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COMMENT

A RECONSIDERATION OF THE RELIGIOUS ELEMENT IN ADOPTION

In 1965, the Bureau of Children's Services in New Jersey denied the application of John and Cynthia Burke to adopt a child because the Burkes "had no religious affiliation and were not members of any organized church." The Bureau relied on regulations requiring that each applicant designate his religious affiliation and obtain a religious reference to establish his eligibility to adopt. After the Burkes brought suit to challenge the validity of this requirement, the regulations were changed to provide that "[l]ack of religious affiliation or of a religious faith . . . should not be a bar to consideration of any applicants for adoption." The agency thereafter capitulated and placed the child with them. The adoption was finalized in 1968. In 1969, the Burkes received custody of a second child, and the agency recommended the adoption. Nevertheless, in In re "E," the court denied the petition for a second adoption solely on religious grounds.

Religion has been and continues to be an important element on the agency level in the placement of children and at the judicial level in the determination of whether adoption petitions should be granted or denied. This is so both in states that have statutes requiring consideration of the religious factor and in states without such laws. Although several states have recently amended their religious protection laws, and agency practices have become more liberal, the religious factor in adoption has not been eliminated. And, as In re "E" illustrates, the trend towards liberalization of religious requirements has been far from uniform.

This emphasis on religion, regardless of where in the adoption process it manifests itself, creates a number of serious problems of

2 Id. The Bureau did not rely on any statutory religious protection provision.
3 Id. at 2.
4 Id.
5 Id. at 6-7. The court, Ironically, based its decision on a provision of the New Jersey constitution (N.J. Const. art. I, ¶ 3) which guarantees free exercise of religion, concluding: "The child should have the freedom to worship as she sees fit and not be influenced by parents or exposed to the views of prospective parents who do not believe in a Supreme Being." In re "E," at 6 (N.J. County Ct. Nov. 2, 1970).
definition, interpretation, and application for the judge and administrator. It cripples the law's ability to respond meaningfully to the other interests of the parties to adoption proceedings by subordinating those interests to religious considerations. Moreover, the role played by religion in adoption is open to serious question in light of recent Supreme Court decisions concerning state involvement with religious matters. In examining the emphasis on religion in current statutory provisions and agency practices, this discussion is confined to non-relative adoptions of children too young to be influenced by religious training at the time of placement.6

I

BACKGROUND

All states now provide statutory means for qualified adults to adopt children. With few exceptions, the transfer of parental rights and obligations is complete upon the granting of a final order of adoption.7 In recent years, adoption has continued to increase in significance as a means of permanently placing neglected or dependent children: the total number of adoptions in the United States has grown more than seventy percent over the last decade, from 96,000 in 1958 to 166,000 in 1968.8 While the percentage of adoptions by relatives has remained fairly stable at just under fifty percent,9 the number of non-

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6 The Cornell Law Review submitted questionnaires concerning agency policy on religious matters to public and private sectarian and nonsectarian adoption agencies. Responses were received from 73 agencies representing 47 states. The information derived from these questionnaires is hereinafter cited as Survey, Adoption Agencies. Additional, more detailed correspondence was carried on with public agencies representing 24 states. Questionnaires were also submitted to family court judges in New York State to determine how judges inquire into the religious affiliations of the concerned parties in adoption proceedings and how they respond to varying factual patterns. Responses were received from 27 of the 59 counties in New York, although not all judges answered all questions submitted. Because some of the judges asked that they not be identified by name, the information derived from the questionnaires is hereinafter cited as Survey, Judges.

7 Uniform Adoption Act § 12 is representative in this respect:

(1) After the final decree of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of the child and parent shall thereafter exist between such adopted child and the adoptive parents ... [and the kindred of the adoptive parents]. ... 

(2) ... [T]he natural parents ... shall be relieved of all parental responsibilities for said child and have no rights over such adopted child or to his property by descent and distribution.


9 Id.
relative placements by authorized agencies, as opposed to private placements, has increased substantially.\(^{10}\)

Modern concepts of adoption indicate that the state has an interest in providing neglected or dependent children with acceptable family surroundings\(^1\) and that adoption should be geared to the best interests of the child.\(^2\) Such agency practices as favoring sterile adoptive parents over those able to procreate,\(^3\) which reflect a belief that adoption is principally for the benefit of childless parents,\(^4\) are rapidly fading from the scene.\(^5\)

In contrast, the persistence of so-called "religious protection" laws,\(^6\) which directly or indirectly require religious matching between

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\(^{10}\) Id. In 1958, out of a total 96,000 adoptions in the country, 51,000 were by nonrelatives. Of these only 27,000 were placed by agencies. In 1965 the figures were 142,000 total, 77,000 nonrelative with 53,000 placements by authorized agencies. In 1968 such agencies placed 64,000 of the 86,000 total adoptions by nonrelatives, while the overall figure for adoptions was 166,000. *Id.*

\(^{11}\) Adoption was originally thought of as a way to provide heirs in a childless family. In modern times the emphasis in adoption is on the interests of the child . . . . It is primarily a means of creating parent-child relationships for homeless children. Smith, *General Concepts and Basic Philosophy of Adoption*, in *READINGS IN ADOPTION* 1 (I. Smith ed. 1963).

\(^{12}\) *E.g.*, *UNIFORM ADOPTION ACT* § 11. Agencies uniformly refer to the standard of "the best interests of the child" as controlling their particular approach to child placement. *Survey, Adoption Agencies*.

\(^{13}\) In New York applicants are required to submit medical evidence about fertility or sterility as part of the application process. New York Dep't of Social Services, Form DSS-338 (June 1968). Kansas regulations explicitly prefer sterile couples. Division of Child Welfare Services, Kansas Dep't of Social Welfare, *Guidelines for Families Interested in Adopting Children* 1 (Aug. 1968).

\(^{14}\) An alternative, but less convincing, rationale for favoring sterility is that a fertile couple giving birth to a natural child after adoption might neglect the adoptive child.

\(^{15}\) North Carolina specifically rejects favoring childless couples: "There is little logic in any policy which seems to assume that a childless couple is more capable of meeting the needs of children than is a couple who has already demonstrated the ability to be successful parents." 1 North Carolina Dep't of Social Services, Manual—Welfare Programs Division, ch. VI, § II(E)(3)(f), at 21 (July 1969).

Age requirements for adoptive parents have been eased as well. Most states now merely require some minimum age for adoptive parents and consent of the child above a certain age. *E.g.*, *UNIFORM ADOPTION ACT* §§ 3, 7 (21-year age minimum for parents; consent of child over 12).

the adoptive parents and the child, runs contrary to liberalizing trends in child care practice, particularly with respect to infants too young to have received any religious training. Although anachronistic in appearance, these religious protection laws have retained substantial vitality.

II

RELIGIOUS PROTECTION LAWS

A. The Statutory Pattern

Typical religious protection statutes provide that when practicable the administering official shall place the child with persons of the same religion as that of the child or its natural parents. Some statutes


New Mexico law is unique in terms of its concept of "protection." It has no religious restrictions upon adoption, but in the case of commitments of orphaned children to institutions, "due regard shall be had by the court to commit such child to such institution as will not proselytize or interfere with its religious belief." N.M. Stat. Ann. § 13-9-8 (1968).

Pennsylvania law is representative of most protection laws, although many do not place sectarian institutions in parity with families as alternative custodians:

The court shall place a child, as far as possible, under the care, guidance and control of persons [having] the same religious belief as the parents of the child, or with some association or society which is controlled by persons of such religious belief ... . In all cases where it can properly be done, the child shall be placed in a suitable family home and become a member of the family by legal adoption, or otherwise.

Pa. Stat. Ann. tit. 11 § 252 (1965). Other statutes substitute "like religious faith" for "same religious belief" (e.g., Ind. Ann. Stat. § 9-3217 (1956)), or "whenever practicable" for "as far as possible" (e.g., Nev. Rev. Stat. § 62.220 (1969)). At least one agency has seized upon the "same religious belief" language in a state statute as implied authority to relax matching requirements on the theory that religious belief is a more liberal rubric than "faith" or formal affiliation. Letter from Arthur Roberge, Assistant Supervisor of Child and Family Services, New Hampshire Dep't of Health and Welfare, to the Cornell Law Review, Nov. 13, 1970.

In most states, differences in language appear to have little importance. The Iowa
set up hierarchies of indices, giving primary emphasis to the religion of the natural parents, followed by "the religion of the child" if the religions of the natural parents are different, and finally referring back to "the religion of either parent" if the religion of the child is not ascertainable. Other statutes refer only to the religion of the natural parents or only to the religion of the child, in the latter case leaving it to the court or agency to find the spiritual and factual nexus necessary to fix the child's religion. It does not appear, however, that statutes distinguish between infants and children who have had some religious training. Some states make specific provision in their protection laws


In many states, differences in language that make the parent's religion determinative or that, alternatively, focus merely on the child's, may be of no consequence. New York has long used the child's religion as its statutory guide, yet New York courts have consistently looked to parental religion. E.g., In re Anonymous, 207 Misc. 240, 137 N.Y.S.2d 720 (County Ct. 1955); cf. In re Maxwell, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958). Where a child is too young to have received any religious training, "the religion of the child" may have meaning only if a court recognizes ritualized entry into a religion, such as baptism, as an index of affiliation. For a discussion of the problems involved in such dedication, see text accompanying notes 147-57 infra.

As of July 1969, Maryland became the first major exception to this rule. Its new law emphasizes the religious interests of the adoptive child which may have relevance to placement. It provides that the court may place the child without regard to religion if it "determines that the infant does not have sufficient religious background, training or beliefs to be a factor in the adoption . . . ." Md. Ann. Code art. 16, § 67(b) (Supp. 1970). A reasonable construction of the new law would automatically preclude matching in the case of a new-born child.

The Delaware statute uses the language "same religion as the natural mother or of
for the expressed wishes of the natural parent.\(^{21}\)

Even states without statutes expressly requiring religious matching may interject the religious factor indirectly. In Washington, for example, although the law is silent as to matching, the petition for adoption and the report of the child's next friend ad litem must state the religious affiliation of both the petitioners and adoptive child.\(^{22}\) Michigan similarly requires an investigation into religious backgrounds by the child's next friend before the adoption can be granted.\(^{23}\) Maryland merely directs the court to consider the religious background of all the parties involved, except where the "infant does not have sufficient religious background... to be a factor."\(^{24}\)

Statutes also differ with respect to the location of protection provisions and the stage in the process of selecting adoptive parents at which religion becomes significant. Religious factors may appear in

the religion in which she has reared the child or allowed it to be reared," thus merely providing an alternative to imputation of parental religion in the case of the child old enough to have had a religious initiation or training. Del. Code Ann. tit. 13, § 911(a) (1953). However, in cases where the child is born in wedlock the statute drops any reference to religious training and specifies matching with the religion of either parent. Id. § 911(b). The Delaware statute is rare in that it permits matching with the religion of only one of the adoptive parents and because it expressly provides that religious matching is not required when not in the child's best interests. Id. § 911(d) (Supp. 1969).


In the absence of an expression of parental preference, Rhode Island authorizes the state to decide whether to place the child in an adoptive home according to religion. R.I. Gen. Laws Ann. § 15-7-13 (Supp. 1970) (decision to be exercised in the child's best interests). The Rhode Island provision is unclear, however, and its practical effect may be considerably diluted by a separate section directing the family court to impute religion to dependent children for the purposes of placement with a private society, agency, or institution. Id. § 14-1-41 (1970). Kentucky law is also unclear as to the impact of parental preference: "[N]o placement shall be disapproved on the basis of religious, ethnic, or interfaith background of the adoptive applicant, if such placement is made with consent of the parent." Ky. Rev. Stat. Ann. § 199.473(2) (1970). Massachusetts will not honor parental religious wishes if placement would not be in the "best interests of the child." Mass. Ann. Laws ch. 210, § 5B (Supp. 1970).

Where not explicitly provided by statute, many states take administrative notice of parental preferences in placing children under the statutory matching requirement. E.g., Cal. Admin. Code tit. 22, § 36223 (1969) ("[e]xception can be made in accordance with the expressed wishes of the parent(s)"); Ga. Rules & Regs. ch. 200, § 3-3-05(3)(b)(iv)(3) (1970) ("[p]lacement with those whose religious affiliation is similar to that of the natural parents unless written consent providing otherwise has been secured from the natural parents"). Even without express authority in regulations, most placement agencies make it a practice to respect parental waivers to some degree. Note 89 and accompanying text infra.


adoption laws,25 juvenile or family court laws,26 social welfare laws,27 and domestic relations laws.28 New York has a religious protection provision in its constitution.29 Inconsistent laws may be found in a single jurisdiction; although Montana has incorporated the enlightened nonreligious stance of the Uniform Adoption Act in its adoption law,30 it has nevertheless retained religious protection provisions affecting adoption in its juvenile court act.31

Statutes and regulations relating to administrative activity take similarly varied stances concerning the religious aspects of adoption practice. Administrators may be required to match religions only when placing children declared by a judicial official to be neglected or dependent upon the state for care,32 or when placing all children, whether for foster care or adoption.33

B. Judicial Administration of Religious Protection Laws

The variety of judicial attitudes towards religious protection policies belies any apparent uniformity in language between statutes.34 Differences in judicial attitudes within states are especially significant because they give the same statute an inconsistent application.35 This

29 N.Y. CONST. art. VI, § 32.
31 Id. § 10-510 (1968) states that the court “may, as far as practicable,” provide that familial or institutional guardians appointed for neglected or dependent children conform to the religious faith of the parents of the child. These guardians later appear in court in loco parentis to assent to any future adoption of the child.

Religious protection provisions are even more obscure when, although statutory law is silent on the question, administrative regulations provide for matching. E.g., 1 North Carolina Dep’t of Social Services, supra note 15, § II(E)(3)(c), at 19.
32 E.g., OHIO REV. CODE ANN. § 5103.06 (Page 1970).
33 E.g., ORE. REV. STAT. § 418.280 (Supp. 1969).
34 The differences presented in Note, Religion as a Factor in Adoption, Guardianship and Custody, 54 COLUM. L. REV. 376 (1954), have continued to the present, albeit reduced somewhat by statutory changes in some states that formerly followed a policy of strict matching. Section III infra.
35 In New York, “different judges in different counties, and sometimes different judges in the same county, follow individual policies on the question of religious matching.” R. ISAAC, ADOPTING A CHILD TODAY 105-06 (1965). Cf. Broeder & Barrett, Impact of Religious Factors in Nebraska Adoptions, 38 Neb. L. REV. 641 (1959). Despite the recent New York amendment establishing recognition of parental preferences in matching (text accompanying notes 76-84 infra), one agency has already complained that some judges are refusing to apply any relaxed standard (Survey, Adoption Agencies).
divergence in judicial views is best reflected by the various interpretations given the “when practicable” provision in religious matching requirements.

