

## CHILDREN'S BELIEFS AND FAMILY LAW

*Margaret F. Brinig*\*

Justice Stevens wrote for the majority in *Elk Grove Unified School District v. Newdow*,<sup>1</sup> the case deciding that a noncustodial father did not have standing to challenge the words “Under God” in the Pledge of Allegiance.<sup>2</sup> Early on, the opinion noted that the school child did have religious views:

[The mother] further stated that her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance, or to its reference to God. [The mother] expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views.<sup>3</sup>

While on its face this statement may not be remarkable, and the Court's eventual holding that the child's and father's views might well conflict may be understandable, the deference to the child's religion is unusual because she was in kindergarten at the time the lawsuit was filed in 2000.<sup>4</sup> In other words, the Court was writing about a young child, whose First Amendment abilities have not traditionally been recognized, and noted that her beliefs need to be considered. The Court concluded:

This case . . . implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

. . . In marked contrast to our case law on *jus tertii*, the interests of this parent and this child are not parallel and, indeed, are potentially in conflict.<sup>5</sup>

---

\* Fritz Duda Family Chair in Law at the University of Notre Dame and the Associate Dean for Faculty Research.

<sup>1</sup> 542 U.S. 1 (2004).

<sup>2</sup> *Id.* at 17–18. Essentially, the father could not take a position contrary to the child's mother's, when the mother had been given final decision-making authority under California law. *See id.*

<sup>3</sup> *Id.* at 9 (citations omitted).

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.* at 15 (citations omitted).

*Roe v. Wade*<sup>6</sup> can be read, and indeed was so read by Justice Stevens in a later case,<sup>7</sup> as avoiding making a decision in derogation of the pregnant woman's constitutional right to exercise her moral or religious choice. Is *Newdow*, then, abandoning children to their rights, as Bruce Hafen put it thirty years ago?<sup>8</sup> In other words, does the opinion imply that neither the state nor the noncustodial parent should speak for the child? Or should children's religious rights be considered not independently from their parents' but only when they agree with one parent's rights and collide with the other's rights? A similar argument for the child's independent First Amendment right was made by Justice Douglas, dissenting in part in *Wisconsin v. Yoder*,<sup>9</sup> the compulsory education case involving exceptions for Amish teenagers. Justice Douglas wrote:

The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.<sup>10</sup>

This Essay attempts to answer the three questions about children's religious interests posed in the preceding paragraph, concluding that while focusing on children's religious beliefs is appropriate and potentially important to the child, the child's beliefs should rarely be considered independently from the child's parents' beliefs.

One way to handle the problem of children's rights, religious or not, is to view them entirely as related to their parents' rights, or at least as presumptively identical with their parents' rights. For example, in economist Gary Becker's *A Treatise on the Family*,<sup>11</sup> the altruistic parent considers the child's utility as a function of his own.<sup>12</sup> This seems to be the way the Court

---

<sup>6</sup> 410 U.S. 113 (1973).

<sup>7</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 777-78 (1986) (Stevens, J., concurring).

<sup>8</sup> See Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their "Rights,"* 1976 BYU L. REV. 605, 651 (emphasizing the importance of parental authority in the development of children).

<sup>9</sup> 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

<sup>10</sup> *Id.*

<sup>11</sup> GARY S. BECKER, *A TREATISE ON THE FAMILY* (rev. ed. 1991).

<sup>12</sup> See *id.* at 278. Becker explains altruism (here a husband's altruism toward his wife) as follows: "Initially, take as given that a person, *h*, is effectively altruistic toward another member of his family, say his

(though not using economic terms) dealt with children in *Parham v. J.R.*,<sup>13</sup> in which the Court considered whether parents could voluntarily commit their children to mental hospitals:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>14</sup>

Similarly, children have historically been seen as having identical derivative (or subsumed) rights that eventually split off from their parents' rights, reaching full bore at emancipation.<sup>15</sup> This view might be reflected in the presumptions on the admission of children's testimony<sup>16</sup> or their inability to commit crimes.<sup>17</sup> Older children, even more than the viable fetus, obviously do have independent rights that touch on moral choices. They may, for example, display armbands protesting wars,<sup>18</sup> obtain information on

spouse, *w.* 'Altruistic' means that *h*'s utility function depends positively on the well-being of *w* . . . and 'effectively' means that *h*'s behavior is changed by his altruism." *Id.*

<sup>13</sup> 442 U.S. 584 (1979).

<sup>14</sup> *Id.* at 602 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*190).

<sup>15</sup> See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 887-90 (1984) (examining parental rights within the natural law tradition); Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1041-50 (1992) (surveying and critiquing the property model of parental rights).

