in the first instance on parental rights in religious contexts—that is, in situations where parents' religious beliefs shape their child-rearing preferences. It is in this context that the principal aspects of parent-state conflicts over child-rearing take on their most extreme form. Many people, including judges, find parents' claims to exclusive child-rearing authority to be at their most compelling when motivated by religious belief. State child welfare laws accord particular deference to parents' religiously motivated child-rearing decisions.¹⁷ Moreover, the societal values of pluralism and state neutrality toward differing belief systems are most clearly at issue in the free exercise context. Focusing on situations that put these considerations into sharpest relief helps to draw out the moral implications of the notion of parents' rights.

Part I of this Article therefore concerns "parental free exercise rights"—rights predicated on religious belief enjoyed only by parents in the context of child-rearing. Parents may claim these rights when state child welfare laws or schooling policies conflict with their religiously grounded preferences regarding the care and education of their children. The courts have interpreted parental rights under the Free Exercise Clause of the First Amendment to extend the child rearing authority and independence of parents beyond that which they enjoy under the Due Process Clause of the Fourteenth Amendment. This means that in most cases courts have been unwilling to allow either the State's determination or their own judgment of a child's best interests to supplant parental free exercise rights. Indeed, only when according decisive weight to parental free exercise rights would threaten the child with death or grievous bodily injury or would result in the child receiving a grossly inadequate education will the State prevail under the current legal regime.

Part II explains why ascribing special rights to persons as parents is

16. Consider, for example, a child in need of surgery to correct a non life-threatening physical deformity, but whose parents object to the procedure on religious grounds. A court faced only with weighing the costs and benefits of ordering the procedure *to the child* might very well conclude that the benefits of living a normal, healthy life outweigh the costs to the child, if any, which might arise from her parents' frustration, resentment toward the rest of society, and anxiety about their own salvation or that of the child. On the other hand, when courts have in similar cases balanced the State's interests in the child's welfare against the constitutionally protected rights of her parents, they have often concluded that the parents' rights trump the State's interests. See discussion *infra* notes 108-14 and accompanying text.

17. Judicial and legislative deference to parents' alleged rights is certainly not limited, however, to the context of religiously motivated child-rearing. See discussion *infra* notes 19-20.

anomalous within our legal system. Providing for such rights implicitly endorses the proposition that one person may be entitled to control, use, or direct the life-course of another, non-consenting person, and may assert on his own behalf a valid legal claim against any third-party interference in the exercise of that control. Judicial interpretation of constitutional rights in the parenting context is unique in this regard, and fundamentally at odds with other, well-established constitutional and common-law principles.

Even if they accept the conclusions of Part II, defenders of parental rights might contend that there are very good reasons for treating children differently from adults, and for creating an exception in the parenting context to general principles regarding rights.¹⁸ In Part III, therefore, I consider a number of potential justifications for parental rights. Ultimately, each is deficient, particularly in regard to parental rights under the Free Exercise Clause. Justifications based on the necessity of protecting children's interests are logically flawed, because a more appropriate approach is available—namely, ascribing to *children* any rights necessary to protect their important interests. Justifications based on parents' interests or on societal interests, such as pluralism and the preservation of traditional communities, are morally flawed, because they implicitly adopt an instrumental view of children, treating them as mere means to the furtherance of other persons' ends.

Two final points about methodology deserve mention. First, in discussing interests and rights, I treat them as attaching to individuals, rather than as attaching to relationships as unitary entities. This is consistent with the way the courts generally interpret rights and construe interests in the context of parent-state conflicts over child-rearing, as well as in other contexts involving intimate relationships, such as marriage. It is also the most sensible approach, given the undeniable fact that a parent and a child are two non-identical persons whose interests at any point in their relationship may differ and even conflict. This individual-oriented approach to discussing interests and rights in no way denies, however, that the interests of parent and child are ordinarily consistent with one another and are, in fact, largely interdependent. Nor is it inconsistent with an understanding that familial relationships constitute a large part of the self-conception of young children.

Second, the most objectionable aspect of the courts' construction of parents' rights is the extension of these rights in some cases to entitle parents to treat children in ways contrary to the children's temporal interests.

18. A few commentators have acknowledged the anomalous nature of parents' rights, but endorsed them nonetheless. See, e.g., Andrew J. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, Part II, 4 FAM. L.Q. 410, 411 (1970); Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965, 969 (1989) ("[D]eference to parental decisions about their children stands as the nearly universal exception from self-determination under the Constitution."); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1353 (1980) [hereinafter *Developments*] (declaring a parental right unique "in that it protects the ability to control another person").

The solution offered in this Article is to dispense with the notion of parental rights altogether. An alternative way to counter this phenomenon would be simply to argue that courts should narrow the scope of parental rights. However, merely narrowing the scope of parental rights would not cure two problems: first, inherent in the very notion of parental child-rearing rights is a morally dubious notion of parental entitlement; and, second, because of the rhetorical power of parental claims to child-rearing rights, judges would be unlikely in practice to contain those rights within carefully defined limits. Continuing to focus on parental claims would in all likelihood continue to distract judges from the interests of children, which should be the primary focus in any dispute concerning child-rearing.

I

JUDICIAL INTERPRETATION OF PARENTS' RIGHTS UNDER THE FREE EXERCISE CLAUSE

A. *The Supreme Court Decisions*

In a series of cases in the 1920s, the Supreme Court invalidated state regulations pertaining to private schools on the grounds that these regulations violated parents' traditional liberty, protected by the Due Process Clause of the Fourteenth Amendment, to direct their children's education.¹⁹ These cases established the rule that state action materially interfering with this liberty must bear a reasonable relation to a legitimate state purpose.²⁰

19. *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating Hawaii's regulation of curriculum, textbooks, teacher qualifications, and language of instruction in private schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating Oregon's compulsory public school attendance law); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating state prohibition of instruction in a foreign language).

20. See *Pierce*, 268 U.S. at 534-35. The courts have continued to recognize a constitutional right of parents to the custody and control of their children under the Due Process Clause of the Fourteenth Amendment. See, e.g., *Halderman v. Pennhurst State Sch. & Hosp.*, 707 F.2d 702, 707 (3d Cir. 1983) (holding that a state may not require the placement of a mentally retarded child in a specific facility over the parents' objection, and noting that the Court has "consistently applied a heavy presumption in favor of parental decisions"). In fact, this right of control has become so entrenched in recent years that it now appears to be treated as a "fundamental" right triggering strict scrutiny rather than mere rationality review. See *McCarthy*, *supra* note 6, at 985-92.

It is clear that as parents' rights have expanded, children's rights have contracted. For example, in proceedings to commit a child to a state mental institution against the child's wishes, the Supreme Court held that the child was not entitled to an adversarial hearing on the matter. *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979). Rather, even though the child had a "protectible interest not only in being free of unnecessary bodily restraints but also in not being labeled erroneously [as mentally ill]," *id.* at 601, the parents' right to decide for the child trumped those interests: "the parents . . . retain a substantial, if not the dominant, role in the decision, . . . [and] the presumption that the parents act in the best interests of their child should apply," *id.* at 604.

The Court has also interpreted parental rights to increase the burden states must meet, from a preponderance of the evidence to clear and convincing evidence, in order to prove allegations of abuse or neglect. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); see also *Alsager v. District Court*, 406 F. Supp. 10, 21-24 (S.D. Iowa 1975) (holding that termination of parental rights without a showing of a very substantial degree of harm to the child violated parents' due process

In 1944, the Court for the first time addressed a challenge to state action that coupled a substantive due process claim with a First Amendment free exercise claim in a parenting context. In *Prince v. Massachusetts*,²¹ the Court affirmed the conviction of a woman who had violated a statute that prohibited parents or guardians from directing or permitting their children to sell publications in public places. An obvious purpose of the statute was to keep children out of potentially dangerous situations. Mrs. Prince was the guardian of her nine-year-old niece, Betty, and both she and Betty were ordained Jehovah's Witness ministers. At Betty's insistence, Mrs. Prince permitted her niece to join her in distributing religious literature at night on the streets of Brockton.²²

Writing for the majority, Justice Rutledge was somewhat ambivalent about whose free exercise liberty was at stake, that of Mrs. Prince or her

rights), *aff'd*, 545 F.2d 1137 (8th Cir. 1976); *In re Carmaleta B.*, 579 P.2d 514, 518 (Cal. 1978) (holding that even evidence of a parent's mental illness was insufficient to meet the high threshold required for termination: "Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood."); *Blackburn v. Blackburn*, 292 S.E.2d 821, 825 (Ga. 1982) (overturning an award of custody to a grandmother where evidence of the mother's unfitness did not satisfy the "high burden of proof" required by mother's substantive due process rights); *Carvalho v. Lewis*, 274 S.E.2d 471 (Ga. 1981) (requiring a finding of parental unfitness in order to terminate parental custody, even where it had been shown that termination was in the best interests of the children). Under this regime, courts and social welfare agencies routinely return children to abusive and neglectful parents. See Patricia Edmonds, *Young and in Danger: Why Kids Get Sent Back to Abusive Homes*, USA TODAY, Apr. 7, 1994, at 1A, 2A; Michele Ingrassia & John McCormick, *Why Leave Children With Bad Parents?*, NEWSWEEK, Apr. 25, 1994, at 52-58; Mary-Lou Weisman, *When Parents Are Not in the Best Interests of the Child*, ATLANTIC MONTHLY, July 1994, at 43, 46, 62-63.

In addition, there have been many instances, some highly publicized, of biological parents successfully claiming a right to the custody of children who have lived with adoptive parents for a number of years. For example, in *In re Doe*, 638 N.E.2d 181 (Ill. 1994), Illinois' highest court awarded custody of a three-year-old boy known as "Baby Richard" to the boy's biological father, even though the child had been with his adoptive parents almost from the day of his birth and had never met the biological father. The court ruled that

since the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. . . . These [state adoption] laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child.

Id. at 182. Similarly, in *In re B.G.C.*, the Iowa Supreme Court ordered adoptive parents living in Michigan to cede custody of 19-month-old "Baby Jessica" to her biological father, who had never before seen her, because a lack of evidence of his abandonment of the child rendered the initial adoption invalid; the adoption statute did not permit a court to terminate the biological father's rights based solely on the best interests of the child. 496 N.W.2d 239 (Iowa 1992), *application for stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1 (Stevens, J., Circuit Justice 1993) (mem.) (upholding Michigan enforcement order), 114 S. Ct. 11 (1993) (Blackmun & O'Connor, JJ., dissenting) (mem.); see also *In re Baby E.A.W.*, No. 93-3040, 1994 Fla. App. LEXIS 6137 (Fla. Dist. Ct. App. June 22, 1994) (finding evidence insufficient to support finding of abandonment by natural father), *withdrawn, substituted op., on reh'g*, 1994 Fla. App. LEXIS 11522 (Fla. Dist. Ct. App. Nov. 30, 1994) (affirming trial court's finding of abandonment by natural father and certifying question to state supreme court).

21. 321 U.S. 158 (1944).

22. *Id.* at 161-63. According to the Court, "Betty believed it was her religious duty to perform this work and failure would bring condemnation 'to everlasting destruction at Armageddon.'" *Id.* at 163.

niece.²³ Ultimately, however, the Court's discussion of the scope of Free Exercise Clause protections focused exclusively on what that Clause does or does not entitle parents to do to their children, rather than on what it entitles children themselves to do.²⁴ The Court held that the State's authority to restrict parents' freedom in child-rearing by means reasonably related to legitimate state ends "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."²⁵ The Court then stated with rhetorical flourish: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."²⁶

These statements, standing alone, suggest that the Court recognized an inherent limitation on the scope of the free exercise right—namely, that this right does not extend beyond religious self-determination to include situations where one person wishes, for religious reasons, to direct another person's life. One could also interpret these statements to mean that a claim of religious liberty does not extend the scope of parental autonomy beyond that secured by the Due Process Clause nor increase the State's burden of justifying any restrictions it imposes on parental freedom. The Court, however, limited its holding by indicating that the Free Exercise Clause might in some situations serve parents as an additional shield against state interference in child-rearing, even in situations that threaten the health and welfare of the children. The Court asserted:

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation "for any [that is, every] state intervention in the indoctrination and participation of children in religion" which may be done "in the name of their health and welfare" nor give warrant for "every limitation on their religious training and

23. The opinion first stated that the two liberties at issue were "the parent's, to bring up the child in the way [s]he should go"—that is, a general right of parental authority not grounded in religious freedom—and the child's, to observe the tenets and practices of the faith her aunt had taught her. *Id.* at 164. The opinion later invoked the liberty of parents to give children religious training and "to encourage them in the practice of religious belief." *Id.* at 165. As support for this liberty, however, the Court here cited two of its 1920s substantive due process decisions, which turned on constitutional provisions other than the Free Exercise Clause and established more generally "the private realm of family life which the state cannot enter." *Id.* at 166 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

24. Justice Murphy, in dissent, did focus on the child's free exercise liberty, contending that the criminal sanction imposed on Mrs. Prince operated as an indirect restraint on that liberty. *Id.* at 172.

25. *Id.* at 166-67.

26. *Id.* at 170.

activities."²⁷

Further, there is no hint in the opinion that children have rights to protection from harms to which parents might subject them in acting on their religious beliefs. In *Prince*, the Court treated the danger to the child's welfare as a public policy concern, a threat to the interest of society as a whole in "the healthy, well-rounded growth of young people into full maturity as citizens," rather than a threat directly to the child.²⁸

The lesson of *Prince*, therefore, is that the Free Exercise Clause protects parents' efforts to indoctrinate their children and to include their children in various religious practices so long as they do not expose their children to particularly grave dangers, even if this may result in some lesser harm befalling the children.

In *Jehovah's Witnesses v. King County Hospital*, the Supreme Court affirmed a district court ruling applying *Prince* to mandate blood transfusions for the child of Jehovah's Witness parents.²⁹ Over the free exercise and due process objections of the parents, the district court upheld a statute granting authority to declare children wards of the State for purposes of authorizing an emergency transfusion.³⁰ While recognizing that the Free Exercise Clause gives parents a right to "train and indoctrinate their children in religious matters," the district court found that putting a child in mortal danger was not a form of training or indoctrination, and so was not constitutionally protected conduct.³¹ At the same time, the district court reiterated the cautionary note in *Prince* that not every state intervention to protect the health and welfare of children would survive constitutional scrutiny.³² And like *Prince*, this decision makes no mention of any rights the children in question might have possessed.

Thus, *Prince* and *King County Hospital* recognized, but imposed limits on the scope of, parental free exercise rights. They held that these rights do not include a right to endanger seriously a child's physical health or safety. They also suggested that parents' free exercise rights are limited to indoctrinating their children and involving them in religious practices. As shown below, subsequent lower court decisions have not adhered to, or even acknowledged, this latter limitation. Even within these limitations, however, parents would have a *right* to control their child's mind, even in ways the rest of society deems harmful to the child, and to involve their children in practices that cause the child less serious physical harms.

These cases thus endorse an interpretation of certain constitutional provisions as conferring on some persons rights to control not only their own

27. *Id.* at 171 (alteration in original). The Court did not, however, suggest a guiding principle for determining which types of harm to a child's health or welfare would justify state intervention.

28. *Id.* at 168.

29. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (mem.).

30. *Id.* at 500-01, 505.

31. *Id.* at 504.

32. *Id.*

behaviors and life choices, but also those of certain other persons—namely, their children.³³ Both cases appear to prescribe a balancing test, weighing the parents' interest in fulfilling their religious aspirations through their children against the State's interest in protecting the welfare of children and in promoting other societal values. Neither decision considered whether children have a right to protection from such manipulation by others.

In *Wisconsin v. Yoder*,³⁴ the Supreme Court for the first time explicitly established that the Free Exercise Clause confers on parents more extensive rights to control children's lives than does the Due Process Clause, and prescribed a balancing of state interests against these parental rights. Because this is the first, and only, Supreme Court decision upholding a parental free exercise claim, it is important to understand the precise nature of the rights that the Court recognized in this case.

In *Yoder*, Amish parents claimed that Wisconsin's compulsory education law, which required parents to ensure that their children attend a public or private school until the age of sixteen, violated their free exercise rights.³⁵ The Amish parents had sent their children to public schools through the eighth grade, but refused to allow their children to attend any high school, public or private, for the additional two years that the law required. The parents defended their decision on the ground that their faith required them to raise their children for "life in a church community separate and apart from the world and worldly influence."³⁶ Attendance at a regular high school, they argued, would expose their children to worldly

33. The term "self-determining behavior" will hereinafter be used to distinguish actions and decisions concerning solely or primarily one's own person, property, and life-course, from "other-determining behavior," or decisions and actions directed primarily at others, including efforts to control the person or life-course of another. Self-determining behavior includes, for example, wearing religiously symbolic clothing, abstaining from eating meat on certain holy days, going to temple, and smoking peyote. Although any such behavior might indirectly affect people other than the actor, it generally does not constitute an effort by the actor to control the life of another or to decide what another person will do. Courts properly interpret the Free Exercise Clause to include such self-determining behaviors within the scope of liberty protected from state infringement. However, as argued in Part II, *infra*, religious liberty should not be understood to include other-determining conduct. Thus, for example, were someone to claim that his religion required him to enslave or murder non-believers, the courts should not treat such actions as within the scope of that person's religious liberty, and then proceed to weigh his liberty against the State's interest in protecting the non-believers. Rather, courts should find that the Free Exercise Clause is irrelevant because it simply does not encompass such other-determining behavior.

In the discussion below, parenting decisions and practices are treated as other-determining. Of course, some decisions parents might make for religious reasons have both self-determining and other-determining components, such as a decision to join a religious cult as a family. Analyzing such decisions requires breaking them down into their component parts to discern which aspects of the decision are self-determining, e.g., entering oneself into the cult, and which are other-determining, e.g., bringing one's children into the cult. Thus, we should say that the parent has a free exercise right (not as a parent but simply as an adult) to join the cult herself, but no right to bring her child into the cult.

34. 406 U.S. 205 (1972). Other than *Prince* and *King County Hospital*, this appears to be the only Supreme Court Free Exercise Clause decision to date involving parenting.

35. *Id.* at 207-09.

36. *Id.* at 210.

influences during the critical adolescent stage of development, and to "higher learning [which] tends to develop values [the Amish] reject as influences that alienate man from God."³⁷

Thus, the parents' free exercise claim had two principal elements: 1) that no one, including their children, had a claim-right to the parents' assistance in ensuring that the children attend school (or, in other words, that they held a privilege not to send their children to school), and 2) that they possessed a liberty, immune from abridgment by the State, to train their children at home to become Amish adults. The majority in *Yoder* held that a court must begin by determining whether the challenged state action encroaches on "legitimate claims to the free exercise of religion."³⁸ The Court's discussion of the burdens that the Wisconsin law imposed on Amish parents reveals that the Court accepted both facets of the parents' objection to that law—their opposition to the imposition of a duty, and their claim to possess a liberty to engage in home-based education—as "legitimate" claims to the free exercise of religion.³⁹

In assessing the law's burden on parents, the Court found that "the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."⁴⁰ The Court failed to explain, though, what acts the law required of parents. In fact, the Court suggested that the relevant acts were ones that the *children* would have to perform, such as attending school and participating in classes that would subject them to certain influences.⁴¹

37. *Id.* at 212. The values allegedly emphasized by secular high schools included "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students." *Id.* at 211.

38. *Id.* at 215 (emphasis added).

39. *See id.* at 215-19.

40. *Id.* at 218.

41. The Court noted that

secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith . . . contravenes the basic religious tenets and practice of the Amish faith . . .

Id. at 218.

To be more consistent, the Court could have argued that, by referring to "acts," it meant acts that parents themselves customarily perform, such as accompanying the child to register at the school and filling out school forms. These acts, the Court could have argued, were inconsistent with the parents' belief that they themselves should "be not conformed to this world." *Id.* at 216 (quoting the "Epistle of Paul to the Romans" without citation). However, neither the Court nor the Amish parents appear to have taken this position. Undoubtedly the parents would not have been satisfied simply to be relieved of the responsibility to perform such acts, and to allow others—e.g., social service workers—to take the necessary steps to get the children to school each day.

It is worth noting in this context that the action/inaction distinction one might point to as significant in discriminating between self-determining and other-determining behavior (e.g., by arguing that the Amish parents simply claimed a self-determining privilege not to perform certain acts) loses meaning in a context, such as parenting, where the legal apparatus of the State confers on one person exclusive authority to act on behalf of another person. When a dependent child is in need of a parent's aid, the parent's refusal to provide that aid is clearly other-determining. For example, "[i]n the prosecution of a parent for the starvation death of her infant, it was no defense that the infant's death was 'caused' by no

Such a view of where the burden lay would, however, be inconsistent with the Court's later insistence that the children's religious liberty was not at issue, since the parents alone were vulnerable to prosecution "for failing to cause their children to attend school."⁴²

The true burden on the Amish parents, it seems, was that the compulsory school attendance law would deny them the liberty to indoctrinate their children at home in the Amish faith, free from outside interference. The opinion set the stage for the free exercise analysis by invoking the traditional "values of parental direction of the religious upbringing and education of their children" and the "traditional interest of parents with respect to the religious upbringing of their children."⁴³ Ultimately, the Court's holding turned on an assessment of whether the State's interest in the children's education "is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life . . . is an essential part of their religious belief and practice."⁴⁴

The Court also referred repeatedly in its burden analysis to the encroachments of modern society on the Amish way of life and the danger of extinction that the community faced.⁴⁵ The community would survive only if it remained set apart and free from government intrusion into the way its members raised their children. The Court asserted:

[C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.⁴⁶

Given that the Wisconsin law could not conceivably have coerced the Amish *parents* into assimilating into society at large, and given that the

action of the parent but by the natural process of starvation, or by the infant's natural inability to provide for itself." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 297 (1990) (Scalia, J., concurring).

42. *Yoder*, 406 U.S. at 230. The Court was emphatic that it was the religious liberty of the parents which was at stake: "It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right to free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent." *Id.* at 230-31.

43. *Id.* at 213-14.

44. *Id.* at 219.

45. *See, e.g., id.* at 217-18.

46. *Id.* at 218. In this passage, and others in the opinion, the Court suggests that the interests of the Amish as a community, e.g., to survive from one generation to the next, and not just the interests of particular parents, weigh in the balance against the State's interests. In response to the argument that granting Amish parents an exemption to the compulsory attendance law would constitute an establishment of religion, the Court asserted that the "purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose." *Id.* at 234 n.22. At other times, the Court weighed against the State's interest in the well-being of the Amish children a concern with preserving values and ways of life: "We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles." *Id.* at 223.

children's religious liberty was allegedly not at issue in the case, the only reasonable reading of *Yoder* is that the free exercise burden consisted of state interference in the Amish parents' affirmative efforts to control the minds and lives of their children.