“Mandatory” constructionists contend that religious diversity is a bar to adoption when parents of the desired faith, eligible and willing to adopt, exist in the community. This interpretation deemphasizes considerations such as the strength of the familial bonds that may have developed between child and adoptive parent during the interlocutory custodial period prior to formal adoption.

The judges sampled in the Cornell Law Review survey demonstrated little agreement on the substantive content and policies underlying the state's religious protection statutes. The most remarkable aspect of this diversity is its persistence, even in factual situations where the state law would appear clearest. When asked whether they would permit a couple of one religion to adopt a child whose parent was of a different religion and who had expressed a wish that the child be raised in that religion, eight judges said that the religious diversity would be an automatic bar to the adoption, seven said their reaction would be extremely unfavorable, seven said unfavorable, four said only slightly unfavorable, and one said the diversity would have no effect on his decision. Conversely, when asked how they would react to the adoption of a child whose mother was religiously affiliated by persons who were atheists or had no religious affiliation, when the mother expressly consented to the adoption, 16 judges said the diversity would have no effect on their decisions. However, one judge said his reaction would be extremely unfavorable, seven said unfavorable, and three said only slightly unfavorable even though the state's parental preference provision may leave no room for disapproval under these circumstances. The fissure widens when the facts are less clear. Where the child is a foundling with no ascertainable religion and the adoptive parents are atheists or have no religious affiliation, one judge said there would be an automatic bar to the adoption, three said their reactions would be extremely unfavorable, nine said unfavorable, three said only slightly unfavorable, and 10 said the religious issue would have no effect on their decisions. Survey, Judges.

In In re Goldman, 331 Mass. 647, 650, 121 N.E.2d 843, 844-45 (1954), cert. denied, 348 U.S. 942 (1955), the court noted that “there are . . . 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 . . . .” The court concluded that it therefore was practicable to match religions.

In In re Duarte, 331 Mass. 747, 122 N.E.2d 890 (1954), the court found that the existence of potential petitioners of the same faith as the child could not be recognized by judicial notice, holding that the party opposing the petition had the burden of showing that matching was practicable. But see Ex parte Frantum, 214 Md. 100, 133 A.2d 408 (1956).

The court in Ex parte Frantum, 214 Md. 100, 102, 133 A.2d 408, 410 (1956), denied the petition despite its finding that the petitioners were “fine people, have a good home, and have done an excellent job in raising the child from a sickly child to good health.”

minority position among states with case law on the subject, it is at least supported by a fair reading of the “when practicable” language and is expressly required by statute in one state. Other courts reject the mandatory approach, reasoning that although religion should receive consideration when adoptions are granted, the “when practicable” clause gives the judge discretion to disregard religious considerations if necessary in the child’s best interests. This “discretionary” construction recognizes religion as one among a number of factors that must be weighed in order to determine the best interests of the child.

Neither approach is entirely satisfactory. Although the discretionary approach allows the judge to play down religion as a factor when it is clearly contrary to the best interests of the child, the burden of evaluating religious considerations in the formulation of the best

38 N.Y. FAMILY Ct. Act § 116(e) (McKinney 1963) provides that religious matching is practicable if either a suitable person or a “duly authorized institution” of the proper religion is available. It thus treats institutions as equivalent to available adoptive homes for the general purposes of its protection formulation. New York law arguably requires placement with an available institution when adoptive parents of the desired religion are not available and when the natural parent or parents have not waived the religious matching requirement under the recently enacted parental preference provision. Id. § 116(g) (McKinney Supp. 1970). This is clearly true if a judge finds that the unrepealed remnants of § 116 of the Family Court Act or the existing constitutional provision control in any given situation. One state legislator has severely criticized the practical consequences of such a strict approach to religious matching:

While the . . . law does not mandate that agencies keep children in foster homes for their entire childhood on the ground that no adoptive home of the same religion is available, this is what happens. It is known to happen even if the mother of the child might wish the child to have the advantage of being reared in an adoptive home though it be of a different religion.

Children are thus deprived of a home of their own simply because no qualified persons of the alleged religion of the child are available. Many children are given a religion simply because their parents may have nominally been members of that religion although they do not practice it, or because a local Department of Welfare may have arbitrarily given a certain religion to an abandoned child.

Memorandum of Stanley Fink with Reference to an Act To Amend the Domestic Relations Law, the Social Services Law, and the Family Court Act in Relation to Religious Permission in Adoptions 2 (undated).

Recently, Maine and Rhode Island repealed their versions of mandatory clauses in favor of alternative formulations. Note 55 infra.


“[I]t is generally desirable in adoption cases to have children adopted into homes of the same religious faith as their natural parents, but such fact alone will not be permitted to prevent adoptions by persons of another faith if such adoption will best promote the child’s welfare.”

See also Cooper v. Hinrichs, 10 Ill. 2d 261, 140 N.E.2d 293 (1957); In re Knre, 197 Minn. 234, 266 N.W. 746 (1936).
interests of the child remains.\textsuperscript{40} Both approaches, mandatory and discretionary, suffer from the difficulties inherent in identifying religions and determining their import in a given case,\textsuperscript{41} and both approaches present the problem of drawing doctrinal distinctions between one religion and another where the religions of the biological parents are not the same.\textsuperscript{42} Parental preference statutes or equivalent judicial holdings that give effect to expressed preferences of the biological parents may solve these definitional problems. However, absent an expression of parental preference, the presumption is that the parents favor an imputation of their religion to the child for the purposes of protection statutes. Among states with matching statutes, only in Maine, where the statute provides for parental preference as an alternative to a complete disregard of religious matching, is the presumption explicitly otherwise.\textsuperscript{43}

III

TRENDS

In the 1950's a number of cases graphically demonstrated the basic disharmony between public temporal concerns and religious considerations in the adoption process,\textsuperscript{44} leading commentators to

\textsuperscript{40} Delaware's protection provision explicitly recognizes the conflict between the temporal interests of the child in placement and religious matching requirements: "Whenever . . . [the matching requirements] appear to create a hardship for the child to be adopted in obtaining a suitable and prompt adoptive placement . . . , [the court] may, in its discretion, waive these requirements in the best interests of the child." \textsc{Del. Code Ann. tit. 13, § 911(d)} (Supp. 1969).

\textsuperscript{41} If the religion of the mother is significant, what weight should be attached to her avowal of religious belief (\textit{e.g.}, Catholicism) subsequent to a statement that she embraced no religious faith? \textsc{In re Maxwell, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281} (1958). What should the court make of the fact that, albeit a Catholic, she is not a "good" Catholic? \textit{Id.}; \textsc{In re Goldman, 391 Mass. 647, 649, 121 N.E.2d 843, 844} (1954), \textit{cert. denied, 348 U.S. 942} (1955). If the religion of the child is crucial, does a subsequent Catholic baptism supersede a circumcision? \textsc{In re Clavas, 203 Misc. 590, 121 N.Y.S.2d 12} (Dom. Rel. Ct. 1953). What weight should be given to parental expressions purporting to change the child's religion? \textsc{In re Israel, 24 Misc. 2d 1089, 206 N.Y.S.2d 497} (Dom. Rel. Ct. 1960); \textsc{In re Anonymous, 207 Misc. 240, 136 N.Y.S.2d 720} (County Ct. 1955).

\textsuperscript{42} Text accompanying notes 149-55 \textit{infra}.


\textsuperscript{44} Three of the most celebrated cases arose in New York and Massachusetts. \textsc{In re Santos, 278 App. Div. 373, 105 N.Y.S.2d 716} (1st Dep't 1951), the court took children from a Jewish adoption agency after a finding that their mother, adjudged unfit, was Catholic and that the children had been baptized Catholic. The mother had boarded the children with a woman for two years, had contributed to their support, and had
extrapolate trends and predict that mandatory approaches to imputation formulas would have harsh consequences. They believed that a decrease in the number of available adoptive parents caused by strict religious matching requirements would correspondingly reduce the adoptive child's chances for the best possible home in the shortest possible time.\textsuperscript{45}

The substantive problems remain identical today, but alterations in the "market" aspects of adoption have brought new ills into focus, while perhaps softening the impact of religion on categories of children currently in great demand. Normal, young Caucasian children, even in states with matching requirements, currently have little trouble finding homes due to increased demand.\textsuperscript{46} Handicapped, older, and minority group children, however, continue to suffer from the additional burden of religious restrictions where exceptions are not made
given instructions to "keep the children or send them to a Catholic home." \textit{Id.} at 375, 105 N.Y.S.2d at 717. The children were committed to a Jewish agency after their temporary custodian's representation of their Jewish faith. The court decided that it was still "practicable" to change institutions under the New York protection statute and that the children had a birthright to be raised in their natural mother's religion.

\textit{In re Maxwell}, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958), the New York Court of Appeals granted adoption of a child by a Protestant couple, notwithstanding evidence introduced by the natural mother of her Catholicism. The mother had previously signed an affidavit declaring that she embraced no religious faith, and custody was awarded to the Protestant couple. When the mother sought to regain custody more than a year after giving the child up, the Protestant couple petitioned to adopt the child. The court accepted the original affidavit of the mother at face value and found no religious diversity for the purposes of New York law. However, the petitioners promised to raise the child as a Catholic.

\textit{In re Goldman}, 331 Mass. 647, 121 N.E.2d 849 (1954), \textit{cert. denied}, 348 U.S. 942 (1955), the court upheld the objections of a guardian ad litem to the adoption of twin infants by a Jewish couple, although the natural mother had consented in writing to the adoption with full knowledge of the religion of the prospective parents. Basing its decision on a reading of the now-repealed religious protection statute, the court rejected the mother's right as a natural parent to "change" the religion of her children by consent and preserved an imputation of her Catholicism to them by operation of law. The court also refused to hold that the mother had ceased "to be a Catholic, even [though] she failed to live up to the ideals of her religion." \textit{Id.} at 649, 121 N.E.2d at 884.

\textsuperscript{45} One commentator noted:

The laws of the various states, and the pressures exerted by religious interest groups even where the laws leave some freedom of action, are becoming ever more severe at the very time when the change in supply and demand makes it necessary as never before that the requirements of religious matching be relaxed. \ldots [I]n actual practice, state laws \ldots ensure that in most states religious lines will not be crossed, even when it means that placement will be delayed or the child placed in a less suitable home.

R. \textsc{Isaac}, \textit{ supra} note 35, at 218.

\textsuperscript{46} Agencies throughout the country report waiting lists of applicants for these children. \textit{N.Y. Times}, Dec. 7, 1970, at 1, col. 7.
in their behalf. The same increased demand for the supply of white children has worsened the position of the religiously disfavored adoptive parent. Agencies that give first preference to parents of the same religion as that assigned the child may effectively be barring applicants whose religion, or lack thereof, does not match that of the available children.

Changes in the legal environment of adoption have perhaps worked more uniformly to reduce some of the harmful effects of religious restrictions. These changes are evident in statutory reform and, to a lesser degree, in agency responses to evolving standards of child care.

Statutory reform, in format, has ranged from abolishing protection provisions altogether to engrafting parental preference provisions onto existing law. In effect, it has ranged from linking religious concerns with a temporal public interest to making confusing law even more confusing. Prior to 1967, Maine had one of the harshest religious matching statutes on record, which required matching in every case "where a suitable family of such faith [could] be found." It provided for institutional placement in the alternative, and, lacking an institution, it begrudgingly allowed for temporary placement until

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47 One official has commented:
There are some delays because of the religious requirements. . . . This is not true with white children who move into adoption fairly easily, but it prevails among the Negro group. Although we try not to make too many transfers, there are times when we decide that it is more important to have a good home for a child than what religion he will be taught.

48 Comments from the Wisconsin Department of Health and Social Services are instructive on this point:
Generally speaking a child's religion is not much of a factor in difficulty of placement, for if a home of a particular faith is not readily available the child is placed in another faith. However looked at from the other side—that of the adoptive parents—it is true that for applicants of some religions we seldom have children of matching faiths.


51 See the discussion of the New York amendments is Section IV infra.

52 ME. REV. STAT. ANN. tit. 22, § 3795 (1965).

53 Id.
"a suitable family" of the proper faith could be found. In its 1967 reform, Maine eliminated all matching except where requested by the natural parents. A recent change in Massachusetts law takes one further step by providing that placements will not be made pursuant to religious requests of natural parents where contrary to the best interests of the child. Both of these changes narrow the scope of the state interest in the religious issue to accommodating the expressed wishes of natural parents. An entirely different approach has been taken by Maryland, which formerly required matching except where the parents specifically consented to placement without regard to religion. Maryland statutory law now disregards parental preference, deemphasizes matching, and concentrates specifically on the importance of religion to the child. The court "may consider the religious background, training and beliefs of the natural parents, the adopting parents and the infant" unless it "determines that the infant does not have sufficient religious background, training or beliefs to be a factor in the adoption . . . ."

IV

Religious Protection in New York

New York has for some time had the most pervasive system of religious matching in the nation. Matching requirements appear in

54 Id.
   Any child . . . shall . . . be placed [whether for foster care or adoption] in a family of the same religious faith as that requested in writing by the parents . . . where a suitable family of such faith can be found . . . . If such family cannot be found or if no request is made by the parent . . . then such child shall be placed . . . as may be determined by the department or agency involved to be in the best interest of the child.

The use of the language "shall . . . be placed" thus constitutes the only remaining discordant note in Maine law, leaving open, as it does, the possibility of a bar to pairing the child and an available applicant solely because of the parents' religious preferences. Rhode Island law was as harsh as prior Maine law until, in a 1970 amendment, the state repealed its mandatory construction clause, which made matching practicable even when an institution of the desired faith was the only custodian available. Although it now provides for placement, when practicable, according to parental preferences, in the absence of such preference the Rhode Island statute places the burden of choosing the future religious affiliation of the child upon the agency: "In the event that the natural parent(s) waive the right to designate the religion of his child such right shall become vested in the governmental child-placing agency to be exercised in the best interests of the child." R.I. Gen. Laws Ann. § 15-7-13 (Supp. 1970).
the state constitution, the Family Court Act, the Social Services Law, and the Domestic Relations Law. These requirements control state and private agency placements and final court orders of adoption. The Family Court Act, which is ultimately relevant to all adoption proceedings, directs the court to match religions "when practicable" in order to ensure that "in the care, protection, guardianship, discipline or control of any child his religious faith shall be preserved and protected by the court." A mandatory construction clause provides that matching is practicable if there is a "proper or suitable person" or a "duly authorized association, agency, society or institution" of the same "religious faith or persuasion as that of the child" available to adopt or care for the child. The court must "state or recite the facts" underlying any determination that matching is not practicable. In addition, the Domestic Relations Law allows courts to grant petitions, brought by any person or authorized agency on behalf of the child, to abrogate adoptions upon evidence of "an attempt to change or the actual making of a change of or the failure to safeguard the religion of the child . . . on the part of the adoptive parents . . . ."

