A Child and a Wall: A Study of "Religious Protection" Laws

Lawrence List
A CHILD AND A WALL: A STUDY OF "RELIGIOUS PROTECTION" LAWS*

LAWRENCE LIST**

I. RELIGION AND THE FREE SOCIETY; A PROBLEM AND ITS DIMENSIONS

I say that the real and permanent grandeur of
These States must be their Religion;
Otherwise there is no real and permanent grandeur:
(Nor character, nor life worthy of the name, without Religion;
Nor land, nor man or woman, without Religion.)
—Walt Whitman, "Starting from Paumanok"

WHEN the great "Poet of Democracy" wrote these lines a century ago, he was expressing a sentiment deeply felt by the American people since their earliest beginnings, a sentiment, simply, that religion is to be valued by the free society. This sentiment is a part of our tradition, and many observers have characterized Americans as "a religious people." Yet inhering in this element of the national character is the potentiality for great tension, a self-imposed tension embodied in the two religious clauses of the First Amendment, the one guaranteeing freedom of religion and the other prohibiting the state from making any law "respecting an establishment of religion." Both clauses manifest a respect for religion but they are apparently contradictory. If the state becomes too active a guarantor it may create an "establishment"; on the other hand, overly zealous isolation of the state from religious influences may result in infringements of religious freedom. This apparent contradiction between the two aspects of the favorable orientation of Americans toward religion, between the principles of separation of church and state and the principles of freedom of religion that are written into our organic law has, during the course of our history, raised a variety of problems for American law, many of which have seemed, in their very nature, to defy satisfactory solution. The relation between religion and the free society has rarely been free of difficulty, and the tensions that are apparently inherent in this relation are posed with a special intensity when the religion of a child becomes an issue, and, more particularly, when the state must participate in the religious upbringing of children. This intensity may be the result of the high regard in which both organized religion and American society hold children; each believes that its future depends, in large measure, upon its youth. In part, this intensity is so great because of the unresolved paradox inherent in the concept that a child is "born with" a religion.

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1. This characterization has become a part of our constitutional law. See Zorach v. Clauson, 343 U.S. 306, 313 (1952) (Douglas, J.).
even though this is not a biologically inherited trait. The free society would regard religion (or irreligion) as a matter of election; the churches regard religion as a matter of status, at least until the communicant reaches an age when he is able to make a choice. Yet the laws of the free society treat the religion of a child as a matter of status, possibly as the least unsatisfactory method of resolving unfortunate disputes, possibly as the best way. The question then becomes this: is the principle of separation so strong that the civil government dare not risk violation in order to settle such disputes, or is the principle of freedom so strong that the civil government dare not risk settlement for fear of a violation? What course may civil government constitutionally take when it must participate in the religious upbringing of children?

There are many aspects to the participation by the state in the religious upbringing of children. At the very least, the state recognizes and will protect the right of parents to raise and educate their children. But the state also must protect the temporal welfare of children, and in exceptional circumstances it will take a child from its parents for its own protection, and thus the state is forced to determine the religious upbringing of the child, usually through the award of custody. Perhaps the state will directly participate, as when its wards must be placed in public orphanages and similar institutions, or when juvenile offenders are placed in youth correction homes. And the courts of the state often must assume some responsibility for the religious upbringing of children through the adjudication of controversies not directly affecting this problem. Thus, the issue arises when a testamentary legacy or devise is made conditional upon the beneficiary following or forebearing from specified religious activities; where such a condition affects a child's upbringing, the courts generally treat it as invalid for interfering with the right and duty of the parents to educate their child in whatever religious atmosphere they wish. The problem has appeared in probation and divorce decrees. And, outside of the area of adoption and

5. In Jones v. Virginia, 185 Va. 335, 38 S.E.2d 444 (1946), two minors who had been declared delinquents were placed on probation on condition that they attend Sunday school and church each Sunday for a year. The court held that the condition was a violation of the religious freedom of the minors.
6. In Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956), a divorce decree gave custody of the child to the mother, provided that the child "be reared in the Roman Catholic religion." A contempt conviction, for violation of this provision, was reversed on the ground that the provision was too uncertain and indefinite to make clear to the mother the duties that it entailed.
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custody, the question is presented most often when the state is called upon to
determine the validity of ante-nuptial contracts relative to the religious up-
bringing of the children of the contemplated marriage.\(^7\) The majority of courts
which have considered this problem have held that the agreement has no bind-
ing effect, usually for the reasons that it interferes with the individual parent’s
duty to exercise independent judgment with reference to the child’s religious
training and that it hinders the child in the exercise of his freedom of conscience
as he reaches maturity.\(^8\)

There are other examples. But for intensity of feeling and difficulty of
solution, the problems of participation by the state in the religious upbringing
of children are best posed in the area of adoption and custody. This area will
be discussed here, not only because of its special intensity but also because of
the peculiar statutes common in this area, the so-called “religious protection”
laws. These laws typically provide that, when practical, the proper court\(^9\) shall
or must award a child to custodians or adoptive parents of the same religion
as the child (or the natural parents of the child); the basic question to be ex-
amined is whether these laws, especially when they are given a mandatory
interpretation, result in violations of the First and Fourteenth Amendments.

Why these laws are peculiar can be understood after a consideration of the
manner in which they compound the difficulties of adjudication in an already
difficult area. In adoption and custody proceedings, the very permanency of
any decision raises special problems. Here, the number and variety of competing
interests is great. These interests, “besides those of the parent and child, may
include the interests of the community, the church, the family, and the would-
be parent. What makes these cases particularly difficult is not only that there
often may be alliances between competitors . . . , but also that a competitor may
represent not a single interest but a class, with internal conflicting and compet-
ing interests.”\(^10\) Here, the courts must adjudicate on the basis of the instinctive

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7. Litigation over ante-nuptial contracts has generally involved an agreement by a non-
Roman Catholic planning marriage to a Roman Catholic that any children of the marriage
will be baptized and educated as Roman Catholics. The agreement is specified in Canon
1061 of the *Codex Luris Canonici* and is required in order that the marriage may be celebrated
before a priest. See Note, 6 Jurist 50, 55 (1946). This is one manifestation of the position of
the Roman Catholic Church that all material factors must be subordinated to insure a
Catholic upbringing for the child. See Note, 50 Yale L.J. 1286, 1291 (1941), citing Pope
Pius IX, *Syllabus of Errors of 1868*, No. 68.

8. See, e.g., Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910); Commonwealth
v. McClelland, 70 Pa. Super. 273 (1918); Denton v. James, 107 Kan. 729, 193 Pac. 307
(1920); Martin v. Martin, 283 App. Div. 721, 127 N.Y.S.2d 851 (2d Dep’t 1954), *aff’d per
curiam*, 308 N.Y. 136, 123 N.E. 812 (1954). Although one Roman Catholic authority has
argued that the courts have not been hostile to such contracts, see Allred, *The Legal Status
of the Ante-Nuptial Promise Before Mixed Marriage*, 12 Jurist 1, 41 (1952), it has been con-
ceded that, aside from Ramon v. Ramon, 34 N.Y.S.2d 100 (N.Y.C. Dom. Rel. Ct. 1942),
where such contracts were said to be enforceable in dictum, no court has decided that they are
valid, see Note, 6 Jurist 50, 54-55 (1946).

9. Invariably these proceedings are before a court rather than an agency, and usually
the courts are specialized, some states having children’s courts, some giving jurisdiction to
probate courts; but the pattern is not uniform. See Note, 54 Colum. L. Rev. 376, 396 (1954).

feeling that the family is the strength of the free society while in ignorance of the relation of religious training to good citizenship and the good life. Here, modern sociology and psychology, with their studies of individual and group behavior, demand consideration. Here, finally, the narrow confines of the adversary system of justice, even as modified for cases in this area, are ultimately tested, for the institution which can no longer serve individual or social needs is of little value; and it is not clear that the courts can satisfactorily solve problems of our religious pluralism.

II. ADOPTION AND CUSTODY; THE RELIGIOUS FACTOR IN THE ABSENCE OF STATUTE

Before turning to an analysis of "religious protection" statutes, the development and present nature of adoption and custody proceedings will be examined in some detail. Special attention will be given to the treatment of religion in these proceedings in the absence of statutory guidelines. Then, after examining the operation of the "religious protection" statutes, it will be possible to see how they have affected the legal, sociological and psychological concepts in this area and, finally, to raise the constitutional questions.

First, what are the rights of the natural parents in regard to the religious upbringing of their children? In England, courts regarded it as a duty for parents to provide their children with some religious education and belief, and only a generation ago English parents who refused all religious instruction to a child would have been considered to have forfeited all their rights to its custody and training. The rights and duties of parents were actually those of the father; the mother had no right to interfere with the education of her children while the father was alive, and even after the death of the father, the mother was still bound to raise the child in the religion of the father. The only situations in which the mother could control the religious education of her child were in cases of illegitimacy or in cases where the father expressly abdicated or forfeited his rights. Assuming that neither of these situations was found, a court would direct that a child be educated in a religion other than that of the father only when the father had abandoned the child and the mother was dead or otherwise unavailable, or, in the more liberal courts, when the "best interests of the child" and an extreme fact situation demanded such a result. Even this power in the courts was circumscribed by an attitude of restraint in cases where the judge felt that the religious education of the child had progressed so far that definite religious ideas had been formed and that any change would produce serious mental consequences.

American theories of parental rights generally followed the English, especi-

12. The following discussion of the English Law is based upon Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485, 488-96 (1916). Case citations are omitted.
ally in the earlier cases. The right to control the religious upbringing of children rested almost absolutely with the father, and the dominance of the father is still recognized to some extent. But, more and more, the American courts have come to the view that the rights of the mother in determining the religious training of the child are equal to those of the father, and that the mother, if she is the surviving parent, has the exclusive right to make this determination. And, to a much greater extent than the English courts, American courts regard the temporal welfare of the child as more important than any technical rules designed to protect the "right" of either parent or both to control the religious upbringing of their children, and hence they will determine custody as between parents, or even as against parents, whether or not religious factors are given any consideration as the best temporal interests of the child dictate.

Implicit in the discussion of parental rights is the difficulty in separating parental right cases and custody cases, and discussing them in distinct categories; obviously, any time a court is called upon to enunciate principles of parental rights, at the base lies a dispute over the custody of a child. When the family is together, a unit, the technicalities of parental right theories are of little consequence; only when the power to control, in some respect, becomes an issue between husband and wife, or natural parents and others, or perhaps among parties all unrelated to the child, must a court necessarily decide who is to have custody.

The term "custody," as applied to a child, is an unfortunate one, connoting as it does a degree of possession of property. Yet it is not altogether inapt; traditionally, the custody of a child was an interest in property, carrying

13. See, e.g., Matter of Jacquet, 40 Misc. 575, 82 N.Y. Supp. 986 (Surr. Ct. 1903); Hernandez v. Thomas, 50 Fla. 522, 39 So. 641 (1905); But see State ex rel. Ball v. Hand, 1 Ohio Dec. 238 (Super. Ct. 1848), where the court denied a petition for habeas corpus by a father to have his two infant daughters returned to him by their maternal grandfather, the father intending to place his daughters in a communal Shaker community which he had joined.


15. People ex rel. Delaney v. Mt. St. Joseph's Academy, 198 App. Div. 75, 189 N.Y. Supp. 775 (4th Dep't 1921); People ex rel. Woolston v. Woolston, 135 Misc. 320, 239 N.Y. Supp. 185 (Sup. Ct. 1929). Friedman, writing in 1916, was accurate in his prediction that "as the law develops . . . it will probably enlarge the mother's authority over her children's religious education," Friedman, supra note 12, at 499. While he could cite only In re Turner, 19 N.J. Eq. 433 (1868), in support of the position of equal rights for the mother, Pfeffer could, in 1955, regard this as almost axiomatic. Pfeffer, supra note 10, at 356.


with it the right to the services of the child and other advantages, and even today this idea underlies, perhaps only subconsciously, the decision of a court which emphasizes parental right rather than parental duty. Custody law has undergone the same general development as parental right theories. At first, the courts spoke of the father, and much later, of the father and mother jointly, as having the exclusive custody of his children. When the problem was one of transfer or surrender of custody, the courts fell back on the language of property law, speaking in terms of “giving,” “granting,” and the like; yet they never reached the point of complete severance of the parent-child relationship “in the sense that the parent is held to have absolved himself completely from all duties to his child . . . , no matter how sweeping and unequivocal were the terms of the alleged emancipation or the purported grant of custody.” Unwilling to go to the extreme, the courts used the language of presumption to overcome the connotations of finality of property terms in reuniting child and parent after the parent had surrendered the child to others. A phrase, such as “a father is prima facie presumed to be competent to have the care and custody of his child, and can only be deprived of his right by an affirmative showing that he is incompetent,” could be employed to prevent the appointment of a relative as custodian, and, at the same time, obscure the basis of the opinion and the concept that eventually was expressly used: that the best interests of the child should be the basic concern in custody proceedings.

The “best interests of the child” test, which presently is the primary, if not the exclusive, guideline in custody cases, developed independently in different jurisdictions, but the leading case is Chapsky v. Wood, the opinion having been written by David Brewer, later to become an Associate Justice of the United States Supreme Court. The case is interesting because it illustrates the development of custody law at a midpoint: Brewer still spoke of the prima facie right of the father to the custody of his six-year-old daughter, but found that, the father having left the little girl with a maternal aunt almost since birth, its best interests would be served by leaving it with the aunt; here “best interests” had overcome the presumption of parental right. Eventually, the legalism of an “overcome presumption” was dropped and the courts expressly recognized that the ultimate concern should be with the child itself and that it should be placed into that custody which will be most conducive to its temporal welfare. It may be generally proper for parents to have custody, but this is true only because, and to the extent that, such custody will best serve the interests of the child.

