

RELIGION, CUSTODY, AND A CHILD'S IDENTITIES[©]

BY SHAUNA VAN PRAAGH*

Custody decisionmaking in which religion plays a role is significant from the perspective of parents, children, religious communities, and the liberal diverse state. Neither a family law analysis based on best interests, nor a constitutional law analysis based on parental rights, provides a wholly satisfactory response to the task of delineating custody and access when religion is at issue. Instead, a child's sense of identity, partly defined through membership in religious communities, must be considered; at the same time, the child's integrity must be protected. By balancing a child's interests of identity and integrity, courts respect religious freedoms and custodial authority, and acknowledge the realities of the lives of children of interfaith families. The complex and multiple affiliations of young individuals are thus recognized.

Les parents, les enfants, les communautés religieuses, et l'État libéral et pluraliste sont tous interpellés par une décision judiciaire sur la garde mettant en cause la religion. Dans un tel cas, ni une analyse tirée du droit de la famille et centrée sur le meilleur intérêt de l'enfant ni une analyse articulée autour des droits constitutionnels des parents ne permettant d'équilibrer de manière satisfaisante la garde et l'accès, lorsque l'élément religion est présent. Tout en protégeant l'intégrité de l'enfant, on doit plutôt se baser sur sa perception de sa propre identité, en partie moulée par l'appartenance à une ou plusieurs communautés religieuses. En combinant intégrité et identité de l'enfant, les tribunaux respectent non seulement la liberté de religion et l'autorité du gardien, mais également les réalités complexes des enfants de familles mixtes. On donne ainsi effet aux filiations multiples des jeunes personnes.

I. INTRODUCTION: WHY RELIGION AND CUSTODY? 311

II. CHARACTERIZING THE CASE OF RELIGION

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I. INTRODUCTION: WHY RELIGION AND CUSTODY?

Oh, it is the biggest mix-up
 that you have ever seen
 —my father, he was orange,
 and me mother, she was green.

...

They were married in two churches
 Lived happily enough
 Until the day that I was born
 And things got rather tough.¹

The religion of mothers and fathers matters for children. The identities of children are influenced by it and, indeed, can be defined and shaped by it. Of course, parents may not share a religious faith and background and this, too, has an impact on their children. In general, state law in a secular society is understood to play no role in the working out of religious difference within the family. When parents with different religions dispute the custody of their children, however, law is often forced to pay attention. Courts may be called upon to consider conflicting parental religious beliefs and practices in determining the allocation of custody and the structuring of access.

Custody disputes in which religious beliefs and practices play a role appear, at first, to constitute a tiny, case-specific, discrete area of the law. A closer look at the issues at stake reveals a complicated intersection of policies and processes: the best interests of children, the scope of custody and access, the extent of individual freedom of religion, and the significance of identity and group affiliation in a diverse society. When religion is considered relevant by both the parents and the court to custody decisionmaking, it is possible to glean insights as to the relationships between parents and children, between state and religion, and between children and their communities.

The question of religion in custody decisionmaking takes on particular and growing significance in a society where intermarriage is prevalent given the coexistence of many religions and cultures,² and

¹ A. Murphy, "The Orange and the Green," recorded by the Irish Rovers on *The Best of The Irish Rovers* (New York: MCA Records, 1972).

² See R. Wuthnow, *The Restructuring of American Religion: Society and Faith since World War II* (Princeton N.J.: Princeton University Press, 1988) at 90 (in every major denomination, the proportion of married people wedded to a spouse of the same religion is on the decline); J. Petsonk & J. Remsen, *The Intermarriage Handbook: A Guide for Jews and Christians* (New York: William

where divorce plays a role in exposing the non-monolithic nature of family life. Further, current dialogue regarding identity politics in legal and social institutions emphasizes community affiliation in a way that implicates children, their education, and the connections they forge as they grow into adult citizens.³ Against this backdrop, the notion of children's rights has gained support, complicated by an ongoing critique and examination of rights themselves, both generally and in the specific context of children.⁴ Finally, the appropriateness of the best interests test for determining custody and post-separation/divorce life for children continues to be questioned, and the meaning of custody and access subject to ongoing scrutiny.⁵

An analysis of the case of religion in custody decisionmaking is important, then, from the perspective of a number of parties. Parents may keenly feel the responsibility and desire to pass on their beliefs and religious identity to their children. Parents who do not share the same beliefs and background may agree in the context of their partnership to

Morrow, 1991); M.E. Smith, "Relations between Church and State in the United States, with Special Attention to the Schooling of Children" (1987) 35 Am. J. Comp. L. 1 (an overview of religious pluralism and diversity in the United States gives the reader a sense of an "interfaith" enterprise); M.A. Richard, *Ethnic Groups and Marital Choice: Ethnic History and Marital Assimilation in Canada, 1871 and 1971* (Vancouver: University of British Columbia Press, 1991); and P.R. Spickard, *Mixed Blood: Intermarriage and Ethnic Identity in 20th Century America* (Madison, Wisc.: University of Wisconsin Press, 1989). Statistical reports can give a precise picture of the prevalence of interfaith marriage: see, for example, Statistics Canada, *Marriages by Religious Denomination of Groom and Bride, Canada, 1992* (Ottawa: Minister of Industry, Science & Technology, 1995) at 84-212.

³ For a general introduction to this discussion, see W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989); A. Gutmann, "Children, Paternalism and Education: A Liberal Argument" (1980) 9 Phil. & Pub. Aff. 338; and D. Miller & M. Walzer, eds., *Pluralism, Justice and Equality* (Oxford: Oxford University Press, 1995). See also D. Danielson & K. Engel, eds., *After Identity* (New York: Routledge, 1995); and Commission des droits de la personne du Québec, *Religious Pluralism in Quebec: A Social and Ethical Challenge* by M. Rochon & P. Bosset (Quebec: The Commission, 1995).

⁴ See generally P. Alston, S. Parker & J. Seymour, eds., *Children, Rights and the Law* (New York: Oxford University Press, 1992); M. Freeman, ed., *Children's Rights: A Comparative Perspective* (Aldershot, U.K.: Dartmouth, 1996); M. Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 Harv. Women's L.J. 1 [hereinafter "Next Generation"]; and, as the overarching international indicator of a new emphasis on children's rights: *Convention on the Rights of the Child (With Reservations and Understandings)*, 20 November 1989, Can. T.S. 1992 No. 3 (entered into force on 2 September 1990) [hereinafter *Rights of the Child*].

⁵ See C.E. Schneider, "Religion and Child Custody" (1992) 25 U. Mich. J. Law Ref. 879 at 879 [hereinafter "Religion and Custody"], where he says, speaking within the U.S. context: "[T]hese problems [at the intersection of religion, law and the family] raise telling questions about the tension between discretion and rules in law, about the discords between religion and law, about the meaning of pluralism in American life, and about the usefulness of rights discourse in American law." The problems have been present for a long time. See L.M. Friedman, "The Parental Right to Control the Religious Education of a Child" (1916) 29 Harv. L. Rev. 485.

raise their children in a certain way (whether one religion, both, or none). In the context of divorce, each parent, whether entrusted with custody or access, may articulate a “right” to share religious beliefs with the children—a right that could be argued to extend to control over religious upbringing and education. Generally left untouched in an “intact” family, those perceived rights and the beliefs and practices to which they apply are laid open to intervention in custody proceedings.

For the children involved, the treatment of religion in custody decisionmaking reflects the court's perception of, and impact upon, their identities and the ways in which those identities are developed and nourished. Decisions based on best interests regarding which parent retains custody, and to what extent that parent directs the religious upbringing of the child and shares that responsibility with the access parent, have ongoing implications for the child's sense of identity. Further, decisions as to what constitutes harm for the purposes of denying or limiting custody or access, indicate the court's willingness to interfere to protect the integrity of children. It should be noted here that my focus on religion in custody decisionmaking is not meant to imply that a religious identity for children is necessary or desirable. But children's affiliation through parents to a religious community does implicate identity formation parallel to, yet distinct from, affiliation to communities based on culture, ethnicity, language, or race.

Religious communities themselves also have a stake in a court's approach to religion in custody decisionmaking. While not directly represented as parties in court, communities may express their interests through a parent or through expert evidence related to membership of the child in the community. Whether modern, traditional, integrated or insular, religious communities generally see the membership of the next generation as crucial. Children therefore take on great significance, although some communities take a more active role in “fighting” for “their” children. Even for liberal religions or branches of a religion, the acknowledgment of “losing” on intermarriage is counterbalanced by a desire to “win” with respect to the children of those partnerships.⁶ From the perspective of insular communities, for whom religion is a complete way of life, it may be important not only to involve children in the practices of the religion, but also to ward off interference from the

⁶ See, for example, Rabbi S. Seltzer, *Intermarriage, Divorce and the Jewish Status of Children*, (New York: Horizon Institute of the Union of American Hebrew Congregations, August 1981) (context of North American Reform Jews); and Chief Rabbi J. Sacks, *Will We Have Jewish Grandchildren?: Jewish Continuity and How To Achieve It* (London, U.K.: Valentine Mitchell, 1994) (English Jewish community as the context).

outside, secular society (which may be represented by a non- or differently-believing spouse).

Finally, the case of religion in custody decisionmaking carries significance from the perspective of a liberal and diverse state.⁷ Most obviously, the state bears responsibility for the protection of children from serious harm and, in fulfilling that role in the context of custody, may indicate what practices it finds unacceptable. The state's respect for religious freedom, and its recognition of diverse normative ways of life for both children and adults, are also at stake here.⁸ The approach taken by courts in custody cases involving religion may shed light on the extent to which parallel "jurisdictions" over family life, based on religious norms, operate within the state. The state's general willingness and ability to define terms of custody and access in the best interests of the child are thrown into question when that may mean interfering with religious doctrine and practice.

Custody decisions involving religion are clearly case- and situation-specific, and seem to defy general guidelines or legal tests. Rather than attempt to offer such guidelines, this paper examines the broad overlapping themes suggested by the interests outlined above, with an emphasis on Canada. The Supreme Court of Canada recently handed down judgments relating to religion and custody,⁹ and underlying the arguments addressed by the Court is the broad and, as yet largely untouched, question of the impact of the *Canadian Charter of Rights and Freedoms*¹⁰ on the family. In treating the issues raised by the appeals, the Court had the opportunity to offer guidance not only on the application of the "best interests test" in custody matters, but also on the

⁷ See S. Van Praagh, "La diversité des enfants: un défi pour l'État pluraliste" (1994) 4 *Revue Lekton* 155 [hereinafter "La diversité"], for a discussion of the challenges faced by the liberal pluralist state, and embodied in religion and custody disputes.

⁸ I acknowledge the conservative or fundamentalist agenda attached in contemporary North American politics to religion, the family, and the combination of the two. I also recognize recent attempts to "reclaim" that ground from a liberal perspective, see S.L. Carter, Comment: "The Resurrection of Religious Freedom?" (1993) 107 *Harv. L. Rev.* 118; and S.L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Anchor Books, 1994) [hereinafter *Culture of Disbelief*]. While I do not intend to enter the fray as such, I do wish to resist explicitly the conservative agenda at the same time that I find it important to realize the significance of religion and religious norms for many individuals and families.

⁹ *Young v. Young* [1993] 4 S.C.R. 3 [hereinafter *Young*], aff'g (1990), 50 B.C.L.R. (2d) 1 (C.A.), rev'g (1989), 2 R.F.L. (2d) 193 (B.C.S.C.); and *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 [hereinafter *P.(D.)*], aff'g *Droit de la Famille—1150* [1991] R.J.Q. 306 (C.A.) [hereinafter *Famille—1150*], aff'g [1988] R.D.F. 40 (Que. C.S.).

¹⁰ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

extent of and limitations on the *Charter's* guarantee of freedom of religion. Further, it had before it an invitation to comment on, or at least demonstrate an appreciation of, the identities of children in a multicultural country.

The challenge in Canada stemmed from two similar cases, *Young*¹¹ from British Columbia, and *P.(D.)*¹² from Quebec, in which the trial judge curtailed the extent to which a Jehovah's Witness father could share his religion during periods of access.¹³ The restrictions imposed ranged from not being allowed to discuss his religious beliefs to being prohibited from taking children to meetings or door-to-door during proselytization efforts. On appeal, the British Columbia Court of Appeal applied the *Charter* and removed the restrictions as unjustified violations of the father's freedom of religion; the Quebec Court of Appeal upheld the restrictions as justified on the basis of the negative impact of the father's actions on the child.¹⁴ The Supreme Court of Canada confirmed the contradictory decisions of both courts of appeal. In a set of somewhat confused opinions, it left unresolved questions and concerns about best interests, the interaction of the *Charter* and the family, and the significance of group affiliation in decisionmaking that affects the lives of parents and children. The contours of the Supreme

¹¹ *Supra* note 9.

¹² *Supra* note 9. *Droit de la Famille—1150* was the style of cause of the case on appeal to the Supreme Court of Canada, in keeping with the fact that family law cases in Quebec are referred to by number. The reports of the Supreme Court decision refer to the initials of the parties.

¹³ The Jehovah's Witnesses recently took centre stage in challenging the ways in which religion has played a role in custody decisionmaking. They were instrumental in bringing appeals to the Supreme Court of Canada, arguing that the best interests test masks the personal bias of judges and operates to the disadvantage of non-mainstream religions and, further, that any directions by a trial judge restricting a parent with visitation rights from sharing his religious beliefs and practices with his child should be struck down as a violation of religious freedom. In the same year, the European Court of Human Rights ruled that an Austrian mother, refused custody by a domestic court on the basis of her beliefs and practices as a Jehovah's Witness, had been denied her right to respect for family life guaranteed by the European Convention on Human Rights: *Hoffman v. Austria* (1993), E.H.R.R. 293 [hereinafter *Hoffman*]. While the analysis here does not extend explicitly to European Convention law, the case indicates the need for consideration of the issues in multiple jurisdictions. The central role of the Jehovah's Witnesses in religion and family matters continued in Canada, albeit in the context of child protection. See *B.(R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315.

¹⁴ This divergence mirrors the general split among provincial courts of appeal in their approaches to the impact of freedom of religion, guaranteed by the *Charter*, on custody decisions involving religious beliefs and practices. See J.T. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992) at 7-49 [hereinafter *Religion and Culture*]. The divergence can also be partly explained by the husband's undertaking, during the trial in *Young*, not to proselytize, so the court did not feel it necessary to impose this condition. See part III(B)(2), below.

Court of Canada cases¹⁵ provide a contextual background against which to articulate the issues raised by the case of religion in custody decisionmaking.

At a time when Canadian constitutional law is introducing itself on a number of fronts to a previously “*Charter*-free family,” it is helpful to consider to some extent both an analysis that underlines the constitutionally entrenched rights of the adults involved and one that does not provide such explicit guarantees. In the analysis to follow, I therefore use examples from the United States and England, as well as Canada, partly to illustrate how courts approach the issues in countries with similar custody law, but with very different religion-state structures and rights-guaranteeing mechanisms. I will not present a complete overview or comparison of the law in the three countries,¹⁶ but rather

¹⁵ For comments written specifically on the decisions, see M.J. Bailey, “Custody, Access, and Religion: A Comment on *Young v. Young and D.P. v. C.S.*” (1994) 11 C.F.L.Q. 319; and W.G. How, Case Comment “*Young v. Young and D.P. v. C.S.*: Custody and Access—The Supreme Court Compounds Confusion” (1994) 11 C.F.L.Q. 109.

¹⁶ For a comparative analysis of decisions and approaches in Canada, Great Britain, Australia, the United States, France and Italy, see D.L. Goldberg & C. Tempesta, *The Impact of Religion on Custody and Access Disputes: A Comparative Analysis* (Toronto: Office of the Official Guardian, Ministry of the Attorney General of Ontario, 1994).

In the United States see, for example, D.L. Beschle, “God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings” (1989) 58 Fordham L. Rev. 383; Note, “The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation” (1984) 82 Mich. L. Rev. 1702 [hereinafter “Establishment Clause”]; J.M. Fitzgerald, “An Overview of Religious Considerations in Child Custody Disputes” (1989) 32 Catholic Lawyer 129; R.A. White, Note, “Divorce: Restricting Religious Activity During Visitation” (1985) 38 Okla. L. Rev. 284; R.C. Mangrum, “Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases” (1981) 15 Creighton L. Rev. 25; J.C. Paul, “You Get the House. I Get the Car. You Get the Kids. I Get Their Souls—The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents” (1989) 138 U. Pa. L. Rev. 583; S.M. Zarowny, Note “The Religious Upbringing of Children After Divorce” (1980) 56 Notre Dame Lawyer 160; and “Religion and Custody,” *supra* note 5.

In Canada see, for example, *Religion and Culture supra* note 14; J. Mucci, “The Effect of Religious Beliefs in Child Custody Disputes” (1986) 5 Can. J. Fam. L. 353; F. Zemans, “Cultural Diversity in Custody Disputes” in R. Abella & C. L’Heureux-Dubé, eds., *Family Law, Dimensions of Justice* (Toronto: Butterworths, 1983) 137; V. Toselli, “Religion in Custody Disputes” (1990) 25 R.F.L. (3d) 261; S.J. Toope, “Riding the Fences: Courts, Charter Rights and Family Law” (1991), 9 Can. J. Fam. L. 55 [hereinafter “Riding the Fences”]; S. Toope, Book Review of *Religion and Culture in Canadian Family Law* by J.T. Syrtash (1993) 71 Can. Bar. Rev. 769; S. Van Praagh, “Bringing the *Charter* Home,” Book Review of *Religion and Culture in Canadian Family Law* by J.T. Syrtash (1993) 38 McGill L.J. 233 [hereinafter “Bringing the *Charter* Home”]; and C. Davies, “Racial and Cultural Issues in Custody Matters” (1994) 10 C.F.L.Q. 1 [hereinafter “Racial and Cultural Issues”].

In England see, for example, B. Walsh, “Religious Considerations in Custody Disputes” [1988] 18 Fam. L. 198; C. Hamilton, *Children and Religion* (London: Sweet & Maxwell, 1994). See more generally B. Hoggett & D. Pearl, *The Family, Law and Society: Cases and Materials* (London: Butterworths, 1991) c. 10; and S. Cretney & J. Masson, *Principles of Family Law* (London: Sweet &

will draw on examples to illustrate general observations and concerns. The three countries share basic tenets about the responsibility of secular courts in determining the best interests of children without favouring one set of religious beliefs and practices over another. However, when the analysis shifts beyond the allocation of custody to the interplay of conflicting beliefs and practices in the life of the child, the language used to describe the interests involved differs as does the approach taken by the courts.

In Part II of this article, I introduce the general issues surrounding the consideration and treatment of religion in the allocation and scope of custody. These include the entanglement and possible bias implied by a court's involvement in questions of religious belief and practice, and the dynamics of gender in the resolution of claims regarding religious upbringing of children. I then examine the two predominant characterizations of the issue of religion in custody decisionmaking and the arguments and problems related to each. As a family law issue, a strong claim can be made on behalf of the custodial parent and his or her control over religious upbringing; at the same time, the malleability of the best interests test is brought to light. As an issue of constitutional law, on the other hand, a claim of some authority over the upbringing of children can be made on behalf of an access parent, understood to be an individual holder of freedom of religion. I suggest that neither approach works in the way it appears to initially, and refuse to make a simple choice between the two.