The Court of Appeals has indicated that only in the most exceptional circumstances will the matching scheme be circumvented through the "when practicable" provision. In In re Maxwell, the court avoided a direct confrontation with the protection law by ac-

59 N.Y. Const. art. VI, § 32 provides:

When any court having jurisdiction over a child shall commit it or remand it to an institution or agency or place it in the custody of any person by parole, placing out, adoption or guardianship, the child shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.

60 N.Y. Family Ct. Act § 116 (McKinney 1963), as amended, (McKinney Supp. 1970), places religious restrictions on judicial commitment of children to private institutions, placements made by such institutions with persons other than natural parents, judicial appointment of guardians, except guardians ad litem, and the granting of petitions of adoption.


64 Id. § 116(c).

65 Id. § 116(f).

66 N.Y. Dom. Rel. Law § 118-a (McKinney Supp. 1970). The previous law, amended in 1970, used the same language, except that it referred to "foster" rather than "adoptive" parents. This attempt to inject the state into the private religious affairs of families is unwarranted and unconstitutional. Notes 140-45 and accompanying text infra.

cepting the natural mother's affidavit that she embraced no religious faith over her later professions of Catholicism. In *Starr v. De Rocco*, however, the court seemed to disregard language in the *Maxwell* decision implying that the "when practicable" provision should be given a discretionary interpretation in the best interests of the child. In *Starr* the Court of Appeals affirmed, per curiam, the appellate division's award of custody to the paternal aunt and uncle of two children whose father had murdered their mother and then committed suicide. The paternal aunt and uncle, of the same Catholic religion as the natural parents, lived in the town where the murder-suicide had occurred. At special term the court had awarded custody to the Starrs, the Episcopalian maternal aunt and uncle of the children, on the ground that the children's best interests would be served by such placement:

Not only was the court most favorably impressed [by the maternal aunt and uncle] when they appeared before the court, but the court finds that they are of a temperament to best care for the children.

... [A]nd in placing custody with them, they will be removed from the locale of the tragedy which befell their parents, and thus, in the future, spared possible embarrassment and degradation.

The appellate division's reversal stressed the constitutional mandate relating to matters of custody, interpreting it to mean that "unless some compelling reason requires otherwise no child shall be placed with a guardian of a religious persuasion other than that of the child." The court found that it was practicable to match religions since there were "available and willing persons ... who profess the same religious faith as that of the children and against whom no cause for rejection exists." The appellate division rejected the Starr's claim to the children, even though they agreed to raise the children as Catholics. The mandatory construction thus given the constitutional

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69 In *Maxwell* the court said: "The presence in the statute of the words 'when practicable' was to enable the court to relax the requirement in the unusual case such as the one before us." 4 N.Y.2d at 434, 151 N.E.2d at 851, 176 N.Y.S.2d at 284-85.
71 *Quoted in* 24 N.Y.2d at 1013, 250 N.E.2d at 241, 302 N.Y.S.2d at 837 (Jasen, J., dissenting).
72 29 App. Div. 2d at 663, 286 N.Y.S.2d at 315.
We think this constitutional provision means more than a mere extension of authority to exercise discretion as to the religious aspect in custody matters. That authority already existed without expression in the Constitution. ... Here there is no ... compelling reason to avoid the constitutional mandate.
*Id.* at 662-63, 286 N.Y.S.2d at 315.
73 *Id.*
74 The dissent of Judges Hopkins and Benjamin pointed to the Starrs' promise,
matching requirement by the Starr court will likely have a similar impact on adoption, which comes within the ambit of the same constitutional provision.

Identical parental preference provisions were added to the Family Court Act and Social Services Law in 1970. The amendment of the Family Court Act purports to read into every subsection of the old religious protection provision the added condition that the "provisions . . . shall . . . be applied so as to give effect to the religious wishes of the natural . . . parents . . . ." The amendment is designed primarily to effectuate expressed, judicially determined, or presumed parental wishes. However, these recent changes in New York law may not bring about the essential realignments effected by other state reforms. First, New York's new parental preference amendment must survive scrutiny under the religious protection section of the state constitution. Second, the statutory mandate has been confused by the legislature's decision to engraft the new provision onto the old, complicated body of religious protection law. Although the new amendment provides that matching is required only "so far as consistent with the best interests of the child," it also provides that matching is required "where practicable"; the mandatory construction clause defining the latter phrase has not been repealed by the new amendment. The

made at trial, to raise the children as Catholics, and to the confusing religious background of the mother and her brother, Mr. Starr, as evidence that made a doctrinal stand on the religious issue unconvincing. Both Starr and his sister, the natural mother, had been born of Jewish parents and subsequently baptized and confirmed as Catholics. The natural mother married a Catholic, De Rocco; Starr married an Episcopalian and was converted to that religion. Id.


76 N.Y. FAMILY CT. Acr § 116(g) (McKinney Supp. 1970). By adding the parental preference provision as the last subsection, the amendment leaves all of the provisions of the old act intact.

77 The memorandum accompanying the New York bill to the Assembly floor noted that the mandatory interpretation of existing law violated constitutionally protected religious freedoms of the biological parents to determine their child's religion and that it was a law respecting the establishment of religion. Proposed Legislation with Respect to Religion in Adoption: Memorandum in Explanation 2 (Dec. 3, 1969); accord, Adoptive Parents Comm., Inc., Memorandum with Reference to an Act To Amend the Family Court Act and Social Service Law, in Regard to Religious Persuasion in Adoption (1970).

78 The parental preference law is arguably unconstitutional under the mandatory construction given the New York constitutional matching provision in Starr. However, the language of the constitution does not itself compel a mandatory construction, so that an amendment to the New York constitution should not be necessary to implement discretionary parental preference.


80 Text accompanying note 64 supra.
crucial question is how the two statutory phrases are to be reconciled. One possibility is that the best interests of the child is an independent factor and that even if matching is "practicable" under the statutory definition, it is not required if the child's best interests are not served. 81 On the other hand, the best interests of the child may be defined narrowly to require preservation of its religious identity. Under this approach, once matching is determined to be "practicable," the child's temporal welfare would receive no independent consideration and matching would be automatically required. 82 The legislature's failure to resolve this ambiguity and to set out the priorities among the interests of the child, the biological parents, and the adoptive parents provides greater leeway for the already significant diversity of lower court interpretations of the state's matching law. 83

A second recent amendment to New York law broadens the provision of the Domestic Relations Law that allows the abrogation of an adoption if the new parents attempt to change the religious affiliation of the child. 85 By thus unequivocally extending the religious

81 Report of the Joint Legislative Committee on Child Care Needs, 1968 N.Y. Leg. Doc No. 6, at 175, recognized the potential conflict between a mandatory matching requirement and the child's best interests:

The Committee, after due deliberation, expressed its support for legislation to permit adoption in the best interests of the child, rather than the existing practice of requiring adoption placements with persons of the same religion as the child or the child's natural parents.

82 Another possible interpretation is that the best interests of the child is an operative factor only when an express parental preference is stated. Under this interpretation the strict matching requirements of the old law are controlling when no preference is stated unless altered by evidence to rebut the presumption that the biological parents wish the child to be brought up in the religion attributed to them.

83 In Starr, the dissenting opinion criticized the majority's disregard for the child's best interests:

"If the Appellate Division majority intended that cause for rejection must be found in the personal character of the De Rocos [who were given custody] to warrant awarding custody to the Starrs [who were found the better parents by the trial court], I believe they were mistaken. Such an interpretation of [the constitution] would require awarding custody to persons of the same religion as the children in all cases, unless the prospective custodians were total social and moral misfits. Such a view constitutes a blatant disregard for the welfare of the child for purely religious reasons and might well be considered to violate the First Amendment..."

24 N.Y.2d at 1015, 250 N.E.2d at 243, 302 N.Y.S.2d at 839 (Jasen, J., dissenting).

84 New York does not have state regulations controlling adoption practices in the counties, thus leaving it to the county judge and the county welfare agency to interpret New York's increasingly confusing body of adoption law. Some local agencies still maintain the practice of assigning children of unknown religious background a religion on a rotating basis. Letter from Peter J. Kasius, Associate Social Services Consultant (Adoption) of the Bureau of Children's Agency Services, New York Dept of Social Services, to the Cornell Law Review, Dec. 10, 1970.

scrutiny of the state past the time of granting a petition for adoption, New York has taken a step of doubtful constitutionality.88

V

AGENCY PRACTICE

It is difficult to generalize about the impact of changes in agency policies on religious matching. Although the best index would be numerical data showing a relaxing of religious barriers, few agencies keep such information or make a practice of abstracting that which they have. Some states relegate responsibilities for placement to counties or private institutions that are subject only to general published guidelines and law. Although placement policies vary from state to state, the attitudes of agency personnel interpreting agency policy appear to concentrate more heavily on secular definitions of the best interests of the child.87 Thus, within allowable statutory bounds, many agencies have come to disfavor and deemphasize formalistic matching requirements.88 This is evident in states where agencies encourage

88 See note 145 infra.

87 Our standard for adoptive applicants regarding religion is “the applicants should be in agreement on the importance and means by which the child’s moral, ethical and spiritual or religious needs will be met and should indicate the manner in which these convictions will be integrated into the education and development of the child” . . . Further, “neither church membership nor attendance is required. As a public agency, we do not discriminate against adoptive applicants on the basis of their religious belief or non-belief. If the applicants are of different faiths, have they resolved their religions differences and decided how their child will be reared? Is the plan realistic? How comfortable are they about the difference?” . . .

. . . .

The child does not inherit religion, he acquires it. Letter from Ruth C. Weidell, Supervisor of the Adoption Unit, Minnesota Dep’t of Public Welfare, to the Cornell Law Review, Nov. 13, 1970 (quoting regulations). The Minnesota agency manages to maintain its relatively enlightened stance despite a matching provision in the state’s juvenile court act. MINN. STAT. ANN. § 260.181(3) (1971). But see In re Kure, 197 Minn. 234, 266 N.W. 746 (1936) (agency could only withhold consent to adopt on religious grounds when to do so would not be inimical to the child’s best interests).

88 A child care administrator in a state with strict matching requirements cannot help but feel the tension between the secular considerations relevant to placement for adoption and the undifferentiated thrust of a protection law. One Louisiana official wrote: “I suppose the question could be raised whether a public agency should be enforcing a provision of this kind, but I think we are conforming with the predominant belief in the State. As you know, this is the ‘Bible Belt.’” Letter from Charles O. Yost, supra note 47. A similar view was expressed by a Wisconsin official:

[For] time to time we have considered whether we should introduce legislation to delete any reference to religion of the parents. However in actuality we do not believe we are barred from making plans for children, and any efforts to amend
natural parents to sign religious waivers\textsuperscript{89} or where agencies give expansive interpretations to "when practicable" clauses of protective statutes.\textsuperscript{90}

At the same time it is evident that agencies are not hesitant to add religious content to child-parent matching provisions when it has not been supplied by the legislature. Almost all agencies in states with or without matching laws will give some effect to maternal wishes.\textsuperscript{91} Others may look to religious affiliation as an index of moral or ethical character in adoptive parents\textsuperscript{92} or may at least require religiously unaffiliated applicants to produce additional evidence of good character, ethical uprightness, or good standing in the community.\textsuperscript{93} Agencies may prefer religion over nonreligion in adoptive parents, pursuant to the rationale that \textit{some} religious training is desirable for a child,\textsuperscript{94} or they may give preferential treatment to parents matching the child's religion by routinely considering such applicants first.\textsuperscript{95} Thus, although the legislation could result in public reaction which could lead to further restriction rather than to further liberalization. Letter from Frank Newgent, \textit{supra} note 48.

\textsuperscript{89} As a basic minimum, almost all states, even those without religious protection provisions in their law, will make some effort to respect the wish of a biological parent as to the future religious upbringing of the child. \textit{Survey, Adoption Agencies}. Most agencies, when the law allows, encourage the mother to sign a religious waiver, and in most instances waivers are obtained. \textit{Id.}

\textsuperscript{90} In New Hampshire the "when practicable" clause uses the language "same religious belief." N.H. REV. STAT. ANN. § 169:19 (1964). The agency considers this "a most lenient limitation, e.g., there are Catholics whose 'belief' is more Protestant than Catholic, etc." Letter from Arthur Roberge, \textit{supra} note 17.

\textsuperscript{91} See note 89 \textit{supra}.

\textsuperscript{92} Many states, such as New York, routinely require some sort of clerical character reference as part of the application process. New York Dept' of Social Welfare, Form CW-299 (April 1966). But in New Hampshire, "evidence of regular church attendance is not prima facie evidence that desirable moral attributes will be acquired [by the child]. Our responsibility . . . is more far reaching than religion." Letter from Arthur Roberge, \textit{supra} note 17.

\textsuperscript{93} We have placed children for adoption in homes where the parents are not members of any organized religion, but do meet moral and other qualifications. In these cases a more in depth study is made to be certain that the child will receive spiritual values from [his] adoptive parents. Letter from Proctor N. Carter, State Welfare Director, Missouri Dept of Public Health and Welfare, to the \textit{Cornell Law Review}, Nov. 5, 1970.

\textsuperscript{94} Illinois licensing regulations for adoptive or foster homes stipulate that "'[t]he adoptive parents shall have an appreciation of spiritual values, with indication of ability to relate them to the adoptive child through an active religious affiliation or otherwise.'" \textit{Quoted in Letter from Elaine J. Schwartz, Social Service Specialist for the Division of Child Welfare, Illinois Dept of Children and Family Services, to the \textit{Cornell Law Review}, Dec. 7, 1970.}

\textsuperscript{95} Many agencies will not permit their matching policy to delay placement of a child, but as a routine matter will determine whether a family of the preferred faith is available before turning to other couples. \textit{Survey, Adoption Agencies}. 
North Carolina has no protection statute and administers its agencies on the county level, its state-wide administrative regulations provide that "[a]gencies will usually attempt to place a child with adoptive parents of the same religious faith as that of the child's natural parents, or of the faith preferred by the natural parents if they have stated a preference." Kansas agencies followed a similar practice until 1968, when matching was abandoned except in circumstances where the child was old enough to have embraced a religion and where it appeared that his faith was important to him.

