COMMENT

THE STATE AND THE "PSYCHO EX-WIFE": PARENTS' RIGHTS, CHILDREN'S INTERESTS, AND THE FIRST AMENDMENT

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INTRODUCTION

> Unless you've experienced it, you can't begin to imagine how helpless you are as a parent when you're dealing with a Psycho Ex-Wife with little or no capacity to grasp her own parental inadequacies.[1]

On June 6, 2011, a judge in a small Pennsylvania county courthouse issued a custody order and started a firestorm. The order, citing the children's best interests,[2] required a father embroiled in a custody battle to take down his critical blog "The Psycho Ex-Wife"[3] and refrain from mentioning either his wife or his children "on any public media."[4] It immediately garnered national media attention,[5] outraged divorced-parent Internet support groups

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1 Anthony Morelli, *Parenting Issues Discussion of 1/06–Part I of II*, PSYCHO EX-WIFE (Jan. 4, 2008), http://web.archive.org/web/20080105023344/http://www.thepsychoexwife.com (accessed by searching for "Psycho Ex-Wife" in the Internet Archive index).

2 Judge Diane Gibbons asserted that the young boys involved "don't want to hear that dad is a bastard" or that "mommy's a bitch," because "[t]hat's someone they love[, a]nd when you say something about someone they love, you hurt them." Transcript of Order at 11, Morelli v. Morelli, No. A06-04-60750-C (Bucks County Ct. C.P. June 6, 2011) [hereinafter Transcript of Order], *available at* http://www.savethepsychoexwife.com/wordpress/wp-content/uploads/2011/06/Transcript-Redacted1.pdf.

3 Morelli described his website as "[t]he true account of a marriage, divorce, and subsequent custody fight between a loving man, his terroristic ex-wife who we suspect suffers from Borderline Personality Disorder (at least from our armchair psychologist diagnosis), and the husband's new partner." Anthony Morelli, *About the Psycho Ex-Wife*, THE PSYCHO EX WIFE (Jan. 1, 2008), http://web.archive.org/web/20081210164735/http://www.thepsychoexwife.com/about-the-psycho-ex-wife/ (accessed by searching for "Psycho Ex-Wife" in the Internet Archive index).

4 Transcript of Order, *supra* note 2, at 9.

5 *See, e.g.*, Lylah M. Alphonse, *Bashing Your Ex in Public May Be Free Speech, but Is It in Your Children's Best Interests?*, YAHOO! SHINE (Aug. 9, 2011), http://shine.yahoo.com/love-sex/bashing-your-ex-in-public-may-be-free-speech-but-is-it-in-your-childrens-best-interests-2523754.html (noting the blog's huge online following); Anna Bahr, *The Psycho Ex-Wife: Free Speech Fight over Divorce Blog*, HUFFINGTON POST (Aug. 9, 2011), http://www.huffingtonpost.com/2011/08/09/the-psycho-ex-wife-free-speech-fight-over-divorce-blog_n_922802.html (reporting on the *Today Show*'s coverage of the incident and discussing the blog); Suzanne Choney, *Dad Behind 'Psycho Ex Wife' Blog Protests Its Shutdown*, DIGITAL LIFE ON TODAY (Aug. 8, 2011, 11:12 PM), http://digitallife.today.com/_news/2011/08/08/7310576-dad-behind-psycho-ex-wife-blog-protests-its-shutdown (providing a link to the *Today Show*'s coverage); Vanessa Ko, *'Psycho Ex-Wife' Blog Starts Free-Speech Fight in Court*, TIME NEWSFEED (Aug. 11, 2011), http://newsfeed.time.com/2011/08/11/psycho-ex-wife-blog-starts-free-speech-fight-in-court (commenting on the dispute over the blog).

around the country,[6] and was even deemed blog-worthy by a renowned constitutional expert.[7] All of these observers posed the same question: how could this restriction on speech be consistent with the demands of the First Amendment? Expressing concern about the judge's order, Professor Eugene Volokh mused, "That strikes me as a pretty clear First Amendment violation; whatever the scope of family courts' authority to protect children's best interests might be, it can't extend to criminalizing one adult's public speech about another adult."[8]

