

**Judicial Nonintervention as a Form of Religious Exemption?:
Whether the Refusal to Adjudicate Spiritual Custody Disputes Affords a
Parental Exemption and whether this is a Permissible Affordance**

1-Sentence Synopsis: Prohibitions on judicial intervention in spiritual custody disputes constitute a form of religious exemption from the application of the best interest of the child standard

Abstract

Over the last several decades, interfaith marriages have increased at a tremendous rate.¹ Of all Americans who have married since 2010, nearly four-in-ten (39%) have a spouse who is in a different religious group, a percentage which has roughly doubled within the last fifty years.² Simultaneous with this rise has been a rapid upsurge in the American divorce rate, with more than fifty percent of marriages ending in divorce.³ The increase in the number of religiously mixed marriages has meant that courts continuously confront child custody disputes involving religion.⁴ As each parent vies to raise their child in their personal religions or belief systems, judges are left with the ultimate responsibility of deciding the outcome for these families.

Most people would probably assume that these kinds of disputes would be treated on the same footing as other matters at issue in custody disputes. Yet, religion is seldom featured as a factor in custody and access disputes.⁵ Rather, when these disputes arise, a common approach that courts take is that of non-intervention, meaning that judges choose not to adjudicate and

¹ Jordan C. Paul, *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. Pa. L. Rev. 583, 583-613 (1989).

² Benjamin Wormald, Pew Research Ctr., *America's Changing Religious Landscape* 3 (2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> (last visited Nov. 6, 2016).

³ Jennifer Benning, Note, *A Guide for Lower Courts in Factoring Religion into Child Custody Disputes*, 45 Drake L. Rev. 733 (1997).

⁴ Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 New Eng. L. Rev. 1121, 1122 (1991).

⁵ Rex Ahdar, *Religion as a Factor in Custody and Access Disputes*, 10 Int.J. Law, Policy and the Family 177 (1996).

thereby leave the issue of the child's religious upbringing up to the parents. This approach "puts religion as a factor beyond the scope of a court's inquiry unless there are compelling reasons to justify the court's intervention in order to protect the child."⁶ In fact, without a clear threat to the welfare of the child involved, courts are reluctant to interfere with how parents decide to practice religion with their child.⁷

In this paper, I will first argue that these prohibitions on judicial intervention in spiritual custody disputes constitute a form of religious exemption from the application of the best interest of the child standard. Moreover, a court's decision not to intervene exemplifies an exception on a category of cases that may not exactly resemble classic religious exemptions, but nevertheless constitute a form of religious exemption that has had and will continue to have lasting effects on the lives of all parties involved in these disputes. Second, I will demonstrate why this religious exemption is constitutionally required, and further demonstrate the implications to this non-interventionist form of exemption.

Since I have not seen this line of argument deliberated in current scholarship, hopefully this paper can shed light on this topic to help people better understand the current debate in the U.S. over rights to religious exemptions.

Best Interest of the Child Standard

In current child custody disputes, the court's paramount consideration is the best interest of the child.⁸ This dominant rule of decision which courts unanimously agree should govern all

⁶ Benning, *supra* note 3, at 734.

⁷ Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 Duke L.J. 971, 979 (1998).

⁸ Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 Vill. L. Rev. 173, 203 (2008) [hereinafter *What Yoder Wrought*]; see also Jeffrey Shulman, *Spiritual Custody: Relational Rights and Constitutional Commitments*, 7 J. L. & Fam. Stud. 317 (2005) [hereinafter Shulman].

child custody proceedings, emphasizes the prioritization of a child's welfare and provides the primary criterion for courts to consider in safeguarding the interests of the child.⁹ Moreover, under the best interest standard, the interests of the child take precedence over the interests of any of the other parties involved in the dispute¹⁰, and the standard confers broad discretion onto judges to intervene in order to require parents to do what the judge determines is in the child's best interest.¹¹ Since most states have not specifically included religion as a factor to consider in awarding custody in spiritual custody disputes because of the general policy of nonintervention, this standard is not applied to child custody cases involving religion.¹²

Spiritual Custody

“Spiritual custody disputes” are disputes between divorced parents over the religious upbringing of their children which are brought before family law courts. With growing frequency, family courts are granting awards of “spiritual custody” to one parent, giving that parent the exclusive right to make decisions regarding the religious or nonreligious upbringing of the child, while requiring the other parent to comply with that parent's decisions (sometimes at the risk of losing custody).¹³ In other words, by granting spiritual custody awards when parents have conflicting religious practices, judges prohibit the custodial parent from passing his or her religion onto the child. Spiritual custody disputes may involve parents who disagree on the religion to raise their child, the denomination to raise their child under, or whether to raise their child religious at all.