In Part III, I consider alternative frameworks for approaching religion and custody. The recognition of pluralism and of the reality and principle of multiculturalism, leads to a consideration of the issue as one of child membership in coexisting religious communities. Finally, relevant claims can be made in the form of children's rights, whether understood to encourage participation in decisionmaking or to inform children's religious affiliations. I attempt to underline the problems and potential associated with each characterization in order to investigate more fruitfully the "best interests" analysis offered by the Supreme Court of Canada.

Elements of the four frameworks derived from family law, constitutional freedoms, coexisting communities, and children's rights, inform an analysis based on children's identities and integrity and the interaction between the two. As sketched in Part IV, the affiliations of children must be taken seriously at the same time that the protection of children—whether physical, emotional or psychological—remains crucial. This analysis may offer guidelines to courts in their exercise of

responsibility in cases involving religion and custody disputes, and, more generally, in cases involving the family and the *Charter*. I conclude by drawing attention to the fact that children of differently believing parents can help to show the interplay among groups in a diverse state, as well as the potential for individuals to live with overlapping attachments to both other communities and other people.

II. CHARACTERIZING THE CASE OF RELIGION AND CUSTODY

A. *Religion in Judicial Decisionmaking*

Courts may consider the religious beliefs and practices of parents in a custody dispute for one of two general reasons: first, the secular effects of those beliefs and practices may be factored into the best interests equation in order to determine which parent retains custody of the child; and second, they may be referred to in order to impose limits on the behaviour of the non-custodial parent during access, or indeed, on the custodial parent. It is important to note that, in both of these areas of decisionmaking, courts do not understand themselves to judge the content and value of particular religious beliefs. Whether in the United States, England, or Canada, directly delving into theology and doctrine in order to assess the merits of a given set of beliefs and practices is strictly beyond the jurisdiction of secular courts.¹⁷ This is not to say, however, that courts refrain from examining religious practices in

¹⁷ By singling out these three countries, I am not, of course, suggesting that these are the only jurisdictions in which this is the case. In England, see *In re J.M. Carroll (An Infant)*[1931] 1 K.B. 317 at 336 (C.A.), where Scrutton L.J. states “It is, I hope, unnecessary to say that the court is perfectly impartial in matters of religion for the reason that it has as a court no evidence, no knowledge, no views as to the respective merits of religious views of various denominations.” In Canada, see *Chaput v. Romain*, [1955] S.C.R. 834, for a similar statement. American jurisprudence is replete with examples of the same idea, anchored by the First Amendment’s anti-establishment clause. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); and *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 U.S. 601 (1969). In a more recent custody context, see *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) [hereinafter *Zummo*], in which the court provides an overview of the attitude and responsibility of American courts with respect to religious questions, especially in the context of the family.

While the explicit assessment of religious doctrine may be off-limits, this does not mean that courts have not expressed clear evaluations of particular religious sects, cults, beliefs, and practices. Indeed, particularly in these and other Western societies, law has played a role in reinforcing what might be seen as a hierarchy of religions—ranging from organized “Judeo-Christian” belief systems, to “new-age” cults.

the guise of the behaviour of the individual parent. Neither is it to say that a judgment rendered on the basis of the child's best interests does not carry with it an implied assessment of the religion in question.

Here, then, we find one of the major concerns of religious individuals and communities, and of commentators worried about the bias of trial judges and the entanglement of secular law and religious doctrine.¹⁸ The context of divorce hands courts the opportunity to "save" children from what judges may deem a fanatic, exclusionary, far-from-mainstream, religious upbringing, or, at the other extreme, from a non-religious and thus deemed amoral or immoral upbringing.¹⁹ The fact that the respect accorded trial judges is especially great in custody disputes where the particular facts are extremely significant, and therefore that appeals are rare, contributes to the fear that courts may exercise their power in a discriminatory and impermissibly interventionist manner.

1. Allocating and setting the scope of custody

With respect to the court's decision as to which parent retains custody,²⁰ the question arises as to whether it is ever permissible to

¹⁸ Good examples of commentators who focus on this concern include Syrtash in *Religion and Culture*, *supra* note 14; and Mangrum, *supra* note 16.

¹⁹ As Bernadette Walsh points out, *supra* note 16 at 198, custody is not any longer so much about the *soul* of a child as it is about the child's *body* [emphasis added].

²⁰ For the purposes of this discussion, I assume a post-divorce arrangement whereby one parent is granted custody of the children, while the other may have access to the children, according to court-specified terms. It must be acknowledged, of course, that this is neither the only possible arrangement, nor the only type of arrangement ordered by courts. For example, joint custody may be ordered, although joint *legal* custody, as opposed to joint *physical* custody, looks very much like the arrangement described above. See A. Harvison Young, "Joint Custody as Norm: Solomon Revisited" (1994) 32 Osgoode Hall L.J. 785. Further, the terms custody and access are far from universal—for example, in England, both parents (and potentially others) may have parental responsibility, while only one has a "residence order." The *Civil Code of Quebec*(CCQ) specifies that parents have parental authority regardless of whether children physically live with them or not (see arts. 513, 598, and 605 CCQ and the following paragraphs of this footnote). However, the reality for most post-divorce families is that children are in the physical custody of one parent. See E.E. Maccoby & R.H. Mnookin, *Dividing the Child*(Cambridge, Mass.: Harvard University Press, 1994).

A note about the law and legal terms in Quebec is warranted here, particularly in light of the fact that one of the appeals to the Supreme Court of Canada comes from Quebec. What is known as legal custody in common law jurisdictions is referred to as parental authority in the civil law. Parental authority is exercised jointly by both parents (art. 600 CCQ) and consists of the rights and duties of custody, supervision, education and maintenance of their children (art. 599 CCQ). See C. Bernard, R. Ward & B.M. Knoppers, "'Best Interests' of the Child Exposed: A Portrait of Québec

consider parental behaviour derived from religious belief in the determination of a child's best interests. While an overt preference for religion over atheism is a thing of the past,²¹ even American courts, explicitly constrained by the Establishment Clause of the First Amendment,²² include the impact of parental religious belief on children's spiritual well-being in the best interests matrix. It is significant that, while earlier in this century the worry was that courts were overly supportive of religious upbringing in general, this has shifted to a critique based on the court's comparison of religious practices and its negative approach to religious upbringing in small, insulated, extremist communities.²³ The threshold, however, for denying custody as a direct

When custody is awarded to one parent, the content of the rights of the non-custodial parent is automatically affected. A person with parental authority who loses the right of custody is not deprived of all the attributes of parental authority: *C.(G.) v. V.-F.(T.)*, [1978] 2 S.C.R. 244. However, the custodial parent has the right to live with, to supervise, and to make daily decisions for the child, which means that some decisions will be made by the custodial parent alone. Thus, while the non-custodial parent continues to be the holder of parental authority, she ceases to participate fully in its exercise (*Droit de la famille—301* [1988] R.J.Q. 17 at 21 (C.A.)). The non-custodial parent continues to exercise other rights over the child which include the right to make decisions for the child when the child is with her and the right to be consulted about decisions made by the custodial parent, such as those concerning education and medical treatment (art. 605 CCO): see M. Pratte, "La garde conjointe des enfants de familles désunies" (1988) 19 R.G.D. 525 at 565. The non-custodial parent is also permitted to supervise the custodial parent's decisions with regard to the child. This is intended to serve as compensation for the loss of custody. If the non-custodial parent disagrees with a decision made by the custodial parent, she may refer the matter to the court, which will decide the matter in the best interests of the child (art. 604 CCO): see S. Guillet, "Les conventions de rupture du lien matrimonial et la garde des enfants" (1992) 2 C.P. du N. 193 at 206; and *Droit de la Famille—1286* [1989] R.D.F. 657 (Que. C.S.).

²¹ In the adoption context, especially, it was at one time urged upon would-be adoptive parents that they profess some religious faith. See L. Pfeffer, *God, Caesar and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon, 1975) c. 3 [hereinafter *God and Constitution*]. See generally M.G. Paulsen, "Constitutional Problems of Utilizing a Religious Factor in Adoptions and Placements of Children" in D.H. Oaks, ed., *The Wall Between Church and State* (Chicago: University of Chicago Press, 1963) 117. In custody cases, a "moral" upbringing is still generally considered in the child's best interests and it has been suggested that religion may be considered relevant to moral welfare only if broadly defined. See Beschle, *supra* note 16 at 417-19.

²² U.S. Const. amend I states in part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." For an articulation of concerns about considering religion in custody disputes in light of the Establishment Clause, see Note, "The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation" (1984) 82 Mich. L. Rev. 1702.

²³ In Canada, see *Religion and Culture* *supra* note 14, c. 1, which provides an overview of traditional approaches and recent changes with respect to the treatment of religion in Canadian custody disputes. Syrtash summarizes the chapter, at 87, with the observation that courts display a "prejudice against those religions that encompass an entire way of life." See also the discussion in "Riding the Fences," *supra* note 16 at 80-83, of *Droit de la famille—239* [1985] C.S. 1106, a case in which custody was changed to the more "tolerant" father because of the mother's new adherence to a rigorous, religious life.

However, in "Religion and Custody," *supra* note 5, Schneider points out, at 891-92, that in the

result of a parent's religious practices and teachings is generally high in the sense that substantial harm or threat of harm to the child must be present.²⁴

Arguments that religion not be taken into account in the court's consideration of best interests when choosing a custodial parent generally have not been successful. Indeed, the court's task of considering all factors relevant to the children involved seems to preclude such arguments. We are left then with a situation whereby judges may make decisions regarding the harmful nature of parental religious beliefs and practices, and where the exercise of such discretion is not characterized as impermissible preference.²⁵

The question as to whether and to what extent courts may dictate the scope and content of custody and access in light of parental religious practices poses additional difficulties. Traditionally, the custodial parent has had control over the religious upbringing and education of the child. The controversy arises with respect to religion when further explicit limitations are placed on the access parent's practices, on the basis of the child's best interests.²⁶ Courts focus on the conflict between the particular parents in the custody cases before them rather than on any

United States, "[W]e ought not over-dramatize the danger that judges may lack sympathy for the heterodox religions these cases involve. ... [T]here is much more substantial evidence [in U.S. appellate court decisions] that courts have been aware of just that danger and have leaned over backwards to avoid it."

²⁴ In the United States, the often-cited cases of *Quinerv. Quiner*, 59 Cal. Rptr. 503 (1967 Ct. App.) [hereinafter *Quiner*]; and *Burnham v. Burnham*, 304 N.W.2d 58 (Neb. 1981) [hereinafter *Burnham*], give a general picture of the "tolerance" of courts and indicate, with relatively dramatic fact scenarios, different perspectives on the impact of parental religion on children. See the discussion in Part II(B)(2), below. In England, the *Children Act 1989*(U.K.), 1989, c. 41, setting out the factors to be considered with respect to best interests, does not mention religion per se but case law suggests that it may be included. See, for example, *Re B. and G. (Minors)* [1985] 1 F.L.R. 134 (Fam. Div.) [hereinafter *Re B & G*]; and *Re T (Minors)* [1981] 2 F.L.R. 239 (C.A.). In Canada, the effect of religious beliefs and practices may be considered in deciding custody. The degree of harm required for denying or switching custody was the focus of dispute prior to the Supreme Court cases, and arguably remains so. See, for example, "Riding the Fences," *supra* note 16 at 80-85; Mucci, *supra* note 16; and *Religion and Culture* *supra* note 14 at 1-49 (overview of Canadian case law).

²⁵ At least one commentator suggests that preference may be acceptable but that a pretense of neutrality with respect to modes of childrearing is not: Mucci, *supra* note 16. The articulation of reasons for choices may indeed be desirable but explicit preference of one religion over another by courts is highly problematic and, moreover, likely unconstitutional in the Canadian context.

²⁶ A variety of commentators focus on this type of situation: see Paul, *supra* note 16; *Religion and Culture*, *supra* note 14; and "Riding the Fences," *supra* note 16. This is, of course, exemplified by the recent Supreme Court of Canada cases. The religious significance often attached to one day or another of the *weekend* means that the problem of limitations on access (which often takes place on weekends) is exacerbated. In addition, school vacation periods often include religious holidays and are often spent with the access parent. See Beschle, *supra* note 16 at 403.

general conflict between religious doctrines *per se*.

Beyond expressing general concern over the impact of different parental teachings or perspectives, courts may be confronted with situations where one parent tells the children, based on his or her religious beliefs, that the other, non-believing parent is evil or going straight to hell or seriously misguided.²⁷ Courts may read this as deliberately damaging to a relationship, the preservation of which is in the child's best interests, and will attempt to limit such behaviour accordingly. Alternatively, courts may find the religious practices of one parent harmful in themselves and may order restrictions on the children's involvement in those practices, without reference to conflict or tension between the parents.²⁸ The general issue to be resolved in all these cases (which include *Young* and *P.(D.)*) is whether and on what grounds courts may make orders setting terms of custody and access with direct reference to religious practice.

2. The gender dimension

In order to fill out this preliminary sketch of the general issues invoked by religion and custody, an acknowledgement of the gender dynamics at play is required. Although ignored to a large extent in the literature focusing primarily on religion in custody decisionmaking, the way in which gender plays a general role in custody law clearly intersects with the issues raised in this specific context.²⁹ In the case of allocation of custody, a major concern from a feminist perspective stems from the possibility that the impact of non-mainstream or "eccentric"/"strange"/"different" religious beliefs and practices may be exaggerated in order to deny custody to an otherwise capable mother

²⁷ See Toselli, *supra* note 16 at 271 and the cases to which he refers: *Sullivan v. Fox* (1984), 38 R.F.L. (2d) 293 (P.E.I.S.C.) (importance of open communication between parents); and *Gunn v. Gunn* (1975), 24 R.F.L. 182 (P.E.I.S.C.) (father's adverse comments about mother's "ill repute"). Such behaviour is, of course, not specific to religious matters.

²⁸ Toselli distinguishes between "direct" harm, usually confined to cases involving "fringe religions" in which specific religious practices are themselves deemed harmful, and "indirect" harm which is deemed to arise from the clash of religious beliefs.

²⁹ For examples of the literature that investigates and illustrates the gender bias in custody and its negative impact on mothers see M.A. Fineman, *The Illusion of Equality—The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991) [hereinafter *Illusion of Equality*]; C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (New York: Routledge, 1990); P. Chesler, *Mothers on Trial: The Battle for Children and Custody* (New York: McGraw-Hill, 1985); and M. Minow, "Forming Underneath Everything That Grows: Toward a History of Family Law" [1985] *Wisc. L. Rev.* 1803 [hereinafter "History of Family Law"].

who, indeed, may have been primarily responsible for childcare during the marriage. Essentially, this concern forces the realization that religion, if included in the tallying-up of factors relevant to the best interests of children, may be used (like other factors) to question custodial ability and responsibility. This is a concern unspecific to the issue of religion, but the contours of religious freedom may provide specialized arguments on behalf of a mother claiming custody.³⁰

It is with respect to the case of setting the scope of custody and access, however, that the dimension of gender deserves careful consideration. It appears that many or most of the cases in which religion is raised as a relevant factor are those where a father attempts to expand his rights to access. If a court understands recognition of the father's freedom of religion to preclude any limits on his sharing of religious practices with his children, significant potential exists for restrictions on the custodial mother's lifestyle, way of caring for her children, and indeed her own freedom. It is possible that the gender dimension of this problem is simply a product of the fact that, in most cases, it is mothers who are the custodial parents after divorce. On the other hand, the willingness to emphasize a father's right to religious freedom at the expense of a custodial mother's authority justifies special attention from a feminist perspective.³¹ In the discussion to follow, the gender implications of an analysis of religion and custody are acknowledged;³² however, I attempt to broaden the spectrum of issues at

³⁰ For example, the *Hoffman* case, *supra* note 13, recognizes the violation of the rights of a Jehovah's Witness mother denied custody on the basis of her religion.

³¹ See "Bringing the *Charter* Home," *supra* note 16 at 237-239, where I voice these concerns in reviewing *Religion and Culture* *supra* note 14; and the author's passing recognition, at 68, that those "concerned with women's issues" may be alarmed at the erosion of custodial rights (which he sees as implicit in the protection of religious freedom and multiculturalism). In Canada, where the Supreme Court appeals were both cases of fathers demanding, on the basis of freedom of religion, an end to restrictions on their behaviour with their children during periods of access, a gender dimension might well have been expected in the Court's response. Indeed, Justice L'Heureux-Dubé does engage in an in-depth discussion of the reality of custody and the fact that women are disproportionately responsible for the actual care for and control over children, and she was especially sensitive to the resulting impact that religious freedom claims may have on custodial mothers: *Young* *supra* note 9 at 49-52.

³² Susan Boyd presented a paper at the annual meeting of the Canadian Law and Society Association in June 1993, in Ottawa, in which she pointed to cases of religion in custody and access as examples of situations in which the "best interests" of children are being used to further "fathers' rights" at the expense of custodial mothers. The arguments she raised in this presentation are the substance of an article entitled "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) 5 Soc. & Legal Stud. 495. Her work in the area of religion and custody thus has explicit links with her past work. See, for example, S.B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990) 7 C.F.L.Q. 1 [hereinafter "Potentialities"]; and "Some

stake and, in doing so, to consider seriously claims of freedom of religion in a context involving children of interfaith partnerships. The gender dimension of the issues does, however, highlight the fact that it is usually *custody* at stake when *mothers* claim religious freedom, while *participation* through access is more often at stake when that freedom is argued by *fathers*.

B. *Family Law vs. Constitutional Law*

Family law and constitutional law offer the two predominant models for approaching the question of religion in custody decisionmaking and, indeed, the two models could be seen battling each other before the Supreme Court of Canada. Here, I attempt to examine the fullest claims that can be made by the parties in each context, the particular problems raised, and the implications of adopting either approach in its entirety. At first glance it might seem that disputes over religion in custody and access are simplified if framed as an issue of family law. Without the added complication of constitutionally guaranteed parental freedoms, the best interests of the child retain top priority and can be determined in a fairly straightforward manner. A second glance uncovers the misleading nature of such assumptions. While it is true that, in Canada, religion and culture in custody decisionmaking have received renewed attention as a result of speculation on the *Charter's* application to family law in general, the *Charter* merely complicates the analysis, rather than creating some new issue. Indeed, case law and commentary in both England and pre-*Charter* Canada indicate that approaching the issues in family law is no less sensitive than is the case in the United States, where they have long been linked to constitutional concerns.

1. An issue of family law: best interests and the scope of parental control

As already noted, the two major questions associated with religion and custody decisionmaking are, first, the appropriate standard for allocating custody, and, second, the scope of custodial authority over the upbringing of children. With respect to the first, the example of

Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79. See also Bailey, *supra* note 15 at 336-41, where Justice L'Heureux-Dubé's treatment of this issue in *Young* is summarized.

religion underlines the difficulty with a supposedly “objective” best interests of children test.³³ The vague, indeterminate nature of that test,³⁴ the interplay of the judge’s notions of childrearing with the evidence presented as to the lifestyles of both parents, the devaluation of pre-divorce care arrangements³⁵ and the increasing reliance on highly manipulable and value-laden social sciences and psychological data and opinions,³⁶ are not only present, but exaggerated in the context of religion.³⁷

With respect to the second question, that of the scope of custody, it is traditionally the parent with custody who controls major aspects of the child’s upbringing, including religious education and training. It is this parent who has general authority over which school the children attend and which extra-curricular activities they engage in. Further, the law has contemplated the custodial parent passing on religious beliefs to children and involving them in religious practices, and this has been

³³ Various alternatives to the best interests test have been discussed in the literature, ranging from a primary caregiver principle to presumptive joint custody, to the replication of a pre-divorce pattern of sharing responsibility. See generally Smart & Sevenhuijsen, eds., *supra* note 29; Maccoby & Mnookin, *supra* note 20; *Illusion of Equality*, *supra* note 29; and “Potentialities,” *supra* note 32. For the purposes of this discussion, I assume that the “best interests” test is here to stay for the immediate future.