Thus, the Court in *Yoder* established that the right guaranteed by the Free Exercise Clause is more than just the religious individual's right to control his own beliefs and self-determining behaviors, and a freedom from state-imposed duties to take actions inconsistent with his beliefs. Under *Yoder*, the right also includes a liberty to control the lives and minds of one's children, to keep them to oneself, isolated from outside influences, and to make them the type of persons one wants them to be in light of one's own religious beliefs. The Court also implicitly recognized as a legitimate element of parents' free exercise rights the power to waive their children's positive claim-rights to government benefits, such as a state-provided education.⁴⁷

Having determined that the Wisconsin law burdened the Amish parents' free exercise rights, the Court balanced the interests protected by these rights against the State's interest in requiring school attendance, which the Court understood to be principally a societal interest in children one day "meeting the duties of citizenship"⁴⁸ and not becoming "burdens on society because of educational shortcomings."⁴⁹ In reaching its holding, the Court made clear that the Free Exercise Clause extends the scope of constitutionally-protected parental rights beyond that arising from the Fourteenth Amendment Due Process Clause,⁵⁰ and increases the State's burden in justifying the imposition of constraints on parental control over children's lives: "[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required"⁵¹ Wisconsin officials would have to show that the State had an interest "of the highest order . . . not otherwise served" in applying its regulations to the Amish, however reasonable those regulations might be as a

47. The Court had recognized this parental power to waive the positive claim-rights of children in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). There the Court held invalid an Oregon statute requiring parents to send their children to public rather than private schools of the parents' choosing. *Id.* at 534-35.

48. *Yoder*, 406 U.S. at 227.

49. *Id.* at 224.

50. The Court intimated that absent a free exercise claim the Amish parents would have had no case: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations" *Id.* at 215. Further, the Court, alluding to its decision in *Pierce*, stated:

[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

Id. at 233.

51. *Id.* (quoting *Pierce*, 268 U.S. at 535).

means of securing an appropriate education for children.⁵²

Significantly, the State did argue that granting the parents' claim for an exemption from the school attendance law would fail to recognize the positive claim-rights of the children to a secondary school education. The Court, however, reinterpreted this argument as one positing negative claim-rights of children to be free from grievous harm.⁵³ It then placed the burden on the State to demonstrate the likelihood of such harm, and found that the State had not met this burden.⁵⁴ The State also failed to show that exempting the Amish would result in harm to "the public safety, peace, order, or welfare."⁵⁵ Thus, the Court held that the State had not provided sufficient evidence to show that overriding the religious rights of the parents was necessary to further its interests, and so awarded the Amish an exemption from compulsory school attendance laws.⁵⁶

It is of particular significance that, according to the majority in *Yoder*, parents' free exercise right to control their children's lives also trumps any conflicting preferences or interests of the children, except where a state demonstrates that the children are at risk of serious harm. Even if the children in this case wanted to attend school (the trial court never developed a record of the children's wishes), granting the State authority to enforce the wishes of the children, or to protect what the State deemed to be the best interests of the children, "would, of course, call into question traditional concepts of parental control over the religious upbringing and education of

52. *Id.* at 215. While the Court did not explicitly state that strict scrutiny applies to state action burdening parental free exercise rights, i.e., whether "interests of the highest order" meant "compelling interests," that is the most reasonable reading of the case. In support of this "highest order" standard, the Court cited *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), which employed a "compelling state interest" test in its free exercise analysis. *Yoder*, 406 U.S. at 215; see also *id.* at 214 (noting that free exercise of religion is a "fundamental right"). Moreover, subsequent judicial interpretations of *Yoder*, including that of Justice Burger (who wrote for the Court in *Yoder*), have almost uniformly interpreted it to require strict scrutiny under a "compelling state interest" standard. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2246-47 n.5 (1993) (Souter, J., concurring); *Employment Div. v. Smith*, 494 U.S. 872, 894-95 (1990) (O'Connor, J., concurring); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (opinion of Burger, C.J.); *Duro v. District Attorney*, 712 F.2d 96, 97 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 518, 524 (E.D. Cal. 1988), *aff'd*, 893 F.2d 1139 (9th Cir.), *cert. denied*, 496 U.S. 937 (1990); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 128-30 (N.D.N.Y. 1988); *State v. Whisner*, 351 N.E.2d 750, 771 n.17 (Ohio 1976); *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692, 696 (Tex. 1984), *appeal dismissed*, 474 U.S. 801 (1985). But see *Davis v. Page*, 385 F. Supp. 395, 399 (D.N.H. 1974) (interpreting *Yoder* as a departure from the "compelling state interest" test normally employed in free exercise cases).

The Supreme Court has also regularly applied strict scrutiny in other free exercise cases. See, e.g., *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *United States v. Lee*, 455 U.S. 252, 257-58 (1982). But cf. *Employment Div. v. Smith*, 494 U.S. at 878-79 (holding that facially neutral and generally applicable laws that incidentally burden religious exercise do not implicate free exercise rights at all, and so need not be subjected to any level of scrutiny).

53. *Yoder*, 406 U.S. at 229-30.

54. *Id.*

55. *Id.* at 230.

56. *Id.* at 234.

their minor children" and "would give rise to grave questions of religious freedom."⁵⁷ The Court thus suggested that parental free exercise rights can operate to limit the religious liberty of children.⁵⁸

In sum, *Yoder* established a very peculiar interpretation of a constitutional right—one that attributes to some persons a right to engage in conduct and make decisions aimed at controlling the lives of other persons. It is important to note that the parental free exercise rights the Supreme Court recognized in *Prince*, *King County Hospital*, and *Yoder* are not a by-product of parents' legal responsibility for the welfare of children. Instead, these rights rest solely on the religious beliefs and preferences of the parents.⁵⁹ Moreover, these rights give parents the legal authority to override the preferences of children and to treat them in ways contrary to state laws and regulations reasonably designed to protect children's interests. Parents can do so as long as the State is unable to demonstrate a compelling interest—the likelihood of life-threatening or grievous physical harm to the children or a grossly inadequate education. As such, parental free exercise rights actually constitute an entitlement to act in ways *contrary* to the normal legal responsibilities of a parent.

57. *Id.* at 231. In denigrating the preferences of children who wish not to follow the dictates of the Amish faith with respect to education, the Court appears to suggest either that the parents' free exercise rights would trump the child's free exercise liberty, or that children have no free exercise liberty that would give force to their preferences. In this context, it is of interest to note that the Amish themselves apparently did not regard their children as having chosen their religion. The Court's summary of the facts states that "[a]dult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community," *id.* at 210, and that the Amish regard adolescence as the crucial period of religious development, *id.* at 223.

58. See also *Parham v. J.R.*, 442 U.S. 584, 600-04 (1979) (holding that the due process rights of children do not necessitate formal adversary proceedings when parents seek to commit their children to state mental institutions, because the rights of parents to direct the upbringing of their children operate to circumscribe the rights of children).

59. The *Yoder* decision does refer to parental duties when it invokes an oft-quoted passage from *Pierce*: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 406 U.S. at 233 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)). The *Yoder* Court interpreted the parent's "high duty" to prepare a child for "additional obligations" as including inculcation of religious beliefs. *Id.* But neither the language from *Pierce* nor anything in the *Yoder* opinion suggests that this parental right to prepare the child for additional obligations rests on or is justified in terms of the duty, rather than merely being coupled with it. The passage appears to state simply that parents generally feel, and perhaps actually have, a moral obligation to train their children to fulfill the requirements of the parent's religion. As such, the Court's statement is at best superfluous rhetoric, and at worst borders on establishment of religion. Moreover, the *Yoder* opinion, as noted above, goes on to say that this "interest of the parent in the nurture and education of his children," by itself is insufficient to challenge the compulsory education law; it is the Free Exercise Clause that enables the parents to surmount this reasonable state regulation. *Id.* As I explain *infra* Part III, it is a mistake to conclude from the fact that parents bear child-rearing responsibilities that parents must also have child-rearing rights, even rights that are limited in scope by the interests of the child (as parental free exercise rights clearly are not).

B. Lower Court Decisions

Though the Supreme Court has not addressed a parental free exercise claim since *Yoder*, lower federal courts and state courts have done so on numerous occasions. This Section shows how lower courts have applied the doctrine of parental free exercise rights that the Supreme Court firmly established in *Yoder*.

In *Yoder*, the Court placed great weight on the unique characteristics of the Amish community, a group isolated from the rest of society that had survived in a relatively unassimilated condition for centuries. Careful to limit its holding to the specific factual situation presented, the Court also reiterated the general power of the states to regulate schooling of any kind to ensure that it satisfies reasonable standards for the education of children.⁶⁰ However, subsequent lower court rulings have generally invoked *Yoder* to advance the position that the Free Exercise Clause guarantees parents extensive rights to control the minds and bodies of their children.

In the survey of lower court decisions that follows, it is apparent that societal interests in the welfare of children have often been found sufficiently compelling to trump parental free exercise claims. Even in such cases, though, courts have continued to ignore or minimize the rights and interests of the children themselves. In many other cases, lower courts have allowed parental free exercise rights to prevail over state objections to particular child-rearing practices. Thus, lower courts have continued to advance an interpretation of free exercise rights that effectively treats children as non-consenting instruments or means to the achievement of other persons' ends, rather than as persons in their own right, with interests of their own that are deserving of equal respect.⁶¹ It is this anomalous interpretation of constitutional rights that is challenged in Parts II and III.

Because the vast majority of parental free exercise decisions in the lower courts arise in the context of either education or medical care,⁶² the

60. *Yoder*, 406 U.S. at 236.

61. At no point in this Article do I mean to attribute to parents raising free exercise challenges to state interference with their child-rearing practices wholly self-regarding motives or an instrumental view of their children. Rather, I contend that the courts treat children instrumentally insofar as they are willing to sacrifice what they view as the best interests of children to satisfy the desires of parents. Section III.A, *infra*, suggests a more appropriate judicial approach to resolving these cases, and discusses the implications of the presumption of state neutrality in religious matters.

62. An additional category of judicial decisions and legislation related to religious child-rearing comprises what might be called "transfer-of-custody" situations, e.g., adoption, foster care, and divorce. This category of cases is not included in the discussion below because legislation pertaining to those situations addresses the question of *who* is to possess child-rearing rights, rather than that of *which* particular child-rearing practices or decisions are permissible. In addition, the relevant judicial decisions involve either challenges to such legislation or conflicts between the parents themselves regarding particular practices, rather than conflicts between parents and the State over particular practices.

It is worth noting, however, that legislative deference to parental free exercise rights has produced statutes in many states that accord biological parents the power to decide the religious upbringing of their child even when the child will be raised by someone else. These statutes require that state adoption and foster care agencies place children, when practicable and when the natural parents prefer (which is

discussion that follows focuses on these two types of cases.

1. Education

At least two states have codified a so-called "Amish exception" to their compulsory school attendance laws, permitting the Amish and members of any similar religious community to educate their children at home, and to do so without meeting certain requirements the states impose on other "home schoolers."⁶³ Courts have been reluctant to extend this narrow exception to non-Amish religious groups. For example, one federal court found that the Iowa statutory exception did not apply to non-Amish parents because they were not members of a centuries-old, unassimilated, and isolated religious community. The court pointed out that the children of the

assumed unless they indicate otherwise), with adoptive or foster parents of the same religion as the biological parents. See, e.g., CAL. FAM. CODE § 8708(c) (West 1994) (adoption); COLO. REV. STAT. ANN. § 19-3-101(2) (West Supp. 1994) (adoption); CONN. GEN. STAT. ANN. § 17a-93(e) (West 1992) (adoption); DEL. CODE ANN. tit. 13, § 911 (Supp. 1992) (adoption); ME. REV. STAT. ANN. tit. 22, § 4063 (West 1992) (adoption); MD. CODE ANN., FAM. LAW § 5-520(a) (1984) (adoption); NEV. REV. STAT. ANN. § 432B.550(2) (Michie Supp. 1993) (adoption); N.Y. SOC. SERV. LAW § 373 (McKinney 1992) (foster care and adoption); R.I. GEN. LAWS § 15-7-13 (1988) (adoption).

Courts, too, have been very deferential to parental free exercise rights in transfer-of-custody cases, which usually do not involve threats to children's well-being. See, e.g., *Wilder v. Bernstein*, 848 F.2d 1338, 1346-47 (2d Cir. 1988) (holding that the free exercise rights of parents are satisfied when the State makes a reasonable effort to ensure the "religious needs of the children are met" while in foster care); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 885 (E.D. Va. 1991) (noting that a "state should attempt to accommodate parents' religious preferences in selecting a foster care placement"), *aff'd without op.*, No. 91-1844, 1992 U.S. App. LEXIS 14,447 (4th Cir. June 19, 1992); *Wilder v. Sugarman*, 385 F. Supp. 1013, 1026 (S.D.N.Y. 1974) (finding that a foster care matching statute did not violate the Establishment Clause because it was "reasonably necessary to satisfy Free Exercise rights" of parents and foster children); *Dickens v. Ernesto*, 281 N.E.2d 153, 157 (N.Y.) (allowing surrendering parents to express their religious preferences regarding adoptive parents), *appeal dismissed*, 407 U.S. 917 (1972).

There may be a secular justification for these statutory provisions, insofar as they benefit a child whose natural parents might not otherwise be willing to put the child up for adoption or foster care. An additional justification in the case of foster care placements may be that, since the State makes such placements with a view ultimately to returning the child to her parents, religious matching allows for some continuity and stability in the child's otherwise disrupted life. In *Sugarman*, however, a federal court reviewing a New York statute found that the matching requirement did not have a solely secular purpose and might have the effect of advancing religion. 385 F. Supp. at 1024.

When divorced parents have conflicting religious views regarding some aspect of child-rearing, courts have tried to accommodate the religious liberty of both parents, but have generally given preference to the custodial parent where they have felt compelled to favor one parent or the other. 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, 403-04, 421-22 (1989). For a review of legislation and judicial decisions concerning religious issues in child custody law, see Jordan C. Paul, "You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." *The Impact of Spiritual Custody Awards On the Free Exercise Rights of Custodial Parents*, 138 *U. PA. L. REV.* 583 (1989).

63. IOWA CODE ANN. § 299.24 (West Supp. 1994); S.D. CODIFIED LAWS ANN. § 13-27-1.1 (1991). The Iowa law requires that the religious community's tenets "differ substantially from the objectives, goals, and philosophy of education embodied in" a list of required subjects for private schools. IOWA CODE ANN. § 299.24. If a religious community satisfies this requirement, and has been in existence since at least July 1, 1957, its members need not comply with the regulations imposed on other home schoolers, e.g., those relating to certification of teachers and periodic reporting to state officials. *Id.*

plaintiffs were likely to make their way in the world at large when they reached adulthood, rather than remaining in a sheltered environment, and would have to be prepared to cope with modern institutions and to interact with people of diverse beliefs and ways of life.⁶⁴

In a similar vein, the State of New York recently took the extraordinary step of creating a new school district, coterminous with the boundaries of a village established by an Hasidic Jewish community. The purpose of this measure was to allow the community to send its developmentally disabled children to a school within the village, without having to incur the entire cost of the children's education.⁶⁵ The community had long complained to the State's Department of Education that they were compelled to send these children to public schools outside the village to receive special services. In the public schools, the children had to associate with people "whose ways were [very] different from theirs" and consequently suffered "panic, fear and trauma."⁶⁶ New York's highest court invalidated the State's effort to accommodate the religious preferences of the community as a violation of the Establishment Clause,⁶⁷ and the Supreme Court recently affirmed that holding.⁶⁸

In addition to these special legislative provisions for particular religious groups, most states permit almost anyone who satisfies certain requirements to educate a child at home.⁶⁹ By one estimate, roughly one

64. *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 496-97 (8th Cir. 1987); see also *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983) (upholding North Carolina's compulsory school attendance law over a Pentecostalist's request to educate his children at home, emphasizing that the Pentecostal religion does not require that children be taught at home), *cert. denied*, 465 U.S. 1006 (1984); *Howell v. State*, 723 S.W.2d 755, 757-58 (Tex. Ct. App. 1986) (upholding the State's compulsory school attendance law where the parents failed to show that the law substantially burdened the exercise of their religious beliefs).

65. See *Grumet v. Board of Educ.*, 618 N.E.2d 94 (N.Y. 1993), *aff'd*, 114 S. Ct. 2481 (1994).

66. *Id.* at 97 (quoting its earlier decision involving the same religious community, *Board of Educ. v. Wieder*, 527 N.E.2d 767, 770 (N.Y. 1988)).

67. *Id.* at 101. The New York court did not clearly state whose religious preferences the State was accommodating—those of the parents of the children involved, those of all adults in the community, those of the children, or those of the community as a whole. Two judges dissented, contending that the state action was a permissible accommodation of the free exercise rights of the members of the community, including, they appear to suggest, the free exercise rights of the children. *Id.* at 118-19.

68. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2492-93 (1994) (treating the legislation as an accommodation of the religious preferences of the community or sect as a whole).

69. As of 1986, the laws of thirty states and the District of Columbia explicitly authorized home schooling, while the laws of eleven other states allowed for "instruction equivalent or otherwise similar to that provided in the public schools." Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. Rev. 69, 75 (1986). The nine states that did not authorize home education as of that date were Illinois, Kansas, Kentucky, Nebraska, New Hampshire, New Mexico, North Dakota, Texas, and Wyoming. *Id.* at 75 n.58. Half of the states that gave explicit authorization did so for the first time between 1982 and 1986. See *State v. Schmidt*, 505 N.E.2d 627, 629 n.6 (Ohio), *cert. denied*, 484 U.S. 942 (1987). This trend reflected a groundswell of interest in opting out of the increasingly secularized public school system. Burgess, *supra* at 69, 71.

Professor Lupu argues that the Supreme Court's line of substantive due process decisions regarding parental liberty, see cases cited *supra* note 19, do not support a constitutional claim to engage in home-schooling, since those decisions invalidated state legislative efforts to limit the opportunities for

million families in this country presently do so.⁷⁰ Most of these states require official approval of one or more aspects of the schooling that parents intend to provide, but the requirements are generally quite minimal,⁷¹ doubtless signifying deference by these states to the putative rights of parents.

Courts have upheld such minimal statutorily-imposed conditions on home schooling in most cases, even over the free exercise-based objections of parents.⁷² In doing so, however, they have reaffirmed that parents can claim substantial constitutional protection of their efforts to raise their children in their own way. Further, courts have placed on school districts the burden of showing that restrictions on home-schooling are the least restrictive means of serving a state interest sufficiently compelling to overcome parents' rights to direct the education of their children.

transmission of knowledge to children, not efforts to expand such opportunities. Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 974-75 (1987). Professor Lupu further argues that there is no support in *Yoder* for a constitutional right to engage in home schooling. The Amish sent their children to school through the eighth grade. Further, the education they gave their teenagers was communal, and therefore involved a socializing component, rather than one limited to the individual family home. "The state's interest in adequately socialized and educated children was thus more likely to be satisfied in the *Yoder* context than in the typical home education case." *Id.* at 976. In addition, courts have rejected claims by parents that a state's authorization of private schooling without also authorizing home schooling violates the Equal Protection Clause of the Fourteenth Amendment. *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 461-62 (N.D. Ill. 1974); *State v. Edgington*, 663 P.2d 374, 378 (N.M. Ct. App.), *cert. denied*, 662 P.2d 645 (N.M.), *cert. denied*, 464 U.S. 940 (1983). Nevertheless, state legislatures have liberalized laws relating to home schooling in response to parents' objections to existing regulations. See Burgess, *supra* at 83; Mark Murphy, Note, *A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere With Alternatives to Public Education?*, 8 GA. ST. U. L. REV. 457, 480, 482 (1992).

70. Murphy, *supra* note 69, at 457.

71. See Burgess, *supra* note 69, at 75-77. State regulations pertaining to home schooling vary considerably in their stringency. As of 1986, only eleven states mandated any form of certification of the home instructor, and only nine required periodic academic testing of the children. *Id.* at 76. Alabama's regulations are among the most restrictive; home schooling parents or private tutors must hold a teaching certificate equivalent to that held by a public school teacher, must give instruction in each of the subject areas taught in public schools for a total of at least three hours a day for at least 140 days a year, and must keep a register of work completed and "make such reports as the state board of education may require." ALA. CODE § 16-28-5 (1987). Florida, in contrast, does not require home schooling parents to themselves have any education whatsoever. It does require parents without a teacher's certificate to maintain a portfolio of the child's work and to have their child undergo an annual educational assessment. Parents of children who fail to progress at a level commensurate with their ability are given one year to get the child back on track before they must send the child to an approved school. FLA. STAT. ANN. § 232.02(4)(b) (West Supp. 1994). In Georgia, home schooling parents need only possess a high school diploma or GED equivalency diploma and complete attendance and progress assessment reports. GA. CODE ANN. § 20-2-690(c) (Harrison 1990). Missouri has neither a certification requirement for home instructors nor a requirement that students in home schools take periodic tests. Instead, state law simply mandates that children receive a minimum number of hours of instruction in certain academic subjects and that parents maintain a record of instruction, evaluations, and a portfolio containing samples of the student's work. MO. ANN. STAT. § 167.031.2(2) (Vernon Supp. 1994).

72. *E.g.*, *State v. Rivera*, 497 N.W.2d 878, 880 (Iowa 1993) (upholding reporting requirement); *Care & Protection of Charles*, 504 N.E.2d 592 (Mass. 1987) (same).

For example, *Blackwelder v. Safnauer*⁷³ concerned objections by Fundamentalist Christian parents to the State's minimum educational standards for home schools. The parents claimed that their faith commanded them to provide their children with a Christian education that interwove their religious values into every area of study. The parents contended that the State's power to approve or disapprove the way in which they educated their children would impermissibly burden their faith. In other words, they demanded a privilege to train their children however they wished and a negative claim-right against *any* oversight by state education officials.

The *Blackwelder* court noted the

tension between the desire of parents to prevent the exposure of their minor children to "attitudes, goals, and values contrary to [the parents' religious] beliefs" . . . and the interest of those children in having access to ideas that might conflict with their parents' notions of religious propriety so that those children are better able to make informed choices later in life.⁷⁴

The court ultimately rejected the parents' claim. But rather than suggest that the parents' desire to control the minds of their children is an inappropriate basis for a constitutionally protected liberty, the court simply found that the compelling interests of the State in regulating home schooling outweighed the parents' constitutionally protected interests in giving their children a religious education.⁷⁵ Significantly, the court pointed out that there might be "cases in which the manner the state enforces [its education regulations] unnecessarily infringes the free exercise rights of . . . parents,"⁷⁶ as would have been the case had the State required "the teaching of secular matters that [we]re inconsistent with their fundamentalist Christian beliefs."⁷⁷

The great bulk of lower court free exercise decisions in the education context has not involved home schooling, but rather parents' objections to various state regulations of private, church-run schools. State regulation and oversight of private schools is generally even more minimal than regulation and oversight of home schools,⁷⁸ again no doubt reflecting deference

73. 689 F. Supp. 106, 128 (N.D.N.Y. 1988), *appeal dismissed*, 866 F.2d 548 (2d Cir. 1989).

74. *Id.* at 131 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)) (alteration in original) (internal citation omitted).

75. *Id.* at 130-31, 135.

76. *Id.* at 135.

77. *Id.* at 130.

78. Burgess, *supra* note 69, at 76 (noting that of the eleven states requiring certification of home instructors, six do not require certification of teachers in private schools). Some states in recent years have eschewed regulation of private schools altogether, instead monitoring performance by requiring simply that students in these schools take standardized achievement tests. North Carolina even permits each private school to choose whatever nationally standardized test it wishes to administer to its students, and to define the minimum acceptable score. Denise M. Bainton, Note, *State Regulation of Private Religious Schools and the State's Interest in Education*, 25 ARIZ. L. REV. 123, 145 (1983); see also PAUL F. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS* 146-50 (1987).

by state legislators and school boards to the supposed rights of parents. Courts have generally upheld state regulations of private schools against free exercise challenges. However, in the rare instance when a state has made more than a superficial effort to monitor the quality of the education children receive in religious schools, courts have found the State's efforts to be an unwarranted burden upon parents' free exercise rights.

