CONSTITUTIONALITY OF MANDATORY RELIGIOUS REQUIREMENTS IN CHILD CARE

When parents are unfit, unwilling, or unable to care for their children, the state intervenes to protect the child's welfare. The prime consideration for state action is the child's best interests. However, since parental rights are not easily severed, there must be a clear showing of parental inadequacy before a court will substitute its judgment of the child's needs for that of his parents. One of the most vital parental prerogatives is the right to control the child's religious training. Statutes, case law and administrative regulations demonstrate the concern of legislatures, courts, and departments of welfare in preserving the religious faith of children who must be placed away from their parents. The degree to which religious considerations are part of or prevail over considerations of the child's best interests varies among the states and results in diverse effects on the administration of child welfare programs.

Existing Rules

Three approaches to the importance of religion in child placement are exemplified in present practice. Some jurisdictions adopt the equity rule that,

2. *Ex parte Badger*, 286 Mo. 139, 226 S.W. 936 (1920); *Commonwealth ex rel. v. Daven*, 268 Pa. 416, 148 Atl. 524 (1930); *Morris v. Jackson*, 66 Wyo. 369, 212 P.2d 78 (1949); *Pomeroy, Equity Jurisdiction § 1307* (5th ed. 1941); *Madden, Domestic Relations* §§ 107-09 (1931).
6. For a comprehensive collection and a detailed analysis of the cases and statutes dealing with religion and child placement, see *Note, Religion as a Factor in Adoption, Guardianship and Custody*, 54 COLUM. L. REV. 376 (1954). Administrative regulations are set out in note 12 infra and accompanying text. The cases deal with the separate problems of adoption, guardianship, and custody, but are used interchangeably as precedent and involve the same legal considerations in so far as the instant problem is concerned.
7. Case law within as well as among the states is inconsistent. Thus, precedent for more than one rule may exist within a state. Compare *Matter of Santos*, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951), *appeal dismissed on other grounds*, 304 N.Y. 483, 109 N.E.2d 71 (1952), where the court ordered two children, who had been well-placed, removed from a home of a different religion, with *In re Krenkel*, 278 App. Div. 573, 102 N.Y.S.2d 456 (2nd Dep't 1951), where an adoption of an illegitimate child across religious lines was affirmed without opinion despite the natural parents' marriage and the withdrawal of the mother's consent. See *Pfeffer, Church, State and Freedom* 649 n.30 (1953). Decisions within the same court sometimes conflict. Compare *Matter of Vardinakis*, 160 Misc. 13, 289 N.Y. Supp. 355 (N.Y. Dom. Rel. Ct. 1936), where the child's best interests determined custody, with *Ramon v. Ramon*, 34 N.Y.S.2d 100 (N.Y. 1931).
since the child's best interests must govern, religion is only one of many factors for consideration. In other jurisdictions religious considerations prevail unless the child's welfare clearly demands care which is unavailable from custodians of the same religion. These approaches differ in degree; neither permits religion to become an absolutely controlling factor. On the other hand, a third rule completely eliminates judicial and administrative discretion: custodians and probation officers are required to be of the same religion as the child's parents regardless of other compelling circumstances.


Several jurisdictions have adopted this equity approach. Whalen v. Olmstead, 61 Conn. 263, 23 Atl. 964 (1891); In re Guardianship of Waite, 190 Iowa 182, 189 N.W. 159 (1920); Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920); In re McKenzie, 197 Minn. 254, 266 N.W. 746 (1936); Commonwealth ex rel. Donie v. Ferree, 175 Pa. Super. 586, 105 A.2d 681 (1954). In addition, some courts have held statutes requiring children to be placed with persons of the same religion "whenever practicable" to be merely advisory. Guardianship of Walsh, 100 Cal. App. 2d 194, 223 P.2d 322 (1950); People ex rel. v. Bolton, 27 Colo. App. 39, 146 Pac. 489 (1915); State ex rel. Baker v. Bird, 253 Mo. 569, 162 S.W. 119 (1913); Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920).

9. Some courts have interpreted statutes which require custodians to be of the same religion as the child "whenever practicable" as limiting the court's discretion, but not eliminating it. In approving an adoption across religious lines, one court said, "whereas before the new statute there was no definite rule binding upon the judge in any set of circumstances as to how much weight was to be given to any one of the several elements as against the others, he is now bound to give controlling effect to identity of religious faith when practicable but not otherwise." Petition of Gally, 329 Mass. 143, 107 N.E.2d 21, 25 (1951). See also State ex rel. Evangelical Lutheran Kinderfreund Society v. White, 123 Minn. 508, 144 N.W. 157 (1913). Cases often allow placement across religious lines with the proviso that the child must be educated in the parents religion. Matter of Mancini, 89 Misc. 83, 151 N.Y. Supp. 387 (Surr. Ct. 1915); Matter of Korte, 78 Misc. 276, 139 N.Y. Supp. 444 (County Ct. 1912); cf. Commonwealth ex rel. Stack v. Stack, 141 Pa. Super. 147, 15 A.2d 76 (1940).