³⁴ See, for example, R.H. Mnookin, “Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy” (1975) 39 *Law & Contemp. Probs.* 226.

³⁵ See, for example, E. Scott, “Pluralism, Parental Preference and Child Custody” (1992) 80 *Cal. L. Rev.* 615.

³⁶ See, for example, M.A. Fineman, “Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking” (1988) 101 *Harv. L. Rev.* 727; and *Illusion of Equality* *supra* note 29, c. 7.

³⁷ English courts, for example, have switched custody from one parent to another based on the “handicapping” aspects of an upbringing within the Exclusive Brethren community (*Hewison v. Hewison* (1977) 7 *Fam. L.* 207 (C.A.)) on a custodial mother’s isolation of the child from the father and other social life in general (*T. v. T.* (1974) 4 *Fam. L.* 190 (C.A.)), and on the “immoral, socially obnoxious, corrupt, sinister, dangerous” beliefs and practices of the Church of Scientology to which the previously custodial father belonged (*Re B & G* *supra* note 24). On the other hand, a “moderate” Jehovah’s Witness mother, willing to let her son spend Christmas with his father, was allowed to retain custody (*Re H. (A Minor)* [1980] 2 *F.L.R.* 253 (Fam. Div.)). Such determinations are justified by the court’s consideration of the best interests of children and its responsibility to shield them from harm and yet they indicate the degree of discretionary power that courts hold and exercise (see the list of factors in section 1(3) of the *Children Act 1989* *supra* note 24). The rejection of “parental rights” in favour of “best interests,” marked by the landmark case of *J. v. C.*, [1970] *A.C.* 668 (H.L.) (in which poor, Spanish, Catholic parents lost their child to better-off, English, Anglican foster parents) has not brought predictability. In light of evidence with respect to religious beliefs and practices, the strongest claim a parent may make for custody is one indicating suitability regardless of religion and, further, the non-harmful nature of the specific mode of childrearing under scrutiny.

considered to be in the interests of the spiritual well-being of those children.³⁸

Such an understanding of the scope of custody indicates that the parent without custody lacks authority over religious upbringing and therefore that his relationship with the children is limited in this significant way. Further, any conflict between the parents over the religious development and identification of the children would be resolved in favour of the custodial parent, so as to ensure some stability in post-divorce day-to-day life. Indeed, such restrictions on the non-custodial parent's control generally have been deemed to be in the best interests of children.³⁹ Thus, from the perspective of the custodial parent who wants to avoid interference and disruption caused by the other parent's desire to pass on religious beliefs and practices, an approach emphasizing the traditional definition of custody in family law would seem advisable.

Characterizing the issue as one of family law and turning to dominant family law principles for answers carries both advantages and drawbacks, however, even for the custodial parent. Contemporary trends in custody decisionmaking focus on the benefits to children of maintaining a strong relationship with both parents after divorce.⁴⁰ While this sentiment has resulted in an increase in ordered joint custody arrangements in some jurisdictions,⁴¹ it is apparent even in situations where parents continue to be allocated custodial and visitation roles. Labelled, and welcomed, as an "erosion" of custody by some

³⁸ A case reported by the English media seems to contradict this general framework. An unmarried Muslim father succeeded in bringing a temporary injunction against the christening of his five-month old daughter. The parents had separated and the Anglican mother had taken responsibility for the care and upbringing of the child: "Court to Rule on Baptism" *The [London]Independent* (24 July 1993) 6. The suit was later dropped by the father "after taking legal advice." See "Mother Wins Baptism Battle" *The [London] Daily Mail* (19 April 1994) 24.

³⁹ Syrtash in *Religion and Culture supra* note 14 at 7-9, describes this as the "traditional" approach to the question of the scope of access.

⁴⁰ See, for example, J.S. Wallerstein & T.B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (London: Grant McIntyre 1980), on the benefits to children of a post-divorce relationship with fathers. See also B.M. Hoggett & D.S. Pearl, *The Family Law and Society* 3d ed. (London: Butterworths, 1991) c. 12; J.B. Kelly, "Children's Post-Divorce Adjustment—Effects of Conflict, Parent Adjustment and Custody Arrangement" (1991) 21 Fam. L. 52; A. Bainham, "Legislation: The Privatisation of the Public Interest in Children" (1990) 53 Mod. L. Rev. 206 at 217-20; E. Walsh, "The Wallerstein Experience" (1991) 21 Fam. L. 49; M.P.M. Richards, "Post Divorce Arrangements for Children: A Psychological Perspective" (1982) J. Soc. Welfare L. 133; and S. Maidment, "Access Conditions in Custody Orders" (1975) 2 Brit. J. L. & Soc'y 182.

⁴¹ See, for example, Harvison Young, *supra* note 20.

commentators,⁴² the phenomenon challenges long-held understandings of the scope of custody and may indeed lead to new restrictions on the custodial parent, again all in the best interests of children. That is, if each parent is seen as an individual whose two-way relationship with each child may begin pre-divorce but continues as fully as possible post-divorce, then it becomes clear that the full exercise of custodial authority and responsibility is laid open to challenge.⁴³

In keeping with the *Children Act 1989*, English law now recognizes the full exercise of parental responsibility and authority by each adult holding such responsibility, whether during custody or visitation.⁴⁴ This approach may be somewhat idealistic or impractical in that it assumes a great deal as to the parents' ability to agree to and create a post-divorce regimen in the interests of their children, but, in theory, it contemplates an "equal" holding of responsibility and authority. Rather than always working to the benefit of the custodial parent, therefore, the dependency of the family law model on a flexible "best interests of the child" standard may instead signal, on the one hand, an increase in judicial interference with parental religious practice in the context of custody allocation, and, on the other, a narrowing of the scope of custody itself.⁴⁵ It would seem that, if the access parent is understood as having full parental responsibility and authority during periods of access (derived from the best interests of the child), the removal of any restrictions on that parent is called for. In Canada, the legislative provision motivated by similar assumptions is section 16(10) of the *Divorce Act*⁴⁶ which, completely apart from *Charter* considerations, mandates that a court, in making an order with respect

⁴² *Religion and Culture* *supra* note 14 at 68-72.

⁴³ See A. Bainham, Case Comment: "Religion, Human Rights and the Fitness of Parents" (1994) 53 Camb. L.J. 39. Bainham suggests that England may now, under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* November 1950, Eur. T.S. No. 5 [hereinafter *ECHR*], turn to the language of "rights" observable in post-*Charter* Canada.

⁴⁴ See the *Children Act 1989*, *supra* note 24, ss. 2(5)-(11). Note that the terms of custody and access are no longer used in England; rather an adult may have a residence order in her favour (similar to custody, whereby the child lives with that person), or may have a contact order (similar to access). Terms of the post-divorce arrangement may be set by prohibited steps or specific issues orders (s. 8 of the *Act*).

⁴⁵ Interestingly, *Hoffman*, *supra* note 13, the European Court of Human Rights decision, suggests that, even in England, a religious parent may resort to a "human rights" argument with respect to custody. Andrew Bainham sees the case as opening the door in England to a clash of rights within the family: *supra* note 43. This shows that England, like Canada, is beginning to struggle with combining the family law and constitutional rights approaches.

⁴⁶ R.S.C. 1985 (2d Supp.), c. 3.

to custody or access

shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.⁴⁷

When parents disagree over religion, or when one parent objects to the involvement of the children in the practices of the other parent, the principle of maximum contact would seem to welcome the children's exposure to two sets of beliefs and practices, and, further, a non-exclusionary religious upbringing.⁴⁸

Thus, even if framed as a question of family law—a characterization that initially appears to operate to the benefit of the custodial mother—the flexible and moving standard of best interests may operate to the detriment of stability and custodial authority.⁴⁹ This twist in the expected consequences of a family law approach explains why the Supreme Court of Canada judgments of L'Heureux-Dubé J. and McLachlin J. in *Young* and *P. (D.)* can both be based on “best interests” at the same time that they differ in result. The reasons given by L'Heureux-Dubé J. for upholding restrictions on the access parents adopt the stronger family law characterization of the issues raised. Yet it is possible, as illustrated by McLachlin J., to strike down those same restrictions and thus limit the authority of the custodial parent, all on the basis of best interests.

2. An issue of constitutional rights: the content and limits of parental freedoms

Casting a constitutional light on the issues related to religion as a factor in custody decisionmaking seems somewhat foreign to Canadian jurisprudence. Parental rights have been examined and analyzed, and

⁴⁷ On implications of this principle see, for example, B. Hovius, “The Changing Role of the Access Parent” (1994) 10 C.F.L.Q. 123, especially at 164-85: “Access Parents’ Involvement in Religious Upbringing.” See also N. Weisman, “On Access after Parental Separation” (1992) 36 R.F.L. (3d) 35.

⁴⁸ This is in keeping with general changes that are currently being discussed in custody and access regimes. See Canada, Department of Justice, *Custody and Access: Public Discussion Paper* (Ottawa: Communications and Consultation, Department of Justice, 1993).

⁴⁹ Not only might restrictions on the access parent be removed, but the custodial parent could find herself subject to restraints with respect to her beliefs and practices—a far cry from full control over religious upbringing.

ostensibly rejected in favour of parental responsibilities,⁵⁰ in the absence of any backdrop of constitutionally guaranteed freedoms.⁵¹ United States jurisprudence, however, has no trouble with acknowledging the constitutional rights contours of family law.⁵² Indeed, the “family” is protected by a constitutional guarantee of parental liberty grounded in the Fifth and Fourteenth Amendments, bolstered by the guarantee of the free exercise of religion, found in the First Amendment.⁵³ Further, the meaning of those guarantees has been worked out to a significant extent in disputes relating to family issues, whether education, birth control and abortion, or child welfare.⁵⁴ The Establishment clause has forbidden extensive analysis of religious doctrine and has been argued to prohibit the courts’ consideration of factors relevant to the child’s spiritual well-being in allocating custody. In conjunction with this, the Free Exercise clause supports an argument against restrictions on the individual parent’s beliefs and practices, ostensibly including those involving children.

As in the family context above, this discussion will not emphasize the issue of religion in the determination of custody. Suffice it to say that American courts, like those in England and Canada, shy away from making explicit choices between religions when assessing the best

⁵⁰ See, for example, *Frame v. Smith*, [1987] 2 S.C.R. 99.

⁵¹ A quick survey of the rights now guaranteed under the *Charter* suggests, however, that a number may be applicable to questions arising related to the family. The guarantee of liberty (s. 7), the freedoms of expression (s. 2(b)), association (s. 2(d)), conscience and religion (s. 2(a)), mobility rights (s. 6(1)), aboriginal rights (ss. 35 & 35.1), the guarantee of equality (s. 15(1)), and the principle of interpretation in a manner consistent with the multicultural heritage of Canadians (s. 27) are all possible candidates for relevance to family law matters. See, for example, N. Bala & D. Cruickshank, “Children and the Charter of Rights” in B. Landau, ed., *Children’s Rights in the Practice of Family Law* (Toronto: Carswell, 1986) 28; D.A. Rollie Thompson, “Why Hasn’t the Charter Mattered in Child Protection?” (1989) 8 Can. J. Fam. L. 133; “Riding the Fences,” *supra* note 16; and *Religion and Culture* *supra* note 14.

⁵² See “Religion and Custody,” *supra* note 5 at 906: “[S]o deeply embedded is rights thinking in the American psyche that the first thought of courts and commentators is to try to cram every legal problem into a rights category.” See also *God and Constitution*, *supra* note 21 at 82-137, where religion, constitutional rights, and the family are discussed with attention to issues such as marriage, homosexuality, abortion, and the religious upbringing of children.

⁵³ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) [hereinafter *Meyer*]; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) [hereinafter *Pierce*]; *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [hereinafter *Yoder*]. See also: Note, “Developments in the Law—The Constitution and the Family” (1980) 93 Harv. L. Rev. 1156; and Mangrum, *supra* note 16 at 75: “the legitimacy of parental rights as part of our cultural and legal heritage and as an important part of personal liberty.”

⁵⁴ See “History of Family Law,” *supra* note 29.

interests of a child.⁵⁵ The courts' avoidance of explicitly preferring one form of religious behaviour over another may not look especially dependent on constitutional guarantees. However, courts may be more hesitant than they would otherwise be to find that religious practices in conflict with more broadly shared childbearing norms are harmful to children otherwise best served by being in the custody of that parent.⁵⁶ American courts have insisted that harm to the children be shown before denying custody on the basis of religion, although they have disagreed over the certainty and amount of harm necessary.⁵⁷ The guiding principle, however, is the avoidance of either the endorsement or rejection of specific forms of religious upbringing.⁵⁸

It is in the context of setting limits on the scope of visitation or custody that the relationship between constitutionally guaranteed individual rights and parental control over the religious upbringing of children is brought to light. While custodial authority over religious upbringing is related to the general parental right to privacy in the rearing of children protected by the Fifth and Fourteenth Amendments,⁵⁹ the access parent can make a parallel argument that the individual right to free exercise of religion, guaranteed by the First

⁵⁵ Despite the principle of anti-establishment, courts do not feel obliged to ignore the effects of parental religious practices on children. Indeed, the specific factors to be considered in ascertaining best interests may include religious or spiritual well-being in several states. See Paul, *supra* note 16 at 600 and n. 85. Some states (Alaska, Hawaii, and South Carolina) have codified the best interests standard and list religion or spiritual well-being as a factor to be considered: see Alaska Stat. § 25.24.150(c)(1) (1983); Haw. Rev. Stat. § 571-46(5)(1985); and S.C. Code Ann. § 20-3-160 (Law. Co-op. 1996). Further, courts traditionally have favoured some form of religious training as beneficial to children, even against the backdrop of anti-establishment concerns. See Beschle, *supra* note 16 at 397-402; and "Establishment Clause," *supra* note 16 at 1703-08.

⁵⁶ See, for example, L. Pfeffer, "Religion in the Upbringing of Children" (1955) 35 B.U. L. Rev. 333 at 366.

⁵⁷ See *Quiner*, *supra* note 24, where the test of "immediate harm" or "actual impairment" was applied. See "Religion and Custody," *supra* note 5 at 880-97, for a discussion of this case. In *Re Marriage of Hadeen* 619 P.2d 374 (Wash. 1980), the test of "reasonable and substantial likelihood of immediate or future impairment" was used.

⁵⁸ But see *Burnham*, *supra* note 24, specifically criticized by Mangrum, *supra* note 16 at 26-30, as an example of best interests prevailing over parental rights. The mother was Fatima Crusader and she said that she would cut her daughter out of her life if she disobeyed the rules of the Church. Teachings of the Church included a "master plot on the part of Jews and Communists to gain control of the world." The daughter's welfare was deemed to be endangered, and the mother therefore was denied custody. This is an "unusual" case and decision according to Beschle, *supra* note 16 at 401.

⁵⁹ In practice, religious upbringing is usually left to the custodial parent. See L.P. Strickman, "Marriage, Divorce and the Constitution" (1981) 15 Fam. L.Q. 259 at 337; and J.M. Fitzgerald, "An Overview of Religious Considerations in Child Custody Disputes" (1989) 32 Catholic Lawyer 129 at 135.

Amendment, includes the ability to share religious beliefs and teachings with one's children. Following that argument, a custodial parent's complaints with respect to interference by the access parent with the child's religious upbringing would not justify the imposition of restrictions on access. Rather, such restrictions, depending on their severity and consequences,⁶⁰ would contravene the First Amendment rights of the non-custodial parent.⁶¹

The consequences of this approach for the tailoring or modification of the terms of access seem, at first glance, blatantly clear: any restrictions would be prohibited as violations of a fundamental freedom. Despite this possible characterization of the access parent's constitutional rights as absolute, however, the notion of harm has always limited and continues to limit those rights in the United States.⁶² In the area of custody this has meant that courts have been reluctant to discard their power to impose restrictions on the non-custodial parent. Thus, many judges continue to exercise their discretion to protect children from harm by tailoring the terms of access. They do vary, however, in their willingness to find "harm" sufficient to limit an access parent's religiously inspired actions. Severe conflict between the custodial and

⁶⁰ Beschle, *supra* note 16 at 422-23, distinguishes among three types of restrictions, saying that they reflect different levels of interference with the non-custodial parent's free exercise right: a) driving of children to and from religious school or services; b) restrictions on taking children to religious meetings; and c) restrictions on talking with, or proselytizing children. He sees the third type as the most troubling because it is not only an intrusion on the right, but also contrary to the value of religious pluralism.

⁶¹ Two major assumptions inform this approach. First, the link between the guarantees of constitutional privacy and freedom of religion, on the one hand, and the authority of parents over children, on the other, depends to a large extent on the notion of an "intact" or pre-divorce family protected from state intervention. Transporting those guarantees without modification to the context of divorce assumes that they operate as fully for each individual rights-holding parent as they do for parents as a unit, and that the rights may be exercised by each parent as against the other. Second, the connection assumes that the full recognition of these constitutional guarantees for an adult translates into that person's power or authority as a parent. That is, the very content of a parent's individual free exercise of religion is understood to include the right to share, teach, or pass on his or her religious beliefs, practices and identity. If this is so, it would follow that the diminishing of parental control over religious upbringing, for example, would be mirrored by a diminishing of the constitutional freedom itself. Both assumptions are open to challenge. Constitutional rights may operate very differently, if at all, in the context of conflicts between parents. And it is possible to question the way in which individual freedom of religion has generally carried with it the right to bring up one's children in a particular faith.

⁶² "The state's reluctance to interfere in the upbringing of children, particularly where religion is involved, must nevertheless be set aside when their welfare is at stake,": *God and Constitution* *supra* note 21 at 131. Mangrum, *supra* note 16 at 74, arguing from a strong parental free exercise stance, acknowledges an element of best interests. That is, parents have extensive, but not complete, authority; he lists *limited* situations (*e.g.*, "substantial harm" or a child's *actual* religious needs) where religious beliefs enter into the decision-making process.

access parent may be labelled harmful enough to justify restrictions on the access parent's religious discussions and behaviour.⁶³ At the same time, courts seem to be increasingly reluctant to find exposure to different religions, in itself, harmful to the children of interfaith parents.⁶⁴

A further limit on the parental freedom model stems from the phenomenon of court orders which split "spiritual" and "physical" custody between the parents.⁶⁵ Ostensibly a response to the constitutional claims of the access parent, such an arrangement means that the custodial parent looks after the children while the non-custodial parent controls the religious upbringing of those children.⁶⁶ Restrictions accordingly may be placed on the *custodial* parent's practices at the behest of the access parent. Far from the model of custodial authority and control described in the family law context, this is a situation which can be described as not only an infringement on the scope of custody but also a violation of the custodial parent's own free exercise of religion. That is, the very recognition of the individual rights-bearing nature of the access parent mandates similar recognition for the custodial parent.⁶⁷ If restrictions on access are seen as unconstitutional, this is equally the case for restrictions on custody. What looks like a potential constitutional "trump" on behalf of the access parent thus turns out to

⁶³ See, for example, *LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990). The case is singled out by "Religion and Custody," *supra* note 5 at 899-904, as an example of injury to a child resulting from each parent's insistence on practising and teaching his or her own religion. The child suffered serious stress as a result of conflicting Catholic and Jehovah's Witness teachings. The Court upheld an order prohibiting the non-custodial father from exposing the child to inconsistent practices and teachings.