22. The “best interests of the child” test has been severely criticized on the ground that it is superficial for a court to state a custody problem in terms of these interests alone, and that all the individual and social interests must be considered if the very richest and finest life is to be secured for the child. See Sayre, supra note 18, at 681-92. In defense of the test, it
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However difficult may be the determination of the best interests of the child, the difficulty is compounded when a custody proceeding presents the court with a choice of custodians of different religious faiths. Even where no statute controls, the courts are faced with the dilemma of working through the prohibitions of the First Amendment in order to give consideration to the nature of the religious training or lack of it that each custodian can give to the child, this factor being recognized as an element of the child's best temporal interests. Although it would be possible to ignore the religious element entirely, most courts take the view that, while they will maintain an attitude of impartiality between religions and will not disqualify an applicant for custody because of his religion, the religious factor is a proper matter to be considered in determining what decision is best for the temporal welfare of the child.

In cases involving guardianship, by nature a temporary relationship, there is less hesitancy on the part of the courts to appoint or confirm a guardian of a different religious faith than that of the child or its parents, especially where the parents have indicated that the religious training of the child is of little significance; there is also less hesitancy to appoint a guardian of one faith with instructions to rear the child in another faith, the courts apparently feeling that the likelihood of tension being engendered by the difference is less where the question is only one of guardianship. Of course, if the parents, or the survivor, express a choice, it will be followed unless contrary to the best interests of the child.

As the custodial relationship involved tends toward greater permanency, the religious factor seems to be given more weight, although it is still considered in terms of its bearing upon the temporal welfare of the child. This is an important qualification, and it is a near universal; almost invariably, when courts speak of the child's "welfare" or "best interests," they use the adjective "temporal," if not expressly, certainly by implication. As spiritual welfare, both in this world and in afterlife, is given greater consideration, the religious factor will become more important, but American courts feel compelled to stress temporal welfare. This emphasis is only partly the result of an attempt to reconcile the popular sentiment in favor of religion in general and the constitutional expressions of this sentiment; in strict theory and as a matter of practicalities, a civil court cannot determine spiritual welfare. Its judges are mortal men, and even if mortal men could decide this question, those with an ecclesiastical background are better suited to do so. This is not to say that religion is not a significant element of the child's temporal welfare, and matching religions, in order to serve that temporal welfare, is certainly the rule and not the exception. But spiritual welfare in its more mystical and obstruse forms (and should be said that Sayre seems to read it too narrowly and literally; many cases demonstrate that, explicitly or implicitly, courts do consider broader interests.

in its more anti-social forms) has never been respected by our courts, and, unless expressly qualified by the adjective "spiritual," the terms "welfare" and "best interests," as used here, refer only to temporal welfare and interests. This limitation, both by the courts and in this paper, is not accidental; aside from any theoretical or practical problems, grave constitutional questions are raised if spiritual welfare becomes an independently significant consideration.

As a general matter, then, where the non-religious factors are in substantial balance and the child has not become attached to any particular faith, preference is given to custodians of the same religion as that of the parents, or the surviving parent. And where the child is old enough to have developed an interest in and a preference for a particular religion, the courts are reluctant to choose custodians of a different religion, for fear that such a situation would interfere with the religion of the child; these cases depend upon the age of the child. But no substantial sacrifice of a child's purely temporal interests will be made in order to insure that it receives training in any particular religion; and this approach follows whether the dispute is between parents and non-related parties, or between applicants other than parents.

One other aspect or the religious factor in custody proceedings deserves mention. Even in the absence of any particular issue as to whether the child should be raised in one religion or another, the courts have often referred to the good religious standing or qualifications of the custodian chosen, or of the superior facilities for religious training in the home background chosen, in deciding which applicant could best serve the interests of the child. This attitude seems in keeping with the American sentiment in favor of religion in general and indicates a policy favoring religion as against irreligion. Such a policy has never been expressly recognized—in fact, direct enunciation has been explicitly avoided—and the fear of constitutional violation possible if this factor ever were made determinative in a custody proceeding makes it unlikely that this attitude would be expressed. Nevertheless, it is significant that

24. This attitude is by no means limited to the area of adoption and custody. It underlies, although not expressly, such constitutional cases as Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); Jacobsen v. Massachusetts, 197 U.S. 11 (1904); Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934); Prince v. Massachusetts, 321 U.S. 158 (1944); and United States v. Ballard, 322 U.S. 78 (1944).

25. See text at notes 50-52 and Part IV, infra.


some form of religious surrounding has been regarded as a necessary element of the temporal welfare of the child.

The most permanent change in the relationship between parents and child is accomplished through adoption. Adoption is a statutory proceeding\(^2^2\) whereby the relationship of natural parents and child is totally and irrevocably severed, the natural parents or parent being replaced by "adoptive" parents, the latter assuming all the rights and responsibilities of natural parents. "The law of adoption in the absence of statute" cannot be discussed since there technically is no such thing; the following discussion relates to adoption proceedings where "religious protection" statutes are not involved.

The general principles of adoption law are the same as those of custody law, and a review of cases would serve no purpose. In any adoption proceeding, the ultimate question that the court decides is whether or not the adoption would be for the best temporal interests of the child, the content of this concept paralleling its content in custody cases. Unlike custody proceedings, however, which typically involve a contest between two parties, both of which want custody and only one of which will be awarded custody, adoption proceedings are not necessarily adversary in nature, at least not in the full sense of that word. Typically, there is a petition by one party before the court and that party is the only one that wishes to adopt the child; even if the agency which has custody of the child appears, or if a guardian ad litem is appointed, the opposition to the petition is merely formal, if there is opposition at all, and behind it is none of the emotional need that lies at the heart of a custody petition. The temporal welfare of the child remains the criterion, but the court is often able to range far afield in analyzing the situation before it; the presumed advantage of two clearly defined arguments, the product of a true adversary proceeding, is lost, but whether this presumption makes any sense in adoption cases is doubtful.\(^3^3\)

As for the religious factor in adoption proceedings, matching religion is the general practice, even in those states without "religious protection" statutes in this area. But this matching of religions is dictated not because of any separate policy relative to the religious factor in adoption but rather because matching generally serves the best temporal interests of the child. And cross-religious adoptions are not rarities in these jurisdictions, the courts showing no hesitancy in granting petitions brought by persons of a religion different from that of the child or the natural parents of the child. At times, agreement by the adoptive parents to rear the child in his own religion seems to have been

\(^2^2\) Adoption was not recognized at common law, and thus the nature of the proceeding is defined entirely by statute. And it is only recently, as the values of adoption have become more widely recognized, that the courts have abandoned, in this area, the strict construction generally applied to statutes in derogation of the common law. See Lutterbuck, *The Law in Illinois Pertaining to the Adoption of Children*, 8 DePaul L. Rev. 165 (1958).

\(^3^3\) The many competing interests involved raise this doubt, see supra note 9, and this difference between adoption and custody proceedings makes Sayre's criticism, at least as applied to adoptions, an overstatement. See supra note 22.
an important consideration in the decision of the court, but this is not decisive: cross-religious adoptions have been allowed, even in the absence of such an agreement, when the adoption would best serve the child's temporal welfare.

If legal rules and court-determined results were the only significant aspects of adoption and custody proceedings, then it would be proper now to turn to analysis of the various "religious protection" statutes. But these aspects are not nearly the only ones, and perhaps they are not even the important ones. These proceedings, and especially adoption proceedings, have far-reaching social consequences, and no discussion is complete if it fails to examine the sociological and psychological aspects of the problem.

The very number of adoptions annually in the United States demonstrates the social significance of this proceeding. In 1944, approximately 50,000 petitions seeking adoption were filed, three times more than were filed ten years earlier, and, by 1955, the national figure had increased to approximately 93,000. Each petition, of course, involves the interests of numerous parties. Placement of the child is most important, and "it is generally agreed that it is the permanence and finality of legal adoption that make possible the security and sense of belonging that should be associated with child placement." The adoptive parents are seeking through the adoption to fulfill strong and unmet emotional needs for a child that they are unable to produce biologically. Their motivations may be psychologically appropriate—a sincere desire for a family—or they may represent attempts to prove status or assuage feelings of guilt caused by this failure to produce children, backgrounds which will make it difficult, if not impossible, for the petitioners to treat the child "in truth as one of them and not a stranger among them"; even with appropriate motivations, the adoptive parents may not be able to accept the child born to someone else. There are problems for the natural parents, too. Parents who surrender their child for adoption because they are financially, physically, or emotionally unable to care for it are likely to suffer feelings of conflict, remorse and guilt. These difficulties are compounded when the surrendering parent is an unwed mother, usually a desperate and confused person forced to make a difficult decision under most trying circumstances.

These are only the most directly related interests. To the extent that a properly functioning family is a socializing asset to the community, both immediate and at large, the community has an interest in the adoption process.

34. In re Adoption of Dure, 197 Minn. 234, 266 N.W. 746 (1936).
38. Clothier, Placing the Child for Adoption, 26 Mental Hygiene 257 (1942).
39. Asch, supra note 36, at 32.
40. Clothier, supra note 38.
41. Over 50% of the adoptions in the United States involve illegitimate children. Asch, supra note 36, at 31.
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In so far as the adoption agency, public or private, recognizes the high responsibilities that have been given to it in the adoption process, the agency has important moral and ethical interests. The duty to the community of the public agency is more all-encompassing; the duty of the private agency, generally religiously-affiliated, is also owed to some organized religion, and here the interests of the churches in the adoption process are most vigorously asserted. On the fringes of adoption proceedings rests another group of interests, those involved in the private placement, or, as it is called by those who dislike it, the "black market."\(^4^2\) The private placement is an interesting problem in itself; it retains a rather ambiguous status, and, in spite of the fact that the need for freer adoption is generally recognized by social workers\(^4^3\) and that the private placement often produces excellent results, the regular agencies are generally antagonistic to this practice, perhaps for admirable reasons, perhaps for self-serving ones.

What is particularly relevant here is the significance attached to religion by the non-legal participants in the adoption process. Once again we find clear expression of the generalized sentiment in favor of religion and the values it fosters; note the words chosen by a representative of the United States Children's Bureau to define the philosophy of social work as it relates to children, on the occasion of the Midcentury White House Conference on Children and Youth:

> The underlying philosophy grows out of our Hebrew-Christian heritage and is in harmony with modern ideas of the physical universe. It rests upon a concept that man is essentially a spiritual being, related inescapably to the Author and Sustainer of creation, and on the further concept that man, because of his nature and his relation to the Spirit holding all of the Universe within its being, is a morally responsible agent. It is this philosophy which underlies the work of the . . . Conference [which] bases its concern for children on the primacy of spiritual values, democratic practice, and the dignity and worth of every individual.\(^4^4\)

Recent studies in connection with the National Adoption Project of the Child Welfare League of America present an accurate picture of treatment of the religious factor by adoption agencies.\(^4^5\) One poll of this study asked various agencies to check from a list of ten factors what they considered to be important when selecting adoptive parents for a child; matching religious back-

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\(^4^3\) See text at notes 108-115 infra, and *cf.* Maddux, *The Case for Adoption* (1947), which is almost an argument in favor of child-swapping at will.


\(^4^5\) The following discussion is based upon 1 Schapiro, *A Study of Adoption Practice* 58-60, 83-86 (1957). The three volumes of this study represent papers presented at conferences, surveys conducted by the Child Welfare League, and conclusions drawn by the League staff in connection with the National Adoption Project, which was directed by Schapiro.
ground ranked with matching racial background and matching temperamental needs as the most important factor. In spite of the widespread practice of matching religions, however, the religious problem is still considered the most sensitive and most controversial in adoption practice, and "in which religion will a child be raised is the principal question confronting agencies." In determining the religion of the child, the agencies almost invariably accept the decision of the mother, especially if unwed, and if both natural parents participate, the father's wishes are generally also considered. If neither parent can decide, the determination of the authorized custodian will control, or else the agencies will examine the church history of the parents, or the mother. In the case of foundlings about whom nothing is known, an arbitrary choice is made. When the child is of mixed religious parentage, about half the agencies follow the same general pattern described, while the remainder individualize placement on a casework basis. If statutes cover this problem they, of course, control. Once religion is determined, the agencies generally consider themselves to have the ethical responsibility, entirely aside from any statutes, to place a child with adoptive parents of the same faith as the child's own parents whenever a good home can be found within that faith. There is disagreement, however, about the content of "faith," the views of an adequate home ranging from a home where the parents are devoutly religious only to a home where the parents are moral and ethical, even though they observe no formal religion. Schapiro concluded that these differences in attitude probably represent a cross-section of American opinion and will continue to vary as a reflection of public feelings on this matter.

These generalities can be better understood against the background of the positions of the three major religions in America on the question of the religious factor in adoption. The most stringent attitude is that of the Catholics, but it is entirely in keeping with a theology that regards religion as an obligation basic to the very nature of the child and requires that all the members of the family practice regular religious worship. The National Conference of Catholic Charities states that the religious status of the prospective adoptive parents should be "the weightiest, although not the sole element" in an adoption and that "Roman Catholic children should be placed only in Roman Catholic families." It is more difficult to find a "Protestant position" or a "Jewish position." Protestant attitudes vary among denominations, and one commentator, while conceding that the child's interests would generally be best served if he were brought up in the religious faith of his parents, wrote that "it is not sufficient to find out whether a prospective parent is a Congregationalist, a Methodist, or a Baptist. It is more

46. Of 253 agencies responding, 240 checked the matching religious background factor as important. Schapiro did not consider this surprising, however, since it "is in many instances required by law. . . ." 1 Schapiro, op. cit. supra note 45, at 86.
47. 1 Schapiro, op. cit. supra note 45, at 58.
necessary and of much more value to discover the extent to which the individual’s life is guided by his religious beliefs.\textsuperscript{50} According to Judaism, the possession of children is the greatest blessing that God can bestow upon man; from this premise a Jewish spokesman expressed the belief that moral and ethical persons, even when not religiously affiliated, could serve well as adoptive parents and, to the National Conference on Adoption, posed this question: "Who are we to decide that persons who cannot become parents by an act of God should be deprived of the joy of adoptive paternity because of religious requirements or should be forced to lie or pretend that they will become religious in order to obtain a child?"\textsuperscript{53} The joint statement of the Department of Social Welfare of the National Council of Churches of Christ and the Council of Jewish Federations and Welfare Funds provides, in part:

Opportunity for religious and spiritual development of the child is essential in an adoptive home. A child should ordinarily be placed in a home where the religion of the adoptive parents is the same as that of the child, unless the parents have specified that the child should or may be placed with a family of another religion. Every effort (including interagency and interstate referrals) should be made to place the child within his own faith, or that designated by his parents. If, however, such matching means that placement might never be feasible, or involves a substantial delay in placement or placement in a less suitable home, a child’s need for a permanent family of his own requires that consideration should be given to placing the child in a home of a different religion.\textsuperscript{52}

III. "RELIGIOUS PROTECTION" STATUTES: THEIR OPERATION AND THEIR WISDOM

Not unexpectedly, the treatment of the religious factor in adoption and custody proceedings has been the subject of widespread statutory activity in the state legislatures, and the most recent thorough examination of the area revealed that forty-three jurisdictions had statutes in some way relevant to the problem of religion in child placement.\textsuperscript{53} The scope and variety of these statutes vary considerably; some are old, some new, and relatively few have received a definitive court interpretation.\textsuperscript{54} There is no "typical" "religious protection" statute but, for
purposes of this analysis, we may hypothesize one; it provides that the court shall or must, when practicable, award the child to custodians or adoptive parents of the same religion as the child (or the natural parents of the child). That this hypothetical law is not an exact reproduction of any actual "religious protection" law should not be objectionable since the interpretation given to the actual laws generally "depends on the attitude of the courts of a particular jurisdiction rather than the terms of the pertinent statute," and the only minor differences in wording have not resulted in anything resembling uniform treatment.