These types of orders, however, are actually quite common in family court proceedings. Under the amorphous "best interests of the child"[9] standard, judges have ordered parents to bring their children to church,[10] avoid criticizing ex-spouses[11] or their religious beliefs,[12] refrain from bringing intimate partners near the children,[13] and even communicate feelings of love

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6 *See, e.g.*, Danielle Nelson, *Dad Ordered to Remove 'Psycho Ex-Wife' Blog. But What About His Tattletale Ex-Wife?*, MOMMYISH (Aug. 29, 2011), http://www.mommyish.com/2011/08/29/dad-ordered-to-remove-psycho-ex-wife-blog-but-what-about-his-tattletale-ex-wife-252/#ixzz2CFo6UyCH ("I hope that Anthony perseveres. I hope that his presence on the internet can continue to help other people dealing with high-conflict, manipulative and abusive ex-spouses for the sake of the innocent children who are all to [sic] often used as pawns by the offending parent."). Not all blog responses have been positive, however. *See, e.g.*, Jeanne Sager, *Dad Who Blogs About 'Psycho Ex Wife' Doesn't Deserve His Kids*, STIR (Aug. 10, 2011, 11:47 AM), http://thestir.cafemom.com/in_the_news/124317/dad_who_blogs_about_psycho (arguing that Morelli's children likely have access to computers and will be harmed by his negative posts about their mother); *The Psycho Ex Wife: It's Really About Letting Go*, DIVORCED AT 50 (Aug. 13, 2011), http://divorcedat50.blogspot.com/2011/08/psycho-ex-wife-its-really-about-letting.html (suggesting that Morelli's duty as a parent to protect his children's wellbeing is more important than his First Amendment right to say cruel things about his ex-wife publicly).

7 Eugene Volokh, *"Father Shall Take Down that Web Site and Shall Never on Any Public Media Make Any Reference to Mother At All,"* VOLOKH CONSPIRACY (July 14, 2011, 10:15 PM), http://www.volokh.com/2011/07/14/father-shall-take-down-that-web-site-and-shall-never-on-any-public-media-make-any-reference-to-mother-at-all (questioning the constitutionality of the judge's order).

8 *Id.*

9 Hereinafter referred to as the "best interests standard."

10 *See, e.g.*, Johns v. Johns, 918 S.W.2d 728, 731 (Ark. Ct. App. 1996) (requiring the non-custodial father to ensure that his children attended Sunday school and church during his visitation); McLemore v. McLemore, 762 So. 2d 316, 320 (Miss. 2000) ("The order [for the children to attend church] was reasonably based upon serving the best interests of the children."); *see also* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 722-33 (2006) (compiling constitutionally problematic custody orders by topic).

11 Volokh, *supra* note 10, at 640-41 (discussing judicial treatment of parental speech that interferes with the child's relationship with his or her other parent).

12 *See, e.g.*, Feldman v. Feldman, 874 A.2d 606, 608 (N.J. Super. Ct. App. Div. 2005) (holding that "the primary caretaker has the sole authority to decide the religious upbringing of the children").

13 *See, e.g.*, J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 866, 870-72 (Mo. Ct. App. 1982) (finding that the lower court did not err in denying overnight visitation privileges to a father sharing an apartment with another man and restricting him from taking his son to same-sex couples social gatherings); Peck v. Peck, 172 S.W.3d 26, 34 (Tex. Ct. App. 2005) (finding no abuse of discretion in

toward their ex-spouses.[14] Although some scholarship has addressed judges' consideration of parents' religious beliefs or sexual preferences in granting custody, the constitutionality of family court orders structuring family interaction and crafting rules of parental behavior, like the custody order issued by Judge Diane Gibbons in Bucks County, "has largely escaped the notice of all but a few First Amendment scholars" and "survives partly because of the little attention paid to family law proceedings."[15] Thus, family law courtrooms have the potential to become constitutional "twilight zones"[16] in which judges adjudicating the responsibilities and obligations of the most basic unit of American society illegitimately violate parents' constitutional rights in the name of children's best interests. In this framework, are children's best interests compelling enough to override parental claims to free speech? Is it time for a radical normative rethinking of the role and function of the family law judge to more accurately correspond to reality? Or is there another legal standard that could be imported for use in this context?

