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WHO OWNS THE SOUL OF THE CHILD?: AN ESSAY ON RELIGIOUS PARENTING RIGHTS AND THE ENFRANCHISEMENT OF THE CHILD

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I. INTRODUCTION: WHAT DOES ARMAGEDDON HAVE TO DO WITH BETTY SIMMONS?

For the most part we do not first see, and then define, we define first and then see.[2]

Walter Lippmann

Betty Simmons was nine years old when she accompanied Sarah Prince, her aunt and guardian, to distribute religious literature on the streets of Brockton, Massachusetts.[3] Mrs. Prince did not ordinarily permit Betty to engage in preaching activity on the streets at night, but on the evening of December 18, 1941, she reluctantly yielded to Betty's entreaties and (perhaps more difficult to

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[2] WALTER LIPPMANN, PUBLIC OPINION 54–55 (First Free Press Paperback ed. 1965) (1922).

[3] Prince v. Massachusetts, 321 U.S. 158, 159–60 (1944).

resist) her tears.[4] Both Mrs. Prince and Betty were Jehovah's Witnesses, for whom street preaching is a religious duty.[5] For Betty, street preaching was work commanded by the Lord, but it was work that she loved to do. It was a way of worshipping God.[6] For the legislators of Massachusetts, however, Betty's religious work was something else entirely: a violation of the state's child labor laws. These statutes prohibited children from selling or offering to sell — any newspapers, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place.[7]

Criminal sanctions were imposed on parents and guardians — who compel or permit minors in their control to engage in the prohibited transactions.[8] Sarah Prince was convicted on several counts, and, for the most part, the judgment of the trial court was affirmed by the Supreme Court of Massachusetts.[9] Mrs. Prince appealed to the United States Supreme Court.[10]

The case of *Prince v. Massachusetts* is well known for its conclusion that — the family itself is not beyond regulation in the public interest, as against a claim of religious liberty.[11] In *Prince,* the Court stressed that the state, acting as *parens patriae* — acting, that is, in its capacity as protector of those unable to protect themselves — is responsible for the general welfare of young people.[12] As *parens patriae* (literally, as parent of the country), the state may protect children against the misconduct of their own parents and guardians.[13] The state's *parens patriae* authority, according to the *Prince* Court, is —not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.[14] Pointing to a number of state regulations (such as child labor and compulsory schooling laws) that interfered with religious parenting rights, the Court rejected Mrs. Prince's contention that such regulations can be justified only by a clear and present danger to the child.[15] While a regulation of *adult* religious activity might require the state to show that it had a truly compelling justification, no such showing was necessary where children are involved.[16] — The state's authority over children's activities, the Court insisted, — is broader than over like actions of adults.[17] Thus, the Court concluded that the state was required to show only that it had a legitimate (not a compelling) interest to promote the public's health, welfare, or safety, and that it had used a means—here, a restriction on commercial activity by children — reasonably related to its purpose

[4] *Id*. at 161–62.

[5] *Id*. at 161.

[6] *Id*. at 162–63.

[7] *Id*. at 172 (Murphy, J., dissenting).

[8] *Id*.

[9] *See* Commonwealth v. Prince, 46 N.E.2d 755, 759–60 (Mass. 1943).

[10] *Prince*, 321 U.S. at 160 (1944).

[11] *Id*. at 166.

[12] *Id*.

[13] *Id*. at 166–67.

[14] *Id*. at 166.

[15] *Id*. at 166–167.

[16] *Id*. at 167–168.

[17] *Id*. at 168.

(not the least restrictive means possible).[18] Child labor laws served —the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well- developed men and citizens.[19] For the Court, it was simply too late to doubt that legislation designed to protect children is within the state‘s police power, —whether against the parent‘s claim to control of the child or one that religious scruples dictate contrary action.[20] Mrs. Prince was not entitled to an exemption from the general law of the state regulating child labor.[21]

Its focus on the welfare of the child notwithstanding, the *Prince* Court managed to ignore the real child whose welfare was the central issue of this landmark case. For one thing, no one on the Court suggested that Betty may have been too young to choose such a strong religious commitment. Writing for the Court, Justice Rutledge noted that —Betty believed it was her religious duty to perform this work and failure would bring condemnation _to everlasting destruction at Armageddon.‘[22] On this point, the Court‘s four dissenting justices agreed with the majority: Betty wanted to accompany her aunt, motivated to engage in missionary evangelism by her love of the Lord.[23] Mrs. Prince‘s brief to the Court also stressed that Betty —desired to serve Almighty God.[24] Her service was freely given to the Lord. In Mrs. Prince‘s words:

> [Betty] was serving Jehovah God and not her guardian, not any man, not the society or any earthly institution. The girl desired to pay her vows unto her God. Since she was thus serving Jehovah it cannot be said that she was working for any creature on earth. No man or government has authority to punish a child or another creature because the child is permitted to serve Jehovah God.[25]

From this point of view, Betty‘s street preaching was not child labor at all.

No constitutional truism is more universally accepted than Justice Jackson‘s famous assertion, in *West Virginia State Board of Education v. Barnette*, that —no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[26] In *Barnette*, the Supreme Court protected school chil-

[18] *Id*. at 170–71.

[19] *Id*. at 165.

[20] *Id*. at 168–69.

[21] *Id*.

[22] *Id*. at 163.

[23] *See id*. at 171–72 (Murphy, J., dissenting).

[24] Brief for Appellant at 34, *Prince*, 321 U.S. 158 (No. 98).

[25] *Id*.

[26] 319 U.S. 624, 642 (1943); *cf*. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (—The _establishment of religion‘ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non- attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and

dren against the action of local authorities, who, by compelling the flag salute and pledge, had —transcend[ed] constitutional limitations on the authority of the state.[27] The injury caused by such a compelled statement of belief was a grievous one, a blow to the intellectual and moral personhood of the young children. The compulsory flag salute and pledge—require[d] affirmation of a belief and an attitude of mind.[28] By forcing the children to utter what was not in their minds,[29] the state had invaded —the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[30]

In the catalogue of opinions not subject to official prescription, religion occupies a privileged place. The Constitution's commitment to religious freedom arises from the assumption that religious principles are uniquely the dictates of conscience. Because religion is, as James Madison put it, —the duty which we owe to our Creator . . . it can be directed only by reason and conviction, not by force or violence.[31] Not, that is, by the state. Even a benign expression of religious views by the state —may end in a policy to indoctrinate and coerce, calling into question the voluntariness, and thus the genuineness, of belief.[32]

—A state-created orthodoxy, the Court has said, —puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.[33]

But, for children, the threat to freedom of belief and conscience is no less grave when it comes from private orthodoxies, and the injury to the child caused by private coercion is no less grievous. The realm of intellect and spirit is invaded when children are forced to believe what other people believe, or kept from believing what other people do not believe, even if—and, perhaps, especially when—those —others are their parents or religious mentors. Yet children are left legally unprotected from most forms of private religious coercion. Indeed, where the religious upbringing of

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vice versa.).

[27] *Barnette*, 319 U.S. at 642.

[28] *Id*. at 633.

[29] *Id*. at 634.

[30] *Id*. at 642. On the First Amendment as protective of individual dignity, see, for example, Cohen v. California, 403 U.S. 15, 24 (1971) (—The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport *with the premise of individual dignity and choice upon which our political system rests*.) (emphasis added); *cf., e.g*., Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 312 (1980) (—The first amendment is . . . a statement of the dignity and worth of every individual.); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) (—[E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted. Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 483 (1995) (—Compelling people through threat of legal sanction to say words that they don't want to say is as much an affront to dignity as many other laws the Court has invalidated.).

[31] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* THE SUPREME COURT ON CHURCH AND STATE 18 (Robert S. Alley ed., 1988); *cf*. Thomas Jefferson, *The Statute of Virginia for Religious Freedom* (1786), *reprinted in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY xvii (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

[32] Lee v. Weisman, 505 U.S. 577, 592 (1992).

[33] *Id*.

children is involved, freedom of belief can lose its customary meaning. Somehow, Betty's fear of —everlasting destruction showed that her evangelical desires were the product of free choice. The Court did not pause to consider whether Betty's religious training had left her unable to choose—freely to choose, or freely to reject—the religious commitments of her guardian. Theologically, we might wonder how free a young child can be to make religious choices when the consequences of choosing wrongly are so stark. More relevant to the Court's work, we *should* wonder what it means for the psychological welfare of a child to believe that her own conduct—or, in Betty's view, misconduct—could bring about her everlasting destruction.

The Supreme Court did not stop to think about such things. It held against Mrs. Prince on the dubious basis that street preaching was dangerous work for children.[34] But the Court chose to overlook a real risk of harm to Betty: the threat posed by a religious regime that makes genuine choice and real faith difficult, if not impossible. Or perhaps it should be said not that the Court ignored this harm, but that it could not see it. The Court could not see the possibility that Betty's obedience was the product not of choice, but of the loss of choice, of childlike surrender to a familial authoritarianism. The danger of emotional maltreatment was hidden in plain sight, but the Court could not challenge the cultural norm that parents have the right to form the religious beliefs of their children. The Court was incapable of asking, *What does Armageddon have to do with Betty Simmons?*

II. A TALE OF TWO LIBERTIES

Sarah Prince rested her case on two liberties: the right of religious freedom (as guaranteed by the Free Exercise Clause of the First Amendment) and the right to parent (under the Due Process Clause of the Fourteenth Amendment). This combination of constitutional claims, as the Court observed, was an especially tough bulwark against state regulation: —The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.[35] From Mrs. Prince's point of view, the state of Massachusetts had struck a blow at the parent's right of religious mentorship. It was abundantly clear to Mrs. Prince that the state did not have the authority to interfere with this most sacred of religious duties and most natural of rights. The family was —the backbone of all orderly governments, she argued; it was the source of a child's moral and social values.[36]

[34] *See* Prince v. Massachusetts, 321 U.S. 158, 169–71 (1944).

[35] *Id*. at 165.

[36] Brief for Appellant, *supra* note 23, at 16.

The family preceded and transcended the authority of the state. —The family and home are institutions in their own right[,] Mrs. Prince argued.[37] —They do not depend upon government for their creation. Long before organized government was established these institutions prevailed to secure the perpetuation of humanity.[38] The role of the democratic state, accordingly, is —to protect and conserve the parental authority over children . . . regardless of how misguided others may think that appellant [i.e., Mrs. Prince] is in the spiritual education of the child and the practice of preaching according to the dictates of her conscience.[39] Mrs. Prince could not follow the dictates of her conscience if she allowed Betty to stray from the true path. Really, then, for Mrs. Prince, there were not two liberties at stake; rather, the right of religious freedom and the right to parent were inseparably wound together. The state could not strike at one without damaging the other.

Mrs. Prince would lose this battle, but the struggle to secure religious parenting rights, though a prolonged one, would be largely successful, and that success would be due in no small part to the idea that religious parenting joins two indefeasible rights in indissoluble union. Today, religious parenting rights enjoy a special constitutional protection from state regulation. State action that burdens religious parenting is subject to heightened judicial scrutiny (the kind of scrutiny that Mrs. Prince argued for), subject, that is, to the —strict scrutiny that is strict in theory but most often fatal in fact. This is a degree of protection that neither the right of religious freedom nor the right to parent enjoys by itself.

Strict scrutiny is usually reserved for state action that impinges upon an individual‘s fundamental rights (or discriminates against a group on impermissible grounds).[40] Most laws receive a far more deferential review.[41] Under —rational basis review, courts presume the constitutionality of legislation.[42] The party trying to overcome this presumption must show (1) that the law serves no legitimate purpose, or (2) that the means employed by the law has no rational relation to the law‘s stated goal.[43] Under a strict scrutiny standard, the court will presume that a law is unconstitutional.[44] To overcome that presumption, the state must show (1) that the law serves a compelling purpose, and (2) that the means employed by the law are as narrowly tailored as possible to achieve the law‘s stated goal.[45] Because the hurdle of strict scrutiny is so difficult to clear, the level of review employed by the court can easily determine the outcome of a case.

Separately, neither the right of religious freedom nor the right to parent would trigger strict scrutiny. The Supreme Court has said, in *Employment Division, Department of Human Resources of*

[37] *Id*. at 17.

[38] *Id.*

[39] *Id*. at 18, 40.

[40] United States v. Virginia, 518 U.S. 515, 567 (1996).

[41] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 720 (3d ed. 2009).

[42] *Id*.

[43] *Id*. (citing Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 175, 177 (1980); and Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959)).

[44] *Id*. at 719.

[45] *Id*.; *see also, e.g*., Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

Oregon v. Smith, that state action restricting religious practice is constitutionally permissible unless it directly targets religious practice or discriminates against religious groups.[46] Nor do parents have a fundamental right to direct the upbringing of their children. The Supreme Court has used loose language about the fundamental right to parent, and this language has led to confusion among lower courts, but, as Justice Scalia has correctly observed, there is little support for the notion that the right to parent is a —substantive constitutional right, let alone a fundamental one.[47] Combined, however, these rights form a constitutional firewall that shields parents from state interference in the religious upbringing of their children. For the Supreme Court also has said, in *Wisconsin v. Yoder*, that when the interests of parenthood are combined with a free exercise claim, —more than merely a ‗reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.[48] In these hybrid cases, strict scrutiny is warranted despite the fact that state action does not target religion or impinge upon a fundamental right.[49]

The —hybrid rights doctrine survived *Smith*, though its scope was less than precisely defined.[50] The *Smith* Court did make clear that the doctrine was an exception to general constitutional principles.[51] But in the universe of religious parenting cases, the exception easily swallows the rule. Because such cases are hybrid by definition, strict scrutiny becomes the norm, and the result is the creation of a separate sphere of the law where the government's ability to enforce the law is subject to an individual's religious beliefs.[52] In this sense, the *Yoder* Court did more than rescue Amish parents from state educational requirements. It created a private right to ignore generally applicable

[46] 494 U.S. 872, 879 (1990) (—[F]ree exercise does not relieve an individual of the obligation to comply with a ‗valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

[47] Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (—Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated.) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923)); *see also, e.g.*, Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) (—The Supreme Court, however, has never expressly indicated whether this ‗parental right,' when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate.); Brown v. Hot, Sexy and Safer Prod., 68 F.3d 525, 533 (1st Cir. 1995) (—[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny.); Baker v. Owen, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (—We reject Mrs. Baker's suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest that outweighs her parental right. We do not read *Meyer* and *Pierce* to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state's interest uncompelling, but because the Court considered the state's action to be arbitrary, without reasonable relation to an end legitimately within its power. Nor has the Court subsequently spoken of parental rights as fundamental; on the contrary, its references to them lend support to the view that they are not.) (citations omitted), *judgment aff'd* 423 U.S. 907 (1975) (per curiam). Broad claims are made for *Meyer* and *Pierce*, *see, e.g.*, Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 143 (2000) (describing *Pierce* as a —ringing endorsement of religious freedom and of limited government dominion over citizens), but these seminal due process cases lend no support to the contention that the right to parent is fundamental.