<sup>16</sup> See Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R. 4th 369 (1988) (summarizing law on admission of children's testimony).

<sup>17</sup> See, e.g., *Commonwealth v. Ogden O.*, 864 N.E.2d 13, 17 & n.3 (Mass. 2007) (affirming ten-year-old's adjudication of delinquency based on acts of mayhem). In *Ogden O.*, the court stated:

In *Commonwealth v. Mead*, the court considered the legal competency of a child under twelve years of age to commit the offense of engaging in the unauthorized sale of intoxicating liquors. We stated that "[t]he rule of the [English] common law is perfectly well settled, that a child between the ages of seven and fourteen is not presumed to be *doli capax*, and the question whether, in committing an offence, such child in fact acted with intelligence and capacity, and an understanding of the unlawful character of the act charged, is to be determined by the jury upon the evidence, and in view of all the circumstances attending the alleged criminal transaction."

*Id.* at 17 (alterations in original) (footnote omitted) (citations omitted).

<sup>18</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). *But see* *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007) (emphasizing that the "mode of analysis set forth in *Tinker* is not absolute," and upholding high school principal's authority to confiscate student banner proclaiming "BONG HiTS 4 JESUS" at official school function to watch Olympic torch relay).

contraceptives,<sup>19</sup> and even, when mature or when it is found by a judge to be in their best interests, obtain legal abortions without their parents' consent.<sup>20</sup>

Catholics have long believed that children who attend Catholic schools are more apt to remain Catholic for life and to contribute more to the Church.<sup>21</sup> But whether what matters is the development of a personal faith, an introduction to a Catholic peer group, or the exposure to the Catholic tradition is less obvious. There is obviously some interaction between the religiosity of parents (the more religious of which are presumably more likely to be interested in a sectarian education) and the development of the child as well. Likewise, whether for all children we are talking about an independent growth of the child's faith, a reflection of the parents' faith, or some combination of the two, remains a puzzle.<sup>22</sup>

In at least some custody battles—those between parents of different religious preferences where at least one of them cares about religion—it is critical for courts to determine the child's religion. A parent-child conflict will be particularly acute in cases where divorcing parents hold strong—and potentially opposing—religious beliefs, as was the case in *Newdow*.<sup>23</sup> In fact, I have found in a study of Iowa divorces that there was a statistically significant relationship between parents who decided religion was important enough to mention in their separation agreements and those who divorced on fault grounds,<sup>24</sup> though these religiously oriented couples did not continue to litigate following divorce.<sup>25</sup>

---

<sup>19</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

<sup>20</sup> See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding that states may not forbid early-term abortions of minors who do not obtain parental consent). The most careful analysis on what constitutes the child's choice appears in *Bellotti v. Baird*, 443 U.S. 622, 634–35 (1979) (plurality opinion).

<sup>21</sup> See, e.g., U.S. CONFERENCE OF CATHOLIC BISHOPS, RENEWING OUR COMMITMENT TO CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS IN THE THIRD MILLENNIUM 1–3 (2005), available at <http://www.usccb.org/bishops/schools.pdf> (emphasizing that Catholic schools are among the most effective means of initiating children into church life and encouraging service).

<sup>22</sup> This quandary is obviously part of the problem confounding Justice Douglas in *Yoder*, as well as the Justices dealing with the Vietnam protests in *Tinker* or the refusal to salute the flag in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Children, especially young children, are unlikely to deviate in their First Amendment preferences from whatever they are taught or see at home.

<sup>23</sup> See Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 888–89 (1992) (“[T]he now-hostile relations of the parents make us doubt some of the reasons we ordinarily have for not intervening in an intact family.”).

<sup>24</sup> Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241, 252, 255–56 (2005) (noting that mention of children's religious education in the parents' settlement agreement predicts the presence of a mention of fault grounds in their divorce action in Iowa, a state where fault is legally irrelevant). In the regression equation, holding assets and the age difference between the spouses constant, the

Reported conflicts about visitation often center on religion itself or disciplinary views strongly colored by religious views.<sup>26</sup> In *Baker v. Baker*,<sup>27</sup> for example, the mother was Baptist and the father was a Jehovah's Witness. The court originally awarded the mother custody. Both parents were taking the children to their respective religious services and training, and each was attempting to undermine the religion of the other. At trial, the mother petitioned for, and won, affirmation of her exclusive right to determine the children's religious upbringing, based on the physical and psychological effects the conflict was having on the children.<sup>28</sup> In another visitation case, *Brown v. Szakal*,<sup>29</sup> the court refused to order the non-Jewish father to observe the Sabbath and keep kosher when he visited his seven- and nine-year-old daughters. The court found that "absent a showing of emotional or physical harm to the children, courts . . . will not impose upon the non-custodial parent the burden of policing the religious instructions of the custodial parent."<sup>30</sup> A third-party-visitation case that involved a conflict over discipline (with a belt) is *Newman v. Phillips*,<sup>31</sup> in which relationships with the grandparents were fairly close and cordial until the attempted discipline.<sup>32</sup>

---

mention of religious education increased the probability that the spouses mentioned fault by more than five times. *See id.* at 266 tbl.III.