⁹ Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. Balt. L. Rev. 83, 97 (2011).

¹⁰ Paul, *supra* note 1, at 598.

¹¹ Warshak, *supra* note 9, at 106.

¹² Benning, *supra* note 3, at 738.

¹³ Paul, *supra* note 1, at 584.

The Policy of Nonintervention

In providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”¹⁴ the First Amendment to the U.S. Constitution articulates the need for government to stay out of controversies involving religion in order to ensure governmental neutrality.¹⁵ This principle suggests that the judiciary should refrain from interfering in religious disputes, and it has led numerous state courts to choose not to adjudicate child custody disputes when religion is involved. Moreover, one of the main ways in which courts have handled child custody disputes involving religion has been a general policy of nonintervention. In fact, courts around the country have placed religion beyond the scope of custody decisions.¹⁶ This approach is based on the tenet that by adjudicating these spiritual custody disputes, judges automatically offend the constitutional values of the separation of church and state and of the freedom of religion.¹⁷ Although the policy of nonintervention is continuously applied in courts across the country, there are no studies that show how often courts are actually refraining from intervening when spiritual custody is at issue.

The majority of courts either apply an actual or substantial threat of harm standard, thereby refusing to intervene unless one parent can clearly and affirmatively show that the child’s exposure to the other parent’s religious views, or to conflicting religious views, places the

¹⁴ U.S. CONST. amend. I.

¹⁵ Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 Mich. L. Rev. 1702, 1725 (1984) [hereinafter *Establishment Clause*].

¹⁶ See *Salvaggio v. Barnett*, Tex.Civ.App., 248 S.W.2d 244, 247 (holding that the separation of church and state principle restricts the authority of courts in interfering with the religious teachings and views of parents); see also *Osteraas v. Osteraas*, 859 P.2d 948, 953 (Idaho 1993) (expressing that, in deciding child custody cases, courts should “refrain from entering the tangled web of religion altogether”).

¹⁷ Barry Glassner et al., *The Jewish Role in American Life* 22 (2002).

child in substantial “harm,” or is a “threat to the well-being” of the child.¹⁸ In general, courts must find that one of the parent’s religious practices poses an actual threat to the physical or mental health of the child, or that it poses a substantial likelihood of harm to the health or welfare of the child, in order to compel the court to adjudicate and make the issue of religion become relevant to the custody determination.¹⁹ Hence, this non-interventionist approach defines harm narrowly.

Religious Exemptions

For the purposes of this paper, I will utilize a definition of “religious exemption” as arising when an individual or organization is granted the right to disobey with impunity a valid law of the state.²⁰ A growing number of people and groups have been going to courts and claiming such a right on the grounds that applying a particular law to them would burden their free exercise of religion. In recent years, religious exemptions have received more attention as they have been invoked in more and more matters, such as in the prominent case of *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014).²¹

In the context of spiritual custody disputes, the policy of nonintervention constitutes an exemption. There are various implications to characterizing nonintervention as a religious exemption. The next three sections first will help to develop this line of argument, and will then explore the constitutionality of this practice, as well as the implications of granting such rights to exemptions.

I. Nonintervention as a Religious Exemption

¹⁸ Strauber, *supra* note 7, at 980.

¹⁹ *Id.* at 978.

²⁰ Ellis West, *The Case Against a Right to Religion Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol’y 591 (1990).

²¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Although the policy of nonintervention may not function precisely as a classic exemption, it resembles one in several significant ways that effectively make the policy constitute a religious exemption. Moreover, nonintervention amounts to a way of not dealing with spiritual custody cases in the interest of preserving the religious parenting right.²² When spiritual custody cases arise, the application of this policy acts as an exception of a category of cases that would ordinarily be subject to the law from its application. This exception is grounded in the religious character of human conduct from which it emerges, and the exclusion of these particular cases from traditional adjudication fundamentally derives itself from the nature of the dispute in a way that treats religion distinctively different from other matters, as is true with typical religious exemptions that are granted. In effect, the policy of non-intervention forges a divide between child custody disputes involving religion and all other matters that are disputed in child custody cases. When the government grants typical exemptions to particular religious people that it does not give to all, this inevitably constitutes favored or special treatment for their religion or conversely, for them because of their religion, as is true with nonintervention.²³ Moreover, exemptions serve a compelling government interest of protecting parents from doing something that they view to be religiously forbidden, or by forbidding parents from doing something that they view as religiously required. Accordingly, nonintervention likewise affords parents protection from the best interest standard and judicial adjudication that would possibly compel them to raise their children under a belief system that contradicts what they believe, or would disallow them from passing on their personal religious beliefs to their children, or both.

In addition, the argument against nonintervention mirrors arguments against the

²² *What Yoder Wrought*, *supra* note 8, at 203.

²³ West, *supra* note 20, at 600.

government granting standard religion-based exemptions. One argument is that religion-based exemptions in these kinds of disputes are undesirable because they encourage deceptive and fake claims which may be granted,²⁴ and that such policies generate divisiveness and ill will among the American people.²⁵ Arguments such as these go further to contend that granting exemptions as constitutional rights contravene the principle of neutrality toward religion. Traditional arguments against granting religious exemptions also contend that exemptions amount to religious favoritism because some people get treated better than others on account of their religious beliefs, and that religious accommodations may be fine generally but they cross the line when they impose undue burdens on third parties.²⁶ Nonintervention may be susceptible to all of these arguments and so these arguments may likewise all apply to the policy of nonintervention, as they do to classic religious exemptions.

Some scholars may argue that characterizing nonintervention as a form of a religious exemption is fundamentally inappropriate because nonintervention lacks some of the distinctive qualities found in classic exemption issues. Unlike classic cases in which parties claim a right to an exemption, the beneficiary of an exemption in spiritual custody disputes does not claim a right or have any say into whether the policy of nonintervention is imposed on their case or not. In fact, by refusing to intervene in religious disputes between parents, the interests of one or either parent may or may not be served whatsoever by courts. Furthermore, when prototypical religious exemptions are granted, usually a religious person is seeking the right to engage in a religiously motivated practice that is prohibited by law. By contrast, parents involved in spiritual custody cases may not necessarily seek judicial nonintervention. Rather, intervention may be sought by

²⁴ *Id.* at 603.

²⁵ *Id.* at 602.

²⁶ Michael W. McConnell, *Religion and the Constitution* 221 (Aspen Publishers, 3d ed., 2011).

one parent while the other parent could be seen as seeking an exemption from the application of the best interest of the child standard. Additionally, in typical cases in which exemptions are granted, the individuals and groups who claim such a right do so because they object to laws that either require them to do or not to do something contrary to their religious beliefs.²⁷ Yet, parties in spiritual custody disputes do not claim any right to nonintervention. Rather, the court decides its application. Hence, there is no preexisting law that nonintervention will protect parents from; rather, the policy protects certain parents from the possibility for judicial intervention in potentially curtailing their rights.

Overall however, nonintervention may easily be construed as a religious exemption since the role that it plays emulates that of other classic religious exemptions and its effects are analogous. Like classic exemptions, at least one party in spiritual custody disputes would likely object to a judicial adjudication compelling them to raise their children within the religious confines of a religion or non-religion that their personal beliefs do not comport with. Additionally, nonintervention, as with customary exemptions, arise when a parent, or parents, are granted the right for the best interest standard not to apply to the custody determination of their child. On the whole, this grant treats religious issues differently from nonreligious issues and fits accurately into the definition of religious exemption as provided in the above section.

In further understanding why nonintervention constitutes a religious exemption, it is helpful to compare the policy to other religious exemptions. A case in point is the growing number of parents refusing to vaccinate their children on the grounds that mandatory vaccination requirements infringe on their constitutional right to the free practice of their religion.²⁸ These

²⁷ West, *supra* note 20, at 591.