10. Several states have equated the best interests of its children with religious considerations. Two states have enacted mandatory statutes which prohibit placement with custodians of a different religion. N.D. Rev. Code § 27-1622 (1943); R.I. Gen. Laws c. 616, § 12 (1938), R.I. Laws 1946 c. 1772, § 26. And Del. Code Ann. tit. 13, § 911 (1953), requires at least one adoptive parent to be of the same religion unless the parents stipulate either a different religion or their indifference. While no court has yet interpreted the statute, it might be held impossible to arrange an adoption across religious lines if both parents are dead. Maine has an involved placement requirement. Me. Rev. Stat. c. 25, § 252 (1954). Children must be placed in homes of the same religion. If such a home is unavailable, they must be placed in an institution governed by persons of the same religion. If no such institution is available, the child is to be placed in a suitable home or institution until one of the same religion can be found.

A mandatory requirement was created from a "when practicable" statute in Matter of
Treatment of religion as a determinative factor in child placement is more prevalent than is commonly assumed.11 While mandatory requirements appear in the statutes or case law of only a few states, administrative regulations or practices in others often apply discretionary statutory language in a similarly rigid manner.12 These actions are rarely exposed to judicial review,13 but their

Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951), appeal dismissed on other grounds, 304 N.Y. 483, 109 N.E.2d 71 (1952). In that case, two children were entrusted to Jewish care by their Catholic mother. Four years later the mother sought to regain custody from prospective adoptive parents. The Appellate Division reversed the trial court's findings that it was for the best interests of the children to remain in the adoptive home, and ordered the children removed to a Catholic institution. "When practicable" was interpreted to mean "when available," leaving no discretion in the court as long as room could be found for the children in an institution of the same faith. The weakness of this rationale is demonstrated by respondent's complete failure to raise this argument before the court of appeals. See Brief for Respondent, Matter of Santos, 304 N.Y. 483, 109 N.E.2d 71 (1952). Cf. Petition of Gally, supra note 9. But see Petitions of Goldman, 121 N.E.2d 843 (Mass. 1954), cert. denied, 23 U.S.L.WEEK 3201 (U.S. 1955), (which is in accord with Santos. The Santos case was critically discussed in Note, 65 HARV. L. REV. 694 (1952), and in PFEFFER, CHURCH, STATE AND FREEDOM 588-91 (1953).

A recent investigation of adoption practices in New York City indicates this statute is so rigorously applied that the phrase "when practicable" is disregarded. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 263-65 (1954). But see Letter from Shad Polier, Counsel, Louise Wise Services, N.Y., to Yale Law Journal, April 8, 1955, on file in Yale Law Library: "[D]uring the past thirty years [almost all] Surrogates . . . have permitted adoptions across religious lines upon proof . . . that this is in accordance with the natural mother's wishes and . . . not in a single instance . . . has a Surrogate refused an adoption on such ground." And see In re Krenkel, 278 App. Div. 574, 102 N.Y.S.2d 456 (2d Dep't 1951), discussed in PFEFFER, CHURCH, STATE AND FREEDOM 649 n.30 (1953).

11. Information was solicited from seventeen children's courts and from the Departments of Welfare of every state. Thirty four states and eight courts responded and many forwarded administrative regulations dealing with child welfare programs. Private child welfare agencies, civic organizations concerned with child welfare, social workers, probation officers, and children's court judges were also consulted by letter and interview (hereinafter cited as INTERVIEWS). This material supplied much of the information relied on in the subsequent portions of this note and is on file at the Yale Law Library.


The New York administrative regulations are not uniform. A mandatory requirement is imposed on placement in foster homes, N.Y. DEP'T OF SOCIAL WELFARE, SOCIAL WELFARE MANUAL pt. III, p. 27 (1952), while the "when practicable" requirements of the statute are spelled out regarding adoption, id. at 58, and children's institutions, N.Y. DEP'T OF SOCIAL WELFARE, AIDS AND PRACTICES FOR CHILDREN'S INSTITUTIONS 23 (1951).