<sup>25</sup> *Id.* at 259, 269 tbl.IX (showing that mention of children's religious education in the parents' settlement agreement significantly and *negatively* related to post-divorce litigation).

<sup>26</sup> The following two paragraphs borrow extensively from my previous essay, Margaret F. Brinig, *From Family to Individual and Back Again*, 51 *How. L.J.* 1, 12-13 (2007).

<sup>27</sup> 1997 WL 731939 (Tenn. Ct. App. Nov. 25, 1997).

<sup>28</sup> *See id.*; *see also* Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967) (involving transfer of a child from the mother, a strict believer in the isolationist Exclusive Brethren sect, to the father, who was much less strict); Felton v. Felton, 418 N.E.2d 606, 607-08 (Mass. 1981) (examining connection between parents' liberties and potential harm to children from being subject to competing religious influences); Lundeen v. Struminger, 165 S.E.2d 285, 287 (Va. 1969) (holding unconstitutional, under state law, direction in divorce decree that parents must raise their children according to Jewish faith). For a case refusing to enforce the parents' agreement to raise the child as a Catholic, *see Lynch v. Uhlhopp*, 78 N.W.2d 491 (Iowa 1956).

<sup>29</sup> 514 A.2d 81 (N.J. Super. Ct. Ch. Div. 1986).

<sup>30</sup> *Id.* at 84; *see also* Grayman v. Hession, 446 N.Y.S.2d 505, 506 (N.Y. App. Div. 1982) (upholding the requirement that a Gentile custodial mother send her child to Hebrew school because she had "either consented to or acquiesced in the religious training the child has undergone since birth," and had recently moved to Long Island, seriously hindering the father's "ability to continue his frequent visitations and religious training of his son"). In *Mester v. Mester*, 296 N.Y.S.2d 193, 197-98 (N.Y. Sup. Ct. 1969), a father could not change the visitation or custody simply to raise the child in the Jewish tradition.

<sup>31</sup> 1996 WL 480856, at \*1 (Tenn. Ct. App. Aug. 27, 1996).

<sup>32</sup> *Id.* Religion and differences between competing "ways of life" were also central to the dispute between the father and maternal grandparents in the famous custody case of *Painter v. Bannister*, 140 N.W.2d 152, 154 (Iowa 1966).

I am not one to suggest that the Supreme Court ought to be more involved with family law than it has been since the substantive due process days of *Meyer v. Nebraska*<sup>33</sup> and *Pierce v. Society of Sisters*.<sup>34</sup> I am also not one to “abandon children to their rights”<sup>35</sup> or otherwise suggest that children should fend for themselves without their parents’ help. For me, a childhood without the nurturing environment of loving parents (or at least one parent) is a dismal prospect.<sup>36</sup> However, I am encouraged that the Court seems to recognize that, in families with children, the children’s interests do need to be considered and will not always mirror their parents’ interests. But the legal system does not have a good way of handling such conflicts. As Carl Schneider put it:

Both the child’s parents claim a right to make decisions for their child. And the children arguably have some kind of right to assert their own preferences. Yet, while our vocabulary of rights has ample ways of resolving conflicts between an individual right-holder and the state, it has no way of resolving such conflicts between rights holders.<sup>37</sup>

In any event, whether courts ultimately can take them into account or not, do children’s independent religious beliefs matter? Do they matter in ways that affect behavior or core feelings about themselves? Which matters more, the parents’ religiosity or the influence of peers?

We have some evidence that religious belief does matter,<sup>38</sup> from the National Longitudinal Survey of Youth 1997 (NLSY97), which is administered by the National Opinion Research Center.<sup>39</sup> According to the Bureau of Labor Statistics:

[The survey as a whole] documents the transition from school to work and from adolescence to adulthood. The survey sample is designed to represent U.S. residents in 1997 who were born during the years 1980 through 1984. The majority of the oldest cohort members (age 16 as of December 31, 1996) were still in secondary

---

<sup>33</sup> 262 U.S. 390 (1923).

<sup>34</sup> 268 U.S. 510 (1925).

<sup>35</sup> Hafen, *supra* note 8, at 607 (internal quotation marks omitted).

<sup>36</sup> I have made this point a number of times, stressing it in Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733 (2001).