[48] 406 U.S. 205, 233 (1972).

[49] *See Smith*, 494 U.S. at 881 (suggesting a history of strict scrutiny review for —Free Exercise Clause [claims] in conjunction with other constitutional protections and for free speech cases also involving freedom of religion, but determining that *Smith* —does not present such a hybrid situation)

[50] *See Smith*, 494 U.S. at 881–82.

[51] *See id*. at 888 (applying strict scrutiny —across the board would be —courting anarchy).

[52] *See id*. at 886 (compelling interest test would produce —a private right to ignore generally applicable laws).

law. Though the Court appeared to step back from the implications of the decision by limiting its holding to the unique facts of the case,[53] the spirit of strict scrutiny, once summoned, would not be easily cabined. *Yoder* became the precedential port from which a wealth of religious parenting cases would be launched, thus requiring courts to apply a rationale that contradicted constitutional tradition and common sense.[54]

Where a hybrid claim is involved, the power of the parent may be limited by the state only —if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.[55] This harm standard protects religious parenting rights at too great a cost: It sacrifices the best interests of the child in order to bolster parental authority. It is a cost that children should not be asked to bear. The Supreme Court famously said as much to Sarah Prince: While parents may be free to become martyrs themselves, —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.[56]

III. A GUARANTEE OF FREE CHOICE

In *West Virginia State Board of Education v. Barnette*, Justice Jackson wrote that public education is not free if its faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party, or faction.[57] Really, though, Jackson was not advocating ideological neutrality. His words are a call to —*individual freedom of mind* in preference to officially disciplined uniformity.[58] Education is to nourish the —free mind of the child. For the happily pre-postmodern Jackson, the freedom to think for oneself is not just another form of official discipline. It is the liberal and liberating ideology at the heart of our constitutional order.

The Supreme Court has consistently put its faith in intellectual independence. Freedom of mind is supported by specific constitutional guarantees, such as the freedoms of speech and religion; and, taken together, these liberties guarantee what constitutional law scholar Laurence Tribe has

[53] *See Yoder*, 406 U.S. at 229, 233 (—[T]he power of the state, as *parens patriae*, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a —free exercise claim *of the nature revealed by this record*.) (emphasis added); *id*. at 236 (observing that the Court's judgment would apply to —few other religious groups or sects).

[54] *See Smith*, 494 U.S at 885 (—To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense.).

[55] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

[56] Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

[57] 319 U.S. 624, 637 (1943); *cf*. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 23–24 (1947) (Jackson, J., dissenting) (The public school —is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.).

[58] *Barnette*, 319 U.S at 637 (emphasis added).

described as —a capacious realm of individual conscience . . . a sphere of intellect and spirit' constitutionally secure from the machinations and manipulations of government.[59] Or, as Justice Stewart more simply said, —The Constitution guarantees . . . a society of free choice.[60]

The *Prince* Court set these principles to work. While —the custody, care and nurture of the child reside first in the parents,[61] and while parents enjoy the right —to give [children] religious training and to encourage them in the practice of religious belief,[62] neither rights of religion nor rights of parenthood are beyond limitation.[63] To guard the general interest in youth's well-being, the Court maintained, the state may limit parental authority in things affecting the child's upbringing, including matters of conscience and religious conviction.[64] The state's wide range of power is directed to ensure the welfare of both the child and society. Indeed, properly understood, the child's interest and the general interest are one and the same. For its continuance, the Court explained, —[a] democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.[65]

But what does that imply? What is —healthy, well-rounded growth ? What does —full maturity mean? The Court's answer was decidedly non-authoritarian: —It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.[66] A democratic society rests on a model of maturation that takes as its norm the individual's full capacity to make free and independent choices. This capacity, as the Supreme Court has affirmed on many occasions, is both the presupposition and the product of our First Amendment freedoms.[67] The guarantee of a society of free choice —presupposes the capacity of its members to choose.[68]

It follows, then, that it is a primary duty of parents to nourish this capacity. It does *not* follow that parents need abandon the role of religious mentor and guide (not that it would be possible: non-mentoring would itself be a form of mentoring); it would hardly be practical, or helpful to children,

[59] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-5, at 1315 (2d ed. 1988) (—The Constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech. Courts have at times properly generalized from these protections . . . to derive a capacious realm of individual conscience, and to define a sphere of intellect and spirit constitutionally secure from the machinations and manipulations of government. (internal quotation marks and footnotes omitted)).

[60] Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result) (—The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a _free trade in ideas.' To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. (footnote omitted)).

[61] *Prince*, 321 U.S. at 166.

[62] *Id*. at 165.

[63] *Id*. at 166.

[64] *Id*. at 165–70.

[65] *Id*. at 168.

[66] *Id*. at 165.

[67] *See, e.g.*, Ginsberg v. New York, 390 U.S.629 (1968); *see also* CHEMERINSKY, *supra* note 40 (listing the advancement of personhood and autonomy as a major rationale for protecting freedom of speech).

[68] *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring in the result) (—[T]he Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.).

to adopt some ideologically neutral model of parenting.[69] In a democracy, political theorist William Galston writes, —parents are entitled to introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to share this orientation.[70] For many, the most vital source of meaning and value is their religious faith, and it should go without saying that parents may introduce their children to what they regard as spiritually true, and to hope that their children will come to share a similar religious orientation.

But this simple proposition raises surprisingly tough questions about the parent-child relationship. Parents may introduce their children to vital sources of meaning, but what limits, if any, can be placed on this introduction? Parents may hope that their children will come to share their values, but how far can parents go to make this hope a reality? If, as it seems, Galston writes with some caution, there is good reason for it, because, as he also observes, children have freestanding intellectual and moral claims of their own, claims that —imply enforceable rights of exit from the boundaries of community defined by their parents.[71] If not the mere creature of the state,[72] the child is more than a placid reflection of the parental image. In a liberal democracy, the care of children resides first in the parents, but not first and last.

If children have a right to leave behind the boundaries set by their parents, then they must be able to exercise that right freely. They must not be disempowered from making their own intellectual and moral claims in the first place.[73] What must be protected is the child's future right to make

[69] *Cf*. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 16 (1987) (—The image of an individual unimpeded by any preconditioning . . . is a fiction. People acquire their values because of innumerable influences upon their lives: the influence of parents; of the family church; of the schools they were required to attend; of their relatives, friends, and neighbors; of writers; and of many others. By thus being indoctrinated into society the individual obtains the frame of reference necessary for actively making decisions, rather than passively receiving impulses.). The same reasoning applies to the state as educator. *Cf*. Richard Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of* Wisconsin v. Yoder, *in* DEMOCRACY'S PLACE 137, 160 (Ian Shapiro ed., 1996) (—Even if it were somehow possible for an educational regime to abstain from inculcating values in the child, this would not be sensible; for the vacuum left by abstaining educators would be filled by other causal influences . . . . At any rate, the phenomenon of choice of values by an individual, which we associate with attainment of autonomy, always presupposes a context in which some standards and values are at least provisionally fixed and guide choice.).

[70] WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 105 (2002).

[71] *Id*. at 104 (—At a minimum, the children's freestanding religious claims imply enforceable rights of exit from the boundaries of community defined by their parents. I would add that the exit rights must be more than formal. Communities cannot rightly act in ways that disempower individuals— intellectually, emotionally, or practically—from living successfully outside their bounds.). On exit rights within intimate relationships, see also SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 136–38 (1989).

[72] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (—The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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.); *cf*. Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (—In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.).

[73] The idea that the child's capacity to form dissenting beliefs should be protected from ideological coercion by state actors finds broad support from First Amendment theorists. On the First Amendment and the protection of belief formation as well as expression, see, for example, Ingber, *supra* note 68, at 16 (—To allow officials to inculcate values is to admit that free speech protects expression only so long as the speaker has been conditioned to say what those in authority accept. In a society of such preconditioned speakers, freedom of speech is virtually irrelevant.); Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 370 (1986) (—A second reason why the minds of public

those claims; what must be secured is the child's present opportunity to develop the capacity to make those claims.[74] Ideally, it would be part of the parent's task to safeguard the child's right to moral autonomy; but where the transmission of religious belief is involved, it is acceptable for parents to enforce spiritual conformity from their children, demanding (often in a loving and compassionate voice) uncritical obedience toward religious authority. It is only natural for parents to want a child to embrace their values, to believe their beliefs, and the legal system, as it ought, leaves parents free to transmit their religious values; but parents abuse that freedom when they give children no real opportunity to embrace other values and to believe other beliefs.

Young children lack the capacity to assert, or to choose not to assert, a personal religious identity. Those who mentor a child, therefore, assume a fiduciary duty to protect his or her prospective religious autonomy.[75] This caretaking is no easy task. Parents may find it troublesome enough when a child does not live by their political or cultural values. But the questioning or outright rejection of parental religious values is likely to occasion a more profound disappointment. Religious principles are dictates that run deeper than politics and culture. Nonetheless, religious freedom for the parent ought not to come at the cost of spiritual servitude for the child, and courts ought not to treat

school students should be especially shielded from governmental influence is that, due to their youth, the students are relatively impressionable and susceptible. Consequently, to maintain the integrity of the process by which public school students form their own beliefs, it is especially important to insulate them from any potentially coercive governmental influence. Society has a significant stake in preserving the free minds of its youth, because it depends upon them to defend and maintain this country's democratic, civil libertarian institutions and traditions.) (footnotes omitted); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 261 (1983) (—[I]t would make a mockery of the protection of an adult's freedom of belief if the government could pre-condition his beliefs by indoctrinating him during childhood.); Arons & Lawrence III, *supra* note 29, at 312 (—Free expression makes unfettered formulation of beliefs and opinions possible. In turn, free formulation of beliefs and opinions is a necessary precursor to freedom of expression . . . . The more the government regulates formation of beliefs so as to interfere with personal consciousness, the fewer people can conceive dissenting ideas or perceive contradictions between self-interest and government-sustained ideological orthodoxy. If freedom of expression protected only communication of ideas, totalitarianism and freedom of expression could be characteristics of the same society.).

[74] *See* Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980). *But see, e.g.*, Shelley Burtt, *The Proper Scope of Parental Authority: Why We Don't Owe Children an "Open Future," in* CHILD, FAMILY, AND STATE 243 (Stephen Macedo & Iris Marion Young eds., 2003); Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 847–52 (1999).

[75] *Cf*. Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 976–77 (1987) (—The legal tradition of authorizing parents to speak for their offspring need not become a device by which children are made to disappear. Children, not fully competent to make decisions because of insufficient awareness of the decisions' long-term consequences, are normally subject to parental control. Parents are presumptively trustworthy decisionmakers for their children because parents generally feel affection for their young and are knowledgeable about their interests. Custodial power of this sort is never absolute, however, for it is based on a theory of fiduciary obligation. If the custodian mistreats his ward, public or private remedies designed to protect the child may be available.) (footnotes omitted). On the same principle, see JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 62–101 (1998) (arguing that the law should grant parents a legal privilege to care for children only in ways consistent with their best temporal interests); Arneson & Shapiro, *supra* note 68, at 138 (—[T]he relationship between parents and children is best thought of as one of trusteeship.); Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321 (1994) (urging reform of family rights discourse by making children's needs the basis of parental authority); Barbara Bennett Woodhouse, *Hatching the Egg: A Child- Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (considering how a parental rights orientation undermines the nurturing values necessary to children's welfare). *See generally* Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290 (2010); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). *But see* THOMAS H. MURRAY, THE WORTH OF A CHILD 61 (1996) (—[P]arenthood as stewardship still has its shortcomings as a model for parent-child relations. As a description of a relationship, it connotes disinterestedness, selflessness, a sort of benign but emotionally distant concern for the welfare of the child. This fits poorly with the intensity, love, and intimacy we prize between parents and children.).

parental rights as though they could be divorced from parental duties.[76] Like adults, children must be free to seek, as well as to find, a spiritual home.[77]

Compelled religious belief is an affront to the child's dignity and worth. When children are forced to believe, they are required, by the dictates of someone else's conscience, to forego the intellectual openness that —plays a vital role in the process of becoming an autonomous individual.[78] Such disrespect for the child can only beget habits of hypocrisy and meanness.[79] Yet we permit parents to impose a presumed religious identity upon a child without the child's consent or understanding. We permit religious parents to raise and educate their children in ideologically segregated enclaves. We permit parents to inculcate religious beliefs contrary to their children's declared preferences.[80] Under the mantle of rights—parental rights, rights of religious freedom, or the especially potent com-

[76] *Cf*. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1389 (1994) (noting that court decisions subsequent to *Yoder* —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). For a parentalist point of view, see, for example, Karen Gushta, *Should Big Brother Shape Your Child's Soul?*, STOP THE WAR ON CHILDREN (April 8, 2011, 7:32 AM), http://stopthewaronchildren.wordpress. com/2011/04/08/should-big-brother-shape-your-child%E2%80%99s-soul/(—[T]here are those who want to take away the right of custodial parents to determine what influences and ideas their children should be exposed to. This is the heart of education, which by definition is intended, directed learning. The issue at stake is not _who owns the soul of the child,' but who has the right to shape it.).