This Comment examines the role that the First Amendment currently plays in family court proceedings and highlights the constitutional tensions inherent in speech restrictions issued under the best interests standard. As the adage goes, marriage is a "contract between three parties—the husband, the wife, and the State." Yet it is unclear how the State is or should be constrained in adjudicating the parties' responsibilities once the marital relationship is dissolved, particularly when there are children involved whose interests must be weighed against parental rights. Cases such as *Pierce v. Society of Sisters*[17] and *Yoder v. Wisconsin*[18] have affirmed a parent's

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the trial court's order forbidding a father from having overnight guests during his children's visitations); *see also* Volokh, *supra* note 10, at 730-31 (listing cases in which a trial or appellate court decision restricted pro–same-sex speech by a parent or held such speech against the parent in a custody decision).

14 *See, e.g.*, Schutz v. Schutz, 522 So. 2d 874, 875-76 (Fla. Dist. Ct. App. 1988) (upholding an order by the trial court requiring a mother to "instruct [her] children to love and respect their father," her ex-husband).

15 Brooke A. Emery, *The Upbringing of a Creature: The Scope of a Parent's Right to Teach Children to Hate*, MOD. AM., Fall 2008, at 60, 62.

16 The use of this term is inspired by media discussion of airports as "constitutional twilight zones" in which traditional constitutional rules regarding searches of one's person do not apply. *See, e.g.*, Paula Reid, *U.S. Airports a "Constitutional Twilight Zone*," CBSNEWS.COM (Nov. 23, 2010, 12:01 PM), http://www.cbsnews.com/2100-201_162-7082555.html.

17 *See* 268 U.S. 510, 533-35 (1925) (noting that children are not "mere creature[s] of the state," and striking down an Oregon statute requiring children to attend public school, thus affirming parents' rights under the Due Process Clause of the Fourteenth Amendment to send their children to private school).

18 *See* 406 U.S. 205, 233-34 (1972) (rejecting a parens patriae claim and striking down a Wisconsin statute requiring children to attend school past the age of thirteen as a violation of the

fundamental right to control the upbringing of his or her children, but when families dissolve during divorce and parents fundamentally disagree about how to raise their children, judges—governed only by the vague and easily manipulated best interests standard—inject themselves into the proceedings and suddenly wield immense power over parental decisionmaking, relationships, and essential liberties. Due to the weight of the liberties at stake, greater attention to this area of law is vital to ensure both that parental rights are not trampled and that children's interests are protected. This Comment provides such attention by examining contemporary court practices in issuing custody orders restricting speech, analyzing the advantages and shortcomings of three potential jurisprudential frameworks, and identifying the best standard of analysis that better protect *both* parents' rights and children's interests.

Part I examines the best interests standard and explores the potential for constitutionally problematic effects of utilizing such a vague standard to restrict speech. Part II discusses how courts have and should resolve the tension between the First Amendment and custody orders restricting parental speech. This Comment then identifies and evaluates three potential frameworks to address custody orders restricting free speech. The analysis of the advantages and disadvantages of each method considers both the demands of the family court system and the sensitive nature of the issues involved.

The first framework—the "pure" First Amendment approach—subjects custody orders restricting speech to the same level of scrutiny applicable to any other governmental order restricting speech. This method is premised upon the notion that all custody orders prohibiting parents from making disparaging comments to their children or to the public are content-based restrictions on speech. It would require family court judges to identify a compelling state interest served by the restraint and narrowly tailor the order to advance that interest. Courts have split as to whether children's best interests constitute compelling state interests, but there are inclusiveness problems with either answer to the question: Where courts find best interests compelling, the standard is so vague and easily manipulated that it does not adequately safeguard parental free speech rights. Conversely, where courts refuse to recognize children's best interests as compelling, children are removed from consideration entirely, which can result in harm

Amish plaintiffs' First Amendment Free Exercise rights). *Contra* Reynolds v. United States, 98 U.S. 145, 167-68 (1878) (rejecting plaintiff's claim that a state law prohibiting polygamy violated his First Amendment free exercise rights and accepting the State's proffered interest in monogamy as compelling because, among other reasons, it protects innocent children).

to the children. Thus, the "pure" First Amendment framework is ultimately rejected as both overinclusive and underinclusive.