While, of course, the judicial attitude toward "religious protection" laws has various shadings, three general approaches have been taken by the courts: the laws are given practically no effect, or they are given a discretionary interpretation, or they are given a mandatory interpretation. The first is characteristic in Missouri, the second in Pennsylvania and Illinois, and the third in New York and Massachusetts.57

In Missouri, a combination of strong policies—a tradition of religious liberty and great judicial respect for the best interests of the child test68—has resulted in the effective negation of the state's various "religious protection" laws. As long ago as 1884, greater consideration was given to the child's temporal welfare than to the "religious protection" law; although in the particular case, child's welfare, father's wishes, and the law all favored the same result, the attitude of the court toward these statutes is revealed by this statement: "A father in Missouri forfeits no right to the custody and control of his child by being, or becoming an atheist, nor are his rights in this respect increased before the law by his believing rightly. The law does not profess to know what is a right belief."69 A petition to remove the guardian of an orphan because his religion differed from that of the child was rejected on the ground that removal for such a reason would violate the State Constitution.64 And, in a recent adoption case, the court allowed Roman Catholics to adopt a Protestant child in spite of objections raised by an argument based upon a "religious protection" law relating to guardianship.62 Missouri still has "religious protection" laws in force, but it is unlikely that they will receive any significant consideration by a judiciary which has traditionally regarded the temporal welfare of the child as its primary concern in child placement cases.

57. This trichotomy is recognized by Note, 54 Colum. L. Rev. 376 (1954) and Comment, 1957 U. Ill. L. Forum 114, 116-17.
58. See, e.g., Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910). Here, an antenuptial contract was held invalid.
59. In re Doyle, 16 Mo. App. 159 (1894).
60. Id. at 166.
62. In re Duren, 355 Mo. 1222, 200 S.W.2d 343 (1947).
63. See Mo. Rev. Stat. §§ 210.160, 211.140, 211.390, 457.170 (1959). The predecessor to § 457.170 was the section interpreted in Duren; its wording was unchanged in the last revision of the Missouri Statutes, and, strangely, is one of the most stringently worded of all the "religious protection" laws, providing that: "A minor shall not be committed to the guardianship of a person of a religious persuasion different from that of the parent's or of the surviving
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Other courts with a tradition similar to Missouri have adjusted their attitudes or at least their language as a result of the enactment of "religious protection" laws. Still, the primacy of the broad best interests of the child test has given only little ground under the force of these laws, and they have generally been regarded as discretionary only and little more than an express legislative statement that the courts should do exactly what they had been doing; that is, treating religion as one element of the temporal welfare of the child. In Pennsylvania, this test has always been emphasized in cases of child placement where a religious issue is involved and where the court has given the child to custodians of a different religion than that of the child. When the first "religious protection" law, one concerning guardians and using the words "shall in all cases be preferred," was presented to a court, the court refused to "construe this language to be a positive command to appoint such person, regardless of other considerations relating to fitness, or as taking from the court its discretion, nor in any way to relieve it of its duty to choose such persons as in its opinion shall be best fitted to look after both the physical and spiritual welfare of the minor . . . . The welfare of the child must remain the primary consideration . . . ." In 1953, this state added a "religious protection" law relative to adoption, but the child's temporal welfare is still considered controlling, and a cross-religious adoption has been allowed even under this law. This same development is noted in Minnesota, where the courts have treated the "religious protection" laws as discretionary only and have continued to consider the child's temporal welfare as controlling, with the religious factor being regarded as one element in this welfare; again, cross-religious custodial relationships have been decreed.

The final example of this intermediate approach to "religious protection" laws is Illinois, another state which traditionally employed the temporal welfare of the child test and considered the religious factor as an element of that test. As late as 1945 Illinois enacted a law which provided that: "The court in entering a decree of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious faith as that of the child." This law reached the Illinois Supreme Court for the first time in 1957, when, in Cooper v. Hinrichs, the Court, after a careful analysis of cases following a mandatory approach, ruled that its law was discretionary only. It granted the

parent of the minor, if another suitable person can be procured, unless the minor, being of proper age, should so choose."

65. Butcher's Estate, 266 Pa. 479, 484, 109 Atl. 683, 685 (1920). It is clear that the court was speaking of temporal welfare.
66. Penna. Stat. Ann. tit. 1, § 1(d) (Supp. 1961): "... Whenever possible, the petitioners shall be of the same religious faith as the natural parents of the child to be adopted."
67. Adoption of Stone, 57 Lanc. L. Rev. 51 (1960).
68. State ex. rel. Evangelical Lutheran Kinderfreund Soc'y of Minn. v. White, 123 Minn. 508, 144 N.W. 157 (1913); In re McKenzie, 197 Minn. 234, 266 N.W. 746 (1936).
70. Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293 (1957).
petition of a Presbyterian couple to adopt twin girls who had been baptized as Roman Catholics, over the objection of the divorced Roman Catholic mother (who had originally consented to the adoption), writing that the law

... does not, however, bar adoption irrespective of all other factors merely because the adopting parents are of a different religious persuasion than the child.

In each instance the court has discretion to determine primarily whether the child's best interests are served by the adoption, and identity of religion between the child and the adoptive parents is a significant and desirable but not an exclusive factor to be considered by the court in the exercise of this discretion.\(^7\)

Thus Illinois reaffirmed its pre-statutory approach to child placement: that the best interests of the child is the "polestar" for the courts, but that it is certainly proper to consider the religious factor as an element of the test. Apparently, the Illinois legislature was satisfied with the decision; in 1959 it enacted a new Adoption Law without changing the wording of the "religious protection" clause,\(^7\) even after the Court had pointed out in the Cooper opinion that the mandatory approach in other states might be dictated by use of the word "must" rather than "shall" in the relevant statute. This further indicates that the intention of the legislature in 1945 was merely to state the law as it then existed, and not to change it in favor of a more stringent rule. This is the same view of legislative intention that had been taken in Pennsylvania.

Cooper is significant in one other aspect. The twins, almost immediately after birth, had been placed in a sectarian orphanage operated by Catholic Charities; about six months later, a county court placed them with the petitioners, with whom they remained up to and during the litigation. When the petitioners sought to adopt the twins, the children's mother contested and the Catholic Charities attempted to intervene as a defendant. The Appellate Court permitted the intervention, but the Supreme Court reversed, ruling that, as the Charities had no custody or other legal right involved in the proceeding, it had no right to intervene. This ruling displays an attitude in marked contrast to that of the courts following a mandatory approach, to which we now turn.

The most stringent court rules relative to "religious protection" laws obtain in New York and Massachusetts, two of our more cosmopolitan states. The courts of these states have been presented with a bewildering variety of problems concerning religion in child placement and no totally consistent approach to these problems can be found in either State. Nevertheless, on the whole, both give their "religious protection" laws a more or less mandatory interpretation, with New York tending more recently toward liberality and Massachusetts displaying a trend toward greater strictness.

\(^7\) Id. at 276, 140 N.E.2d at 297.

\(^7\) The section of the new law which succeeded (and combined) §§ 4.1, 4.2 is Ill. Ann. Stat. ch. 4, §§ 9.1-9.15 (1961) ; it uses the exact wording of the old sections.
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In Matter of Santos, two neglected girls, aged three and four, were committed to the care of a Jewish adoption agency when their parents could not be found. Two years later, the mother of the girls reappeared and asked to have the commitment vacated on the ground that the children had been baptized as Roman Catholics. Although the court found the mother unfit to take the girls herself, it held that the relevant law required it to remove the children to a Catholic adoption agency, finding that the law was "mandatory" and left "no area for judicial discretion." Although this decision was in keeping with earlier cases in which decrees of guardianship were revoked because of religious differences, the court rested its decision on statutory interpretation (and a doubtful interpretation at that) rather than judicial precedent. This unnecessarily rigid interpretation obviously had a disruptive effect on the little girls; the change was only from one institution to another, but nevertheless it forced their removal from a religious environment in which they had received substantial training, apparently the only religious training they had ever received. And note too that the court, without any discussion, determined that the girls were Roman Catholic solely because of the fact of baptism. Although this respect for ecclesiastical determination seems in keeping with the principles of Watson v. Jones, it obviously disadvantages adherents of those religions which suspend acceptance into membership until a time when their doctrines can be understood by a comprehending mind.

New York's "religious protection" laws are comprehensive, covering every conceivable aspect of child placement. Though they use both the term "must, when practicable" and the term "shall, when practicable" all are strictly applied with no distinction being drawn between "must" and "shall." At their most liberal, the New York courts have allowed cross-religious guardianships, but only

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The court may at any time during the progress of a proceeding arising under any provision of this act vacate any commitment previously made where it can be shown to the satisfaction of the court that a mistake of fact was made in adjudicating the child's religion or may be its own motion or on application . . . proceed with judgment, consistent with the religion of the child. . . .
77. N.Y.C. Dom. Rel. Ct. Act § 86(3) uses the word "may," whereas § 88(1) & (5), which concern original commitment, use the word "must" and define "when practicable" to mean that so long as there is a person or an institution of the same religious faith or persuasion as the child available, the phrase is inapplicable.
78. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). The relevant principle of this case is that a civil court will treat as conclusive the determination of ecclesiastical questions by ecclesiastical courts which form a part of a hierarchical religious organization. And see Matter of Glavas, 203 Misc. 590, 121 N.Y.S.2d 12 (N.Y.C. Dom. Rel. Ct. 1953). The child of a Greek Catholic father and a Jewish mother had been circumcised according to Jewish rites. While the mother was in the hospital and the boy was five years old, the father had him baptized as a Roman Catholic. The court held that the boy was still Jewish.
on the condition that the guardian raise the wards in their own religion and
only when the best interests of the child demanded that the cross-religious place-
ment be made. More often, a difference in religion has prevented the establish-
ment of any custodial or adoptive relationship. The objection of the New York
Foundling Hospital, a Roman Catholic institution, was held sufficient to bar the
adoption of two children by a Protestant “free thinker,” even though there was
no evidence of the religion of the children, they having been placed by a court in
the Hospital after they were found deserted. A more complex case reveals again
the willingness of the New York courts to heed the views of denominational insti-
tutions and the dictates of the “religious protection” laws, no matter what the
consequences to the children. In Matter of Vardinakis, the future of the four
children of a Mohammedan father and a Roman Catholic mother was involved.
When the home was broken up, a court placed all four children in a Catholic
institution, ordering that no religious instruction be given to the youngest three.
When the father objected violently to this arrangement, the children were trans-
ferred to a Protestant institution. Later the oldest boy was sent back to the
Catholic institution; he ran away to live with a paternal uncle, a Mohammedan.
The father, learning that the Protestant institution had been giving the three
youngest children Protestant instruction, threatened to blow up a Protestant
church, and both institutions petitioned the court to resolve this rather unpleasant
situation. Its ruling: the oldest son, aged fifteen, was paroled to his uncle, with the
mother to have visitation rights; the three youngest children were placed in a
neutral Protestant foster home, where no religious instruction was to be given;
the mother was given permission to take the oldest daughter, aged thirteen, to
church with her and the father was given permission to take the other two
children with him to Mohammedan worship. The court here too considered the
wishes of the two oldest children in reaching this result.
The most interesting development in the treatment of “religious protection”
laws in New York has occurred in the area of adoption. Until fairly recently the

80. Matter of Mancini, 89 Misc. 83, 151 N.Y. Supp. 387 (Surr. Ct. 1915); In re Hauser,
189 N.Y. Supp. 51 (Surr. Ct. 1921).
81. Matter of Korte, 78 Misc. 276, 139 N.Y. Supp. 444 (Kings County Ct. 1912). The
petitioner here was already the foster parent, and the court decreed that he could keep the
children, provided that he place them in a Roman Catholic school, even though there was
no such condition originally attached to his relationship to the children, first established
seven years earlier. But see Ex parte Agnello, 72 N.Y.S.2d 186 (Sup. Ct. 1947). The petition
for habeas corpus by a Baptist father to have his thirteen-year-old twins returned to him
by their maternal grandfather was denied. The children had been baptized as Baptists with-
out opposition by their Roman Catholic mother, who had since died. The father had de-
serted his family when the twins were seven. Since the desertion, the children had been
raised as Roman Catholics. Under these circumstances, and giving some consideration to
the wishes of the children, the court found that their best interests would be served if the
petition of their father, a stranger to them, was denied; here, religious protection over-
rode parental rights.
83. This respect for the wishes of the children involved, at least after they have reached
the age of discretion (usually twelve to fourteen) is quite common in New York. See also
courts showed no hesitation in denying petitions for cross-religious adoptions, but then, in 1958, the Court of Appeals, in Matter of Maxwell, affirmed the grant of a petition for the adoption of a presumably Roman Catholic child by Presbyterians, who had agreed to raise the child as a Roman Catholic. The child was illegitimate and the mother, a non-practising but baptized Roman Catholic, had come to a hospital in Buffalo for the birth. She gave a fictitious name and address and consented to the adoption of the child by the petitioners, knowing their religion, in a document in which she declared that she “does not at the present time embrace any religious faith.” The child was almost immediately placed (privately) with the petitioners, and, even a year later, when the adoption petition was actually presented to a court, the mother offered no objection. Shortly thereafter, however, while the petition was still before the lowest court, she changed her mind and asked for the child back, or at least that it be raised as a Catholic, claiming that she never understood the document she had signed. When the petitioners agreed to raise the child as a Catholic, the lowest court granted the petition and the Appellate Division affirmed.