⁶⁴ See Beschle, *supra* note 16.

⁶⁵ See Paul, *supra* note 16. The author examines the concept of "spiritual custody" and argues that any decision to give the noncustodial parent control over the child's religious upbringing constitutes a violation of the right to free exercise of religion held by the custodial parent. He argues that, once the child's home has been established any further infringement of the custodial parent's rights should be subject to strict scrutiny. That is, restrictions could be justified only on the basis of physical or actual psychological harm.

⁶⁶ Paul, *supra* note 16 at 585, note 13, for a discussion of several cases. For example, children in the custody of their Baptist mother were ordered to go to Catholic school (*Vazquez v. Vazquez* 443 So.2d 313 (Fla. Dist. Ct. App. 1983)); in another situation, an antenuptial agreement to raise the children as Jews could not be modified when the Catholic custodial mother wanted the children to go to Catholic school (*Gottlieb v. Gottlieb* 31 Ill. App. 2d 120 (1961)). In the case of *Romano v. Romano*, 283 N.Y.S.2d 813 (1967), a Jehovah's Witness mother with custody was ordered to allow the Catholic father to take the children to Catholic day school and church.

⁶⁷ See "Religion and Custody," *supra* note 5 at 885. The author declares, in the context of *Quiner*, *supra* note 24, and the question of custody allocation: "To put the point crudely, the two rights cancel each other."

be significantly restricted.⁶⁸ It is modified by the consideration of harm, with the understanding that limits on the access parent's behaviour may be justified despite the associated interference with individual freedom of religion. And it may clash irreconcilably with the existence of identical rights held by the custodial parent who wants to exercise her freedom of religion by overseeing the spiritual upbringing of the children.

The paradigmatic structure for resolving conflicts over religious upbringing in the context of custody thus becomes a clash between parental rights. The 1990 Pennsylvania case of *Zummo*⁶⁹ provides a good illustration of this structure. In *Zummo*, three children, aged three, four, and eight, were being raised as Reform Jews and were enrolled in Jewish religious education according to an agreement within marriage between their Jewish mother and their non-practising Catholic father. Upon separation, the mother retained physical custody of the children and continued their upbringing within Judaism. At the same time, the non-custodial father expressed a desire to take the children to Catholic church services with him during his weekend visitation periods, partly with the intent of more fully exposing them to their Italian heritage. The judge at first instance prohibited him from doing so. Saying that it would be contrary to the best interests of the children to interrupt the stability of their religious beliefs by exposing them to conflicting religions, and that the agreement during marriage with respect to religious upbringing should continue to govern this particular situation, the judge ordered the father not to take the children to religious services contrary to the Jewish faith.⁷⁰

On appeal, the restriction was overturned. According to the

⁶⁸ Before the Supreme Court of Canada, the Jehovah's Witness non-custodial fathers in the *Young* and *P.(D.)* appeals argued that their freedom of religion, guaranteed by the *Charter*, should prohibit a court from placing restrictions on access in the name of best interests. The argument seemed to assume that a *Charter*-based structure of analysis would benefit the access parent in any dispute over religious practices involving the children.

⁶⁹ *Supra* note 17. The case merits special attention because it has been enthusiastically embraced by some Canadian commentators and lawyers eager to see both the introduction of the access parent's freedom of religion to the Canadian analysis, and a decrease in traditional custodial control. See, for example, *Religion and Culture* *supra* note 14 at 79-89. See also *Factum of the Appellant D.P.*, Supreme Court of Canada, Court File No. 22296 in *P.(D.)*, *supra* note 9 [unpublished]; and *Factum of the Respondent James Kam Chen Young*, Supreme Court of Canada, Court File No. 22227 in *Young* *supra* note 9 [unpublished], on appeal to the Supreme Court of Canada. In response to the arguments put before the court and based on *Zummo*, see the reasons of L'Heureux-Dubé J. in *Young* at 89-97; and in *P.(D.)*, at 181. I return to *Zummo* in the context of an exploration of the identity and integrity of children in Part IV, below.

⁷⁰ C.P., Montgomery County, Civil Division, No. 87-09747, Ott, J.

Pennsylvania Superior Court, the father's parental authority was attached to a right to "pursue whatever course of religious indoctrination [of the children] which [he] sees fit ... during periods of ... visitation."⁷¹ The court went on to say that, while the agreement as to Jewish upbringing of the children was unenforceable, and the children had no legally recognizable religious identity, the mother held an equal constitutional right to the free exercise of *her* religious beliefs. Accordingly, the court ruled that the father, who had access on weekends, could take the children to Mass, but that he had to deliver them to synagogue for Jewish religious school on Sunday mornings. That is, the father had the right to have the children accompany him to church but also had an obligation not to violate the mother's corresponding right to give the children a Jewish education and upbringing. This was the custody/access regime understood to resolve a rights conflict between the parents.

The parental freedom framework perceived to benefit the non-custodial parent may not resolve the difficulties of post-divorce religious upbringing any more satisfactorily than the custodial authority framework. Just as the shifting meaning of children's "best interests" limited custodial authority under a family law model, that of "harm" to children limits non-custodial access under a constitutional law model. Further, as suggested by *Zummo*, the reconciliation of conflicting fundamental individual freedoms guaranteed to each parent is far from easy or obvious. The often uncompromising nature of religious beliefs means that no court-directed scheme of custody and access will fully meet the constitutional demands made by both parents.⁷²

C. *A False Dichotomy*

The dichotomy between a family law model understood as advantageous to the custodial parent (usually the mother) and a constitutional model understood as advantageous to the access parent (usually the father) is overly simplistic. Either parent can use either model to back his or her position. The task in resolving conflicts over religious upbringing between custody and access parents, then, is not one of choosing between two mutually exclusive frameworks. Instead, it

⁷¹ *Zummo*, *supra* note 17 at 1140.

⁷² Along these lines, it has been suggested that the *child's* interests would be better served if visitation were *not* considered a parental right. See White, *supra* note 16 at 296. For further discussion and critique of *Zummo*, see Parts III(B) and IV(C), below.

may be one of understanding the way in which the two can inform each other and, further, may require substantial modification drawn from alternative frameworks.

The Supreme Court of Canada judgments in *Young* and *P.(D.)* reinforce this conclusion. It is true that the arguments put forward in the appeals did tend to ask the Court to make a choice between a pro-custody solution derived from family law and a pro-access solution based on constitutional rights. And the two major sets of reasons, offered by L'Heureux-Dubé and McLachlin JJ., do diverge roughly along the lines that divide a traditional family law approach from a rights-based constitutional law approach. That is, for L'Heureux-Dubé J., priority goes to supporting custody and the decisionmaking powers and responsibilities that accompany it. Children are entitled to the best possible custody and access arrangement, one in which ongoing conflict is minimized and in which constitutional rights play no part. For McLachlin J., on the other hand, emphasis is put on maximal contact between each parent and the children involved subject to their best interests and, more particularly, to the risk of harm associated with actions taken by either parent.⁷³ Again, any significance of constitutional rights is undercut by McLachlin J.'s opinion that parental freedom of religion, even if a factor, would be limited according to best interests. However, her approach does coincide with a constitutional model in which the access parent's ability to include the children in religious beliefs and practices would be subject to maximal contact between the custodial parent and the children and, more importantly, to any harm associated with the practices.

Both judges claim to follow a best interests of the child approach, grounded in family law principles, that rejects a *Charter*-based characterization of the issues at stake. Following the same general approach, albeit with very different contours, they reach opposing conclusions—one prepared to restrict the access parent, the other prepared to eliminate restrictions. Both “choose” the family law model but understand best interests differently; both decline to “choose” the constitutional law model, but differ on their willingness to adopt the notion of harm. What is evident is that “best interests” and “harm” are both terms with open-ended definitions and, further, that they operate as sides of the same coin, both used to justify a judge's decision as to the scope of custody and access.

⁷³ See *Hockey v. Hockey* (1989), 69 O.R. (2d) 338 (Div. Ct.), in which a Jehovah's Witness access father was allowed to take his children to services against the wishes of their Catholic custodial mother. No harm was found by the court.

III. ALTERNATIVE FRAMEWORKS FOR A MULTI-FACETED ISSUE

In rejecting a choice between the family law and constitutional law models as they have been traditionally understood, I turn now to the perspectives of children and religious communities themselves and suggest that they complicate the analysis in a necessary and realistic way. By introducing the following approaches to decisionmaking in the context of religion and custody, I set the stage for a further examination of the concepts of best interests and harm. I suggest that the relationship between children and their communities may be captured by an element of “identity” in the best interests equation, and that the responsibility for shielding children from harm connected to that relationship may be captured by an element of “integrity.”

A. *Recognition of Difference and The Coexistence of Communities*

1. The importance of membership

The religious communities to which parents involved in these custody disputes belong have a vital, if muted, stake in the outcome of legal proceedings. In responding to children of interfaith partnerships, courts provide an indication of the state’s recognition of the religious communities involved and, more broadly, of the diversity of communities that coexist. For any given religious community—whether large, generally integrated, and liberal, or small, insulated, and traditional—ongoing existence and strength depend literally and rhetorically on “its” children.⁷⁴ Accordingly, it is extremely important to each community that it be able to welcome and retain child members. At the same time, the affiliations that children have with their communities (for example, cultural, ethnic, and linguistic, as well as religious) have a significant impact on their development and sense of identity. An exploration of the perspective of communities in what otherwise look like “familial” disputes can shed light both on the

⁷⁴ Of course, this dependence may be articulated in very different ways by more traditional and more liberal groups, even within the same religion. See *God and Constitution*, *supra* note 21 at 20, on the similarity between traditional Catholics, fundamentalist Protestants, and Orthodox Jews as compared with liberal religious self-understanding and communities.

interactions between law and a diverse, multicultural reality, and on the meaning of community affiliation for children.⁷⁵

The relationship between religious communities and children is mediated by parents who are, of course, the parties in any custody conflict where religion is an issue. The meaning of adult membership in a given religious community may well include a commitment to raising children to be members themselves, and it is clear that parents play an important part in initiating and cementing the affiliations of their children.⁷⁶ Interestingly, the very existence of children may influence adult membership in a given religious community in the sense that a parent may reinforce his or her commitment in order to bring up children within the community. In an interfaith relationship, then, the parents can be characterized as representatives of their respective religions. The conflict over religious upbringing and the scope of custody and access becomes a struggle between members of two communities, both of which may feel compelled to pass on membership to their children.

2. Community claims in the custody context

A brief sketch of the relationship among child, parent and community reveals that a court's resolution of a custody dispute may be perceived as either supportive or destructive of a religious community's existence in the larger society. When a judge restricts an access parent from sharing religious beliefs and practices with his children, the religious community to which that parent belongs is affected in symbolic and concrete ways. A message as to the unacceptability of certain precepts and practices may be conveyed by such a judgment; further, it is unlikely that a child will "choose" a religion if he or she has no contact with it. While the interests or claims of the particular communities

⁷⁵ See C. Taylor, "The Politics of Recognition" in C. Taylor, *Multiculturalism and "The Politics of Recognition"* with commentary by A. Gutmann, ed., (Princeton N.J.: Princeton University Press, 1994) 25 at 62-63, for a discussion of the discourse of recognition and identity and the way in which the latter is partly shaped by the former. According to Taylor, at 36, the importance of recognition is now universally acknowledged: "Not only contemporary feminism but also race relations and discussions of multiculturalism are undergirded by the premise that the withholding of recognition can be a form of oppression."

⁷⁶ This is made explicit in the case of *Ramon v. Ramon*, 34 N.Y.S.2d 100 (Dom. Rel. Ct., 1942) [hereinafter *Ramon*]. A Roman Catholic father and Protestant mother agreed that the children would be baptized and educated in the Catholic religion. The Court made reference to Canon Law and the biblical interdiction of intermarriage, saying that Catholics are *bound* to raise their children in the Catholic faith; otherwise they may face excommunication.

implicated in custody proceedings do not mean that those communities become parties on their own, the Watch Tower Bible and Tract Society of Canada (*i.e.*, the Jehovah's Witnesses) was recognized as one of the respondents before the Supreme Court in *Young*. The fact that the Seventh Day Adventist Church, a group not directly affected by the recent appeals, presented arguments before the Court as an intervenor underlines the significance of the cases for religious communities in general.

The claims made by communities, whether explicitly or implicitly, arise out of two general situations in which post-divorce families in a diverse society may find themselves. First, parents simply may adhere to different religions; alternatively, one parent may belong to a closed or strict religious community which dictates a certain way of life for its members.⁷⁷ In the first situation, both religious communities may lay claim to the religious identity of the children. In the second, denial of custody or restrictions on access based on parental membership may be experienced as a severe blow to the particular community which, in turn, may articulate a claim based on equal standing and multiculturalism.

In a diverse society in which different faiths and cultures can flourish in co-existence, and in which individuals can grow and develop partly through connections and affiliation, such claims on behalf of communities may deserve recognition.⁷⁸ Indeed, in Canada, sections 15 and 27 of the *Charter* appear to direct and facilitate such recognition.⁷⁹ And yet, as we shall see, even the deepest respect for religious communities does not yield obvious answers to the questions raised in

⁷⁷ This second situation arises when one parent either joins or exits such a community, thereby creating conflict. In the context of such a community, it is essentially impossible for one spouse to belong while the other doesn't, as long as the two individuals remain together (and, especially, if they parent together). If both parents belong to such a community initially and both remain members, then a conflict over custody would either be resolved outside a secular forum or, at least, would not raise the issue of religious practice (unless the question of which parent was more committed to the religious community was raised before a *secular* court—highly unlikely if both are devout members). For religion to enter a secular custody conflict, then, one parent may join a “way of life” religious community in the context of marriage, and the resulting conflict would be linked to the breakdown of the relationship. Alternatively, both might belong to the same community initially and one might exit that community. In both cases, the issue of religion could well become the core of the custody dispute. The observation to be emphasized here is that some conflict in the relationship precedes conflict before a court.

⁷⁸ This is not the same as deference. This challenge is similar to that which Taylor articulates, *supra* note 75 at 63, of “dealing with their [members of cultures that question liberalism] sense of marginalization without compromising our basic political principles.”

⁷⁹ Equality and multiculturalism, respectively. See “Racial and Cultural Issues,” *supra* note 16.

custody decisionmaking.⁸⁰ Before turning to the problems with full recognition of community perspectives, however, it is helpful to describe briefly the ways in which community claims are packaged within the custody dispute context in order to better explore the court's response.

Within a family law model, the decision as to allocation or scope of custody is guided by a notion of custodial authority limited by the best interests of the children involved. A community-based approach would suggest that the assessment of best interests be based on an appreciation of diverse modes of childrearing and religious upbringing across communities, and on an understanding of the importance of community affiliation for children. Thus, it could be argued that custody should be allocated to the parent through which the child could best retain membership in his or her community.⁸¹ The argument might become even stronger if the community in question were understood to be a minority group in a larger society, in need of (and perhaps claiming the right to) protection.⁸² The strongest claim on behalf of communities would suggest that best interests of children coincide with community affiliation even (or especially) when the particular religious beliefs and practices clash with liberal values espoused by the state.⁸³ If we turn to a constitutional law model, it initially appears difficult to factor community concerns into assertions of individual rights. However, the recognition of a parental right to direct children's religious upbringing allows for the interests of religious groups to be played out behind individual claims. Indeed, freedom of religion may become a vehicle for

⁸⁰ See generally M. Minow, *Making All the Difference—Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) on the diversity of individuals and groups in the United States and especially the responses of law to the "dilemma of difference."

⁸¹ See, for example, Zemans, *supra* note 16 at 158: "The concept of the family is amorphous and culturally grounded, thus precluding any 'a-cultural' treatment of the concept and similarly preventing any set of 'a-cultural' values that attach to the concept of the family from being defined." See also F. Zemans, "The Issue of Cultural Diversity in Custody Disputes" (1983) 32 R.F.L. (2d) 50.

⁸² In Canada, this kind of argument is most prevalent in discussions of First Nations children. Strong criticisms have been aimed at the notion and application of "best interests," particularly in the contexts of welfare and adoption, based on the related devaluing of a child's First Nations identity and affiliation. See, for example, M. Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall L.J. 375; C. Davies, "Native Children and the Child Welfare System in Canada" (1992) 30 Alta L. Rev. 1200; A. McGillivray, "Transracial Adoption and the Status Indian Child" (1985) 4 Can. J. Fam. L. 437; P.A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C.J.W.L. 1; and P. Zylberberg, "Who Should Make Child Protection Decisions for the Native Community" (1991) 11 Windsor Y.B. Access Just. 74.

⁸³ See, for example, *Robichaud v. Robichaud* (1978), 6 R.F.L. (2d) 22 (Sask. Q.B.). See also the discussion of the case in *Religion and Culture* *supra* note 14 at 22 and at 34.

advancing the interests of religious communities to which parents belong. That is, in alleging a violation of freedom of religion in the form of denial of custody or restrictions on access, a parent implicitly invokes the community to which he or she belongs and to which the child has formed or might form valuable links. From the perspective of religious communities, then, it might well be advantageous to support a rights-based analysis of custody disputes involving religious upbringing.⁸⁴ If parental control over, or at least influence on, children's religious identity is constitutionally protected, then the focus of courts shifts away from the question of whether community norms are understood to serve the best interests of those children.

3. Risks of recognition

As just described, it is possible to imagine community claims as instrumental in analyzing best interests or individual parental rights within a religion and custody context. However, it must be pointed out that the relationship between secular courts and religious systems creates an initial limit to an analysis derived from community perspectives. That is, religious communities and the state clearly may conflict over the understanding of children's best interests. Similarly, the court's notion of harm to children—the factor limiting the exercise of parental rights—may be defined differently by religious communities, especially those whose tenets are far removed from mainstream faiths. From their perspective, it might be argued that, in imposing the state's notion of harm, a court mounts a direct attack on religious communities and their ability to continue.⁸⁵ For example, a finding that proselytizing door-to-door was, in itself, harmful to a child whose custodial parent objected to the behaviour, would be a severe blow to the Jehovah's Witnesses as a group for whom part of their religious existence includes that practice.

An awareness of the impact of decisions in the "private" sphere of the family on the "public" sphere of communities in a multicultural state should lead to a more sophisticated understanding of, and

⁸⁴ This was, in fact, the case in the positions argued before the Supreme Court in *Young supra* note 9; and *P.(D.) supra* note 9. That is, the religious groups involved understood their concerns to be best met by a *Charter* protection approach, and were concerned that the malleability of "best interests" worked against them.

⁸⁵ Such an argument might be derived from a Coverian analysis of the issue, taking into the account the distinct "nomos" of each community. See R.M. Cover, "The Supreme Court 1982 Term: Foreword: Nomos and Narrative" (1983) 97 *Harv. L. Rev.* 4.

justification for, the court's actions.⁸⁶ Yet, unless courts abandon their task of determining best interests of children and protecting children from harm, the clash between the norms of a liberal state and those of particular religious communities necessarily will continue to characterize disputes over religion in the custody/access context. In addition, the secular perspectives of judges confronted with public expressions of religion, sometimes in its more intense or fundamentalist forms, will continue to influence their analysis of parental beliefs and practices.⁸⁷ Embracing an approach that truly deferred to communities⁸⁸ and their perspectives might eliminate this phenomenon of normative conflict, but different problems would emerge. Two major risks of such recognition are especially apparent. Not only does a framework that envisages community perspectives dictating the outcome of disputes over religion and custody fail to appreciate the conflict between communities themselves, but it may overlook the dangers of a monolithic perception of community.