For example, in *State v. Whisner*,⁷⁹ the Ohio Supreme Court heard a challenge by a Fundamentalist Christian school to the State's minimum education standards, and held that these standards unduly burdened parents' free exercise of religion. The court found that a regulation allocating instructional time for required subjects was unconstitutional because it would interfere with " 'rights of conscience,' by requiring a set amount of time to be devoted to subjects which, by their very nature, may not easily lend themselves to the teaching of religious principles (e.g., mathematics)."⁸⁰ The court also struck down Ohio's requirement that all activities of a non-public school conform to policies adopted by the board of education and that such a school "cooperate with elements of the community in which it exists."⁸¹ The combined effect of the State's regulations, the court contended, would be to "repose power in the state Department of Education to control the essential elements of non-public education in this state."⁸²

A decision by a federal district court in Massachusetts provides further evidence that courts view parental free exercise rights as a barrier to substantial state regulation of religious schools. In *New Life Baptist Church Academy v. Town of East Longmeadow*,⁸³ the court ruled that the State's school approval requirement, which entailed "considerable surveillance of the school" and turned in part on the qualifications of teachers, burdened the free exercise rights of parents and was not the least restrictive means for accomplishing the State's objective of ensuring an adequate education for children.⁸⁴ The court recognized that this case presented "the question of whether it is legitimate for the state to require that children be educated

79. 351 N.E.2d 750 (Ohio 1976). One commentator has described this decision as having "profound importance to Christian schools in Ohio and elsewhere." James C. Carper, *The Whisner Decision: A Case Study in State Regulation of Christian Day Schools*, 24 J. CHURCH & ST. 281, 282 (1982).

80. *Whisner*, 351 N.E.2d at 765 (footnote omitted).

81. *Id.* at 767. This last requirement conflicted with the Fundamentalists' belief in the importance of separation from the rest of society. See Carper, *supra* note 79, at 288.

82. *Whisner*, 351 N.E.2d at 770.

83. 666 F. Supp. 293 (D. Mass. 1987), *rev'd on other grounds*, 885 F.2d 940 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990).

84. *Id.* at 294-95. Relying on *Yoder* and *Plyler v. Doe*, 457 U.S. 202 (1982), the court construed an adequate education as one that provides simply a " 'basic education' imparting 'basic skills.' " *New Life Baptist Church Academy*, 666 F.Supp. at 318. The Court of Appeals reversed the district court's decision in *New Life Baptist Church Academy* only because the district court erred in concluding that standardized testing of students and individual follow-up, perhaps coupled with a teacher certification requirement, would be both less restrictive and adequate for the State's purposes. The higher court did not challenge the finding that the approval process burdened the parents' free exercise rights. *New Life*

to assure that they can, and likely will, make an intelligent choice between submitting to their parents' religious beliefs or selecting a more conventional, secular style of life."⁸⁵ In answering this question negatively, the district court relied on *Yoder* for the proposition that a religious interest extends the scope of parental liberty beyond that protected by the Fourteenth Amendment Due Process Clause. Under *Yoder*, the State is not empowered to save a child from his parents by ensuring the child's growth toward intellectual autonomy. Allowing the State this power would conflict with what the court deemed a fundamental interest of the parents "to guide the religious future and education of their children."⁸⁶

In those cases where courts have rejected parents' free exercise challenges to private-school regulations, they have done so only after subjecting the regulations to heightened scrutiny.⁸⁷ Of particular note is a 1985 Iowa decision that, while recognizing the constitutionality of a state law requiring merely that all school teachers possess state certification and make periodic reports to the State, carved out for parents expansive child-rearing authority and independence under the Free Exercise Clause.⁸⁸ The court agreed with

Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 946 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990).

85. *New Life Baptist Church Academy*, 666 F. Supp. at 318.

86. *Id.* at 318-19 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

In *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979), the court sustained a parental free exercise objection to co-ed physical education. The court found that "daily exposure of the children to worldly influences in terms of attitudes and values of dress contrary to their religious beliefs . . . interferes with the religious development of the Pentecostal children and their integration into the . . . Pentecostal . . . community at the crucial adolescent stage of development." *Id.* at 276.

Another court refused a request by Apostolic Lutheran parents that a public school allow their children to leave the classroom whenever teachers used audio-visual equipment for educational purposes. *Davis v. Page*, 385 F. Supp. 395, 399, 401 (D.N.H. 1974). The court recognized a burden on the parents' free exercise rights, arising from the fact that the use of such equipment "allow[ed] to be done in the school what [was] prohibited at home." *Id.* at 399. However, it found that, because teachers used such equipment in the classroom quite frequently, allowing the children to leave the classroom in all instances would deny them an effective education since there was no reasonable alternative means available for giving the children the same instruction. *Id.* at 401. The court did rule, though, that the school must allow the children to leave the classroom when audio-visual equipment was used for entertainment purposes, because "[i]n this situation, the parents' interests become predominant." *Id.*

87. See, e.g., *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (statute requiring standardized testing of students schooled at home passes strict scrutiny mandated by *Yoder*); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987) (upholding reporting and teacher certification requirements for non-public schools); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 518, 526, 529 (E.D. Cal. 1988) (finding state licensing regime for private pre-schools necessary to satisfy state's compelling interest in health and safety of children), *aff'd*, 893 F.2d 1139 (9th Cir.), *cert. denied*, 496 U.S. 937 (1990); *Sheridan Road Baptist Church v. Department of Educ.*, 396 N.W.2d 373 (Mich. 1986) (upholding certification requirement for teachers in parochial schools), *cert. denied*, 481 U.S. 1050 (1987); *State ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571 (Neb.) (upholding requirements for school approval, reporting of children's names, teacher certification, and state inspection), *appeal dismissed*, 454 U.S. 803 (1981); *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692 (Tex. 1984) (upholding licensing requirements imposed on church-run day-care facility), *appeal dismissed*, 474 U.S. 801 (1985).

88. *Johnson v. Charles City Community Schs. Bd. of Educ.*, 368 N.W.2d 74 (Iowa), *cert. denied sub nom. Pruessner v. Benton*, 474 U.S. 1033 (1985).

the State that the law constituted only a minimal interference in the affairs of the school, but cautioned:

We agree with plaintiffs' contention that the religious freedoms guaranteed them under the first amendment entitle them to educate their children at the private religious school they have established. The same guarantees accord them the right to operate the school with minimal necessary supervision by the state.

....

... The whole purpose of such a school is to foster the development of their children's minds in a religious environment. If the state were to unnecessarily control teacher selection a free exercise right could be threatened.

... The parents have the clear right to select for [their children] teachers with religious convictions which are consistent with the purpose of the school.⁸⁹

In upholding the regulation, the court emphasized that the legislation at issue would not prevent the school from selecting Fundamentalist Christian teachers, nor from teaching required subjects "in its own way,"⁹⁰ which meant permeating all curricular materials with biblical teachings, presenting all subjects only from a biblical point of view, and requiring all parents of students, as well as all teachers, supervisors, and assistants, to agree with the church's doctrinal position.⁹¹ Thus, the Iowa court clearly understood the Free Exercise Clause to protect the Fundamentalist parents against any but the most minimal state requirements.⁹² Whether the schooling to which the parents subjected their children was on the whole conducive to their well-being, let alone whether it was the best available educational alternative for the children, was apparently rendered irrelevant by the religious motivation of the parents.

2. Medical Care

Both before and since the *King County Hospital* litigation,⁹³ a great number of states have provided exemptions in their child abuse and neglect laws for parents who sincerely object to particular forms of medical treatment on religious grounds. Many states first enacted such exemptions after the United States Department of Health, Education, and Welfare, in imple-

89. *Id.* at 76, 80-81.

90. *Id.* at 83.

91. *Id.* at 76. The aspects of public school education that these fundamentalists most emphatically opposed were the Darwinian theory of evolution, *id.* at 77, and "a multicultural non-sexist approach for the teaching of subjects," *id.* at 82 n.2 (internal quotation omitted).

92. The mandated reports were to include only the name and age of the child, the period of instruction, a description of the course of study, and the name of the teacher. See IOWA CODE ANN. § 299.4 (West Supp. 1994).

93. See *supra* text accompanying notes 29-32.

menting the Child Abuse Prevention and Treatment Act of 1974,⁹⁴ mandated such an exemption as a condition for receiving federal funds under the Act.⁹⁵ As of 1993, a total of forty-four states and the District of Columbia included such exemptions in their abuse and neglect laws, thereby precluding prosecution under those laws of parents whose children die or become ill as a result of the parents' failure to obtain medical care.⁹⁶

Despite the typically blanket nature of these statutory exemptions,⁹⁷ states have effectively limited their scope to non-fatal cases by successfully prosecuting parents under criminal statutes other than their abuse and neglect laws. States have convicted parents under manslaughter or felony endangerment laws where children have died for lack of treatment, even where the child neglect laws included a "spiritual treatment" exemption.⁹⁸ This back-door approach has recently come under attack, however, as some courts have overturned manslaughter or murder convictions of parents on due process grounds. These courts have found that the religious exemptions in neglect laws lead parents to believe that they are free not to seek medical care for their children, so that the laws of the State as a whole do not give parents unambiguous or fair notice of their legal duty.⁹⁹

Among the judicial decisions addressing such spiritual treatment

94. 42 U.S.C. § 5101 (1988 & Supp. V 1993).

95. Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135, 141 (1993). This requirement was eliminated in 1983, but no states repealed their exemptions as a result. *Id.*

96. *Id.* at 140. One typical statute reads:

Any parent, guardian or other person having care, custody, or control of a minor child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not, for that reason alone, be considered in violation of this section.

VA. CODE ANN. § 18.2-371.1(C) (Michie Supp. 1994).

97. Only Oklahoma expressly limits the scope of its spiritual treatment exemption in terms of the degree of danger to the health of a child, confining it to cases in which there is no danger of permanent physical damage. Treene, *supra* note 95, at 145.

98. See, e.g., *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989); *Funkhouser v. State*, 763 P.2d 695 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Commonwealth v. Cottam*, 616 A.2d 988 (Pa. Super. Ct.), *appeal denied*, 636 A.2d 632 (Pa. 1993); *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. Super. Ct. 1985), *appeal denied*, 538 A.2d 874 (Pa.), *cert. denied*, 488 U.S. 817 (1988); *State v. Norman*, 808 P.2d 1159 (Wash. Ct. App.), *review denied*, 818 P.2d 1099 (Wash. 1991).

There was precedent in early English common law for completely excusing parents for allowing their children to die for lack of medical care because their religious beliefs were opposed to the required treatment. See *Regina v. Downes*, 1 Q.B.D. 25, 29 (1875) (citing *Regina v. Hines*, 80 Central Crim. Ct. Sessions Paper 309 and *Regina v. Wagstaffe*, 10 Cox Crim. Cas. 530). American courts, however, began to take a different view early in this century. See Judith Inglis Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429, 1431 (1990).

As the discussion of permissible state interventions to order treatment below reveals, the Free Exercise Clause clearly does not compel states to create an exemption applicable to fatal cases, but on the reading of some courts it may compel an exemption applicable to non-fatal cases. See *infra* notes 108-14 and accompanying text.

99. See, e.g., *Hermanson v. State*, 604 So. 2d 775, 776 (Fla. 1992); *State v. McKown*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 112 S. Ct. 882 (1992).

exemptions, one is extraordinary for its unique appreciation of what is wrong with those provisions from a child-welfare perspective. In *State v. Miskimens*, the court prospectively invalidated the religious exemption in Ohio's neglect laws, in part on equal protection grounds. The court found that the exemption denied the equal protection of the neglect laws to the children of parents whose religious beliefs direct them not to seek medical care.¹⁰⁰ Manifesting a rare recognition of the separate personhood and distinct interests of children, the court stated:

This special protection should be guaranteed to all such children until they have their own opportunity to make life's important religious decisions for themselves upon attainment of the age of reason. After all, given the opportunity when grown up, a child may someday choose to reject the most sincerely held of his parents' religious beliefs, just as the parents on trial here have apparently grown to reject some beliefs of their parents. Equal protection should not be denied to innocent babies, whether under the label of "religious freedom" or otherwise.¹⁰¹

The *Miskimens* court thus rejected the idea that the exemption might be an appropriate accommodation of the religious interests of parents, in terms suggesting just the sort of in-principle limitation on rights that this Article urges. Picking up on the language in *Prince* suggesting that free exercise rights protect only self-determining behavior,¹⁰² the court drew a line between exercising one's religious rights by refusing medical care for oneself, and preventing another person from receiving medical care.¹⁰³ It is particularly noteworthy that the court put children on the same footing as adults, implicitly recognizing children as full legal persons. Unfortunately, this decision is unique among free exercise cases in its recognition of equal protection rights for children, its in-principle limitation of the religious rights of parents, and its respect for the morally distinct personhood of

100. 490 N.E.2d 931, 935 (1984). The parents were charged with child endangerment for neglecting to obtain medical care for their infant son, who died of a bacterial infection. The court dismissed the charges on the ground that the laws of the State pertaining to parental failure to obtain medical care were unconstitutionally vague. *Id.* at 937-38. The court also held that the State's religious treatment exemption violated both the Establishment Clause, by favoring one religion over others (Ohio's exemption, like that of many other states, is drafted in such a way as to apply almost exclusively to Christian Scientists), and the equal protection rights of parents not entitled to the exemption. *Id.* at 935.

101. *Id.* at 935-36.

102.

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Prince v. Massachusetts, 321 U.S. 158, 170 (1944), quoted in *Miskimens*, 490 N.E.2d at 934.

103. *Miskimens*, 490 N.E.2d at 934 (noting that "[T]he right to hold one's own religious beliefs, and to act in conformity with those beliefs, does not and cannot include the right to endanger the life or health of others, including his or her children.").

children.¹⁰⁴

More important than prosecuting parents for allowing their children to die, however, is the ability of courts to intervene to secure treatment for children before they die. At least ten states with prayer exemptions also explicitly provide by statute that such exemptions do not preclude a court from ordering treatment for a child despite her parents' religious objections.¹⁰⁵ The laws of most states include more general provisions empowering courts to declare a child who is not receiving proper care a dependent or ward of the court for the limited purpose of giving the court authority to order necessary medical treatment.¹⁰⁶ Courts have done so even over the religious objections of parents.¹⁰⁷

What is troubling, however, is that when parents assert a claim of religious freedom against state intervention, courts are willing to step in and order treatment only in extreme cases. Their reluctance to intervene typically arises not from concern that state intervention might be more traumatic for the child than the threatened injury, but rather from deference to the supposed religious rights of parents. Courts have uniformly permitted state officials to order medical treatment where necessary to save the life of a child, but have divided over the question of whether the State may order medical treatment to avoid grievous injury short of death.¹⁰⁸ And no court has decided that it is constitutionally permissible to override the religious objections of parents to medical treatment when the danger is of less serious injury.

A Pennsylvania Supreme Court decision is representative of the minority view that the Free Exercise Clause precludes state intervention to order

104. The bulk of legal commentary relating to spiritual healing likewise manifests a greater concern with the rights of parents than with the well-being of children, containing frequent recommendations for legislative changes to better protect the due process or free exercise rights of parents. See, e.g., Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 585-87 (1990); Edward E. Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491, 1521-24 (1991); Treene, *supra* note 95, at 197-99.

105. Treene, *supra* note 95, at 144-45.

106. McCarthy, *supra* note 6, at 1020-21.

107. See, e.g., *Novak v. Cobb County-Kennestone Hosp. Auth.*, 849 F. Supp. 1559 (N.D. Ga. 1994) (rejecting federal and state causes of action based on court-ordered blood transfusion for 16-year-old Jehovah's Witness against the wishes of the child and his mother); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill.) (affirming order appointing guardian to consent to blood transfusion necessary to prevent death of child of Jehovah's Witnesses), *cert. denied*, 344 U.S. 824 (1952); *In re Hamilton*, 657 S.W.2d 425 (Tenn. Ct. App. 1983) (State may require cancer treatment for twelve-year-old child despite religious objections of parents).

108. Goldstein, Freud, and Solnit endorse the view that courts should override the medical decisions of parents, whether religiously motivated or not, only when denial of treatment would result in death for a child who could otherwise enjoy "a life worth living or a life of relatively normal healthy growth." See GOLDSTEIN ET AL., *supra* note 7, at 92. Professor Wald criticizes these authors for being more concerned with preventing judges from exercising value judgments than with protecting the welfare of children, Wald, *supra* note 7, at 682, and proposes that courts order medical treatment when necessary to prevent serious physical injury or severe emotional damage, Wald, *supra* note 15, at 1019, 1030. For a more comprehensive presentation of cases prior to 1983 involving religious or non-religious objections by parents to proposed forms of medical treatment of children, see Sher, *supra* note 3.

medical treatment over the religious objections of parents absent risk that the child will die.¹⁰⁹ The *In re Green* decision, which followed closely on the heels of *Yoder*, allowed a mother to deny her sixteen-year-old son an operation that would have corrected his paralytic scoliosis, a curvature of the spine that made the son unable to stand or walk and that would soon have made him bedridden. The mother, a Jehovah's Witness, initially consented to the corrective procedure but, because of her religious beliefs, refused to consent to the blood transfusions that would have been necessary to perform the operation. The court acknowledged that *Prince* held that the State may in some situations limit parental authority where necessary to protect the health or safety of the child, but found in the *Yoder* opinion evidence that the standard for state intervention is danger of death, not merely grievous injury or illness.¹¹⁰ Absent such a danger, the court asserted, the State's interest in ordering the medical care is not sufficient to outweigh the religious preferences of the parent.¹¹¹

Fortunately, the majority view today is to the contrary. In a decision representative of this view, *Muhlenberg Hospital v. Patterson*,¹¹² a New Jersey court ruled that the State can intervene to order a blood transfusion for a child over the religious objections of the child's parents when the transfusion is necessary to prevent grievous injury. In dictum, however, the court stated that the government could not intervene if only the likelihood of a lesser injury existed: "The Courts have been and will continue to be

109. *In re Green*, 292 A.2d 387 (Pa. 1972); see also *In re D.L.E.*, 614 P.2d 873, 874 (Colo. 1980) (overturning juvenile court adjudication of 12-year-old as a dependent of the State arising from mother's refusal on religious grounds to comply with program of treatment for son's seizures, stating: "In reaching our decision, we emphasize by way of limitation that this is not a case where D.L.E.'s life is in imminent danger through a lack of medical care."); cf. *In re Cabrera*, 552 A.2d 1114, 1120 (Pa. Super. Ct. 1989) (ordering blood transfusion for six-year-old was consistent with *In re Green* where there was substantial risk of death).

110. *In re Green*, 292 A.2d at 390-91. The court quoted a passage from the *Yoder* opinion stating that parental power, "even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens," but noted that the only analogous case that the *Yoder* opinion cited in connection with that passage was one involving a life or death situation. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972)). The court also drew on "the broad holding of *Yoder* that the state's interest in the education of its children must fall before a parent's religious beliefs." *Id.* at 391.

111. *Id.* at 392. Three dissenting Justices criticized the majority for giving primary consideration to the mother's religious beliefs rather than to the health of the son. *Id.* at 393-95 (Eagen, J., dissenting). The court ultimately remanded the case for a determination of the views of the son, but without deciding whether the son's preferences would trump the mother's beliefs if they turned out to be inconsistent. *Id.* at 392. The court distinguished the *Yoder* holding that the views of the Amish children were irrelevant since the Amish children were not parties to that litigation and not subject to prosecution, on the basis that in the case before it the son was directly involved. *Id.*

112. 320 A.2d 518 (N.J. Super. Ct. Law Div. 1974). The child in this case was a six-day-old boy with jaundice and a high bilirubin count, who would soon have suffered "severe and irreparable brain damage" without a blood transfusion. *Id.* at 519; see also *In re Sampson*, 278 N.E.2d 918 (N.Y. 1972) (upholding order of blood transfusions needed during surgery to improve function and appearance of child's face and neck). Most legal commentary on the subject also favors this view. See, e.g., Mike Hulén, Case Note, 27 ARK. L. REV. 151 (1973); Wald, *supra* note 15, at 1019, 1030; Kenneth P. Walsh, Recent Case, 77 DICK. L. REV. 693 (1972-73).

the guardian of the religious rights of the individual[] to see that this power of the State is not exercised beyond the area where treatment is necessary for the sustaining of life or the prevention of grievous bodily injury."¹¹³ In other words, even in the view of this court, the Free Exercise Clause does secure for parents a *right*, when their religious beliefs so require, to cause their children to suffer avoidable illness or bodily injury, so long as that injury is not "grievous."¹¹⁴

In addition to the spiritual treatment exemption to general abuse and neglect laws, many states also include religious objection exemptions in statutes mandating specific types of medical care for children.¹¹⁵ For example, a Massachusetts law requiring that school children receive certain vaccinations exempted children of parents who were members of a recognized church or religious denomination whose tenets conflict with the practice of immunization.¹¹⁶ In *Dalli v. Board of Education*,¹¹⁷ Massachusetts' Supreme Judicial Court struck down the statutory exemption when it was challenged by a parent who objected to vaccination for his child on religious grounds, but who was not a member of a recognized church or religious denomination.¹¹⁸ The court found that this preferential treatment of some forms of religion over others violated the equal protection guarantee of the First and Fourteenth Amendments,¹¹⁹ presumably because it constituted an establishment of religion and afforded unequal protection of the law for some parents.

The *Dalli* decision is striking in its utter disregard for the interests of the plaintiff's child. The court expressed sympathy for the plaintiff parent and for parents who had previously enjoyed the exemption, and suggested that they petition the state legislature for an exemption sufficiently broad as not to offend the United States Constitution. The court opined that the original exemption was "an appropriate mark of deference to the sincere religious beliefs of the few which at the same time created a minimal hazard to the health of the many," and noted medical evidence that there was no real

113. *Muhlenberg Hosp.*, 320 A.2d at 521.

114. The importance of parental support for a child undergoing medical treatment may counsel in favor of raising the threshold for state-ordered treatment above simply a finding that treatment would effect some modest improvement in the child's health. See Wald, *supra* note 15, at 1030. On the other hand, the common assumption that parents know what is best for a child seems particularly inapposite in medical contexts, especially where parents' objections to treatment are based on religious beliefs.

115. E.g., COLO. REV. STAT. ANN. § 25-4-1005 (West 1990) (screening of newborns for disease or physical defects); DEL. CODE ANN. tit. 16, § 122(3)(n) (Supp. 1992) (immunization); HAWAII REV. STAT. ANN. § 321-11(22) (Supp. 1993) (immunization); ILL. ANN. STAT. ch. 410, para. 235/6 (Smith-Hurd 1993) (immunization); N.Y. PUB. HEALTH LAW § 2164(8) (McKinney 1993) (immunization); OHIO REV. CODE ANN. § 3701.504(B) (Anderson 1992) (testing for hearing impairment); TEX. HEALTH & SAFETY CODE ANN. § 36.005(b) (West 1992) (screening for vision and hearing disorders); WYO. STAT. § 21-4-309 (1992) (immunization).

