The Impact of Religion on Child Custody Cases: A Discussion

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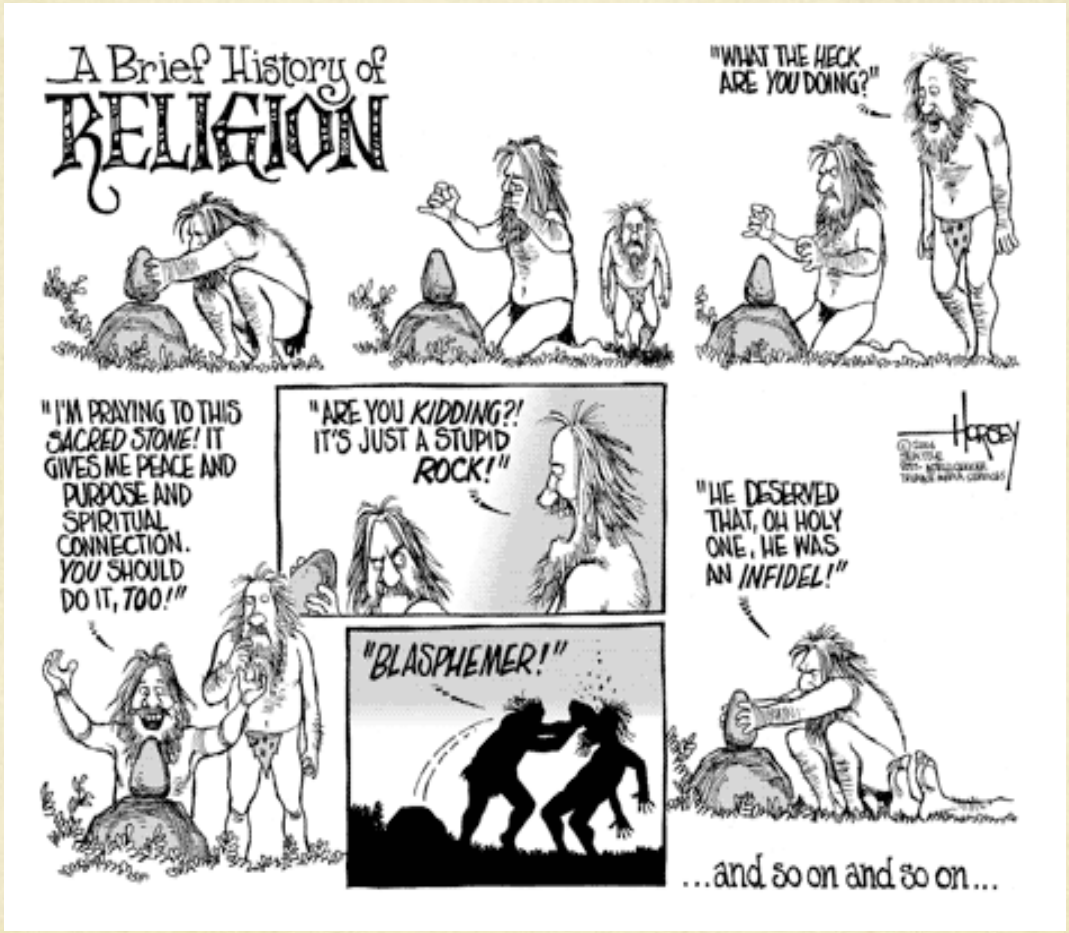
First Amendment:

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.


A Brief History of
RELIGION
"WHAT THE HECK ARE YOU DOING?"
"I'M PRAYING TO THIS SACRED STONE! IT GIVES ME PEACE AND PURPOSE AND SPIRITUAL CONNECTION. YOU SHOULD DO IT, TOO!"
"ARE YOU KIDDING?! IT'S JUST A STUPID ROCK!"
"BLASPHEMER!"
"HE DESERVED THAT, OH HOLY ONE, HE WAS AN INFIDEL!"
HARLEY
...and so on and so on...