In affirming the Appellate Division, the Court of Appeals split, four to three, and there is no majority opinion since Judge Froessel concurred in the affirmance solely on the ground that the petitioners had agreed to have the child baptized as a Roman Catholic and educated in parochial elementary and high schools. The opinion of Judge Fuld, speaking for the other three members of the majority, is more interesting since there is no mention of the petitioners’ agreement; it rests rather on a rationale somewhat akin to a theory of fraud. After ruling that the mother’s conduct constituted abandonment (and therefore that her consent was unnecessary), Judge Fuld discussed the relevant “religious protection” law and then said that the policy of this law

... does not require a court to deny custody to adoptive parents where a child has been accepted by them following a declaration or representation by the mother, which may or may not be true, that she does not embrace any religious faith. ... If the rule were otherwise, the foster parents would ever run the risk of not being able to adopt the child, and the child ever subjected to the danger of having attachments formed painfully severed, for how may it be known that the natural mother has not lied about her religious affiliation?

He then found, emphasizing the attachment that had developed between the child, by now four and a half years old, and the petitioners, that this was one of

84. Matter of Anonymous, 195 Misc. 6, 88 N.Y.S.2d 829 (Surr. Ct. 1949); Matter of the Adoption of “Hale,” 207 Misc. 240, 137 N.Y.S.2d 720 (Saratoga County Ct. 1955). In the latter case, the petition was denied even though the petitioners agreed to raise the child as a Roman Catholic, the religion of his parents.
86. N.Y. Soc. Welfare Law § 373(3): “In appointing guardians of children, and in granting orders of adoption of children, the court shall, when practicable, appoint as such guardians, and give custody through adoption, only to a person or persons of the same religious faith as that of the child.”
87. 4 N.Y.2d 429, 434, 151 N.E.2d 848, 850, 176 N.Y.S.2d 281, 284 (1958). (Italics in the original.)
those “unusual” cases where the court could operate within the leeway given it by the “when practicable” clause. The dissent took a much stricter view of the scope of discretion that the law allowed and suggested, in writing that it is “inconceivable that in the city of Buffalo [Roman Catholic adoptive parents] could not be found,”\(^8\) that the “when practicable” clause means that, unless there are no persons in the area of the same religion as the child, whether or not they are before the court, cross-religious adoptions should not be allowed. This follows the Massachusetts interpretation.

The language of Maxwell does point to a retreat from a strict mandatory approach, but before we rejoice that “New York has now taken its place with the majority of jurisdictions in interpreting the religious requirements of adoption statutes liberally where the child’s welfare is concerned,”\(^8\)\(^9\) the decision ought to be carefully examined. First of all, if New York had really become a “liberal” jurisdiction, Maxwell would have presented no problem at all. Since the mother claimed no religious affiliation and the child was not baptized, the court could easily have held that the statute was inapplicable since the child had no religion. Instead, it created the issue by imputing Roman Catholicism to the child, even after the mother had denied a religious affiliation and even in the face of the fact that Roman Catholic ecclesiastical law would treat the child as a “pagan,” or a person devoid of religion, until baptism, solely because the mother had been baptized as a Roman Catholic. This is protection of religion, although certainly not of the mother’s or the child’s. Second, the essential disagreement between majority and minority was one of fact. The majority found an abandonment, the minority did not; the majority emphasized the good faith of the petitioners and the relationship that had developed, the minority did not. And third, whatever their differences, these are of no real importance because the adoption was allowed only because Judge Froessel accepted the condition that Presbyterian parents, who are to give their name and all the other benefits of a natural child to the adopted child, would raise the child as a Roman Catholic. Whatever may be the status of parental rights in New York, these parents were thus denied the power to raise their child in the religion of their own choosing.

However far New York has retreated from a mandatory approach toward a greater emphasis on the best interests of the child test, the trend in Massachusetts is the opposite. The former leading adoption case here, Purinton v. Jamrock,\(^9\) clearly placed the temporal welfare of the child ahead of any compulsion of the relevant “religious protection” law in affirming the grant of a petition to adopt a nine year old child, baptized as a Roman Catholic, brought by Baptist foster parents who had cared for the child for four years. The child had previously been taken from the mother, a Roman Catholic, on a finding charging her

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88. Id. at 440, 151 N.E.2d at 854, 176 N.Y.S.2d at 289.
89. Case Note, 10 Syracuse L. Rev. 124, 126 (1958).
90. 195 Mass. 187, 80 N.E. 802 (1907).
with "neglect, crime, drunkenness, and other vice," and her consent was unnecessary under the circumstances of the case. The court wrote:

It is undoubtedly the general policy of the commonwealth to secure to those of its wards who are children of tender years the right to be brought up, where this is reasonably practicable, in the religion of their parents. But it is the right of the children that is protected by this ["religious protection"] statute. . . . The first and paramount duty is to consult the welfare of the child.91

And, when a "religious protection" section was expressly inserted into the state adoption law92 (in Purinton, the statute concerned minor wards of the state) the court93 easily followed the approach taken in Purinton, noting the similarity between the phrase in that case, "where this is reasonably practicable," and the statutory phrase, "when practicable." It conceded that the word "must" added a certain amount of compulsion, but argued that the compulsion existed only when matching religion would be practicable, and that, under the circumstances,94 would not be practicable. In reaching this determination, it emphasized the facts that no petitioners of the same faith as the child had sought to adopt the child nor was there any evidence that any such persons would offer to do so. The sole dissenter took a position similar to that of the dissent in Maxwell: he argued that the burden was on the petitioners to prove that it was not practicable for the lower court to match the child's religion and seemed to suggest that it was the duty of that court to take judicial notice of the fact that there were persons and institutions of the same religious faith as the child in the area (Boston).

Only this dissent foreshadowed the decision in Petitions of Goldman,95 which effectively upset the reasoning of Purinton and Gally and is now the controlling adoption case in Massachusetts. Here the Supreme Judicial Court affirmed the denial of a petition for the adoption of illegitimate, presumably Roman Catholic twins, a boy and a girl, aged three, by a Jewish couple. The twins had been privately placed with the petitioners about two weeks after their birth and had lived with them continuously since that time; they had never been baptized and the mother had consented to the adoption with knowledge of

91. Id. at 199, 80 N.E. at 804-05.
   In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.
   If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition and such statement shall be made part of the minutes of the proceeding.
94. The child involved, a two-year-old girl, was the natural mother's third child by her mother's husband, her own stepfather, with whom she had been living. The stepfather was also her adoptive father and had a criminal record and was an army deserter. The child had been with the petitioners since she was three-weeks-old, and the natural mother consented to the adoption with knowledge of petitioners' religion and intention to rear the child in that religion.
petitioner's religion and their intention to raise the children as Jews. This decision deserves careful examination, not only because it best (or worst) represents the mandatory approach to "religious protection" laws but also because its unsatisfactory treatment of the constitutional issues involved has made it the center of extensive First Amendment discussion.

First, the court imputed Roman Catholicism to the twins. They had not been baptized and they were determined to be Roman Catholic on the basis of evidence that the mother and the natural father were of that religion. Such imputation did not bother the court. "We do not attempt to discuss the philosophy underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion," the opinion stated in an unfortunate attempt to avoid the essence of the problem. Yet there was an answer, albeit unsatisfactory, for the converse situation: that a person old enough to understand religion meaningfully might have no religion. While conceding that "if neither parent had any religion we suppose the statute would have no application," the court wrote that "the mother did not cease to be a Catholic, even if she failed to live up to the ideals of her religion. If that were the test of belonging to a religious faith it is feared that few could qualify for any faith." It is true that the mother here, unlike the mother in Maxwell, did not expressly disavow a religion, but she certainly did nothing to protect her religious and parental interests (and this would include the right to raise a child in the religion chosen by the parent, a right exercised by the mother in consenting to the adoption by Jewish petitioners). And the court erred in its view that it is not significant in any faith that a communicant fails to "live up" to the ideals of that faith; for some, the essence of the religious experience is "living up" to ideals, and the failure to do so would bar communion (in a broad sense).

Second, the court determined that it was not practicable to grant the petitions even though no Roman Catholic couple had come forward to seek the adoption of these twins. The probate court heard evidence relative to the availability of Catholics in the area and found that "there are in and about the city of Lynn [which is near the residence of the petitioners] many Catholic couples of fine family life and excellent reputation who have filed applications with the Catholic Charities Bureau for the purpose of adopting Catholic children of the type of the twins, and are able to provide the twins with a material status equivalent to or better than that of the petitioners and with whom the twins could be placed immediately.' This finding was in effect a finding that it was 'practicable,' within the meaning of that word in § 5B, to 'give custody only to

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96. Id. at 652, 121 N.E.2d at 846.
97. Id. at 653, 121 N.E.2d at 846. This is the one point at which Goldman is more "liberal" than Maxwell, since Maxwell backed into the problem of the application of the New York "religious protection" law by imputing religion to the child even after the express declaration by the mother that she had no religion. See text at notes 86-89 supra.
99. But this did not solve the problem in Maxwell, see note 97 supra.
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persons' of the Catholic faith." This displays an attitude that appealed only to the minority in Maxwell and to no Illinois judge in Cooper—that so long as there are in the area persons of the same religious faith as the child, whether or not they are before the court, a cross-religious adoption, no matter what the circumstances, will not be allowed. It places before the court not persons seeking to adopt a child but an organized church seeking to protect its own interests. It results in involuted statutory interpretation because of the impossibility of allowing an adoption by a person who has not even petitioned the court. In most cases it means the return of the child to an institution rather than placement with a family. And, in a situation like Goldman, it means consequences for the petitioners and the twins much worse than a return to the status quo. The Goldmans now know that they can never adopt children they have grown to love unless they change their religion and the twins, having been adjudged Roman Catholics, face the possibility of being torn from the only home and parents they have ever known in order to be placed with strangers, in a religious environment different from the one in which they have been raised, at best, or, at worst, in an institution.

Third, the opinion is significant in its failure to consider the temporal welfare of the children, even to the extent of serious mention of the best interests of the child test. Nowhere to be found is the traditional examination of a court in an adoption case into the background of the petitioners, the relationship between the petitioners and the child and the relative and absolute suitability of the petitioners as potential parents of the particular child before the court. Purinton, the case which established this approach in Massachusetts, is cited by the court to support

100. Petitions of Goldman, 331 Mass. 647, 650, 121 N.E.2d 843, 844-45 (1954). (Brackets in the original.)

101. Massachusetts has never gone as far as the suggestion in the dissent in Gally. In Petition of Duarte, 331 Mass. 747, 122 N.E.2d 890 (1954), the probate court had taken judicial notice of the availability of persons of the same religious faith as the child in the area concerned and denied a petition for a cross-religious adoption. The Supreme Judicial Court reversed and remanded, ruling that this was not a subject of which judicial notice could be taken and pointed out that the probate court in Goldman had heard evidence and made detailed fact findings about this matter.

102. All these evils were graphically illustrated by the decision in and the events surrounding Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955). Jewish petitioners sought to adopt the child of a Roman Catholic mother, the child having been privately placed with the petitioners at birth by the mother's physician. While in the hospital, the mother had consented to the adoption, but as soon as she learned of petitioners' religion she withdrew her consent, not in order to have the child back but rather to have it placed with a Catholic family by a Catholic organization. The Supreme Judicial Court, although it recognized the suitability of the Ellises and the attachment that had developed between them and the little girl, affirmed the granting of the motion to withdraw consent brought by the mother. A promise by the Ellises to raise the child as a Catholic was to no avail. When the Ellises then refused to return the child, the probate judge threatened to arrest them and the Ellises secretly moved to Florida with the child. Massachusetts could not implement the arrest order or the writ of habeas corpus authorizing seizure of the child which followed, and, later, when a grand jury indicted the Ellises on a technical charge of kidnapping, the Governor of Florida refused to extradite them. On July 11, 1957, a court in Florida approved the adoption of the girl by the Ellises over futile opposition by representatives of Massachusetts. The case was nationally publicized, and, in spite of the "happy ending," the events are bound to have some harmful effects on the girl. See Foote & Sander, op. cit. supra note 54, 6B-26b, to 6B-26c.
the proposition that the religion of a child is that of its parents, or of the mother in case of dispute. Little attention is given to the mother's wishes, however. Of course, what are the child's best interests is a fact question and nothing can be gained by argument over the facts here. What is much more important is that the approach of this court seems to give weight to the religious factor independently of the temporal welfare of the children; the only possible conclusion to be drawn from the opinion is that the religious factor was controlling, because the children's temporal welfare was barely considered. Or, if welfare was considered at all, only spiritual welfare was considered. The best interests of the child test has always referred to the child's temporal welfare. Concededly religion is one element in temporal welfare, but, in giving independent significance to the religious factor, Goldman seems to have carried the Massachusetts "religious protection" law beyond an express statement of an important factor in temporal welfare and toward a separate statement of the controlling relevance of spiritual welfare, this interpreted to be simply matched religions.103 And all the other factors that should be examined when the temporal welfare and happiness of children are at stake (and these are the only considerations that can be before a civil court) are disregarded.