116. MASS. GEN. L. ch. 76, § 15 (1982).

117. 267 N.E.2d 219 (Mass. 1971).

118. *Id.* at 222-23.

119. *Id.*

danger to public health if only a small number of children remained susceptible to the contagious diseases.¹²⁰ The court failed to consider that the danger to the religious parent's unvaccinated child might itself be a compelling reason for eliminating any exemptions.

In *Brown v. Stone*,¹²¹ a Mississippi court likewise struck down a religious exemption from a state law requiring vaccination of all school children as a violation of the Fourteenth Amendment rights of persons not covered by the exemption. This court did show sensitivity to the interests of the children of religious objectors, asking incredulously: "Is it mandated by the First Amendment to the United States Constitution that innocent children, too young to decide for themselves, are to be denied the protection against crippling and death that immunization provides because of a religious belief adhered to by a parent or parents?"¹²² The court answered this question in the negative, finding that the immunization requirement "serves an overriding and compelling public interest."¹²³ This decision was atypical in its reference to children's positive claim-rights against their parents and parents' correlative duties to provide for the basic welfare of their children.¹²⁴ Even this court, however, did not challenge the notion that parents have the right, in general, to decide important matters for their children, and to do so even in ways that adversely affect the children's interests, as long as the harm neither violates a recognized legal right of the children nor gives rise to a compelling state interest in preventing it. In its free exercise analysis, the court apparently understood its task to be a balancing of state interests in the welfare of the plaintiff's children and of other children in the school against what it accepted as the parents' legitimate First Amendment claim to religious freedom.¹²⁵

The above cases and others arising in the medical-care context do not take up the suggestion in *Prince* and *King County Hospital* that parental free exercise rights encompass only religious indoctrination and involvement of children in religious practices.¹²⁶ To the extent that they refer to either of these Supreme Court holdings, these lower court decisions generally focus on the negative statement in *Prince* that constitutionally protected

120. *Id.* at 223.

121. 378 So. 2d 218 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980).

122. *Id.* at 221. In other passages, however, the court indicated, rather incomprehensibly, that the statutory exemption actually violated the equal protection rights of children whose parents were *not* entitled to the exemption, rather than the children who did not receive the vaccination, because "it would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized." *Id.* at 223. Apparently the court viewed the children of non-exempt parents as somehow vulnerable to harm despite the fact that they had been immunized. The court implied that this latter group of children would receive the equal protection that was their due if they too were not immunized.

123. *Id.* at 222.

124. *Id.* at 223.

125. *See id.* at 222-23.

126. *See supra* text accompanying notes 28-34.

religious rights do not include a right to expose one's children to ill health or death or to make martyrs of them.¹²⁷ This is a significantly lesser limitation than would be posed by a rule confining those rights to religious ceremonies and indoctrination.

In sum, in the areas of religious schooling and medical care, lower federal courts and state courts have consistently interpreted the Free Exercise Clause of the First Amendment to guarantee parents a right to control the mental and physical lives of their children. This right is not always controlling, but only a compelling state interest can override it. Often courts have found the State's interest in protecting children's welfare to be compelling, but few decisions have even suggested that children themselves might have rights that should override or limit parents' rights. *Yoder*, in fact, casts doubt on the viability of such a claim.¹²⁸ And except perhaps for the *Miskimens* decision, no court has suggested that it is altogether a mistake to find that parents have a right to determine the course of their children's lives merely on the basis of parents' religious preferences. Moreover, state legislatures have shown substantial deference to the religious interests of parents, even beyond that required by the Constitution.

Thus, in the area of education, parental free exercise rights entitle parents to send their children to religious schools rather than public schools, or to educate their children at home if they belong to a centuries-old religious community isolated from the rest of society. These rights generally do not prevent states from requiring that religious schools go through a minimally intrusive approval process. However, by subjecting any state regulation or oversight of religious schools to strict scrutiny, parental free exercise rights prevent the State from undertaking any substantial efforts to ensure that children in these schools receive an adequate education and are not subjected to demeaning or traumatizing indoctrinatory practices.

In the area of medical care, most state legislatures defer to parental free exercise rights by excusing parents from the usual obligation to secure medical care for their children, as long as the children do not die as a result. In addition, courts will intervene to order medical care for a child when parents have religious objections only in those extreme cases where the child is threatened with grievous injury. Thus construed, the Free Exercise Clause gives parents a *right* to harm their children to any lesser extent.¹²⁹

Of course, adults do not enjoy the same rights of control over the education or medical care of children not in their legal custody. The Seventh

127. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

128. See discussion *supra* notes 57-58 and accompanying text.

129. I have not even touched on the situation of children whose parents belong to religious cults. For a description of the routine maltreatment of children in these cults, and of the difficulties facing child welfare workers who might seek to identify such abuse, see Susan Landa, *Children and Cults: A Practical Guide*, 29 J. FAM. L. 591 (1990-91). There appear to be no published opinions concerning state intervention to protect children in religious cults, which suggests that such interventions are rare.

Circuit's decision in *Palmer v. Board of Education*¹³⁰ is instructive in this regard. The plaintiff in that case was a public school teacher and a Jehovah's Witness who demanded the right not to implement aspects of "the prescribed curriculum concerning patriotic matters," which she claimed conflicted with her religious principles.¹³¹ In rejecting this demand, the court intimated that the teacher's free exercise rights extend only to her self-determining behavior: "Plaintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy."¹³²

If the Supreme Court had applied this same principle to the parents in *Yoder*, its analysis would have been much different and the State of Wisconsin might have prevailed. Instead, currently the law grants parents a unique right to require certain other persons—their children—to submit to their views, even if that means the children must "forego a portion of their education they would otherwise be entitled to enjoy."¹³³

I note finally that the Supreme Court's interpretation of the Free Exercise Clause recently took a sharp turn toward a non-accommodationist position in *Employment Division v. Smith*.¹³⁴ There the Court upheld the denial of unemployment compensation to Native Americans who were fired for ingesting peyote in violation of Oregon law.¹³⁵ The majority opinion enunciated a general principle that facially neutral and generally applicable laws that incidentally burden religious practice do not violate the Free Exercise Clause.¹³⁶ Taken at face value, however, Justice Scalia's majority opinion in *Smith* would not change the doctrinal course of free exercise cases involving parenting because it exempted from this general rule laws that also burden other fundamental rights, such as the substantive due process right of parents to direct the upbringing of their children.¹³⁷ Thus, ironi-

130. 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

131. *Id.* at 1272.

132. *Id.* at 1274.

133. *Id.*

134. 494 U.S. 872 (1990).

135. *Id.* at 878-79.

136. *Id.* at 879.

137. *Id.* at 881-82. Here the Court was attempting to distinguish past decisions, such as *Yoder*, which clearly did hold on free exercise grounds that certain facially neutral and generally applicable laws were unconstitutional as applied. *See id.* It is ironic that Justice Scalia deemed the *Yoder* holding legitimate only because there the parents' substantive due process claim lent additional support to the free exercise claim: the Court in *Yoder* found that a substantive due process claim by itself would have been inadequate to support the Amish parents' objection to the Wisconsin law, and that the Free Exercise Clause extended the scope of protected parental freedom and authority beyond that which the non-religion-based parental right afforded. *See discussion supra* notes 50-52 and accompanying text. In addition, Justice Souter has argued that Justice Scalia's attempt to distinguish *Yoder* was flawed because there was no substantive due process claim in *Yoder*; the Yoders advanced *only* a free exercise claim. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2244 n.4 (1993) (Souter, J., concurring).

cally, adults cannot now claim a religious exemption from neutral laws intended to prevent them from harming themselves, but they can claim a religious exemption from neutral laws intended to prevent them from harming their children.

In Parts II and III, I argue that the very notion of parental rights that the courts have developed and that has taken on its strongest form in religious contexts is illegitimate because it is inconsistent with a proper understanding of the limited purpose of rights in our legal system. Part II discusses the concept of legal rights as reflected in numerous areas of the law not involving children, and shows that rights in these contexts are properly limited to protecting self-determining conduct. Part III demonstrates that the justifications typically offered for the anomalous set of "other-determining" rights held by parents do not withstand scrutiny. The Article concludes that judicial analysis in cases such as *Yoder* has been severely flawed. Rather than granting parents a right to treat their children as instruments of the parents' religious aspirations, courts should decide disputes relating to child-rearing based on the fundamental interests and rights of the children involved.¹³⁸

II

THE LIMITS OF RIGHTS IN NON-PARENTING CONTEXTS

In this Part, I develop the proposition that, as a general rule, our legal system does not recognize or bestow on individuals rights to control the lives of other persons. In other words, there is an in-principle limitation on legal rights that confines them to protection of a right-holder's personal integrity and *self-determining* activities. As such, it is illegitimate to construe an individual's rights to include an entitlement to exercise extensive control over another person, or *any* control over a non-consenting person apart from self-defensive measures. To deem one individual entitled to use another non-consenting person as an instrument to advance his own interests free from interference by the State or other third parties is to commit a conceptual and moral mistake.

In considering the validity of this proposition, one must keep in mind the distinction between a right and a privilege. Of course, the law *permits* individuals in particular circumstances to direct some aspects of the life of another adult who cannot act on his own behalf. These individuals can act as agents in order to advance the interests of that adult, even where he cannot consent to being so represented. However, the law does not accord any individuals a *right* to direct the life of another adult, such that those

138. This alternative approach might yield the same practical outcome as the present approach in some cases. See e.g., Robert A. Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 LAW & CONTEMP. PROBS. 118, 127-31 (1975) (offering a child-centered defense of the result in *Yoder*). In many other cases, it would not.

individuals would have cause to complain on their own behalf if denied the ability to direct the other person's life as they wished.

That no one has a right to control the life of another adult may seem self-evident. Nevertheless, it is difficult to demonstrate the truth of this proposition due to the lack of clear statements by the judiciary that this is in fact a controlling principle of law in this country. This silence might be attributable to the self-evident nature of the proposition. It might also be a consequence of the fact that, outside the parenting context, people simply do not claim a right to direct the lives of others, and thus do not present courts with the question of whether the law should recognize such a right. The fact that people do not make such claims, in turn, may reflect not only widespread recognition that other people have a right to personal autonomy, but also an understanding that the scope of individual rights is inherently limited to the sphere of one's own life.

In view of judicial silence on this issue, I proceed first by making the negative case that, except in the parenting context, no court has expressed an opinion *contrary* to the proposition that no one possesses a right to control another's life. To make this negative case, Section A begins by discussing judicial interpretations of a number of particular rights that suggest the limited scope for rights advocated here, i.e., that construe rights as protections of a right-holder's self-determination and personal integrity. Section B develops the positive case that principles applied in areas of the law unrelated to child-rearing affirmatively support this conclusion. To this end, I examine areas of law pertaining to situations of *de jure* or *de facto* subordination of adults and situations in which adults are, like young children, unable to articulate rational preferences with respect to important life decisions, or to assert rights on their own behalf. In each of these situations the law explicitly denies individuals rights of control over the lives of others. By ordering the discussion so that the situations considered are increasingly analogous to the situation of children, I eliminate in turn certain factors that might at first appear to be appropriate bases for distinguishing the relationship between a parent and minor child from all other relationships.

A. *The Rhetoric of Rights*

While judicial opinions frequently address the content and purpose of specific rights, they rarely enunciate any theory of what a "right" is. In particular, there has been no clear judicial statement affirming or denying that in our legal system one generally has no right to control the life of another. I suggest that it is simply universally understood that rights protect only a right-holder's self-determination and personal integrity. Support for this conclusion can be found in language the Supreme Court has used to articulate a number of particular constitutional rights.

For example, the Supreme Court has described the religious liberty

protected by the Free Exercise Clause as "the right of every person to freely choose *his own course*" with respect to religious training, teaching and observance;¹³⁹ as "rights to *one's own* religious opinion";¹⁴⁰ and as a person's liberty "to worship God according to the dictates of *his own* conscience."¹⁴¹ The Court has never suggested—again, apart from parenting cases—that the Free Exercise Clause entitles anyone to force others to espouse certain religious beliefs or engage in particular religious practices, or otherwise to control the life of another person in accordance with the dictates of one's religion.

Not surprisingly, none of the free exercise cases that the Court has considered has involved any such claim. One can imagine that if a plaintiff asserted a right to compel another adult to go to the plaintiff's church, to receive religious training of the plaintiff's choice, or to forego medical treatment prohibited by the plaintiff's religion, any court would summarily dismiss the claim. It would do so regardless of how passionately the plaintiff felt that he must indoctrinate the other adult or prevent the religiously objectionable medical treatment, and regardless of whether the other adult had any opinions or preferences of her own regarding religion. Moreover, courts would not find that state action preventing a plaintiff from forcing other adults into conformity with the dictates of the plaintiff's own religion burdened the plaintiff's constitutionally-protected religious liberty, and then go on to consider whether compelling state interests outweighed this burden. Courts would instead simply refuse to recognize the type of right that the plaintiff asserts.¹⁴²

One type of free exercise case that some state courts have addressed does involve a situation in which one person claims a religiously grounded right to control to some degree the life of another adult. This is where one spouse raises a religious objection to a State's granting a civil divorce to the other spouse. This kind of objection falls far short of a demand to dictate the religious training or medical care of another person, however, and, in any event, state courts have summarily dismissed such claims.

*Sharma v. Sharma*¹⁴³ is typical of these cases. There, a woman who was an adherent of Hinduism argued that the State of Kansas violated her free exercise right by granting her husband's request for a divorce, because her religion did not recognize divorce. The court found that civil divorce in

139. *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (emphasis added).

140. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (emphasis added).

141. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

142. The same would be true if the plaintiff claimed a right to indoctrinate someone else's children, even if those children and their parents had no views of their own on religious matters. Yet, when adults seek to indoctrinate their own children, courts find that they have a constitutional right to do so. This right includes a negative claim-right against efforts by the State to protect and promote the health and intellectual development of the children, and may even include the power to override the preferences of the children regarding religion. See discussion *supra* Part I.

143. 667 P.2d 395 (Kan. Ct. App. 1983).

no way impaired the woman's religious freedom. The divorce did not change the status of the marriage under Hindu ecclesiastical law or otherwise interfere with the wife's practice of Hinduism, and she remained free to take any view of the relationship that she liked.¹⁴⁴

In construing the First Amendment Free Speech Clause, the Supreme Court has similarly spoken in terms suggesting that it views the protected right as limited in scope to the right-holder's sphere of personal autonomy. The Free Speech Clause protects the "right of *self*-determination in matters that touch individual opinion and personal attitude,"¹⁴⁵ and embodies the "concept of '*individual* freedom of mind.'" ¹⁴⁶ People simply do not claim a right under the Free Speech Clause to force another adult to profess their beliefs,¹⁴⁷ and it is inconceivable that a court faced with such a claim would find that such a right exists and must be weighed against competing interests.

Likewise, the Supreme Court construed the Due Process Clauses of the Fifth and Fourteenth Amendments as protecting a right-holder's control over her own person and property. Liberties warranting due process protection include "the right to make contracts for the sale of *one's own* labor,"¹⁴⁸ "the right to build on *one's own* property,"¹⁴⁹ and the right of the individual "to plan *his own* affairs" and "to shape *his own* life as he thinks best."¹⁵⁰ The Court has described the right to make medical decisions as "the right of

144. *Id.* at 396 (citing a similar decision by an Oklahoma court in *Williams v. Williams*, 543 P.2d 1401 (Okla. 1975), *cert. denied*, 426 U.S. 901 (1976)). The *Sharma* decision stands in sharp contrast to *Yoder*: in *Yoder* the Supreme Court failed to recognize that compulsory school attendance for the children of Amish adults would in no way affect the parents' beliefs nor lessen the parents' religious authority over their children. See *supra* text accompanying notes 40-42. Nor did the *Sharma* decision suggest that the civil divorce might have burdened the wife's free exercise of religion by making it more difficult for her to carry out the spousal obligations that her religion imposed on her. In contrast, *Yoder* suggests that an impediment to fulfillment of religiously-imposed familial obligations is a legitimate basis for finding a burden. See *supra* text accompanying note 44. Finally, while the court in *Yoder* factored in the preservation of the Amish community and way of life, see *supra* text accompanying notes 45-46, the *Sharma* court did not consider the social value of marriage or of preserving the Hindu way of life in America.

145. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (emphasis added).

146. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637) (emphasis added); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 816 (1978) (White, J., dissenting) (noting that the Free Speech Clause protects "the right to adhere to one's own beliefs and to refuse to support the dissemination of the personal and political views of others"); *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (noting that the First Amendment protects the right of "autonomous control over the development and expression of one's intellect, interests, tastes, and personality") (emphasis omitted).

147. Plaintiffs have claimed a free speech right to be allowed to express their views in certain privately-owned public fora, such as a newspaper or a shopping mall, but they have not claimed that the owners of these venues must endorse their views. The Court has granted such claims only when doing so would not effectively force the venue-owners to speak and would not make it appear that the owners endorsed the views expressed. See discussion *infra* notes 214-22 and accompanying text.

148. *Adair v. United States*, 208 U.S. 161, 172 (1908) (emphasis added).

149. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) (emphasis added).

150. *Doe v. Bolton*, 410 U.S. at 213 (Douglas, J., concurring) (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)) (emphasis added).

every individual to the possession and control of *his own person*" and "to determine what shall be done with *his own body*."¹⁵¹ These statements confirm that rights are guarantees of "physical freedom and self-determination."¹⁵²

The Court has used similar language in discussing the right to counsel in criminal actions. The Sixth Amendment guarantees the "'right to conduct *one's own* defense,'"¹⁵³ not a right to control the defense of other accused adults, and a "right to choose *one's own* counsel,"¹⁵⁴ not a right to so choose for another. Likewise, the Fifth Amendment guarantees the "right to testify on *one's own* behalf,"¹⁵⁵ not a right to testify when others are charged.

In the abortion context, members of the Court have described the rule of law that *Roe v. Wade* and its progeny established as "a woman's fundamental right to self-determination,"¹⁵⁶ resting on the "'moral fact that a person belongs to himself and not others nor to society as a whole.'"¹⁵⁷ Other members of the Court have characterized the constitutionally protected choice to have an abortion as among the "choices central to personal dignity and autonomy."¹⁵⁸ They argue that "[a]t the heart of liberty is the right to define *one's own* concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁵⁹

151. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891), and *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E.2d 92, 93 (1914), respectively) (emphasis added).

152. *Id.* at 287 (O'Connor, J., concurring) (emphasis added). Similarly, Justice Brennan pointed out that "'Anglo-American law starts with the premise of thorough-going selfdetermination [sic].'" *Id.* at 305 (Brennan, J., dissenting) (quoting *Natanson v. Kline*, 350 P.2d 1093, 1104 (Kan. 1960)).

153. *Faretta v. California*, 422 U.S. 806, 816 (1975) (quoting *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964)) (emphasis added).

154. *Wheat v. United States*, 486 U.S. 153, 159 (1988) (emphasis added).

155. *Rock v. Arkansas*, 483 U.S. 44, 51, 53 n.10 (emphasis added).

156. *Rust v. Sullivan*, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting) (joined by Stevens and Marshall, JJ.).

157. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977)), *overruled in nonrelevant part by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

158. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (plurality opinion of O'Connor, Kennedy, & Souter, JJ.).

159. *Id.* (emphasis added); *see also Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J., concurring) ("What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty.") (quoting CHARLES FRIED, *RIGHT AND WRONG* 146-47 (1978)).

The Court has clearly established that it is the adult woman alone, not her husband, who is entitled to decide what will happen to her body. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (invalidating state statutory provisions requiring husband's consent). Where minors seek abortion, this right to self-determination may be circumscribed by parental consent requirements, so long as provision is made for judicial bypass of parental consent when a minor is mature enough to make the decision for herself or when she can show that it is in her best interest to have an abortion. *See Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979); *see also Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (reaffirming the *Bellotti* holding).

In sum, the courts consistently interpret rights as protections of individual self-determination. Curiously, though, the Court has also intimated that decisions regarding the education and upbringing of one's child are in fact aspects of the *parents'* self-determination. For example, in *Doe v. Bolton*, Justice Douglas asserted in his concurrence that the term "liberty" in the Fourteenth Amendment implies "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."¹⁶⁰ There is a paradox inherent in this understanding of personal liberty, arising from the fact that decisions regarding children's education and upbringing are actually a form of "other-determination," and from the fact that insulating the family from state intervention can operate to destroy children's own "ability independently to define [their] identity."¹⁶¹ This paradox has apparently escaped the awareness of the Court.¹⁶² Surprisingly, this remains the case even after the Court's decision in *Eisenstadt v. Baird*,¹⁶³ which emphasized that constitutional liberties pertain to individuals, not to intimate relationships as unitary entities. It is also surprising given that, in contexts not directly involving parents, the Court has recognized children as distinct persons

160. 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis omitted); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) ("Protecting these [family] relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

161. *Roberts*, 468 U.S. at 619.

162. This paradox has also largely escaped notice by legal scholars. See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 172, 179, 199 (1993) (arguing for greater parental control over the education of children as an aspect of the parents' religious autonomy); FRIED, *supra* note 159, at 152 ("[T]he right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself."); Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 *ETHICS* 6, 17 (1980) ("To set terms for . . . parenting more stringent than required for the protection of children from abuse and neglect constitutes an interference in a person's claim to establish intimate relations except on the society's terms."). But see David A.J. Richards, *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 *N.Y.U. L. Rev.* 1, 45 (1980). In reaction to *Yoder*, Richards writes:

Chief Justice Burger's opinion in *Yoder* put[s] great weight on the non-majoritarian life style of the Amish, as if the case were protecting the right to personal autonomy that underlies the Constitution. But, again, let us observe the morally indisputable: parents and children do not possess unitary interests. Whatever considerations may justify protecting the right of adults to control their own lives do not validate the unqualified right of adults to deprive their children of the right to decide, as free and rational persons, what kinds of lives they will choose to lead. This is another instance of the intellectual confusion and moral error engendered by regarding the constitutional right to privacy as, quintessentially, a family right.

Id. at 45 (footnote omitted).

163. 405 U.S. 438 (1972). In ruling that unmarried persons have the same privacy right to use contraception that the Court recognized for married persons in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court stated that:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . .

Eisenstadt, 405 U.S. at 453.

with rights of their own under the Constitution.¹⁶⁴

Of course, the foregoing survey of Supreme Court rhetoric regarding rights outside of the parenting context does not amount to a conclusive demonstration that the Court subscribes to the proposition that rights are inherently limited to self-determining choices and activities. It is, however, entirely consistent with that proposition, and thus provides support by way of negative inference for finding the proposition to be true. The next Section provides positive support for this hypothesis by examining several areas of law in which controlling precedents expressly deny rights to engage in other-determining behavior. The next Section also shows that judicially recognized rights that appear to involve some element of control over other persons do not constitute counterexamples to the proposition that, as a general rule, rights in our legal system are properly limited in scope to protecting self-determining conduct and cannot include an entitlement to control the lives of other persons.