[77] *Cf*. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & Feminism 7, 10–11 (1989):
To become autonomous is to come to be able to find and live in accordance with one's own law.

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> I speak of —becoming autonomous because I think it is not a quality one can simply posit about human beings. We must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity. I use the word —find to suggest that we do not make or even exactly choose our own law. The idea of —finding one's law is true to the belief that even what is truly one's own law is shaped by the society in which one lives and the relationships that are a part of one's life. —Finding also permits an openness to the idea that one's own law is revealed by spiritual sources, that our capacity to find a law within us comes from our spiritual nature. From both perspectives, the law is one's own in the deepest sense, but not made by the individual; the individual develops it, but in connection with others; it is not chosen, but recognized. —One's own law connotes values, limits, order, even commands just as the more conventional use of the term does. But these values and demands come from within each person rather than being imposed from without. The idea that there are commands that one recognizes as one's own, requirements that constrain one's life, but come from the meaning or purpose of that life, captures the basic connection between law and freedom—which is perhaps the essence of the concept of autonomy. The necessary social dimension of the vision I am sketching comes from the insistence, first, that the capacity to find one's own law can develop only in the context of relations with others (both intimate and more broadly social) that nurture this capacity, and second, that the —content of one's own law is comprehensible only with reference to shared social norms, values, and concepts.

(footnotes omitted); WILLIAM J. SHEARER, THE MANAGEMENT AND TRAINING OF CHILDREN 269 (1904) (—We must not forget that the great object of training is not merely to make children obedient. It is not to make them behave. It is not to keep them quiet. It is not to make them admired by others . . . . The great purpose of training is to make out of each what the Almighty evidently intended him to be. What He intended is not always an easy matter to determine. The only way it can be determined is by carefully studying the peculiarities of each mind, heart and body with which every child is gifted.).

[78] John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 346–49 (1979). Garvey identifies four ways in which free speech performs an instrumental role in the child's growth toward autonomy: (1) —by permitting the individual to experience the satisfaction that results from self-expression ; (2) by —offering occasions for practice in skills of rational discourse ; (3) by —showing the young the potential of speech to accomplish good or bad results ; and (4) by —allowing receipt of information important for the child's development. *Id*.

[79] *See* Jefferson, *supra* note 30, at xvii; *cf*. Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 61–95 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (arguing that the protection of expressive liberty nurtures character traits instrumental to the pursuit of social objectives).

[80] *See, e.g*., Zummo v. Zummo, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) (—Moreover, even if the children had expressed a personal religious identity it is not clear that the children would have had any constitutional right to resist, or to be protected from, attempts by either parent to exercise their constitutional rights to inculcate religious beliefs in them contrary to their declared preferences prior to their legal emancipation.).

bination of the two—we so circumscribe the child's spiritual autonomy that, for many children, the freedom to choose or not to choose religious belief comes to exist more in principle than in fact.[81]

In his —parentalist manifesto, Stephen Gilles allows that the state has a duty to protect children from all forms of educational coercion.

> The same goal—ensuring the liberty of individuals—requires the state to protect its citizens . . . . [N]o one in a liberal society may coerce another's choice of values or beliefs unless somehow privileged to do so. The baseline for defining coercive behavior (or sufficient justifications) may shift as one moves from state action to private conduct, but the core principle still holds: in a liberal society, *all* authority is limited, and *all* coercion requires reasoned justification.[82]

It might be argued that parental religious mentoring is less likely to be injurious than state compulsion, but why should the baseline for defining coercive behavior shift as one moves from state action to private conduct? With equal force, it might be argued that coercion is likely to be more effective, and the injury it inflicts deeper, when the child is compelled to believe by those closest to him. Children are no less captive to private educators—all the more so when cut off from ideas contrary to those of home or community; and religious mentorship presents a specially effective form of force, bringing with it, as it does, the imprimatur of divine authority and the specter of divine disapproval.

The state that protects the freedom of adults to choose a religious (or non-religious) path must also ensure that the freedom of children to choose a religious (or non-religious) path will not be taken from them. The dictates of conscience are as compelling to the child (and future adult) as they are for the parent. Indeed, the commitment to individual choice may be the best guarantee of a society with rich and robust religious traditions. Children are natural religious seekers. As young adults, some will choose new spiritual paths, and some will choose to abandon religious ways altogether; but many will find their faith in traditional places, arriving where they started. For religious freedom to flourish, however, these choices must be genuine ones, based on knowledge and experience gathered, as it were, —out of a multitude of tongues, religious and secular.[83] In a liberal democracy, the binding power of moral commandments depends on individual acceptance.[84] This

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[81] *Cf*. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (—Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact.).

[82] Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 946 (1996).

[83] Keyishian v. Bd. of Regents, 385 U.S. 589, 683 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y 1943)); *see also Associated Press*, 52 F. Supp. at 372 (—[N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.). *But see* Stanley Fish, *Children and the First Amendment*, 29 CONN. L. REV. 883, 884 (1997) (—[W]ithout _authoritative selection,' education, whether public or private, would be impossible.).

[84] *See* GALSTON, *supra* note 69, at 28 (maintaining that it is a matter of great importance for Jews —to live in a society that permits them to live in accordance with their understanding of an identity that is given rather than chosen, and that typically is structured by commandments whose binding power does not depend on individual acceptance); *cf*. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA

constitutional commitment to free choice means at least this: that the state has a compelling interest in providing all children the opportunity to make the most meaningful choices about the most meaningful matters.

IV. THE MORAL PERSONHOOD OF THE CHILD

For the *Yoder* majority, mandatory secondary schooling was objectionable because it would take Amish adolescents —away from their community, physically and emotionally, during the crucial and formative adolescent period of life.[85] In what sense, then, did the Court consider this period crucial and formative? It is during this period, the Court says, that the children —*must* acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife.[86] During this period, children —*must* learn to enjoy physical labor.[87] During this period, —the Amish child *must* also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism.[88] For the Amish child, the adolescent period is crucial and formative not in the sense that the child is forming his or her identity; rather, the child labors under a number of —musts, all of which are crucial if the child is to conform successfully to communal religious traditions. The *Yoder* decision turns upside-down the nature of adolescence, ignoring what is really important about this stage of development—the increasing independence from adult guidance;[89] the defining of a self by reference to new ideas and by association with unlike peers;[90] the preparation for intelligent

IN SEARCH OF A PUBLIC PHILOSOPHY 66–67 (1996) (—For procedural liberalism . . . the case for religious liberty derives not from the moral importance of religion but from the need to protect individual autonomy; government should be neutral toward religion for the same reason it should be neutral toward competing conceptions of the good life generally—to respect people's capacity to choose their own values and ends. But despite its liberating promise, or perhaps because of it, this broader mission depreciates the claims of those for whom religion is not an expression of autonomy but a matter of conviction unrelated to a choice. Protecting religion as a life-style, as one among the values that an independent self may have, may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity.). *But cf., e.g.*, Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (—[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .).

[85] *Yoder*, 406 U.S. at 211.

[86] *Id*. (emphasis added).

[87] *Id*. (emphasis added).

[88] *Id*. (emphasis added).

[89] *Cf*. Arneson & Shapiro, *supra* note 68, at 172 (—[T]he Amish defendants themselves seemed to have a lively appreciation of the fact that early adolescence is a crucial period for defining one's identity and one's relation to the values taught as authoritative in one's childhood. If the development of children's minds from ages fourteen to sixteen is not consequential, what is the fuss about?).

[90] *See, e.g.*, Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1270–73 (2000) (describing the importance of peer interaction in adolescent identity formation).

participation in the democratic process;[91] even the adolescent's own quest for spiritual meaning[92] —and consigns the young adult to a life of —idiosyncratic separateness.[93] (It was no mean feat of legal analysis for the Court to find that the —limitations accompanying the Amish way of life are —self-imposed.[94])

In general, the Supreme Court sees the liberty interests of the parent and child as —inextricably linked.[95] The child is not, however, without independent constitutional standing to challenge deprivations of educational opportunity.[96] Though the Supreme Court has seen the need to act —with sensitivity and flexibility to the special needs of parents and children,[97] it is undisputed that —whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.[98] And with respect to many due process claims, the Court has concluded —that the child's right is virtually coextensive with that of an adult.[99] Even against parents, the child is not beyond the protection of the Constitution.[100] Indeed, the due process protections from which the right to parent arises also work on behalf of the child's independent educational interests. Thus, the Court has read *Meyer v. Nebraska* and *Pierce v. Society of Sisters* as protecting children against state efforts to enforce intellectual homogeneity.[101] It is the child's due process rights that, in part, explain why —state-operated schools may not be enclaves of totalitarianism.[102]

Students in school as well as out of school are —persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[103]

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[91] The idea that the classroom is the seedbed of democratic virtues is one of our most enduring national themes. *See generally, e.g.*, EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997); LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607–1783 415–71 (1970); AMY GUTMANN, DEMOCRATIC EDUCATION (1987); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000).

[92] On children's religious development, see generally ROBERT COLES, THE SPIRITUAL LIFE OF CHILDREN (1990); JAMES W. FOWLER, STAGES OF FAITH: THE PSYCHOLOGY OF HUMAN DEVELOPMENT AND THE QUEST FOR MEANING (1981); CHRISTIAN SMITH & MELINDA LUNDQUIST DENTON, SOUL SEARCHING: THE RELIGIOUS AND SPIRITUAL LIVES OF AMERICAN TEENAGERS (2005); THE HANDBOOK OF SPIRITUAL DEVELOPMENT IN CHILDHOOD AND ADOLESCENCE (Eugene C. Roehlkepartain et al. eds., 2006); Note, *Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2220–25 (2002).

[93] *Yoder*, 406 U.S. at 226.

[94] *Id*. at 225.

[95] Parham v. J.R., 442 U.S. 584, 600 (1979).

[96] *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977); Goss v. Lopez, 419 U.S. 565 (1975); Breed v. Jones, 421 U.S. 519 (1975).

[97] Bellotti v. Baird, 443 U.S. 622, 634 (1979); *cf*. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (—Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.).

[98] *In re* Gault, 387 U.S. 1, 13 (1967).

[99] *Bellotti*, 443 U.S. at 634.

[100] *See In re* Gault, 387 U.S. at 13. State constitutions may provide even greater protection. *See* Paul L. Tractenberg, *Education Provisions in State Constitutions: A Summary of a Chapter for the State Constitutions for the Twenty-First Century Project*, Rutgers Shool of Law—Camden, http://camlaw. rutgers.edu/statecon/subpapers/tractenberg.pdf. (last visited February 3, 2012).

[101] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506–07 (1969).

[102] *Id*. at 511.

[103] *Id*. at 511.

The law of parent-child relations accepts as a starting point the longstanding legal presumptions (1) that —parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions, and (2) that —natural bonds of affection lead parents to act in the best interests of their children.[104] The Court has had numerous opportunities to test the currency of these legal presumptions. In *Parham v. J.R*, the Court considered the constitutionality of mental health laws permitting parents to admit children to hospitals for treatment.[105] On behalf of the children, it was argued that

> the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.[106]

But the Court thought that this argument swept too broadly.

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments . . . . We cannot assume that the result in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.[107]

The Court rejected the —statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children . . . .[108] Absent evidence that rebuts the traditional presumptions in favor of parental control, parents retain —a substantial, if not the dominant, role in the [commitment] decision.[109] Still, the Court did not walk away from the interests of children, adding that —the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.[110]

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[104] Parham v. J.R., 442 U.S. 584, 609 (1979).

[105] *Id*. at 584.

[106] *Id*. at 602.

[107] *Id*. at 603–04 (citations omitted).

[108] *Id*. at 603.

[109] *Id*. at 604.

[110] *Id*.

The Court walked a careful line between the interests of child and parent, and it noted that —experience and reality may rebut what the law accepts as a starting point . . . .[111]

Sometimes, experience and reality *do* rebut legal presumptions. The liberty interests of children and parents are not always compatible; there will be points of collision where the protection of children's needs and rights has to come at the cost of parental authority. This is often the case, for instance, in the area of medical decision-making. The law generally pays homage to the medical choices that parents make for their children, but in some circumstances minors can get care without their parents' consent, and, in fact, without their parents' knowledge.[112] In many states, unemancipated minors are allowed by law to consent to treatment for substance abuse, for venereal disease (including testing for HIV and sexually transmitted diseases), and counseling for mental health problems, sexual abuse, and family planning.[113] Minors can get birth control, including prescription contraceptives, without parental consent or notification; a pregnant minor may consent to prenatal care as well as labor and delivery services.[114] Information about these medical services remains confidential.[115] And where statutory protection is lacking, the mature minor doctrine may operate to shield the child's medical decision-making rights from the religious beliefs of his or her parents.[116]

It is true that there are practical concerns at work here. The worry is that parents will object to these services, thus discouraging adolescents from seeking treatment important to their health and to the welfare of society as a whole. So, to protect these interests, legislators have provided minors with what amounts to a parental bypass option.[117] But to cast these decisions as medical, not ethical—itself a value-laden judgment— too easily dismisses the moral and religious concerns of parents. The truth is that the state has wrested control from parents over some of a young person's most intimate and morally problematic personal decisions.

In fact, the Supreme Court has applied a mature minor doctrine to the most value-laden of medical decisions. The legal struggle to guarantee a woman's right to terminate a pregnancy has put the Court squarely in the business of defining the allocation of moral authority between parent and child. In *Planned Parenthood of Central Missouri v. Danforth*, the Court held (among other things) that the state could not justify legislation that required a minor to obtain the consent of a parent as a condition for abortion during the first trimester.[118]

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[111] *Id*. at 602.

[112] Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 416–22 (2002).

[113] *Id*.

[114] *Id*. at 418–19.

[115] *Id*.; *see also* Parents United for Better Schools, Inc. v. Sch. Dist. of Phila. Bd. of Educ., 148 F.3d 260, 269–70 (3d Cir. 1998) (interpreting federal law to extend confidentiality to minors' consent for reproductive services).

[116] On the evolution of the mature minor doctrine, see, for example, Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 144–52 (2000).