Finally, the constitutional issue. Goldman is one of the few adoption cases which directly discuss this matter, but, unfortunately, the analysis is very shallow and adds credence to the comment that the debate over the constitutionality of "religious protection" laws "has for the most part been conducted in a vacuum."104 The court, in a brief statement, rejected all the constitutional objections raised by the petitioners, saying that:

All religions are treated alike. There is no "subordination" of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented, or hampered. It is argued that there is interference with the mother's right to determine the religion of her offspring, and that in these cases she has determined it shall be Jewish. . . . [T]here is clearly no interference with any wish of hers as long as she retains her status as a parent. It is only on the assumption that she is to lose that status that § 5B becomes operative. The moment an adoption is completed all control by the mother comes to an end.105

Without arguing the constitutional issues here, what the court did and did not do in Goldman must be examined. The excessive technicalism of its position that the mother's parental rights end at the moment of the adoption still does not answer the contention that parental rights, whatever their status, include the power to dictate the religious upbringing of children even if surrendered for adoption, a rule of law rarely questioned in such absolute terms; although many cases may be found in which the wishes of parents have been overridden, the

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103. See text at notes 23-32 supra.
106. See text, Part IV infra.
courts always justified such action previously on the ground that it would serve the temporal welfare of the child involved. Note, next, that the statement of the court is an attempt to answer constitutional objections based upon freedom of religion, and that there is an almost total disregard of objections based upon the non-establishment clause. And the facts do not support the position of the court taken on the freedom of religion issue. Even assuming that the religious freedom of the children is totally derivative, how can it be said that the free exercise of religion by the petitioners or the mother is not burdened or hampered? For the adoption petition to be granted, either the Goldmans must convert to Roman Catholicism or the mother must convert to Judaism; in this sense, disabilities because of religion have been placed on these three parties. Furthermore, to determine the religion of the children, the court first had to determine the religion of the mother, and, in doing so, it treated her religion as a matter of status rather than election. Again, if the right of a parent to control the religious upbringing of a child is considered as an element of freedom of religion, then the court has prevented the mother from exercising this freedom in the particular manner she chose—to place the children with persons of another religious faith. The more difficult problems raised by the non-establishment clause were avoided, but they should be faced. Was the court proselytizing for the Roman Catholic Church in denying the petition solely because the Goldmans were Jewish? Was the court acting as an “enforcement agency” of the Roman Catholic church, in order to help the Church maintain its membership, in deciding that the mother was a Roman Catholic? Was the court respecting an establishment of religion in imputing Roman Catholicism to the children? Was the court, in giving the religious factor significance independent of the temporal welfare of the child and in extending the law to believers only, actively protecting organized religion and imposing disabilities on non-believers? Whose interests were actually protected by the prevention of a cross religious adoption—those of the children, or the mother, or the Goldmans, or a particular church, or religion in general? All these questions went unanswered.

Thus stand “religious protection” laws; the operative effect given to them varies greatly, and this variety is not the necessary result of the slightly different phrasings of these laws. Judicial attitudes, and behind them, popular attitudes, account for the diversity of treatment. Some states disregard the laws. Some have fit them within the traditional framework—the religious factor as an element of the temporal welfare of the child. Some treat them as absolutely controlling, or are very close to that position. The “religious protection” laws in these latter states are of primary concern, and the question of their constitutionality will occupy the bulk of the remainder of this examination. It has been written, with regard to a related area, that the

... [constitutional] decision is an embarrassing one to make, because some governmental recognition of and backing for religion has been customary for many years and continues with surprising vigor. . . .
No system of government—particularly no such concretion of many governments as is the United States—can be completely consistent or logical. Where people here or there have some custom that pleases them... wisdom might suggest, even to the zealous in these matters, that the practice is better let rest.¹⁰⁷

So, before turning to the embarrassing decisions, we might first inquire as to the wisdom of these laws. Aside from the constitutional issues, what does wisdom suggest about them?

Especially in New York and Massachusetts, “religious protection” laws have gotten the courts into the business of deciding what religion is, and who has what religion, and who has religion at all, and whether this matters. They have resulted in the rejection of the only two theories yet developed by the judicial mind to resolve ugly disputes over the religion of a child—the parental right theory and the best interests of the child test. They have brought before the courts interests far removed from those of the parties involved, and have let those interests become overriding. They have resulted in the destruction of going domestic relationships, reduced the number of adoptions, and kept institutions from reducing their unhappy ranks. Most importantly, “religious protection” laws have made the courts forget what adoption is all about: the central concern of an adoption proceeding is the temporal welfare of a child, not religious dogma. In the balance in such a proceeding is the future of an infant human being, neither good nor bad, of unknown potential, rejected by its natural parents and desired by other people, a little child about whom precious little is known and for whom a court must make a decision which in large measure will chart the course of his life, irrevocably, for however long he lives. No higher duty nor greater responsibility can rest with a court than this duty and this responsibility. And to whatever extent “religious protection” laws hamper, rather than help, a court in making a wise decision in an adoption case, that is, a decision which gives foremost concern to the temporal welfare of the child, they are indefensible.

One test of the wisdom of “religious protection” laws is possible through an examination of the effect of the “when practicable” requirement on the likelihood of placement. Clearly in Massachusetts this clause means that so long as there is a possibility of placing the child with persons or institutions of the same religious faith of the child, even if they are not before the court, a cross-religious placement must not be made. The practicalities of the situation—religiously pluralistic communities and the availability of religiously-affiliated institutions, especially in urban areas—make it virtually impossible for petitioners of a religious faith different from that of the child to show non-practicability, except in marginal situations where the child belongs to an uncommon faith or proves, for racial or other reasons, not easily placed. Such a result conflicts with the basic purpose of adoption, which is to give the child a home.

¹⁰⁷ Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306, 1308, 1317 (1949).
Modern sociology and psychology are unanimously agreed that early placement in a home is far more desirable than institutional placement, if not absolutely necessary to the well-being of the child. A classic study of the harsh effects of the institution—primarily because it cannot provide the child with proper stimulation or a mother (or, a least, a mother image)—concluded that

... institutionalized children [frequently] developed subsequent psychiatric disturbances and become asocial, delinquent, feeble-minded, psychotic, or problem children.

... It would seem that the developmental imbalance caused by the unfavorable environmental conditions during the children’s first year produces a psychosomatic damage that cannot be repaired by normal measures.

Other writers emphasize the values of home placement over institutional life. “I think we are justified in making the general statement that foster-home care is nearly always the best thing for the younger child,” one social worker stated, calling the institution “an abnormal situation.” Another recognized that “foster-home care is the nearest approach to the experience of family life in the community that can be given to the child deprived of his own parents.” Numerous articles condemn the institution because, as compared with the home, it fails to provide the child with necessary parent figures, proper stimulation for normal mental and physical development, and the indefinable warmth and feeling of belonging engendered by the family unit. And, of all forms of foster-home care, “adoption under proper safeguards is the most satisfactory type....” The earlier in the child’s life the better. The Child Welfare League of America neatly summarizes these views:

Family life and satisfactory relationships between parents and child create the natural setting in which wholesome personality development of children takes place. To attain his maximum potentiality, every child must have the security and affection of a family that is his. A child needs a close and continuing relationship with a mother and father who love him and whom he can love. When the child does not have the care he needs from his family, it should be provided for him by other means. Adoption is a way....

110. Howard, Institution or Foster Home?, 30 Mental Hygiene 92, 96, 103 (1946).
It seems clear then that to the extent that "religious protection" laws prevent adoption or other forms of home placement, they are distinctly unwise.

And how much wisdom is there in laws which involve courts in questions which theologians have been unable to answer for centuries? The operation of these laws has forced courts to determine what constitutes religious faith and how membership in a faith should be determined. Should a ceremonial, physical act like baptism or circumcision control rather than meaningful understanding of doctrine? If the religion of a child is derivative (at least until the age of discretion) does this mean that a child's religion changes every time a parent with sincere doubts changes religious affiliation or rejects all religious affiliation? Must every child have some religion, as a matter of status until the time when he is capable of making a rational choice? Very few pretend to have the answers to all these questions, and even if religious doctrine provides the answers for any given faith, it seems unwise for a non-ecclesiastical court to be placed in the position of having to find answers and of having to implement its decision within our pluralistic society.

Even on the assumption that "religious protection" laws have no effect on the volume of adoption and home placement, the question of the relation of these laws to the quality of adoption and home placement must be raised. To the extent that they result in a disregard for the totality of factors that compose the child's best temporal interests, their effect in this sense is detrimental. The best interests of the child must be crucial in custody and adoption cases. Concededly, determination of best interests is a complex process, and the knowledge now available to the courts through modern social work makes the inquiry even more involved. It must encompass not only simple economic data but also difficult psychological data. It must, too, include consideration of the religious element. But to make the religious element controlling is to deny all the techniques that sociology and psychology have developed in recent times. The basic premise of these techniques, that each placement problem is unique, is an application of the truth that all human beings are unique; certainly a child, as well as an adult, is entitled to be accepted as a unique individual, and mandatory "religious protection" laws prevent such treatment. They compound the already difficult problem of placement. "Children are often denied the special attention their individual needs require because the only homes or agencies which can provide the proper care are in the hands of persons whose religion differs from that of the child. And state institutions, non-sectarian by statute, become dumping grounds, since they provide the only facilities available to children without regard to religious considerations."110 These laws cannot help but hinder intelligent child placement. "Modern social science, especially with the growth of child psychology, provides the courts with tools enabling them to make the decision in the child's best interests. To ignore these possibilities . . . is unjustifiable."117

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Of course, the great majority of cases never reach the appellate courts and our last inquiry into wisdom must be made at the level of the societal mechanisms that participate in child placement, both agencies and private persons. Information on private placement is impossible to obtain, but there seems little doubt that "religious protection" laws "may prove to be a factor in the augmentation of the black market."118 A black market operator does not have to consider the religious factor, but he need not consider any factor relevant to the child's temporal welfare either, and in this sense the effect of these laws is deplorable.

Agencies have sufficient difficulty in operating within the bounds of adoption laws on the whole, which they regard as "unable to meet the current needs of children who need adoptive homes, within those precepts considered sound for good social work practice."119 "Religious protection" laws make the task harder; the Executive Director of the Child Welfare League wrote:

Our focus is on the well-being of the child. Sometimes this focus is in direct conflict with the values of religious groups which, though just as concerned with the well-being of the child, may place spiritual considerations far above temporal considerations. For example, many social workers reject the concept that if a home cannot be found for a child of his own religious faith, he should not be placed in a good home of another faith, even though it means that he will live in a family group as their own child.120

On the agency level, the mere existence of "religious protection" laws molds procedures. A study of the effect of these laws on adoption administration in New York was recently conducted by the New York Times. The conclusions are interesting: the applications of professed atheists or agnostics are rejected and couples of a mixed religious background have little chance of getting a child; practically speaking, it is almost impossible for Jewish couples to adopt children because so few Jewish children are placed for adoption, and, technically speaking, it is absolutely impossible for Ethical Culturists to adopt a child because no child can be an Ethical Culturist; state law121 requires that the parents surrendering a child specify a religious preference—failure to do so technically makes the child unadoptable; and, most absurd of all, true foundlings are assigned a religion in a simple rotation system, being listed as Protestant, Catholic, or Jewish as they happen to come along, no matter what the race or background of the child.122 How much a demoralizing system like this makes obtaining trained personnel more difficult and forces a lowering of levels of competence cannot be determined. It seems clear, though, that "religious

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119. 1 Schapiro, A Study of Adoption Practice 93 (1957).
121. N.Y. Dom. Rel. Law § 112(2).
protection" laws stifle proper child placement techniques and make a mockery of modern sociology and psychology. However noble the motives behind their enactment, their operation has shown them to be distinctly unwise in every regard of social significance.

IV. "Religious Protection" Statutes: Their Constitutionality

One area of inquiry remains: the constitutionality of "religious protection" statutes. In one sense, this area must be kept separate from all the earlier analysis; no citation of authority is necessary to support the proposition that a court will not inquire into the wisdom of a law in determining its constitutionality. In another sense, though, all this background is essential. No law can properly be examined in a vacuum and the setting previously reviewed is necessary in order to add detail to the simple words of any "religious protection" law. One traditional mode of constitutional analysis is in terms of the "intention of the Founding Fathers." A complete reexamination of the "intention" of the First Amendment is neither within the scope of this paper nor would it prove fruitful, because the Founding Fathers did not consider adoption and custody problems when they drafted the First Amendment; nevertheless, some interest in "intention" is necessary because decisions concerning the religious clauses of the First Amendment have displayed a marked reliance upon history and social attitudes. Another reason for reference to this background is the principle that one who attacks the constitutionality of a law must show its invalidity as applied to him; discussion of the operation of these laws in actual cases is therefore relevant. Finally, although the wisdom of legislation is not a proper subject for inquiry, the Supreme Court has recently shown an attitude receptive to non-legal data in studying the effect of law, and thus the sociological and psychological discussion previously developed deserves some place in the total setting of "religious protection" statutes.

The subject of "standing" will not be discussed. Although this requirement presents some difficulty in this area, since not every person affected by the operation of a "religious protection" law may be able to attack it, suffice it to say that the requisite interest necessary to constitute "standing" can generally be shown in these cases by either the child, the natural parents, or the petitioners, or perhaps all these parties, depending upon the particular fact situation presented for adjudication.