B. Supporting Doctrines and Possible Counterexamples

The Thirteenth Amendment's prohibition of slavery and involuntary servitude¹⁶⁵ is the strongest and most obvious embodiment of the principle that no person should have a right to control the life of another person. The Supreme Court has interpreted this constitutional provision as proscribing not merely the formal institution of slavery,¹⁶⁶ but also all the "badges and incidents" of slavery, including any "state of bondage" or "control by which the personal service of one man is disposed of or coerced for another's benefit."¹⁶⁷ In one case, the Court defined slavery as "the state of entire subjection of one person to the will of another."¹⁶⁸

This broad principle underlying Thirteenth Amendment proscriptions is reflected in a number of rules in modern contract law, most notably the refusal of courts to order specific performance of personal service contracts.¹⁶⁹ This same unwillingness to allow the subjection of individuals to

164. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that a child's First Amendment free speech rights protect the wearing of a black armband to school to protest government policy); *In re Gault*, 387 U.S. 1, 13 (1967) (holding that children have due process rights entitling them to procedural safeguards prior to confinement in an institution for juvenile delinquents).

165. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

166. For a description of the constitutive elements of slavery, see ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 1-14 (1982).

167. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

168. *Hodges v. United States*, 203 U.S. 1, 17 (1906) (internal quotation omitted), *overruled in part* by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

169. See RESTATEMENT (SECOND) OF CONTRACTS, § 367 & cmt. a (1981); see also *American Broadcasting Cos. v. Wolf*, 420 N.E.2d 363, 367 (N.Y. 1981) ("[A] court normally will not decree specific enforcement of an employee's anticompetitive covenant unless necessary to protect the trade secrets, customer lists or good will of the employer's business And, an otherwise valid covenant will not be enforced if it . . . would operate in a harsh or oppressive manner") (citations omitted).

inordinate control by others also underlies rules limiting a creditor's right to the future income of a debtor who defaults on a loan, as well as rules giving bankrupts a "fresh start" free from the prior claims of creditors.¹⁷⁰

The principle of non-subjection has also been applied outside the commercial realm. Rules pertaining to financial aspects of divorce reflect the same reluctance of judges and legislators to allow one person to retain substantial control over the life of another person after the severance of a voluntary relationship. For example, equitable distribution of property following divorce has generally involved only material assets; most courts have not treated professional degrees and licenses as property subject to distribution.¹⁷¹ At least one court has indicated that part of the reason for refusing to do so is a concern that this would infringe the Thirteenth Amendment.¹⁷²

One might argue that toleration of slavery at the time of the drafting of our original Constitution shows that the idea of some persons having rights to control the lives of other persons has not been entirely alien to our legal system at all times. In actuality, however, the formal institution of slavery was not contrary to the thesis of this Part, because under that institution enslaved blacks were not, in the eyes of the law, persons at all—they were

170. See generally Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 (1993). Federal legislation limits to 25% the portion of a debtor's income that is subject to garnishment, and a number of states have even more stringent limitations on garnishment of wages, *id.* at 415 (citing 15 U.S.C. § 1673 (1988), and TEX. CONST. art. 16, § 28), while bankruptcy law leaves creditors with no claim on the future earnings of a bankrupt, *id.* at 419-23. One of the rationales, and arguably the most compelling one, for limiting creditor's claims to future earnings is the fear that "unless human capital receives protection against creditor claims, debtors will be subjected to a form of involuntary servitude." *Id.* at 423, 431-32.

171. See, e.g., *Marriage of Graham*, 574 P.2d 75 (Colo. 1978) (holding that an M.B.A. degree is not marital property); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982) (holding that an M.B.A. degree is not marital property per se, but creating a new remedy, "reimbursement alimony," for the supporting spouse). But see *Inman v. Inman*, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979) (finding a dental license to be marital property, but limiting the wife's interest to the amount of her investment in her husband's education); *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985) (holding that a medical license constitutes marital property and awarding the supporting spouse an equitable share of its present value).

172. Sterk, *supra* note 170, at 434, 443 (citing *Severs v. Severs*, 426 So. 2d 992, 994 (Fla. Dist. Ct. App. 1983)). Courts have also spoken of the unfairness of effectively preventing an ex-spouse from changing to a less lucrative career by locking that spouse into fixed future payments based upon his or her current income level. *Id.* at 443-44 (citing *Stevens v. Stevens*, 492 N.E.2d 131 (Ohio 1986), and *O'Brien v. O'Brien*, 489 N.E.2d at 720 (Meyer, J., concurring)). Sterk notes that, in those few states where courts have treated a degree or license as property subject to equitable distribution, "no court has awarded one spouse a share of the other's future earning capacity. At most, courts have awarded a share of the estimated present value of that future earning capacity." Sterk, *supra* note 170, at 438. The difference between awarding an ongoing claim to the earnings of an ex-spouse, on the one hand, and awarding a share of the estimated present value of the ex-spouse's future earnings, on the other, is merely a formal difference as long as a judge can accurately estimate future earnings. However, the difference in form marks a difference in the symbolic import of the award. The one-time award conveys a sense that the degree-holder is thereafter free and independent of the former spouse, except to the extent of owing the former spouse a debt. On the other hand, ongoing participation in the earnings of an ex-spouse would convey a sense that the relationship is never entirely severed; that the degree-holder can never be entirely free from the claims of the ex-spouse.

considered "property." Moreover, even if ante bellum slavery were inconsistent with the proposition advanced here, it would not lessen the force of the claim that present-day legal principles uniformly support that proposition.

Parental control over the lives of children certainly differs in important respects from the institution of slavery, but it nevertheless can manifest some of the "badges and incidents" of slavery. One recent scholarly work argues that parents' substantive due process right to physical custody of their children can amount to state-enforced slavery "when a parent perverts this coercive authority by systematically abusing and degrading his ward—treating his child not as a person but as a chattel, acting as if he had title over the child rather than a trusteeship on behalf of the child."¹⁷³ The authors of this work caution that "custody alone should not be confused with slavery," because custody can be justified as an exercise of control to promote the child's interests.¹⁷⁴ Parental free exercise rights, which are not tied to the interests of the child, and which ensure parents the freedom to exercise nearly complete domination over their children, arguably come closer to this understanding of slavery than to a legitimate custody privilege.

The subordination of African Americans under the formal institution of slavery represents one, admittedly imperfect, analogy to the control parents exercise by legal right over their children. Women, particularly when they have entered into marriage, have also been subjected to legally sanctioned domination by other persons (i.e., men, and especially husbands) for much of our nation's history. The legal status of wives in the past therefore presents an additional analogy to the situation of children and, as such, another potential counterexample to the proposition that our legal system does not generally recognize rights of control over other persons.

Under common law rules of marriage, a husband held rights of consortium with respect to his wife. These included positive claim-rights to the wife's services in the home and to sexual intercourse with her.¹⁷⁵ The husband was head of the family, meaning that he held the right "to direct the family's affairs, to determine where and what the home of the family shall be"¹⁷⁶ Correlative to the husband's rights were the wife's duties to submit to the husband's "reasonable governance" of the family, "to afford him her society and her person, . . . and to labor faithfully to advance his interests."¹⁷⁷ The wife also suffered certain legal disabilities under the

173. Akhil R. Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1364 (1992). These authors define slavery as "[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons." *Id.* at 1365 (internal quotation omitted).

174. *Id.* at 1364.

175. See generally 41 AM. JUR. 2D *Husband and Wife* §§ 9-10 (1968).

176. *Id.* § 10 (footnote omitted).

177. *Id.* §§ 9-10 (footnotes omitted). Wives also had positive claim-rights against their husbands,

common law; she was, for example, unable to sue or be sued.¹⁷⁸ In particular, a wife was unable to sue her husband, even for such harmful conduct as forcible rape.¹⁷⁹

Significantly, even these common law rights of husbands were predicated on the idea that women consented to certain duties and limitations when they married. Underlying the common law rules was the assumption that, by entering into a contract of marriage, a woman voluntarily gave up her separate identity and was subsumed under the identity of her husband.¹⁸⁰ She also gave up certain negative claim-rights which she previously enjoyed against the man she married,¹⁸¹ and in essence agreed to become the property of her husband.¹⁸² Thus, because a man was entitled to largely unfettered control over his own person and property, he was also entitled to such control over his wife. Further, the fact that a man could not commit crimes against himself or against his own property constituted a conceptual barrier to any criminal prosecution of a husband for crimes against his wife.¹⁸³

The law of marriage has changed substantially in the last three decades. Although vestiges remain of the early common law view of wives as property and as lacking a separate identity, courts have removed many of the traditional instruments of husbands' control over their wives. Perhaps the most important change has been the advent of no-fault divorce laws, which make it easier for a woman to exit from a marriage. Wives have also obtained greater control over their reproductive choices under Supreme Court decisions establishing rights to obtain and use contraceptives¹⁸⁴ and to have an abortion without a husband's consent.¹⁸⁵ In the course of granting these rights, the Court has dismissed the view of a married couple as a unitary legal entity, and instead has characterized marriage as an association of two individuals, each having separate, personal rights of privacy.¹⁸⁶

including the right to support and protection, and negative claim-rights against cruel and inhuman treatment. *Id.* § 8. However, a wife's inability to sue her husband must have weakened these rights substantially. *See id.* § 6.

178. *Id.* § 6.

179. *See People v. Liberta*, 474 N.E.2d 567, 572 (N.Y. 1984) (noting one archaic notion underlying the marital exemption for rape: "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract") (citing 1 HALE, HISTORY OF PLEAS OF THE CROWN 629), *cert. denied*, 471 U.S. 1020 (1985). *But see id.* at 573 (rejecting Hale's view and overturning the State's marital rape exemption).

180. *Id.* ("[T]he legal existence of the woman was 'incorporated and consolidated into that of the husband.'") (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 430 (n.p., 1966)).

181. *Id.* at 572; *see also* 41 AM. JUR. 2d Husband and Wife § 2 (1994).

182. *Liberta*, 474 N.E.2d at 573.

183. *See Warren v. State*, 336 S.E.2d 221, 223 (Ga. 1985) ("Since a married woman was part of her husband's property, nothing more than a chattel, rape was nothing more than a man making use of his own property.").

184. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

185. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

186. *Id.* at 70 n.11 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

Growing judicial hostility to marital exemptions in state rape laws exemplifies the present-day rejection of the early common law view of wives as property and the interpretation of the marriage agreement that supported it. In *People v. Liberta*, New York's highest court conveyed the now prevailing view:

We find that there is no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny.

....

... Indeed, "[n]owhere in the common-law world—[or] in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."¹⁸⁷

The court in *Liberta* rejected the husband's claim to be protected by a right of marital privacy because "this right of privacy protects consensual acts, not violent sexual assaults."¹⁸⁸ In *Warren v. State*,¹⁸⁹ Georgia's highest court similarly refused to find that a husband has a right to force his wife to have intercourse with him. The court held that construing the marriage contract to include a woman's consent to rape would be unreasonable; given that rape represents " 'almost total contempt for the personal integrity and autonomy of the female victim' " and, short of homicide, "is 'the ultimate violation of self,' " no reasonable person would consent to it.¹⁹⁰

Thus, in the area of husband/wife relations, as in slave-holder/slave relations, the rights of some persons to control and dominate the lives of certain other persons rested on a characterization of the subordinated persons as "property," on a denial of their very personhood. These rights have been deemed illegitimate as the law has over time come to recognize the subordinated individuals as persons, distinct from those with whom they share intimate relationships.

Husbands and wives still enjoy by law some measure of control over each other, and the reality of the respective economic power of women and men today translates into some inequity in the degree of *de facto* control

187. *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (quoting *Trammel v. United States*, 445 U.S. 40, 52 (1980)) (alterations in original), *cert. denied*, 471 U.S. 1020 (1985). The *Liberta* court noted that only one other state court in recent years had concluded that there was a rational basis for the marital exemption to rape laws. This supposed rational basis was the hope that the exemption " 'may remove a substantial obstacle to the resumption of normal marital relations' " and " 'avert[] difficult emotional issues and problems of proof inherent in this sensitive area.' " *Id.* at 575 n.10 (quoting *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981)).

188. *Id.* at 574 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

189. 336 S.E.2d 221 (Ga. 1985).

190. *Id.* at 224 (quoting *Coker v. Georgia*, 433 U.S. 584, 599 (1977)).

that husband and wife hold over one another. Nevertheless, the formal, *de jure* rights and privileges that husbands now possess with respect to their wives by virtue of the marriage contract are no different from the rights and privileges that wives enjoy with respect to their husbands and, as under earlier common law, are predicated upon the parties' voluntary consent.

Indeed, in any contractual relationship the parties exert by right some measure of control over one another—e.g., rights to compel another to deliver money or other property or to perform some service. However, the legality of a contract depends critically upon the consent of the parties and upon mutuality of consideration. Moreover, as discussed above, contractual rights now cannot be so extensive as to amount to domination of one person over the life of another. In sharp contrast, parental rights of control over children's lives under the Fourteenth Amendment Due Process Clause and the First Amendment Free Exercise Clause *do* amount to legally sanctioned domination. And the courts have not predicated recognition of parental rights on any hypothetical "contract," i.e., on imputed consent or receipt of reciprocal consideration by the child. Rather, as in the case of the slave or wife of old, parental rights today appear to rest on an assumption of ownership or on a denial of the child's separate existence.

In addition to the rationales mentioned above, the subjection of African Americans and wives to the legal control of other persons was often defended as necessary because those under subjection were seen as being naturally suited to governance by others.¹⁹¹ This alleged justification lost its force with the recognition that the capacities of women and African Americans are as great as those of white males. There are, however, other groups of persons who unquestionably are less capable of furthering their own interests, and one might think that genuine incompetence provides a legitimate rationale for giving some persons rights to govern the lives of such individuals. Children at birth certainly fall into the category of persons lacking self-governing capacities, and they gain competence only gradually over the course of many years. However, certain disabled adults fall into this category as well. One would expect that if incompetence alone were sufficient reason to give another person the right to determine the course of someone's life, these adults too would have someone deciding by right what will happen to them. This turns out, however, not to be the case.

In *Cruzan v. Director, Missouri Department of Health*,¹⁹² the Court considered the case of a woman in a persistent vegetative state whose parents wished to have the hospital remove her life-support system. Missouri law permits a surrogate to make various medical decisions on behalf of a patient in a persistent vegetative state, but only as a spokesperson for the patient herself; the surrogate must show by clear and convincing evidence

191. See, e.g., JOHN S. MILL, *THE SUBJECTION OF WOMEN* 12 (Susan Moller Okin ed., Hackett 1988) (1869) (disparaging this view).

192. 497 U.S. 261 (1990).

that his decision conforms to the wishes of the patient before she became incompetent.¹⁹³ Thus, the surrogate, in effect, advances and effectuates the rights of the patient herself to decide on her medical treatment because she cannot exercise these rights directly.¹⁹⁴ The surrogate does not exercise any right of his own to decide what the hospital will do with the patient. In this case, the Missouri Supreme Court held that Nancy Cruzan's parents had not provided clear and convincing evidence of their daughter's alleged wish to have hydration and nutrition withdrawn if she were ever in such a condition, and so upheld the hospital's denial of the parents' request.¹⁹⁵

The parents in *Cruzan* insisted that Missouri should accept the judgment of close family members regarding what should happen to an incompetent patient, even in the absence of clear and convincing evidence that their own views matched those of the patient. The Supreme Court rejected the notion that the parents possessed a right to decide what would happen to their adult daughter: "[W]e do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself."¹⁹⁶ The Court recognized that close family members generally will have very strong feelings about what happens to the patient in such situations, but also that these feelings may not be entirely disinterested: "[T]here is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent."¹⁹⁷

Nowhere in *Cruzan* did the Court imply that family members would possess a right to make decisions for an incompetent adult patient if the decision were less momentous than one involving life and death.¹⁹⁸ Nor did the Court suggest that it would have been appropriate to balance the parents' free exercise rights against the daughter's interests or preferences if the parents had had religious objections to artificial life support. Rather, *Cruzan* stands for the bald proposition that nobody is *entitled* to make decisions for an incompetent adult patient.¹⁹⁹ In the absence of certainty as to

193. *Id.* at 280. The Court noted that a number of other states (e.g., Illinois, Connecticut, New York, Maine, New Jersey, and Ohio) also had in place a substituted-judgment procedure for such situations, and that all required clear and convincing evidence of "the prior expressed wishes of the incompetent individual," or, in some cases, more generally "what the individual's decision would have been." *Id.* at 284-85.

194. *Id.* at 280.

195. *Id.* at 285.

196. *Id.* at 286.

197. *Id.*

198. The gravity of the decision was a factor only in the Court's consideration of which standard of proof was appropriate with respect to demonstrating the patient's wishes. *Id.* at 282-83.

199. In the very similar case of Karen Ann Quinlan, a New Jersey state court explicitly rejected a claim by the parents of a woman in a persistent vegetative state to have a right, based on their religious beliefs, to have the hospital discontinue artificial life support. *In re Quinlan*, 355 A.2d 647, 661-62 (N.J.) ("[W]e do not recognize an independent parental right of religious freedom to support the relief requested."), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976). In *Quinlan*, the court ordered cessation of artificial life support based on a right of privacy, making plain that it was Ms.

what the patient herself would want, the State permissibly elected to act on its own presumption that the patient would wish to continue to live; it was not required even to consider the preferences of close family members.

Thus *Cruzan*, which focused on the integrity and distinct personhood of the incompetent individual whose fate was being decided, stands in sharp contrast to decisions under both the Due Process Clause and the Free Exercise Clause upholding parents' rights to determine the life course of their minor children. In *Yoder*, for example, the Court expressed indifference to the children's wishes, going so far as to say that the parents' preferences for the children's future would likely outweigh any contrary preferences of the children themselves, were it required to consider the latter.²⁰⁰ In *Pierce v. Society of Sisters*,²⁰¹ the Court treated the children's interests even more cursorily, and gave no consideration to what rights children themselves might have with respect to education.²⁰² That decision rested on the constitutionally guaranteed "liberty of parents and guardians to direct the upbringing and education of children under their control" and on the liberty of private school operators to conduct their business.²⁰³ In contrast to *Cruzan*, the Court in *Yoder* and *Pierce* was apparently unconcerned that parents' feelings regarding the children's education might not be entirely disinterested.²⁰⁴

Quinlan who had a right of privacy at stake, not the parents, and that the court would simply "permit the guardian and family of Karen to render their best judgment" as to what her "putative decision" would be in the circumstances. *Id.* at 664 (emphasis added). The court stated:

Regarding Mr. Quinlan's right of privacy, we agree [with the lower court] that there is no parental constitutional right that would entitle him to a grant of relief *in propria persona*. Insofar as a parental right of privacy has been recognized, it has been in the context of determining the rearing of infants Karen Quinlan is a 22 year old adult. Her right of privacy in respect of the matter before the Court is to be vindicated by Mr. Quinlan as guardian

Id. (citations omitted); see also John A. Robertson, *Cruzan: No Rights Violated*, HASTINGS CENTER REP., Sept./Oct. 1990, at 8-9 (dismissing the notion that parents or other family members should have any right to decide to terminate medical treatment of a comatose person).

200.

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which . . . [it] is asserted . . . that Amish parents are preventing their minor children from attending high school despite [the children's] expressed desires to the contrary. Recognition of [such a] claim . . . would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom

Wisconsin v. Yoder, 406 U.S. 205, 231 (1972).

201. 268 U.S. 510 (1925).

202. The Court found that the private schools were "engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious" and that there was "nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State." *Id.* at 534. The *Pierce* opinion reveals that the State of Oregon did not file an answer to the complaints in *Pierce*, so the "present records" may have consisted entirely of the factual assertions of the schools themselves as to their own merits. *Id.* at 533.

203. *Id.* at 534-35.

204. In *Parham v. J.R.*, 442 U.S. 584 (1979), in which the Court held that no formal adversary

A comparison of judicial and legislative treatment of parental rights over mentally retarded adults is also illuminating. Like young children, some mentally retarded adults whose medical treatment or residential placement is judicially contested will never have formed or expressed rational judgments regarding their situation. While some legislatures have granted parents authority to *participate* in the decision-making process regarding the institutionalization or medical treatment of adult offspring who are mentally retarded, they have not granted parents the right to actually *make* decisions for their offspring.

For example, in *Heller v. Doe*,²⁰⁵ the Court voted to uphold a Kentucky statute giving guardians and immediate family members party standing in proceedings for institutional commitment of mentally retarded adults.²⁰⁶ The statute did not, however, give the parents' judgment or preferences dispositive weight or presumptive authority in those proceedings.²⁰⁷ The Court found that the statute was consistent with mentally retarded adults' due process rights. The Court reasoned that, even though guardians and family members might have interests adverse to those of the person facing commitment and their participation might increase the likelihood of commitment, their party status would not alter the focus of the proceedings on the welfare of the retarded adult nor increase the risk of an erroneous decision.²⁰⁸ In fact, it might lessen that risk because the family would usually be in a position to contribute important information to the factfinder.²⁰⁹ Three members of the Court, in dissent, rightly pointed out that it was not necessary to give guardians and family members party status in order to obtain information from them, because a court could simply call

proceedings are necessary when a parent seeks to commit a child to a state mental institution, the Court did recognize that parents sometimes act primarily out of self-interest rather than out of concern for the well-being of their children. However, the Court insisted that the presumption should be that parents are acting in their child's best interests. *Id.* at 602-03. The *Parham* Court also made explicit what the *Pierce* and *Yoder* decisions had only suggested: that the rights of parents operate to circumscribe the rights of children. The Court found that with respect to commitments of a child to institutional care, the traditional right of parental authority outweighed most due process rights of the child. *Id.* at 603-04.

205. 113 S. Ct. 2637 (1993).

206. *Id.* at 2648-49.

207. KY. REV. STAT. ANN. § 202B.160(3) (Michie/Bobbs-Merrill 1991). *But cf. Parham*, 442 U.S. at 604 (holding that parents have presumptive authority to commit their minor child to a mental health institution, subject to review by the institution's superintendent).

208. *Heller*, 113 S. Ct. at 2648.

209. *Id.* at 2648-49. The Court also suggested that parents have an independent stake in the commitment proceedings, because the costs of caring for their child might become overly burdensome as they reached old age. *Id.* at 2649. The overriding assumption, however, seems to be that parents of mentally retarded adults act in accordance with the interests of their offspring. It is interesting that, in dealing with children and mentally retarded adults, the Court reverses the presumption on which it operated in dealing with a normal adult in a persistent vegetative state in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990). The presumption in *Cruzan* was that parents may seek to act in furtherance of their own interests and at the expense of their offspring. *See supra* text accompanying notes 196-99. The Court's reversal of this presumption may be easy to explain (e.g., judicial squeamishness about letting people die), but it is difficult to justify.

them as witnesses to testify.²¹⁰

In cases involving proposed medical treatment for mentally retarded adults, courts have used a substituted-judgment procedure in which the court attempts to discern what the incompetent person's decision would be if he were competent.²¹¹ This approach allows parental input but does not treat parents as parties, nor does it confer on them a right to make decisions for their adult offspring.²¹² Thus, the law ensures parents of a mentally retarded adult some role in important decisions regarding their offspring's life, in furtherance of their offspring's rights. However, the parents' authority is substantially more limited than that which parents exercise over minor children, and certainly it does not amount to a right of control over the life of their adult offspring.