Some state agencies consider controlling statutes self-explanatory and also accept them as agency guidelines. Agency personnel in Indiana, for example, feel no need to moderate the state's statutory formula since the religious homogeneity of the state supposedly avoids the creation of hardships.

A state agency may ostensibly mitigate the impact of religious restrictions by soliciting religious waivers from natural parents, but this in no way forecloses the possibility of a continued policy of de facto matching. Other tactics are more clearly attempts to soften the impact of religious restrictions. Minnesota has a religious matching requirement in its juvenile court act, yet the administering agency requires neither church membership nor attendance but merely asks that religious differences within mixed marriages be resolved to the extent of deciding upon the religious training of the child. Moreover,

We do not have a "matching procedure" per se: however, if homes are available we do try to place children with two parent families of the same race and religion as the child .... If such homes are not available we place children in the home that will best serve those children ....

Letter from Elaine J. Schwartz, supra note 94 (emphasis added). Although agency policy in Virginia is not found in law or regulations, "[I]t is the general philosophy of those involved in the field of adoption in our state that applicants must provide the child with some basis for religion." Letter from Doris D. Falconer, Assistant Chief of the Bureau of Family and Children's Services, Virginia Dep't of Welfare and Institutions, to the Cornell Law Review, Dec. 1, 1970.

1 North Carolina Dep't of Social Services, supra note 15, § II(E)(3)(c), at 19.


Maine law empowers the agency to place the child in a family according to its best interests unless the biological parents, in writing, request religious matching, or, when such a request has been made, if a family of the requested faith cannot be found. Me. Rev. Stat. Ann. tit. 22, § 3795 (Supp. 1970). The agency believes this formula is sufficiently clear so as not to require interpretive regulations. Letter from Dorothy B. Larabee, Foster Care and Adoption Consultant for the Division of Child and Family Services, Maine Dep't of Health and Welfare, to the Cornell Law Review, Nov. 10, 1970.

Survey, Adoption Agencies.

Note 87 supra.
If a natural mother placed importance on having her child adopted by parents of the same religion... the child-placing agency will make a reasonable effort to locate such a home. [But] the natural mother is advised that this cannot be guaranteed. If the mother objects to a specific denomination or religion a similar effort is made to honor her request. Agencies do not wish to delay adoptive placement too long so will place the child across religious lines if necessary.101

It is clear, however, that statutory matching requirements have a decided effect on placement practices even where agency attitudes are liberal. Thus, a Wisconsin administrator who expressed only slight discomfort over the policies inherent in the protective statute was nevertheless bound by a set of the most detailed administrative regulations on the subject of matching.102 Wisconsin Department of Health and Social Services regulations dictate a mandatory interpretation of the statutory "when practicable" clause.103 After a four-week search throughout the state for a home of the proper faith, higher administrative approval must be obtained before a search for parents of another faith may be conducted.104 The department is no doubt hard pressed at times to achieve its stated purpose that "every child legally free for adoption, and able to develop in a family home, should be placed as early as possible."105

Significant differences in approach to the religious issue occur in states with decentralized systems of placement106 or with systems that

101 Letter from Ruth C. Weidell, supra note 87.
102 Note 88 supra.
103 A child should not be denied an adoptive home if a suitable home of his own faith cannot be found, when a suitable home with parents of another faith is available.

1) . . . [F]irst consideration will be given to applicants of the [same] religious faith . . .

2) If a suitable home . . . of his own faith is not available . . . there should be circularization to find such a home elsewhere in the state . . . .

2 Wisconsin Dep't of Health and Social Services, CY Manual, ch. XXI, §§ 3561.20-22, at 1-2 (Nov. 1968). Four pages of single-spaced regulations alone are devoted to prescribing limits on cross-religious placement.

104 Id. § 3561.22, at 2. These regulations go further than any court decision in defining the mandatory interpretation of "when practicable" by providing the added dimension of time. Agencies in other states, without the aid of detailed regulations, probably apply their own rule-of-thumb waiting period—e.g., 90 days in Illinois. Letter from Elaine J. Schwartz, supra note 94.

105 Letter from Frank Newgent, supra note 48.
106 North Carolina publishes a lengthy welfare programs manual, but the operative mechanisms of the adoption process exist entirely on the county level:

We have 100 counties—which, in effect, means that we have 100 public child welfare agencies which offer adoption services.
rely heavily on private placement agencies. When placement is initially with a private, sectarian child care institution, the subsequent placement for adoption will, absent exceptional circumstances, follow religious lines. Since agency practice within the state is permitted to vary, the state seems to have little interest in imposing uniform religious restrictions on placement. The interests of adoptive parents and the children themselves should be identified and weighed in the balance against such an uncertain governmental commitment.

The variety of treatments given the religious issue not only makes the law confusing to the would-be petitioner, but invites the interjection of personal religious biases by administering officials into determinations made at any of the levels of child care administration where the issue might appear. Even agencies that profess no strong policy...

... Although our agencies operate within the broad policy framework described in [the] manual material, they are free to establish local policies which are not inconsistent with acceptable adoption practice.

Letter from Joan C. Holland, Supervisor of Adoptions for the Family and Children's Services Section, North Carolina Dep't of Social Services, to the Cornell Law Review, Nov. 23, 1970. North Carolina's regulations assume that matching will "normally" occur. Yet the Department of Social Services is cognizant of counties where matching practices are even more rigorous than those prescribed in its regulations. Id.

In Kansas the state places children whom private agencies might be unwilling or unable to place or care for over extended periods of time. Letter from Dorothy W. Bradley, supra note 97. Although Kansas has officially abandoned matching requirements in public placements, the limited scope of public agency activity reduces the significance of the recent change in policy. The state exercises no control over the religious matching policies of private agencies and expects that those policies will differ from its own. The majority of children placed for adoption are handled by licensed private agencies: one Lutheran, two Catholic, and one bearing no sectarian label. Id. Hence, Kansas probably has a significant religious input into its adoption process in the pre-judicial stages, despite the silence of its statute on religion and the liberalness of its public administrative policy. Indeed, Kansas probably differs little in terms of practical outcome from states with religious matching statutes.

Religious agencies operate almost exclusively to serve their sectarian group. Survey, Adoption Agencies. A 1963 survey of 96 Catholic agencies found that such agencies not only refused to place children with non-Catholics, but also excluded those Catholics who were divorced, non-practicing, or married to non-Catholics. R. Isaac, supra note 35, at xv-xvi. Thus, even in the absence of a protection statute, adoptive placements will take on a religious coloration to the extent that private agencies are made up of sectarian groups.

Indeed, the very existence of sectarian agencies may indicate that religious interests are being safeguarded and that the state therefore need not be concerned with the minority of natural parents who express strong religious preferences at the time they give up custody of the child to a public agency.

The harmful effects of matching laws on children and adoptive parents are discussed in Section VI infra.

Although this is not generally a matter of blatant religious discrimination, judges have gone to extremes in ascribing religious policies to matching laws. See, e.g., Ramon v. Ramon, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).
on matching have encountered such biases in their social workers or have found it difficult to deal with applicants of certain minority religions, such as Jehovah's Witnesses or Christian Scientists.

Where the state law is clear but harsh on the question of religion, the result is a distinct subordination of the temporal needs of children and adoptive parents, based on a policy that favors organized religion and the supposed wishes of biological parents. Where state law is unclear, unevenly applied, or even silent, the state's power, which provides the legal framework for adoption, is in danger of being used as a vehicle to give effect to the personal or institutional religious biases that exist at all levels of administration. The object of state law on the religious question should be to identify carefully the various interests, religious and temporal, that are relevant to the administration of a child placement program; to enunciate clearly, within the limits permitted by the Constitution, a state policy on how those religious interests bearing a reasonable relation to public needs should be protected; and to ensure a uniform and disinterested implementation of those policies at all levels of government.

VI

CONSEQUENCES OF RELIGIOUS PROTECTION STATUTES

Most religious protection laws, as currently drafted, emphasize the supposed religious interests of the biological parents to the detriment of both the child and the adoptive parents. The harmful consequences of religious requirements are numerous.

Since satisfaction of the child's need for suitable parents should be the primary goal of adoption, it is ironic that the child may suffer most. The imposition of any requirement that excludes a number of people from the pool of available adoptive parents, as does religious

112 See note 129 infra.

113 Oregon regulations prohibit adoption by the devout Christian Scientist. Jehovah's Witnesses are, as a practical matter, excluded because "some of their beliefs which set them apart from the community make it difficult to work with these people." Letter from Raymond W. Riese, Director of the Special Child Care Services Section, Oregon Public Welfare Division, to the Cornell Law Review, Nov. 16, 1970. Some states make special provision for the Christian Scientist in adoption or custody laws. E.g., Wis. STAT. ANN. § 48.82(3) (1957): "No person shall be denied the benefits of this chapter because of a religious belief in the use of spiritual means of prayer for healing."

114 Section VI infra.

RELIGION AND ADOPTION

matching, can result in increasing the risk of delay. The medical profession agrees that early placement of infants is especially important because

[the adopting parents have the opportunity of caring for the infant during the state of infantile helplessness, an arrangement which simulates . . . the natural family experience.

Early placement also avoids the danger of exposing an infant to possible inadequate mothering. Observations and studies demonstrate clearly that infants are susceptible to maternal deprivation from the earliest months of life.

Limiting the number of families eligible to adopt may mean that a child is not placed or that its ultimate placement is not in the best possible home. Placement in a sectarian institution is certainly far

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116 As recently as 1965, it could still be said that in actual practice, state laws, and in the absence of laws state administrative regulations for the licensing of agencies, ensure that in most states religious lines will not be crossed, even when it means that placement will be delayed or the child placed in a less suitable home.

R. Isaac, supra note 35, at 218.

The 1970 Cornell Law Review survey indicates that many agencies are now unwilling to delay placement in order to match religions. Survey, Adoption Agencies. One agency, for example, reported:

In the past we placed children of Protestant families with Protestant adoptive parents, children of Catholic families with Catholic adoptive parents, and children of Jewish families with Jewish adoptive parents. When we were operating in that way we occasionally had difficulty placing a Catholic child because we had few Catholic adoptive applicants. Consequently we modified this plan . . . .

Letter from Dorothy W. Bradley, supra note 97. In Minnesota, “[a]gencies do not wish to delay adoptive placement too long so will place the child across religious lines if necessary.” Letter from Ruth C. Weidell, supra note 87.

Delays in placement, however, have not been entirely eliminated. In Louisiana, for example, “[t]here are some delays because of the religious requirements. This is just one other factor which makes matching difficult.” Letter from Charles O. Yost, supra note 47. In Wisconsin, a delay factor is built into the adoption procedure. If a matching family is not available in the area, the agency must make an inquiry first to other districts, allowing two weeks for responses, and then inquire through the Resource Exchange, allowing an additional two weeks for responses. 2 Wisconsin Dep’t of Health and Social Services, supra note 103, § 3561.22, at 2.

117 American Academy of Pediatrics, Adoption of Children 12 (2d ed. 1967). See Bowlby, Substitute Families. Adoption, in Readings in Adoption, supra note 11, at 434, 435. In view of the advantages of early placement, one agency conducted an experiment by making several placements of infants directly from the hospital with successful results. See Lynch & Mertz, Adoptive Placement of Infants Directly from the Hospital, in Readings in Adoption, supra note 11, at 188.

118 The administrative regulations of North Carolina explicitly recognize, however, that “it is not in the best interest of a child to allow requirements for religious matching . . . perhaps to deny him altogether of the opportunity for adoption.” 1 North Carolina Dep’t of Social Services, supra note 15, § II(5)(b)(c), at 19. But see text accompanying note 96 supra.

119 List, A Child and a Wall: A Study of “Religious Protection” Laws, 13 Buffalo
inferior to placement in any suitable home, yet this may be the result of religious requirements.\textsuperscript{120} Even after custody of a child has been given to a would-be parent, a petition for adoption may be denied on religious grounds. This has occurred even in cases where the child had been in petitioners’ custody for many years and strong parent-child attachments had developed.\textsuperscript{121} Denial of a petition in these circumstances destroys a beneficial on-going relationship,\textsuperscript{122} severs the emotional ties between parents and child, and forces the child to undergo the trauma of readjusting to a new home or institutional setting, possibly hampering his normal psychological development.\textsuperscript{123} Even if a long-standing relationship is not involved, multiple placements may jeopardize a child’s emotional development.\textsuperscript{124}

People who wish to adopt a child are also disadvantaged by reli-

\textsuperscript{120} In some jurisdictions, matching placement is deemed practicable if there are numerous families available of the same religious faith who would hypothetically be willing to adopt the child, or if there is a sectarian agency that services children of that faith. This interpretation may be required by statute or judicial precedent. \textit{E.g.}, \textsc{La. Rev. Stat. Ann. }\S 13:1581 (1968); \textsc{N.Y. Family Ct. Act }\S 116(c) (McKinney 1963); \textsc{Pa. Stat. Ann. tit. 11, }\S 292 (1965); notes 36-38 supra.

\textsuperscript{121} See, \textit{e.g.}, \textsc{Ellis v. McCoy, }332 Mass. 254, 257, 124 N.E.2d 266, 267 (1955), where the adoption was denied even though, as the court conceded, “[t]he child is happy with [the adoptive parents] and they have grown to love her.” \textit{See also In re Goldman, }331 Mass. 647, 121 N.E.2d 843 (1954), \textit{cert. denied, }343 U.S. 942 (1955); \textit{In re Santos, }278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep’t 1951); \textit{In re Anonymous, }195 Misc. 6, 88 N.Y.S.2d 829 (Sur. Ct. 1949).

A study of adoption in New York revealed that sympathetic court personnel sometimes advise adoptive parents to delay for several years the filing of a petition since “[t]his gives the court an excuse for ultimately granting the adoption.” \textsc{Asch, supra note 115, at 55.} In light of past decisions, however, the danger of this practice is evident.

\textsuperscript{122} In \textit{In re Stone, }21 Pa. D. & C.2d 730, 738 (County Ct. 1960), the court expressed concern lest it “wipe out a relationship of more than two years standing . . . .”