A basic part of the total setting of any discussion of constitutionality is the judicial precedents related to the problem being examined, the constitu-

123. See, e.g., Tileston v. Ullman, 318 U.S. 44 (1943).
125. This would seem especially true as a result of the language in Engel v. Vitale, 370 U.S. 421 (1962), a recent non-establishment clause case which indicated that a party raising a challenge to a state activity under this clause need not demonstrate coercion or expenditure of public funds, to any significant degree, in order to have "standing" to raise the challenge. See Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 25 (1962); School Dist. v. Schempp, 372 U.S. 901 (1963).
tional doctrine developed in earlier cases. The precedents available for this discussion present several peculiar difficulties. First, no case yet decided is particularly relevant—no freedom of religion case is concerned with an exercise of that freedom anything like the exercise involved in an adoption or custody situation, and the cases closest to adoption and custody situations in the non-establishment aspect (which is more important here) concerned state action in the field of education. Thus, there is some question about the applicability of the constitutional doctrine thus far developed to the problem under analysis; those materials that appear closest will be used. Second, constitutional doctrine in the area of the Bill of Rights is particularly susceptible to broad and general phrasing, and such phrasing provides little guidance in the analysis of later cases. Broadly worded doctrine is found in cases involving the free exercise of religion, and, unfortunately, in cases arising under the non-establishment clause. The first important case in this area has been conventionally cited for one paragraph of dictum, and since this paragraph has become the battleground of non-establishment clause disputes, it should be quoted in full:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished in entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and state." Third, it is difficult to find any constitutional doctrine expressly developed for the area of religious liberty. The relevant cases presented to the Supreme Court have characteristically involved both freedom of religion and freedom of speech,

126. Both religious clauses of the First Amendment are applicable to the states through the due process clause of the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Educ., 330 U.S. 1 (1947).
129. Id. at 15-16. In spite of this language, the case upheld a resolution of the Board of Education authorizing the reimbursement of parents for fares paid for the transport by public carriers of children attending sectarian schools (as well as public schools). The "wall" metaphor was first used by the Supreme Court in Reynolds v. United States, 98 U.S. 145, 164 (1878), in which the conviction of a Mormon for polygamy by a territorial court was upheld. Thomas Jefferson, who did not take part in the drafting of the First Amendment, used the phrase in a letter in 1802 to the Danbury Baptist Association. See 1 Stokès, Church and State in the United States 335 (1950), quoting 16 Writings of Thomas Jefferson (Monticello ed.) 281-82.
and very little attempt has been made to distinguish these two freedoms in terms of separate doctrine when the exercise of religion has taken the form of speech or other activity suppressed by the state.\(^\text{130}\) The fact that rarely, if ever, has any American government attempted to interfere with religious beliefs, as distinguished from action based upon those beliefs,\(^\text{131}\) probably accounts for this lack of separate doctrine. The issue is largely academic, however, in view of the final observation to be made: that, generally, and particularly in the area under analysis, the problems presented by the free exercise clause are intertwined with the problems presented by the non-establishment clause. Whenever state activity\(^\text{132}\) in this country is attacked because it respects an establishment of religion, the same activity, at least indirectly, interferes with the free exercise of religion by some persons. This is not necessarily so, as the example of an established church and religious freedom in England bears witness, but this is the practical consequence of such activity in the United States.\(^\text{133}\)

And, given the absence of a developed doctrine of free exercise of religion, the fact that the adoption and custody area manifests the described interrelation of freedom and non-establishment problems, and the necessary observation that “religious protection” laws, if invalid, are primarily objectionable as laws respecting an establishment of religion (the very reference to these laws in terms of “protection” indicates the nature of the objection), the constitutional analysis will be undertaken here basically within the framework of the non-establishment clause.

This attempt to refine the scope of the examination to follow does not

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131. The distinction between action and belief is best illustrated by the polygamy cases, Reynolds v. United States, 98 U.S. 145 (1878), and Davis v. Beason, 133 U.S. 333 (1890). In both cases, action, i.e., the practice of polygamy, based upon Mormon belief was condemned by a government and in both the condemnation was held valid by the Supreme Court.

132. To view the state activity involved as activity by a court, to view the facts of any given adoption or custody case, and then to conclude that there is or is not the requisite “state action” sufficient to constitute a violation of the due process clause of the Fourteenth Amendment is to miss the point that the relevant “state action” in a case involving a “religious protection” law is the enactment of legislation, such legislation merely being interpreted by a court. This is true even as to the issue of imputation of religion to the child, see Mass. Gen. Laws Ann. ch. 210, § 5B (1955), quoted above, supra note 92. In New York, imputation is not covered by statutory provision, but the intricate debate over “state action” (see, e.g., Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 29 (1959); Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1, 6-11 (1959)) can still be avoided since the source of the imputation is a court acting directly, Ramsey, The Legal Imputation of Religion to an Infant in Adoption Proceedings, 34 N.Y.U.L. Rev. 649, 651-53 (1949), rather than a court acting to enforce the proprietary, contractual, or other interests of a private individual, these situations being more problematical, although not difficult, see, e.g., Shelly v. Kraemer, 334 U.S. 1 (1948). See generally Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1086-88 (1960). Thus, no aspect of “religious protection laws” presents difficulties in terms of the presence of “state action” necessary to make the Fourteenth Amendment applicable; there is always sufficient “state action.”

133. Cf. note 191 infra.
appreciably lessen the difficulties because the fundamental question of the meaning of the non-establishment clause still remains. If the absolute terms of the *Everson* dictum were acceptable, then little more than its citation would seem necessary to support an argument that all "religious protection" laws, however interpreted, are unconstitutional. Short reflection, however, would indicate that not even the absolutism of the *Everson* dictum would require the invalidation of "religious protection" laws in States following the Missouri approach or in states following the discretionary approach. Nowhere in the literature on this subject has such a doctrinaire position been taken, and even such a libertarian as Justice Douglas has conceded that the principle of separation does not imply hostility between church and state. In speaking about the non-establishment clause, he has written:

The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.¹³⁴

And *Everson* itself would support the power of a state to give consideration to the religious factor, as an element of the temporal welfare of the child, in custody and adoption proceedings. The actual decision in that case upheld the reimbursement of parents for the transportation of their children to parochial schools, Justice Black considering the plan as one to aid children, not religions, and equating it to the police or fire protection which the State provides for all its citizens. Justice Jackson bitterly attacked this "fallacy," writing in his dissent that a "policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society."¹³⁵ But, even in Jackson's terms, the discretionary approach to "religious protection" laws can be defended because these laws, as applied, urge a consideration of the child's religion, not to protect religion but rather to protect the child.

This, of course, does not settle the basic problem of the meaning of the non-establishment clause, but, for the remainder of this analysis, the problem will be examined in terms of the mandatory approach to "religious protection" laws. The argument to follow will demonstrate the distinction between the discretionary approach and the mandatory approach, and will attempt to establish that only the latter is unconstitutional. Again assuming the acceptability of the *Everson* dictum, it would not be difficult to maintain that the mandatory approach violates the non-establishment clause; this analysis, however, rejects the *Everson* dictum and still reaches the conclusion that "religious protection" laws, when given a mandatory interpretation, are unconstitutional.

The "wall of separation" metaphor, which became a basic part of our constitutional doctrine through the Everson dictum, is one of the most unfortunate and misleading shorthand phrases that the Supreme Court has ever employed. It has been made doubly so by its indiscriminate application to both the federal government and the state governments without any attempt to understand the essentially different problems that each of these governments must face. In reference to this metaphor, Justice Reed once wrote that a "rule of law should not be drawn from a figure of speech," and his criticism was well taken; this figure of speech has hindered rather than fostered sound analysis of establishment problems because it is an inaccurate description of the relations between church and state in the United States, or, more broadly, between religion and the free society.

It would serve little purpose here to restate the voluminous historical research concerning the question of whether or not the non-establishment clause was meant to apply to the states. The arguments have been fully developed on both sides. In historical terms, the very fact that five states had established churches at the time the First Amendment was adopted seems to make logically inescapable the conclusion that the Framers could not have intended that the non-establishment clause was to have any reference to the states, as distinguished from the federal government. This limitation of the scope of the clause may have been due to practicalities, or to principled adherence to early states-rights philosophy, and probably to both. One authority has characterized it as

the easiest way out of an extremely difficult situation created by the large number of religious bodies, and the dominance of different denominations in different states, some involving a State Church.

Consequently, as it would have been impossible to get the representatives of the thirteen original states to unite on any one form of establishment, it seemed best to separate Church and State federally, and to let each state decide for itself on any Church connection.

An equally impressive body of research has been developed over the question of whether or not the due process clause of the Fourteenth Amendment was intended to incorporate the non-establishment clause of the First Amendment.

137. Only recently has the Supreme Court begun to break away from First Amendment analysis in terms of this metaphor. In Engel v. Vitale, 370 U.S. 421 (1962), Justice Black went beyond the metaphor but still felt obliged to pay it homage. Id. at 424. It appears nowhere in the opinions in School Dist. v. Schempp, 372 U.S. 901 (1963).
139. That the religious clauses of the First Amendment were not intended to apply to the States seems clear in view of the fact that eight States guaranteed religious freedom at this time (1 Stokes, op. cit. supra note 129, at 538), thus making the free exercise clauses unnecessary as a restraint on the States, and that five States had established churches at this time (1 Stokes, op. cit. supra note 129 at 559), thus making the non-establishment clause practically senseless if it were meant to apply to the States.
140. 1 Stokes, op. cit. supra note 129.
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The problem has become especially acute since the decision in *Palko v. Connecticut*,141 which ruled that only those principles of the Bill of Rights essential to the concept of "ordered liberty" are incorporated by the Fourteenth Amendment and thus made applicable to the states. As a matter of constitutional doctrine, this question has been foreclosed by *Everson*, which held that the non-establishment clause was one of these essential principles. But scholars disagree. Taking their leads from the Blaine Amendment,142 among other historical items, they have developed a convincing argument that the non-establishment clause was not incorporated by the Fourteenth Amendment. Speaking for this position, Professor Corwin has written that

the Fourteenth Amendment does not authorize the Court to substitute the word "state" for "Congress" in the ban imposed by the First Amendment on laws "respecting an establishment of religion." So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anybody of religious liberty. It is only liberty that the Fourteenth Amendment protects.143

Of course, even assuming that these researches correctly reveal the intention of the First and Fourteenth Amendments, it does not necessarily follow that intention freezes meaning or that the *Everson* dictum is wrong in its view that the non-establishment clause limits the states to the same extent as it limits the federal government. The content of a concept may change with time and the *Everson* dictum may be a proper reflection of that change. On the other hand, the content may be misunderstood, and the result of such misunderstanding may be unsound constitutional doctrine.

Even with reference to the federal government, the description of the principle of separation of church and state in terms of a "wall" is unfortunate because the principle serves only to make "a logical distinction between two orders of competence,"144 not to set those two orders in opposition to each other. The free society has consistently manifested a strong sentiment in favor of religion and no part of its organic law can be taken to represent a fundamentally different sentiment. Perhaps we are "a religious people only in the sense that we are a 'reverential' people who have escaped the dogmatic anti-religion which has infected large portions of European society" and perhaps our "public religion is largely a matter of good fellowship and good works,"145

142. In 1875, James G. Blaine presented to Congress a joint resolution proposing an amendment which would have provided, in part, that "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." This proposal has led to the conclusion that Congress thought that the Fourteenth Amendment incorporated no part of the First Amendment. The proposal was rejected by the Senate. See Howe, Cases on Church and State in the United States 86-87 (1952).
145. Id. at 25-26. (Italics in the original.)
but we have always recognized the need to encourage social forces which can secure and preserve the ends of the free society. And one such force is religion, even when it takes the form of the generalized, ethics-oriented common creed, almost devoid of theological content, that is our "public religion." 146 From this "public religion" follows a respect due to private religion, as a means toward the end of developing people who can contribute to the maintenance of free society. This is the point generally missed by the extremists who would argue that every penny minted by the Treasury is a bit of religious propaganda aimed at weakening their atheism (and the free exercise clause protects a belief in no religion as well as a belief in religion): that governmental recognition of the popular sentiment in favor of religion is a mechanism for establishing the free society, not religion. 147 The extremist is certainly entitled to object to the free society but he ought to understand what he is criticizing.

No evidence supports the absolutism of the Everson dictum, the sense of total separation that it gives to the non-establishment clause. The traditions and practices on which the principle of separation of church and state have depended and on which they must depend do not treat the non-establishment clause as a rigid wall but rather as the definition of a mutually friendly relationship between two orders. "Separation in the American mind then has meant simply the mutual non-interference in the administrative affairs of the other, but, at the same time, tacit recognition has been given by society of the inseparability of religious concepts and general social functions." 148 Separation "is of fundamental importance, but it has never been a rigid or complete one excluding informal cooperation, where essential separation of responsibility and function are maintained, and all religious bodies are treated with entire impartiality." 149

If the federal government may properly recognize religion within the confines of the non-establishment clause, then the state governments should be able to do so at least to the same extent. And no further, if the state governments performed the same functions as the federal government. But they do not. Whereas the federal government is one of limited powers and functions, the state governments, in theory, exercise all those powers and functions of government not granted to the federal government or denied to them. These affect the vast majority of activities that are a part of the every-day existence

146. The classic example of this "public religion" is the reference to God on currency of the United States. Less generalized "public religion" is manifested by our congressional chaplains, armed services chaplains, and the encouragement given to organized religion in the Internal Revenue Code.

147. This is not to say that a government may necessarily excuse its engagement in an essentially religious activity on the ground that the activity takes the form of this generalized common creed. An excellent illustration is Engel v. Vitale, 370 U.S. 421 (1962); here the use of an almost perfectly generalized prayer in public schools was ruled invalid. Cf. the concurring opinion of Justice Brennan in School Dist. v. Schempp, 372 U.S. 901 (1963), which suggests that the "common core" approach to school prayers conceived by a government might result in violations of the free exercise clause.


149. 1 Stokes, op. cit. supra note 129, at 557.
of the population. Specifically, these include many aspects of the conduct of domestic relations, among them proceedings concerned with custody and adoption of children.150 The federal government may not act in these areas.

How much further than the federal government the states may "respect" an establishment of religion without violating the First Amendment depends upon these essentially different activities with which each is concerned and upon the content of the concept of "ordered liberty." With respect to the free speech clause, more than one Supreme Court Justice has expressed the view that "ordered liberty" allows the states greater freedom of action in restraining undesirable speech than that possessed by the federal government. Justice Jackson was the leading exponent of this position,151 and it has been most recently restated by Justice Harlan, who, citing Jackson's conclusion that the "inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms . . . I would not limit the power of the State with the severity appropriately prescribed for federal power,"152 wrote that

The Constitution differentiates between those areas of human conduct subject to regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interests in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved.153

In terms of the religious clauses of the First Amendment, this same argument may be made. The states of necessity must deal with situations which require consideration of religion to a far greater extent than those faced by the federal government. How is a state effectively to determine property rights when ecclesiastical property is involved? How is a state effectively to regulate charities, hospitals or schools when some are religiously affiliated? Should contract or tort law be varied when a religious organization has a concern? Can the tax law

150. If the power of the states is at least that of the federal government, then this analysis demonstrates that there can be no question about the validity of the Missouri approach or the discretionary approach to "religious protection" laws. See text at notes 133-35 supra.