In New Jersey, "[the public] agency is bound by law to place a child in a home of the same religion as its parents, and the private agencies, although not so required, usually do." Letter from J. E. Alloway, Executive Director, Board of Child Welfare,
importance in the field of child placement becomes evident as an increasing number of children are handled by such agencies.¹⁴


For examples of administrative practice: In Maryland, "the law requires that children be placed in foster homes or institutions of the same religious faith as their families and that requirement is carried out in selecting the placement plan for the child . . . . The standards set for selection of foster and adoption homes are by administrative regulation, except the legal requirement that children be placed in homes of the same religious faith as the homes from which they came." Letter from Thomas J.S. Waxter, Director, State Department of Public Welfare, Maryland, March 5, 1954. Cf. Md. Ann. Code Gen. Laws art. 88A, § 26 (1951).

In Arkansas, "unless there is a special request, there is no restriction as to foster parents of the same religion but, in adoption, children are placed only in homes falling into the same main religious group . . . ." Letter from Miss Ruth Johnston, Director of Child Welfare, Arkansas, March 3, 1954. Cf. Ark. Stat. Ann. § 45-229 (1948).


13. Research has disclosed no case in which an administrative regulation in this field was challenged. The primary reason for this is that most of the cases deal with placement so that the children involved are almost always dependent, neglected, or delinquent and come from low income families who lack both the awareness and the means to complain of the regulations and procedures. See Polier, Everyone's Children, Nobody's Child 92-98 (1941); Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 116 (1909). Children's court procedure is under the almost absolute control of the individual judge. Few persons before the court have legal advice. And, since the proceedings are confidential, few parents would like to subject their child to the notoriety of an appeal. Thus, abuses can and do occur. See id. at 118-19, quoting from Mill v. Brown, 31 Utah 473, 78 Pac. 699 (1907). See also Kahn, A Court For Children 98-123, 268-70 (1953); Gillow, op. cit. supra note 10, at 81-85. These two books were sponsored by the Citizens' Committee on Children of New York City and the Bar of the City of New York respectively, and are excellent studies of New York City's children's courts.

¹⁴ Twenty three states reported an increase in the number of children given service either for adoption or placement. Seven could not furnish statistics and four reported the number of children handled had remained constant over the past several years. See Arnold, Meeting the Needs of Children and Youth, 25 Soc. Serv. Rev. 156 (1951).
Effect of Religious Requirements on Child Welfare

Stringent religious requirements have several adverse effects on child welfare programs. By unduly restricting discretion, they limit the utilization of modern techniques for providing child care and preclude the effective use of available facilities. Furthermore, they restrict the choice and hamper the efficiency of probation officers. And when imposed as a condition of probation, they play a doubtful or negative role in the rehabilitation of neglected and delinquent children.

Effect on use of scientific techniques. Psychological and sociological techniques are relied upon in most states to implement provisions for child welfare. These techniques operate on the premise that children's needs are determined by many interrelated factors. Since these factors vary from case to case, no hard and fast rules can prove effective in all situations. Older children generally respond to institutional care while children under six years of age require a home environment. Normal children can be cared for fairly easily;
the physically or emotionally handicapped require specialized treatment. All prospective custodians should meet general standards of financial security, emotional stability, and appropriate motivation. But intellectual capacity of both parent and child, ability of the former to develop special aptitudes, and a racial, cultural, and religious background to which the individual child can readily adjust require particular attention in each case.

Mandatory religious requirements ignore the basic premise that each placement problem is unique. This is most clearly illustrated in the extreme cases where, despite the traumatic effect of disrupting a satisfactory adjustment, children have been withdrawn from the homes of custodians having a different religion. But in any placement situation a requirement which subordinates all other considerations precludes a determination of the best interest of the child. Religion should be treated as any other factor entering into decisions in those states with mandatory religious requirements. See notes 10 and 12 supra.

20. See Matter of Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951), appeal dismissed on other grounds, 304 N.Y. 483, 109 N.E.2d 71 (1952), where the appellate court ordered the removal of two children from a Jewish adoptive home to a Catholic agency despite the trial court's findings that the evidence "clearly portrays the happiness of the children, their sense of being Jewish, and the unusually fine opportunity now open to them." Transcript of Record, p. 682, Matter of Santos, 304 N.Y. 483 (1952). The trial court had concluded that these "children are now, in thought, association, and conduct, Jewesses, and a forced change to another environment and instructions in a different religious faith would be a tragic disregard of their welfare." Id. at 695.

A New York statute provides for the revocation of prior commitment orders if the child's religion was erroneously reported in the prior hearings. N.Y. Dom. Rel. Cr. Acr. § 86(3). Since a large number of adoptions are privately arranged without extensive investigation of either the child's background or his suitability to the adoptive home, the child's religion could be erroneously reported, either by mistake or design. Comment, Moppets on the Market, 59 Yale L.J. 715 (1950). Thus, this provision may be invoked to upset such adoptions after the child has made a satisfactory adjustment to the home.