\textsuperscript{123} Take the case of Frances, a gay, talkative five-year-old until she was snatched from the only home she had known and sent to live with strangers, her new parents. Frances became hysterical, stopped eating, and started to wet her bed. Her intelligence, rated as bright-normal, dropped to low-average. Time was no healer, for three years later a psychiatrist reported: “This child is still depressed and so badly traumatized that we cannot predict her future.” \textsc{Lake, Must Babies Wear Religious Tags?, Good Housekeeping, Nov. 1970, at 79, 218. Cf. \textsc{Wires, Placement for Adoption—A Total Separation?, in Readings in Adoption, supra note 11, at 144. But see Fitzsimmons v. Liuni, }51 Misc. 2d 96, 272 N.Y.S.2d 817 (Family Ct. 1966).}

\textsuperscript{124} \textsc{American Academy of Pediatrics, supra note 117, at 9-10.} Some courts have explicitly recognized this factor: “It is highly detrimental to the welfare of small children to shift them around from one family to another.” \textsc{State ex rel. Baker v. Bird, }253 Mo. 569, 586, 162 S.W. 119, 124 (1915).
igious requirements. Adoptive parents suffer if they are separated from a child with whom they have strong emotional ties. The consequences, however, extend further back than the actual adoption proceedings. Religious requirements may discourage some suitable adoptive parents from seeking to adopt a child. More important, a large number of adoptive parents are denied custody in the first instance. This reservoir of would-be parents constitutes a loose category of individuals with no appreciable representation or influence in the political decision-making process, in sharp contrast to organized religions that are able to exert effective political pressures to further their interests.

125 In one widely-publicized case, Ellis v. McCoy, 352 Mass. 254, 124 N.E.2d 266 (1955), the adoptive parents were so attached to the child that, refusing to give her up, they fled to Florida. Florida denied a Massachusetts request to extradite the adoptive parents on kidnapping charges, and eventually the child was adopted under Florida law. R. Isaac, supra note 35, at 219-20.

126 The law may therefore have a deterrent effect before it raises a formal bar to adoption. For example, a couple with mixed religious backgrounds who would like to adopt may wonder if the state will pry into their religious differences or, worse yet, if the state will place a child with them only to take it away later when their religious diversity is revealed. Their fears are not altogether unfounded. Even though an agency might accept a nominal religious affiliation (and thus place a child with them), the judge might have different notions. This is revealed by the survey of New York family court judges. First, asked how often they inquired about the religious affiliations of the adoptive parents, 21 judges replied always, one occasionally, and two never. Further, when asked how often they inquired whether the adoptive parents are church members, 12 judges replied always, five generally, one occasionally, and only seven replied never. Finally, when asked how often they inquired about the regularity of church attendance by the adoptive parents, nine replied always, five generally, three occasionally, and seven never. Survey, Judges.

Moreover, a couple of mixed religious background will, when compared with a group with unmixed religious affiliations, probably get the coolest reception from their caseworker, notwithstanding the liberalism of state law on the issue of religion. In a 1959 experiment conducted by the Child Welfare League, 184 social workers from 13 states conducted hour-long interviews with five couples. The couple that consistently ranked the lowest was the only one in which religions were mixed, even though other couples had demonstrated psychological problems which caused the workers to comment. R. Isaac, supra note 35, at 30-32.

127 "[T]he pressures exerted by religious interest groups even where the laws leave some freedom of action, are becoming ever more severe . . . ." R. Isaac, supra note 35, at 218. Religious pressure groups sometimes attempt to exert their influence not only by lobbying for laws favorable to their interests but also by intervening in particular cases. Some courts have taken a dim view of such intervention. In Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293 (1957), the Supreme Court of Illinois declared that it was improper to allow Catholic Charities to intervene in an adoption case, since the institution had no enforceable or recognizable legal right to the children, but only a general interest in the proceedings. Similarly, in Purinton v. Jamrock, 195 Mass. 187, 196, 80 N.E. 802 (1907), the lower court declared: "[I]f members of [the] church have taken an interest in this case as sectarians and promoters of the interests of their church, they have no proper place before the court, and will receive no recognition there."
In the adoption process, ideally all potential parents should be “assured complete equity with others seeking children.”128 In practice, however, those of minority religious backgrounds often encounter serious obstacles in attempting to adopt a child.129 Those who are, in effect, precluded from adopting through an authorized agency on religious grounds are faced with three options. The first is to give up the idea of adoption.130 This alternative deprives would-be parents of the family they desire and the equitable treatment they deserve. Moreover, needy children are also deprived of homes that would otherwise be available to them.131

The adoptive parents, moreover, are exclusively concerned with providing homes for needy children whereas the sectarian agency often mixes its concern for the child’s welfare with its own evangelical predispositions. See Reid, Principles, Values, and Assumptions Underlying Adoption Practice, in Readings in Adoption, supra note 11, at 26, 29.

128 National Conference of Lawyers and Social Workers, Responsibilities and Reciprocal Relations in Adoption—Lawyer and Social Worker 4 (1965).

129 This, of course, includes people who are members of no religion as well as those who are members of minority faiths:

The couple who is not affiliated with a church . . . may have to abandon hope of adopting through an agency.

. . . Jews and others of minority faiths find the supply of children of their faith so low that private adoption is often the only alternative.

R. Isaac, supra note 35, at 13. Recently, one Jewish couple, after being rejected by several agencies, was finally able to obtain a child through private sources for a fee of $6,000. N.Y. Times, Dec. 7, 1970, at 35, col. 2. Caseworker biases may further exacerbate the situation. In Minnesota, for example, agencies “have encountered worker biases when placing children into certain denominational homes such as Christian Science, Jehovah’s Witnesses and avowed atheists. With time and repeated effort [they] have been able to make placements in these homes.” Letter from Ruth C. Weidell, supra note 87. In North Carolina, “one of [the] counties once hesitated to place an Anglo-Protestant infant with a Mohammedan couple from Iran but finally did so—they have . . . been excellent parents.” Letter from Joan C. Holland, supra note 106. See also T. Bradley, An Exploration of Caseworkers’ Perceptions of Adoptive Applicants 167 (1966).

Couples who are not only members of a dominant faith but who also actively practice that faith occupy a preferred position among applicants. See R. Isaac, supra note 35, at 12. This is indicated by the extent to which judges inquire about the church affiliations and activities of adoptive parents. Note 126 supra. One writer therefore advises would-be adoptive parents to join a church,

perhaps even joining the young married group of the church to make themselves more visible in less time to the minister and other congregants. Where there is a mixed marriage and one member has been intending for years to join the faith of the other, he or she might take the plunge.

R. Isaac, supra note 35, at 12.

130 See note 126 and accompanying text supra.

131 This, of course, depends on the number of children available for adoption compared with the number of adults who want to adopt, which varies from time to time. Since the present demand for normal, white babies exceeds the supply, these children may not be disadvantaged now; however, handicapped, older, and racial minority children are still hard to place. Note 47 and accompanying text supra. Moreover, the situation may change in the future, and, if it does, the first group of children may again be disadvantaged in finding adoptive homes.
Second, adoptive parents may misrepresent their religious affiliation in order to qualify;\textsuperscript{132} in fact, they may even be encouraged to do so.\textsuperscript{133} Encouraging people to compromise their integrity brings the law into disrespect. This alternative further places adoptive parents in continual jeopardy of being discovered in their deception,\textsuperscript{134} even after they have custody. It also has the anomalous effect of making those who are less honest more eligible to adopt.

Third, couples may abandon attempts to adopt through an authorized agency and turn to independent sources. The authorized agency, "composed of social workers, doctors and lawyers, with help from geneticists, anthropologists, psychologists and psychiatrists,"\textsuperscript{135} has at its disposal resources unavailable in independent adoptions. The interests of all parties are protected through examinations of the child and investigations of the prospective home.\textsuperscript{136} Independent placements lack these safeguards, and therefore even where they are well-meaning and without pecuniary consideration,\textsuperscript{137} they are more hazardous than placements through an authorized agency.\textsuperscript{138} In addition, the identity

\textsuperscript{132} One writer includes among the options available to those with no church affiliation to "pretend to belong to a church, perhaps obtaining the reference of a sympathetic clergyman-friend . . ." R. Isaac, supra note 35, at 13.

\textsuperscript{133} The agencies are not unaware of this factor. In response to the Cornell Law Review questionnaire, one agency commented: "Many people start going to church before they apply in order to 'qualify' but after the adoption is decreed who knows what happens? . . . People become members of a religion for adoption purposes in other words." Survey, Adoption Agencies. Nor is the judiciary unaware. In one case the judge commended the adoptive applicant for not doing so: "He could have lied about it and the fact that he didn't lie about it is so much in his favor." Transcript of Proceedings at 9, In re "E" (N.J. County Ct. Nov. 2, 1970). The petition was nonetheless denied.

\textsuperscript{134} One would-be parent recalled: '"Some social workers suggested that we couldn't want a baby all that badly or we'd certainly be willing to sacrifice our integrity. Why didn't we just join a church and shut up about our views?'" Lake, supra note 123, at 220.

\textsuperscript{135} Id.


\textsuperscript{137} Although a 1950 study indicated that "black-market" adoptions were infrequent (Note, supra note 136, at 715), more recent studies indicate that they are increasing (O'Connell, The Adoption Muddle: A Possible Solution, 15 N.Y.L.F. 759, 766 (1969); N.Y. Times, Dec. 7, 1970, at 1, col. 7). Independent placements in nonrelative adoptions are now prohibited in some states. E.g., Del. Code Ann. tit. 18, § 904 (1955). See generally Schmidt, The Community and the Adoption Problem, in Readings in Adoption, supra note 11, at 38.

\textsuperscript{138} One study revealed that out of 100 independent placements, "only 46 were satis-
of the parties may not be confidential in an independent placement, thus leaving the adoptive parents vulnerable to pressure from the biological parents. The policy of the law, therefore, should be to discourage independent placements, yet religious protection statutes may have the opposite effect.

The influence of religious protection laws may continue even after a petition is granted, when the court decrees or makes it a condition of the adoption that the child be brought up in a particular religion. Such requirements are as unwise as they are ineffectual. Commanding parents to train the child in a religion that may be anathema to them risks injecting a hostile element into the home; even if the religion is not hateful to the parents, the disparity in religious worship is bound to result in disharmony in the family. The purpose of adoption should be to duplicate as nearly and completely as possible the natural relationship between parent and child, and state supervision of the child's religious training, traditionally the preroga-

factory; 26 were questionable at best; and 28 were definitely undesirable." Out of 100 agency placements, 76 were satisfactory, 16 were questionable, and eight were undesirable. Note, supra note 156, at 724 n.43.

139 Id. at 724.


141 See, e.g., Lemke v. Guthmann, 105 Neb. 251, 181 N.W. 132 (1920); In re Mancini, 89 Misc. 83, 151 N.Y.S. 387 (Sur. Ct. 1915). In State ex rel. Evangelical Lutheran Kindergarten Soc'y v. White, 123 Minn. 508, 514, 144 N.W. 157, 159 (1918), the guardians were prohibited from attempting "to influence the religious training of the child contrary to the doctrines of the church of her [natural] parents . . . ." The supposed liberality of certain decisions (see, e.g., the discussion of In re Maxwell, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958), in Note, The Religious Factor in New York Adoption Proceedings, 18 Syracuse L. Rev. 825, 829-31 (1967)) must be seriously questioned in light of the adoptive parents' willingness to raise the child in its "own" religion. Note 44 supra.


143 "To create a basic religious conflict in the mind of the child, and between it and its custodian, would be detrimental to its welfare." Boerger v. Boerger, 26 N.J. Super. 90, 104, 97 A.2d 419, 427 (1953).

Such requirements may also operate to inhibit placement in the first instance. For example, one couple wanted to adopt a boy of eight with a deformed arm and serious emotional problems, a so-called "hard-to-place" child:

[T]he agency had second thoughts. The [adoptive parents] could have the boy, they said, but only if they took him to church on Sundays. Can parents raise three of their [own] children in the Jewish faith and one as a Christian? [This couple] honestly felt that they could not.

Lake, supra note 128.
vive of the parents,144 introduces an alien element into the family environment.145

VII

THE CONSTITUTIONALITY OF RELIGIOUS PROTECTION STATUTES

A. The Imputation of Religion

Although the Supreme Court has not yet confronted the issues presented by religious protection statutes, several aspects of these laws seem to collide with constitutional prohibitions. Before religious matching can be effected, the relevant religion must first be determined. Most statutes provide that the relevant religion shall be that of the child or the natural parent or parents.

This seemingly simple formula is in reality fraught with difficulties. Although it may make sense to talk about the child's own religion where the child is old enough to have received and understood religious training, where the child is an infant or has had no such training, courts must confront the inherent difficulties "underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion."148 No court has yet faced up to these difficulties.

1. Judicial Interpretation of Religious Doctrine

Courts frequently give weight to dedication to a faith, such as baptism or circumcision.147 This judicial emphasis on ceremonial reli-

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144 "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
Parenthetically, sometimes I question whether a child under the age of four or six or seven has a distinctive religious faith or has any particular religious persuasion. Children who are non sui juris, or who have not as yet reached the age of reason, cannot be converted from one religion to another. . . . Conversion . . . is accomplished by the parents.
147 See, e.g., In re Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951). In
igious rites has been criticized as an improper civil acceptance of ecclesiastical authority.\textsuperscript{148}

Moreover, where a child has been dedicated to more than one faith, the courts may be faced with difficult religious doctrinal questions. For example, in \textit{In re Glavas},\textsuperscript{149} the court was asked to determine the religion of a four-year-old boy whose mother was Jewish and whose father was Greek Catholic. Shortly after his birth, and with the father's consent, the child was circumcised in accordance with rules prescribed by the Jewish religion.\textsuperscript{150} Four years later, without the mother's knowledge or consent, the father had the boy baptized by a Roman Catholic priest.\textsuperscript{151} The court found it significant "that the father [was] not a Roman Catholic" and questioned his good faith.\textsuperscript{152} It concluded that "the baptism [did] not supersede the circumcision" and the consent of both parents was necessary to effectuate a change in the child's religion.\textsuperscript{153} Because the number of marriages in the United States be-

\textit{In re Israel}, 24 Misc. 2d 1089, 206 N.Y.S.2d 467 (Dom. Rel. Ct. 1960), the court's conclusion that no finding could be made as to the religions of the three children—aged three, two, and almost one year—despite both biological parents' averments that the children were Jewish, was in part based on the fact that "the children have neither been baptized nor formally admitted into any faith." \textit{Id.} at 1090, 206 N.Y.S.2d at 468. Of course, not all decisions attach such great weight to dedication:

A custom has grown up that where a child is once baptized or entered in any prescribed manner into a church, that the child is to be treated as belonging to that church so long as he is a minor. There is no foundation in law for such a position. \textit{In re Vardinakis}, 160 Misc. 13, 15, 289 N.Y.S. 355, 359 (Dom. Rel. Ct. 1936).