<sup>37</sup> Schneider, *supra* note 23, at 906.

<sup>38</sup> I use “we” for this section of the Essay to acknowledge the very significant data and statistical help given by Steven L. Nock of the Department of Sociology, University of Virginia.

<sup>39</sup> The NLSY97 survey results are available online. See Bureau of Labor Statistics, U.S. Dep’t of Labor, The NLSY97, <http://www.bls.gov/nls/nlsy97.htm> (last visited July 27, 2008).

school during the first survey round and the youngest respondents (age 12) had not yet entered the labor market. The original sample includes 8,984 respondents. The NLSY97 collects extensive information on respondents' labor market behavior and educational experiences. The survey also includes data on the youths' family and community backgrounds to help researchers assess the impact of schooling and other environmental factors on these labor market entrants.<sup>40</sup>

About 4,800 of the respondents were ages 12–14, and most were asked the questions that particularly interest us. These questions deal with the child's parents' religiosity,<sup>41</sup> the religiosity of the child's peers,<sup>42</sup> religious activities done as a family,<sup>43</sup> and nonreligious activities done as a family.<sup>44</sup>

We have run a number of regressions, beginning with the economists' assumption that income (defined relative to the Census's needs standard to account for geographic variation as well as household size) affects outcomes including the two I will report here, optimism and delinquency. We then add

---

<sup>40</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NLS HANDBOOK, 2005, at 7 (2005), available at <http://www.bls.gov/nls/handbook/2005/nlshc2.pdf>.

<sup>41</sup> Parents were asked six questions about their religiosity. See U.S. DEP'T OF LABOR, NLSY97 CODEBOOK SUPPLEMENT MAIN FILE ROUND 1 app. 9, at 99–100 (1999), available at <http://www.nlsinfo.org/nlsy97/nlsdocs/nlsy97/codesup/app9pdf.pdf>.

<sup>42</sup> The child was handed a card that asked:

- What percentage of kids [in your grade /in your grade when you were last in school] . . . [go/went] to church or religious services on a regular basis?
1. Almost none (less than 10%)
  2. About 25%
  3. About half (50%)
  4. About 75%
  5. Almost all (more than 90%)[.]

BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL LONGITUDINAL SURVEY OF YOUTH, 1997 COHORT: ROUND 1 YOUTH QUESTIONNAIRE 103 (1997) (alterations in original), available at <http://www.bls.gov/nls/quex/r1/y97r1yg0.pdf>.

<sup>43</sup> Here is the text of the question asked: "In a typical week, how many days from 0 to 7 do you do something religious as a family such as go to church, pray or read the scriptures together?" *Id.* at 219.

<sup>44</sup> Here is the text of a series of three questions that were asked:

In a typical week, how many days from 0 to 7 do you eat dinner with your family?

....

In a typical week, how many days from 0 to 7 does house work get done when it's supposed to, for example cleaning up after dinner, doing dishes, and taking out the trash?

....

In a typical week, how many days from 0 to 7 do you do something fun as a family such as play a game, go to a sporting event, go swimming and so forth?

*Id.* at 218–19.

variables considering the child's living arrangement and various demographic measures, including the child's age and gender, and the mother's race, education, and age at first birth. Finally, we add the religion variables noted above. For the reader not statistically inclined, this means that we are using many variables to produce the best possible equation to predict the various outcomes. The final result tells us how much of the variance in the outcome we have explained, and also the relative effect, net of the other predictors, of each variable. Table 1 shows descriptive statistics on the different variables we considered.

**Table 1: Descriptive Statistics**

Variables	N	Min.	Max.	Mean	Standard Deviation
Behavior/Emotional Problems Scale; Kid Reports; Combined Boys and Girls	5368	.00	8.00	2.1143	1.5780
Child Lives with Two Biological Cohabiting Parents	8984	.00	1.00	.0025	.0497
Child Lives with Two Parents—Biological Mom, Married Partner	8984	.00	1.00	.0950	.2932
Child Lives with Two Parents—Biological Mom, Cohabiting Partner	8984	.00	1.00	.0075	.0862
Child Lives with Two Parents—Biological Dad, Married Partner	8984	.00	1.00	.0219	.1464
Child Lives with Two Parents—Biological Dad, Cohabiting Partner	8984	.00	1.00	.0008	.0284
Child Lives with One Parent—Biological Mom, Cohabiting Partner	8984	.00	1.00	.0118	.1078
Child Lives with One Parent—Biological Dad, Cohabiting Partner	8984	.00	1.00	.0023	.0477