21. "A mandatory provision that placement must be with the same religious faith as the parents would seem most undesirable. It has been our experience in the field of laws relating to child protection that flexibility and discretion is always preferable to mandatory requirements. It would also seem a mere matter of common sense that the harmony of personalities between adoptive or foster parents and the child involved would be a far more important factor than the matter of religious faith." Letter from Brooke Wunnicke,
on child placement. Its importance should depend on the education, interests, and emotional needs of the individual as well as the choice of available custodians. Where persons of the same religion are as capable of caring for the child as those of a different religion, the child should be placed with his co-religionists. But where persons of a different religion can provide better care, the court or agency should be able to place across religious lines. Effect on use of existing facilities. Facilities for both long and short term child care are grossly inadequate. Private homes meeting requisite psychological,

Executive Secretary, Wyoming Youth Council, March 4, 1954. "It would seem very unwise to set up a mandatory criteria for placement. The field of social work has developed a body of knowledge as background for an application by the skilled practitioner in meeting individual children's needs." Letter from Miss Lorena Scherer, State Child Welfare Supervisor, Missouri, Feb. 24, 1954.

22. The standard adoption law suggested by the Children's Bureau contains no religious requirements, but recommends that the child's religious heritage should be included in the social study and report to the court. Federal Security Agency Children's Bureau, Essentials of Adoption Law and Procedure 17 (1949). A "when practicable" requirement is in the Standard Juvenile Court Act drafted by the National Probation and Parole Association, but there is no indication that it is to be applied inflexibly. National Probation and Parole Ass'n, A Standard Juvenile Court Act (1949).

23. "The primary factor in determining the type of home selected for a particular child is drawn from the background of the child itself. The intent is to place the child in a home which would be as near a normal situation as possible. We would then try to select adoptive parents who had the same racial, religious and cultural background—parents who would have roughly the same mental ability as the child." Letter from John F. Larson, Director, Bureau of Services for Children, Utah, March 9, 1954.

24. All states which provided information, agreed on this procedure.

25. See Commonwealth ex rel. Kuntz v. Stackhouse, 176 Pa. Super. 361, 108 A.2d 73 (1954), cert. denied, 23 U.S.L. Week 3242 (U.S. 1955). "The few times in which I believe this discretionary power [to place across religious lines] should be exercised is when adoption agencies have made a long, conscientious search for adoptive parents of the same religion as the child. If the search has been fruitless and therefore the child could not know the security and feel the sense of belonging which adoptive parents could give him, then I believe that the child should be given that opportunity through placement with a couple of another faith rather than face long-time boarding care in a foster care agency under the auspices of his religious faith." Letter from Dorothea Coe, Executive Director, The Spence-Chapin Adoption Service, New York, March 5, 1954. The result feared in the above quotation is what occurred as an aftermath of the Santos case. The children remained in an institution for a long period of time after the case. Interviews.

Religious differences should not preclude adoption of children who are physically or emotionally handicapped and difficult to place. For other compelling reasons to place across religious lines, see the next section of text dealing with the shortage of facilities for child care. For a general discussion of religious factors and adoption, see Note, Religious Factors in Adoption, 28 Ind. L.J. 401 (1953).

26. "For those children who must be cared for away from their own homes, facilities are far from adequate. Nowhere in the country are there enough foster-family homes or specialized group-care facilities to meet the need. Outside metropolitan areas the lack is even more acute." Arnold, Meeting the Needs of Children and Youth, 25 Soc. Serv. Rev. 156, 158-59 (1951). See also Crystal, What Keeps Us from Giving Children What We Know They Need, 27 Soc. Serv. Rev. 136 (1953); Osborn, Aid to Dependent Children—Realities and Possibilities, 28 Soc. Serv. Rev. 153 (1954); Clothier, Need of New
financial, and social standards are difficult to locate.\textsuperscript{27} Private agencies, largely sectarian, limit their admissions to children they consider desirable.\textsuperscript{28} State institutions, which must accept all whom the courts and departments of welfare send, are seriously over-crowded.\textsuperscript{29} Yet some private agencies tend to be jealous of encroachments upon their respective shares of existing facilities and resist public agency expansion.\textsuperscript{30}

Arbitrary religious requirements compound these problems. Children are often denied the special attention their individual needs require because the only homes or agencies which can provide the proper care are in the hands of facilities for the care of disturbed children, \textit{34 Ment. Hyg. 97} (1950). Nine states supplied information about existing facilities and all reported inadequacies.