As pointed out in the previous Section, courts simply have not been called on to address claims that one individual possesses a right to make life-determining decisions for another, competent adult.²¹³ I have suggested that the absence of such claims lends support to the conclusion that, outside of the parenting context, it is accepted without question in our legal system that rights are inherently limited to protecting self-determination. To further support this proposition, it is worth considering a few right-based claims individuals have made to be free to act in certain ways that would effectively diminish the autonomy of other competent, non-consenting adults.

In the First Amendment context, the Supreme Court has pronounced as a general rule that individuals may not be forced to express any belief,²¹⁴ or to subsidize the expression of others' beliefs.²¹⁵ Nevertheless, in *Pruneyard Shopping Center v. Robins*,²¹⁶ the Court upheld a state court ruling that California's constitution required owners of a large shopping mall to allow a group of students to solicit signatures for petitions in the common area of the mall. The Court emphasized, however, that because the shopping center was a business establishment open to the public, "[t]he

210. *Heller*, 113 S. Ct. at 2656 (Souter, J., dissenting, joined by Blackmun & Stevens, JJ.). The dissenting Justices objected to giving the parents party status principally because doing so would subject the incompetent adult not only to a second advocate for institutionalization, but also to a "second prosecutor with the capacity to call and cross-examine witnesses, to obtain expert testimony and to raise an appeal that might not otherwise be taken." *Id.* at 2657.

211. See *infra* notes 257-59 and accompanying text.

212. For a discussion of the potential application of a substituted-judgment procedure in cases involving minor children, see *infra* notes 254-68 and accompanying text.

213. See *supra* text accompanying notes 139-64.

214. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state may not require an individual to display an ideological message on his car license plate); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a state may not compel students to recite the pledge to the flag); see also S.D. CODIFIED LAWS ANN. § 22-27-2 (1988) (making it a misdemeanor to compel another person by threats or violence to adopt, practice, or profess any religious belief).

215. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a state may not require a newspaper to publish a political candidate's reply to a previously published criticism).

216. 447 U.S. 74 (1980).

views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner."²¹⁷ In addition, the mall owners were free to make clear to the public that the students' use of the mall did not constitute an endorsement of their views.²¹⁸

In their concurring opinion, Justices Powell and White clarified that the First Amendment rule against compulsory speech or endorsement applies not only to state-compelled speech, but also to state-mandated rights of access which entitle some persons to speak on the private property of others. Where such access rights amount to compelled affirmation of the speakers' views, or otherwise force the property owner to speak, they conflict with the First Amendment.²¹⁹ They further indicated that their decision would have gone the other way if the commercial establishment had been smaller, since the public would then be more likely to assume the property owners endorsed the students' position,²²⁰ or perhaps if the mall owners had objected to the ideas contained in the students' petitions.²²¹ Thus, the more a situation involves the imposition of one individual's view on another, the less likely are the first individual's efforts to be deemed a matter of right, deserving of constitutional protection.²²² Nevertheless, courts maintain that parents are entitled to impose their beliefs on their children, and to isolate them from competing cultural and intellectual influences.²²³

The abortion debate presents a number of control issues. The Court in *Roe v. Wade* declared that a fetus is not a person,²²⁴ so it has not had to face the question whether a pregnant woman could possess a right to decide that another person will die, nor the question of whether an unborn child has a positive claim-right to be carried to term. However, in dictum, the Court intimated that if the fetus *were* a person, its claim-rights would be controlling on the abortion question.²²⁵ A number of commentators have objected that even if the fetus were a person, according it a right to life would be to use the pregnant woman as a non-consenting instrument to further the inter-

217. *Id.* at 87.

218. *Id.* The Court distinguished *Wooley v. Maynard*, 430 U.S. 705 (1977), noting that there the State sought to compel the display of an ideological message on personal property used in daily life, which was an appreciable encroachment on personal autonomy. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87.

219. *Pruneyard Shopping Ctr.*, 447 U.S. at 97-98.

220. *Id.* at 99. Justices Powell and White were uncomfortable with the majority's suggestion that the mall owners could simply disavow any endorsement of the students' views. In a situation where property owners must express such a disavowal to avoid attribution of another party's speech to them, they are effectively compelled to speak, in violation of their free speech rights. *Id.*

221. *Id.* at 97-98, 101.

222. *Id.* at 100-01 n.4.

223. See discussion *supra* Section I.A.

224. 410 U.S. 113, 158 (1973).

225. *Id.* at 156-57.

ests of another person.²²⁶

An additional control issue arises when persons opposed to abortion seek to disrupt the activities of abortion clinics. Significantly, these pro-life activists, to the best of my knowledge, do not claim that the Free Exercise Clause or the Due Process Clause grants them a right to control pregnant women's lives. Rather, they claim a right of self-expression and, as justification for their more disruptive activities, claim to act as agents for the unborn child, asserting the unborn child's right to life.²²⁷ Courts have uniformly rejected this agency argument, and have held pro-life activists criminally liable when they have crossed the line between self-expression and obstruction of the activities of pregnant women and their doctors.²²⁸

Thus, even though abortion evokes the strongest of feelings about how other people should act and offends fundamental principles within some religious belief systems, these abortion cases and the debate surrounding them are entirely consistent with the proposition that in our legal culture, individual rights are understood to be limited, outside the parenting context, to self-determining conduct. Even the most fanatically religious participants in the debate appear to accept a distinction between what their religious beliefs legally entitle them to do to their children and what their beliefs legally entitle them to do to other adults. Even though they might desperately wish to control what a pregnant woman does with her body, pro-life advocates seem to understand that their constitutional freedom of religion simply does not include a right to do so. Thus, they appeal instead to what they regard as the claim-rights of the unborn child.

Of course, there is one class of persons other than parents who *do* possess rights that impose quite substantial burdens and restrictions on other persons—namely, children themselves. Children possess not only negative claim-rights against grievous harm, but also positive claim-rights to on-going care and support from their parents. These claim-rights may continue to operate to some extent even after a parent relinquishes or loses custody of a child, as often occurs following divorce. Parents' legal duties to feed, clothe, shelter, supervise, and obtain medical care for their children

226. See, e.g., Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1622, 1630-31 (1979); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). One way out of this dilemma that would be consistent with the conception of rights advanced here would be to recognize *no* rights—neither a right of the unborn child to be carried to term nor a right of the woman to abort—and to either prohibit or permit abortions simply as a matter of public policy.

227. See *Allison v. City of Birmingham*, 580 So. 2d 1377, 1381-82 (Ala. Crim. App.) (citing numerous cases in which persons charged with criminal trespass in connection with abortion clinic protests have raised, and courts have rejected, the defense that their actions were necessary to protect the lives of unborn children), *cert. denied*, 580 So. 2d 1390 (Ala. 1991).

228. See, e.g., *id.*; *State v. O'Brien*, 784 S.W.2d 187 (Mo. Ct. App. 1989); *Crabb v. State*, 754 S.W.2d 742 (Tex. Ct. App. 1988), *cert. denied*, 493 U.S. 815 (1989). In the parental free-exercise context, in contrast, the courts have drawn no such line between self-expression and other-determination. See discussion *supra* Part I.

can effectively limit parents' life choices and dictate a large part of what they must do on a daily basis.

There are, however, at least two reasons why children's claim-rights against their parents do not constitute a counterexample to the proposition that in our legal culture no one, other than parents of minor children, possesses rights to control the life of another, non-consenting person. First and most importantly, the adults who bear the duties corresponding to children's claim-rights have, as far as the law is concerned, undertaken these duties voluntarily. Those adults who do not wish to shoulder the obligations of parenthood are legally free not to conceive children, to abort a fetus before the stage of viability, or to give up a child for adoption or care by the State.²²⁹ Children, therefore, do not possess rights of control over non-consenting adults.

Second, the self-imposed constraints of parenthood are quite different from the control that parents are currently deemed entitled to wield over their non-consenting children. The purpose and primary effect of children's claims on their parents are to protect and promote children's interest in their own self-determination and personal integrity, not to determine the course of parents' lives. Thus, children have no right to determine which faith their parents will adopt, what schooling their parents will receive, where and whether their parents will work, or what medical treatment their parents will undergo.

In sum, the presumption of parental consent to obligations owed to children, and the absence of rights reposing in children to control the lives of their parents in a manner even remotely similar to the way that parents are deemed entitled to control the lives of their children, establish that children's rights do not represent a counterexample to the proposition advanced in this Part. Parental rights remain the sole exception to the general rule that rights in our legal system are limited to protecting self-determination and personal integrity. Unless there is some rational justification for this anomaly, the extensive set of other-determining rights held by parents is indefensible. Part III therefore explores whether there are any characteristics of children or of the parent-child relationship, not present in the situations discussed thus far, that might justify subjecting children to rights of control held by other persons.

III

JUSTIFICATIONS FOR PARENTS' RIGHTS

On the rare occasions when legal scholars or philosophers offer any justifications for parental rights, they typically invoke one or more human

229. Of course, circumstances are such that many women are coerced into conceiving, bearing, and raising children they would otherwise not have, but the denial of self-determination in such cases comes not from the children but from other adults, whether they be husbands, boyfriends, rapists, parents, or church leaders, and is not directly sanctioned by law.

interests that parenting rights are supposed to protect: the interests of children, the interests of parents, and/or the interests of society as a whole. I consider each of these categories of interests in turn below. However, before doing so, it is important to address the one justification on which the courts have principally relied—one which does not fall into any of these categories. The main rationale the courts have offered for according rights of parental control protection under either the Free Exercise Clause or the Due Process Clause is simply that parents have traditionally held such rights.²³⁰

That some practice or rule has a long tradition does not, however, mean that it is in *anyone's* interest; a tradition might persist even though on the whole it diminishes the well-being of all concerned parties, including those who appear to be its beneficiaries.²³¹ In such a case, it is difficult to imagine what reason there would be for maintaining the practice or rule, other than an irrational attachment to the past. Nor does a long tradition mean that a practice or rule is just, or that it is consistent with fundamental moral and legal precepts. For example, African slavery and the legal subjugation of women persisted for hundreds of years, but few today would argue that these "traditions" were worthy of preservation.

Nevertheless, certain members of the Supreme Court continue to advance the jurisprudential line that it is a sufficient condition for finding a liberty to be fundamental and protected by the Constitution that it is "deeply rooted in this Nation's history and tradition."²³² Other recent members of the Court, have, on the other hand, disparaged reliance on this criterion as a means of identifying constitutionally-protected liberties. In his *Bowers v. Hardwick*²³³ dissent, Justice Blackmun invoked the following justly famous words of Oliver Wendell Holmes:

"[I]t is revolting to have no better reason for a rule of law than that

230. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); see also CARTER, *supra* note 162 at 184:

Even [Justice] Douglas did not quite suggest [in *Yoder*] that the state should intervene to prevent the parents from forcing the dissenting child to accept their religion, and that is a good thing. The right of parents to choose a religious upbringing for their children is older than America, and ought to stand as an unshakable fundament of national life.

231. One might argue, for example, that the traditional marital exemption from criminal rape laws, discussed *supra* text accompanying notes 179-90, did not enhance anyone's well-being before the courts abolished it, and that it in fact made both wives and husbands worse off by encouraging attitudes and permitting behavior destructive of the emotional bonds between them.

232. *Moore*, 431 U.S. at 503. Several recent opinions by members of the Court—principally Justice Scalia—reflect this reliance on "tradition." See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 294, 295 (1990) (Scalia, J., concurring) (noting that there is no tradition and therefore no liberty to commit suicide); *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and in part by O'Connor & Kennedy, JJ.) (requiring an asserted liberty to be "rooted in history and tradition").

233. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that freedom to engage in homosexual activity is not a liberty rooted in the Nation's traditions).

so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."²³⁴

Justice White once pointed out that "[w]hat the deeply rooted traditions of the country are is arguable; which of them deserve [due process protection] is even more debatable."²³⁵ Justice Brennan expressed similar skepticism of "tradition" as a criterion: "Even if we could agree . . . on the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes . . . too obsolete to be relevant any longer."²³⁶

A more sensible approach would be to engage a rebuttable presumption that a long-standing social practice or legal right is beneficial and just,

234. *Id.* at 199 (Blackmun, J. dissenting, joined by Brennan, Marshall, & Stevens, JJ.) (quoting Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)); see also *Roe v. Wade*, 410 U.S. 113, 117 (1973) (holding that simply because the moral judgments expressed by an anti-abortion statute are "natural and familiar," we should not assume that "statutes embodying them [do not] conflict with the Constitution of the United States") (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

235. *Moore*, 431 U.S. at 549 (White, J., dissenting); see also LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 98 (1991) ("[T]he extraction of fundamental rights from societal traditions is no more value-neutral than is the extraction of fundamental rights from legal precedent . . ."); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1618 (1990) ("[W]hat is most troubling about Justice Scalia's call for respecting the most specific tradition available is that our most specific historical traditions may often be opposed to our more general commitments to liberty or equality."); Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 26 (1981) ("Societies do change, however, and cognizant of this, the Court could not have intended to become constitutionally committed to every practice rooted in our history and tradition. In particular, progress toward racial and sexual equality depends upon success in freeing ourselves from the yoke of history and tradition."); McCarthy, *supra* note 6, at 984 ("[A]lways looking backward in time to see whether tradition would support a claim of right can freeze in time very specific rights, but no others, and . . . requires that the entire argument be moved to a different level of abstraction for which the tradition itself provides no direct support.").

236. *Michael H. v. Gerald D.*, 491 U.S. 110, 138 (1989) (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.). For a defense of the practice of relying on tradition to define the contours of protected liberty, see *Developments, supra* note 18, at 1186-87. The main argument is primarily a negative one: that reliance on other criteria, such as the requirements of ordered liberty or the Court's own theory of political liberty, would leave too much room for judicial arbitrariness in decisionmaking. *Id.* Tradition, on the other hand, is a "relatively objective" criterion. *Id.* at 1187.

An objective criterion is not, of course, necessarily a good criterion. In any event, Supreme Court Justices have amply demonstrated their ability to manipulate tradition to reach desired outcomes. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no tradition of privacy regarding consensual homosexual activity in the home, and therefore, no protected liberty) with *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding that heterosexual activity between unmarried persons is within the realm of traditionally protected privacy).

It is also worth noting that the traditional understanding of parents' status has changed over time. The notion that parents have inherent rights of control over their children is a relatively recent development. See discussion *supra* Section 1.A; *Developments, supra* note 18, at 1223. In the nineteenth century, American society regarded parents' custody of children as a delegation of the State's responsibility for the well-being of children, and the "presumption of parental custody was based upon the extent to which the parent successfully served the state's [sic] interest in promoting the child's welfare" *Developments, supra* note 18, at 1223; see also McCarthy, *supra* note 6, at 975-76.

and deserving of constitutional protection. However, when good reason exists for challenging such a traditional practice or rule, courts should ask whether it does in fact serve the interests supposed to underlie it, and whether it is indeed just and consistent with other legal principles. If a traditional rule or practice fails this test, then it no longer merits constitutional protection.

The remainder of this Article endeavors to demonstrate that a break with tradition is warranted in the case of parents' rights of control over their children.²³⁷ As shown in Part II, these parental rights are inconsistent with the general rule against granting individuals rights to control the lives of others. In the past, such other-determining rights have been granted only where the subjugated individual was regarded as "property" or as subsumed under the identity of the right-holder. Today, however, the law recognizes that children are not chattel, but persons, who themselves hold rights under our Constitution. Thus, parental rights of control may be no more just than was the centuries-old institution of slavery or the longstanding legal sanction of marital rape. We should seriously consider, then, what interests parents' child-rearing rights *do* serve, and on that basis determine whether it is rational and just to perpetuate these rights.

This Part addresses these questions and concludes that, because any interests that allegedly only parental rights can protect are in fact illusory or illegitimate, these rights are indefensible. It shows that a parental child-rearing privilege,²³⁸ coupled with an appropriate set of *children's* rights, are all that is necessary to protect the legitimate interests at stake in the raising of children.

A. *Justifications Based on Children's Interests*

Legal scholars usually justify parents' rights, if at all, on the ground that they are necessary to protect the interests of children.²³⁹ There is widespread agreement among academic commentators today that children should be respected as distinct persons, rather than treated as appendages or property of their parents.²⁴⁰ Nevertheless, many commentators argue that because children are incapable of protecting or providing for themselves, or of making rational, informed decisions about important aspects of their lives, some adult must be in a position to direct their lives and make important decisions for them.²⁴¹ Moreover, many child-development experts believe that an optimal upbringing includes an intimate, continuous rela-

237. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992) (plurality opinion of O'Connor, Kennedy, & Souter, JJ.) (enumerating criteria for exceptions to the rule of *stare decisis*).

238. See *supra* notes 7-13 and accompanying text.

239. See, e.g., McCarthy, *supra* note 6, at 1017 ("Virtually every discussion of parental rights begins by focusing on the needs of children.").

240. See, e.g., Ruddick, *supra* note 6, at 127-29.

241. See, e.g., GOLDSTEIN ET AL., *supra* note 7, at 7; Francis Schrag, *Rights Over Children*, 7 J. VALUE INQUIRY 96, 98 (1973); Wald, *supra* note 7, at 645.

tionship with a single parent or set of parents that is largely insulated from interference by third parties.²⁴² Conventional wisdom further holds that parents are in the best position to know what is best for their children and are likely to care more than any other adult about their children's well-being.

These beliefs are not entirely uncontroversial. There is disagreement, for example, about the age at which children become competent to make certain decisions for themselves and to engage responsibly in certain activities.²⁴³ Some writers also dispute the presumption that parents know what is best for their children.²⁴⁴ However, even if the assertions above have some core of truth, it simply does not follow from them that parents should have child-rearing rights, including plenary rights to effectuate their own ideologically-based judgment concerning how a child's life should proceed.

There are at least four problems with invoking children's interests to defend the courts' sanctioning of parental rights. First, at least with respect to parental free exercise rights, the courts themselves have never taken this approach.²⁴⁵ As noted above, courts have granted parents rights against state intervention intended to protect children's interests simply because there is a long tradition²⁴⁶ of letting parents do what they want with their children absent a threat of grievous harm.²⁴⁷ They have not focused on whether, for the child, the costs of intervention by the State would exceed the costs of non-intervention. If the courts did focus first and foremost on the interests of children in discussing parents' rights, the scope of those rights would undoubtedly be much different from what it presently is.²⁴⁸

A second problem with the child-centered approach to defending parents' rights is relevant only in the free exercise context. It is not self-evident that a connection exists between parents' religious beliefs and children's interests. Anyone promoting the child-centered justification exclusively would have to demonstrate such a connection, it would seem, in order to justify the Supreme Court's determination that parents should have greater rights of control over their children's lives when parental preferences regarding the upbringing of children arise from religious rather than

242. See, e.g., GOLDSTEIN ET AL., *supra* note 7, at 4, 8-10; Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 277 (1979).

243. See DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 49-50 (1993); Wald, *supra* note 242, at 272-75.

244. See, e.g., McMullen, *supra* note 7, at 594-96.

245. The Supreme Court has occasionally drawn a connection between parents' rights and children's interests in the substantive due process context. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979).

246. See *supra* notes 230-37 and accompanying text.

247. See generally *supra* Section I.B.2.

248. See Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CALIF. L. REV. 151, 159 (1988) ("[I]f we attribute rights to parents because doing so generally helps children, may we not, ought we not, deny parents rights in any class of situations in which attributing rights to parents would generally not help children?").

secular beliefs.²⁴⁹ It is necessary to show that the very fact of adhering to a religion—any religion—whose tenets include preferred modes of parenting makes a parent better able or more disposed to further the temporal interests of the child.

The qualification “temporal” applied to “interests” in the preceding passage is critical, and calls for explanation. Naturally, religious parents are concerned about more than the temporal interests of their children. Consistent with the Establishment Clause of the First Amendment, however, temporal interests are the only interests with which the State can properly concern itself in carrying out its responsibility to protect the well-being of children. For the State to take account of children’s supposed spiritual interests would require it to assume the truth of particular religious beliefs—e.g., that children have spiritual interests in the first place, that those interests are of a certain nature, and that they are best served by living in a certain way. It would therefore require the state to endorse a particular religious view, which the State may not do.²⁵⁰

This is not to say, however, that the State may not acknowledge the effect of parents’ particular religious beliefs on the temporal interests of the child—for example, the psychological trauma that might result if a child’s parents came to believe that they or the child will be eternally damned. Any defensible interpretation of the Establishment Clause, however, would recognize that it does preclude the State from assuming that the parents’ belief is true and from weighing the child’s alleged spiritual interests against her temporal interests based on that assumption. In addition, neither the Establishment Clause nor the Free Exercise Clause requires that the State allow individual citizens to determine for themselves the legality of their actions by balancing the temporal and spiritual interests of other persons affected thereby. It is for legislators and judges to determine the legality of people’s actions, based on the material they have to work with—the temporal interests of the people whom the actions affect. In our legal system, religious belief has never been an excuse for harming the temporal interests of other, non-consenting adults, and it should not be any more so when it is a child who is harmed.

While the motives of persons who promulgate or interpret religious teachings concerning child-rearing are undoubtedly quite complex, there is

249. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 233 (1972); see also text accompanying notes 50-52.

250. See *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (holding that religious displays on government property are impermissible because “[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (plurality opinion) (striking down a tax exemption benefiting only religious publications because “the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally”); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down an Establishment Clause grounds a statute that forbade the teaching of evolution science in public schools where creationism was not also taught because the statute endorsed a particular religious doctrine).

no reason to suppose that in most or even many cases their primary motive is concern for the temporal well-being of children. Indeed, parents embroiled in conflicts with the State over schooling and medical-care for children commonly invoke their own spiritual interests, as well as those of their children, in support of their parenting choices—against what the larger community perceives to be the temporal interests of the children. Therefore, whatever the deficiencies of the child-centered approach in justifying the more limited parental rights courts have carved out under the Due Process Clause, this approach seems particularly unpromising with respect to parental free exercise rights.

A third problem with invoking children's interests to justify parents' rights is that it is very odd to tie one person's rights to another person's interests.²⁵¹ In our legal culture, rights ordinarily protect the right-holder's interests, not the interests of other persons. Thus, it is fitting to ask why, if what we are most concerned with is protecting children's interests, we do not grant children themselves the rights necessary to protect those interests. Why, instead, do we rely on the conceptually awkward notion of parents' rights?

All of the important interests one might attribute to children can give rise to a right of one kind or another residing in the child. For example, we could attribute to children a positive claim-right to the exclusive and continuous care, protection, and guidance of a single set of parents, as well as to equal educational opportunity and medical care. We could also grant children a negative claim-right against any interference by the State in the parent-child relationship that would do more harm than good to the child.

One objection to this substitution of one set of rights for another might be that it locates the new set of rights in persons who are not in a position to effectuate them. Most children are not capable of invoking the necessary institutional mechanisms for asserting rights—police protection and investigation, litigation, and the legislative process. However, this objection has no greater force in the case of children than it does in the case of incompetent adults. Persons other than the right-holder can and do act as agents to prosecute an incompetent person's rights.