[117] *Id*.; *see also* Hartman, *supra* note 111, at 416–22.

[118] 428 U.S. 52 (1976).

The Court made the customary nod toward *Meyer*, *Pierce*, and *Yoder*, but finally rejected chronological age as a constitutional yardstick by which to measure whether a minor can independently make the abortion decision: —Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.[119]

On this doctrinal platform, the Court held that —the safeguarding of the family and of parental authority was not a state interest sufficiently significant to justify conditioning the minor's access to abortion on parental consent.[120] In *Bellotti v. Baird*, the Court struck down a law that required a minor seeking an abortion to either (1) obtain the consent of her parents, or (2) notify them of any proceedings by which the minor sought to obtain judicial consent for an abortion.[121] The *Bellotti* Court did its best not to challenge the core presumptions governing the relations of parent and child. Typically, the Court made the point that there were several good reasons why the state may reasonably limit a minor's freedom to make independently —important, affirmative choices with potentially serious consequences.[122] In the context of abortion, however, none of these reasons was reason enough to require parental notification. The Court based its decision on the unique nature of the abortion decision.[123] Unlike countless other decisions (like the decision to marry, for example), the abortion decision cannot be postponed; unlike few other situations, the consequences of denying a minor the right to make this decision would be —grave and indelible.[124] Given what the Court described as the —profound moral and religious concerns associated with the abortion decision,[125] it would be unrealistic to think that some parents would not make (all too emphatically) clear their objection to the minor's decision.

> [M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.[126]

In this context, the Court seems to have accepted the —statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children . . . .[127] The presumption that parents act in the best interests of their children has been reversed. Or, perhaps, the presumption is meaningless when there is no way to agree about where the child's

[119] *Id*. at 74.

[120] *Id*. at 75; *cf*. Carey v. Population Servs. Int'l, 431 U.S. 678, 719 (1977) (declaring that a state may not use police power to enforce its concept of public morality as it pertains to minors).

[121] 443 U.S. 622, 625 (1979).

[122] *Id*. at 635.

[123] *Id*. at 442–44.

[124] *Id*. at 642.

[125] *Id*. at 640.

[126] *Id*. at 647.

[127] Parham v. J.R., 442 U.S. 584, 603 (1979).

best interests lie. The unique nature of the abortion decision cuts both ways. The child may focus on the fact that the decision cannot be postponed; the parent may focus on the fact that the decision cannot be undone. That the consequences of the decision are grave and indelible would strike many as more reason for parents to be involved. Regardless of one's position on abortion, it is difficult not to conclude that the Supreme Court's abortion jurisprudence has changed the landscape of parent-child relations. If minors can make a decision as profound as whether to terminate a pregnancy, why should courts presume that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's other difficult decisions?

In its position on the reproductive rights of minors, the Court is clearly attentive to the limits of parental authority, but there is also at work a deeper concern about the personhood of the prospective mother. The abortion cases rest in part on the fundamental —moral fact that a person belongs to himself and not to others nor to society as a whole.[128] Of course, other —facts of human nature work against atomistic theories of personhood and social relations, but surely Kenneth L. Karst is correct enough when he asserts that —freedom of associational choice enhances the values of intimate association to a degree that would not be attainable if choice were absent.[129] As children mature, they enter into a host of intimate associations, the value of which very much depends on the child's freedom of choice. We might even say that the child will have to choose whether or not to identify with his or her parents and —to be committed to maintaining a caring intimacy with them.[130] But the decision to choose one's parents, so to speak, is meaningful only if it is a free one, only, that is, if the maturing child enjoys the freedom to choose not to make that association (or, at least, not to make it an intimate one). As Karst writes, the full value of commitment can be measured —only when there is freedom to remain uncommitted . .

. . [C]oerced intimate associations are the most repugnant of all forms of compulsory association.[131] This is not just the case with intimate associations, however; it is (again, Karst) —equally applicable to associations that are primarily ideological.[132] It hardly needs to be added that coerced religious association is repugnant in ways both intimate and ideological.

Frieda Yoder was fifteen years old when she testified that religious beliefs guided her decision to discontinue school attendance.[133] Lillian Gobitis was not yet a teenager when the court heard her

[128] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288–89 (1977).

[129] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE. L.J. 624, 637 (1980).

[130] *Id*. at 644.

[131] *Id*. at 637–38.

[132] *Id*. at 638; *see also* Alan B. Kalin, Comment, *The Right of Ideological Nonassociation*, 66 CALIF. L. REV. 767 (1978). And, we might add, freedom of choice is equally applicable to associations that are primarily vocational. *See* Wisconsin v. Yoder, 406 U.S. 205, 239–40 (1972) (White, J., concurring) (—It is possible that most Amish children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary.); *see also id*. at 244–45 (Douglas, J., dissenting) (—While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer.).

[133] Wisconsin v. Yoder, 406 U.S. 205, 207 n.1 (1972).

objection to compulsory patriotic rituals.[134] And Betty Simmons was only nine years old when she testified that street preaching was a religious duty.[135] The courts should be no less reluctant to hear from children when they choose not to follow the religious preferences of their parents, when there are, as Justice Douglas put it, —potentially conflicting desires.[136]

When parent and child agree, it will not always be easy to determine if the child is speaking freely. When parent and child disagree, it will not always be easy to determine whether the child is sufficiently mature to make decisions about religious identity. But these are matters with which courts are familiar enough. The reality is that children can be coerced by not being heard as surely as they can by being forced to utter what is not in their minds. If the child belongs to herself, she may not be made a means by which parents perpetuate their own moral mandates or preferences; she may not be held hostage to religious tradition.[137] Before the full moral personhood of the child, the right to parent, even when joined to a claim of religious liberty, must give way.

William Galston, among others, describes parenting as a form of expressive liberty.[138] By expressive liberty, he means —the absence of constraints imposed by some individuals or groups on oth-

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[134] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591(1940).

[135] Prince v. Massachusetts, 321 U.S. 158, 159 (1944).

[136] *Id*. (Douglas, J., dissenting) (—Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.).

[137] For instance:

> The slave-master *may* withhold education and the Bible; he *may* forbid religious instruction, and access to public worship. He *may* enforce upon the slave and his family a religious worship and a religious teaching which he disapproves. In all this, as completely as in secular matters, he is —entirely subject to the will of the master, to whom he belongs. The claim of chattelhood extends to the soul as well as to the body, for the body cannot be otherwise held and controlled . . . . There is no other religious despotism on the face of the earth so absolute, so irresponsible, so soul- crushing as this.

WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 235 (1853) (emphasis added). Compre the above regulation with, for example, Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1200–05 (1997) (—A religion, then, is not a static thing, existing at a particular place and time. It is, or rather, it aspires to be at once elusive and evolutionary, existing in more than one time. A religion, in this view, is a story that a people (not a person) tells itself about its historical relationship to God. One reason our contemporary constitutional law tends to miss this point is that it tends to view religion as a matter of individual choice rather than as a community activity; but serious religions revolve around the group, not the individual . . . . A religion survives through tradition, and tradition is multigenerational. A religion that fails to extend itself over time is, in this vision, not a religion at all. It might be a set of moral beliefs or a collection of folk tales or a nifty theological idea or a list of interesting rules, but, if it does not exist in this timeless, evolutionary fashion, the one thing it is not is a religion.); George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students,* 43 CASE W. RES. L. REV. 707, 738 (1993) (—The communitarian tradition is especially relevant to the religion clauses because the survival of religious communities is necessary to make the religious freedom of individuals _both possible and meaningful.' The education of children is crucial to this survival. People are mortal, but humanity (we hope) is not. To survive, religious groups depend on raising their members' children within the faith. Although government may not act affirmatively to preserve any particular religious group or religion generally, religious freedom permits, and to some extent requires, government to forbear from unnecessarily weakening religious communities. When public schools undermine a sect without a compelling need to do so, the state should offer reasonable accommodation to children of the sect.).

[138] GALSTON, *supra* note 69, at 101–02, 109 (—[T]he ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of expressive liberty.); *see also* DAVID WILLIAM ARCHARD, CHILDREN, FAMILY AND THE STATE 96 (2003) (—Being a parent is extremely important to a person. Even if a child is not to be thought of as the property or even as an extension of the parent, the shared life of a parent and child involves an adult's purposes and aims at the deepest level . . . . [P]arents have an interest in *parenting*—that is, in sharing a life with, and directing the development of, their child. It is not enough to discount the interests of a parent in a moral theory of parenthood. What must also merit full and proper consideration is the interest of someone in being a parent.); Colin M. Macleod, *Conceptions of Parental Autonomy*, 25 POLITICS AND SOCIETY 117, 119 (1997) (—[T]hose who accept the responsibility of raising children frequently do so because the project of creating and raising a family is an important, indeed often fundamental, element of their own life plans. Viewed from this perspective, parents cannot be seen as mere guardians of their children's interests. They are also people for whom creating a family is a project from which they may derive substantial value. They have an interest

ers that make it impossible or significantly more difficult for the affected individuals or groups to live their lives in ways that express their deepest beliefs about what gives meaning and value to life.[139] Galston adds that —[n]ot all sets of practices will themselves rest on, or reflect a preference for, liberty as ordinarily understood . . . . Expressive liberty protects the ability of individuals and groups to live in ways that others would regard as unfree.[140] For Galston, then, the expressive interests of parents —are not reducible to their fiduciary duty to promote their children's interests.[141] But does the expressive liberty of parents include the right to force children to live in unfree ways?[142] Here, Galston agrees with Eamonn Callan's critique of parenting that leads children to a life of ethical servility. —As a parent, Galston writes (quoting Callan), —I cannot rightly mold my child's character in a way that effectively preempts _serious thought at any future date about the alternatives to my judgment.'[143] The child, too, has an interest in expressive liberty, though a prospective one, —that parents cannot undermine.[144]

No doubt, the expressive interests of parents can be pushed too far. The question is: How far is too far? No doubt, children, dependent as they are, rely on parental direction to establish a sense of self and place in the world. But a healthy respect for the proper boundaries of parental authority does not mean that children ought to be used as the vehicle of adult religious expression.[145] We would all agree (wouldn't we?) that the expressive interests of parents would not legitimate the ritual sacrifice of children.[146] Galston appears to require parents to hurdle a much higher bar when

in the family as a vehicle through which some of their own distinctive commitments and convictions can be realized and perpetuated.); Arneson & Shapiro, *supra* note 68, at 151 (—As the discharge of parental obligations allows wide scope for parental discretion, choosing and pursuing a child-rearing regimen is for many parents an important mode of self-expression and personal creativity.).

[139] GALSTON, *supra* note 69, at 101.

[140] *Id*. at 29.

[141] *Id*. at 103; *cf*. CALLAN, *supra* note 90, at 144–45 (—We do not experience the rearing of a child merely as unilateral service on behalf of a separate human life; we experience it as the sharing of a life and a cardinal source of self- fulfillment. The child-centered strategy, when it purports to be the whole moral truth about parenthood, flies in the face of our ordinary understanding of what rearing a child signifies because it does not accommodate the task's momentous expressive significance in parents' lives. By the _expressive significance' of child-rearing I mean the way in which raising a child engages our deepest values and yearnings so that we are tempted to think of the child's life as a virtual extension of our own . . . . No one would now deny that if a moral theory interprets the child's role so as to make individual children no more than instruments of their parents' good it would be open to damning moral objections. But parallel objections must be decisive against any theory that interprets the parent's role in ways that make individual parents no more than instruments of their children's good. (citations omitted)).

[142] *See* WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 253 (1991) (objecting to conclusion that —the state must (or may) structure public education to foster skeptical reflection on ways of life inherited from parents or local communities). *But see* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 484 (2006) (—A developmental approach [to caregiving] does rule out the possibility that a commitment to democratic citizenship is compatible with depriving children of the means by which to choose whether to accept or reject family beliefs or practices. The unexamined life—a life premised on faith rather than reason—is a perfectly acceptable choice for adult citizens, but foreclosing children from eventually making that choice for themselves is not compatible with democratic principles or the maintenance of a democratic constitutional polity. A developmental perspective sets some outer limits on the extent to which communities of faith may sustain themselves by depriving children of the opportunity for acquiring the skills of democratic citizenship. (footnote omitted)).

[143] GALSTON, *supra* note 69, at 105 (quoting CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY152–54 (1997)).

[144] *Id*.

[145] *Cf*. Martha L. A. Fineman, *Taking Children's Rights Seriously*, *in* CHILD, FAMILY, AND STATE 240 (Stephen Macedo & Iris Marion Young eds., 2003) (—The big question is not whether the state must recognize parents' expressive interest in their children's interest, but where we draw the line separating that expressive interest from the *child's* interest in the diversity and independence-conferring potential of a secular and public education.); Arneson & Shapiro, *supra* note 68, at 154 (stating that parents —cannot pretend to speak for the child while really regarding the child as an empty vessel for the parents' own religious convictions).

[146] *See* GALSTON, *supra* note 69, at 102 (—No one would seriously argue that the expressive liberty of parents would legitimate the ritual

he proposes that —parents abuse their expressive liberty if . . . they deprive their children of the opportunity to exercise their own expressive liberty.[147] But it turns out that the bar is not very high: Galston means that parents abuse their expressive liberty —if they turn their children into automatons.[148] It would be abusive to seal off the outside world —so that children are not even aware of alternatives to the group's way of life.[149] Thus, for Galston, *Yoder* is a correct decision. It protects the expressive liberty of Amish parents without depriving Amish children of the opportunity to exercise their own expressive liberty. After all, he observes, —the Amish community is not a prison.[150]

Of course, Galston knows that parents can undermine the expressive liberty of children without turning them into automatons. The narcissistic parent can create a regime of filial obedience so rigid that children cannot fairly consider the alternatives of which they are aware. Galston writes that —[t]he nonexercise of a justified claim becomes questionable only when the potential claimant is subject to intimidation or is deprived of the information and self-confidence required for independent judgment.[151] But is not rejection by home and community always a form of intimidation? Is not schooling beyond the eighth grade a prerequisite for the information and self-confidence required for independent judgment? Galston notes that —[s]ubstantial numbers of Amish children decide to leave their religious community.[152] But he fails to note that those who do decide to leave face the prospect of being shunned—that is, they exercise a justified claim of religious liberty (their free-standing exit right) only at the cost of forsaking the only life they know, at the cost of being abandoned by home and community. We ought to remind ourselves that the ritual sacrifice of children can take a variety of forms.

sacrifice of their children . . . .).