Nevertheless, the \textit{Cornell Law Review} survey of judicial practice in New York reveals that for many judges dedication is a significant factor in adoption proceedings. When asked how often they inquire as to whether the infant has been dedicated to a faith by a ritual such as baptism, 16 of the judges said they always asked, three said generally, two said occasionally, and only four said never. \textit{Survey, Judges}. The judges were also given a hypothetical situation in which the mother is a member of a major religion and the adoptive parents are of a different faith and intend to raise the child in their faith; the child has been dedicated to the faith of the mother by a ritual such as baptism. Two of the judges would automatically bar such an adoption; eight of the judges reported that their reaction would be extremely unfavorable, eight were unfavorable, and four were only slightly unfavorable. Only five stated that they would give the dedication factor no effect. \textit{Id.} See also Broeder & Barrett, \textit{supra} note 35, at 654.

\textsuperscript{148} Ramsey, \textit{supra} note 145, at 672.
\textsuperscript{149} 203 Misc. 590, 121 N.Y.S.2d 12 (Dom. Rel. Ct. 1953).
\textsuperscript{150} \textit{Id.} at 593, 121 N.Y.S.2d at 15.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 594, 121 N.Y.S.2d at 16.
\textsuperscript{153} \textit{Id.} at 597, 121 N.Y.S.2d at 19. One can only speculate whether the decision would have been different if the father had been Roman Catholic; or if the court had been impressed with the father's sincerity; or if the mother had known about the baptism and had neither consented nor objected; or if the father had been unaware of the religious implications of the circumcision. Since Jewish law holds that any child born of a Jewish mother is a Jew (Cf. Rubenstein, \textit{Law and Religion in Israel}, 2 \textit{ISRAEL L. REV.} 380, 413 (1967)), the court might have held the child to be a Jew even without circumcision.
RELIGION AND ADOPTION

between persons of different religious faiths is substantial and increasing, it is likely that more cases involving multiple dedications will arise.

Even if civil courts may properly accept the determinations of ecclesiastical authorities, the problem is not solved where the religious dogma of such authorities conflict. When the court is unable to rely on parental consent, as it did in Glavas, the difficulty appears to be insurmountable. The Supreme Court has held that the first amendment prohibits civil courts from entertaining litigation that "is made to turn on the resolution . . . of controversies over religious doctrine and practice." Determination of a child's religion based on dedication to a faith is nothing less than adjudication "over religious doctrine and practice." Moreover, the courts may not avoid this difficulty by ignoring ecclesiastical doctrine and attempting to decide which religion will best promote the child's welfare, for "the State . . . cannot, under our present Constitution, undertake to decide what form of religious instruction is best for any person."

Similar difficulties are involved where determination of the child's

154 Newsweek, March 1, 1971, at 57.

155 A similarly complex situation was presented to the court in In re Vardinakis, 160 Misc. 13, 289 N.Y.S. 355 (Dom. Rel. Ct. 1936). There, a Catholic mother and a Moslem father, married in the Protestant church, had four children. The first child, a son, was baptized Catholic, against the father's wishes; the second and third were Mohammedan against the mother's wishes; and the court determined that the fourth child had no religion, although the father claimed the child to be Mohammedan. The court ordered the oldest son placed with his Moslem uncle, with the mother's consent. The other three children were placed in a Protestant foster home; the oldest girl was permitted to go to church with her mother and the other two were permitted to go to Moslem services with their father.

156 Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). Previously, the Court had held:

[When]ever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Watson v. Jones, 80 U.S. (13 Wall) 679, 727 (1871). This approach is admittedly better than allowing a civil court to decide matters of religious doctrine, thus possibly overriding ecclesiastical authority on an interpretation of parochial dogma. Nevertheless, such civil acceptance of ecclesiastical pronouncements represents a state involvement in religious matters. The better rule is to prohibit state involvement in ecclesiastical matters entirely. For a discussion of state intervention in ecclesiastical disputes, see L. Pfeiffer, Church State and Freedom 287-302 (rev. ed. 1967).


"The Roman Catholic church and the Baptist church are both alike before the law. The court does not hold that the interests of a child will be promoted by education in either of these churches in preference to the other."
religion is based on that of its natural parent or parents. If the parent's religion must be ascertained at the time the child was relinquished or at the time of the adoption. If the parents are only nominal members of a faith and do not actively practice their religion, or if their conduct arguably demonstrates an abandonment of that religion, a determination of parental religion necessitates court involvement with the same doctrinal questions forbidden civil jurisdiction by the first amendment. For example, in In re Goldman, the Jewish adoptive parents argued that the natural mother had abandoned Roman Catholicism by committing adultery, obtaining a civil divorce (both mortal sins under Church doctrine), failing to baptize her children, and placing the children with Jewish parents, knowing that they would be raised in the Jewish faith. The court rejected the argument:

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.

The claim was not that the mother failed to live up to the ideals of her faith, however; it was that she had, by her conduct, demonstrated an abandonment of that faith. The court's failure to examine the issue more deeply is not surprising, for the issue is one of religious doctrine and not civil law. Judicial reliance on formal expulsion from a faith, such as excommunication, is not a satisfactory solution either. Many sects make no formal provision for expulsion, and, even where such provision is made, reliance would involve improper obeisance by civil to religious authority.

2. Establishment of Religion

Even if the courts were able to overcome the threshold difficulty of determining the relevant religion, the practice of imputing religion to children may violate the establishment clause of the first amendment, which is applicable to the states through the fourteenth amend-

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158 The Supreme Court has suggested by way of dictum that any state examination of religious beliefs might infringe upon first amendment rights: "[A] state-conducted inquiry into the sincerity of the individual's religious beliefs [is] a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees." Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (footnote omitted).
159 See note 156 and accompanying text supra.
160 See supra note 161.
162 Pfeffer, supra note 142, at 882-84.
163 331 Mass. at 649, 121 N.E.2d at 844.
Although the boundaries of the establishment clause have not yet been clearly defined, the Supreme Court has ruled that the clause must be given a "broad interpretation." With this admonition in mind, the imputation of religion must be measured against the two principal tests that have emerged from recent Supreme Court establishment decisions.

The first test, based on a no-aid principle, requires that government be neutral as regards religion; while the state may not be hostile, neither may it actively support religion. The test was thus formulated in the leading case, *Everson v. Board of Education:* "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."

Where religion is imputed to a child in the absence of a parental request or contrary to such a request, the state cannot claim to be effectuating any parental right theory. The imposition of a religious status on a child in such circumstances, wholly on the initiative of the state, prefers religion over nonreligion and constitutes a substantial aid to religion. Moreover, judicial reliance on such religious dedication rites as baptism and circumcision supports those religions in which such rites are determinative of religious faith over those in which they are not. Imputation based on dedication therefore favors some religions over others in contravention of the first amendment.

The second principal test is a dual one which requires that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances

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165 Id. at 15.
166 330 U.S. 1 (1947).
167 Id. at 15.
168 Id. at 15.
169 Decisions sometimes refer to the religious "status" of a child (*e.g.*, *In re Mancini*, 89 Misc. 83, 85, 151 N.Y.S. 387, 388 (Sur. Ct. 1915)) or hold that the child is "entitled" to be raised in a specific faith (*e.g.*, Ramon v. Ramon, 34 N.Y.S.2d 100, 113 (Dom. Rel. Ct. 1942); Palm v. Smith, 183 Ore. 617, 622, 195 P.2d 708, 710 (1949)).
170 Imputation based on the faith of the natural parents makes it virtually impossible for a child to avoid some religious designation, since most people have a religious element somewhere in their backgrounds. Wisconsin regulations, for example, provide:

The religious faith of the child . . . is considered to be the same as the religious faith of the parent or parents (or the religious heritage or background if the parent or parents are unaffiliated at the time the child is placed in the agency's guardianship) . . . .

2 Wisconsin Dep't of Health and Social Services, *supra* note 103, § 3561.20, at 1 (emphasis added).
170 This approach "obviously disadvantages adherents of those religions which suspend acceptance into membership until a time when their doctrines can be understood by a comprehending mind." List, *supra* note 119, at 25. See Ramsey, *supra* note 145, at 672.
nor inhibits religion." It is difficult to find any secular purpose in state imputation of religion. Imputation cannot be justified on the theory that the child's spiritual welfare will best be promoted by one religion rather than another or by any religion rather than none, for "[t]he law does not profess to know what is a right belief." Moreover, enhancement of spiritual well-being is hardly a secular purpose.

In order to justify imputation, the imposition of a religious status on a child must be connected with some secular benefit. One possible argument along these lines is that the social status of the child could be enhanced through imputation of certain religions—a child who is a member of a major faith will face fewer problems in society than will a child who is, for example, a Jehovah's Witness or an atheist. If this is true of religion, however, it is even more true with respect to race; whites are obviously spared many of the obstacles encountered by blacks. Nevertheless, in In re a Minor, Judge Bazelon ruled that "the distinction between the 'social status' of whites and Negroes" cannot be the basis for denial of an adoption. The very purpose of the first amendment is to promote tolerance among persons of different religions and to eradicate social distinctions based on religion, while maintaining within the country the independence and vitality of a multiplicity of religious faiths. To impute religion on the theory that one faith is better socially than another or than none is to violate the spirit of the first amendment by emphasizing these


172 Although the dual tests under the establishment clause are analytically distinguishable, they do overlap. Thus, although the following arguments are directed primarily at the first part of the test, that of secular purpose, they may be applicable to the second part, the primary effect test, as well.

173 In re Doyle, 16 Mo. App. 159, 166 (1884). Thus, the court cannot consider "the eternal interests of the child in a future state of existence . . . ." Id. at 167. See note 157 and accompanying text supra.

174 Not all legislation with religious overtones is prohibited. The crucial distinction is between legislation which finds support in considerations of public interest, even though also identifiable with religious views and practices, and legislation designed to force a religious view or practice upon the community. The latter must be condemned as an unconstitutional establishment of religion.


175 228 F.2d 446 (D.C. Cir. 1955).

176 Id. at 448.

177 Historians include among the factors underlying the first amendment the large number of unbelievers in the colonies, the large number of denominations among the believers, and the necessity, under these circumstances, of religious toleration. P. KURLAND, RELIGION AND THE LAW 16-17 (1962).
distinctions and by exacerbating the frictions the amendment was
designed to overcome.\textsuperscript{178}

A second argument is that the state, as \textit{parens patriae}, must pro-
vide for the moral development of the child, and the imputation of
religion is a means of ensuring the child’s proper moral upbringing.
But this position presupposes a causal relationship between religious
training and morality that has yet to be proved. In fact, the few studies
that have been made indicate no such relationship.\textsuperscript{170} Even assuming
the existence of such a connection, however, the argument further
presumes that religion is a necessary criterion of morality.\textsuperscript{180} Again,
there is no evidence to support this view. In many cases where adop-

\textsuperscript{178} Moreover, as the court recognized in \textit{State ex rel. Baker v. Bird}, 253 Mo. 569,
585, 162 S.W. 119, 124 (1913): “It is difficult to see how the State could be interested in
perpetuating the same religious views from one generation to another.”

\textsuperscript{170} For a discussion of the connection between religious training and delinquency,
see \textit{Wattenberg, Church Attendance and Juvenile Misconduct, 34 Sociology & Social
Research 195} (1950), \textit{W. Gellhorn, Children and Families in the Courts of New York
City} 84 (1954), refers to other research projects in this area. For a discussion of studies
made on the correlation between religious training and “good character traits,” see
\textit{Broeder & Barrett, supra} note 25, at 669-71. In \textit{State ex rel. Baker v. Bird}, 253 Mo. 569,
585, 162 S.W. 119, 124 (1913), the court observed:

Courts . . . should never attempt the more delicate and difficult task of deter-
mining what form of religious teaching is most likely to promote good morals or
good citizenship. In fact, they could not do so without invading the domain of
private conscience, and undermine, if not destroy, the inestimable blessings of
religious liberty.


\textsuperscript{180} One organization has a more enlightened attitude:

Opportunity for religious or spiritual and ethical development of the child should
receive full consideration in the selection of adoptive homes. Lack of religious
affiliation or of a religious faith, however, should not be a bar to consideration
of any applicants for adoption.

\textbf{CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE: REVISED 51} (1968)
(emphasis added).

A small minority of public agencies share this attitude. In Missouri, “[a]ll that we
require is that the child be taught spiritual values . . . .” Letter from Proctor N. Carter,
\textit{supra} note 93. In Minnesota, according to public welfare regulations, “‘neither church
membership nor attendance is required.’” The only requirement is that

“the applicants should be in agreement on the importance and means by which the
child’s moral, ethical and spiritual or religious needs will be met and should
indicate the manner in which these convictions will be integrated into the educa-
tion and development of the child.”

\textit{Quoted in} Letter from Ruth C. Weidell, \textit{supra} note 87 (emphasis added). In New Hamp-
shire

we need to be satisfied that a child will be raised so as to acquire the moral attri-
butes necessary to live in a civil and free world. With this approach you can
readily see that evidence of regular church attendance is not prima facie evidence
that desirable moral attributes will be acquired. Our responsibility then, in terms
of morality, is more far reaching than religion.

Letter from Arthur Roberge, \textit{supra} note 17.
tion petitions were denied on religious grounds, the courts have conceded that the moral qualifications of the adoptive parents were entirely satisfactory, indicating that the denials were not based on a fear that the child would not receive proper moral training.\footnote{181}

Although the moral development of a child is a secular purpose, and religious training may be one way of promoting this purpose, it is clearly not the only way. The same goal can be achieved by simply providing that adoptive parents meet the state’s moral qualifications. It is well settled that the state may not use religious means to accomplish secular goals if those goals may be achieved by nonreligious means.\footnote{182} In \textit{School District v. Schempp},\footnote{183} Pennsylvania attempted to justify its requirement that the Bible be read at the beginning of each school day on the ground that moral values were promoted, but the Supreme Court held that such “religious exercises” nevertheless violated the first amendment.\footnote{184} In his concurring opinion, Justice Brennan explained that the establishment clause forbids those involvements of religious with secular institutions which use essentially “religious means to serve secular ends where secular means would suffice.”\footnote{185}

Absent a demonstrable temporal benefit to the child, the argument that imputation of religion is permissible because it promotes the child’s secular well-being is untenable. For, although the state may certainly seek to foster the secular interests of the child, it may not equate the child’s temporal welfare with its alleged religious welfare without violating the first amendment.