Studies in New York have been the most detailed and demonstrate a glaring need for more facilities of all kinds; yet New York has a well developed child welfare program compared to many other states. \textit{New York Citizen’s Committee of One Hundred for Children and Youth, Child Welfare in New York State,} \textit{95-96, 99} (1951); \textit{Gellhorn, Children and Families in the Courts of New York City} 132-34, 141-48 (1954); \textit{Kahn, A Court for Children} 119-20, 245, 250-54, 314-15 (1953); \textit{Delinquents Jam Youth House,} N.Y. Times, Feb. 24, 1955, p. 29, col. 7.

Nevada is all but barren of child welfare facilities. There are no state funds for the direct care of children, only one state institution, no local private institutions except one private child placing agency, and only one county department of public welfare. The juvenile courts have no funds for child care. Letter from Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, March 17, 1954. Wyoming is in a similar position. The department of public welfare is the only social agency in the state and neither the state institutions nor the two private agencies have trained staffs. Letter from Ethyllyn Hartwell, Director, Division of Children’s Services, Department of Public Welfare, Wyoming, Feb. 25, 1954. Delaware has no state facilities for physically handicapped children. Letter from Mrs. Florence A. Clark, Chief, Child Welfare Services, Delaware, March 2, 1954.

\textsuperscript{27} “In general, foster-home agencies tend to indict the community for its lack of generous impulse in opening doors to children who require a family atmosphere . . . . Our frustration is inevitable when appeals for foster-homes evoke but little response or when in the response itself we find little that can serve the emotional needs of children.” Crystal, \textit{What Keeps Us From Giving Children What We Know They Need?}, \textit{27 Soc. Serv. Rev.} 136 (1953). Thus, children who should be placed in foster homes are often placed in institutions as the only facility available. Letter from Miss Lorena Scherer, State Child Welfare Supervisor, Missouri, Feb. 24, 1954; \textit{Kahn, op. cit. supra} note 26, at 119-20, 245, 250-54, 314-15; \textit{Gellhorn, op. cit. supra} note 26, at 132-34, 141-48. Alabama, California and Missouri conduct a continuous program of foster home recruitment by public education and through civic organizations such as church groups, parent-teachers associations, etc.

\textsuperscript{28} Seventeen states supplied information concerning the types of private agencies in the state. A majority or substantial portion of such agencies are sectarian. And “the sectarian and private institutions . . . control their own intake. They accept only the cases that strike them as suitable and within the limits of their own convenience . . . .” \textit{Gellhorn, op. cit. supra} note 26, at 133. See also \textit{New York State Citizens’ Committee of One Hundred for Children and Youth, Child Welfare in New York State}, 95-96, 99 (1951) and \textit{Kahn, op. cit. supra} note 26, at 251-53.

\textsuperscript{29} \textit{Gellhorn, op. cit. supra} note 26, at 133; \textit{Kahn, op cit. supra} note 26, at 250-51.

\textsuperscript{30} \textit{Kahn, op. cit. supra} note 26, at 257-58. Confidential communication to the \textit{Yale Law Journal} on file in the Yale Law Library. \textit{Interviews}.
persons whose religion differs from that of the child.\textsuperscript{31} And state institutions, non-sectarian by statute, become dumping grounds, since they provide the only facilities available to children without regard to religious considerations.\textsuperscript{32} Elimination of mandatory religious requirements would allow more effective use of those private homes and agencies which are available for child care and would, at least to some degree, reduce the overtaxing of state facilities.\textsuperscript{33}

Effect on choice and and efficiency of probation officers. Children's courts usually assign probation officers to neglected and delinquent children on the basis of geography, case load, and special aptitude.\textsuperscript{34} But the New York City Domestic Relations Court requires assignment to a child of the same religion.\textsuperscript{35} And religious groups elsewhere are now pressing for similar requirements.\textsuperscript{36}

Assignment of probation officers by religion increases the difficulty of obtaining trained personnel and lowers the overall level of competence. By taking a rough religious census of the children who come before it, the New York Court has established quotas for Catholic, Protestant, and Jewish officers.\textsuperscript{37} Since vacancies must be filled by persons of the same religion as their prede-
cessors, the group from which a given officer may be chosen is substantially limited, and more competent candidates may be excluded from consideration.38

Assignment by religion also results in an inefficient use of probation officers.39 Since cases then cannot be assigned on a purely geographic basis, officers waste a great amount of time travelling from one probationee to another, and two officers may be working simultaneously in the same block.40 This time is extremely valuable to an already overburdened staff.41 And if officers attempt to save time by arranging to meet probationees at a specified place, usually a school, the semi-institutional setting creates an unnecessarily formal atmosphere and prevents observation of the child's adjustment to family and home environment.42