The second framework contemplates the judge as fiduciary: a nonstate actor "stepping outside of the Constitution" and considering *only* the child's best interests. Despite the exciting possibilities revealed by this radical conception of the State's role in family custody proceedings, this method is not a viable solution because it allocates too much unchecked power to judges, endangers parents' established constitutional rights, and creates murky implications for the role of a judge as a nonstate actor.

The third potential framework, a Goldilocks solution between the stringent strict scrutiny standard and the loose, constitutionally unregulated judge-as-fiduciary standard, is the substantial harm principle. This balancing test has been used to analyze the constitutionality of custody orders that restrict parents' free exercise rights[19] and appears to be a natural fit in the context of custody orders restricting speech.[20] This standard permits courts to consider the effects that speech is likely to have on the children, while avoiding the morass of the best interests standard. It also recognizes the importance of the parental speech right and remains within established constitutional bounds. Thus, the substantial harm principle stands out as the best framework to analyze custody orders that restrict parental speech, and this Comment recommends its adoption by family courts.

I. BEST INTERESTS, CUSTODY ORDERS, AND THE FIRST AMENDMENT: OUTLINING THE CONFLICT

> Children represent the . . . soft underbelly of liberal theory because . . . the state cannot be as standoffish or as respectful of privacy when the interests of children are involved as they are in other areas of life.[21]

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19 *See, e.g.*, Kendall v. Kendall, 687 N.E.2d 1228, 1233 (Mass. 1997) (affirming the lower court's order prohibiting the father-defendant from taking his children to religious services upon a finding that the substantial harm standard was satisfied because the children believed their mother would go to hell and were very conflicted after attending the services); Garrett v. Garrett, 527 N.W.2d 213, 221 (Neb. Ct. App. 1995) (upholding the lower court's decision to grant custody to the mother, because her religion-based objection to blood transfusions failed to satisfy the substantial harm standard); Shepp v. Shepp, 906 A.2d 1165, 1173-74 (Pa. 2006) (holding that a court can restrict a parent from teaching a sincere religious belief only when "discussing such matters constitutes a grave threat of harm to the child").

20 This standard, however, is not without its critics. *See, e.g.*, Jeffrey Shulman, *What* Yoder *Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 177-78 (2008) (calling the standard a "tough constitutional firewall" and arguing that a more lax approach is desirable).

21 Michael W. McConnell, Circuit Judge, U.S. Court of Appeals for the Tenth Circuit, Panel Discussion: Restricting Parental Speech, at The Federalist Society for Law & Public Policy 2007

A. *The Amorphous Best Interests Standard*

When a family unit dissolves,[22] parents who are unable to agree on how to structure their relationships with each other and their children often ask the State[23] or another arbiter[24] to assist them in reaching an agreement. Although "[t]he great majority of custody arrangements following divorce arise by arrangement of the parents,"[25] the *Morelli* case demonstrates that the contested issues are typically wrought with emotion and can result in intractable arguments and, ultimately, litigation. Even when ex-spouses do reach custody agreements, a "judge or magistrate is supposed to approve the agreement only upon determining independently that the agreement is not inconsistent with the substantive standard that applies when the court dictates a custody arrangement."[26] Thus, judges inevitably enter the intimate complexities of family life after divorce: "[I]t has become commonplace for courts presiding over divorce proceedings to fashion the frame and details of the relationship between parents and their children. Divorce courts not only decide who within divorcing families sees whom . . . but encroach upon the most intimate details of everyday familial life."[27]

In determining whether and how often children will see their parents and how parents should behave while with their children, "the legal standard the child custody court[s] traditionally appl[y] is the 'best interests of the child' test."[28] Although a few states do not rely on this traditional standard,[29] in thirty-five states "custody statutes or common law doctrines explicitly and unambiguously make the best interests or welfare of the child

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National Lawyers Convention (Nov. 16, 2007) [hereinafter Panel Discussion], *reprinted in* 6 GEO. J.L. & PUB. POL'Y 487, 487 (2008).