Another justification that has been advanced is that imputation is permissible because it furthers freedom of religion. This is one of

\footnote{181} In a recent New Jersey case, an adoption petition was denied because the adoptive parents lacked a religious affiliation, even though the couple was highly recommended by the agency, which “found them to be people of high moral and ethical standards.” \textit{In re “E,”} at 3 (N.J. County Ct. Nov. 2, 1970). The judge presumably agreed with this judgment, for at the hearing, after questioning petitioner about his ethical beliefs, the judge commented:

\textit{I have heard some Catholics who are unable to express the Christian view as well as you expressed it. In other words, you don’t take the Christian view but basically you have a good moral life and you believe in a code of morals, sir.}


\footnote{182} McGowan v. Maryland, 366 U.S. 420, 462 (1961) (Frankfurter, J., separate opinion); \textit{cf.} Brauneifield v. Brown, 366 U.S. 599, 607 (1961) (dictum) (statute imposing an indirect burden on free exercise of religion invalid if the secular purpose can be achieved by means that do not impose such a burden).

\footnote{183} 374 U.S. 203 (1963).

\footnote{184} Id. at 223.

\footnote{185} Id. at 281.
the most enigmatic of rationales employed by the courts in adoption cases because, no matter what the holding, the decision is invariably justified on the grounds of religious freedom. Free exercise of religion, however, does not exist in a vacuum; the state must demonstrate whose religious freedom it is protecting.

One possibility is that the state is protecting the child's religious freedom; thus, some courts have held that a child is "entitled" to be raised in a particular religion. While a child may have an ecclesiastical right to be so raised, it does not have such a civil or constitutional right. To the contrary, it is the child's parents who have the right to control the child's religious upbringing. Although the courts may respect a child's religious preference where he is old enough to have such preferences, this is not constitutionally required but is based on other factors. For example, the court may believe that a change in religious environment will be traumatic for the child, or that it will impede the child's adjustment to a new home, or that implicit in the child's religious desires is a preference for one home rather than another. To couch such secular considerations in religious terms only confuses the real issue—determining the placement that will best promote the child's secular welfare.

The state can hardly maintain that it is promoting the religious freedom of the natural parents, for imputation of religion, by definition, is state-initiated and determined and is not designed to effectuate parental wishes. In reality, state imputation of religion ignores parental indifference to the religious upbringing of the child and may

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187 Note 168 supra.
188 Ramsey, supra note 145, at 672-73.
191 Even the natural parents' right to change the child's religion may be circumscribed because repeated changes may be detrimental to the child's "sense of security." In re Glavas, 203 Misc. 590, 596, 121 N.Y.S.2d 12, 18 (Dom. Rel. Ct. 1953). Cf. Boerger v. Boerger, 26 N.J. Super. 90, 102, 97 A.2d 419, 426 (1953): "The Catholic training of the children never progressed so far that definite religious ideas were impressed upon their minds to such an extent that any change would unsettle their tranquility and disturb their mental poise."
192 In In re Mancini, 89 Misc. 83, 87, 151 N.Y.S. 387, 389 (Sur. Ct. 1915), a court that heavily emphasized the Roman Catholic "status" of a 14-year-old girl nevertheless permitted her to remain in the custody of a Protestant minister largely because of the child's strong preference for her new home. The court insisted, however, that the child be given religious instruction in the Roman Catholic faith.
sometimes even operate to contravene parental wishes. Moreover, it supports no religious interest of the adoptive parents.

The only interest really served by imputation is that of organized religion. Although churches have a legitimate right to freedom from state interference in their internal affairs and from state inhibition of their activities, they have no right to utilize the power of the state to increase or maintain the size of their flock. To permit this would breach the wall of separation between church and state.

The conclusion that imputation of religion lacks a primary secular purpose is reinforced by an examination of Supreme Court decisions. The Court has upheld Sunday closing laws because they provide a day of rest and relaxation and "are of a secular rather than of a religious character." Similarly, state financial aid to parochial schools for busing and for nonreligious textbooks has been sustained on the child benefit theory: the purpose of such aid is to benefit the children, not to aid parochial schools. The benefits involved—safer transportation and improvement of educational resources—were secular in nature. In the case of imputation of religion, however, the benefit of enhancing the child's spiritual well-being is religious in nature, not secular. Moreover, any aid received by the parochial schools as a result of child benefit laws was incidental, whereas the benefits of imputation to organized religions are direct and primary.

In contrast, the Court has invalidated state laws and regulations that lacked a clear secular purpose and were essentially religious in nature. For example, laws requiring public officials to declare their belief in a Supreme Being provisions for daily recitation of a non-denominational prayer or Bible reading without comment in the

193 In In re Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954), cert. denied, 348 U.S. 942 (1955), for example, the Roman Catholic mother's consent to the placement of her children in a Jewish home could be seen as an implicit preference that the children be brought up in the Jewish faith. Cf. Pfeffer, supra note 142, at 384.

194 For a discussion of how some potential parents may be disadvantaged by religious protection statutes, see notes 129-39 and accompanying text supra.


public schools, and provisions for a public school released-time program where religious classes were held on school premises have been struck down as violative of the first amendment. These laws are more analogous to imputation than those upheld by the Court in that their primary concern is promotion of religion.

The results in two decisions, Zorach v. Clauson and Walz v. Tax Commissioner, apparently blur the line drawn in the other cases between religious and secular purposes. Both cases, however, are distinguishable from imputation. In Walz, the Supreme Court upheld the constitutionality of tax exemptions for church property. Although a secular purpose is difficult to discern, several factors persuaded the Court. First, the Court found that the exemptions constituted only a minimum and remote involvement between church and state. Second, there was no coercion involved; participation in religious activities remained voluntary and was neither encouraged nor discouraged. Third, and perhaps most important, was the overwhelming historical support

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204 343 U.S. 203 (1952).
206 Justice Brennan, in his concurring opinion, relied on the theory that exemptions aid the many charitable, cultural, and other secular activities carried on by religious organizations (id. at 687-89), but the majority opinion explicitly avoided this justification (id. at 674). Instead, the Court accepted the theory "that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation . . . ." Id. at 672. Yet the promotion of morals rationale was previously rejected by the Supreme Court in Schempp. Text accompanying notes 188-84 supra. Moreover, the Court apparently confused the Everson "no-aid" test with the Schempp "secular-purpose" test, for it concluded that the fostering of moral improvement was not "sponsorship" of religion; it did not conclude that this purpose was secular. 397 U.S. at 672.

The Walz case is susceptible to criticism because its logic is unsatisfactory and because it apparently represents a dilution of both the Schempp test (by substituting minimal state involvement for a clear secular purpose) and the Everson test (by allowing some state aid, as long as that aid is not equivalent to state sponsorship). Id. The Court was acutely aware of the tension between "logical analysis" and a "sensible and realistic application of the language of the Establishment Clause." Id. at 671. Churches are exempt from taxation in all 50 states and have been exempt from federal taxation for over 75 years. Id. at 676. Thus, one commentator could predict more than two decades ago that "a decision that exemption is 'establishment' seems more logical than probable." Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306, 1338 (1949). It is unlikely that the unique concatenation of circumstances exemplified in the church tax exemption case will be easily duplicated; thus, it would be a mistake to view Walz as a permanent relaxation of the establishment clause tests.

207 397 U.S. at 676.
208 Id. at 696 (Harlan, J., concurring).
for such exemptions. All three factors are lacking in the case of imputation of religion.

In Zorach, the Court upheld a public school released-time program in which the religious classes were conducted outside the schools. In comparison with imputation, two crucial differences emerge. In Zorach, the initiative for providing religious instruction derived from the parents, who requested the release of their children, with the state merely “accommodating” itself to the request; in imputation, the initiative derives from the state, and parental acquiescence, if any, is coincidental. Furthermore, the Court in Zorach stressed that attendance at religious classes was voluntary, whereas the element of compulsion is glaring in the imputation situation. In Zorach, the Court noted that government may not “use secular institutions to force one or some religion on any person”; this is precisely what government does when it commands imputation of religion to children.

The second part of the dual test requires “a primary effect that neither advances nor inhibits religion.” Imputation of religion fails to meet this test as well, for its primary effect is to exalt religion over nonreligion by imposing on children a religious status they might otherwise not have. Moreover, the extent of the effect is tied to a judicial propensity to find religious affiliations where their actual existence is dubious. The apparent egalitarianism of the statutes

209 “[A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.” Id. at 678. Justice Brennan, in his concurring opinion, also emphasized this factor: “Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.” Id. at 681.

211 Id. at 314; Ramsey, supra note 145, at 683.
212 “No one is forced to go to the religious classroom . . . .” 343 U.S. at 311.
213 Id. at 314.
214 Furthermore, due to the lack of clarity in the Court’s reasoning and the essentially pragmatic basis of the decision, Zorach is a relatively weak precedent and “has not been heavily relied on in later cases.” Note, The Ministerial Draft Exemption and the Establishment Clause, 55 CORNELL L. REV. 992, 1003 (1970).

216 For example, in In re Korte, 78 Misc. 275, 277, 139 N.Y.S. 444, 445 (County Ct. 1912), the court presumed that the natural parents, whose identity was unknown, were Catholic because the children were originally surrendered to a Catholic institution. This case exemplifies judicial favoring of religion over nonreligion. Although the adoptive father expressed belief in the doctrines of Christianity, while shunning ties to organized religion, the court relied on “some evidence . . . that he is what is termed a ‘free-thinker.’” Id. at 277, 139 N.Y.S. at 445. The court concluded that “it would be a manifest wrong to permit these children to be brought up in a condition of pagan unbelief and atheism.” Id. at 280, 139 N.Y.S. at 446.
is belied by the fact that lack of religion is never mentioned as a category worthy of imputation.\textsuperscript{217} Imputation of religion, therefore, whether mandatory or discretionary, constitutes an establishment of religion in violation of the first amendment.

3. \textit{Free Exercise of Religion}

Matching requirements make it more difficult for some people than others to adopt a child. For example, members of minority religions, atheists and agnostics, and couples of mixed marriages are disadvantaged because they must overcome obstacles in the adoption process that do not exist for others.\textsuperscript{218} Imputation requirements mean that virtually all children available for adoption will sport a religious tag,\textsuperscript{219} usually one of the two major American faiths.\textsuperscript{220} Often the result is that potential adoptive parents in any of the disadvantaged categories have to misrepresent their religious affiliations,\textsuperscript{221} or they will be denied a child from an authorized agency\textsuperscript{222} and forced to resort to independent sources. The Supreme Court has proclaimed that neither the state nor the federal government can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelieve in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.\textsuperscript{223}

In a very real sense, religious protection statutes force people to profess a belief in religion and to go to church\textsuperscript{224} if they wish to adopt.

\textsuperscript{217} In \textit{In re Goldman}, 381 Mass. 647, 653, 121 N.E.2d 843, 846 (1954), \textit{cert. denied}, 348 U.S. 942 (1955), the court observed: "If neither parent had any religion we suppose the statute would have no application." In other words, the court would not require that the child of such parents be placed with adoptive parents who lack a religious affiliation, and might even refuse to allow such a placement.

\textsuperscript{218} Note 129 and accompanying text \textit{supra}.

\textsuperscript{219} This is so because almost all Americans have a religious element somewhere in their backgrounds, even if they do not actively practice that religion, and, absent strong evidence to the contrary, a mother who does not expressly indicate otherwise will be considered to be of the same religion as her parents. See note 169 \textit{supra}.

\textsuperscript{220} See note 129 \textit{supra}.

\textsuperscript{221} See notes 132-33 and accompanying text \textit{supra}.

\textsuperscript{222} Sometimes an adoption will nonetheless be permitted if the parents agree to bring up the child in a specific faith. For a discussion of the difficulties inherent in such conditions, see notes 140-45 and accompanying text \textit{supra}.

\textsuperscript{223} \textit{Everson v. Board of Educ.}, 330 U.S. 1, 15-16 (1947).

\textsuperscript{224} \textit{R. Isaac}, \textit{supra} note 35, at 12; notes 132-34 and accompanying text \textit{supra}. The element of coercion was an important factor in \textit{McCollum v. Board of Educ.}, 333 U.S.
through an authorized agency, and the statutes punish them by disallowing an adoption in cases where there is no match. Admittedly, the state is not required to provide legal machinery for adoption; but having done so, it must make the benefits available to all equally, without religious requirements, or it violates the free exercise clause.\(^\text{225}\)

The right to free exercise of religion is not absolute; it may be circumscribed where the public interest so demands.\(^\text{226}\) But, although government is free to regulate conduct that is commanded by religious scruples, it is "deprived of all legislative power over mere opinion."\(^\text{227}\) Imputation severely impinges on potential parents' freedom to believe and is in no way justified by the state's interest in prohibiting "actions . . . in violation of social duties or subversive of good order."\(^\text{228}\) Imputation of religion, therefore, limits adoptive parents' free exercise of religion in violation of the first amendment.

B. Parental Religious Preference

In an attempt to liberalize religious requirements in adoption, some states have recently amended their statutes by providing for the effectuation of parental religious wishes.\(^\text{229}\) An argument frequently advanced in favor of such provisions is that the first amendment requires that the religious wishes of the parents be honored by government, and any state law that fails to respect these preferences violates the natural parents' free exercise of religion.\(^\text{230}\) While in most circumstances parents have a right to control the religious upbringing of

\(^{203}\) (1948) (released-time program with religious instruction on school premises unconstitutional), and in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (public school requirement of flag salute unconstitutional).

\(^{226}\) Similarly, the state is not compelled to provide unemployment compensation, but, once having done so, the benefits must be available to all regardless of their religious convictions, even where such convictions are the cause of unemployment. Sherbert v. Verner, 374 U.S. 996 (1963).


\(^{227}\) Reynolds v. United States, 98 U.S. 145, 164 (1878).

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.


\(^{229}\) Notes 49-58 and accompanying text supra.

their children, the situation is more complicated in the context of adoption because of the two sets of parents—natural and adoptive—involved.

Natural parents, of course, must be protected in adoption proceedings. Social welfare literature on the subject includes confidentiality and freedom from duress among the interests that must be protected, but the right to continued control over the child's religious upbringing is conspicuously absent. Such control is an anomaly in a legal proceeding designed to sever permanently and completely one parent-child relationship and to create a new relationship between the adoptive parents and child. Moreover, since a parent relinquishes all parental rights and responsibilities when her child is legally adopted, it should follow that the right to continued control of the child's religious upbringing is also relinquished. The argument that the state must effectuate parental religious wishes to comply with the dictates of the first amendment cannot be maintained.

This does not mean, however, that the state must not effectuate such preferences. There are a number of policy reasons in favor of parental preference statutes. Some parents who are compelled to give up their children possess strong religious convictions. If such a parent is told that an authorized agency cannot give any consideration at all to her religious desires, she may choose to keep the child, even though she is unable to care for it adequately, or she may opt for a more hazardous independent placement.