²⁸ Linda E. LeFever, *Religious Exemptions from School Immunization: A Sincere Belief or A Legal Loophole?*, [110 Penn St. L. Rev. 1047 \(2006\)](#).

parents can legally avoid mandatory school immunization requirements by simply claiming a non-medical exemption, allowed in almost every U.S. state. Although these exemptions protect the rights of parents who obtain exemptions, the accommodation favors the overriding interest of these particular parents while posing a serious threat to public health at the expense of others. Likewise, the policy of nonintervention favors the right to freedom of religion for particular parents, which means that the custodial parent, who is generally the parent who determines the religion and religious training of the children,²⁹ will likely benefit in raising the children according to his or her personal beliefs and values, as opposed to the non-custodial parent. Hence, as with school vaccination, at least one parent, likely the custodial parent, will thus be protected from a court's authority to compel him or her from raising their children under a belief system contrary to their own spiritual beliefs.

Another matter which further illustrates how the nonintervention policy may be construed as a religious exemption comes from a recent case that has transpired in Indiana. A mother, Kin Park Thiang, was charged with the battery of her young children.³⁰ She cited Indiana's religious freedom law, arguing that it allowed for her to punish her children in accordance with her religion.³¹ Although this case is ongoing, the fact that the state's religious freedom law is being used as a defense to the beating of children demonstrates how a prohibited form of conduct such as child abuse, which would otherwise be considered a crime, may be allowed because of the

²⁹ Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 J. Am. Acad. Matrim. L. 211, 221 (2002); see also Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 Fordham L. Rev. 383, 403 (1989).

³⁰ Kristine Guerra, *She Used Indiana's Religious Freedom Law as a Defense for Beating Her Son, Then Got Probation*, The Washington Post (Oct. 30, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/10/30/she-used-indianas-religious-freedom-law-as-a-defense-for-beating-her-son-then-got-probation/?utm_term=.2a8d2058c88f.

³¹ *Id.*

role that exemptions play in serving to protect religiously-motivated practices. Nonintervention plays a similar role in that the policy could be used to justify the fact that the religious upbringing of children is left up to the competing loyalties of parents who could perhaps be in the heat of a tumultuous divorce. In fact, studies have shown that, for example, children exposed to more than one religion may suffer adverse psychological effects.³² Exposure to more than one religion may become more likely if the question of a child's religion is left up to parents who clash and cannot reach an agreement over matters that concern the religious upbringing of their children. Furthermore, divorces involving spiritual custody disputes may not have effects that are as severe or anywhere comparable to child abuse, however, children left in the middle of these disputes may likely face negative consequences if the issue of their religious upbringing is left up to their hostile parents in the midst of nasty divorces and custody battles. Opponents to the imposition of nonintervention also argue that court intervention is preferable in spiritual custody disputes because it protects children from a destructive contest of parental wills and that private ordering leaves children in vulnerable positions.³³ A judicial finding of harm onto a child under these circumstances may be questionable since the bar is high in requiring a showing of harm.³⁴ Hence, nonintervention, like the Indiana religious freedom law, may similarly have effects that protect, allow, and possibly even facilitate these kinds of harms imposed on children, thereby constituting an analogous religious exemption.

The two above examples, namely the vaccination matter, and the child abuse case in Indiana, involve forms of exemptions that further show the appropriateness of characterizing

³² Shadee Ashtari, *Children Exposed to Religion Have Difficulty Distinguishing Fact From Fiction, Study Finds*, Huffington Post (July 21, 2014), http://www.huffingtonpost.com/2014/07/21/children-religion-fact-fiction_n_5607009.html.

³³ Shulman, *supra* note 8.

³⁴ *What Yoder Wrought*, *supra* note 8, at 178.

nonintervention in spiritual custody cases as an exemption. Construing it as such says a lot about what kind of policy it actually is and the effects it has, as well as justifications for why it is constitutionally required, as discussed in the next section of this paper. This is significant because it demonstrates the deeper realities of how family courts function in spiritual custody disputes and about the permissibility of religious exemptions, whether they are labeled as such or not. Indeed, nonintervention seems to carve out a religious exemption to the application of the best interest of the child standard.