22 Although the State can become involved in custody disputes between unmarried parties, for the purposes of simplicity and brevity, this Comment focuses only on the adjudication of child custody issues in the context of the dissolution of married couples.

23 *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 907-10 (2003) (cataloguing state custody statutes).

24 *See* ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 50-67 (2004) (delineating several models for the settlement of divorce, including hiring a private, neutral arbiter and resolving many noncustody issues without state involvement).

25 Dwyer, *supra* note 23, at 910.

26 *Id.*

27 Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 424 (1997) (footnotes omitted).

28 SCHEPARD, *supra* note 24, at 162.

29 *See* Dwyer, *supra* note 23, at 907-09 (surveying factors other than the best interests of the child that are paramount in custody decisions).

the sole consideration" in custody proceedings,[30] and in several others, judges must consider the interests of the children either as the "primary" factor or equally with other factors.[31]

Typical best interests statutes subordinate all outside interests to that of the child at the center of the custody case. California's Family Code, for instance, declares: "[I]t is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children."[32] By contrast, multifactor consideration statutes found in other states generally "articulate[] factors that judges should consider in making best interest determinations."[33] The Minnesota legislature, for example, took this approach by listing, among other things, "the wishes of the . . . parents[;] . . . the intimacy of the relationship between each parent and the child[; and] . . . the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed"[34] as considerations for family court judges. These rules apply not only to initial and revised orders regarding physical custody of the children, but also to orders governing the behavior of former spouses with their children, toward each other, and even to third parties.

The best interests standard has been heavily criticized by scholars and practitioners "for being no standard at all because of its vagueness"[35] and for "creat[ing] great uncertainty about the probable outcome of custody litigation [thus] . . . encourag[ing] parents to litigate."[36] Although a focused critique of this standard is beyond the scope of this Comment, a great deal of scholarship has addressed the benefits and disadvantages of utilizing this system to structure familial relationships and a variety of potential alternatives have been proposed.[37] For the purposes of this Comment, the most

30 *Id.* at 909; *see also id.* at 907-10 (explaining that there are four categories of child custody statutes: those that do not mention the child's welfare at all, those that declare the interests of the children to be primary or paramount considerations, those that list multiple considerations including the child's interests, and those that cite best interests as the sole consideration).

31 *Id.* at 908.

32 CAL. FAM. CODE § 3020(a) (Deering 2012).

33 SCHEPARD, *supra* note 24, at 163.

34 MINN. STAT. ANN. § 518.17 (West 2012).

35 Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 108 (1997).

36 SCHEPARD, *supra* note 24, at 164.

37 *See, e.g.*, JOSEPH GOLDSTEIN ET. AL., THE BEST INTERESTS OF THE CHILD 50 (1996) (recommending an interdisciplinary "least detrimental alternative" standard in recognition of the fact that judges are not trained to properly oversee children's development); Dwyer, *supra* note 23, at 988 (suggesting a judge-as-fiduciary approach that ignores parental rights and interests);

relevant (and frequently criticized) element of the best interests standard is the vast amount of flexibility and discretion that it affords to judges. Statutes and the common law paint broad outlines for the standard. Nonetheless, judges still retain a great deal of autonomy when choosing how to navigate the murky, labyrinthine realm of intimate family activity. It may seem that such a foreign intrusion on such a fundamental area of life should be governed by stricter, more transparent standards.