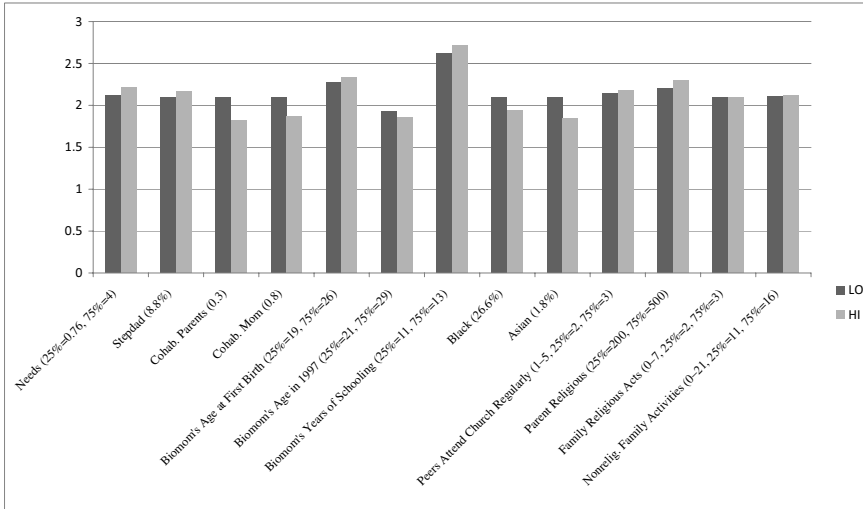


Variables	N	Min.	Max.	Mean	Standard Deviation
Child Lives with Married, Adoptive Parents	8984	.00	1.00	.0092	.0952
Child Lives with Adoptive Parent Who Is Not Married	8984	.00	1.00	.0041	.0641
Child's Age in Years (in 1997)	8984	12.00	18.00	14.3191	1.4925
1 = Male; 2 = Female	8984	1.00	2.00	1.4868	.4999
Biological Mother's Age in Years (in 1997)	8431	10.00	101.00	25.7861	5.3781
Biological Mother's Years of Schooling	8356	1.00	20.00	12.8525	2.7489
Household Income-to-Poverty Ratio Percentage	6714	.00	16.27	3.2040	2.8587
Low Warmth, Low Control	8581	.00	1.00	.1034	.3045
High Warmth, Low Control	8581	.00	1.00	.3597	.4799
Low Warmth, High Control	8581	.00	1.00	.4163	.4930
Parents' Level of Religiosity (High = More)	5977	.00	600.00	365.5532	163.2523
Number of Days per Week Family Typically Does Something Religious	5338	.00	7.00	1.5391	1.9833
Index of Family Routines, Youth Report	5345	.00	28.00	15.0225	5.2736
Substance Use Index	8962	.00	3.00	1.0765	1.1464
Delinquency Score Index 1997	8971	.00	10.00	1.3607	1.8542
I Rarely Count on Good Things to Happen to Me—Reverse Coded	5987	1.00	4.00	3.0021	.8645
Valid N (listwise)	3614				

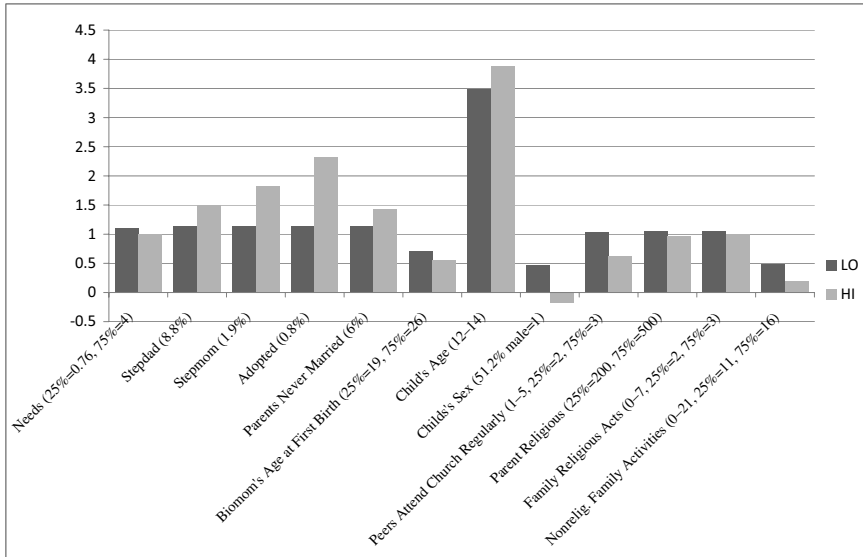
The figures are charts with bars representing the predicted optimism and delinquency at the low and high values of the various independent variables. The high and low values will be either 0 or 1 for no or yes questions, like whether the parent has been married, or the actual value at the twenty-fifth and seventy-fifth percentiles otherwise. We report only the impact of statistically significant coefficients. Figures 1 and 3 both deal with an attitude value closely related to optimism: *I often think that good things will happen to me*. Figures 2 and 4 deal with delinquency, a measure of external behavioral