Thus, in a world without parents' rights but with an appropriate set of children's rights, the law could recognize parents as their children's agents, with the responsibility to assert the children's rights and invoke the necessary institutional mechanisms when actions by third parties threaten the children's interests. Such actions would include unwarranted attempts by the State to intervene to protect what it mistakenly perceives to be the temporal interests of the child.²⁵² If a conflict over child-rearing practices were

251. See McCarthy, *supra* note 6, at 1019.

252. While it is rare for judges or legal scholars to think of parental authority in terms of children's rights, it is not an entirely novel approach or locution. See, e.g., ARCHARD, *supra* note 243, at 103 ("My loving you does not give me rights over you. But if you have a right to certain kinds of treatment and

to arise between parents and the State under this legal regime, courts would not balance the child's interests against the parents' child-rearing rights, because the parents would have no such rights. Rather, courts would determine as best they could which outcome—that which the parent recommends or that which the State recommends—is more consistent with the rights of the child.

The analogy between children and incompetent adults suggests a way for courts to make this determination that perhaps best embodies a proper respect for the personhood of the child. As in the case of adults who are mentally retarded or in a persistent vegetative state,²⁵³ courts could employ a substituted-judgment procedure for imputing preferences to children. Under this approach, the parents, acting as agents for the child, would have to argue that their judgment is the same as what the child would choose for herself if rationally able to do so, given the child's existing desires, values, inclinations, and needs, as well as her likely future interests.²⁵⁴ If the child's rational preference would likely be that her parents not be prevented from directing her life in the manner they prefer, then courts might find that *the child* has a negative claim-right against state interference. Likewise, if parents were to challenge any authority the State might assume over their child,²⁵⁵ the State would have to argue that it has accorded due weight to

my love for you guarantees that treatment, then it may follow that I am the person to love you. This, however, is your right not mine.”); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 67, at 37 (C.B. Macpherson ed., Hackett 1980) (1690) (parents' authority over the child “to speak properly . . . is rather the privilege of children, and duty of parents, than any prerogative of paternal power”); Schwartz, *supra* note 2, at 1733 (“Habilitation choices are the kind of choices parents traditionally make for their children, and retarded children should have a right to have their parents, and not other adults, make them.”).

253. See discussion *supra* notes 192-212 and accompanying text.

254. The substituted-judgment framework could also generate the procedural rules governing the litigation of disputes between parents and the State. For example, given the potentially high cost of intervention for the child, we might impute a hypothetical preference to children that the State be required to present “substantial” or “persuasive” evidence that a particular child would benefit from the State stepping in to restrict or mandate certain parental behavior—before the parents are required to present a case in opposition.

255. An appropriate procedural rule in these cases might be to permit parents to establish a *prima facie* case against state action by presenting evidence or arguments sufficient merely to lend plausibility to the claim that their own way of treating their children is more consistent with what the child would prefer than the State's way. Again, we should think about which procedural rules or presumptions would be best from the child's point of view, rather than crafting rules to accord deference to the supposed rights of parents.

Legislatures also might use the substituted-judgment framework for deciding which child-rearing decisions should presumptively reside with parents and which decisions, if any, should presumptively reside with appropriate state agencies. For example, it may be reasonable to impute to children a hypothetical preference that the State, rather than parents, have presumptive authority to decide what type of school they attend or whether they require medical treatment, but that parents be permitted to have input into and the ability to challenge the decisions of state officials. At the same time, it may be reasonable to impute to children a hypothetical preference that their parents have presumptive authority to decide such things as whether the children will participate in religious activities outside of school, what they will eat, and what time they will go to bed.

the hypothetical rational preferences of the child herself.²⁵⁶

Of course, unlike an adult who prior to his incompetency made his preferences known, a young child probably has never developed and expressed rational preferences regarding her schooling, medical care, or other important aspects of her life. This fact eliminates one important basis for making a substituted judgment determination, but it does not render the substituted-judgment framework unworkable or inappropriate in the case of children. Judicial resolution of disputes involving proposed medical care for mentally retarded adults supports this conclusion. For example, in *In re Moe*,²⁵⁷ Massachusetts' highest court held that state courts could approve a parent's request for sterilization of a mentally retarded adult woman "by finding the incompetent would so choose if competent."²⁵⁸ The court explained:

We are aware of the difficulties of utilizing the substituted judgment doctrine in a case where the incompetent has been mentally retarded since birth. The inability, however, of an incompetent to choose, should not result in a loss of the person's constitutional interests. . . . We admit that in this case we are unable to draw upon prior stated preferences the individual may have expressed. An expression of intent by an incompetent person while competent, however, is not essential. . . . "While it may thus be necessary to rely to a greater degree on objective criteria . . . the effort to bring the substituted judgment into step with the values and desires of the affected individual must not, and need not, be abandoned."²⁵⁹

256. There is certainly reason for skepticism about the courts' ability to decide what a child's reasoned judgment would be if he were not incompetent, just as there is reason for skepticism concerning the ability of courts to discern a child's best interests. See e.g., Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 615-22 (1973). However, this concern in and of itself does not justify establishing a presumption that parents' preferences should determine the life of the child. The substituted-judgment framework would simply require that we take this skepticism into account in deciding which procedural rules children would likely prefer. It would also require taking into account that, with respect to some important aspects of children's lives, parents are likely to be less competent to judge their child's best interests or hypothetical rational preferences than are people who spend their lives studying and thinking about what is best for children. Courts should acknowledge and draw upon a parent's unique knowledge about the particular characteristics of her child, and should take into account that the parent in all likelihood cares a great deal about the child. But once the court has elicited such information from the parent and factored in the parent's benevolence, what reason is there for according the parent's judgment decisive weight? And shouldn't the court also factor in that parents may be motivated primarily by ideological beliefs that have nothing to do with the child's temporal interests? The costs of intervention for the child should also be a factor, but this is not to say that courts should presume that the parents' judgment is accurate.

257. 432 N.E.2d 712 (Mass. 1982).

258. *Id.* at 721.

259. *Id.* at 720 (quoting Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 430-31 (Mass. 1977)) (citations omitted). Several other state courts have also relied on the doctrine of substituted judgment to decide cases involving severely retarded adults. See, e.g., *In re Grady*, 426 A.2d 467, 474-75 (N.J. 1981) (establishing standards for the authorization of proposed sterilization of 19-year-old woman with Down's Syndrome); *In re Weberlist*, 360 N.Y.S.2d 783, 787 (N.Y. Sup. Ct. 1974) (approving dental work, facial restoration, and surgery on hand, cleft palate, and jaw for 22-year-old

The idea of using a substituted-judgment framework for achieving just treatment of children has been suggested by John Rawls,²⁶⁰ and there is growing interest among scholars in the field of children's rights in developing this approach.²⁶¹ Rawls relies on the notion of primary goods to address cases in which children do not have settled rational preferences regarding certain aspects of their care and education. Primary goods are those basic things that any rational person would want to ensure for herself if forced to choose, in a hypothetical situation of ignorance as to her particular social circumstances, personal attributes, and conception of the good, principles to govern the basic institutions of society, including the family and the education system.²⁶² These might also be thought of as fundamental needs or, in Joel Feinberg's terminology, "welfare interests" that must be satisfied before a person can pursue her individualized "ulterior interests" or higher aims in life.²⁶³ The less we know about a particular person's actual preferences, values, inclinations, and other characteristics, the more we must rely on such generic descriptions of basic interests in determining what that person would choose for herself if able. As such, using the substituted-judgment framework with respect to a very young child would in

man with an I.Q. of 20, based on "what [he] would choose if he were in a position to make a sound judgment").

Before making a substituted judgment, a lower court must first determine whether the ward, despite being mentally retarded, is capable of making an informed decision about the proposed procedure. If not, then in construing what the incompetent person's judgment would be if competent, the court must take into account that person's existing preferences, if any. The court should also, however, assume that a competent person contemplating how she should be treated if she were incompetent would regard the fact of her incompetence as justifying some check on, or protection from, her expressed preferences to the extent they are clearly irrational. *In re Moe*, 579 N.E.2d 682, 686 (Mass. App. Ct. 1991).

260. JOHN RAWLS, *A THEORY OF JUSTICE* 249 (1971).

261. See, e.g., M.D.A. FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* 55-60 (1983); John Eekelaar, *The Importance of Thinking That Children Have Rights*, in *CHILDREN, RIGHTS, AND THE LAW* 221 (Philip Alston et al. eds., 1992); Richards, *supra* note 162, at 16.

262. Rawls writes:

[T]he principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society. Others are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational, this authorization coming into effect only when we cannot look after our own good. Paternalistic decisions are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods. As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position. We try to get for him the things he presumably wants whatever else he wants. We must be able to argue that with the development or the recovery of his rational powers the individual in question will accept our decision on his behalf and agree with us that we did the best thing for him.

RAWLS, *supra* note 260, at 249. Rawls goes on to clarify that the assent of the child upon reaching maturity should not be the result of brainwashing, but rather the result of an objective assessment and uncoerced approval of her past treatment. *Id.* at 249-50.

263. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 37 (1984). Feinberg describes ulterior interests, in contrast, as individually determined desires for higher forms of accomplishment, meaning, and fulfillment. *Id.* He argues that only welfare interests warrant legal protection. *Id.* at 62-63.

practice not differ greatly from a best-interest calculation.²⁶⁴ Even in that case, however, the substituted-judgment framework encourages the decision-maker to see the child as a distinct and equal person deserving of respect, rather than simply as an object of paternalistic concern, and to avoid making decisions for the child based on the decision-maker's own particularized values and ideals.

This Article cannot fully develop the implications of the substituted-judgment procedure for different aspects of child-rearing, nor address all the questions that skeptics might raise about this approach. I will simply suggest here that it is reasonable to impute to all children a hypothetical preference that they receive certain basic forms of care: medical care to prevent avoidable sickness and physical injury, not only death; protection from adult behaviors that may cause them to suffer physical, psychological, or emotional trauma; and an education that develops in them independence of thought, keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good, and is sensitive to their developing, individual inclinations as they gain maturity.²⁶⁵ A strong case can be made that each of these things is a primary good or an aspect of a child's welfare interests.²⁶⁶ It would therefore be rational for any child to want these things

264. Depending on how one interprets "interests," it may be possible to conceive of situations involving young children in which the substituted-judgment approach would yield outcomes different from what a best-interest analysis would yield—in particular, where it is reasonable to impute other-regarding motives to a child. One such situation might be a decision to make a non-life-threatening organ transplant from a young child to a sibling in order to save the sibling's life. Many adults consent to removal of one of their organs to save the life of a family member. Likewise, in some cases it might be plausible to impute to the potential donor child, unable to give rational consent to such an operation, a hypothetical preference that the operation take place, even though we normally think of organ donors as sacrificing their own interests for the benefit of the recipient.

Some courts, though, have in fact justified a transplant from an incompetent donor to a sibling on the basis of the donor's interests. These courts have reasoned that the donor child's interests include the benefits to be derived from the continued companionship of the sibling, from avoiding the grief of losing the sibling, and from experiencing the happiness of having helped save the sibling's life. *See, e.g., Hart v. Brown*, 289 A.2d 386, 390-91 (Conn. Super. Ct. 1972); *Strunk v. Strunk*, 445 S.W.2d 145, 146 (Ky. 1969).

265. *See generally* Richards, *supra* note 162. Richards argues for a liberal education as a matter of equal opportunity:

[T]he purpose of education is not merely to prepare the child for the specialized skills that industrial society demands. Education also plays a critical role in fostering the values of autonomy that are fundamental to those liberal principles of justice that require that persons be treated as equals. Accordingly, such education should eschew indoctrination in rigid sectarian ideology. Instead, it should seek to develop the general capacities that any person would want in order to determine her or his vision of the good life. Thus, schools should cultivate self-critical capacities such as precise expression, logic, various forms of analysis, sensitivity to evidence and rational weighing of it, and an open curiosity and readiness to take the risk of an experimental attitude toward problems and life.

Richards, *supra* 162, at 22 (footnote omitted).

266. In contrast, satisfaction of a parent's desire to mold his children in his own likeness and to control every aspect of the children's upbringing should be viewed as an ulterior interest. Similarly, satisfaction of a desire to control the minds and bodies of other adults, no matter how strong that desire, is merely an ulterior interest. Frustrating that desire closes off one aim in life for a person but does not threaten his welfare interests, so he remains free to pursue any number of other ulterior aims—

for herself.²⁶⁷

As children approach adulthood, they are free to adopt whatever conception of the good they like, to engage in any lawful religious rituals they choose, and to forego medical care of their own free will. It seems unlikely that any individual, upon reaching adulthood, would resent having had a range of options in matters of belief, lifestyle, and health preserved for her during her childhood. It seems reasonable to believe that she might want to make her own choices as an adult in accordance with the personal attitudes and ambitions she has developed, rather than having almost all options closed off to her just because her parents wished to determine her life for her.²⁶⁸

These comments are intended to be merely suggestive. Determining what types of education and medical care best serve the welfare interests of children generally or of any particular child requires extensive analysis. This point leads to the fourth problem associated with using parental rights

including, for the parent, the aim of loving and guiding a child while also recognizing and appreciating the child's equal personhood and individuality.

267. It also seems reasonable to impute to children a hypothetical preference that their parents not feel disempowered, incompetent, or embattled as a result of state interventions or regulations. See Wald, *supra* note 242, at 280 (noting that it is important to successful parenting that parents feel competent and empowered). This preference should be weighed against children's other hypothetical preferences. The outcome of this balancing might be some compromise between the position of the parents and what the child might ideally choose for herself. For example, such a compromise might result in genuine regulation and monitoring of church-run schools to ensure that such schools provide the components of a liberal education identified above, rather than compulsory public school attendance. Such a compromise might satisfy to a large degree the standard developmental interests of the child without generating extreme resentment and frustration in the parents. In other situations, compromise may not be called for or even feasible, as when a child requires a specific medical procedure in order to improve his health or to avoid significant injury.

268. This is not to say that parents can or should make their offspring's adult options limitless. Nor would I deny that creating an open future for a child might irrevocably close off a certain type of religious experience. For example, it might preclude an unquestioning commitment to religious faith combined with a sense of belonging by birth, rather than by choice, to the community that embraces that faith. I submit, however, that unless and until it is shown that this type of experience generates greater well-being than does the experience of open possibility and self-determination in matters of belief and lifestyle, it would be easier for the State to justify to the offspring of religious parents having ensured the latter experience for them, out of respect for them as individuals, than to justify having enabled someone else to determine their faith for them.

Regarding the nature of chosen commitments, Professor Waldron writes:

To retain the capacity to review our commitments, we do not always have to be holding something back from them. Having the capacity to reflect means being able to make an effort when one needs to, to wrench away and construct the necessary psychological distance. It does not require a continuous reserve of commitment and energy which could have been associated with one's attachment but is not, and it certainly does not mean sitting back all the time in the isolated citadel of self treating the attachment as a curious and contingent event in which one has no interest. In modern experience, intensity, whole-heartedness, and the sense of having identified comprehensively with a project or commitment, are as much features of the commitments that people choose and the ones they could give up if they wanted to, as of the commitments which people discover they have and find they cannot question—many moderns would say more so.

Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 646-47 (1988) (emphasis omitted).

to protect children's interests: the legal categories courts employ inevitably affect the way judges and lawyers think about the interests at stake, leading them to focus on some of these interests and deemphasize others. Establishing and giving priority to parents' rights seems to have fostered the tendency of courts to analyze parent-state conflicts as if there were no other party involved, as if children were merely appendages or property of their parents.²⁶⁹ Characterizing the shield against unwarranted state intervention as the claim-right of the child, rather than a right of the parent, might go a long way toward refocusing the attention of judges and legislators on the interests of the child, and away from the desires of the parent.

Were this to occur, we could expect a much more thorough investigation and public discussion of the effects of various child-rearing practices on children than that which presently takes place. For instance, we currently know very little about the relative costs and benefits to children of various forms of religious education, because state officials have been reluctant to encroach upon the rights of parents. This reluctance has prevented them from seriously studying what goes on inside church-run schools and what effects these schools are having on the children in them.²⁷⁰ Making children's rights, rather than parents' rights, the dominant motif in legal and popular discourse concerning children's education might make it more likely that state officials could muster the political will to investigate the educational practices of these schools and to initiate appropriate regulation of them.

Before moving on to adult-centered rationales for parents' rights, two variations on the "children's interests" rationale deserve mention. The first, an application of the maxim that "ought implies can," contends that because the law imposes on parents substantial duties of care with respect to their

269. See Schneider, *supra* note 248, at 162-63. Schneider argues that the courts' emphasis on parents' rights may also encourage parents to be self-concerned, rather than concerned about the well-being of their children: "Thinking in terms of rights encourages us to ask what we may do to free ourselves, not to bind ourselves. It encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought." *Id.*

270. As noted above, states currently do very little to monitor the quality of church-run schools. See Burgess, *supra* note 69, at 76; see also SUSAN D. ROSE, KEEPING THEM OUT OF THE HANDS OF SATAN: EVANGELICAL SCHOOLING IN AMERICA 36 (1988) ("It is difficult to determine how many Christian schools exist because in many states they do not need and generally do not choose to be accredited."). Even if such a school must go through an initial approval process, it may thereafter have no contact with state officials, except possibly for the periodic submission of standardized test scores or enrollment data. Should anyone suggest that the State closely scrutinize the educational practices in these schools, a hue and cry of parents' rights and religious freedom is raised. See, e.g., PARSONS, *supra* note 78, at 141-42, 146-47 (describing court and legislative battles Fundamentalists Christians have successfully waged to prevent state regulation of their schools).

Even if lawmakers viewed parents' rights as limited in scope to protecting the interests of children, thinking in terms of parents' rights would lead them to identify the children's interests with what the parents believe are the children's interests. However, the parents' view is likely to derive more from religious commands than from a concern for the intellectual growth or psychological and emotional well-being of the child. Transforming the rhetoric to focus on children's rights would make it more difficult for public officials to make this mistake.

children, parents must also have substantial child-rearing rights, in order to be able to fulfill their duties.²⁷¹ Importantly, this argument would justify a set of parental rights that extended only as far as parents' legal obligations. It thus clearly would not support rights to send one's children to a religious school or to refuse necessary medical treatment for a child. Moreover, apart from this issue of scope, the reasoning of this argument is simply flawed.

The fact that one person owes duties to another person certainly does not *logically* entail that the first person has any rights—not even rights that might be necessary as a practical matter to fulfill her duties. The logical corollary of a legal duty owed to another person is simply a claim-right residing in *that other person*, not any right residing in the individual under the duty. For example, a doctor owes a duty of care to his patients, but this duty of care does not itself entail rights against her patients or against third parties.

In addition, it is not necessary as a *practical* matter that the State confer on parents any rights in order to ensure that they are able to fulfill their legal obligations to their children. As indicated above, it is sufficient for this purpose to grant parents a legal *privilege* to engage in parenting practices not incompatible with their children's temporal interests, and to recognize *the children's* claim-rights against unwarranted interference by the State or other third parties in the parents' efforts to fulfill their duties.²⁷² Moreover, when the State prevents a parent from performing some action or from making some decision for the benefit of a child, it also to that extent lessens the legal responsibility of the parent, implicitly declaring that that action or decision is no part of the parent's legal responsibility. Since it is the State that establishes the legal responsibilities of parents in the first place, there cannot be any conflict between those responsibilities and restrictions that the State imposes on parents.²⁷³ It is thus nonsensical to assert that parents need rights against the State as a practical matter in order

271. See, e.g., ARCHARD, *supra* note 243, at 109; J.W. DOCKING, PRIMARY SCHOOLS AND PARENTS: RIGHTS, RESPONSIBILITIES AND RELATIONSHIPS 34 (1990); Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 343 (1980); Peter Hobson, *Some Reflections on Parents' Rights in the Upbringing of Their Children*, 18 J. PHIL. EDUC. 63, 64 (1984). As noted above, the Supreme Court's reference to parents' moral obligations in *Yoder* and *Pierce* is not an argument that parental rights follow from parental responsibilities. See discussion *supra* note 59. The Court has drawn such a connection more explicitly outside the free exercise context. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("[T]he rights of the parents are a counterpart of the responsibilities they have assumed.").

272. Analogously, to ensure that an attorney is able to fulfill her duties to her client, it is sufficient to accord the attorney a privilege to guide and act on behalf of her client, and to repose in the client rights against unwarranted outside interference in the attorney's performance of her responsibilities. Thus, for example, if a state denies a criminal defendant's access to her client, the lawyer will assert that the State has violated her client's Sixth Amendment rights, but need not and cannot plausibly claim that the State has violated any rights of her own.

273. It is difficult to imagine a state prosecuting parents for failing to perform some action that state law prohibited them from doing. Were a state ever to do so, the legal prohibition would, of course, be a complete defense.

to carry out their legal responsibilities to their children.²⁷⁴

The second variation on the childrens' interests rationale contends that the desire of adults to raise children as they see fit is so strong that, if they did not have extensive rights of parental control, adults would forego having children.²⁷⁵ This situation, so the argument goes, would be contrary to the interests of children.²⁷⁶ Under this view, a parental privilege limited to allowing parents to serve as the primary caretaker, within bounds defined by the child's interests, would simply be too meager a benefit to make parenting worthwhile.²⁷⁷

This argument is unpersuasive. The premise that parenting constitutes such a large part of an adult's personal fulfillment is directly at odds with the conclusion that any substantial limitations on how adults may satisfy their parenting desires would discourage them from parenting altogether. This is akin to arguing that if a person is starving, and is prohibited from eating the foods he most desires, he will opt not to eat at all. To reconcile these two claims would require adding the further premise that having to operate within bounds defined by a child's temporal interests would be so unpleasant that the suffering it occasioned parents would outweigh any satisfaction they could still derive from the parenting experience. While this may be the case for a few people, it is very unlikely to be true for the vast majority. Of course, parents may feel frustration and even great anguish when the larger community disagrees with their child-rearing practices and imposes restrictions on them.²⁷⁸ It would be very surprising, though, to hear a parent say that because of this it is simply not worth having children. Indeed, there is no evidence to suggest that members of any particular religious order would forego parenting if they were to lose control over, for example, their children's medical treatment. In any event, we would regard

274. Of course, some protection is needed against state officials acting *ultra vires* in a way that prevents parents from carrying out legally mandated actions. This protection would be a right of the child in the legal regime I propose.

275. See, e.g., David Bridges, *Non-Paternalistic Arguments in Support of Parents' Rights*, 18 J. PHIL. EDUC. 55, 59 (1984).

276. There are conceptual problems with asserting that a child is worse off for never having been born, but these problems need not be addressed here.

277. I assume here that, within the substituted-judgment framework, it is reasonable to impute to any child a preference that the best judgment of the professional child-care community as to the temporal interests of children serve as a constraint on parental behavior and decision-making, when the risk and severity of potential harm to the child's well-being are sufficient to outweigh the costs to the child's interests associated with state interference in the child's relationship with the child's parents. I also assume, however, that the child hypothetically would want his parents to have input into any determination of his interests, since the parents would be most familiar with the child's individual characteristics and inclinations. They would know, for example, the child's medical history, temperament, preoccupations, and skills. As noted above, it is also to a child's advantage that his parents feel engaged, respected, and empowered in the process of raising him.

278. In a world without parental rights, however, perhaps parents might have lesser *expectations* of control, and would therefore be less frustrated when the larger community demands adherence to its standards, rather than those of the parents.

such a person as one who is unlikely to be a very good or loving parent—as someone who is in the parenting profession for the wrong reasons.