Yet, as a family law matter, marriage is a contractual relationship defined and regulated by the State. Therefore, family court judges, as representatives of the State, are not truly alien to the broken relationships of parent-litigants. Decisions that judges reach under this discretionary best interests standard, however, can have major implications for the constitutional rights of the parents involved. When parents are neither physically nor psychologically abusive, and statutory factors appear to neutralize each other, it is not immediately clear that a judge can objectively determine which parent would most advance the child's best interests. "The adversary system tends to camouflage issues of concern to the child by directing the discussion at the rights of the parents. Commentators and practitioners . . . [argue] that child custody matters are really not about the best interests of the child, but instead are about the interests of the parents . . . ."[38] This observation reveals the second focus of this Comment: Should a parent's right to free speech be balanced against his children's best interests? If so, how should a judge weigh these interests, and what remedies should she grant?

B. *Custody Orders: The Basics*

As most family court orders are not published or kept in public records,[39] it is important to explain the structural and procedural aspects of custody orders to provide context. After ex-spouses who cannot agree on custody matters turn to the family court, there is usually an initial decision of physical custody, issued through a divorce decree or custody arrangement. Additional requirements are often attached to this initial order, mandating certain parental behavioral action or inaction.[40] Additionally, parent-litigants can generally return to court to modify custodial arrangements in

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Volokh, *supra* note 10, at 656-58, 713-14 (arguing that the best interests standard is unconstitutionally vague for court orders restricting parental liberties and proposing a flat prohibition on its use in this context); Weinstein, *supra* note 35, at 141 (criticizing the adversarial nature of the court system in the context of child custody adjudications and suggesting a more collaborative process).

38 Weinstein, *supra* note 35, at 88 (footnote omitted).

39 Emery, *supra* note 15, at 70 n.69.

40 *See, e.g.*, Dwyer, *supra* note 23, at 909 n.183.

light of changed circumstances, request new parental behavioral orders,[41] or allege violations of the current custody order and demand that the violating party be held in contempt of court.[42] There is no single all-encompassing decision, but rather an ongoing series of amorphous decisions and orders in which judges can mandate parents to act—or refrain from acting—in certain ways to serve the best interests of their children. Custody proceedings can thus be complicated, drawn-out litigations, and a judge's involvement in a family's life can last for years as custody orders are issued, revised, and reissued if circumstances change. Morelli's girlfriend, a contributor to the "Psycho Ex-Wife" blog, described this process, alleging, "We have been through 3 custody evaluations, 6 false contempt petitions, 3 custody schedules, 1 psych evaluation, 1 false child abuse allegation, 2 false calls to the local sheriff's office, 4 years of parental alienation, $80,000, . . . 1 restraining order, and we FINALLY have 50/50 custody of the children."[43]

Procedurally, this means that a family court judge's order restricting parental speech could be issued at any time (or multiple times) over a period of years during the ongoing child custody hearings. In *Morelli*, for example, the order requiring the ex-husband to take down his blog was issued in the context of the ex-husband's petition for a modified custody arrangement and the ex-wife's simultaneous petition to hold the ex-husband in contempt of court for allegedly violating a past order issued by the same judge.[44] Thus, a judge relying on the best interests standard may infringe parental constitutional rights when crafting orders that govern everything from visitation rights to where the children must spend their time on Sundays,[45] how one parent can refer to the other,[46] what a parent may say online,[47] and whether a parent may consume alcohol.[48] It is, therefore, vital to understand that these are not average court proceedings with final judgments. Rather, custody hearings are high-stakes, emotionally involved proceedings where judges wield immense power over all aspects of family life.[49] And often, the

41 These two remedies were sought in *Morelli*. Transcript of Order, *supra* note 2, at 2-3.

42 *See, e.g.*, Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 841-43, 853-70 (2007) (explaining that custody orders are innately coercive and demonstrating how the contempt process works when a custody order has been violated).

43 Alphonse, *supra* note 5 (quotation marks omitted).

44 Transcript of Order, *supra* note 2, at 2, 9.

45 *See supra* note 10 and accompanying text.

46 *See supra* notes 12 & 14 and accompanying text.

47 *See, e.g.*, Transcript of Order, *supra* note 2, at 9.