[147] *See id*. at 105.

[148] *Id*.

[149] *Id*.

[150] *Id*. at 106. *But see* Arneson & Shapiro, *supra* note 68, at 140–41 (—Although the Amish believe that the vow of baptism must be taken voluntarily by a mature person, they go to great lengths in designing their system of education and acculturation to ensure that Amish children will take the vow and join the church.).

[151] GALSTON, *supra* note 69, at 105.

[152] *Id*. at 106. According to Donald Kraybill's study of Amish culture, the Amish —retention rate is about eighty-six percent. *See* Donald B. Kraybill, *Plotting Social Change Across Four Affiliations*, *in* THE AMISH STRUGGLE WITH MODERNITY 73 (Donald B. Kraybill & Marc A Olshan eds., 1994); *cf*. Macleod, *supra* note 137, at 136 (—[A]lthough entrance into the Amish culture by an adolescent is officially a matter of voluntary choice, it is difficult to see such a choice as the expression of genuine autonomy. After all, the ordinary Amish adolescent can hardly be said to have an informed opinion about other possible life choices and for most of her life has, in effect, been subjected to the will of her parents and community.). Oddly, *Yoder* was based on the premise that secondary schooling was not needed because the children were being prepared —for life in the separated agrarian community that is the keystone of the Amish faith. Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).

V. EDUCATION FOR AN OPEN RELIGIOUS FUTURE

Few disputes generate the degree of heat or the depth of hostility that accompany religious controversy. When that controversy touches the lives of our children, it is often a struggle to find room for compromise; it takes nothing less than a leap of faith to see compromise as anything less than a violation of one's conscience. The religious destiny of our children matters so deeply, so personally—it matters so much—that we fight with . . . well, with religious fervor. In our homes, schools, and communities, and, of course, in our courts, we fight to control our children's religious upbringing as though we are (and many truly believe they are) fighting for the soul of the child. Sadly, if predictably, it is children who suffer the fallout of uncompromising religious conviction.

Children are poorly served by a legal regime that too readily In this regard, courts should look skeptically at any educational program, whether imposed by the parent or by the state, that restricts the spectrum of knowledge available to the child.[153] To see that free choice is not strangled at its source,[154] the state may not sponsor particular religious beliefs, but that is not enough; it must protect its children from being forced to adopt religious beliefs; and this obligation, as educational theorist Harry Brighouse has pointed out, —cuts against the differential regulation of public and private schools with respect to religious instruction.[155] The state must protect all its children, not just those in the public school system.[156]

It is the state's duty to ensure that all schools, public and private, inculcate habits of critical reasoning and reflection, a way of thinking that implies a tolerance of and respect for other points of views.[157] To pursue this goal, the state need not make public schooling compulsory.[158] (Unless

[153] *Cf*. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (—[W]e have held that in a variety of contexts the Constitution protects the right to receive information and ideas . . . . [T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. (internal quotation marks omitted)); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (—[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.). On children's intellectual rights, see generally David Moshman, *Children's Intellectual Rights: A First Amendment Analysis*, *in* CHILDREN'S INTELLECTUAL RIGHTS 25 (David Moshman ed., 1986); Harvey Siegel, *Critical Thinking as an Intellectual Right*, *in* CHILDREN'S INTELLECTUAL RIGHTS 39 (David Moshman ed., 1986).

[154] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[155] Harry Brighouse, *School Vouchers, Separation of Church and State, and Personal Autonomy*, *in* MORAL AND POLITICAL EDUCATION 247 (Stephen Macedo & Yael Tamir eds., 2002).

[156] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); *cf*. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245–46 (1968) (—Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.); Everson v. Bd. of Educ. of Ewing. Twp., 330 U.S. 1, 18 (1947) (—This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.).

[157] *See, e.g*., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (—These fundamental values of _habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views . . . .); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (—These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.).

[158] *But see* Fineman, *supra* note 144, at 241 (—Perhaps the most appropriate suggestion for our current educational dilemma is that public education should be mandatory and universal.).

Pierce is overruled, it could not.) But it must see that all children are provided an education that is, in the fullest sense, public—a schooling that gives children the tools they will need to think for themselves by making public, as it were, a common intellectual and cultural capital; a schooling that takes seriously the idea that both autonomy and tolerance require children to know other sources of meaning and value than those they bring from home. This effort may well divide child from parent. Indeed, we should be entirely forthright and unapologetic about this: The inculcation of such habits is more likely than not to divide child from parent, not because socialist educators want to —submerge our children,[159] but because learning to think for oneself is what children do; it is one facet of the overall movement toward separation and individuation that is —growing up, perhaps the most natural and vital part of healthy maturation. Likewise, we should be entirely candid about the fact that the inculcation of such intellectual habits will be more compatible with the beliefs of some religious groups than others.[160]

The state as educator, then, is no ideologically neutral actor.[161] The philosophical foundations supporting a truly public education are the liberal biases of our nation's intellectual forbearers, biases in favor of a non-authoritarian approach to truth, of free argument and debate—what Thomas Jefferson called truth's —natural weapons —and of a healthy sense of human fallibility.[162] Unless children are to live under —a perpetual childhood of prescription, they must be exposed to the dust and heat of the race—intellectually, morally, spiritually.[163]

Whether one considers the formation of moral commitments a matter of choice or duty, of self-directedness or cultural embeddedness, the child must not be denied the type of education that will allow him, as an adult, to choose whether or not (and in what way, and to what degree) to honor those commitments. A public education is the engine by which children find a place (or places) on

[159] Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (—In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.).

[160] *Cf*. Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1593 (2001) (—The patterns of social life that support liberal democratic forms of civil flourishing embody definite rankings of competing human goods, which will be associated with some versions of religious truth and not others. In this sense, the project of promoting a healthy liberal democratic civil society is inevitably a deeply judgmental and non-neutral project.).

[161] *See, e.g*., Stanley Ingber, Comment, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 778–79 (1993) (—A value-free curriculum is clearly impossible . . . . [S]chools simply cannot attain value-neutral or balanced education. With only limited resources and time, they cannot possibly provide curricula that encompass the world's enormous mass of information and perspectives. Furthermore, subtle characteristics such as style and emphasis may undermine any substantive success in achieving balanced presentations. Even if these practical difficulties could be overcome, an insurmountable conceptual problem remains: Value neutrality itself has a value bias favoring the liberal philosophy embodied by the scientific method of inquiry. (footnote omitted)); *cf*. Arons & Lawrence III, *supra* note 29, at 309 (—Schooling is . . . a manipulator of consciousness, an inculcator of values in young minds.).

[162] Jefferson, *supra* note 30, at xvii.

[163] JOHN MILTON, AREOPAGITICA, *in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 727–28 (Merritt Y. Hughes ed., 1957) (1644) (—For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser; there were but little work left for preaching, if law and compulsion should grow so fast upon those things which heretofore were governed only by exhortation . . . . I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal garland is to be run for, not without dust and heat.).

—the great sphere that is their world and legacy.[164] It is their means of escape from, or free commitment to, the social group in which they were born. It is their best guarantee of an open future.

In *Meyer* and *Pierce* the Court feared that the state as educator would —standardize its children.[165] But children sent to religiously or ethnically homogeneous private schools, or those kept cloistered at home, might more easily suffer a similar fate. We are well cautioned by family law historian Barbara Bennett Woodhouse that —[s]tamped on the reverse side of the coinage of family privacy and parental rights are the child's voicelessness, objectification, and isolation from the community.[166] The open world of public schooling *should* challenge the transmission of any closed set of values, whether those values belong to parent or state. If education is to foster, in Eamonn Callan's words, —[t]he cultivation of serious and independent ethical criticism, and the enlargement of the imagination that process entails,[167] it must not only question parental authority but provide as well a brake on efforts at state indoctrination.[168] Ideally, the state, like the ideal parent, would want to cultivate the child's capacity to make free choices. But, like real parents, the state can behave less than liberally toward its young people. The liberal state wants to pass on its traditions of freedom and equality, but the surest way *not* to do so would be to pass on those traditions as moral absolutes to be accepted uncritically.[169] To guard against indoctrination at home or at school

[164] *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 159 (1980) (—The entire educational system will, if you like, resemble a great sphere. Children land upon the sphere at different points, depending on their primary culture; the task is to help them explore the globe in a way that permits them to glimpse the deeper meanings of the life dramas passing on around them. At the end of the journey, however, the now mature citizen has every right to locate himself at the very point from which he began—just as he may also strike out to discover an unoccupied portion of the sphere.).

[165] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (—The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.). On the threat of state indoctrination in the public schools, see, for example, Dent, Jr., *supra* note 136, at 707; Strossen, *supra* note 72; Arons & Lawrence III, *supra* note 29; Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Joel S. Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPP. L. REV. 105 (1979); *cf*. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 117–18 (Oxford Univ. Press 1991) (1859) (—A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power . . . whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind.).

[166] Barbara Bennett Woodhouse, *Who Owns the Child?:* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1001 (1992); *cf*. ACKERMAN, *supra* note 163, at 160 (criticizing educational proposals that would —[legitimize] a series of petty tyrannies in which like-minded parents club together to force-feed their children without restraint).

[167] CALLAN, *supra* note 90, at 5.

[168] *Cf*. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 188–89 (1995) (—[A] citizen needs to be able both to understand and internalize the norms of her society and to judge those norms against rational attack. A predisposition to adopt certain values, coupled with the knowledge and critical skills necessary for citizenship, is likely to yield slow but careful changes that jeopardize nether the stability of the polity nor the liberty of its citizens.); Ingber, *supra* note 160, at 19 (—Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms.).

[169] Of course, the state as educator may have interests other than the child's intellectual welfare. On the mixed motives undergirding historical efforts to regulate public schooling, see generally SAMUEL BOYLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTION OF ECONOMIC LIFE (1976); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND THE AMERICAN SOCIETY (1983); MICHAEL B. KATZ, THE IRONY OF EARLY SCHOOL REFORM: EDUCATIONAL INNOVATION IN MID- NINETEENTH CENTURY MASSACHUSETTS (1968); ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); DAVID TYACK, THE ONE BEST SYSTEM: A HISTORY OF URBAN EDUCATION (1974); *cf*. DIANE RAVITCH, THE REVISIONISTS REVISITED: A CRITIQUE OF THE RADICAL ATTACK ON THE SCHOOLS (1978).

(or elsewhere, for that matter), the liberal state must provide a common education that prepares its children to make choices that are as free and independent as possible.

The state as educator does not replace the parent as educator. The parent remains a private source of intellectual and moral authority (as do a host of private players and entities). Indeed, against these private sources, —the state is normally at a disadvantage.[170] Thus, even if the state were to mandate a common curriculum for all schools, public and private, the allocation of educational authority still would be shared by parent and state. Ira Lupu usefully approaches the issue of educational pluralism by thinking in terms of separated powers, comparing the division of power and influence over the educational liberty of children to the Constitution's structural division of governmental power.[171] This model of power separation, as Lupu writes, —reduces the risk of tyrannical treatment and domination of children by parents as well as the state.[172]

But parentalism is not about educational power sharing. It is about control. Parentalists who paint the public education system as ideologically monolithic and propose greater educational choice rarely purport to be the guardians of *the child's* educational options.[173] What the parentalist seeks

[170] *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (—What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote.), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *cf*. GUTMANN, *supra* note 90, at 69 (—[P]arents command a domain other than schools in which they can—and should—seek to educate their children, to develop their moral character and teach them religious or secular standards and skills that they value . . . . The discretionary domain for education— particularly but not only for moral education—within the family has always been and must continue to be vast within a democratic society. And the existence of this domain of parental discretion provides a partial defense against those who claim that public schooling is a form of democratic tyranny over the mind.).

[171] *See generally* Lupu, *supra* note 74. *See also* Parker v. Hurley, 514 F.3d 87, 105–06 (1st Cir. 2008) (—[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently. A parent whose _child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials.' (quoting C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005)); GUTMANN, *supra* note 90, at 42 (—A democratic state of education recognizes that educational authority must be shared among parents, citizens, and professional educators even though such sharing does not guarantee that power will be wedded to knowledge, that parents can successfully pass their prejudices on to their children, or that education will be neutral among competing conceptions of the good life.); Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1340 (2007) (—[G]iven the legitimacy of claims by the community to have a say in how its future citizens should be educated; the equally legitimate claims of parents to have a say in how their own children should be educated; the need for children to develop the autonomy that liberalism demands; and the needs of the polity to ensure that children come to possess the civic virtues necessary to perpetuate a healthy liberal democracy, none of these interests should be allowed to dominate education in public schools. Instead, a vigorous liberal democracy must develop a framework for education that gives all of these interests some accommodation.); *cf*. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) (holding that a school requirement to recite Pledge of Allegiance does not impair parent's right to instruct his daughter in his religious views).

[172] Lupu, *supra* note 74, at 189–90 (—We have learned as a people to be distrustful of despotic power. The federal Constitution, and all of our state constitutions as well, proceed from the premise that dividing governmental power over adults will help safeguard their liberty. Not surprisingly, we have developed analogous mechanisms to protect the liberty of children. The division of power and influence over them among parents, school employees, and others in the community reduces the risk of tyrannical treatment and domination of children.).