153. Roth v. United States, 354 U.S. 476, 503-04 (1957). In this opinion, Harlan was dissenting from the affirmance of a conviction under the federal obscenity law and concurring in the affirmance of a conviction under a state obscenity law in the companion case of Alberts v. California, 354 U.S. 476, 503-04 (1957).
be used to foster or hinder religious interests? Can domestic relations be treated sensibly if the religious factor is disregarded?

Given these differences in function, and "emphasizing a fact which has too frequently been over-looked—that the Bill of Rights as a whole, and the First Amendment in particular, reflect not only a philosophy of freedom but a theory of federalism," then some broader ground of action can be found for the states within the boundaries of the non-establishment clause. To the extent that the non-establishment clause represents a manifestation of basic principles of federalism and imposes non-libertarian limitations solely on the federal government, then its direct and total application to the states makes no sense. Professor Howe would draw the line of applicability in terms of the effect of the action on individual liberty. "The Court did not seem to be aware of the fact that some legislative enactments respecting an establishment of religion affect most remotely, if at all, the personal rights of religious liberty," he wrote in criticizing *Everson*, and his conclusion was that "however absolute may be the ban on national legislation respecting the establishment of religion there is nothing in the latter or the history of the Fourteenth Amendment to suggest that such legislation by the states, when it has no significant relation to the liberties of individuals, is forbidden." This echoes Professor Corwin's statement that liberty is the primary concern of the Fourteenth Amendment. While this position has the advantage of providing somewhat workable guidelines if the absolutism of the *Everson* dictum is ever fully rejected, it goes a bit too far in turning questions raised under the non-establishment clause into questions to be answered in terms of the free exercise clause. If the non-establishment clause is conceded to have some application to the states, and even acknowledging the fact that problems of freedom and establishment are generally closely related, then any question raised under the non-establishment clause must be considered too in terms of that clause alone, for not every establishment problem raises an issue of the free exercise of religion. Analysis in terms of the non-establishment clause should be made with reference to the nature of the activity in which the state is involved, the interest it has in that activity and the necessity for pursuing it to the degree chosen. Recognition must also be given to the fact that the existence of two different claims to man's loyalty imposes inherent limitations on any state activity and on any church activity. Determination of the proper range of each of these claims is the essential issue to be decided when a situation challenged as an establishment is presented to the Court. The states should no more get into the business of

154. Howe, *The Constitutional Question*, in Fund for the Republic, Religion and the Free Society 51-52 (1958). Professor Howe recognizes that this fact was emphasized in Rutledge's dissent in *Everson* and that the historical analysis in this dissent was accepted by the majority.

155. *Id.* at 55-56.

156. See text at note 143 supra.

157. See text at notes 132-33 supra.
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the churches than the churches should get into the business of the states.158

Viewed within this framework, the decisions in all the non-establishment cases that have been decided by the Supreme Court could be supported, but without the use of the objectionable "wall" metaphor or a test which has come to be expressed in terms of "aid." It could be found that the Board of Education of Champaign was asserting religious claims through its expansive released time program without ever thinking in terms of the coercion of Terry McCollum,159 and that the New York City Board of Education was properly engaging in a state function, not "aid" to religion, through its released time program.160 New York, Abington Township, and Baltimore could be seen to be engaging in religious activities by sponsoring prayers and Bible-reading in their public schools and there would be no need for tortured analysis of content and procedure.161 The unrealistic distinction between secular and religious corporations could be avoided and the Congressional appropriation to the Providence Hospital of Washington, D.C., could still be found to be valid as an activity in furtherance of the health and safety of the citizens of the District.162 And, finally, all the discussion of whether there is "aid" to children or "aid" to religion when a state supplies textbooks163 or transportation164 to all school-children is unnecessary when these activities are viewed as exercises of the police powers of the states rather than as assertions of claims which should be made by churches. However facile it may be to speak in terms of a "wall," there simply is no wall separating church and state, and whether or not the non-establishment clause is violated must be determined in view of other principles more in harmony with the nature of the relationship between religion and the free society.

One observer has written that "just as the American government is a voluntarily self-limiting government, so the churches, whatever their theological claims are, in terms of their public role in American society, must regard themselves as self-limiting."165 In the case of "religious protection" laws in

158. The recent First Amendment case of School Dist. v. Schempp, 374 U.S. 203 (1963) indicates that the Supreme Court is beginning to examine State activity challenged under the non-establishment clause in the terms here being proposed. In an opinion noteworthy for the absence of the "wall" metaphor, Justice Clark invalidated two forms of Bible-reading in public school classrooms by applying this test (id. at 222):

[What are the purpose and primary effect of the enactment? If either is the advance or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

162. Bradfield v. Roberts, 175 U.S. 291 (1899). While the government involved in this case was the federal government, it was performing in its essentially non-federal capacity as the municipal government of the District of Columbia.
New York and Massachusetts, it is not clear whether the churches have failed to limit themselves or whether the states have consciously encouraged the churches to expand their public roles beyond the bounds permitted by the principle of separation, but, whatever the reason, these laws operate so as to violate the non-establishment clause. Before turning to this primary attack, however, several other grounds of possible unconstitutionality will be explored.

Closely related to the argument that the mandatory approach to "religious protection" laws results in an establishment is the argument that these laws, so interpreted, constitute religious tests for the holding of public office. This argument must be varied to suit the particular state and circumstances, but it may be illustrated by State ex rel. Baker v. Bird. Here there was an attempt to remove guardians, because their religion differed from that of their orphan ward, under a broad statutory provision ("...or in anywise incapable or unsuitable to execute the trust reposed in him..."). The Supreme Court of Missouri ruled that a construction of this law so as to authorize removal on religious grounds "would undoubtedly render said section obnoxious to section 5, art. 2, Constitution of Missouri, which, among other things, declares that 'no person can, on account of his religious opinions be rendered ineligible to any office of trust or profit under this State,'" and, in answer to the contention that a guardianship did not fall within this constitutional provision, the court wrote "that a person charged with the care, maintenance, and education of a minor possesses a very important trust cannot be logically gainsaid." If the justification given here for finding that a guardianship is an office of trust is acceptable, then the case for holding a custodianship or the status of an adoptive parent to be an office of trust is logically stronger because these two positions place responsibility for the care, maintenance, and education of a minor on a person to a much more permanent extent than does a guardianship. The very fact that the state takes such an intimate part in the determination of who shall hold these positions indicates that it regards them as offices of trust.

New York has a constitutional provision similar to that of Missouri. Thus, if a New York court denies a petition for a custodianship or an adoption solely on the ground that the petitioner is of a religion different from that of the child, as was done in Santos, or even if it imposes disabilities on the petitioner as a condition of the grant, as was done in Maxwell, the reasoning of Bird, as extended, would support the contention that the court is violating the State Constitution by imposing a religious qualification on the holding of an office of public trust.

In Massachusetts, the argument is more complex because the Massachusetts Constitution contains no provision barring the use of religious tests as a qualifica-

\[^{166}\] 253 Mo. 569, 162 S.W. 119 (1913).

\[^{167}\] Id. at 583, 162 S.W. at 123. (Italics in the original.)

\[^{168}\] Id. at 583, 162 S.W. at 123. In support of this position, the court cited Maxey v. Bell, 41 Ga. 183 (1870).

\[^{169}\] N.Y. Const. art. XIII, § 1 requires an oath of faithfulness of specified executive and judicial officers, and legislators, and then provides that "no other oath, declaration or test shall be required as a qualification for any office of public trust...."
tion for holding public office. On the contrary, specified high officials, unless they are Quakers, must swear to an oath which concludes with the phrase "so help me God." The recent Supreme Court decision in Torcaso v. Watkins, which held that a provision in the Maryland Constitution requiring the holder of "any office of profit or trust" to swear to a belief in the existence of God was unconstitutional as a law respecting an establishment of religion, raises grave doubt as to the validity of the Massachusetts provisions but is only indirectly helpful because the Massachusetts provisions do not apply to all office-holders. Even without such coverage, however, Massachusetts decisions which have denied adoption petitions solely on religious grounds, such as Goldman and Ellis, can be challenged on the basis of the non-establishment clause rationale of Torcaso, since they operate in fact to impose a religious test on the holding of office in the state (assuming acceptance of the extended Bird reasoning). In so far as Torcaso reaffirmed the Everson dictum, however, it is preferable to delay further amplification of the argument based on the non-establishment clause until that argument is developed directly, since, as has been pointed out, the Everson dictum is unacceptable and the theory of non-establishment will depend upon other principles.

The Fourteenth Amendment, through the due process clause and the equal protection clause, by itself provides two bases on which the mandatory approach to "religious protection" laws can be found unconstitutional. In so far as this approach forces a court to subordinate to the religious factor every other factor bearing on the welfare of the child whose custody or adoption is sought (and this was the result in Matter of Anonymous, Matter of the Adoption of "Hale," Goldman and Ellis), then the child is deprived of liberty without due process of law. One test of the due process of the activity of a government is whether or not it is "reasonably related to any proper governmental objective"; in custody and adoption proceedings, the parens patriae power of a state exists in order to promote the temporal welfare of children and the state can properly assert this power only in so far as it serves the best temporal interests of the child involved. In this sense then, "the best interests of the child are at once the source, direction, and limiting consideration in determining the reasonableness of the state's action" in terms of the defined objective. And, when controlling weight is given to the religious factor, the decision of a state court bears no reasonable relation to the objective of promoting the temporal welfare of the child, because such a decision fails to give consideration to the numerous other social, psychological, and economic factors that necessarily are relevant in effectuating a result which will serve the best interests of the child to the highest degree possible. If it could be said that this approach was dictated by a legislative finding that the religious factor was so important to the best interests of the child that it could override all other considerations of temporal welfare, then the problem is somewhat dif-

170. See Mass. Const. ch. VI, art. I; ch. VI, amends. VI, VII.
different, because the arbitrariness of the action would lie not in its failure to relate to a proper governmental objective but rather in the unreasonableness with which the degree of relationship is manifested. That is, unless it is shown that religion is a controlling element in the temporal welfare of a child generally, then it is unreasonable to make it a controlling element in a custody or adoption decision. And there is no evidence that religion is so important; on the contrary, the evidence revealed that what is most important to the child of an age typical for an infant who is the subject of a custody or adoption petition is the need for a home environment, the very thing generally denied in the cases that have been examined. At best, religion is only one of the many factors that a court must consider in determining how to promote the best interests of the child.

Other views of the mandatory approach also run afoul of the due process clause as it was viewed in Bolling. If the purpose of these laws, so interpreted, "is the retention of the relative distribution of the different faiths among the inhabitants of the state . . . it is more doubtful that this is a purpose within the constitutional competency of a state in a democracy such as ours." Such a view would not even require an examination of the reasonableness of relation because the stated purpose is not a proper governmental objective under the non-establishment clause; the state is not the shepherd of the various churches' flocks.

One other objective of the state remains—the proper administration of justice. In implementing this objective in Goldman, for example, the court appointed a guardian ad litem to represent the interests of the twins. Their interest, except for the "religious protection" law, was to be adopted. Yet the guardian ad litem, by bringing to the attention of the court the availability of people in the area of the same religion as that presumed to be the religion of the children, effectively prevented the adoption. Pfeffer goes too far in stating that it would be "more realistic to call him the representative of the church, for it was only the interest of the church seeking sovereignty over the twins that he was defending", but the guardian did fail to give the twins the best protection possible. This same objective of the proper administration of justice presents one other issue which has not yet been raised in a case. The statutes in both New York and Massachusetts use the term "religious faith" but fail to provide guidelines to determine the content of the term. It would be regrettable if, in a case where this term became involved, state courts were forced to determine the fundamental theological question of how religious is religious. More important is the effect of this term when the petition is made by an atheist or agnostic. In Goldman, the court conceded that the "religious protection" law would not, by its terms, apply if no one had a religion, but, given the imputation of religion to a child that is customary in custody and adoption cases, then the result would be that no petition by an atheist or an agnostic could ever be successful. It is doubtful that there is any proper governmental objective involved here, but this is

175. Id. at 382.
essentially a question of equal protection, the next clause of the Fourteenth Amendment to be considered.