II. The Permissibility of Nonintervention as an Exemption

Why Nonintervention is Legally Required

Given that the policy of nonintervention in spiritual custody disputes constitutes an exemption, it is also constitutionally and legally required. Where courts go beyond the limits of nonintervention to consider religion in custody cases, they do so in contravention of the Constitution as well as the principles of freedom of religion, and the separation of church and state principle. Also, under the Supreme Court's past precedent and core tests that have been developed for examining laws, the policy of nonintervention seems not only to be permissible, but constitutionally required. Both the Free Exercise and the Establishment Clauses of the First Amendment have been employed successfully in order to defend family rights against intervention.³⁵

In order to understand why the policy of nonintervention is constitutionally required, it is also helpful to understand why a policy of intervention would be legally prohibited. Not only does intervention violate the right to freedom of religion, but it would mean that judges would regulate the internal affairs of the home. In doing so, "no end of difficulties would arise should

³⁵ Korzec, , *supra* note 4, at 1128.

judges try to tell parents how to bring up their children.”³⁶ Moreover, intervention would be a problematic approach in spiritual custody disputes because the religion of a child is not the proper business for judges to decide and they could inevitably infringe on a parent’s constitutionally protected religious freedom. This would be inevitable because in making a best interest determination, a preference for one parent’s religious practice definitively prevails over the other parent’s.³⁷ Hence, this would mean that at least one parent would no longer have the autonomy to raise his or her child in the manner that she or he deems appropriate, thereby stripping away his or her parental rights.³⁸

Implication of this ‘Exemption’

There are various implications to the religious exemption that is triggered through the policy of nonintervention. Courts are adamant that in matters of religion, they must be neutral in treating religion on the same footing as non-religion and denominations equally as well.³⁹ However, by choosing to forego the adjudication of such cases in which the heart of the matter is religion, courts are thereby treating religious matters differently from non-religious matters. Yet, without the implementation of such a policy, judges would very likely have to weigh the merits of different religions, beliefs, and denominations and place relative values of differing religions.

In choosing not to apply the best interest of the child standard, courts are directly and indirectly deciding what is best for the child without adjudicating or applying the best interest of the child standard. This may be understood as one of the unintended burdens of the policy of

³⁶ Strauber, *supra* note 7, at 981.

³⁷ See Gary M. Miller, Note, *Balancing the Welfare of Children with the Rights of Parents: Peterson v. Rogers and the Role of Religion in Custody Disputes*, 73 N.C. L. Rev. 1271, 1280 (1995).

³⁸ John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 Neb. L. Rev. 1240, 1243 (2005).

³⁹ Ahdar, *supra* note 5, at 177.

nonintervention. Nonintervention prevents against downfalls of the best interest standard which include that the open-ended standard is too subjective, stimulates litigation, provides no objective basis or guidance for judges to choose between two fit parents, confers too much broad discretion onto judges, and that this carries the potential for abuse. Yet, critics point to some benefits to the best interest of the child standard that the spiritual custody cases are being excluded from receiving.⁴⁰ Moreover, the best interest standard allows judges to craft their decisions on a case-by-case basis while drawing on a comprehensive array of each child's needs. Although application of the best interest formula comes with the danger that a judge may exceed his or her power in order to reach a desired objective for proper child placement while trampling constitutional parental rights, the exclusion from case-by-case review triggered by nonintervention means that these disputes may not benefit from this kind of holistic evaluation and appraisal by a neutral third party such as a judge, but only in dire situations when harm compels courts to adjudicate.

In addition, another implication to the exemption that is triggered through the policy of nonintervention comes from the bar set by the "harm" portion of the general noninterventionist approach. The use of the "threat" or "harm" standard suggests that courts seek to safeguard the welfare of children while protecting the constitutional rights of parents. Although the finding of harm or threat is in fact rare because most courts require concrete evidence of actual impairment to the well being of a child, the potential nevertheless remains for the right for nonintervention to be undermined given that the terms "harm" and "threat to well being" are capable of numerous constructions. Moreover, judges may use the harm standard in order to intervene in more spiritual custody cases and thereby balance the state's concern for a child's welfare over the

⁴⁰ Warshak, *supra* note 9, at 104.