[173] On the public school as educational monolith, see Strossen, *supra* note 72, at 370 (—An additional characteristic of the typical public school, which further enhances the importance of protecting students' freedom of belief, is its relatively authoritarian, hierarchical, and disciplined structure. This structure limits the students' opportunity to express or hear viewpoints at variance with those expressed by school officials. In tandem with the compulsory education requirement and the students' relative impressionability, the school's structure makes students especially vulnerable to the influence of teachers and other school authorities, who wield significant power over them.); Arons & Lawrence III, *supra* note 29, at 317 (comparing public school to other —total institutions); *cf*. Yudof, *supra* note 164, at 902 (describing school as a —semitotal institution).

to protect is *the parent's* choice —to reject schooling that promotes values contrary to their own.[174] We can be certain that some parents will choose educational options precisely because they want monopolistic control over the ideas to which their children have access. For some religious parents, no compromise is possible with the public school curriculum; no state regulation is acceptable;[175] and the only educational option is the ideological and social segregation of private schooling.[176]

[174] Gilles, *supra* note 81, at 938. This reality can be masked by referring to parental choice as —family choice. *See also, e.g.*, Arons & Lawrence III, *supra* note 29, at 325 (—The government allows families to inculcate their own values by choosing private schools.).

[175] *See, e.g.*, New Life Baptist Church Acad. v. Town of East Longmeadow, 666 F. Supp. 293, 297 (D. Mass. 1987) (—Plaintiffs believe that parents are required by their religion to educate their children to share their faith. They also believe that they are obligated by God to provide as an indispensable ministry of their church a school which teaches their religious beliefs. For plaintiffs, the secular and religious aspects of education are inseparable. Thus, in its educational ministry, New Life teaches all subjects from a biblical and Christian view of the world. Plaintiffs believe they are forbidden to send their children to schools, such as public schools, which they believe teach doctrines contrary to the Holy Scriptures.).

[176] *See* MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 58 (1999) (arguing that —it is difficult for children to achieve autonomy solely within the bounds of their families and home communities—or even within the bounds of schools whose norms are constituted by those held by the child's home community); *cf*. Rob Reich, *Testing the Boundaries of Parental Authority over Education*, *in* MORAL AND POLITICAL EDUCATION 299 (Stephen Macedo & Yael Tamir eds., 2002) (—I submit that even in a minimal construal of autonomy, it must be the function of the school setting to expose children to and engage children with values and beliefs other than those of their parents. To achieve minimal autonomy requires that a child know that there are ways of life other than that into which he or she has been born. Minimal autonomy requires, especially for its civic importance, that a child be able to examine his or her own political values and beliefs, and those of others, with a critical eye. It requires that the child be able to think independently. If this is all true, then at a bare minimum, the structure of schooling cannot simply replicate in every particularity the values and beliefs of a child's home.). The social segregation of private schooling can be its own form of intellectual incapacitation. The child misses the associational incitements, good and bad, that accompany a diverse peer group. *See, e.g.*, Buss, *supra* note 89, at 1233 (suggesting that public education might be required in order to facilitate adolescent associational activity with unlike peers); *cf*. *In re* Kurowski, 20 A.3d 306, 319 (N.H. 2011) (noting that in custody decision trial court was —guided by the premise that education is by its nature an exploration and examination of new things, and by the premise that a child requires academic, social, cultural, and physical interaction with a variety of experiences, people, concepts, and surroundings in order to grow to an adult who can make intelligent decisions about how to achieve a productive and satisfying life). *But cf*. Eugene Volokh, *Preference for Public School over Homeschooling—and Maybe Private Schooling—Partly Because It Provides "Exposure to Different Points of View"?*, THE VOLOKH CONSPIRACY (Mar. 17, 2011), http://volokh.com/2011/03/17/preference-for-public- school-over-homeschooling-and-maybe-private-schooling-partly-because-it- provides-exposure-to-different-points-of-view/#contact (—It may well be in [a] child's best interests to be exposed to more views in public school—or it may well be in the child's best interests to avoid the views that public school will expose her to. Those are not judgments that courts should generally make given the First Amendment.). And the child will never meet that teacher who, just by being a non-parental role model, opens the eyes of children to new and unimagined vistas. *Cf*. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (—Consciously or otherwise, teachers—and indeed the older students— demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.); Ambach v. Norwich, 441 U.S. 68, 78–79 (1978) (—Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to- day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students . . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.). Before the boom era of the modern home-schooling movement, social segregation was a concern that courts took seriously, routinely upholding state educational regimes that did not permit home instruction. *See, e.g.*, State v. Edgington, 663 P.2d 374, 378 (N.M. Ct. App. 1983) (—By bringing children into contact with some person, other than those in the excluded group, those children are exposed to at least one other set of attitudes, values, morals, lifestyles and intellectual abilities.); State v. Riddle, 285 S.E. 2d 359, 366 (W. Va. 1981). The defendants in *Riddle* were —Biblical Christians who, according to the court, —[were] determined to have their children totally indoctrinated and educated in their religious beliefs, with no smattering of heresy. *Riddle*, 285 S.E.2d at 361. The parents —never requested the county superintendent of schools to approve their home as a place for instruction, as required by law. *Id*. at 363. With less than abundant generosity of spirit, the court thought it was —inconceivable that in the twentieth century the free exercise clause of the first amendment implies that children can lawfully be sequestered on a rural homestead during all of their formative years to be released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives. *Id*. at 366; *cf*. State v. Hoyt, 146 A. 170, 170–71 (N.H. 1929) (—Education in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. The association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for discharging the duties of a citizen.); Knox v. O'Brien, 72 A.2d 389, 392 (Cape May County Ct. 1950) (—Cloister and shelter have its place, but not in the every day give and take of life . . . . The entire lack of free association with other children being denied to [the O'Brien chil-

Even proponents of public school choice may show little interest in schooling that is ideologically pluralistic. The charter school movement may hold the promise of a common education without the curricular rigidity of a common schooling,[177] and more attention should be paid to the role that charter schools, including religious charter schools, might play in a public school system;[178] but charter schools ought to be more than a state-supported means of forming an ideologically bounded community —within which like- minded parents and teachers can reside.[179] (And, it goes without saying, students who will be expected to be equally like-minded.) One advocate of educational choice observes approvingly that a charter school would provide parents —with the opportunity to create a free public school that, while it does not teach their religious beliefs, also does not teach lessons that they find religiously objectionable.[180] Indeed, it has been argued that —if students are financially empowered to choose among a variety of secular and religious schools, the compulsion to protect their individual consciences from the moral or religious content embodied in the curriculum or environment at any particular school dissipates significantly.[181] Of course, it hardly needs to be pointed out that children do not make these choices. If parental choice can mean that the compulsion to protect a child's conscience dissipates, then the safest place for a child's conscience is the traditional public school.

In the broadest sense, an education that is ideologically or socially reclusive robs children of community. It keeps from them a common intellectual and cultural capital. Even the children of a separatist religious community are members of many other communities: political, historical, philosophical, artistic. They belong to a past as well as a present; they live, geographically and otherwise, in multiple jurisdictions. A liberal education takes heed of this. It respects the rootedness of chil-

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dren], by design or otherwise, which is afforded them at public school, leads me to the conclusion that they are not receiving education equivalent to that provided in the public schools in the third and fifth grades.).

[177] On —separate schooling, see, for example, CALLAN, *supra* note 90, at 162–95; Rosemary C. Salomone, *Common Education and the Democratic Ideal*, *in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 213–32 (Diane Ravitch & Joseph P. Viteritti eds., 2001). On charter schools, see generally INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION (Bruce Fuller ed., 2000). *See also* Pearl Rock Kane & Chrisopher J. Lauricella, *Assessing the Growth and Potential of Charter Schools*, *in* PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EQUITY, AND SOCIAL COHESION? 203–33 (Henry M. Levin ed., 2001); Amy Stuart Wells, *Privatization and Charter School Reform: Economic, Political, and Social Dimensions*, *in* PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EQUITY, AND SOCIAL COHESION? 234–59 (Henry M. Levin ed., 2001).

[178] A common state-mandated curriculum could ensure that all charter schools, including religious ones, do not become segregated educational enclaves. Charter schools that satisfy common curricular requirements would be able to add focused educational offerings compatible with religious values and culture. (In addition, they would be able to make reasonable accommodations logistically impossible for the public schools.) Additions to a common curriculum are consistent with the core principle of *Meyer* and *Pierce* that a parent has a right, —after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford. Meyer v. State, 187 N.W. 100, 104 (Neb. 1922) (Letton, J., dissenting); *cf*. Berea College v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (—The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety.). While state support of pervasively sectarian schools would violate the Establishment Clause, many church-affiliated charter schools could embrace a common state- mandated curriculum and a diverse student/faculty body without considering their normative religious mission in danger of being undermined. On religious charter schools, see, for example, Preston Green III, *Charter Schools and Religious Institutions: A Match Made in Heaven?*, 158 WESTLAW EDUC. L. REP. 1 (2001); Benjamin Siracusa Hilton, Note, *Is There a Place for Religious Charter Schools?*, 118 YALE L.J. 554 (2008).

[179] Bruce Fuller, *The Public Square, Big or Small?: Charters Schools in Political Context*, *in* INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 14 (Bruce Fuller ed., 2000).

[180] LAWRENCE D. WEINBERG, RELIGIOUS CHARTER SCHOOLS: LEGALITIES AND PRACTICALITIES 2 (2007).

[181] Robert K. Vischer, *The Sanctity of Conscience in an Age of School Choice: Grounds for Skepticism*, 6 MD. L.J. RACE, RELIGION, GENDER & CLASS 81, 96 (2006).

dren's lives, teaching children from the inside, in what Warren Nord has nicely called —the communities of memory which tentatively define them.[182] A liberal education is inherently conservative, reinforcing cultural continuity. In this sense, a liberal education is inherently liberating, freeing children from cultural discontinuity. A liberal education also respects the self-directedness of children's' lives, teaching children from the outside, from a stance (again, Nord) of —critical distance on the particularities of their respective inheritances.[183]

These are not incompatible lessons. We reinforce tradition as we come to understand it and even as we come to reinterpret it.

Children who are cut off from an understanding of—or, at least, an introduction to—foreign ideas and values, cultures and traditions, suffer more than an intellectual loss. Understanding what is —other is an exercise of heart and soul as well as mind; in Eamonn Callan's phrase, it requires — the enlargement of the imagination,[184] the experience —of entering imaginatively into ways of life that are strange, even repugnant, and some developed ability to respond to them with interpretive charity.[185]

This is why, according to Nord, a liberal education must nurture —passions and imagination as well as thinking,[186] why it must nurture the faculties that allow children to get inside alternative ways of life and —to feel the[ir] intellectual and emotional power.[187] This human and humane sympathy is not an elective subject, an option to be selected after the child has learned basic reasoning skills. As both Nord and Callan (and others) remind us, developing the faculties that allow for sympathetic engagement with —otherness is a process at the core of teaching children to understand themselves.

> [I]t is only when we can feel the intellectual and emotional power of alternative cultures and traditions that we are justified in rejecting them. If they remain lifeless and uninviting this is most likely because we do not understand them, because we have not gotten inside them so that we can feel their power as their adherents do. Only if we can do this are we in a position to make judgments, to conclude, however tentatively, that some ways of thinking and living are better or worse than others.[188]

[182] WARREN NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 202–03 (1995) (—Liberal education has both a conservative and a liberating task: it should provide students a ballast of historical identities and values at the same time that it gives them an understanding of alternatives and provides critical distance on the particularities of their respective inheritances . . . . The essential tension of a liberal education, properly understood, lies in its commitment to initiating students into the communities of memory which tentatively define them, and, at the same time, nurturing critical reflection by initiating them into an ongoing conversation that enables them to understand and appreciate alternative ways of living and thinking.).

[183] *Id*. at 202.

[184] CALLAN, *supra* note 90, at 5.

[185] *Id*. at 133.

[186] NORD, *supra* note 181, at 202.

[187] *Id*. at 201.

[188] *Id*.

Kept out of a conversation to which their birthright entitles them to join, cloistered children are cut off from themselves, bereft of self-consciousness and awareness of cultural place, and denied the moral freedom to stand or fall. Only through wide and fair exposure to moral and intellectual difference can children —surpass the threshold of ethical servility.[189]

The Supreme Court has identified autonomy and tolerance as the fundamental values indispensable —in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . . .[190] The prerequisite for both autonomy and tolerance is exposure. To think for themselves, children must know how others think; to take their place as members of a liberal democracy, they must learn to make room for the places that other members will take. Our constitutional freedoms are predicated on the republican distrust of authoritarian ideologies and a profound skepticism toward final and complete truths.[191] The Supreme Court has said, a bit hyperbolically perhaps, that —[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[192] Constitutionally speaking, we are all students and teachers.

Liberal pluralists concede that some religious groups will create lives that run far counter to cultural norms, separate lives where they can educate their children without exposing them to and engaging them with diverse values and beliefs. For Galston, a liberal society can and should make room for religious separatism: —Autonomy is one possible mode of existence in liberal societies—one among many others; its practice must be respected and safeguarded; but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place.[193] Even a proponent of autonomy-facilitation like Harry Brighouse agrees that civic stability does not require everyone to lead autonomous lives, as long as enough people do so —to yield a threshold level of stability.[194] But one need not quarrel with the virtue of peaceful coexistence to ask about the fate of children whose families and communities do not give autonomy pride of place. While democracy may survive if it maintains a threshold level of stability, this is no reason to assign some children to a life without free choice.[195]

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[189] Reich, *supra* note 175, at 293. For a multiculturalist defense of exposure to otherness, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 82–83 (1995); JOSEPH RAZ, THE MORALITY OF FREEDOM 204 (1986); CHARLES TAYLOR, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 204–05 (1985).

[190] Ambach v. Norwick, 441 U.S. 68, 76 (1979).

[191] *See Barnette*, 319 U.S. at 642; *see also supra* note 29 and accompanying text.

[192] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

[193] GALSTON, *supra* note 69, at 24. *See also generally* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

[194] Brighouse, *supra* note 154, at 269; *cf*. WALZER, *supra* note 192, at 219 (1983) (stating that there is no need for a —frontal assault on private schools as long as the chief effect is —to provide ideological diversity on the margins of a predominately public system).