232 CHILD WELFARE LEAGUE OF AMERICA, supra note 180, at 15-16; NATIONAL CONFERENCE OF LAWYERS AND SOCIAL WORKERS, supra note 128; Reid, supra note 127, at 28.

233 See, e.g., ALASKA STAT. § 20.10.120(a) (1962); DEL. CODE ANN. tit. 13, § 919 (1953); UNIFORM ADOPTION ACT § 12; H. GOLDBERG, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 3, 9 (Children's Bureau Pub. No. 394, 1961).

234 The natural parent is characterized as female since approximately 80% of the children adopted by nonrelatives are surrendered by unmarried mothers. AMERICAN ACADEMY OF PEDIATRICS, supra note 117, at 2.

235 Survey, Adoption Agencies.

236 Unmarried mothers, for example, face serious problems in providing adequate care for their children. See Reid, supra note 127, at 34. Moreover, "reports by social workers and sociologists alike have affirmed that at the present time the white unmarried mother who keeps her child is in general more disturbed and less able to provide a normal life for her baby than the mother who chooses adoption." R. ISAAC, supra note 35, at 57.

237 See notes 135-39 and accompanying text supra.
sideration of the child's welfare, states may make some provision for effectuation of parental preferences. The remaining question is in what circumstances such preferences should be honored.

1. The Mandatory Approach

The mandatory interpretation given to imputation statutes may well be applied to the new parental preference amendments. This interpretation means that matching is practicable if there are a number of families of the matching religion that might hypothetically wish to adopt the child or if there is an institution that services children of that religion in the area. This interpretation is of dubious constitutionality.

Parental preference statutes meet the first principal test of neutrality under the establishment clause, provided that all religious wishes, including those requesting minority sect, atheistic, and agnostic homes are honored. If the latter parental requests are not respected, however, then the statutes would exalt religion over nonreligion in violation of the establishment clause. The result under the second, purpose-effect test is somewhat more uncertain. Mandatory interpretations may lead to harmful consequences to the child, such as delays in placement, placement in a less suitable home, disruption of a beneficial on-going relationship, and multiple placements. The only secular purpose of honoring parental requests is to promote the child's welfare by allowing it to be suitably placed. Where a mandatory interpretation is permitted to defeat this goal, the secular purpose of the statute is eliminated and its primary purpose can then only be religious. Further, the statutory effect would clearly be to encourage religion to the detriment of the child's temporal welfare.

A mandatory interpretation may continue to make adoption more difficult for potential parents of minority religious backgrounds. If so, such an interpretation constitutes a burden on the adoptive parents' free exercise of religion in violation of the first amendment. Insofar as mandatory interpretations lead to less satisfactory placements, they constitute a burden on the child as well and can be viewed as a violation of the child's first amendment rights.

The mandatory interpretation may also violate the equal protec-

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238 See note 55 supra.
240 Text accompanying note 167 supra.
241 Text accompanying note 171 supra.
242 Text accompanying notes 223-28 supra.
tion clause of the fourteenth amendment. Although the equal protection clause usually requires only that a classification bear a reasonable relation to a legitimate governmental objective, the test is more stringent where suspect classifications are involved. In order to justify such a classification, the state must prove a compelling state interest. Religious classifications are suspect, and when a mandatory interpretation is applied it tends to be detrimental to the best interests of the child. Deference to the religious wishes of the natural parents can hardly be characterized as a compelling state interest where the child's welfare is endangered and the interests of adoptive parents are also jeopardized.

2. Proposal for a Discretionary Approach to Parental Preference

The discretionary approach to imputation makes religion a subordinate consideration. If applied to parental preference provisions, this approach can strike the most appropriate balance among the interests of the parties in an adoption proceeding. Such an approach should ensure that the child's temporal welfare will always be the paramount consideration, that strong religious feelings of biological parents will be honored as long as they are consistent with the best interests of the child, and that the disadvantages suffered by adoptive parents are minimized to the greatest possible extent. To satisfy these requirements, however, certain changes in existing parental preference


244 In this situation, legislation is subjected to a more "rigid scrutiny." Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).


246 Everson v. Board of Educ., 330 U.S. 1, 16 (1947); Tussman & tenBroek, supra note 243, at 356. One commentator favors an equal protection approach to first amendment issues, arguing that the first amendment prohibits government from utilizing any "classification in terms of religion either to confer a benefit or to impose a burden." P. Kurland, supra note 177, at 18.

247 Note 39 and accompanying text supra.

248 Agency practices in states without a religious protection law indicate that religious factors may operate in a variety of ways even when not sanctioned by public law (notes 91-93 and accompanying text supra); moreover, judicial decisions reveal that any general formula for religious matching may give rise to a variety of substantive applications (notes 34-39 and accompanying text supra). Thus, there is a need for state statutes that confine the role played by religion in adoption to parental preference and limit the discretion of administrators and judges in carrying out the religious preferences of biological parents.
statutes must be made. First, application of the discretionary approach must be made explicit in the statute and should not depend on judicial construction. Second, the weight to be given the religious factor should be clearly indicated in the statute. Finally, as explained below, the degree of discretion granted to the administrative agency and the judiciary must differ. The statutes regulating adoption agencies and those governing judicial review of adoption petitions must make this difference explicit.

Statutes regulating adoption agencies should provide:

1. That biological parents be given an opportunity to state a religious preference for the child and that if no preference is stated, the child must be placed without further regard to religion;
2. That the parental preference so stated may be honored only when consistent with the best interests of the child; and
3. That honoring parental preferences is not consistent with the best interests of the child where
   a. delays in placement may result; or
   b. placement in a sectarian institution is the only available matching placement; or
   c. the only available matching placement is less suitable than placement in a home that does not match the parental preference.

On the agency level, parental preference should operate in the following way. The agency will inform the parents before surrender of the child that they have the option to state a religious preference, but that the agency will honor that preference only when consistent with the best interests of the child. If a preference is stated, the agency will follow its usual procedures in determining which available homes are suitable for the adoptive child, without regard for religion. Then, if several equally suitable adoptive homes are immediately available, and one or more of these homes also matches the parental preference, the matching home must be chosen. But if the only available adoptive home of the matching religion is less suitable, or if any

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249 For example, the recent amendments to the New York statutes do not explicitly indicate which of the two interpretations, mandatory or discretionary, is intended. Notes 79-84 and accompanying text supra.

250 Many agencies now conform to this practice. Survey, Adoption Agencies; text accompanying note 101 supra.

251 See generally Note, supra note 119.

252 The suitability of a home is of particular importance with respect to handicapped children; yet, even with such "hard-to-place" children, religious requirements have been applied. In one case, for example,
delay in placement is involved in finding an equally suitable home, then the child’s temporal welfare must prevail over the parental preference with matching no longer required. Since placement in any suitable home, even if religions are unmatched, is superior to placement in any institution, placement in an institution when an adoptive home is available is not consistent with the best interests of the child.

Statutes governing judicial review of adoption petitions should provide that an adoption petition shall be granted when consistent with the best interests of the child, and that it is inconsistent with the best interests of the child to deny a petition for adoption on religious grounds. Judicial discretion with regard to the religious factor must be more circumscribed than agency discretion because judicial review occurs at a later stage of the adoption process. All states require a probationary period, usually six months or one year, during which the adoptive parents have custody of the child before a petition for adoption may be granted. In view of the depth of relationship that usually develops during probation, and the per se disadvantages of multiple placements, placement with other adoptive parents would not be beneficial to the child’s welfare at this stage.

This discretionary approach disposes of the constitutional objections applicable to mandatory interpretations. Since the child’s welfare is the paramount consideration, the primary purpose and effect of the statute remain secular, and establishment clause requirements are met. Since the vast majority of placements will have no religious coloration, all qualified petitioners are treated substantially equally.

[i]t seemed like the perfect combination: the little boy was almost blind, and the potential father, an expert in rehabilitating the partly-sighted. Yet ... the child went on waiting. For the adoption agency was not willing to take a chance. The couple was Unitarian; the child, Catholic.

Lake, supra note 123.

See note 116 and accompanying text supra.

See e.g., ILL. ANN. STAT. ch. 4, § 9.1-14 (Smith-Hurd 1965); LA. REV. STAT. ANN. § 9:432 (1965); MINN. STAT. ANN. § 259.27 (1971).

A petition for adoption may still be denied if, on grounds other than religion, the court determines that the placement is not in the best interests of the child.

Any “aid” received by organized religions under this scheme would be de minimis. See note 258 infra.

The presumption that religious considerations are significant elements in the decision of most biological parents to give up custody of the child is wholly without foundation. The facts clearly indicate that, quite to the contrary, the vast majority of parents are anxious to have the child placed without religious restrictions. Note 258 infra. One judge even commented that “most children placed for adoption come from irreligious parents who may, as an afterthought, consider religion when it is mentioned.” Survey, Judges.

In states where religious waivers are allowed, overwhelming numbers of biological parents sign, hoping thereby to increase their child’s chances for an early placement in the best possible home. In Arizona, for example, out of 266 children placed for
thus satisfying equal protection requirements.\textsuperscript{259} The burden on the adoptive parent's free exercise of religion is also relaxed. Religious protection statutes, then, can satisfy policy and constitutional considerations only if the relevant religion is determined by parental preference rather than by imputation, and the scope of discretion granted to the administering officials is clearly circumscribed.\textsuperscript{260}

3. Parental Preference in New York

Although the New York amendment represents an improvement over the old law, ambiguities and defects remain. The amendment provides that the religious preferences of the natural mother, if the child is illegitimate, or of the parents or living parent if the child is born in wedlock “shall include wishes that the child be placed in the same religion as the parent or in a different religion from the parent or with indifference to religion or with religion a subordinate consideration.”\textsuperscript{261} The statute further provides that absent expressed preference, the
determination of the religious wishes, if any, of the parent, shall be made upon the other facts of the particular case, and, if there is no evidence to the contrary, it shall be presumed that the parent wishes the child to be reared in the religion of the parent.\textsuperscript{262}

There are three major defects in the New York law as presently drafted. First, a mandatory interpretation of parental preference is arguably still required.\textsuperscript{263} That the law was intended to be given a mandatory interpretation can be seen in the language of the amendment itself, which includes as one of the parental choices that the child be placed “with religion a subordinate consideration.” Since

\textsuperscript{259} Text accompanying notes 243-46 supra.

\textsuperscript{260} This applies at least to public agencies. It may be argued that it should apply to sectarian agencies as well, since adoption agencies perform a public function and their practices therefore constitute state action. See Reitman v. Mulkey, 387 U.S. 369, 385-86 (1967) (Douglas, J., concurring). However, the public function argument has been accepted by a majority of the Supreme Court only in exceptional situations. Marsh v. Alabama, 326 U.S. 501 (1946) (private control of a town); Smith v. Allwright, 321 U.S. 649 (1944) (private control of primary elections). Although it is conceivable that a majority of the Court will ultimately adopt this theory, a discussion of the possible extension of the concept of state action is beyond the scope of this comment.

\textsuperscript{261} E.g., N.Y. FAMILY Ct. ACT § 116(g) (McKinney Supp. 1970).

\textsuperscript{262} Id.

\textsuperscript{263} Notes 81-84 and accompanying text supra.
the mandatory interpretation is unconstitutional, however, the state cannot delegate the determination of the weight to be given the religious factor to the natural parents. In order to meet constitutional requirements, the parental preference statute must be given a discretionary interpretation, and religion must always be a "subordinate consideration."

Second, the statute is ambiguous as to whether atheism and agnosticism may be included in parental wishes. The phrase "or with indifference to religion" must be interpreted to include such wishes or the statute will violate the establishment clause by favoring religion over nonreligion.

Finally, the presumption that the natural parents desire the child to be reared in their own religion presents serious policy and constitutional questions. An attempt to justify the provision has been made on the theory that "given the nature of American society, the presumption is not only reasonable but is one which is most likely to be in accord with the parental wish." The reasonableness of the presumption is open to question from the viewpoints of both experience and common sense. Many adoption agencies indicate that the majority of natural parents sign religious waivers. It is likely that most parents would prefer the assurance that their child will be raised in the best possible home to the assurance that the child will be raised in their own religion.

Moreover, the purpose of the statute is to give recognition to the religious feelings of biological parents and to deter independent placements. If no such wishes have been expressed, the deference rationale no longer applies, and there is no danger of an independent placement. With this secular purpose eliminated, the religious overtones of the statute predominate, and it becomes suspect under the first amendment.

CONCLUSION

At present, there is a confusing array of state statutes and inconsistent judicial interpretations, even within jurisdictions, concerning the religious element in adoption. This situation is all the more un-

264 Text accompanying notes 240-46 supra.
265 Text accompanying note 167 supra.
266 Polier, supra note 230.
267 Note 89 supra.
268 Text accompanying note 171 supra.
fortunate because religion is such a sensitive area and because the interests of the parties most affected—the children and the adoptive parents—are not adequately protected. Many state laws have the potential of sacrificing the child’s best interests on purely religious grounds. The rights of adoptive parents, which have become increasingly significant due to recent shortages of available adoptive children, may also be trammeled by religious protection statutes.

Policy and constitutional considerations require that the imputation of religion and the mandatory interpretation of parental preference laws be abolished. It has been suggested that this can be accomplished by a more liberal judicial interpretation, but this merely increases the probability that an unconstitutional law will receive an occasional constitutional interpretation.269 It must be made clear, either through new legislation or a mandate from the Supreme Court, that imputation of religion is not permissible and that effectuation of parental religious wishes must always be subordinate to the child’s best interests.

The influence of religion is cultural as well as spiritual, and as such it pervades our society. That the civil law must refuse primacy to religious considerations does not mean that religion will cease to exert its influence in American life. Rather, it means that “the religious nature of our people”270 will be neither state imposed nor state perpetuated, but a voluntary affirmation of private conviction and belief in the American tradition of separation of church and state.271

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269 Where judicial discretion is unfettered, it becomes easier for a judge to permit his own religious prejudices to intrude perhaps even unconsciously. In response to the Cornell Law Review survey of family court judges, one judge commented:

The present New York statutes are designed to assure that the maximum number of children are brought up in the Roman Catholic faith. A Protestant mother signs a consent that the child be placed in a home regardless of religion. Such a child is placed by the agencies in a Catholic home. The reverse never happens.

Survey, Judges. Moreover, judges may be subject to political pressures: “[A] great many . . . judges are only fearful of incurring the disfavor of the electorate.” Buttenweiser, International Aspects, in The Child at Law, supra note 135, at 61, 63.


271 It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those [religious] beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men’s conduct, free of the dictates and directions of the state.