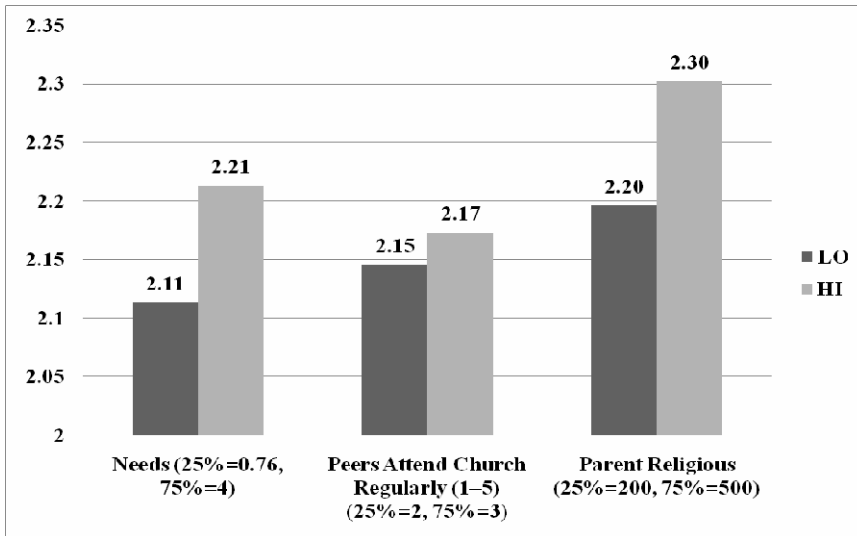
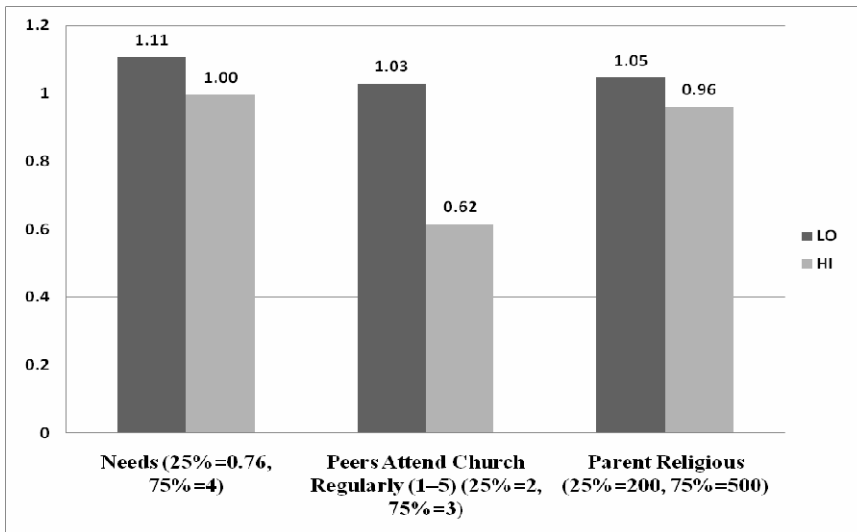
problems. While Figures 1 and 2 both include all the significant variables, Figures 3 and 4 include the significance of the mother’s and peers’ religiosity in comparison to each other and to the influence of income.

**Figure 1: Good Things Happen to Me**



**Figure 2: Delinquency Index**



**Figure 3: Key Values—Good Things Happen to Me****Figure 4: Key Values—Delinquency**

What the figures show is that, even holding many other things constant, religion seems to matter for a child's well-being. Specifically, when a child's income increased from the twenty-fifth percentile to the seventy-fifth percentile (or from what is only three quarters of the poverty level to more than four times the poverty level), her tendency to believe that good things often happened to her increased by 5.6%. For a parent's religiosity, moving from "not at all religious" to "very religious" increased the tendency for the child to believe that good things often happen by nearly as much, or 4.5%.

Even more dramatically, holding other variables constant, when a child's income increased from the twenty-fifth to the seventy-fifth percentile, his delinquency decreased by 10%. However, moving from the twenty-fifth to the seventy-fifth percentile in the percent of the child's friends who attended church regularly (from about 25% of the friends to about half) decreased delinquency by more than 40% (or four times the effect of income).