48 *See, e.g.*, *id.*

49 A type of proceeding with a comparable level of continued judicial observation is a criminal case involving jail time or probation. The State has an immense degree of control over the minutiae of the criminal-defendant's life in criminal proceedings, and it wields a similar amount of

sole check on this power is the best interests standard, which—as discussed—can yield unfair or arbitrary results.[50] This is a potential "twilight zone" of constitutional rights.

C. *Custody Orders and the First Amendment*

The most obvious solution in a vicious custody battle where one or both parents are engaged in "public[] browbeating"[51] that is potentially damaging to their children is for the family court judge to issue an order prohibiting the harmful speech. Although it is beyond the scope of this Comment to determine whether children in this environment actually suffer psychological harm, courts continually find that they do. In *Morelli*, for example, the judge declared, "The children love you both. This is not helping them. This is causing them to be upset. This is causing them to lose their confidence in their relationships with both of you."[52] This Comment therefore presumes that this type of parental fighting is harmful and, therefore, not in the best interest of the children.[53]

The next logical question is whether the best interests of the children can outweigh the free speech rights of their parents. The tension here is apparent: if family court judges are permitted to use the unconstitutionally vague best interests standard to justify restricting parental speech, the parent's First Amendment right to free speech is violated. All child custody orders must be approved by the court, and the court may alter them at will,

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power over battling parents constrained by custody orders. The problematic nature of this comparison is evident—families have committed no crimes; they have simply experienced a breakdown. *See* Dr. Jay Allen Sekulow, Am. Ctr. for Law & Justice, Panel Discussion, *supra* note 21, at 498 (observing that the dissolution of a marriage does not imply that the parents are incompetent). The enforcement of custody orders through findings of contempt also means that a party who is bound by a custody order can be brought back to court repeatedly, and his behavior is always under the microscope. *See, e.g.*, Mahoney, *supra* note 42, at 843 ("The regulation of post-divorce parenting conduct in this fashion can be experienced by parents as a serious interference with their autonomy. This intrusion by the State, in the form of enforceable judicial mandates about future conduct, is intended to accomplish the goal of supporting the relationships between children and both of their parents following divorce.").

50 *See supra* Section I.A and *infra* Part II.

51 Transcript of Order, *supra* note 2, at 8.

52 *Id.* at 11.

53 Psychologists have found that chronic parental arguing negatively affects children. *See, e.g.*, Daniel Goleman, *Chronic Arguing between Parents Found Harmful to Some Children*, N.Y. TIMES, June 25, 1985, at C3; Susan Pease Gadoua, *Divorce Doesn't Harm Children—Parents Fighting Harms Children*, PSYCHOL. TODAY (Nov. 15, 2009), http://www.psychologytoday.com/blog/contemplating-divorce/200911/divorce-doesnt-harm-children-parents-fighting-harms-children ("There are some interesting and surprising studies out that show even small amounts of parental conflict can cause problems for their children.").

notwithstanding the private agreement of the parties on the matter.[54] Therefore, it is vital that a framework be adopted that both advances children's best interests and protects parental rights.

II. FRAMEWORKS FOR RESOLUTION

> And then your boys will make it through their teenage years and they will go to college and they will get married and they will have a wonderful life. That is what I want done, so go do it.[55]

A. *The Conflicted Contemporary Jurisprudential Paradigm: Compelling State Interests*

The first framework for resolving the tension between custody orders restricting parental speech and the freedom of speech guaranteed by the Constitution is a traditional First Amendment analysis. The Supreme Court requires that content-based restrictions on speech be justified by a compelling state interest and evaluated using the strict scrutiny standard.[56] Utilizing an established constitutional standard would remove custody orders from the malleable, emotionally wrought, and child-focused context of the family courtroom and subject the orders to the same degree of scrutiny as any other governmental restriction on speech. Subsection II.A.1 argues that under traditional First Amendment doctrine, custody orders restricting speech would be subject to strict scrutiny as a content-based prior restraint and would likely not withstand strict scrutiny review.