A more plausible version of this argument posits that should the role of parent become too onerous because of excessive state interference, many parents will become less attached to the children they do choose to bear and rear. These parents would feel either powerless to direct their children's lives or resentful of the aggravation that their children have occasioned, and children would suffer as a result.²⁷⁹ The problem with this version of the argument is that it rests upon an exaggerated view of the restrictions on parents that eliminating parents' rights would occasion. In fact, eliminating parents' rights would not in itself permit or encourage an increased level of state regulation or intrusion into the family. Instead, the scope of permissible regulation and intervention would be determined by reference to the child's interests, with the parent acting as an agent for the child against the State when it intrudes too far. Because the child has an interest in the parent deriving satisfaction from parenting, adopting this approach would be unlikely to result in a drastic increase in the level of state regulation. Rather, the likely result would be a significant, but limited, lowering of the threshold of harm necessary to justify state intervention to protect a child.

Further, it would be implausible to claim that parents could never be satisfied in their role without the particular form of social recognition that having rights entails. Countless people in our society—teachers, judges, and doctors, for example—derive great satisfaction simply from being entrusted with important responsibilities in roles to which they have no right, but which they are accorded the privilege of performing.

Finally, it is worth pointing out that anyone who wishes to improve the lives of children, and who believes that the family is the best environment for raising children, should also be committed to making all parents successful and happy in their role. This includes helping those parents who find it particularly difficult to meet the needs of their children. If we as a society did this successfully, there would be a need for state intervention only when parents were determined to take actions contrary to the temporal interests of their children.

Thus, child-centered rationales for parents' rights fail to show that these rights are necessary to protect and promote the interests of children. An adequate and more appropriate means of protecting and promoting children's well-being is to attribute certain rights to children themselves, and to complement that right with a parenting privilege. This approach is preferable not only because it eliminates a category of rights that is anomalous and

279. See Wald, *supra* note 242, at 280. Wald expresses concern that "if parents lose ultimate authority they will be less willing to assume responsibility for the child." *Id.* at 277. However, he also suggests that "the legal system and the granting or withholding of legal rights may have little to do with how parents view their role." *Id.*

that rests on a dubious notion of entitlement, but also because it more directly focuses attention on the child's interests.

B. Justifications Based on Parents' Interests

Less common in scholarly writing is the claim that parents should have child-rearing rights in order to protect their own interests.²⁸⁰ Raising children is, indisputably, a large component of most parents' happiness. For many people, raising children is their greatest good, their highest accomplishment, their most profound emotional experience, and a coalescence of their most important beliefs, values, and hopes. The struggles many adults endure just to bear or adopt a child, and the sacrifices they make to provide for a child, attest to the high priority they give to parenting within the hierarchy of their desires. Where this desire is coupled with a sense of religious duty, an even greater portion of a parent's happiness may be bound up in directing the life of the child. Parental rights, so the argument goes, are necessary to protect this aspect of well-being, to enable parents to achieve this noble form of human fulfillment.²⁸¹

This argument is deficient for at least three reasons. First, the intensity of parental urges by itself is not a justification for generating rights to satisfy those urges.²⁸² Second, this argument fails to explain the anomaly of

280. See, e.g., Edgar Page, *Parental Rights*, 1 J. APPLIED PHIL. 187, 195-96 (1984); Richards, *supra* note 162, at 28; Schoeman, *supra* note 162, at 14; Schrag, *supra* note 241, at 101.

281. Some writers have hinted at an additional, equal protection type of rationale—that poor adults, like wealthy adults, are equally entitled to enjoy the benefits of child-rearing, even though they may not be equally equipped to satisfy children's temporal interests. Thus, under this rationale, a regime of strong parental rights is necessary to give equal protection to the poor, because an exclusive or primary focus on the interests of children might result in less parental freedom and authority for poor parents than for wealthy parents, or the wholesale removal of children from the homes of parents living in poverty. See, e.g., *In re Rinker*, 117 A.2d 780, 783 (Pa. Super. Ct. 1955) ("The welfare of many children might be served by taking them from their homes and placing them in what the officials may consider a better home. But the Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich . . ."), cited with approval in Wald, *supra* note 15, at 1004 n.110; see also *New Jersey Div. of Youth & Family Servs. v. A.W.*, 512 A.2d 438 (N.J. 1986) (reversing trial court decision to excuse parents' neglect of children on the basis of the parents' poverty).

This line of argument suffers from all of the defects identified below: a morally dubious notion of entitlement, a willingness to sacrifice the interests of children in order to satisfy the interests of adults—or to satisfy a broader social interest in justice among adults—and a failure to explain why the inequity concern justifies rights of control over children but not rights of control over other adults. Gross disparities of wealth in our society certainly impose unjust burdens on the poor, but transferring the costs of injustice from poor adults to children hardly seems a defensible response. Of course, those who raise this equity concern would prefer that no parent have to labor under the burden of economic deprivation, and that no child suffer as a result of poverty. See Wald, *supra* note 15, at 1000. It should also be noted that poverty of the parents generally does not by itself make removal the best option for the child.

282. Nor would a presumption that parental urges are generally benevolent make the case for parental rights.

An interest in having a child that we might recognise as of real value would be to bring into existence another human who could be the object of our disinterested love, concern and care. But this would suggest a child-centered argument. It is the child's interest in a loving upbringing which does the moral work. The parents' interest in offering such an upbringing

granting parents rights of control over their children when the courts have abolished or refused to create such other-determining rights in every other area of the law. Given the general rule that no individual's desire to control the life of another person, no matter how intense, properly gives rise to a right to do so, anyone who advocates parents' rights over children must identify some unique feature of parents' interests with respect to children that justifies a departure from the general rule.

One possible distinguishing feature of parents' interest in their children is the desire to recreate themselves in another human being, to shape an entire life as a reflection of their own.²⁸³ Parents have a uniquely propitious opportunity to do so, given the young child's relatively unformed state. While this desire may reflect negative character traits such as selfishness and narcissism, it also may involve benevolent motives. In either case, however, it does not deserve the protection of a right. One simply does not have a fundamental interest in creating a copy of oneself.

A third objection to the argument based on parents' interests is that it is simply not true that parents must have child-rearing *rights* in order for them to be able to satisfy their interest in caring for a child. As noted repeatedly above, a child-rearing privilege is sufficient to enable parents to maintain an intimate parent-child relationship and carry out parental responsibilities. The negative claim-rights of the child could serve as an appropriate and adequate basis for opposing interference by third parties, particularly the State.

At bottom, parental rights are necessary only to ensure that parents can treat their children in a manner that is contrary to the children's temporal interests.²⁸⁴ For example, suppose that a parent's faith requires that he involve his infant daughter in a religious ritual that the State can demonstrate to be inimical to the daughter's temporal interests. Suppose further that non intervention would leave the daughter to suffer greater harm than state intervention might cause her. In such a case, having rights himself gives the parent a legal basis for objecting to state intervention, while he could not plausibly object to intervention in such a case by asserting the child's rights. With parental free exercise rights, he has presumptive authority to treat his daughter in this way regardless of her interests, simply because he wants to.

Thus, to show that it is rational for parents to demand child-rearing

does not of itself justify their claim to rear. Rather it qualifies them to be good rearers given that this is what the child deserves.

ARCHARD, *supra* note 243, at 105.

283. See Page, *supra* note 280, at 195.

284. Given the costs of state intervention for the child, the child's negative claim-rights would preclude state intervention where parents' actions are in the child's interests, have no clear effect on the child's interests, or negatively affect the child's interests to a lesser extent than would the intervention. Given this assumption, parental rights would be necessary only to raise the threshold of harm to children that must be reached before the State may intervene.

rights, one must argue that it is in parents' interests to be able to treat their children in ways contrary to their children's temporal interests. To show that parental rights are just, one must also argue that these parental interests are legitimate and outweigh any competing interests or considerations against creating those rights.

Arguably, it is rational of parents, within their scheme of values, to demand child-rearing rights if they believe themselves bound by their faith to raise their children in a way that is inconsistent with the children's temporal interests. Within their conception of the good, spiritual aims may conflict with and outweigh some worldly aims. In addition, some parents, whether religious or not, may derive some immediate satisfaction from enjoying unfettered discretion to direct their child's life in the way they see fit.

However, even if rights to control a child's life in ways inimical to the child's temporal interests would further some interests of the parents, these rights may not serve other, long-term parental interests. For example, not having such rights might better lead parents to recognize their children as separate persons whose well-being is also the concern of other people. It might lead parents to consider that their own views of what is right for their children may not be the same as what the children would choose for themselves if able to do so. These realizations might, in turn, lead parents to adopt certain attitudes—humility, greater respect for their children, openness to dialogue about child-rearing with other persons—that would likely benefit not only the children, but also the parents. Much of the conflict and hostility that arises between parents and children, particularly as children become older and begin to form opinions about the justness of their upbringing, might be avoided if parents were less possessive of their children and less demanding of their rights as parents. Any determination of whether it is rational, from any perspective, for parents to demand parental rights should take these additional considerations into account.

Moreover, even if it does on the whole further parents' interests to possess rights to direct their children's lives in ways that are harmful to the children, the state should deem such interests illegitimate and refuse to give them precedence over the interests of children. The problem with such "interests" is that they entail treating children instrumentally, using children in ways that sacrifice their welfare interests in order to further the ulterior interests of parents.²⁸⁵ This instrumental view of children is inconsistent

285. This is true whether the parents' motives are self-regarding or solely concerned with the well-being of the child (e.g., if the parents believe they are sacrificing the child's temporal interests in order to further the child's spiritual interests). If state decision-makers *themselves* believe certain parenting practices or decisions to be harmful for a child, then their advocating parental rights to undertake those practices or decisions necessarily means that *they* are willing to accept the sacrifice of the child's interest for the sake of satisfying the parents. The reluctance of liberals, in particular, to take a stand against religiously motivated parenting of which they personally disapprove is, I believe, due largely to their believing that liberal values of tolerance and respect for diverse ideological views require the state

with the moral principle that we should treat all persons as ends in themselves, giving equal consideration to their interests, and not merely as means to the furtherance of others' ends.

From another perspective, though, one might argue that because parents give so much to children, it is fair to give parents rights to direct the lives of their children²⁸⁶ even in ways that may be contrary to their children's welfare interests, so long as they do not cause their children grievous harm. The responsibilities of parenting are a substantial burden, and some freedom to satisfy one's own desires or to allow one's religious views to trump the temporal interests of one's child might be appropriate compensation for carrying that burden. This *quid pro quo* reasoning may underlie the sense some people have that parents *are* entitled to determine the course of their children's lives, that parental authority should be seen as a right and not merely a privilege. However, this reasoning fails to distinguish rights to control one's minor children from rights to determine the lives of adult offspring who remain in or have returned to a parent's care because of some disability—rights that the courts have refused to establish. Indeed, this argument, if generalized, might require that a whole host of people who shoulder the burden of caring for other people receive, as a matter of fairness, rights of control over the lives of those people: adult offspring caring for elderly parents, teachers nurturing children's minds, nurses tending to the sick, shelter operators caring for homeless persons, and many others. The law does not, however, confer such rights in these cases, and few if any persons would sincerely contend that it should. Even with respect to care-providers who receive no monetary compensation for their labors, fairness does not seem to require this result.

In sum, the parental interest justification is unconvincing. It ultimately depends either on a suspect understanding of the interests of parents and a morally unacceptable, instrumental view of children, or on an aberrant and unsupported notion of fairness.

C. Justifications Based on Social Interests

An argument for parents' rights might also rest on the supposed interests of society as a whole that are served by the existence of these rights.

to defer to the viewpoint of the parents in determining whether particular parenting practices should be permissible. See, e.g., Gutmann, *supra* note 271, at 352-53. This might be a defensible position from which to determine the permissibility of what individuals do to themselves or what consenting adults do to each other. However, it is a mistake in the case of children, who are not the same persons as their parents, nor, in general, consenting participants in the religious practices of their parents. Liberals should instead view the child-rearing behaviors of parents the same way they view actions affecting any other nonconsenting persons. As was demonstrated in Part II, we simply do not give people rights to use other, nonconsenting persons as instruments for the advancement of their own interests. Nor do we permit people to inflict what a majority of the community considers to be harm on other, non consenting persons, regardless of their motivations for doing so.

286. See, e.g., Bridges, *supra* note 275, at 59-60.

One such interest might be in the preservation of a particular form of social and political life, such as our liberal democracy. The Supreme Court has in fact in some contexts decided whether asserted liberties are fundamental, and therefore merit heightened protection under the Fourteenth Amendment Due Process Clause, by evaluating whether they are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed."²⁸⁷ Such liberties are "the logical implications of a system that recognizes both individual liberty and democratic order."²⁸⁸ In *Palko v. Connecticut*,²⁸⁹ for example, the Court held that the right to trial by jury and to immunity from prosecution except as the result of an indictment are "not of the very essence of a scheme of ordered liberty."²⁹⁰ Thus, these are not among the liberties that the Fourteenth Amendment protects against state encroachment. These rights are not so important that "a fair and enlightened system of justice would be impossible without them"; they "might be lost, and justice still be done."²⁹¹

In light of the *Palko* holding, it would appear frivolous to contend that it is implicit in the concept of ordered liberty that underlies our political culture that the religious preferences²⁹² of parents should translate into rights to determine the lives of their children, or indeed, that parents should have any such other-determining rights.²⁹³ Such rights are no more implicit in the concept of ordered liberty than would be a right to direct the lives of other adults based on one's religious preferences.

This becomes clearer when one realizes that parental rights are not necessary to preserve the institution of the family, which many people believe is necessary to the maintenance of a free society. Instead, a limited parental privilege coupled with appropriate claim-rights for children would be sufficient for that end, given a child's basic interest in an intimate, continuous relationship with a parent, free from unwarranted intrusions by the

287. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting) (alterations in original) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). As noted above, in other contexts, including religious parenting, the Court has looked to tradition as a determinant of whether a liberty is fundamental. See discussion *supra* notes 230-32 and accompanying text.

288. *American College*, 476 U.S. at 791.

289. 302 U.S. 319 (1937).

290. *Id.* at 325.

291. *Id.*

292. The fact that our nation's founders included the Free Exercise Clause in the Bill of Rights naturally suggests that they believed protection of some measure of religious freedom would be necessary to a stable system of ordered liberty. The question that arises today in free exercise cases such as *Yoder*, of course, is not whether there should be protection for *any* religious freedom at all, but rather whether a particular form or aspect of religious exercise should be included within the scope of protected religious freedom.

293. In the substantive due process context, the Court has intimated on a few occasions that parental rights are essential to ordered liberty or basic to a free society. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 38 (1981) (holding that parental rights are among those "'essential to the orderly pursuit of happiness by free men'") (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); see also *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

State or other third parties. In fact, parental rights, particularly as extended under the Free Exercise Clause, violate one premise of ordered liberty, insofar as they enable parents to undermine the "individual liberty" of their offspring.

An additional argument for parents' rights that rests on an appeal to the interests of society is implicit in the *Yoder* and *Pierce* opinions. This argument states that giving parents the right to direct the upbringing of their children in accordance with the parents' religious beliefs allows different religious communities to survive and thus fosters cultural and religious diversity in our country. In contrast, the argument goes, a uniform, state-imposed education or list of proscribed parenting behaviors would standardize this nation's citizens and forestall cultural progress. It might even weaken the institutions of democracy, which may depend on a substantial measure of heterogeneity. This argument may appear compelling to some,²⁹⁴ but it rests on a shaky empirical foundation and a dubious normative premise.

The empirical assumption underlying this argument is that such increased state control would preclude the survival of diverse ideologies and ways of life. Even if states were to make public school attendance compulsory, however, parents of different religious faiths could continue to model and teach their beliefs to their children at home. The emotional bond between parents and their children naturally engenders in children some inclination to adopt their parents' faith. Public school attendance would simply guarantee that some range of alternative ways of thinking about the world and the individual's place in it were genuine options for the child. Furthermore, good public school teachers today actively promote individuality and teach children to value diversity. In short, the standardizing effect of public schooling is grossly overstated. Indeed, there does not appear to be any want of diversity in our society today, despite the fact that for many decades now the vast majority of children in this country have attended public schools. Further, it is difficult to imagine that diversity would be threatened if a state merely regulated private schools stringently enough to ensure that the quality of education they provide is comparable to that in public schools.

Pluralism is in fact one of the most poorly articulated of social values. Those who invoke it as a reason for opposing increased state control over child-rearing rarely offer any definite views on how much and what kind of pluralism is desirable.²⁹⁵ There are, on the other hand, quite obvious costs

294. See, e.g., CARTER, *supra* note 162, at 174 (arguing that parents should be entitled to remove their children from certain components of public school education, such as sex education, to which they have religious objections, because this will help preserve "epistemological diversity" in our society).

295. See Schneider, *supra* note 248, at 161 ("[W]e lack a sense of the limits of pluralism. Pluralism is not an absolute, and is perhaps not even a pre-eminent, value, since some common views about behavior and morals are necessary if society is to function at all, to say nothing of functioning well.").

to religious diversity; religious difference gives us yet another reason for distrusting and doing violence to one another. We should not so readily accept promotion of religious diversity as an aim of social policy, then, without seeing evidence that it produces benefits outweighing these costs.²⁹⁶ It is not unreasonable to ask whether diversity of ethnic backgrounds, languages, occupations, political beliefs, hobbies, and tastes is not itself sufficient to prevent tyrannical majorities from forming and to keep us from feeling that we are all too alike.

Even if it were true that parental free exercise rights are necessary to preserve a high degree of religious diversity and that a high degree of religious diversity is a good thing, however, the conclusion that parents should have such rights to treat their children in ways inimical to the children's temporal interests requires a further, normative premise. This premise is that it is not only acceptable, but also morally requisite, to sacrifice the welfare interests of certain children to promote a social aim like pluralism. This is a premise that any adult would surely reject if its principle were to be applied to him.

Suppose, for example, that the State granted members of a dying religious community a right to force certain adults from outside the community to undergo intensive religious indoctrination to ensure the survival of that religious community, or that the State itself intended to force such indoctrination. These adults would undoubtedly be outraged by the notion that our society, or communities within our society, could treat them in this way—as non consenting means to promote this supposed public good.²⁹⁷ To be consistent in their moral attitudes, adults should concede that this notion is equally objectionable when applied to children. The survival of ancient creeds and religious communities may be a good thing, but it should occur as a result of free choices, not coercion and the sacrifice of children's interests.²⁹⁸

Finally, I note that a desire for cultural diversity is not what motivates

296. This is certainly not to suggest that *discouraging* religious diversity should be a goal of social policy.

297. Many people in this country have objected for the same reason to the military draft or to taxation—forms of state coercion or forced sacrifice for the community that are in some ways analogous to that considered here. Others accept military service or payment of taxes as their obligation to their country, as the price they tacitly agree to pay in exchange for the benefits they derive from living in a democracy. Therein lies a crucial difference between these situations and that of indoctrination of and control over children. Children do not *consent* to being used as instruments for promoting pluralism. In fact, reliance on the notion of a willing exchange would counsel in favor of subjecting adults, rather than children, to indoctrination and other forms of religious control in order to promote pluralism, since adults are capable of giving consent to the terms of membership in a national community.

298.

It might be claimed that some traditional ways of life—for instance, that of the Amish—could not survive the requirement that older children be allowed to go to school with children from the larger community and to learn about science and technology. If this claim is true, then such traditional ways of life have no right to survive, for their survival is at the expense of the liberty of the children who are born into them.

Kenneth Henley, *The Authority to Educate*, in *HAVING CHILDREN*, *supra* note 1, at 254, 262.

those religious groups who have been most insistent about the rights of parents under the Free Exercise Clause. Their aim is to standardize children in their own way.²⁹⁹ The irony of the appeal to pluralism in *Yoder* is that the decision "broaden[s] the range of choices available to adults by decreasing the range of choices available to their children."³⁰⁰ Indeed, the efforts of some religious groups today to reintroduce Christian teaching into the public school curriculum suggests that, if they could, they would standardize everyone's children in their way. To be sure, "the child is not the mere creature of the State,"³⁰¹ but the child is also not the mere creature of the parent, nor of the religious community to which the parent belongs. Rather, the child is his or her own person. A child may lack a fully formed independent character, but is nonetheless an individual who deserves the same respect accorded adults.

The discussion in this Part has thus shown that none of the interests that may be bound up in the conflict between parents and the State over the appropriate forms of child-rearing supports the perpetuation of parents' rights. Objections to state interventions that would be detrimental to the well-being of a child can stand entirely on an assertion of the child's rights. Parents' rights are necessary only to ward off state interventions that would on the whole enhance a child's well-being. That aim is illegitimate because it entails a willingness to sacrifice the welfare interests of children in order to advance uncertain (given the possible long-term harm to the parent/child relationship discussed above) and, in any event, non fundamental interests of parents or of other members of society. We do not allow adults to be treated as mere instruments for the achievement of others' ends, and we should not allow children to be treated in this way either.

CONCLUSION

Consideration of judicial interpretations of rights in numerous contexts has revealed that the notion of parental rights is inconsistent with well-established legal principles. Rights protect only a right-holder's self-determination and the integrity of the right-holder's own person and property. No one should possess a *right* to control the life of another person no matter what reasons, religious or otherwise, he might have for wanting to do so. Children are persons, intimately bound up with but nevertheless distinct from their parents. Supposed justifications for parents' rights based on the

299. See ALAN PESHKIN, *GOD'S CHOICE: THE TOTAL WORLD OF A FUNDAMENTALIST CHRISTIAN SCHOOL* 190 (1986) (finding, with regard to Fundamentalist Christian education, that "church and school consciously, unapologetically work to restrict their students' cognitive associations 'in order to avoid contact with people, books and ideas, and social, religious, and political events that would threaten the validity of one's belief system'") (quoting MILTON ROKEACH, *THE OPEN AND CLOSED MIND* 48 (1960)); PARSONS, *supra* note 78, at 135 (noting that even some Fundamentalists acknowledge that "too many fundamentalist schools have atmospheres that stifle individual thought and development").

300. Schneider, *supra* note 248, at 160.

301. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

interests of children, on the interests of parents, or on the interests of society simply do not withstand scrutiny.

These findings compel the conclusion that parental child-rearing rights are illegitimate. A better regime would simply grant parents a legal privilege to care for and make decisions on behalf of their children in ways that are not contrary to the children's temporal interests. Children themselves should possess whatever rights are necessary to protect their fundamental interest in an intimate, continuous relationship with their parents. This includes the right to be insulated from any state interference that is not in the children's interests.

Courts should acknowledge the illegitimacy of the parents' rights doctrine and decline to recognize claims of parental rights in the future. The evolution of our social attitudes toward, and legal treatment of, children in recent decades would afford the Supreme Court an adequate rationale for departing from the rule of *stare decisis*³⁰² and for overruling *Yoder* and *Pierce* to abolish parental child-rearing rights. Subsequently, courts would decide cases involving disputes between parents and the State over child-rearing practices based on the interests and rights of the children involved. This approach would encourage a more appropriate social and legal understanding of parenthood as a privilege conditioned upon a parent's willingness to operate within limits defined by the temporal well-being of her children. It would also foster recognition that children are distinct persons deserving of respect equal to that accorded adults, and not merely means to the fulfillment of parents' life-purposes.

302. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (plurality opinion of O'Connor, Kennedy, Souter, JJ.) (noting that one factor to be considered in departing from precedent is whether facts have "come to be seen so differently, as to have robbed the old rule of significant application or justification").