The results show, unsurprisingly, that children do better in families of means. More important for this Essay, however, the results demonstrate that parental religiosity is related to adolescents' outlook on life in an important way. Further, for these young people, the religiosity of their peers is more related to their behavior, not only on the delinquency index we reported, but also for substance abuse (decrease of nearly 10%) and general behavioral problems (decrease of 8%), both about the same as similar changes in income.

Doing things together regularly as a family (religious, nonreligious, or both) was also a significant variable in reducing delinquency, though the reductions were only half as great as for reported peer religious attendance. This finding provides mild support for the old adage that "the family that prays together stays together," as well as the more recent governmental campaign entitled "Parents. The Anti-Drug."<sup>45</sup>

Children's religion does matter, sometimes in the context of their parents' religion, and sometimes, as they grow, in the context of their peers. This corresponds to the findings of social psychologists who suggest that peers may be critically important for adolescents.<sup>46</sup> Although these figures are not

---

<sup>45</sup> Parents. The Anti-Drug., <http://www.theantidrug.com> (last visited July 27, 2008).

<sup>46</sup> See generally JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* (1998) (debunking beliefs that parents, rather than peers, have the greatest influence on children's development, once genes are taken into account).

included here, activities done with the family have important relationships to lower rates of substance abuse and behavioral problems.

Does Justice Stevens's statement in *Elk Grove v. Newdow* point to a new direction? I have argued elsewhere that it does—that courts now have a constitutional reason to look at things from the child's point of view (as advocated by Barbara Woodhouse<sup>47</sup>), rather than only from the child's parents' point of view, at least when these viewpoints conflict,<sup>48</sup> as they may have in *Newdow* itself.<sup>49</sup> The law would be much clearer if the Supreme Court rearticulated the principle in *Parham* (in which plaintiffs alleged that the interests may have conflicted)<sup>50</sup> to reflect the good sense of the family law scholars discussed here. Children do have rights and interests, including religious convictions that are strong and important to them and to their well-being and growth. In the vast majority of cases, particularly for younger children, these interests will be best advocated by their parents, who will often share the children's beliefs, and in any event will love them unconditionally and know them far better than a legal advocate or trial court judge. Parents are presumed to be the best proxies or fiduciaries for their children. Sometimes they will even be liable for the harms wrought by their children.<sup>51</sup> However, in situations where the family is disrupted or for other reasons parents are thinking of themselves before their children, the presumption should not be as strong.<sup>52</sup> Of course, a pregnant woman can legally decide to abort a nonviable

---

<sup>47</sup> See Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own,"* 11 CORNELL J.L. & PUB. POL'Y 481, 484–85 (2002); Woodhouse, *supra* note 15.

<sup>48</sup> Brinig, *supra* note 26.

<sup>49</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (“[T]he interests of this parent and this child are not parallel and, indeed, are potentially in conflict.” (footnote omitted)).

<sup>50</sup> See *supra* note 13 and accompanying text.

<sup>51</sup> Parents are sometimes liable for the tortious activities of their minor children. See *Vanhournout v. Burge*, 387 N.E.2d 341, 343–44 (Ill. App. Ct. 1979) (upholding legislative authority to punish parents for their child's property damage); *Bd. of Educ. of Piscataway v. Caffiero*, 431 A.2d 799 (N.J. 1981) (upholding constitutionality of parental liability for child's malicious destruction of school property), *appeal dismissed*, 454 U.S. 1025 (1981); *Bell v. Hudgins*, 352 S.E.2d 332 (Va. 1987) (rejecting tort liability against parents for their child's malicious intentional act, an attempted rape). Parents have always been expected to help curb their children's dangerous propensities, as part of the education of their children. See John R. Sutton, *Stubborn Children: Law and the Socialization of Deviance in the Puritan Colonies*, 15 FAM. L.Q. 31 (1981).

<sup>52</sup> Even a parent's First Amendment rights can be curtailed if the child's life or health is endangered. This is because the parent's freedom to be a martyr herself does not extend to endangering the life of her child. See *Prince v. Massachusetts*, 321 U.S. 158 (1944); see, e.g., *In re D.L.E.*, 645 P.2d 271 (Colo. 1982) (allowing state to declare twelve-year-old child with epilepsy as neglected and dependent so that he could receive treatment despite mother's religious-based objections); *Harris v. Harris*, 343 So.2d 762, 764 (Miss. 1977) (holding that parents' custodial arrangement could be changed only if snakes were actually being handled at

fetus,<sup>53</sup> and any parents can divorce. We do not deem the parents unfit for either reason.