[195] *Cf*. ARCHARD, *supra* note 137, at 75–76 (—A pluralistic culture is important not for its own sake but because it is the natural outcome of the exercise of autonomous life-choices and, at the same time, the invaluable, indeed indispensable, background against which autonomy is exercised. This point is significant for it means that children must still be reared to be autonomous. If all that mattered was pluralism as such it would suffice that families produced heteronomous adults with very different outlooks on life. What the argument from pluralism shows, however, is that families are to be valued for producing diverse, but also autonomous, adults.).

Yet if the classroom really is, as the Supreme Court has said, —peculiarly the marketplace of ideas,[196] the voices of religious children must be allowed to be heard, too. The school classroom, at every level, should be a forum where students are exposed to a variety of viewpoints, secular and religious. The idea that students benefit from exposure to opposing viewpoints only makes sense if that benefit flows in all directions. To that end, the study of religion should be a regular part of a common curriculum. The state has a compelling interest in teaching children the —fundamental values of habits and manners of civility essential to a democratic society,[197] but if children are to learn a civility that is more than mere manners, then the state must let them speak for themselves (whether they speak the language of reason or faith) and for their community and culture (whether that background is informed by religious or secular values). The voices of religious children must be allowed to be heard—for the educational benefit of the entire class. The classroom that welcomes appropriate religious expression may also be a less threatening place for some religious parents.[198]

Many religious parents are concerned, and rightly so, that school officials sponsor particular religious or political beliefs— not deliberately, perhaps, but by a failure to see their own beliefs as partial viewpoints. Certainly, the principle of exposure can be manipulated for use as a political instrument, a latter-day version of the child-saving strategies of the nineteenth century.[199]

But exposure, if it is genuinely implemented, operates on more intellectually generous principles. First, if autonomy is to be taken seriously, then liberals as well as conservatives, the secular-minded as well as the faithful, must be willing to look critically at their own values and beliefs. The voices of all children need to be heard, with fairness and respect. Compulsory education requirements presuppose —sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic group into which the child is born[;][200] they entail the effort to foster respect for difference and a willingness to entertain, if only for the sake of argument, ideas that go against the familial grain. Second, exposure is not a ready means to discount the history and culture that children bring with them to school. Respect for difference does not presuppose the child's rejection of his primary culture. Just the opposite should be the case: The classroom should be a place where the child's primary commitments can be strengthened; it should be a place where children can go to be understood as well as to understand others.[201] What compulsory education

[196] *Keyishian*, 385 U.S. at 603 (internal quotation marks omitted).

[197] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (internal quotation marks omitted).

[198] *See, e.g.*, GUTMANN, *supra* note 90, at 122–23 (stating that refusal to permit exemptions from some required practices will drive parents away from public schools); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 488 (1995) (observing that school officials may have prudential reasons to accommodate religious parents in order to keep their children in public schools).

[199] *See generally* Bruce Bellingham, *Institution and Family: An Alternative View of Nineteenth-Century Child Saving*, 33 SOCIAL PROBLEMS 533 (1986).

[200] CALLAN, *supra* note 90, at 133. *But see* Tyll van Geel, *Citizenship Education and the Free Exercise of Religion*, 34 AKRON L. REV. 293 (2000) (arguing that programs to promote specific conceptions of tolerance are themselves intolerant); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993) (discussing the liberal society's paradoxical intolerance of the intolerant).

[201] *Cf., e.g.*, Steven C. Rockefeller, *Comment*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 97–98 (Amy Gutmann ed., 1994) (—[A]ny liberal democratic politics committed to the ideals of freedom and equality cannot escape the demand that it create inclusive and sustaining social environments that respect all peoples in their cultural diversity, giving them a feeling of belonging to the larger community.).

requirements seek to ensure is that, at a minimum, the child learns that there are important choices to be made, and that no source of authority—parent or teacher—has the right to deny someone the opportunity to make choices that are genuinely free.

VI. CONCLUSION: THE LIMITS OF RELIGIOUS ADVOCACY WHEN SUSAN MURPHY WAS THIRTEEN YEARS OLD, SHE BEGAN TO

explore the beliefs of the Hare Krishna religion.[202] She was taught, among other things, that women are inferior to men, that the female form is the form of evil, that women should always consult a man before making any type of decision, and that a woman should take her husband as her spiritual authority.[203]

Upon leaving the church, Susan sued the church, alleging that church teachings had caused her emotional distress.[204] Expert psychiatric testimony supported Susan‘s claim, and she received a jury award of $210,000.[205]

On appeal, the Massachusetts State Supreme Court vacated the emotional distress judgment.[206] Concluding that tort liability amounted to punishment for religious heterodoxy, the court barred what it considered to be a constitutionally impermissible evaluation of the church‘s religious beliefs: —The essence of what occurred in the trial is that the plaintiffs were allowed to suggest to the jury extensively that exposure to the defendant‘s religious beliefs was sufficient to cause tortious emotional damage . . . .[207]

No defendant, the court maintained, should be forced to prove —that the substance of its religious beliefs is worthy of respect.[208]

For the *Murphy* court, the key question was whether Susan‘s testimony related to conduct or belief. The court rejected her argument that religious teaching is activity, not belief: —Inherent in the claim that exposure to [defendant‘s] religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed . . . .[209] The court suggested that Susan‘s

[202] Murphy v. I.S.K.Con. of New Eng., Inc., 571 N.E.2d 340, 342 (Mass. 1991).

[203] *Id*. at 346.

[204] *Id*. at 344.

[205] *Id*. at 346.

[206] *Id*. at 342.

[207] *Id*. at 347.

[208] *Id*. at 348.

[209] *Id*. at 347.

age —may lessen the degree of constitutional protection which [the church] has against a claim of an intentional tort based on religiously motivated activity.[210] But it would not be enough. According to the court, the nature of Susan's case would —embroil[] the court in an assessment of the propriety of those beliefs regardless of the age of the plaintiffs.[211]

Essentially, the court would not conduct a heresy trial.

In fact, whether the church's religious beliefs were —fundamentally flawed was really irrelevant. The right legal question was not whether the female form is truly evil (as the church taught), but whether Susan Murphy could show that the church's teachings, regardless of their truth or falsity, had caused her tortious injury. To borrow from the law of evidence, the court did not need to decide the truth of the matter asserted.[212] In the adjudication of such cases, courts can, and must, restrict their inquiries to objective measures of emotional and psychological harm to children.[213]

Adults consent to religious association, but the religious identity of children is determined without their consent or understanding.[214] They are made members of religious groups by birthright, or ceremonies of induction and initiation, or other rules of religious affiliation. Not possessing the full capacity for individual choice,[215] children are by their very nature captive to the will of others.[216]

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[210] *Id*. at 349.

[211] *Id*.

[212] *See* FED. R. EVID. 801(c).

[213] *Cf*. Kendall v. Kendall, 687 N.E.2d 1228, 1236 (Mass. 1997) (finding that a restriction on the father's right to share religious belief with his children —does not foster excessive government entanglement because the focus of any judicial inquiry will center on the emotional or physical harm to the children rather than the merit worthiness of the parties' respective religious teachings).

[214] By freely choosing to unite themselves with the spiritually like-minded, adults submit to be governed by the rules of religious membership. But religious authority may not be imposed on those unwilling to subject themselves to it. *See, e.g*., Guinn v. Church of, 775 P.2d 766, 781 (Okla. 1989) (—[T]he First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline.). Thus, once a member withdraws consent, see, for example, *id*., or where a religious entity has used coercive techniques to undermine a member's capacity to consent, the constitutional shield that safeguards religious freedom against tort liability is appropriately broken, see, for example, Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 56–63 (Cal. 1988) (reversing summary judgment for church on emotional distress claim where atmosphere of coercive persuasion rendered plaintiffs incapable of deciding not to join church); Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d. 1, 7–19 (Cal. Ct. App. 1989) (affirming emotional distress judgment for plaintiff where church conducted religious practices in coercive environment); *cf., e.g*., *Guinn*, 775 P.2d at 776 (—No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.).

[215] *See, e.g*., Bellotti v. Baird, 443 U.S. 622, 635 (1979) (—Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability . . . .).

[216] *See* Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result).
Where a listening audience is effectively captive to the will of the speaker, —government regulation of [protected] expression may coexist with and even implement First Amendment guarantees. *Id*. On the captive audience doctrine, see Hill v. Colorado, 530 U.S. 703, 716–18 (2000) (upholding statute that prohibited speakers from approaching unwilling listeners outside health care facilities); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (targeted picketing of a hospital or clinic threatens psychological well-being of the patient held —captive by medical circumstance); Frisby v. Schultz, 487 U.S. 474, 484 (1988) (residential privacy protects the —unwilling listener from unwanted and intrusive speech); Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (describing the psychological tensions and pressures that result from targeted residential picketing); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (—Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970))); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–10 (1975) (noting that restrictions on speech are warranted when the degree of captivity —makes it impractical for the unwilling viewer or auditor to avoid exposure); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (noting that riders on city transit system are captive audience); *Rowan*, 397 U.S. at 738 (—We

This vulnerability drives the concern that public schoolchildren are easy targets for state indoctrination.[217]

But children are no less captive to private educators—indeed, where cut off from ideas and values contrary to those of the home, they are likely to be more so; and religious mentorship carries with it a form of authority from which children may find it especially difficult to escape.

When courts consider the tort liability of religious mentors, they commonly ask two questions: (1) whether liability would infringe upon belief as opposed to conduct, and (2) whether the conduct was secular or, if the conduct is deemed religious, whether it is a central part of the religious teachings of the defendant (and, thus, prohibition would be a substantial burden on religious freedom).[218] But both questions rest on dubious grounds.

The line between belief and conduct is not as bright as we might think.[219] Laura Schubert discovered how quickly bright lines can lead to confusion when she sued the Pleasant Glade Assembly of

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therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‗good' ideas on an unwilling recipient. That we are often ‗captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952))); *Pollak*, 343 U.S. at 468 (Douglas, J., dissenting) (riders on street railway and bus system are captive audience); Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949) (—The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it.) (citing Schneider v. State, 308 U.S. 147, 162 (1939))); Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (viewers of display advertising on billboards and street car placards have messages thrust upon them —without the exercise of choice or volition on their part); *cf*. Campbell v. Cauthron, 623 F.2d 503, 509 (8th Cir. 1980) (religious —witnessing to prisoners who cannot —escape the preaching violates Free Exercise Clause). *But see* Cohen v. California, 403 U.S. 15, 21–22 (1971) (persons confronted with defendant's jacket bearing the words —Fuck the Draft could have avoided —further bombardment of their sensibilities simply by averting their eyes); Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978) (residents could —simply avoid Nazi-affiliated protest activities).

Some courts have addressed captivity of a psychological sort, the kind of incapacity to make decisions that may afflict those who endure coercive indoctrination techniques. On coercive indoctrination techniques, see generally CULTS, CULTURE, AND THE LAW: PERSPECTIVES ON NEW RELIGIOUS MOVEMENTS (Thomas Robbins et al. eds., 1985); MARK GALANTER, CULTS: FAITH, HEALING, AND COERCION (1989); JOHN LOFLAND, DOOMSDAY CULT: A STUDY OF CONVERSION, PROSELYTIZATION, AND MAINTENANCE OF FAITH (1966); THOMAS ROBBINS, CULTS, CONVERTS, AND CHARISMA: THE SOCIOLOGY OF THE NEW RELIGIOUS MOVEMENTS (1988); A. JAMES RUDIN & MARCIA R. RUDIN, PRISON OR PARADISE?: THE NEW RELIGIOUS CULTS (1980); Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533 (1982); Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CALIF. L. REV. 1 (1977); Robert N. Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CALIF. L. REV. 1277 (1983). Though brainwashing is a controversial theory, some courts have recognized that coercive persuasion in religious settings may vitiate consent. *See, e.g.*, *Molko*, 762 P.2d at 61 (religious organization can be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion); *Wollersheim*, 66 Cal. Rptr. 2d at 15 (religious practices conducted in a coercive environment do not qualify as voluntary religious practices entitled to constitutional protection); Peterson v. Sorlien, 299 N.W.2d 123, 126 (Minn. 1980) (—Coercive persuasion is fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation, physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and the ability to think independently, which induces a subject's unyielding compliance and the rupture of past connections, affiliations and associations.). *But see* Lewis v. Holy Spirit Ass'n, 589 F. Supp. 10, 12 (D. Mass. 1983) (no cognizable action against religious organization on basis of alleged tort of brainwashing and indoctrination); Meroni v. Holy Spirit Ass'n, 506 N.Y.S.2d 174, 177–78 (N.Y. App. Div. 1984) (rejecting claim of brainwashing where methods of indoctrination are commonly used by religious groups).

[217] On the threat of state indoctrination in the public schools, see, for example, Arons & Lawrence III, *supra* note 29; Dent, Jr., *supra* note 136, at 707 (1993); Kamenshine, *supra* note 164; Strossen, *supra* note 72; Yudof, *supra* note 164; Moskowitz, *supra* note 164; *cf*. MILL, *supra* note 164, at 117–18 (—A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power . . . whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind . . . .).

[218] *See, e.g.*, Turner v. Unification Church, 473 F. Supp. 367, 371–72 (D.R.I. 1978).

[219] *See, e.g.*, Murphy v. I.S.K.Con. of New Eng., Inc., 571 N.E.2d 340, 345 (Mass. 1991) (rejecting argument that religious teaching was conduct, not belief). On the belief/conduct distinction, see generally Cantwell v. Connecticut, 310 U.S. 296 (1940); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878).