In those instances where rapport is better when the child and probation officer are of the same religion, individual assignments can be made. There is no need of the inefficiency of mandatory religious assignment to meet this situation.43

Effect of compulsory religious conditions of probation. Children's courts encourage religious training for probationees. The majority recommend such programs on an entirely voluntary basis.44 But some courts require regular religious observance and education as a condition of probation.45

38. The legality of such recruiting practices has been questioned. Simon, Racial and Religious Democracy: Its Effect on Correctional Work, NATIONAL PROBATION AND PARDON ASS'N YEARBOOK 205, 206 (1951). Probation officers in New York City are overworked and underpaid. GELLHORN, op. cit. supra note 37, at 114-15; KAHN, A COURT FOR CHILDREN 195-200 (1953). This alone makes the recruiting of competent personnel extremely difficult. With trained candidates in short supply, the broadest possible base for selection would seem a necessity.

39. For a critical analysis of the operation of probation in New York City, see KAHN, op. cit. supra note 38, at 136-223, and GELLHORN, op. cit. supra note 37, at 105-24.

40. "The annual loss of staff energy attributable to this one cause reaches a tremendous aggregate." GELLHORN, op. cit. supra note 37, at 300.

41. Id. at 121-22.

42. See KAHN, op. cit. supra note 38, at 186-87. For the need to observe the probationer's environment for successful probation, see DRESSLER, PROBATION AND PAROLE 46 (1951); Anderson, Counselor-Child Relationship, NATIONAL PROBATION AND PARDON ASS'N YEARBOOK 103, 105 (1951).

43. "[I]t is necessary that the assignment be on a geographical basis . . . . If more than one officer is working in a particular area, then, of course, we attempt to make our assignments more personal by taking into consideration racial, religious, and emotional factors." Letter from William B. McKesson, Presiding Judge, Juvenile Department, Superior Court, Los Angeles, California, March 11, 1954. "The assignment of probation counselors to cases depends more upon the specific problem presented and the peculiar qualifications of counselors than upon religious faith. However, if there is reason to do so we assign Catholic officers to Catholic children." Letter from Paul W. Alexander, Judge, Court of Common Pleas, Division of Domestic Relations, Toledo, Ohio, March 6, 1954.

44. Six courts specifically emphasized the point that religious programs for probationers should be entirely voluntary. Two of these courts reported that religious conditions on probation are used by some judges, but the writer opposed such moves in both letters. Two other courts frequently make religious observance and education a condition
Compulsory religious practice is difficult to justify. Probation is designed to afford advice and guidance in overcoming the problems which resulted in court appearance. Courtroom lectures on religion have little effect on a frightened or belligerent youth. And religious training, of itself, has a doubtful effect on a delinquent's behavior. If a religious program appears advisable, it should be devised by the probation officer in conjunction with the parents and clergy after the officer has had an opportunity to become familiar with the child's problems. Judicially imposed religious exercise is seldom warmly accepted, and may actually alienate the child from spiritual values.

Constitutionality of Mandatory Religious Requirements

Mandatory religious requirements appear to be subject to serious constitutional objections based on due process, freedom of religion, and the separation of church and state.

Due process. The subordination of all other factors affecting child welfare to religious considerations would seem to deny children their right to due process of probation. In Virginia, "religious education and practice, as a condition of probation, is illegal according to our law." Letter from David H. Katz, Jr., Chief Probation Officer, Juvenile and Domestic Relations Court, Richmond, Virginia, March 11, 1954. See Jones v. Commonwealth of Virginia, 185 Va. 335, 38 S.E.2d 444 (1946).

45. "It is the usual requirement of probation that the probationer attend some religious service of his own choosing, or at the direction of his parents, at least once per week while on probation." Letter from Walter H. Beckham, Judge, Juvenile and Domestic Relations Court, Dade County, Florida, Feb. 26, 1954. Also, some judges of the New York City Domestic Relations Court impose religious conditions on probation. Kahn, op. cit. supra note 38, at 108.

46. For a discussion of the aims, methods and requirements of probation, see Dressler, Probation and Parole (1951).

47. For extreme instances of ineffective religious lectures by a judge, see Kahn, op. cit. supra note 38, at 108-12. See also Gellhorn, op. cit. supra note 37, at 83-84.