The first problem with a community-based framework, then, is that custody disputes can become irreconcilable conflicts between religious communities which cannot accept the potential for more than one religious community in a child's life. From the perspective of each religion involved, adherence to more than one community is often

⁸⁶ See S. Van Praagh, "The Youngest Members—Harm to Children and the Role of Religious Communities" in M.A. Fineman & R. Mykitiuk, eds., *The Public Nature of Private Violence* (New York: Routledge, 1994) 148 [hereinafter "The Youngest Members"].

⁸⁷ The sense one gets from Canadian cases, in particular, is of judges who may be privately observant expressing concerns over religious behaviour that characterizes a public way of life for individual parents fighting over custody or access. That is, the problem may not be with the particular religion at stake but rather simply with "too much" religion in a given parent's life. It is worthwhile to remember that surveys in the United States suggest that 90 per cent of Americans identify themselves as religious: "Portrait of Religion in U.S. Holds Dozens of Surprises" *The New York Times* (10 April 1992) A1. In Canada, it seems that the number of Canadians reporting "no religion" is increasing: "Protestant Numbers Tumbling" *The [Toronto] Globe and Mail* (2 June 1993) A1. However, a sociologist commenting on the 1991 Statistics Canada results reported in the article did say that "88 per cent of Canadian people still see themselves as religious."

⁸⁸ Such an approach may be found behind "religion matching" laws in adoption. For example: "One possible goal of religious matching is to help a church or a synagogue retain 'its own.' ... This aim, however, is hardly a proper one for government under the Constitution": M. Paulsen, "Constitutional Problems of Utilizing a Religious Factor in Adoptions and Placements of Children" in Oaks, ed., *supra* note 21, 133. In the context of race-matching in adoption, the discussion is more complex. See, for example, T. Perry, "Race and Child Placement: The Best Interests Test and the Cost of Discretion" (1990-91) 29 J. Fam. L. 51.

inconceivable or impossible.⁸⁹ But, in a diverse society in which interfaith marriage or partnership is common, children may have real or possible connections to more than one religion through their parents. While this situation opens the door to creative arrangements with positive consequences for children, it also means that a custody dispute between individual parents can be transformed into a battle between communities. Rather than resulting in any clearer decisionmaking, community-based analysis envisions a secular court choosing between religions and religious identities, a task for which it is especially poorly suited. Even if a court did have some way to choose between communities (for example, by preferring a small, minority group which has experienced discrimination), it is not clear how that would translate into deciding the scope of custody and access in any given case.⁹⁰ For example, we might be reluctant to defer to community concerns such that only member parents could raise member children; instead, the possibility that a child could be primarily a member of a certain community but be raised by the non-member parent might be acknowledged.

Thus, even if it were possible to place a priority on communities and their connections to children, the very structure of a custody dispute involving religion indicates that children may have or develop connections to more than one religious community. A strictly religious approach generally cannot deal with such a situation. Religious doctrine usually makes little or no space for conflict between communities and, unlike a secular approach, has great difficulty defining the religious identity of a child under more than one religious influence.

The second, connected, problem is found in the risk of seeing a given religious community as monolithic and responding to its claims by imposing a similarly monolithic religious identity on children. That is, recognition of affiliation is perhaps easiest when the community is presented in its least integrated form. Indeed, it is often only within the community, far from the scrutiny of the secular justice system, that pluralism in beliefs and practices is evident. A court may thus be compelled to base its assessment of the religious community's role in a

⁸⁹ This notion was explicitly referred to by O'Brien J. in *Ramon*, *supra* note 76 at 108, which allowed the incorporation of religious norms into secular life and law: "Indissolubility of marriage and prohibition of 'mixed marriages' are not mere sectarian rules but are deeply rooted in the consciousness and history of mankind."

⁹⁰ See "Religion and Custody," *supra* note 5 at 887. Schneider points out, in the context of his analysis of the argument that attributing rights to parents promotes pluralism: "[C]ustody disputes do not pose a choice between a heterodox religion and some state orthodoxy: the choice must be between the heterodox religion and whatever views the other parent espouses."

child's life on an official representation of the community's norms and practices.

In attempting to accord appropriate respect to the community, then, courts may look for some "true" or essential group identity of the child. Expert evidence from Orthodox rabbis, for example, as to whether a child is truly Jewish may be accepted,⁹¹ and the court thereby may participate in enforcing orthodoxy within a religion in the guise of good-willed acceptance of difference. From the perspective of the Orthodox Jewish community in such a case, the involvement of a secular court in determining the religious identity of children might be welcomed. From that of the non-Orthodox Jewish community, the phenomenon of a court relying on one interpretation of who belongs to the community and who does not, is highly problematic.⁹² Even if such a finding does not dictate a particular custody/access arrangement, it does mean that the court adopts a monolithic view of and from the community. It accepts one version of the meaning of child membership and the kind of religious upbringing thereby required.⁹³

These risks suggest that the perspective of religious communities cannot direct the outcome of disputes over custody and religion. And yet the many religious communities represented in custody disputes legitimately have certain interests at stake related to their coexistence in a diverse society. Filtered through the arguments of individual parents in the courtroom, the claims of communities are largely ignored in the explicit reasons given by courts for decisions on allocation of custody or restrictions on access. Incorporated into the analysis of children's interests, however, they might play a stronger role by reminding us that, as developing members of religious communities, children deserve full consideration of the connections that inform their identity. Thus, while setting out the contours and consequences of a community-based approach does not create a functioning alternative framework of

⁹¹ In *Avitan v. Avitan* (1992), 38 R.F.L. (3d) 382 (Ont. Ct. (Gen. Div.)) [hereinafter *Avitan*], discussed at length in Part IV, below, the judge followed the Jewish "rule" that the child was Jewish because the wife had converted under Orthodox supervision just prior to the birth.

⁹² See Seltzer, *supra* note 6.

⁹³ The fact that religious communities do not necessarily speak with one voice therefore means that courts prepared to take community perspectives into consideration are asked to make a choice among varying interpretations of doctrine. This problem arises both in a situation where it appears that sets of religious beliefs and practices are being compared, and in a situation where a judge is called upon to, in effect, define the community to which a child belongs. If courts are hesitant to explicitly engage in the first situation (as well they should be), they should be even more hesitant to take on the burden implied by the second.

analysis, it does provide some guidelines for courts as they reflect on the significance of identity in children's lives.

B. *Children's Rights—A Shift in Focus*

1. Advocating a voice for children

The final perspective to be considered is that of children themselves. Children might assert their "rights" such that they direct court decisions with respect to custody, religious upbringing and restrictions on access. Such an approach stems from the observation that, whether characterized primarily by best interests, parental freedoms, or community claims, disputes over religion and custody assume children's "silence." A "voice" for the children affected by a court's decisions is hard to find in a custodial parent's claim to authority, an access parent's insistence on constitutional rights, or the community's interests in maintaining young membership. In families with which courts have no contact, religious conflict is resolved by family members themselves and any resistance by children to parental control is left untouched.⁹⁴ In a custody dispute before a judge, however, children may have the opportunity to be heard and their "rights" may be placed in the balance along with those of their parents.

Recipients of much recent attention, children's rights have been explored against the backdrop of family law and human rights law, and take on both domestic and international⁹⁵ dimensions. The notion of children's rights is still developing within the contours of ongoing discussion over what it means for children to have and exercise rights.⁹⁶ Rights for children might entail greater protection from danger or harm; they might allow children to make decisions as to crucial factors in their lives such as education or health care; they might force greater scrutiny of age restrictions; they might dictate youth-responsive safeguards in criminal proceedings. Rights for children might be envisaged as claims

⁹⁴ It is, however, possible for religious conflict within the family, while the parents remain married, to reach a level such that courts do get involved in a child protection context. See, for example, *Protection de la Jeunesse—433*[1990] R.D.F. 280 (Que C.S.), in which the director of youth protection brought Jehovah's Witness adolescent boys to court for a protection order.

⁹⁵ *Rights of the Child* supra note 4.

⁹⁶ See, for example, M.D.A. Freeman, ed., *Children's Rights: A Comparative Perspective* (Aldershot, U.K.: Dartmouth, 1996); P. Alston, ed., *Children, Rights and the Law* (Oxford: Clarendon, 1992); and D. Archard, *Children: Rights and Childhood* (London: Routledge, 1993).

for attention, services, and protection; they might also be understood to ground independence, autonomy, and the ability to make choices free of parental or other control.⁹⁷

A full analysis of the project of articulating the theory and practice of children's rights, defining their content, and investigating the impact of rights on children and the reverse impact of children on rights,⁹⁸ is beyond the scope of this paper. Instead, this discussion will focus on two ways in which the perspective of children might be conveyed through children's "rights" and thereby brought to the issue of religion in custody decisionmaking. First, it might be argued that children's decisions and preferences should be heard such that parental behaviour with respect to religious upbringing is limited; second, a strong freedom of religion claim might be made out on behalf of young individual rights-holders. After assessing a children's rights framework as an analytical solution to religion and custody disputes, I conclude that response to the perspective of children is crucial but can be included in a framework that rethinks best interests.

2. A voice in custody decisionmaking

Perhaps the most obvious way to bring the perspective of children to the issue of religion and custody is to welcome their input into decisionmaking. With respect to both the question of allocation of custody and that of the scope of custody and access, children could assert their right to be heard.⁹⁹ Thus, they might articulate their preference as to which parent should retain custody or, in another context, might indicate a desire to restrict the actions of their access parent.¹⁰⁰ Those preferences or desires could then be factored into the court's assessment of best interests or of the risk of harm to the children involved. Alternatively, the express wishes of children might dictate the

⁹⁷ See M.D.A. Freeman, *Rights and Wrongs of Children* (London: Pinter, 1983). See also J. Eekelaar, "The Emergence of Children's Rights" (1986) 6 *Oxford J. Legal Stud.* 161; and H.H. Foster & D.J. Freed, "A Bill of Rights for Children" (1972) 6 *Fam. L.Q.* 343.

⁹⁸ See "Next Generation," *supra* note 4, for the argument that attention to children can have an impact on the notion of "rights" themselves in law.

⁹⁹ See C. Mahood Huddart & J.C. Ensminger, "Hearing the Voice of Children" (1992) 8 *C.F.L.Q.* 95.

¹⁰⁰ This is tied to an understanding of access as a "right" of the child and not the parent. See, for example, H.A. Davidson & K. Gerlach, "Child Custody Disputes: The Child's Perspective" in R.M. Horowitz & H.A. Davidson, eds., *Legal Rights of Children* (Colorado Springs: Shepard, 1984) 232 at 251-55.

court's decision directly. While this latter option could be characterized as more strongly recognizing children's rights, courts have generally stayed away from asking children to choose a custody/access arrangement for themselves. Instead, they have moved toward the former option by listening to children in some less direct way before determining the custody/access arrangement that best meets their interests.

A child's right to be heard in a custody dispute thus is usually understood to operate in tandem with the court's responsibility to resolve the dispute in the best interests of that child.¹⁰¹ That right is also limited by the age of the child and his or her capacity to express preferences and to make decisions. While this aspect of children's rights is not particular to the context of *religion* and custody, it played a role in the Supreme Court of Canada's approach to the two cases that introduced them to these issues. Indeed, the children's voices, albeit *imagined* rather than heard, contribute significantly to the difference in the disposition of the appeals.

In *Young* the non-custodial father undertook at trial not to force his children to accompany him to religious services against their expressed wishes. This fact is crucial to the swing vote judges, Cory and Iacobucci JJ., who underline its importance in their decision to agree with McLachlin J. that court-dictated restrictions on access were unnecessary in meeting the best interests of the children. In *P.(D.)*, the father made no such promise, partly because the child in question was much younger and thus not considered capable of expressing her preferences. Given this lack of self-imposed restraint on the father's behaviour during access, Cory and Iacobucci JJ. declare themselves prepared to defer to the trial judge and to uphold restrictions for the reasons given by L'Heureux-Dubé J.¹⁰² Thus, the voices of the children old enough to make their feelings known about the religious behaviour of their father during access periods are considered but only indirectly. That is, a *parent's* undertaking to listen to those voices (and his

¹⁰¹ Eekelaar, *supra* note 97, has discussed the problematic nature of these two principles operating together. That is, the child's decision, made according to the child's rights, may not coincide with that child's best interests. In Ontario, see *Strobridge v. Strobridge* (1994), 18 O.R. (3d) 753 (C.A.). Osborne J.A. held that a child's counsel must act as an advocate, and cannot advise the court with respect to the best interests of the child. For instance, evidence cannot be put before the court by the child's counsel which then decides the best interests of the child, although the court acknowledged that the child's preferences would be taken into account in the assessment of the child's best interests.

¹⁰² Thus the confusing result: McLachlin J. has a 4-3 majority in *Young* *supra* note 9, while L'Heureux-Dubé J. gets a 5-2 majority in *P.(D.)*, *supra* note 9.

fulfilment of that promise) is enough to release the Court from involvement.

From the perspective of L'Heureux-Dubé J. who specifically addresses the question of children's evidence in a custody and access dispute, this response seems problematic at best. In her reasons given for upholding the trial judge's initial restrictions on Mr. Young, L'Heureux-Dubé J. asserted, in agreement with McLachlin J., that "expert evidence should not be routinely required to establish the best interests of the child,"¹⁰³ and then goes on to say that children's testimony itself might be "a sufficient evidentiary basis upon which to restrict access."¹⁰⁴ Thus, it would seem, children who voice distress, anger, or disagreement with respect to the behaviour of a parent who involves them in his religious beliefs and activities during access should have an impact on a court's decision to restrict that parent. Presumably, a parent's undertaking not to act in a way contrary to the children's wishes would not satisfy the court's responsibility to take those wishes seriously. Beyond asserting a right to be heard with respect to questions of allocation or scope of custody, making space for the perspective of children brings a challenge to parental authority. That is, a custodial parent's control over upbringing and education might be questioned by a child-focused framework of analysis. In the context of religion and custody disputes, an additional challenge might be aimed at a religious community's authority with respect to child members. Indeed, any relationship which implies the exercise of power over children is potentially subject to attack from the notion of children's rights. The risk of damage or harm resulting from a parental exercise of such power is indeed a particularly significant target for advocates of children's voices.

In outlining the possibly far-reaching implications of a framework of analysis derived from the perspective of children, I am not suggesting that parent-directed upbringing of children should disintegrate, or that the responsibility of judges in custody and access matters be replaced by the express desires of children. Indeed, critiques of the general application of traditional notions of rights to children are highly persuasive, especially when they underline children's dependence, vulnerability, and need for support and resources.¹⁰⁵ Further, the risks

¹⁰³ *Young supra* note 9 at 86.

¹⁰⁴ *Ibid.*

¹⁰⁵ See M. Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 *Yale L.J.* 1860 [hereinafter "Interpreting Rights"].

to children associated with freedom of decisionmaking, perhaps especially in the context of custody disputes, are significant.¹⁰⁶ I do, however, want to suggest that an emphasis on the perspective of children, often captured by the language of rights, conveys an appreciation of their integrity and entitlement to concern and respect.¹⁰⁷ That is, we can take from a children's rights framework a commitment to the perspective of children in the court's decisionmaking process, and to a critical stance towards any negative exercise of power over children.

3. Freedom of religion for children

In the particular context of religion and custody, the framework of children's rights introduces the possibility of claims by children to freedom of religion. That is, the basis for listening to children and questioning parental power can be grounded in freedom of religion in these cases. Especially with respect to a constitutional model of analysis that places great weight on the rights of parents to the free exercise of their religious beliefs, children's advocates might well argue that the emphasis is misplaced. Instead of focusing on parental freedoms and assuming that an adult's right to freedom of religion incorporates the right to bring up children within a religious tradition, courts should focus on the possibility that a child's rights are at stake in custody and access decisions involving religion. Indeed, the *Charter* could be seen to emphasize the potential for a children's rights framework of analysis in Canada.

Zummo,¹⁰⁸ the Pennsylvania case discussed earlier as an example of a rights-based model for resolving disputes over religious upbringing, provides a good target for criticism along these lines. Indeed, *Zummo* has been singled out for attack based on its adoption of a "children as

¹⁰⁶ Turning to children in the decisionmaking process may hurt the likelihood of a care-giving parent—usually the mother—getting custody. See *Illusion of Equality*, *supra* note 29, c. 6. As I discuss in Part IV, below, this in itself might be considered damaging or harmful to children.

¹⁰⁷ See M.D.A. Freeman, "Taking Children's Rights More Seriously" in Alston, Parker & Seymour, eds., *supra* note 4, 52. Freeman says, at 66, that in advocating rights for children, we have to recognize their moral integrity. That is, children are persons entitled to equal concern and respect, holders of actual and potential autonomy, and in need of nurture, care and protection—all at the same time.

¹⁰⁸ *Supra* note 17.

property” paradigm.¹⁰⁹ By focusing on the rights of the parents, the court engaged in an instrumentalism whereby “[t]he minor child is a key tool of the parents’ free exercise but has no independent free exercise protections.”¹¹⁰ Understood to be incapable of asserting any personal religious identity themselves, the children in this case led religious lives subject to the exercise of their parents’ constitutionally recognized rights. This critique of *Zummo* underlines the discrepancy between children and adults with respect to the ability to hold and exercise religious rights, and suggests that children might well claim constitutional protection in their own name. Custody and access arrangements concerning religion should be scrutinized for any infringement of the religious freedom of the children involved.¹¹¹

Immediate questions are obvious. What would it mean for children to hold and exercise religious freedoms? And how would such “rights” be factored into an analysis of a custody dispute in which, as we have seen, considerations of custodial authority and parental rights are taken into account? While a full answer to the first question is beyond the scope of this paper, some observations on why a child’s freedom of religion is difficult to define can be made before turning to the particular context of custody. The 1989 *Convention on the Rights of the Child*² provides some valuable insight in this regard. Guaranteed by the States party to the *Convention* are a child’s right to preserve his or her identity (article 8) and the right to freedom of thought, conscience and religion (article 14). And yet, the child’s freedom of religion is immediately followed by recognition of the rights and duties of parents to provide direction to the child in the exercise of his or her right to freedom of religion “in a manner consistent with the evolving capacities of the child” (article 14). This is a right, then, intertwined with parental guidance and authority. Rather than being perceived as independent of parent-child

¹⁰⁹ See B.B. Woodhouse, “Who Owns the Child?: *Meyer* and *Pierce* and the Child as Property” (1992) 33 Wm. & Mary L. Rev. 995. Woodhouse chooses *Zummo* as an example of cases following *Yoder*, *supra* note 53, which ratify what she labels an instrumentalist approach to children established in *Meyer*, *supra* note 53; and *Pierce*, *supra* note 53.

¹¹⁰ Woodhouse, *supra* note 109 at 1115.

¹¹¹ See, for example, Zarowny, *supra* note 16 at 171-73. He suggests that child custody situations may be the first context in which a child’s right to make decisions based on his or her own religious beliefs may be tested. Courts may be more willing to make decisions regarding the religious upbringing of children once their parents’ marriage has been dissolved. It is possible that a child’s own choice of religion could defeat a custodial parent’s wishes, especially if the child were backed up by the non-custodial parent.