parent's right to freely practice their religion.⁴¹ This raises the possibility for judges to find harm merely because a child would be exposed to two contrary religions in the context of interfaith divorce, for example. Or, to find harm in religious practices that the judge is personally unfamiliar with, or where a child may be confused or upset by conflicting religions. Yet, this seems to be a blatantly unfair policy which would favor more mainstream religions and religious practices. For example, a judge may not characterize male child circumcision in the Jewish religion as a harm, while treating a Jehovah's Witness's refusal to authorize the giving of blood transfusions to their child as conferring a harm onto the child, simply because the judge is less familiar with the set of belief system of Jehovah's Witnesses than those of a Jewish person.⁴² While some courts have been able to restrict parents by labeling many types of emotional stresses as harm, other courts require a showing of greater physical or mental harm.⁴³ Yet, the potential for judicial variations between adjudications of these cases raises a potential threat to the constitutional rights of parents. This is especially true since the Court has failed to articulate specific guidelines for lower courts to follow when it becomes necessary to consider religion in child custody disputes, other than holding steadfast to the principle that courts should not choose one religion over another, and that courts should impose a strict policy of noninterference in spiritual custody disputes.⁴⁴

Further, critics of the policy also argue that nonintervention means that courts must wait for harm to happen, thereby leaving children in a vulnerable position. They argue that this reluctance to intervene unless a child's welfare is endangered means that courts must wait for

⁴¹ Strauber, *supra* note 7, at 978.

⁴² George L. Blum, Annotation, *Religion as Factor in Child Custody Cases*, 124 A.L.R. 5th 203 (2004).

⁴³ Strauber, *supra* note 7, at 980.

⁴⁴ Oстераas, *supra* note 16, at 948.

harm, or substantial harm, or the substantial threat of harm to occur (or to be imminent).⁴⁵ A judge must deem the extent of harm or threat of harm sufficient in order to justify intervention in spiritual custody disputes.

Critics of the nonintervention approach in spiritual custody disputes also argue that courts should consider religious preferences since refusing to consider religious questions is not a “neutral” alternative. For this reason, they claim that nonintervention is unfair, since a decision not to adjudicate in spiritual custody disputes supports the parent who opposes the action,⁴⁶ so even nonintervention in effect sides with one parent against the other, despite “neutral” intentions. In responding to such concerns, the alternative approach of intervention would more clearly and obviously violate the value of neutrality as an express constitutional guarantee of religious freedom.

Additionally, in suspending the use of the best interest standard that is ordinarily applied in these cases, nonintervention facilitates interfaith dialogue and in doing so, serves as a value ecumenism among the differing religions or non-religions of parents. Moreover, nonintervention indirectly encourages mediation and cooperation between parties of differing faiths and denominations, and promotes unity among these parents who must come to an agreement in arranging the religious upbringing of their children. Given these implications, further questions arise, such as whether the policy of nonintervention should be legally mandated, or whether an entirely different kind of standard should be applied to these cases rather than outright

⁴⁵ See *Zummo v Zummo*, 574 A.2d 1130, 1138 (Pa. Super. Ct. 1990) (judge adopted the opinion that “judges and state officials are deemed ill-equipped to second-guess parents, and are precluded from intervening” in parental disputes, save for emergency situation where the behavior of one of the parents is actually endangering the child, as in the case of child abuse and neglect).

⁴⁶ *Id.* at 6.

nonintervention, or whether definitive guidance should be provided to lower courts to help them determine questions such as how to treat the harm standard or what instances necessitate intervention.

Conclusion

As the incidence of both interreligious marriages and divorces increase, the lives of an alarming number of children have been and continue to be disrupted as the frequency of spiritual custody disputes continue to increase.⁴⁷ In the end, whether a court intervenes or not, both of these options will likely infringe on the rights of particular parents.⁴⁸ However, the most justifiable infringement seems to be that which the parties choose for themselves, rather than a court imposing a determination upon them. Hence, when the religions of parents diverge, each parent should have an equal as well as equally imperative claim on the conscience of their child, and although nonintervention is not formally labeled as an exemption, it functions as such.

Indeed, judicial nonintervention, by giving each parent the freedom to compete for religious primacy in their children's lives, attempts a constitutionally required juggling act that more effectively balances the rights of parents with the welfare of the children than the alternative of intervention does. I hope that this line of argument may help people to better understand the role that the policy of nonintervention and religious exemptions play in affecting our lives and the lives of those around us.

⁴⁷ West, *supra* note 20, at 592.

⁴⁸ Strauber, *supra* note 7, at 1007.