48. Many studies have been made on the relationship between religious instruction and the incidence of delinquency. Several are described and analyzed in Teelis & Reichenmann, The Challenge of Delinquency 158-64 (1950); Waltenberg, Church Attendance and Juvenile Misconduct, 34 Soc. and Social Research 195 (1950). Cf. Harper & Reinhardt, Four Relationship Status of a Group of Delinquent Boys, 21 J. Crim. L., C. & P.S. 379 (1930). See also Kahn, A Court for Children 109 (1953); Gellhorn, Children and Families in the Courts of New York City 84 (1954), for citations to other research projects on this subject.

49. There must be a readiness on the part of parents to use religious help as well as a relation between the child's problem and religion before any religious program can be effective. See Kahn, op. cit. supra note 47, at 109.

50. "I have seen Orders made requiring the Ward to attend religious education classes and church, but I have the feeling that a child who is in attendance at religious services because of the compulsion of a Court Order is not apt to receive benefit as one who attends a religious service voluntarily, or because of an inward desire." Letter from William B. McKesson, Presiding Judge, Juvenile Department, Superior Court, Los Angeles, California, March 11, 1954. See also Kahn, op. cit. supra note 47, at 48. For various approaches which have been taken to make religion a deterrent to juvenile delinquency, see Smith, Role of the Church in Delinquency Prevention, 35 Soc. and Social Research 183 (1951).
of law. Until children reach majority, their own welfare requires the imposition of proper restraints designed to further their best interests. Parental supervision is assumed to accomplish this end. The state intervenes under its parens patriae power only when the child's welfare is not being adequately served by parental care. Hence the best interests of the child are at once the source, direction, and limiting consideration in determining the reasonableness of the state's action. Mandatory religious requirements prevent consideration of the myriad factors which must be weighed if the child is to be placed so as to maximize his welfare. Therefore, state action under such arbitrary requirements deprives the child of his fundamental right to the protection of his best interests.


53. Purinton v. Jamrock, 195 Mass. 187, 50 N.E. 802 (1907); Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907); Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wis. 328 (1876). It is the duty of the state, as parens patriae, to afford such protection to children whose parents are unfit. In re Sharp, 15 Idaho 120, 127, 96 Pac. 563, 565 (1903) (dictum); Commonwealth v. Fisher, 213 Pa. 48, 56-57, 62 Atl. 193, 201 (1905) (same).


55. See text and footnotes at pp. 776-78 supra under heading Effect on use of scientific techniques.

56. In Petitions of Goldman, 121 N.E.2d 843 (Mass. 1954), cert. denied, 23 U.S.L. Week 3201 (U.S. 1955), the adoption of twins by a family of a different religion was denied. However, it was found that couples of the same religion, as well suited as the petitioners, were desirous of adopting the twins. Thus, the court may not have felt that the best interests of the children were endangered

While the power of the state to intervene in the custody of children is based on its status as parens patriae, state regulation of children's activities while in the homes of their natural parents is based on the police power. Thus, the state can regulate child labor, Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913), and require children at attend school, State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901). Even if state control of the custody of children was based on its police power, mandatory religious requirements would seem to violate the Fourteenth Amendment. The exercise of the police power must have a reasonable relation to ends which are the legitimate objects of legislative action.
Parental exercise of religion. The freedom of religion which is guaranteed by the First Amendment includes the right of fit parents to control the religious training of their children. This includes the right to change the child's religion if the parents so choose. One way of changing the religious affiliations of a child is to place it with persons of a different faith. Since mandatory religious requirements prevent parents from doing this, their right to control their children's religious development is impaired.

Separation of church and state. Mandatory religious requirements also appear to violate constitutional prohibitions on the establishment of religion. One of the main purposes of the First Amendment was to prevent the imposition of religious status by political authority. Yet, where a parent consents to adoption by persons of a different religion, judicial denial based upon mandatory requirements amounts to establishment of the child's religion in disregard of parental wishes. And the resulting restriction upon the choice of available

Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). A mandatory requirement would act as an irrebuttable presumption and preclude courts from determining the welfare of the child. "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." Manley v. Georgia, 279 U.S. 1, 6 (1929).


60. This conclusion is not precluded by Petitions of Goldman, 121 N.E.2d 843 (1954), cert. denied, 23 U.S.L. WEEK 3201 (U.S. 1955). The Massachusetts court specifically declined to decide whether placement in the same religion would be "practicable" if the natural mother, rather than merely consenting to adoption by petitioners, refused to give the children to any couple but the petitioners.