¹¹² *Supra* note 4.

relations, the child's freedom of religion is generally understood to be in keeping with that of the parents.

The fact that a document dedicated to children's rights does not contemplate the possibility of a clash between parent and child over religion initially may seem strange. And yet it is not so surprising when we consider one of the key elements of adult freedom of religion combined with assumptions regarding the family. That is, the notion of autonomous *choice* has been built into religious freedom¹¹³ such that persons have the right to believe and act according to their faith or conscience. While religious freedom may also include group- or community-based aspects (as we have seen in the discussion of the perspective of religious communities above), an individual's fundamental right to freedom of religion usually is understood to guarantee that the individual neither is prohibited from acting according to his or her beliefs nor is forced to act in a way contrary to those beliefs.¹¹⁴

This aspect of freedom of religion sits uneasily with the way in which even a rights-oriented liberal society leaves religious upbringing of children to parents and, by implication, religious communities. In general, children are not understood to exercise choice at an early age in the matters of religious belief and practice. Instead, they are brought up with a certain religious (or non-religious) identity which may play a significant role in their lives even if it does not feel "chosen."¹¹⁵ Thus, as long as a liberal understanding of freedom of religion assumes an adult

¹¹³ This has been true at least in liberal democracies such as the United States and Canada in this century. On religious liberty in the United States in general see, for example, K. Greenawalt, "Religion as a Concept in Constitutional Law" (1984) 72 Cal. L. Rev. 753; M. Galanter, "Religious Freedoms in the United States: A Turning Point?" [1966] Wisc. L. Rev. 217; M.W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion" (1990) 103 Harv. L. Rev. 1409; *Culture of Disbelief* *supra* note 8; and S. Levinson, "The Multicultures of Belief and Disbelief" (1994) 92 Mich. L. Rev. 1873. Contemporary Canadian jurisprudence on religious freedom includes *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [hereinafter *Big M. Drug Mart*]; and *Central Alberta Dairy Pool v. Alberta Human Rights Commission* [1990] 2 S.C.R. 489, as an example of human rights case law in Canada dealing with religious discrimination.

¹¹⁴ A discussion of the differences of freedom *from* religious coercion and freedom *to* believe and behave within a certain religion is beyond the scope of this article. My purpose here is merely to highlight the fact that the ability to choose to be religious or not, or to adhere to a specific religion, is incorporated into the meaning of freedom of religion for adults.

¹¹⁵ On the apparent contradiction between this deference by liberal society to communities and families with respect to the upbringing of children, and the emphasis placed by liberal society on individual freedom, choice and autonomy, see Kymlicka, *supra* note 3, especially c. 8, where he suggests that communities that, in effect, "govern" children's lives can be tolerated by liberalism because of their role as structures within which children develop a capacity to choose how to live their own lives as adults.

ability to make choices,¹¹⁶ and that of children assumes parental influence, then it is difficult to describe children as “full” holders of the right. This does not mean that religious freedom has no meaning for children. Indeed, in significant areas, such as schooling, such freedom is crucial and might result in a challenge by, or on behalf of, children.

In the context of custody, however, the difficulties with the notion of a child's right to freedom of religion are particularly blatant. Parental involvement in religious upbringing is assumed here and a rights framework challenging interference with the religious beliefs and practices of children does not respond adequately to the operating family dynamics. The call for religious freedom in this context does convey the importance of emphasizing children and their own religious development, beliefs and practices. The challenge is in maintaining that emphasis without trying to assign to children fundamental freedoms designed for adults. Thus, while a right to religious freedom, traditionally understood, does not appear to capture the perspective of children of interfaith parents engaged in a dispute over custody and religion, consideration of that perspective might contribute to a more child-responsive understanding of such a right.¹¹⁷ For instance, a membership model of religious freedom, according to which children's sense of religious affiliation and identity develops through their relationships with their parents and religious communities—rather than a model based on choice free from the influence of those relationships—may be better suited to the needs and interests of these children.¹¹⁸

How then might we think of a religious identity “right” or interest tailored to the children of interfaith parents? Here, I want to outline two possible ways in which courts might respect the child's perspective on religious upbringing in the context of a dispute over

¹¹⁶ Of course, this concept is subject to critique given its investment in an individual rights-based framework that gives little weight to dependence, and the inevitability of influence and relations with others. See, for example, M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); J. Nedelsky, “Law, Boundaries and the Bounded Self” (1990) 30 *Representations* 162; and “Interpreting Rights,” *supra* note 105.

¹¹⁷ Some of the problems with “rights” identified by, among others, Glendon, *supra* note 116; Nedelsky, *supra* note 116; and Minow in “Interpreting Rights,” *supra* note 105, are particularly relevant with respect to “children's rights.” That is, communities, families and cultures play a significant role in an analysis of children's rights and interests in the context of custody and religion, and inform the discussion to follow in Part IV, below.

¹¹⁸ This has been discussed most often in the context of adoption, especially in the United States. See, for example, Note, “Religious Matching Statutes and Adoption” (1976) 51 *N.Y.U. L. Rev.* 262.

exactly that issue. First, we could think of children claiming an interest in enriching the religious identity in which they have been grounded. That is, a child of differently believing parents might be brought up with one religion and the connections to that particular religious community may be very strong. In such a case, the child's sense of religious identity should be taken into account by the court before assuming that a "bi-religious" upbringing after divorce would be appropriate. Conversely, a child of differently believing parents might claim an interest in celebrating connections to more than one religious community and, in such a case, the court should be careful not to insist on a "mono-religious" upbringing.¹¹⁹ That is, the opportunity for children to be exposed to more than one religion may well be a positive and welcome consequence of interfaith relationships.¹²⁰

While these two ways of taking a child's religious affiliation into account might seem contradictory, they display the complexities of factoring the perspective of children into the resolution of custody and religion disputes. They also highlight the significant impact that a court has on the religious upbringing, beliefs and practices of *children* when it delineates the scope of *parental* custody and access. The notion of religious freedom for children thus brings the religious aspect of children's lives to the forefront of an analysis of religion and custody. Combined with the focus on integrity that a general children's rights framework insists upon, this emphasis on young religious identity forms the basis for an enriched understanding of children's best interests in an interfaith family and a multicultural society.¹²¹ The question of how to understand the court's task in assessing "best interests," in light of the preceding discussion of alternative frameworks derived from family law, constitutional law, diverse communities, and children's rights, is the one with which we are left.

¹¹⁹ Parallels with language can be made. That is, if language is understood in a way that incorporates cultural community, then "bilingual" children may not have a primary linguistic/cultural affiliation. Parents (with different languages) may, however, raise children with a primary cultural/linguistic identity.

¹²⁰ See discussion in Part IV, below.

¹²¹ This can be understood to respond to Woodhouse's critique, *supra* note 109 at 1114, that law does not respect children and that children are therefore "denied [their] own voice and integrity."

C. *Questions Left Unanswered: Toward a Response*

The case of religion in custody decisionmaking brought before the Supreme Court of Canada includes strands of all four of the approaches set out above. The challenge of recognizing and juggling the perspective of parents who feel a responsibility to pass on religious or cultural identity, the perspective of children for whom decisions on custody and the scope of access have long-term implications, and the significance to communities of young membership, is built into the issues raised by *Young and P.(D.)*. So too is the challenge of understanding the way in which the *Charter* might be implicated in the examination of family law principles, claims of religious groups, and children's upbringing in Canada.

These challenges, so central to the appeals brought to the Court, remain largely unmet. In response to the questions that were posed, the Court simply directed Canadian lawmakers, families, and society in general to children's "best interests." Before proceeding to a discussion of what content we might give to best interests in the context of religion and custody, I want to suggest that the Court overlooked the links between characterizing the issues, the meaning of best interests, and the relationship between the *Charter* and the family. That is, the questions of characterization, best interests, and the *Charter* are connected: the answer to the second depends on the first and informs the third.

By emphasizing best interests of children without giving sufficient attention to the context in which courts try to determine best interests in custody disputes involving religion, the Supreme Court failed to incorporate satisfactorily significant elements of the four frameworks of analysis that have been discussed above. And by insisting that freedom of religion and constitutional rights in general could have no impact on an understanding of best interests, the Court refused to consider the role the *Charter* might play with respect not only to the access parent's religious rights, but also to the scope of custodial authority, the claims of religious communities, and the rights of children. The requisite guidance for lower courts to be able to resolve custody and religion disputes, in keeping with the significance of the related issues to a liberal, democratic, diverse state, is not apparent.

This critique is not meant to suggest, however, that there is a unified way in which the Supreme Court of Canada failed to articulate these questions and their interconnections. Rather, as we have seen, two distinct directions are taken by the Court, embodied in the reasons for judgment offered by McLachlin and L'Heureux-Dubé JJ., and each

displays its own particular gaps and risks, especially when assessed in light of the alternative frameworks set out above. McLachlin J. encourages an access parent's involvement in the religious upbringing of children, subject to a harm-based best interests test. In doing so, she draws Canadian courts into three general difficulties. First, as we have seen, the consequences of merely extending the power to direct religious upbringing to the realm of visitation are problematic: a split between physical and spiritual custody may occur, and courts may find themselves intruding to a greater and greater extent into the day-to-day life of parents and children. Second, the potential for disruption and instability of custody is significant, and courts need to be aware of the impact on custody (and, usually, custodial mothers) of arguments for unlimited access based on religious freedom. Third, the meaning of "harm" and the circumstances under which it should affect custody or access are far from clear-cut.¹²² McLachlin J. does not articulate what she perceives as harmful and thus contrary to children's best interests. That is, the religious teachings themselves might be "harmful;" the type of religious community at stake might be understood to produce "harm;" serious conflict between religious beliefs of parents might itself be "harmful" enough to satisfy McLachlin J. Limits on the basis of harm require careful steering between acknowledgement of their negative impact on the religious community and the responsibility of the state to protect children, and McLachlin J. does not offer particularly clear or helpful directions.

L'Heureux-Dubé J., on the other hand, holds fast to the primary significance of custody and the authority that accompanies it, subject to children's best interests. According to her, best interests are served when the best possible arrangements are made on behalf of children; thus, the court's task is to enforce, and perhaps even construct, such arrangements. Again, potential problems, evident in light of the preceding consideration of alternative analytical frameworks, are left unaddressed. First, in rejecting an "absence of harm" test which would allow for limits on religious activity during access only if there were evidence of harm, L'Heureux-Dubé J. insists that children need not live with negative situations just because they are barely better than "harmful." And yet, like McLachlin J., she avoids explaining what harm means; further, it is unclear what constraints, if any, exist on the task of ordering the best possible arrangements for children. Second, courts are told to discount arguments based on religious freedom, although those

¹²² I do not mean to suggest that a clear definition of harm is easy or even possible. See "The Youngest Members," *supra* note 86.

arguments, as we have seen, could bolster the custodial parent's position in a way, it would seem, to which L'Heureux-Dubé J. would be amenable. Finally, the specific contours of an interfaith family—including the connections between children and the religious communities with which they grow up—don't appear to inform Justice L'Heureux-Dubé's notion of best interests to an adequate extent.

The presumption found in McLachlin J.'s reasons in favour of unlimited access in the sphere of religious beliefs and activities seems to be reversed by L'Heureux-Dubé J. Neither provides strong justification for her position rooted in the best interests of "interfaith children." If it were clear which of these two judges—one of whom has the majority in *Young*, the other in *P.(D.)*—set the stage for further resolutions of custody and access disputes in which religion plays a role, we could focus on that particular judgment as we move from the question of various perspectives and the models they inspire to that of best interests. However, confusion at the level of interpretation adds to the difficulties in understanding and applying what each judge says. Perhaps, then, it is preferable to understand these as essentially an interlocked pair of majority positions, and to concentrate on the task of extracting valuable parts of each.

As we have seen, the question of how to acknowledge and balance the different interests at stake demands that the analytical approaches inspired by those interests be constructed and assessed. With this project completed we can move on to the meaning of best interests of children, taking into account elements of the alternative frameworks considered. By drawing on the perspectives embodied in those frameworks, and on the sometimes buried guidelines that can be pulled from the Supreme Court of Canada, the meaning of a "best interests" test that can justify limited access or full access, full custody or limited custody, can be explored. By focusing on the identity and integrity of children in the following discussion, I try to redefine elements of "best interests" and "absence of harm" in a child-centred approach informed by family law principles, constitutional rights, and an understanding of the state as made up of diverse faiths and cultures. This enriched analysis of the task of courts in resolving custody and access disputes involving religion, is meant, in turn, to inform a more fruitful investigation of the relationship of the *Charter* to the family.

IV. INTERESTS OF IDENTITY AND INTEGRITY

A. *Elements of a Court's Assessment*

A court confronted with the issue of allocation or structuring of custody and access, complicated by religious conflict, may perceive its task as one of investigating the custody and access arrangements that are best for the children involved, or as one of protecting those children from potential or actual danger. Regardless of its characterization, that court's role includes a consideration of children's interests of identity and integrity. These are not new concerns, although an attempt to extract and define them may be. That is, both family law and constitutional law frameworks, with their traditional ways of inserting children into the analysis through "best interests" or "harm," have made and continue to make room—albeit implicitly—for an assessment and balancing of needs and assertions based on identity and integrity of children. The perspectives of religious communities and child members of those communities are integrated in this way into a court's decisionmaking in custody disputes involving religion,¹²³ and, subject to explicit critique and guidance, this should continue to be the case. In the following discussion, I attempt to uncover some of the assumptions about identity and integrity of children made by courts, and to sketch criticisms and suggestions drawn from the earlier analysis of alternative approaches to the issues. In doing so, I turn to specific cases as examples. Religion and custody situations are often unique, and the cases chosen below are not indicative in a comprehensive way of the state of the law;¹²⁴ however, they form the basis for general observations and guidelines.

¹²³ See "Racial and Cultural Issues," *supra* note 16 at 25, where the author suggests that the interests of community or religious groups or parents may be "masked" behind the "best interests" criterion. Rather than reading this as potential conflict, I would ask how community or parental interests can inform the analysis of a *child's* best interests.

¹²⁴ Although I will draw on some Canadian examples in this discussion, I do not pretend to offer extensive coverage of the case law and direct the reader to *Religion and Culture* *supra* note 14; Toselli, *supra* note 16; Mucci, *supra* note 16; Zemans, *supra* note 16; and "Riding the Fences," *supra* note 16.

B. *The Meaning of Identity and Integrity*

If courts can be understood to respond to two sets of interests—those of identity and integrity—vested in children, initial working definitions of those interests are necessary. More complex and satisfactory definitions are continuing or evolving in nature, however. That is, the exploration of the interaction of identity and integrity interests in concrete contexts, and the way they are inserted into judicial decisionmaking, will fill out the contours of these concepts. For the purposes of that exploration, I offer the following sketch of children's developing identities and sense of integrity, and the clusters of interests they foster.

1. Identities of children

The notion of identity interests generally refers to a child's belonging to a community or communities. The significance of identity interests is premised on the idea that children develop a sense of identity as they grow and that connections with individuals and groups inform that identity. This is not to say that children have no identity when born—indeed, their right to an identity in the form of a name and nationality, for example, is fundamental¹²⁵—but it is to assert that meaningful affiliations during childhood contribute to a personal sense of self which may of course continue to change and develop through adulthood. Those affiliations, with parents, siblings, teachers, friends, or with communities based on, for example, religion, culture, language, or ethnicity, interact with each other to create a complex web within which the child's identity evolves.¹²⁶ Children's interests of identity are not

¹²⁵ See, for example, *Rights of the Child* *supra* note 4, arts. 7, 8.

¹²⁶ That is, a child goes through a process of “becoming” or “developing” in life (although more obvious in childhood, this ongoing process is also lived by adults). See Zemans, *supra*, note 16 at 151 (for a discussion of culture in light of the emphasis on stability and continuity for a child found in J. Goldstein, A. Freud & A.J. Solnit, *Before the Best Interests of the Child* (New York: Free Press, 1979) at 9):

[A] child's lifestyle is a function of the cultural environment in which the child develops; a child does not grow up in a cultural vacuum. A child has, in addition to a set of recognizable individuals who surround him, a set of habits, beliefs and perceptions which all reflect the particular cultural climate in which that child is developing.

Relevant to this discussion of identity is the issue of sexual orientation. Participants in workshops or conferences in which I have presented my ideas have asked whether a parallel might be drawn between parental religious identity “passed on” to children, and parental affiliation to gay

predicated on individual choice: for example, a child can belong to a community prior to choosing that membership. This is not to be confused with an assertion that a person's identity is *determined* or *fixed* by the community into which she was born or in which she was brought up; instead connections are crucial to developing a sense of self that in turn incorporates the ability to choose whether to strengthen, adjust or indeed sever those connections.¹²⁷

From this starting point, some general comments can be made with respect to religious identity of children. These are related, of course, to the earlier discussion of a child's perspective with respect to religion and custody, and the ways in which that perspective is not ideally captured by the language of rights. Usually, a child's connections to a religion are forged through her parents, often according to the precepts or norms of the religion itself. Again, this is not to say that the child necessarily retains that identity throughout life, but, as noted above, there is usually no question that parents may include their children in religious practice. Indeed, some of those practices may be solely concerned with children. It should be noted that the handing down of religious identity need not involve any ceremony, practice, or, indeed, belief on the part of the parent. That is, the rules of the religious community may dictate the child's membership regardless of the parent's behaviour.¹²⁸ The state also recognizes the child's membership, albeit implicitly, when it refrains from interference with the parents' passing on of their religion.¹²⁹

In the case of an interfaith marriage or partnership, parents generally come to some agreement as to the religious upbringing and

between parental identity and the child's identity differs. That is, while a Catholic parent might say, "I insist my child *be* Catholic," a lesbian parent, while obviously invested in insuring that her child relate to, and even feel part of, a lesbian community, would not be likely to say "I insist my child *be* lesbian." That is, the sense of intergenerational *transmission* of religious faith and belonging is not easily analogized.

¹²⁷ This is more fully discussed in "The Youngest Members," *supra* note 86.

¹²⁸ See K.L. Karst, "Paths to Belonging: The Constitution and Cultural Identity" (1986) 64 N.C. L. Rev. 303 at 307, suggesting that a child "comes to belong" through the process of socialization and, at 308, that "from childhood we insist on our labels and could not do without them."

¹²⁹ Non-interference with, or "accommodation" of, religion in this sense forms part of the state's protection of human rights—*i.e.*, the state's prohibition on baptism, or circumcision, for example, would be seen as an infringement of the individual human rights of parents *and*, perhaps, of children, and a blow to the religious community in question.

identity of their children.¹³⁰ They may agree to raise their child with one religious identity, with some combination of both, or with none at all. That agreement may clash with the teachings or norms of one or both religious communities, but attracts no interference from the state. Thus, children's identities may be non-religious, mono-religious or bi-religious, and, in certain imaginable circumstances, might even be poly-religious. Prior to or upon divorce, however, any agreement that existed between interfaith parents may break down. The court's decision with respect to custody and access thus potentially carries with it substantial implications for the religious identity or identities of the children. That is, the court, in effect, may uphold or alter the earlier agreement, and thus may play a part in forming, sustaining or changing the religious identity of children.