God.[220] In *Pleasant Glade Assembly of God v. Schubert*, Schubert brought a tort claim based on the emotional injuries she suffered when church members, against Laura's objections, sought to cast demons out of her.[221] Laura was physically restrained as part of a —laying on of hands, and subsequently she commenced a tort action for assault, battery, and false imprisonment.[222] The Supreme Court of Texas concluded that the adjudication of such claims —would necessarily require an inquiry into the truth or falsity of religious beliefs.[223]

In the court's judgment, —the act of ‗laying hands' [was] infused in Pleasant Glade's religious belief system.[224] The court ignored the irony that this judgment was itself a determination about doctrinal matters. Dissenting from the majority opinion, Chief Justice Jefferson was on more solid ground when he observed that —[i]n reaching the conclusion that the act of ‗laying hands' is infused in Pleasant Glade's religious belief system, the Court engages in the unconstitutional conduct it purports to avoid: deciding issues of religious doctrine.[225]

When courts assess what is a substantial burden on religion, they do so despite the Supreme Court's admonition that it is not the business of the courts to determine what beliefs or practices are central to a religious tradition.[226] But what if litigation itself is a substantial burden? In Schubert's case, the church did not seek protection from Laura's secular claims of false imprisonment and assault. To these claims, the church stated, its religious belief and practices were —actually irrelevant.[227] In its words:

> Plaintiff, Laura Schubert, a teenager, does bring a *secular complaint* against the church and its pastors. It begins when, according to her own pleading, she —collapsed while standing at the altar of the church during a church service. She alleges she was physically grasped, taken and held on the floor of the Church against her will. *This was allegedly done as part of an "exorcism" in an alleged attempt to exorcise a demon from her. However, this religious context is actually irrelevant*. Since Laura Schubert alleges she was held on the floor against her will, she brings claims for assault, battery, and false imprisonment. *This is a "bodily injury" claim . . . Relators, the church and the pastors, concede that this is a "secular controversy" and*

[220] 264 S.W.3d 1, 5 (Tex. 2008).

[221] *Schubert*, 264 S.W.3d at 5 (Tex. 2008).

[222] *Id*.

[223] *Id*. at 9 (quoting Tilton v. Marshall, 9025 S.W.2d 672, 682 (Tex. 1996)); *see also* Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987) (—Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members.).

[224] *Schubert*, 264 S.W.3d at 11.

[225] *Id*. at 18 n.7 (Jefferson, C.J., dissenting (citation omitted)).

[226] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (—Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (—It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . .); *see also Smith*, 494 U.S. at 887 (—Judging the centrality of different religious practices is akin to the unacceptable ‗business of evaluating the relative merits of differing religious claims.' (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1983) (Stevens, J., concurring))).

[227] *Schubert*, 264 S.W. 3d at 7.

> *does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person . .*
>
> . .
>
> If this were the sum total of this dispute, Relators [i.e., the church defendants] would not be here before this Court . . . No religious beliefs would be implicated. The First Amendment and the free exercise of religion would simply not be an issue. *Therefore, Relators do not request that this Court issue mandamus to stop litigation of this "secular controversy forbv bodily injury*.[228]

Nonetheless, the court held that the church was constitutionally protected —against claims of intangible harm derived from its religious practice of _laying hands.'[229] The *Schubert* court decided that a restriction on the —laying hands practice would be a substantial burden.[230] Even if the tort claim could be decided without regard to religion, the adjudication of the claim—that is to say, the mere fact that the church was subject to tort liability——would have an unconstitutional _chilling effect' by compelling the church to abandon core principles of its religious beliefs.[231]

Though *Yoder*'s harm standard fails to offer children the full measure of protection they need, it does set an outer limit to the right of religious indoctrination. Where indoctrination —impairs a child's emotional development or sense of self-worth,[232] the state should protect the child by allowing religious mentors to be subject to tort liability. This protection need not come at the cost of constitutional privilege for religious entities. Tort liability is not premised on the judgment that a religious belief is somehow —fundamentally flawed or not worthy of constitutional protection.[233] To the contrary, whether religious advocacy was meant to and did inflict severe emotional distress is a question that can be adjudicated by the neutral and generally applicable principles of tort law.[234]

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[228] *Id*.

[229] *Id*. at 8.

[230] *Id*. at 11.

[231] *Id*. at 10.

[232] The definition of —child abuse and neglect under the federal Child Abuse and Prevention Treatment Act of 1996 (CAPTA) includes serious emotional harm. 42 U.S.C. § 5106g (2006). The U.S. Department of Health and Human Services defines emotional abuse as —a pattern of behavior that impairs a child's emotional development or sense of self-worth. This may include constant criticism, threats, or rejection, as well as withholding love, support, or guidance. U.S. Dep't of Health and Human Serv., CHILD WELFARE INFORMATION GATEWAY 3 (2008), *available at* http://www.childwelfare.gov/pubs/factsheets/ whatiscan.pdf.

[233] *See supra* note 213 and accompanying text.

[234] *See Smith*, 494 U.S. at 879 (—[T]he right of free exercise does not relieve an individual of the obligation to comply with a _valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' (quoting *Lee*, 455 U.S. at 263 n.3 (1982) (Stevens, J., concurring in the judgment))); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (—Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without _establishing' churches to which property is awarded.); Jones v. Wolf, 443 U.S. 595, 602 (1979) (—[W]e think the _neutral principles of law' approach is consistent with the foregoing constitutional principles.); *see also, e.g*., Smith v. O'Connell, 986 F. Supp. 73, 80 (D.R.I. 1997) (finding that —there is no question that the principles of tort law, at issue, are both neutral and generally applicable); Doe v. Hartz, 970 F. Supp. 1375, 1431–32 (N.D. Iowa 1997) (holding that the First Amendment does not bar tort claim against church defendants because claim can be assessed applying neutral principles of law); Isely v. Capuchin Province, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (finding no constitutional bar to adjudication of tort claim because —_neutral' principles of law can be applied without determining underlying questions of church law and policies (citing Serbian E. Orthodox Diocese v. Milivojevich, 426

It is a powerful and remarkable privilege to control the spiritual consciousness of another. And it is not immune from abuse. Children need to be protected from religious indoctrination that is psychologically injurious, but, more broadly speaking, they need to be safeguarded from mentorship that denies them the ability to make independent choices about religious matters.[235] Religious mentorship should make, so to speak, no permanent marks on the child; in other words, it must not foreclose the child's prospective religious freedom. To direct, rather than to control, the religious destiny of the child: This is the great and challenging task, the heart (and soul) of the religious mentor's fiduciary responsibilities.[236]

With all its attendant joys, parenting is a somber task for it entails, in a profound and poignant way, the loss of the child. It is the parent who enables the child to make free and independent choices, thus preparing the child to leave behind home and family, thus encouraging (or at least allowing) the child to form his or her own image rather than merely to conform to some parental likeness. If we could, we might shield our children from the responsibilities and sufferings that accompany choice. If we could, we might shield ourselves from the pain that accompanies the child's individuation and eventual separation from our hands. The law presumes that parents act in the best interests of their children, but, as every parent knows, it is often more difficult for parents to

U.S. 696 (1976))); Moses v. Diocese of Colorado, 863 P.2d 310, 320–21 (Colo. 1993) (civil suit not barred by First Amendment because deciding claims does —not require interpreting or weighing church doctrine and neutral principles of law can be applied); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208, 1225 (Me. 2005) (—[C]ourts do not inhibit the free exercise of religion by applying neutral principles of law to a civil dispute involving members of the clergy.); *cf*. Kendall v. Kendall, 687 N.E.2d 1228, 1233 n.16 (Mass. 1997) (noting that —[t]he GAL's report was based on interviews with the parents, the children, and the children's teachers, psychological tests, and observations of the children interacting with both parents); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 502–03 (2005) (—[P]ositive religious questions, such as those concerning the content of religious beliefs or the importance of a religious practice within the context of a religion, do not call on courts to employ anything other than ordinary tools of judicial fact-finding and can be resolved through resort to traditional evidence, such as reliance on expert witnesses, treatises, and factual testimony.); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 45–46 (1990) (adjudication of emotional distress cases applies neutral rules).

[235] *Cf*. Macleod, *supra* note 137, at 130 (—A refined liberal conception [of parental authority] does impose constraints on the strategies that parents may legitimately employ to transmit a conception of the good to children . . . . The general idea is that parents should be permitted to advance a distinctive conception of the good for their children. However, parents must not seek to exempt the ends they wish their children to adopt from rational scrutiny. Nor may parents undertake to foreclose the possibility of deliberation about such matters by tightly insulating children from exposure and access to the social conditions of deliberation.); David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 25 (1980) (—Parents may not justly mold their children's interests to conform with their own interests and values, no matter how profound, if they do so in a way that unfairly deprives the children of developing the capacity to assess these matters by rationally weighing arguments and evidence.).

[236] The Supreme Court has defined the due process right to parent as —the interest of parents in the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 65 (2000). On the phrase —care, custody, and control, see Leebaert v. Harrrington, 332 F.3d 134, 142 n.3 (2d Cir. 2003):

The *Troxel* Court appears to be the first to use the phrase —care, custody, and control, rather than the very similar —care, custody, and management, *Stanley v. Illinois,* 405 U.S. 645, 651 (1972), in the context of a parent's right concerning his or her children. Prior to *Troxel,* the phrase was typically used with respect to physical property, for example, in criminal statutes, *see, e.g., Fischer v. United States,* 529 U.S. 667, 675 (2000) (quoting 18 U.S.C. § 666 which prohibits theft or bribery concerning programs receiving federal funds), and in the context of insurance policies, *see, e.g., First Investors Corp. v. Liberty Mut. Ins. Co.,* 152 F.3d 162, 167 n.6 (2d Cir. 1998) (quoting a portion of an insurance policy which read, —The loss, depreciation in value, or damage to any real or personal property, including, but not limited to, money, securities, negotiable instruments or contracts representing money, held by or in the care, custody or control of the insured.). After *Troxel,* federal courts of appeals have begun to employ the phrase to refer to parental rights. *See, e.g., Batten v. Gomez,* 324 F.3d 288, 295 (4th Cir. 2003) (seizure of child violated mother's due process interest —in the companionship, care, custody, and control of her child); *Hatch v. Dep't for Children, Youth and Their Families,* 274 F.3d 12, 20 (1st Cir. 2001) (—The interest of parents in the care, custody, and control of their children is among the most venerable of the liberty interests embedded in the Constitution.) (citing *Troxel,* 530 U.S. at 65); *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 288 (5th Cir. 2001) (—One of _the fundamental liberty interests' recognized by the Court is the _interest of parents in the care, custody, and control of their children.') (quoting *Troxel,* 530 U.S. at 65–66).

separate themselves from their children, to let go of them, than it is for children to follow the natural path to adulthood.

Most of us do manage to let go. We see every day that our children are on a path that leads to separation and individuation. We encourage that growth, validating the child's steps (literal and metaphorical) toward independence. But we should not presume that all parents do so. Deeply dependent on the child, desperately wanting the child to mirror, and thus affirm parental interests and emotions, the narcissistic parent uses any number of emotional tools—often disguised to parent and child alike as acts of love—to frustrate the child's assertions of selfhood.

Among other students of parenting pathologies, the psychoanalyst Alice Miller has described how the narcissistic parent, ridden with a profound lack of security, disrupts the process by which children become morally, intellectually, and spiritually autonomous.[237] In fact, the narcissistic parent turns this developmental process on its head:

- Healthy parenting serves the needs of the child. One of the most important needs of the child is for mirroring (or echoing). By being a mirror of the child's emotions and interests, the parent reflects the child's evolving self-image. The act of mirroring enables the child to gain the trust and confidence that is a prerequisite to both individuation and intimacy. In the natural course of events, children separate themselves from their parents. In the natural course of events, children form new relationships outside the family sphere of interest.

- The narcissistic parent reverses this process. Narcissistic parents use the child as a mirror of their own interests and emotions. The adult creates the child in his or her own image. The problem of individuation does not belong to the child: The problem is that it is difficult for parents to separate themselves from their children.

- Emotional or psychological misconduct occurs when the love of the parent is made conditional on the child's mirroring of the adult image. The issue is obedience in the broadest sense. It is not just a matter of following the rules, though that is important. It is more a matter of being like the adult, of thinking and acting like the adult. It is a matter of accepting the adult's set of interests and perspectives. It is even a matter of liking and loving the adult.

- The child has no choice but to accept the images of approval and disapproval it receives from the parent, and to embrace these images as an ego ideal. Conforming to an image needed

[237] On parental narcissism, see generally ALICE MILLER, THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD (1998); LEONARD SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRIVATION (1989); R.D. LAING, THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS (Penguin Books 1965) (1959); *cf.* Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1326 (1994) (—[S]elf-love may be an unusually corrupting force when it comes into play in a parent-child relationship. When a politician or corporate official advances the interests of himself, his class, or his cronies, one would expect that he would at least be aware of the tension between his own interests and those of the commonwealth;
cognitive dissonance has its limits. In the parent-child relationship, however, the capacity for self-deception may be at its maximum. Because the parent is socially and psychologically reinforced to view her relationship with the child as one of affectionate personal attachment, the parent may be unusually blind to the possibility that self-love is distorting her judgment. Moreover, one can much more easily justify domination of children, who obviously need some degree of care and guidance, than one can justify comparable (mis)treatment of adults.).

and desired by the parent, the child represses its own need and desires. The child represses its own will. The price of not doing so is shame and humiliation (the child is willful, the child is bad). The child must accept that the adult is not at fault. If my parent withdraws love from me, I must be bad. The ideal image of the parent must be preserved.

- But the price of repression is that the child must come to see its own needs and desires as bad. The obedient child is thus trapped in a double-bind of self-abnegation.

This type of parental rule takes a terrible emotional toll on the child. The child comes to see its own needs and desires as unworthy and, accordingly, represses its evolving capacity for thinking and feeling independently. To be fully loved, the child has no choice but to conform to, to be obedient to, the parental image. And when parental authoritarianism has the sanction of religious authority, its emotional toll is compounded, its emotional effects more entrapping. It is one thing to disobey and displease a parent, another to disobey and displease God. When God himself demands the child's self-sacrifice, the child is bound to suffer sorely for simple acts of self-assertion.

If the state as educator demanded submission to its ideological authority, we would consider that gross misconduct.[238]

But we do not define the same requirement as injurious when required by religious mentors. Quite the opposite: We applaud the obedient child—the child who, like Betty Simmons, embraces filial devotion, unaware of its costs.

And because we do not define the child's self-sacrifice as injury, we do not see it.

[238] *Cf*. Arons & Lawrence III, *supra* note 29, at 312 (—If the government were to regulate the development of ideas and opinions through, for example, a single television monopoly or through religious rituals for children, freedom of expression would become a meaningless right.).