62. In Petitions of Goldman, 121 N.E.2d 843 (1954), cert. denied, 23 U.S.L. WEEK 3201 (U.S. 1955), the court found children to be of a certain religion because their mother was of that religion. However, the children were not baptized and the mother had consented to their being raised in a different faith. Therefore, the court was under no compulsion to find the children to be members of any religion, and should have restricted itself to deciding whether the adoption was for the children's best interests. Matter of Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951), appeal dismissed on other grounds, 304 N.Y. 483, 109 N.E.2d 71 (1952), is a more obvious imposition of religion by a court. There, the trial court's determination that the children were Jewish because of four years of intensive Jewish training and that it was for the best interests of the children to remain in a home where "for the first time [they] found security and happiness," Transcript of Record, p. 696, Matter of Santos, 304 N.Y. 483
custodians impresses temporal consequences on the child due to his religion of birth.\footnote{1952}

Even where parents are unfit to make decisions affecting their children's welfare, decisions based solely upon religion of birth seem to exceed the state's constitutional authority. For, since all religions are equal before the law, courts lack the power as well as the ability to decide that one will serve a child's spiritual needs better than another.\footnote{1953} Nor may religious requirements be justified on the ground that they protect "parental rights."\footnote{1954} Once parental unfitness invokes state intervention, the child's welfare takes precedence over parental prerogatives.\footnote{1955}

Enforcement of religious observance and education as a condition of probation seems patently unconstitutional.\footnote{1956} No arm of government may compel

(1952), was reversed. The mother was unfit to care for the children, and, thus, their best interests should have been determinative. But the appellate court found the children to be Catholics because of their baptism (without the father's consent, id. at 67) and their mother's religion, and temporal consequences flowed from that decision; the children were removed from a fine adoptive home and placed under institutional care. For discussion of this case, see notes 10 and 20 supra. The rationale of the appellate division is by no means final since the appeal was dismissed by the Court of Appeals on technical grounds and the case was not appealed after the remand. For a criticism of placing so much emphasis on baptism, see Note, 65 Harv. L. Rev. 694 (1952). See also, Pierce, Church, State and Freedom 588-91 (1953).

Those Supreme Court cases which have upheld state action against a claim of aid to religion did not involve the issues present here. Released time from school, Zorach v. Clauson, 343 U.S. 306 (1952), but see Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948), and Note, 61 Yale L.J. 405 (1952), and state transportation for students of parochial schools, Everson v. Board of Education, 330 U.S. 1 (1947), do not impose a particular religion upon a child which conflicts with his best interests or the legally recognized rights of his parents.

63. See text and notes at pp. 776-82 supra under heading Effect of Religious Requirements on Child Welfare. As a matter of pure logic, it may be argued that the mere consideration of religion as one of many factors governing decisions concerning child care would also result in an unconstitutional imposition of temporal consequences upon the child. However, the released time cases indicate that the question of constitutionality or unconstitutionality in this area is a matter of degree. Zorach v. Clauson, 343 U.S. 306 (1952), noted in 61 Yale L.J. 405 (1952); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 1 (1947). Thus, the Supreme Court would be more likely to strike down a procedure which has a present detrimental effect upon the child than one which merely takes religion into account in a manner not inconsistent with the child's best interests.


65. For an analysis and collection of cases dealing with parental rights as a determinant of a child's religion after placement, see Note, Religion as a Factor in Adoption, Guardianship and Custody, 54 Colum. L. Rev. 376 (1954).


67. Jones v. Commonwealth of Virginia, 185 Va. 335, 38 S.E.2d 444 (1944). Although a privilege and not a right, probation cannot be conditioned unconstitutionally. Fleenor
either attendance at any church or belief in any religion. And since the constitutional prohibition bars aid to religion as such, as well as to any particular denomination, the fact that all religions benefit equally is irrelevant.

Conclusion

Mandatory religious requirements, whether statutory or administrative, seriously impede the administration of child welfare programs. They impair effective utilization of existing facilities and techniques for child care, curtail the effectiveness of probation programs, and are open to serious constitutional objections. Religion should be viewed as one of many interrelated factors which must be considered in determining how to promote the child's welfare. Only in this way can the child's best interests be safeguarded in a manner compatible with the constitutional rights of all parties involved.


69. "Neither [state or federal governments] can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1946).

70. The following quotation from the Indiana Department of Public Welfare Rules and Regulations is typical of an approach which fulfills the state's obligation to the child without unduly restricting parental preferences or infringing basic constitutional principles: "Each child-placing agency, after giving due consideration to the emotional and physical needs and religious background of the child or parents of the child, shall select a foster home or child-caring institution wherein the foster care given to the child will be for the best interests of the child." INDIANA DEP'T OF PUBLIC WELFARE, RULES AND REGULATIONS tit. III, reg. 3-210(d).