As the reader must surely and rightly remark, the role of courts does not include the raising of children. And yet, the element of religion in custody decisionmaking allows courts to have an impact on identity formation by putting in question the links between the child, each parent, and each religious community involved. The allocation of custody and access, and any terms limiting the exercise of either, may shape the religious identity of a child, rendering her mono-religious or bi-religious. Courts thus hold the potential power to enforce a certain identity of the child in question, while blocking other possible identities for that same child.¹³¹

2. Children's integrity

The integrity interests of children refer to the protection of their bodies, minds, and spirits from harm or damage. Such damage is understood to have a negative impact on children's development and dignity, and is thus contrary to their interests, needs, and perhaps rights. A full description of the integrity of children, whether physical, psychological, emotional or spiritual, and the role of courts in protecting that integrity, is clearly beyond the scope of this project. Instead, the context of custody disputes involving religion directs a discussion of the integrity interests of children in relation to their identity interests. At

¹³⁰ This may involve making a promise before a religious leader to raise their children in that religion before being married, as in the case of Catholicism. That is, pre-marriage meetings of Catholic and non-Catholic partners include discussion and commitment with respect to bringing up the children as Catholics.

¹³¹ It is rare that such power is explicitly acknowledged.

least in this context, the interests of identity and integrity inform each other and, indeed, become interdependent.¹³² That is, the child's development thrives on connections that enrich her identity and, at the same time, depends on protection from damage or harm.

Not only are the identity and integrity interests of children characterized by fluid interactions but the definition of integrity itself is influenced by identity. Thus, relationships that damage the integrity of a child cannot be justified by that child's identity interests: membership in a community, or involvement in identity-related practices or beliefs, does not eliminate a concern for the dignity of the child. Conversely, however, identity interests can and do play a role in defining children's integrity and deserve to be considered in any assessment of harm to the child. The identity or identities of a child accordingly insert themselves into the decisionmaking process as to whether a certain custody and access arrangement is damaging to a child.

The way in which the definition of integrity interests may be affected by that of identity interests in the circumstances of a given child, underlines the shifting and complex nature of any definition of harm to children and the need for protection. In the context of religion and custody disputes, we have seen that "best interests" of children, and "harm" to children—both broadly concerned with the integrity of children—are not understood or applied in a concrete or consistent way. Indeed, even within a constitutional law framework according to which guaranteed rights of parents are explicitly limited by any related harm to the children, courts move between demanding substantial evidence of present harm before denying or restricting custody and access, and asking only for indications of potential harmful effects. Inevitably linked to the values and perspectives on children found in law (and society more generally), the notion of children's integrity shifts over time and across value structures.¹³³

Here, I want to focus briefly on the implications of the non-fixed meaning of harm for the relationship between identity and integrity interests of a child affected by a religion and custody dispute. It is precisely over the question of integrity that the state (represented by the court) and religious communities (generally represented by parent

¹³² This may be, and probably is, true in a general sense when we investigate issues relating to children, whether they relate to custody, adoption, or welfare and protection. Here, however, I focus on the interrelationship of identity and integrity of children in the specific context of custody disputes in which religion plays a significant role.

¹³³ See "The Youngest Members," *supra* note 86; and L. Gordon, *Heroes of their Own Lives* (New York: Penguin, 1980).

members) may clash. As already discussed, a denial of custody or the imposition of restrictions on religious practice during access, may be interpreted as a critique of a given religious community. Thus, consideration of identity interests of children may be welcomed by religious communities, while the concurrent consideration of integrity interests might be perceived as threatening to those same communities. After all, one can imagine instances in which protection or restoration of a child's integrity might dictate the end—or non-beginning—of the child's membership in a community. At the same time, however, integrity interests can coincide with identity interests: breaking apart valuable affiliations with a community clearly holds the potential for damaging the integrity of the child.¹³⁴

Insisting on a consideration of children's integrity interests, despite the risk of "attacking" a religious community with its own set of interests in the outcome of a religion and custody dispute, does not shield the courts' assessment of integrity in these cases from criticism. Parental difference itself, and the confusion or resentment in the child that may accompany that difference, can become too easily synonymous with "harm," too easily diagnosed as contrary to "best interests." While divisive conflict can be damaging to integrity, the earlier sketch of identity suggests that a bi-religious upbringing might be possible for a child. In addition, the response to integrity interests tends to be the eradication or restriction of damaging situations or behaviours. Factors that foster the integrity of a child—for example, a stable relationship between custodial parent and child—may already be present, however, and should be reinforced in response to the demands of this set of interests.

C. Responding to Identity and Integrity Interests in the Analysis

Given the dynamic and difficult relationship between children's identity and integrity, and the consequences that flow from their recognition and balancing, making a choice between the two sets of interests might seem an attractive option. That is, it would be easier if we could decide which was more important in a child's life, and then make custody and access decisions based on either group-based identity, or individual-focused integrity. And yet, as the following discussion will

¹³⁴ Consider *Robichaud*, *supra* note 83, a case in which custody was awarded to the father over a mother living in a religious institution. Reasons for finding a conflict between identity and integrity in this case were not clearly articulated.

attempt to show, courts *do* grapple with the interaction of these two notions: their responsibility includes assessment of, and reaction to, the identities and integrity of children of interfaith parents.¹³⁵ As was noted at the start of this sketch of what I mean by these sets of interests, the definitions are provided on an ongoing basis, derived from the situations that come before courts for resolution.

A valuable illustration of the way in which children's identity and integrity interests might be incorporated can be derived from the American case of *Zummo*.¹³⁶ While the critique of the court's emphasis on parental rights in this case is valid, the court's decision can be reread and justified on other grounds. First, in *Zummo*, the three young children had been attending Jewish religious school and were part of the Jewish community in a concrete way. This did not change. The children continued those connections to their community, most specifically as a result of their court-ordered ongoing religious school attendance on Sunday mornings. In this way, the decision of the court could be taken as an acknowledgement of the identity interests of the children. Second, the court ruled that the *Zummo* children could occasionally accompany their father to Catholic church services during periods of access. Rather than being interpreted as the satisfaction of the father's constitutional rights, the decision reflects the complex, yet real, identities of these children; further, especially in light of the clearly marked continuation of Jewish identity for the children, the decision indicates a reluctance to see multiple influence as contrary to the integrity interests of those children. Third, the fact that the *Zummo* children were to continue their Jewish education and affiliation to the Reform Jewish community to which their mother belonged, can be seen to underline the significant contribution of a stable relationship with a custodial parent to the children's interests of integrity.

This brief outline of an alternative way of reading and understanding the custody and access resolution in *Zummo* introduces three key concerns with respect to the way in which identity and integrity interests are integrated, albeit implicitly, into a court's analysis. The following discussion of these three areas does not exhaust the possibilities for a full exploration of the handling by courts of children's identities and integrity. But it does offer important guidelines derived

¹³⁵ See C.E. Schneider, "Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard" (1991) 89 Mich. L. Rev. 2215, on the subject of judicial discretion with respect to custody decisions.

¹³⁶ *Supra* note 17.

from the alternative frameworks set out earlier and articulates risks associated with attempts to address these sets of interests.¹³⁷

1. Life patterns versus determination of “real” identity

One way in which courts may attempt to acknowledge and respond to the identity interests of children is by relying on expert evidence as to “real” identity or membership in a given religious community. The Ontario case of *Elbaz v. Elbaz*¹³⁸ provides a good example. Like *Zummo*, the situation was that of an interfaith Jewish-Christian relationship. Here, however, the man was an Orthodox Jew and the woman a non-practising Catholic who converted to Judaism prior to marriage. Upon divorce, the parents went to court in order to resolve the issue of custody allocation. Religious identity appears to have been a key factor for the judge in determining that the father should retain custody. Relying on expert evidence of the rabbi of an Orthodox Jewish congregation in Ottawa, the court found the children, aged ten and six, to be Jewish. Thus, given that the father was a committed, practising Orthodox Jew who wanted his children to “live their lives in the same spirit,”¹³⁹ while the mother, although Jewish by conversion, was not “committed totally to every aspect of the orthodox way of life,”¹⁴⁰ custody was awarded to the father.¹⁴¹

From the perspective of the Orthodox Jewish community, represented by the father, the approach taken by the court may appear particularly welcome. The court's readiness to acknowledge and apply religious norms reflects an appreciation of the connections between the

¹³⁷ See Zemans, *supra* note 16 at 140:

What is needed and what must be elucidated is a set of guiding principles which enable the judiciary to make consistent and predictable custodial determinations in as many situations as possible in which diverse cultural values come into contact and conflict. ... Such a set of principles may be no more than general guidelines. It would be difficult to prescribe specific, exhaustive criteria for dealing family law issues which involve cultural conflict.

¹³⁸ (1980), 29 O.R. (2d) 207 (H.C.J.) [hereinafter *Elbaz*].

¹³⁹ *Ibid.* at 218.

¹⁴⁰ *Ibid.*

¹⁴¹ While custody appears to have been decided based largely on these observations, other factors also play a role in the judge's decision. That is, the fact that the wife had undergone an abortion without informing her husband (albeit in the midst of great marital turmoil), thus acting contrary to his wishes and Orthodox Jewish beliefs and values (again testified to by the rabbi), and that she travelled a considerable amount for her academic work, also contributed to the custody allocation.

children in question and the Jewish community in which their religious identity is formed. And yet, as the earlier discussion of a community-based framework of analysis indicated, we should be wary of what amounts to the imposition by a secular court of a religious identity and lifestyle on children, based on a monolithic definition that cannot accommodate interfaith reality. This is not to say that the child of an interfaith partnership should not be allowed to be “mono-religious.” It is to insist, however, that, rather than turning to the expert evidence offered by a representative of the religious community in question, the court should look for patterns in a child’s life that indicate the development of significant identity interests that should be respected.¹⁴² The custody and access arrangement in *Zummo* could be interpreted in this way: despite the fact that the court refused to explicitly find any “personal religious identity”¹⁴³ on the part of the *Zummo* children, their father’s obligation to ensure that they attended Jewish religious school in keeping with their upbringing, responded to their past and ongoing involvement in their religious community. In contrast to *Elbaz*, the court’s (implicit) appreciation of the children’s identity had absolutely nothing to do with deference to religious doctrine dealing with who is a Jew or what conduct is compatible with being Jewish.

In *Elbaz*, the court could easily have focused on the way in which these particular children had been living their lives as members of their family and of the Orthodox Jewish community, rather than referring to rabbinical testimony as to the way in which Orthodox Jewish children *should* be raised. Indeed, the conclusion in *Elbaz* may have been roughly the same if the pattern in the children’s lives had been the basis for extracting an identity interest. That is, in this case, the preferred approach to the question and significance of children’s identity does coincide with the claims of the religious community. However, by paying attention to the patterns of upbringing, the court would have avoided the risks of deferring to the religious community in the allocation of custody. The less Orthodox mother may well have been granted custody and, even if not, the court would have been more flexible in setting out the parameters of her access to the children.¹⁴⁴

¹⁴² This is analogous to *Zemans*’ emphasis on the principles of stability and cultural continuity.

¹⁴³ *Zummo*, *supra* note 17 at 1148.

¹⁴⁴ See *Zemans*, *supra* note 16 at 155, on the subject of *Elbaz*. *Zemans* says the court should have explained its reasons and characterizes the access regime as “unmanageable and unenforceable.”

In their efforts to respect identity interests, then, courts should avoid taking on the task of labelling children as definitively belonging to one religious community. Evidence as to the particular child's membership in a community should be preferred to expert evidence on the rules or normative structure of that community.¹⁴⁵ Clearly, this principle is easier to apply in a situation where there has been an agreement between parents during the marriage as to the question of religious upbringing of the children. Upon divorce, of course, disagreement over the continued upbringing of the child may become part of the custodial dispute, especially if one parent turns back to an earlier identity or adopts a new one. The original agreement,¹⁴⁶ however, may have served to shape a child's sense of identity.

The scenario is somewhat different when parents have never resolved religious differences for the purpose of raising children. That is, parents initially may belong to the same faith, or share in general non-observance. At some point in the marriage, or even after separation, one parent decides to change religions or to become extremely observant, and enthusiastically embraces new beliefs and practices not shared and often strongly opposed by the other parent. This was the situation in both the *Young* and *P.(D.)* appeals before the Supreme Court of Canada. Here, the very lack of any parental agreement contributed to the conflict itself; indeed, the newly developed religious differences acted as a trigger for divorce. In these cases, the "changed" parent asked for the court's help in including the children in his religious community. That is, the appeal of each Jehovah's Witness father can be seen as a plea for a shift in the religious identity of the children, against a backdrop of the mother's insistence that the children not be exposed to the father's religion.

In a situation characterized by the lack of some earlier resolution of conflict over religious upbringing, the children's identity interests are defined by fluctuating or still-to-be settled connections. The mere fact of baptism in such a case, for example, may not persuade a court that a very young child must remain "mono-religious" in keeping with that faith. Neither is the wish of a custodial mother that her child simply be

¹⁴⁵ This is similar to the argument Zemans makes, *ibid.* at 156, that courts must "determine the focus of stability and continuity in the child's life."

¹⁴⁶ The question of whether such an agreement is, or should be treated as, an enforceable contract between parties to the marriage is an interesting one and can be relevant to the court's approach. Analysis of this issue is left to another article.

the same as the other children she knows,¹⁴⁷ determinative of the limits on the access father's activities. Again, the court should avoid making a decision based on the mere presence of a recognizable religious community and the intense beliefs of one parent. In *Elbaz*, a secular court could be understood to impose a certain religious identity on the children by adopting the perspective of a representative of the religious community; in both *Young* and *P.(D.)*, the trial judges also enforce a religious identity for the children, here by *blocking* the children's exposure to a particular religious community. The suggestion that past patterns of religious connections be referred to loses its strength in a situation where one of the religious communities at stake has never been part of the past life of either the child or the parents, and where it is the multicultural reality of Canadian life that has led to the introduction of that new community. In this context, it would seem that consideration of identity interests might lean toward the children's exposure to the different religious communities available in their lives as their identities are developed. Thus, at the same time that the court should avoid ordering a mono-religious identity for children, so too should it avoid prohibiting the possibility of a bi-religious upbringing.¹⁴⁸

Identities of children are significant yet malleable within the family context. The complexity of the above scenarios indicates that interests derived from identity alone cannot determine fully the outcome of custody conflicts in which religion plays a part. Both Justices McLachlin and L'Heureux-Dubé seem to recognize this, albeit implicitly, in their respective emphases on exposure to difference and the meaning of custody. Indeed, these are the remaining two areas in which guidelines to the balancing of identity and integrity interests must be sketched. Exposure to difference combines both identity and integrity concerns, while the impact of the meaning of custody is primarily integrity-related.

¹⁴⁷ See *Factum of the Respondent C.S.*, Supreme Court of Canada, Court File No. 22296, para. 67 [unpublished] in *P.(D.)*, *supra* note 9: "C'est toutes des joies de l'enfance que je veux que ma petite en profite pareil comme nous autres on en a profité."

¹⁴⁸ That is, recognition of the importance of group-based identity in a child's (and adult's) life need not lead to an essentialist understanding of identity that requires *enforcement* by a court.

2. Exposure to difference and living with conflict:
considering identity and integrity together

The very existence of the phenomenon of interfaith partnership or marriage implies the potential for the non-mono-religious upbringing of children. As suggested above in the context of *Young* and *P. (D.)*, the exposure of children to different influences may serve their identity interests in a society that contemplates and exemplifies the complex overlap of communities. At the same time, exposure to different and even conflicting sets of religious beliefs and practices might be understood to be in keeping with the integrity interests of children. Courts should not be too quick to find harm in the influence of two or multiple identity-influencing sets of beliefs. Integrity is not necessarily damaged by the influence of differing perspectives on religious faith and upbringing.¹⁴⁹

This guideline to interpreting children's integrity can be gleaned from the opinion of McLachlin J. in the Supreme Court of Canada appeals. In both cases, she refused to accept that religious conflict between the custodial mother and the non-custodial father—conflict manifested in profound resistance by the mother to the Jehovah's Witness beliefs and teachings of the father—justified limits on the father's behaviour during access. Indeed, in adhering to her "harm" standard, McLachlin J. resisted any speculation as to the potentially negative impact on children of exposure to different messages, one of which is insistently pious in tone while the other strongly denies the value of the religious faith embodied in the first.

While exposure to different religious perspectives might result in confusion and resentment, and the complexity of the situation may at times be painful, all occasionally difficult disagreement between parents cannot be litigated or eliminated in a divorce context. Again, *Zummo* can be instructive in this regard. It is probably not easy for the *Zummo* children to be Jewish and yet occasionally to accompany their Italian Catholic father to Church on Sundays, albeit—or especially—after Jewish religious school. Neither religious community involved would view the situation as ideal, and the religious upbringing of the children as Jews is obviously complicated by any involvement in their father's

¹⁴⁹ See *Religion and Culture* *supra* note 14 at 89-91. See also "Religion and Custody," *supra* note 5 at 901. Schneider warns against the risks of turning to psychologists and psychiatrists for evaluations and argues that courts are poorly situated for gathering and analyzing evidence with respect to conflicts. Further, at 903, he states: "[E]ven if a court correctly analyzes a child's plight, we may doubt that it will often be able to remedy it."

faith and culture. Courts, however, must be wary of the implications of an order that prohibits exposure to the beliefs and practices of a parent to whom the children have access. Integrity interests cannot demand that the real-life consequences of interfaith families be muffled by courts.

This understanding of integrity and identity interests combined is strengthened if we compare the result in *Zummo* with that in *Elbaz*. In the Ontario case, the judge explicitly shared the father's anxiety over the prospect of the children occasionally spending week-ends with their maternal grandparents in Montreal and thus being "deprived of the fulfilment of the Shabbat and in lieu thereof [being] exposed to activities which are the antithesis of the Shabbat."¹⁵⁰ Further, he ordered that, during periods of access, the mother ensure that the children eat kosher food, observe the Sabbath as far as possible, and "avoid exposing the children to influences that are in conflict with orthodox Jewish spiritual values."¹⁵¹ Indeed, the judge appeared to chastise her for taking the children on a summer holiday to Prince Edward Island, where there was no synagogue and thus no possibility of religious observance.¹⁵²

The underlying assumption here appears to be that identity-based restrictions on parental behaviour will protect the integrity of the children. And yet, such restrictions can often be characterized as unnecessary. Exposure to the influences of relatives of different faiths can be seen as simply reflective of the reality of particular family situations in which children grow up, and accompanying parents to occasional religious services, listening to their opinions, learning about their faith, need not destroy a strong sense of identity on the part of children. Neither need it produce conflict to the extent that children's interests are seriously damaged.

While this approach serves as a general guideline with respect to parental religious difference, there are situations in which conflict is irreconcilable. For example, religion may constitute a complete "way of life" for one parent, while it may be insignificant or at least less intense for the other.¹⁵³ Bi-religious influence may not be acknowledged by

¹⁵⁰ *Elbaz*, *supra* note 138 at 219.

¹⁵¹ *Ibid.* at 220.

¹⁵² Not only does this order adopt a simplistic approach to identity, but it can be criticized from a feminist perspective focused on the role to which the mother in this case is assigned.