Just as race,\textsuperscript{170} sex\textsuperscript{177} or nationality,\textsuperscript{178} when used as a basis of discrimination or classification in the application of the laws of a state, may constitute a violation of the equal protection clause, so may a distinction in application based solely upon religion. The test of equal protection, like that of due process, is essentially one of reasonableness; as Justice Jackson phrased it, the equal protection clause requires the states to "exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation."\textsuperscript{179} The object of custody and adoption law is to serve the temporal welfare of the children involved in custody or adoption proceedings. In cases in both New York and Massachusetts, courts have used the relevant "religious protection" laws to deny petitions solely because of a religious difference, and even after conceding that the grant of the petition would be beneficial to the welfare of the child. For example, the opinion in the Ellis case stated that the "Ellises are suitable people to adopt the child. The child is happy with them and they have grown to love her",\textsuperscript{180} yet the adoption was not allowed. In this express failure to consider the temporal welfare of the child, the court here, as in other cases, has denied the child the equal protection of the state's child placement laws, and, in fact, may very well have brought about a result directly contrary to the object of these laws—there is no way to gauge the detrimental effect to the child's best psychological interests that such a decision may cause.\textsuperscript{181}

Nor should it be thought that the only proper claimant to the equal protection of the state's child placement laws is the child. Especially as they relate to adoption, these laws also fulfill important and well-recognized needs in the adult population—the need of childless couples for a family and the need of natural parents (and especially the unwed mother) who cannot care for their children of a social mechanism to assure them that the welfare of their children will be protected.\textsuperscript{182} With regard to these interests, the object of the adoption law is to give suitable persons the privilege of adopting children and to give natural parents some control of the choice of adoptive parents (generally, consent is required). But, for example, solely because of a religious difference, suitable persons could not adopt children, and the consent of the mother to the adoption by those particular suitable persons was disregarded, in the Goldman case. Of course, it may be argued here, as in the due process framework, that, given these

\textsuperscript{177. Goesaert v. Cleary, 335 U.S. 464 (1948) (dictum).}
\textsuperscript{178. Yick Wo v. Hopkins, 118 U.S. 356 (1886).}
\textsuperscript{180. Ellis v. McCoy, 332 Mass. 254, 256-57, 124 N.E.2d 266, 267 (1955).}
\textsuperscript{181. In reference to the Ellis situation, see note 102 supra.}
\textsuperscript{182. See Asch, \textit{A Critical Appraisal of Adoption in New York State}, 20 Brooklyn L. Rev. 27, 31 (1954); Lutterbuck, \textit{The Law in Illinois Pertaining to the Adoption of Children}, 8 DePaul L. Rev. 165, 165 (1958); Clothier, \textit{Placing the Child for Adoption}, 26 Mental Hygiene 257 (1942).}
objectives of the law, consideration of the religious factor does bear a reasonable relation to the ends sought to be attained. This cannot be denied, and the intimacy and emotion involved in custody and adoptions proceedings can properly justify a consideration of the factors of race and national origin too, but this does not mean that any one of these factors alone can serve as the sole basis for differentiation when the very object of the law is defined in a multiple-factor test. Here, when he writes that "it is at least doubtful that so blunderbuss an approach would satisfy the requirements of reasonable classification", Pfeffer underestimates the likelihood of constitutional violation because his objection is equally applicable in the hypothetical situation presented in the discussion of the due process clause—that of an atheist or agnostic as petitioner. If the object of the adoption law is to match backgrounds to the greatest degree possible, then the absence of religion alone should be no more controlling than the presence of a particular religion alone. The position of the court in Goldman that the "religious protection" law would not apply if no one had a religion does not solve this problem because of the likelihood of imputation. In either situation—petitioner as a devout member of an orthodox faith, or petitioner as an atheist—the controlling weight given to the religious factor denies to the child, and perhaps to the petitioner and the natural parents, the equal protection of the state's child placement laws.

Presumably, more exact constitutional standards are available for the analysis of the mandatory approach to "religious protection" laws in terms of the two religion clauses of the First Amendment, as they are made applicable to the states through the Fourteenth Amendment. No longer is the "rational basis" test of the due process clause the necessary guide. "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake... Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard."

With respect to the non-establishment clause, much of the vagueness does disappear, but the alternative is the absolutism of the Everson dictum. With respect to the free exercise clause, one vague test is replaced with another. In Barnette, Justice Jackson spoke in terms of the clear and present danger test borrowed from free speech cases: "the freedoms of speech and of press, of assembly, and of worship... are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." The most comprehensive statement is in Cantwell:

The constitutional inhibition of legislation on the subject of reli-

183. Pfeffer, supra note 174, at 391.
184. Imputation, even if entirely arbitrary, is required in New York, see text at note 121 supra.
186. Ibid.
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gion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . . The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be exercised as not, in attaining a permissable end, unduly to infringe the protected freedom.\textsuperscript{187}

Essentially, this too is a test of reasonableness, like the ones employed under the due process clause and the equal protection clause, and in so far as the test is the same, earlier argument need not be repeated. Several differences should be noted, however. Belief, as contrasted with action, is absolutely protected against infringement by the state. Action may be infringed, but only when the interest of the state in protecting society is threatened, perhaps only when the threat is grave and immediate.

The operation of custody and adoption proceedings necessarily involves the freedom to act, a limited freedom, and not the absolute freedom to believe, which exists only in reference to an individual in his non-societal capacity; that is, once the individual asserts his belief in a social setting, the assertion constitutes action. Even conceding that a limited freedom is involved, however, the mandatory approach to "religious protection" laws still constitutes a violation of the freedom of religion of all the parties concerned in an adoption proceeding—the petitioners, the natural parents, and the child. And, given the greater strictness of the test of reasonableness under the First Amendment than the similar tests under the Fourteenth Amendment clauses, the conclusion of violation follows \textit{a fortiori} from the conclusion of violation reached in the discussions of the due process clause and the equal protection clause.

The Goldman case may serve as an illustration. The decision of the court in that case places upon the petitioners the choice of losing the twins or abandoning the practice of Judaism. The court was concerned with the freedom to act, since the Goldmans would, if the petitions were granted, rear the twins as Jews. But, in denying the petitions, the court was interfering with their freedom to believe since the mere adherence to Judaism was the ground of denial. Even Maxwell did not go this far because there the difference in religion did not prevent the adoption; in conditioning the grant, however, New York did interfere with the petitioners' freedom to act by barring them from rearing the child as a Presbyterian. The interest of the state in protecting society was not so threatened as to

produce these results; in so far as the family unit is a value to society, these results harmed society rather than protecting it. In two ways, the Goldman court interfered with the religious freedom of the twins’ mother. First, this freedom includes the right of the parent to control the religious upbringing of a child\textsuperscript{188}; such right of control must include the right to change the religion of the child. One way of doing this is to place the child with persons of a different religious faith, exactly what the mother of the twins did in Goldman; yet the court rejected the placement in spite of the mother’s consent and in this sense abridged her religious freedom. Second, to determine the religion of the twins, the court, under the imputation principle, had to determine the religion of the mother. The mother had been baptized as a Roman Catholic and she had never formally changed her religion; nevertheless, the court interfered with her right to have no religion by deciding that she was a Roman Catholic. Maxwell demonstrates this more acutely; there the court found a religion for the mother in spite of her express statement at the time her child was born that she had no religion. Again, the protection of society does not demand such infringement.

The case of the child is much more difficult. If the concept of freedom of religion implies knowledgeable acceptance of theological doctrine to any extent, then the child may have no freedom of religion, because there is little sense in protecting a belief which the child is incapable of holding. This difficulty is the essence of the previously mentioned paradox inherent in the idea that a child can be “born with” a religion, even though he cannot understand it.\textsuperscript{189} The easy answer is to reject this idea and argue that the religion of a child rests in a state of suspension until the age of discretion is reached; this view is based on an extreme approach to the concept of voluntary entry and the right to have no religion, these being considered to be elements of the free exercise of religion.\textsuperscript{190} But this easy answer fails to consider the interest of the state in the protection of society. Society is better protected if the child is “born with” a religion if for no other reason than the impossibility of enforcing any rule which would prevent religious indoctrination until the child reaches the age of discretion. More positively, deep social and psychological needs are served when those most interested in the child know that the child has a religion, even as a matter of status. Too much meaning, for too many centuries, has been given to such sacramental acts as baptism or circumcision for the state, consistent with its protective function, to deny that a child is “born with” a religion. To the same degree, the state must protect the belief of other elements of society that a child is “born with” a religion where no sacramental acts are involved, or that a child is “born with” no religion, if that happens to be the belief of those most concerned. The reason the state must respect all these views, no matter how illogical it may be to say that

\textsuperscript{188} Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

\textsuperscript{189} See the discussion of the avoidance of this difficulty in Goldman, text at notes 96-99 supra.

\textsuperscript{190} See, e.g., Pfeffer, supra note 174, at 385-86.
a child is "born with" anything but certain biological characteristics, lies in the interest of the state involved. As has been stated, the general interest is the protection of society; the particular interest here is the protection of these most fundamental beliefs, as held by those persons for whom the welfare of the child, in its full sense, is the primary preoccupation. These beliefs are so elemental that disrespect for them can do permanent harm to the society.

This rejection of the easy answer takes the problem out of the framework of the free exercise clause and places it within the framework of the non-establishment clause, the last area of inquiry. Examination in terms of the non-establishment clause is necessary because the rejection of the easy answer forces a recognition of the fact that the state does treat the religion of a child as a matter of status. This treatment does not seem to be objectionable when the family is a unit, but it has been regarded as the ultimate offense in custody and adoption situations. In speaking of the imputation of Roman Catholicism to the twins in Goldman, Pfeffer condemned the action in these words: "This, it is submitted, a secular state may not do under a Constitution that prohibits it from making any 'law respecting an establishment of religion.' For that is exactly what an establishment of religion is—the imposition of a religious status by political authority." This criticism would apply equally to the religion of a child who is a member of a family that is functioning as a unit; here too religious status is being imposed by political authority, at least to the extent that the state will recognize the rights of the parents to control the religious status of their child, and, unless these critics are willing to apply this analysis to the situation of the child in the functioning family unit, they have not carried the argument far enough.

It is not imposition of a religious status by political authority in itself that constitutes a violation of the non-establishment clause; rather violation lies in the fact that the religious status is imposed without regard to the interest or wishes of any person bearing any relevant relationship to the child involved. This lack of regard has been recognized by many of the critics of the mandatory approach to "religious protection" laws, but they have failed to give it this final significance.

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191. Insofar as the problems raised under the free exercise clause do not involve the child, the discussion of the free exercise clause may be restated in terms of the non-establishment clause, in the Howe-Corwin view of the manner in which this latter clause applies to the states. Of course, not every interference with free exercise can be posed in terms of establishment because a situation can be conceived where a state could interfere with the free exercise of a religion without in any appreciable way favoring other religions. For example, the practice of one given religion could be made unlawful; this would result in the establishment of any other religions in only the most attenuated sense. The fact that the Howe-Corwin position does not cover such a situation, in terms of the non-establishment clause, is another ground of criticism of the position. In custody and adoption cases, however, the position can be applied because, given the assumption of the state that the child must have some religious disposition, then an interference with one religious disposition necessarily results in a benefit to another religious disposition.


because of their acceptance of the Everson dictum or similarly broad views of the non-establishment clause, as it should be applied to the states. That their interpretation of the non-establishment clause is unsound is illustrated by their failure to object to the imposition of religious status to the child of a functioning family unit even though this basis of criticism would logically admit of no distinction for this situation. Given a proper view of the non-establishment clause—one that would examine the state interest involved—the mandatory approach to "religious protection" laws could still be found to violate the First Amendment, and the distinction which these critics can make only by avoiding discussion of it can logically follow.

The broad activity in which the state is involved through its "religious protection" laws is the protection of society, and its interest is preserving and securing the fundamental beliefs, variously held, concerning the religious nature of the child. It may pursue this interest only to the point of protecting the needs, represented by these beliefs, of those persons most concerned with the welfare of the child because it is only in terms of the needs of these persons (and the child is included in this category) that these beliefs are defined and it is only in terms of these beliefs that the interest of the state may properly be exercised.

When these beliefs are disregarded, then the state is no longer acting within its sphere of interest: protection of the temporal welfare of its citizens; it is asserting the claim of a church and, in doing so, it violates the non-establishment clause.

This analysis may be tested by comparing the treatment of the child in a functioning family unit with the treatment of the twins in Goldman. By protecting that religious status of the child in the functioning family unit that has been chosen for it by its parents, those persons most concerned with that child's welfare, the state properly pursues this interest—its own claim to sovereignty may be asserted only in so far as it can protect societal interests and society recognizes the sovereignty of the state only on these terms. In Goldman, the court disregarded the beliefs as to the religious status of the twins of the persons most concerned with the welfare of the child—the mother and the petitioners. All agreed that the twins should be Jewish but the court denied the petition, thus disregarding the only reasons for the existence of a state interest and asserting a claim that can only be made by a church—the claim to sovereignty over spiritual welfare regardless of any consideration of temporal welfare. It is no part of the function of a state to determine what course will best serve the spiritual needs of a member of society or to provide a mechanism through which another order of sovereignty may assert its own claims to make such a determination; this is the result of the mandatory interpretation of the various "religious protection" laws that have been examined. Depending upon where the impetus for this interpretation had its source, the states are in the business of the churches or that the

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churches are in the business of the state. Either result is prohibited by the First Amendment.

It would be possible to continue the non-establishment clause argument in these terms to an analysis of the effect of the mandatory approach on the petitioners or the natural parents; most of such an analysis has already been indicated, however, in previous discussion. Using the example of the Goldman case again, the state, as against the petitioners, is effectively proselytizing for the Roman Catholic Church by putting the Goldmans to the choice of losing the twins or converting to Roman Catholicism. By imputing Roman Catholicism to the mother and totally disregarding the possibility that she may actually have no religion, the state, as against the mother, is discriminating against agnostics, if in fact the mother is an agnostic, or it is protecting the membership rolls of a church in a manner available only to a church. In neither situation is the state performing any function which is a proper exercise of its sovereignty in the free society. However difficult it is to define the relationship between religion and the free society, a definition is demanded, and action inconsistent with the relationship cannot be allowed. The mandatory approach to “religious protection” laws is inconsistent with this relationship; it must be rejected.

This conclusion need not lead to the overturning of the adoption laws in New York and Massachusetts, nor even to the repeal of the “religious protection” laws. Further enactment of such laws seems unwise, but only because they necessarily give express emphasis to only one element that must be considered in reaching a decision consistent with the temporal welfare of the child. Where “religious protection” laws already exist, all that is required is a change in judicial attitude; the courts should view these laws in the perspective of the totality that constitutes the best temporal interests of the child. To repeat, the influences of religion must be considered because they have a significant effect on the child’s temporal welfare, but courts possessed of civil sovereignty cannot practically and must not constitutionally make the ecclesiastical decisions involved in a determination of strictly spiritual welfare. Even where the relevant law uses the word “must,” a broader reading of the “when practicable” clause can place these laws in their proper perspective.

On the broader problem involved in the rejection of the Everson dictum, no grand proposal or complete solution is available. Here, the words of Justice Jackson bear consideration; in 1949, in a bitter dissent in a free speech case, he wrote that “there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” The United States is not facing suicide if the Everson dictum is retained; the lesson of this dissent is its warning against extremism. Pure logic and intellect may be satisfied with absolutes, but wisdom demands something more. The problem that underlies this analysis of “religious protection” laws—the relation between religion and the free society—is profoundly

difficult, and profoundly important; there can be no easy solution. But if the analysis were conceived of, not as a search for absolutes, but rather as an attempt to understand all the competing interests, including the interests represented by the concept of sovereignty and the manner of its disposition by the people, then wisdom may be served.