First Amendment Cases

- Establishment of Religion
  - Separation of Church and State
  - Church-State Neutrality
- Freedom of Religion
  - Freedom of Belief & Non-Belief
  - Freedom of Conscience
  - Freedom of Religious Practice

US Supreme Court Cases

- *Watson vs. Jones*, 13 Wall. 678, 80 US 679 (1872)

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  - **To the extent that courts can apply "neutral principles of the law" to court property disputes, they must.**
  - **To the extent that courts are faced issues of doctrine, discipline, faith, or ecclesiastical rule, the legal courts must leave those issues to the highest church authorities.**

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US Supreme Court Cases

- *Watson vs. Jones*, 13 Wall. 678, 80 US 679 (1872)
  - "In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. . . ."
  - "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

US Supreme Court Cases

- *Reynolds v. United States*, 98 U.S. 145 (1878)

US Supreme Court Cases

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  - "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.
  - "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

US Supreme Court Cases

- *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

US Supreme Court Cases

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  - "[A] grant of power which rests [upon] a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

US Supreme Court Cases

- *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

US Supreme Court Cases

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  - First Amendment Rights are subject to regulation: "only to prevent grave and immediate danger to interests which the State may lawfully protect."

US Supreme Court Cases

- *Everson v. Board of Education*, 330 U.S. 1 (1947)

US Supreme Court Cases

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  - "The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. . . .Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State," ... [and] that wall must be kept high and impregnable."

US Supreme Court Cases

- *Zorach v. Clauson*, 343 U.S. 306 (1952)

US Supreme Court Cases

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  - "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each group flourish according to the zeal of its adherents and the appeal of its dogma. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government showed a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe

US Supreme Court Cases

- *Fowler v. Rhode Island*, 345 U.S. 67 (1953)

US Supreme Court Cases

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  - "[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."

US Supreme Court Cases

- *Torcaso v. Watkins*, 367 U.S. 488 (1961)

US Supreme Court Cases

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  - "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

US Supreme Court Cases

- *Abington School District v. Schempp*, 374 U.S. 203 (1963)

US Supreme Court Cases

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  - "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."

US Supreme Court Cases

- *Sherbert v. Verner*, 374 U.S. 398 (1963)

US Supreme Court Cases

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  - "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right,' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

US Supreme Court Cases

- *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

US Supreme Court Cases

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  - The Court stated three criteria with which "[e]very analysis in this area must begin":
    - "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."

US Supreme Court Cases

- *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
  - "Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn."

US Supreme Court Cases

- *Thomas v. Indiana Emplmnt Security*, 450 U.S. 707 (1981)

US Supreme Court Cases

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  - "The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

US Supreme Court Cases

- *Frazee v. Illinois Emplmnt Security*, 489 U.S. 829 (1989)

US Supreme Court Cases

- *Frazee v. Illinois Emplmnt Security*, 489 U.S. 829 (1989)
  - "There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause[.]' Purely secular views do not suffice. Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held.
  - "Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, *but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.* Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection."

US Supreme Court Cases

- *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)

US Supreme Court Cases

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  - "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs'. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."

Rights of Parenthood

- *Meyer v. Nebraska*, 262 U.S. 390 (1923)

Rights of Parenthood

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  - "While this Court has not attempted to define with exactness the liberty thus guaranteed. . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Rights of Parenthood

- *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
  - "Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. . . .The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Rights of Parenthood - Limits

- *Prince v. Massachusetts*, 321 U.S. 158 (1944)
  - "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . .
  - "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's wellbeing, the state, as *parens patriae*, may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."

Rights of Parenthood – Non-marital

- *Stanley v. Illinois*, 405 U.S. 645 (1972)
  - "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"
  - [Parents with children outside marriage] cannot be denied the [same rights] arising within a more formally organized family unit.

Rights of Parenthood – Best Interests and the Constitution

- *Quilloin v. Walcott*, 434 U.S. 246 (1978)
  - "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' "

Rights of Parenthood – Good or Bad

- *Santosky v. Kramer*, 455 U.S. 745 (1982)
  - "The fundamental liberty interest of natural parents in the care custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."

What's a Judge to Do?

- *Marriage of McSoud, 131 P.3d 1208 (Colo. 2006)*
  - A court may not properly inquire into or make judgments regarding the abstract wisdom of a particular religious value or belief in allocating parental responsibilities.
- *Ex Parte Snider, 929 So.2d 447 (Ala. 2005)*
  - Although "religious beliefs alone shall not constitute the sole determinant in child custody awards" and even though the mother's actions adhered to their religious beliefs "does not necessarily preclude exploration into those beliefs.

Three Standards

- *"Custodial Parent" Rule.*

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- ***Risk of Harm***

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- *"Custodial Parent" Rule.*
- *Risk of Harm*
- ***Actual or Substantial Harm***