Where does this reasoning lead us? If adolescent children want to express an independent religious faith, courts should let them make that choice, particularly if there is some reason they are already in court. Of course, when the children are over eighteen, the parents' control becomes strictly monetary. And the Court has held that even for a minor who is pregnant, the ability to decide whether to carry a child to term rests in the last instance with her and her physician (or a judicial neutral, through a bypass procedure, if she is not "mature").<sup>54</sup>

Emily Buss argues that "children who choose to articulate a separate religious identity from that of their parents will generally have reasonably advanced decision-making skills, for the development of a distinct religious identity generally occurs, not coincidentally, when their capacity for reasoned decision-making roughly matches that of adults."<sup>55</sup> My findings from the Panel Study of Income Dynamics, reported elsewhere,<sup>56</sup> are not limited to any particular age, but they suggest that involvement with organized religion matters even for children as young as six.<sup>57</sup> However, like Buss, I suggest that for intact families, there typically should be no state involvement in their religious life.

On the other hand, there are some legal options that would be a mistake in my opinion. The American Law Institute's (ALI) *Principles of the Law of*

---

the religious services to which the mother brought the children). There are also a host of medical-care cases, mostly involving blood transfusions. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory smallpox vaccinations to protect both community and child threatened by outbreak); *J.V. v. State*, 516 So.2d 1133 (Fla. Dist. Ct. App. 1987) (severely burned child); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill. 1952) (RH-negative child); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964) (woman pregnant with viable fetus); *In re Jensen*, 633 P.2d 1302 (Or. Ct. App. 1981) (hydrocephalus).

<sup>53</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>54</sup> *Bellotti v. Baird*, 443 U.S. 622, 643-44, 647-48 (1979) (plurality opinion).

<sup>55</sup> Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 63 (1999) (citing ADRIAN FURNHAM & BARRIE STACEY, *YOUNG PEOPLE'S UNDERSTANDING OF SOCIETY* 123 (1991); and Carol A. Markstrom, *Religious Involvement and Adolescent Psychosocial Development*, 22 J. ADOLESCENCE 205 (1999) (studying several dozen white and black students in rural West Virginia)).

<sup>56</sup> Margaret F. Brinig & Steven L. Nock, *The One-Size Fits All Family*, 49 SANTA CLARA L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=997903>.

<sup>57</sup> See *id.* Further, an interaction between age and religious attendance is never statistically significant, suggesting that the relationship between religious attendance and the various outcomes does not intensify with age.

*Family Dissolution*,<sup>58</sup> in its generally sound child custody chapter, contains a bar on looking at religion, which in view of the evidence I have presented here, bears reexamination. The text of the relevant ALI principle is as follows:

§ 2.12 Criteria for Parenting Plan—Prohibited Factors

(1) In issuing orders under this Chapter, the court should not consider any of the following factors:

(a) the race or ethnicity of the child, a parent, or other member of the household;

(b) the sex of a parent or the child;

(c) the religious practices of a parent or the child, except to the minimum degree necessary to protect the child from severe and almost certain harm *or to protect the child's ability to practice a religion that has been a significant part of the child's life . . .*<sup>59</sup>

If religion is important to children, either on its own or because the parent is religious, is it appropriate to bar courts from considering it at all unless it “has been a significant part of the child’s life”? How would this be measured? How could the proof be gathered even before a court hearing (in itself problematic for children)? In the NLSY97 data examined here, there were results, positive and negative, even when religion could only be measured through the child’s parent or friends. Does this constitute significance “in the child’s life”?

In *Hodgson v. Minnesota*,<sup>60</sup> Justice Stevens, writing for the majority, noted, “It follows that the combined force of the separate interest of one parent and the minor’s privacy interest must outweigh the separate interest of the second parent.”<sup>61</sup> As it was with the privacy cases, so too may it be with the religion cases—if the child identifies with one parent, he or she should surely prevail against the other. Thus, it is not the child’s religion per se but the child’s religion—when paired with a parent’s religion—that a court might find important.

At this point, I wish to include some cautions about the results reported here. First, they represent a snapshot of related variables, not causation. We cannot say that failure to marry causes delinquency, for example, just that they are associated. Beyond this, we know that we are not explaining all the

---

<sup>58</sup> ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

<sup>59</sup> *Id.* § 2.12, at 272 (emphasis added).

<sup>60</sup> 497 U.S. 417 (1990) (involving an abortion statute requiring both parents to be notified before their minor child could obtain an abortion).

<sup>61</sup> *Id.* at 453.

variation of anything measured. Some quantities are too small to measure for statistical significance. Only thirty kids in our sample were adopted by their dads, and no adopted children were in black families. The numbers for Asians and Hispanics (which we have) are too small to show much. Further, our equations do not predict all, or even nearly all, the differences in outcomes. There is a tremendous lot more going on in these families that we are not measuring. Other studies will need to confirm our results generally and fill in these gaps.