¹⁵³ It is important to recall that the issue of *access*, not of custody *allocation*, is at stake here; that is we can imagine situations in which custodial religious identity makes no space for multiple influences. Remember, we are talking here about the problem of access, not whether courts could take this into account in allocating custody.

either parent; indeed it may seem impossible particularly from the perspective of the “way of life“ parent. In such a situation, a court’s permission for children to be exposed to the religious beliefs and practices of each parent, whether during custody or access, may simply be unworkable. It becomes imperative to look further for ways in which to articulate the integrity interests of children.¹⁵⁴ Below, I suggest that the relationship between the custodial parent and the children must be factored into the analysis. The family law framework in which custodial authority figures so prominently thus can be fruitfully incorporated into the assessment of identity and integrity interests of children.

3. Custody and what counts as harmful

Children’s well-being after divorce is influenced to a great extent by their custodial parent and her exercise of authority. As insisted upon by L’Heureux-Dubé J. in the two Supreme Court of Canada appeals, the scope of custody must be wide enough to carry out the significant responsibilities which attach to custody. For her, the decisionmaking power of the custodial parent is intimately connected to the welfare of the children,¹⁵⁵ such that substantial interference with that power, whether or not religious in nature, cannot be consistent with “best interests.” In the present analysis of the identity and integrity interests of children underlying judges’ decisionmaking in cases of religious conflict, the relationship between the custodial parent and the children is crucial to the assessment of integrity. Situated in this way, appreciation of custodial authority and the related integrity interests of children may trump identity-related factors and may indeed create new identities for children.

The integrity-related significance of the relationship between children and their custodial parent can also be derived from *Zummo* as the third element of a revised interpretation of the judgment. That is, the fact that the *Zummo* children were to continue their Jewish religious school training and affiliation to the Jewish community to which their mother belonged, corresponds to the appropriate scope of custody. While the order forcing the father to ensure the children’s attendance at Jewish religious school during periods of access is not, on its face,

¹⁵⁴ For example, it has been suggested that the custodial parent’s understanding of religious identity include a willingness to exhibit “tolerance” (*Religion and Culture*, *supra* note 14 at 85-89) if it is not be found “harmful” to the child, but I am unconvinced as to the potential for such a test.

¹⁵⁵ *P.(D.)*, *supra* note 9 at 166-74.

consistent with his otherwise acknowledged desire to share his own religion, it can nevertheless be justified by the interests of the children in living according to their mother's authority as to religious upbringing.

An Ontario case illustrates the problems attached to the violation of this general principle and, indeed, combines the concerns articulated with respect to both identity and integrity analysis. In *Avitan*,¹⁵⁶ the husband was an Orthodox Jew and the wife a Pentecostal Christian who converted to Judaism not for "any deep religious commitment," according to the court, but rather because she was "a pragmatic soul who determined that it was in her best interest ... if she wanted to marry Meir."¹⁵⁷ Custody of, and access to, their five-and-a-half-year-old son, Daniel, was at issue. The parents lived together only for a few months after the marriage, during which Daniel was born. They then separated, at which time the mother had the baby christened at the Pentecostal Church. According to a later agreement between the two, the child was to be raised by his mother as a Jew. However, the mother recommenced her involvement in the Pentecostal church; in response, the father kidnapped Daniel to Israel at one point, only to be ordered back to Toronto.

Given this confused and antagonistic situation, the judge found, based on expert Orthodox rabbinical evidence, that "Daniel was born a Jew and will remain such all his life no matter what religious training he receives during his life."¹⁵⁸ Quoting the rabbi as saying that "[t]o every Jew, his child is the apple of his eye,"¹⁵⁹ the judge ruled that Daniel should "understand what it means to be a Jew" and that this was not possible "without the guidance and care and teaching of his father."¹⁶⁰ While custody was awarded to the mother who had been primarily responsible for the care of Daniel since his birth, the father was granted structured access, including the power to arrange for religious day school education.

Here, then, the fact that the child was explicitly found to *be a Jew* did not determine custody, but it did dictate the details of the custody/access arrangement. While the judge ascertained the "real" religious identity of the child, he had no trouble with the child being Jewish and being brought up by a non-Jewish parent. Indeed, despite

¹⁵⁶ *Supra* note 91.

¹⁵⁷ *Ibid.* at 385.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* at 384.

¹⁶⁰ *Ibid.* at 402.

what appears to be the essence of this child's character as found by the court, the custodial mother was explicitly permitted to take the child with her to the Pentecostal church. At first glance, this approach seems consistent with the guidelines sketched above. Although his deference to religious authority can be criticized, the judge accepts that the parent with primary responsibility for upbringing of the children need not be the person who is "truly" or "more observantly" a member of the religious community in which the child was brought up during the marriage. Further, he attempts to respect both sets of religious beliefs by handing responsibility over Jewish education and upbringing to the access father, while at the same time recognizing that Daniel would be exposed to the Pentecostal faith of his mother.

In this case, however, the excessive conflict between, and past actions undertaken by the parents, suggest that a bi-religious upbringing is not a real possibility. By ordering that the custodial mother defer to the access father on issues of religious observance and, more importantly, on issues of education in general, the court allowed the continued exercise of excessive power by the father over the mother. Instead of being quick to allocate substantial authority to the access father, especially given the history of religion-based intractable conflict between the parents, the court should have taken more seriously the necessary authority attached to custody. In this case, that might mean that Daniel would be brought up outside the Jewish faith. While tragic from the perspective of both the Orthodox Jewish community and the father, this is a situation where integrity interests trump those of identity voiced by a parent and his religious community.¹⁶¹

Integrity that incorporates the relationship between custodial parent and child can also be understood to direct the formation of new identity interests. In the case of *B.(L.) v. C.(J)*,¹⁶² decided by the Quebec Court of Appeal, a Jehovah's Witness mother was granted custody. The combination of custody and religious belief would seem to suggest the development of a Jehovah's Witness religious identity for the child. At the request of the access father, however, restrictions were imposed on the custodial mother's religious activities. Door-to-door

¹⁶¹ Note here that the decision of the court with respect to custody does not change the fact that Daniel is Jewish from the community's point of view. But, although the community's understanding of membership may be considered with respect to identity interests, the *Avitan* situation illustrates the possible desirability of a custody and access decision being made in a way that shifts the child's identity into line with the custodial parent's religious affiliation.

¹⁶² (1991), 91 D.L.R. (4th) 27 [hereinafter *B.(L.)*].

visits “seemed to upset the child”¹⁶³ and this negative, yet nebulous, effect of the mother’s religious practices was deemed sufficient to warrant court-ordered limits on her behaviour. While the court thus appears to take integrity interests into account in making the order, the link between custodial authority and integrity is not considered. If incorporated into the analysis in the manner suggested here, that link would have demanded that any damage to integrity derived from religious beliefs and practices would have to outweigh the integrity interests served by the consistent authority of the custodial parent with respect to the religious upbringing of the children.¹⁶⁴ According to such an analysis, restrictions on the custodial mother in *B. (L.)* would likely be found unjustified. By extending the scope of integrity beyond a substantial threat of physical or mental harm to include the significance of custody, children’s religious identity might be allowed to evolve in a way very different from that desired by the access parent.¹⁶⁵

In considering restrictions on access, courts can and should acknowledge the possibility of difference between parents in their religious beliefs and communities. They therefore cannot stop discussions or the taking of children to services; indeed they respond to children of interfaith partnerships by refraining from imposing such limits. On the other hand, a non-custodial parent cannot undermine the primary responsibility for upbringing held by the custodial parent, for example by dictating education, diet or lifestyle of children not in his care. That is, the link between custodial authority and integrity means that a non-custodial parent’s assertion of a self-perceived right to pass on religion or enforce a monolithic religious identity on children or exclude other religious influences, all to the detriment or undermining of the custodial parent, carries the potential for damaging children’s integrity interests.¹⁶⁶ Such an extreme situation is unusual and should be

¹⁶³ *Ibid.* at 37.

¹⁶⁴ This is similar to what the American *Uniform Marriage and Divorce Act* § 408, 9A U.L.A. 561 (1996 Supp.) suggests: courts are not to intervene with the authority (and religious practices) of the custodial parent unless there is actual harm involved such that the child’s physical health or emotional development is endangered.

¹⁶⁵ This does not assume that children do not voice their own preferences or choices; indeed the custodial parent is subject to children’s decisions and behaviour the same way as any other parent.

¹⁶⁶ This differs from the strict pro-custody approach embodied in *Strum v. Strum* (1973), 8 R.F.L. 140 at 144 (N.S.W.S.C.). In this case, the Roman Catholic mother had custody while the Jewish father was prevented from teaching his religion to the children: “There could not be other than discord engendered in the [custodial parent’s] household if she were to be compelled to acquiesce in the children committed to her care being brought up in a faith to which she profoundly

understood as such.¹⁶⁷ However, if a non-custodial parent's sharing of beliefs and practices does operate in this way, then restraints may be justified. Similarly, a court should be extremely slow to impose restraints on a custodial parent's religious beliefs and practices at the behest of an access parent: the allocation of custody should carry with it the full exercise of its scope.

D. *The Interactions of Identity and Integrity*

In drawing attention to how courts take identity and integrity interests of children into account in custody decisionmaking, I am not calling for an explicit tally of these interests in every case. Instead, I have tried to uncover what "best interests" and "harm" might mean in the context of divorce-related disputes over religious upbringing. Judges called upon to untangle the complicated situations that these cases present have an impact on the identity and integrity of children, regardless of whether those interests are explicitly named or acknowledged. In exercising their power and discretion in this way, judges indicate the contours of the state's perspective on religion and custody and its response to the significance of the attached issues.¹⁶⁸

The interactions of identity and integrity, illustrated by the three general guiding principles sketched above, draw from, and hold implications for, all of the analytical frameworks proposed. From the family law framework, we find an emphasis on custodial authority and stability within a post-divorce family. From the constitutional law framework, we find respect for the guarantee of freedom of religion and an associated rejection of the state's determination of the definition of true religious beliefs and practices. Further, there is a recognition of the

objects." As should be clear, this is an exclusionary and extremely problematic framework.

¹⁶⁷ See, for example, the recent "witch" case from Alberta—*Gay v. Kingston*, [1992] A.J. No. 1171 (QL) (Prov. Ct.), in which the father, an adherent of the Wicca religion, was not restricted during access to his son. Nothing harmful was found in the father's religious practices. Note, however, before admiring the court's acceptance of the child's exposure to a different, and indeed, very out-of-the-mainstream, community, the fact that the father imposed limitations on himself in testimony before the court. He said that he did not intend to pass on his religious beliefs to his son, and would not answer questions on religion until the child was approximately twelve years old. See also "'Witch' is entitled unsupervised access to son, Alta. judge decides" *Lawyer's Weekly* (22 January 1993) 3.

¹⁶⁸ Toope in "Riding the Fences," *supra* note 16 at 83, characterizes the task as follows: "On the one hand, courts should be willing to uphold the religious choices parents make in relation to the raising of children. On the other hand, children need protection from religious beliefs and practices which endanger their health and welfare." Toope's fundamental objective is to uphold diversity in attitudes with respect to religion and child-rearing.

potential for children to grow up exposed to different, and perhaps conflicting, religious influences. From a community-based framework, we find acknowledgement of and support for a diversity of communities, each with interests expressed through individual parents and through children themselves. Finally, from the perspective of children, a balancing of identity and integrity responds to their interests as complex individuals who are meaningful members of families and communities.

Not only can we find echoes of the frameworks derived from different perspectives, but the interaction of identity and integrity tells us something about resolving the tension between parental claims linked to religion and the best interests test insisted upon by the Supreme Court of Canada. Looking at ways in which we can and should address children's interests in these cases actually informs the notion of constitutional freedom of religion. Instead of denying or avoiding the significance of freedom of religion in the context of the breakdown of an interfaith partnership or marriage with children, we can instead tentatively explore the meaning and extent of that freedom. That is, while the *Charter* introduces freedom of religion into family law, the relationships among members of a family that includes children, no matter the format of that family, affect the definition and scope of any rights claimed with respect to each other.¹⁶⁹

Parental freedom of religion, in keeping with the identity and integrity interests of children of interfaith partnerships, thus extends to discussing beliefs with children, taking the children to religious meetings or services, and sharing religious practices with them. At the same time, those interests dictate that, while a child may be exposed to and connected to different religious communities, the non-custodial parent cannot insist on monopolizing the religious identity of the child by "passing on" his religion in a way that undermines the primary responsibility for upbringing held by the custodial parent or destroys the relationship between custodial parent and child. Taking a child to religious services during access periods is usually not an example of such behaviour on the part of the non-custodial parent. On the other hand,

¹⁶⁹ See Karst, *supra* note 128 at 357. He argues that an individual's religious liberty "includes the freedom to develop, maintain, or modify a religious identity." See also Note, "Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self" (1984) 97 Harv. L. Rev. 1468.

dictating education, diet, and lifestyle is, and should not receive the court's backing.¹⁷⁰

In general, the exercise of parental freedom of religion corresponds with the identity interests of a child whose community membership contributes to her development and sense of self. In the event of the breakdown of an interfaith partnership, however, when claims of parental freedom of religion may pull in opposite directions, the court's task is not to limit the connections a child may have to different religious communities or to enforce a monolithic mono-religious identity on the child at the behest of one parent. In other words, parental freedom of religion does not operate to promise a religious community the membership of "its" children.¹⁷¹ A child of an interfaith marriage should be *allowed* to have a mono-religious identity, however, in the sense that the court cannot respond to the rights claims of the parents by trying to *make* the child truly bi-religious. From the community's perspective, this translates into an implied obligation on the part of the court not to set about to destroy communities by forcibly severing their connections with children.¹⁷²

V. CONCLUSION

The appeals before the Supreme Court attempted to pit the best interests test against *Charter* freedoms in a misleading and problematic manner.¹⁷³ The Court, unfortunately, did not explicitly reject that dichotomy; nor did it provide guidelines as to how parental freedoms interact with and are shaped by the children whose identity and integrity are thereby affected. By focusing on the interplay of identity and

¹⁷⁰ Compare the slightly different position taken by Schneider who also stresses the limits of courts in "Religion and Custody," *supra* note 5 at 904: "Courts do not have to iron out conflicts between custodial and non-custodial parents unless those conflicts provoke behaviour amounting to child abuse. Courts must do what courts must do; they should avoid doing what they can only do badly."

¹⁷¹ See N.M. Stolzenberg & D.N. Myers, "Community, Constitution and Culture: The Case of the Jewish *Kehilah*" (1992) 25 U. Mich. J. L. Ref. 633. They conclude that an autonomous legal order cannot be fully protected within a system of state law unless, perhaps, it was extremely insular with a very limited exposure to courts. The membership of children, however, would be one way in which the state could defer to some extent to parallel community structures.

¹⁷² Zemans, *supra* note 16 at 141, articulates the "guiding notion" that "the judiciary has few absolute values at its disposal when dealing with family law matters within a context of cultural diversity."

¹⁷³ According to Christine Davies in "Racial and Cultural Issues," *supra* note 16 at 21, courts will use the *Charter*, to balance the rights of parents and interest groups against a child's interests.

integrity interests, it is possible to accept that the *Charter* can inform issues related to the family, especially with respect to children; equally, however, family law should inform any analysis of the rights and freedoms at stake.¹⁷⁴ This assertion rejects a private picture of the loving family, untouched by concerns of justice,¹⁷⁵ at the same time that it allows for the particularities of familial connections to have an impact on the exercise of individual rights. Custody disputes involving religion indicate that the context of family relationships must inform the content of any rights claimed in that context.

Courts are not ongoing monitors, however, of the development of the identity of children; neither can they ensure children's continued integrity. Parental respect for the identity and integrity of their children must generally be assumed whether before or after divorce.¹⁷⁶ In making decisions concerning custody and access, however, courts do consider, and have an impact on, identity and integrity interests. Thus, in allocating custody, courts should grant the custodial parent primary responsibility for the education and religious upbringing of the child. This does not mean that custody should be allocated according to the religious identity of the child as found or established by the court on the basis of expert testimony. Indeed, the custodial parent and the children need not share identical membership in a religious community. Neither should parental affiliation with a certain religious community on its own disqualify that parent from custody, although courts may consider the impact of religious practices on the child's integrity. With respect to access, children's identity and integrity interests suggest that, as a parent, an adult may discuss, teach, and share religious beliefs and practices with a child. Children with connections to more than one religious community emerge from a multicultural society and their exposure to difference within their relationships with family members should be celebrated. These basic principles target and work to eradicate judicial bias against unusual or non-mainstream religions and the refusal to contemplate the coexistence of different religious communities in a

¹⁷⁴ Further, as Zemans points out, *supra* note 16 at 140, cultural values are "built into the concept of the family itself."

¹⁷⁵ See, for example, F.E. Olsen, "The Family and the Market: A Study in Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497; and S. Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

¹⁷⁶ This is the case just as parents, generally, are understood to understand and serve the best interests of their children.

child's life.¹⁷⁷ But those principles are also enriched, complicated, and made more reflective of the realities of children of interfaith parents, when they are carefully applied in a way responsive to those children.

In making decisions with respect to custody and access, when religion plays a part in the dispute, courts have an impact on each parent, the children, and the religious communities represented by the individuals in the courtroom. And yet, courts do not bring up children, govern individual religious beliefs and practices, or enforce religious doctrine and the norms of religious communities within the state. Acceptance of these limitations should shape the task of judges even as they are handed the responsibility for resolving custody disputes involving religion—a responsibility that encompasses ensuring freedom of religion in the context of custody and access, and appreciating the identity and integrity of children. Thus, judges tread a fine line between responding to real concerns of parents over the religious upbringing of children, distinguishing between these and superficial attempts to justify claims for restrictions on custody, and digging themselves deep into unenforceable schemes ostensibly created on behalf of children, but guaranteed to generate ongoing conflict and resentment.

A liberal society such as Canada, with a significant interfaith marriage rate¹⁷⁸ accompanied by a significant divorce rate, requires an approach to custody decisionmaking adapted to those circumstances. Parents should know that, in general, they will not be restricted with respect to religion in their relations with their children; they should also be assured that the allocation of custody will not depend solely on the religious identity of the child as found by the court. Primary or agreed-upon religious identity of children may play a part in determining the content of custody and access, but it should be modified by considerations of integrity and the role of the custodial parent.

A custody conflict is usually understood to rage over a “private” child, in a “private” family law context. And yet, the way in which the

¹⁷⁷ A remaining issue is whether the *Charter* itself might be used to justify judicial preference for religions and religious practices that correspond to *Charter* values. Mucci, *supra* note 16 at 360, suggests that religious values reflecting tolerance, charity, compassion and social duty, would thereby be favoured. It would seem that, conversely, non-*Charter*-like beliefs and teachings of a particular religion might be found damaging to children. This line of reasoning appears to undermine the religious freedom *guaranteed* by the *Charter* in the first place, but a full examination of the issue is beyond the scope of this article.

¹⁷⁸ Focusing on interfaith marriage is, of course, tied to liberal society, and, usually, liberal members of that society. The guidelines I have offered would not be satisfactory to individuals who adhere to strict non-liberal religious normative systems; and thus show the potential for both clash and dialogue between state law in a liberal society and religious orders that perceive of themselves as parallel frameworks.

court takes a hand in determining post-divorce arrangements for the child's life shows how that child is also a "public" young person or emergent citizen. In a diverse state with citizens belonging to numerous groups, including religious communities, the child of an interfaith partnership presents an obvious example of the potential for overlapping community memberships in one individual.¹⁷⁹ The response of Canadian courts to the reality of these Canadian children indicates, in one small way, the response of the state to the reality of multicultural dynamics.

¹⁷⁹ See "La diversité," *supra* note 7. The child is an emergent citizen located within multiple normative communities or forces.