At first blush, a child's best interests could potentially serve as a compelling state interest that justifies the State's exercise of its parens patriae power. There is no such easy resolution, however, because as subsection II.A.2 explains, courts have split over whether children's best interests constitute a state interest powerful enough to override parental free speech. The State's parens patriae interest in protecting children is important, but that interest does not provide courts with unfettered discretion to restrict parents' speech. The Supreme Court explained in *Palmore v. Sidoti* that, although "[t]he State, of course, has a duty of the highest order to protect the interests of minor children[,] . . . [p]ublic officials sworn to uphold the Constitution may not avoid a constitutional duty."[57] Thus, the State's parens

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54 *See* Dwyer, *supra* note 23, at 910 (explaining that the majority of custody arrangements arise by agreement of the parents, but still must be approved by a court).

55 Transcript of Order, *supra* note 2, at 12.

56 *See, e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000).

57 466 U.S. 429, 433 (1984) (reversing a judgment that denied custody to a mother because she lived with a man of a different race).

patriae power does not eliminate constitutional guarantees of free speech to parents involved in custody battles.

As subsection II.A.3 demonstrates, this "pure" First Amendment approach is problematic, especially when combined with the amorphous best interests standard. A court that refuses to recognize children's best interests as compelling is unlikely to restrict parental speech, thus increasing the risk that such speech will harm children. Conversely, a court that recognizes children's best interests as compelling could restrict parental speech without necessarily providing a correlative measure of protection for parental speech. This approach neither fully safeguards children nor thoroughly protects parents' constitutional rights and, thus, fails to provide an adequate solution.

1. Prior Restraints, Content-Based Orders, and Compelling State Interests

Two concepts entrenched in the Court's traditional First Amendment jurisprudence pose immediate obstacles to the constitutionality of a court order restricting parental speech. First, a custody order preemptively prohibiting a parent-litigant from saying certain things to his children or to the public is a prior restraint on speech. Second, a custody order forbidding a parent-litigant from expressing a certain message because of its substance is an impermissible content-based restriction on speech. Because the Court has developed a strong presumption against prior restraints and content-based restrictions, under a "pure" First Amendment approach, it is vital to address whether a court would consider the order at issue to be either of these two restrictions. If a court finds that an order constitutes a prior restraint or a content-based restriction, it should engage in strict scrutiny analysis to determine whether a compelling state interest is at stake and, if so, whether the law burdens more speech than is necessary to advance that interest.[58]

The Supreme Court first articulated judicial disfavor of prior restraints on speech when it struck down a Minnesota statute that restrained newspaper publication of "malicious, scandalous, and defamatory" content.[59] Although Justice Butler disagreed with the Court's opinion, he noted that "every man shall have a right to speak, write, and print his opinions upon any subject

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[58] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 270 (1981) (requiring a state university to show that its content-based regulation was necessary to serve a compelling state interest and was narrowly tailored to achieve that end).

[59] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 701-02, 713-14 (1931) (discussing the longstanding tradition against prior restraint of the press).

whatsoever, without any prior restraint, so [long as] he does not injure any other person[,] . . . disturb the public peace, or attempt to subvert the government."[60] The Court's disfavor of such restraints has also led it to carefully examine the effects of laws and orders to see if they are, in practice, prior restraints. For instance, in its 2010 decision in *Citizens United v. Federal Election Commission*, the Court declared part of the Bipartisan Campaign Reform Act of 2002 unconstitutional. It held that, although the Federal Election Commission's "regulatory scheme may not be a prior restraint on speech in the strict sense of that term,"[61] its restrictions still "function[ed] as the equivalent of prior restraint."[62] Prior restraints are therefore treated with suspicion, and proponents of such restrictive orders face a heavy burden in persuading a court that the restraints should be enforced. A custody order requiring a parent-litigant not to express certain sentiments to his children or the public, such as the one at issue in *Morelli*, would qualify as a prior restraint because it bans speech before the words are spoken and would thus be disfavored by the Court.

In addition to its aversion of prior restraints on speech, the Supreme Court "frequently has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content"[63] and that "[c]ontent-based regulations are presumptively invalid."[64] In *Citizens United*, the Court also highlighted the special treatment reserved for content-based restrictions on speech: "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."[65] A restriction is content-based if "the government has adopted a regulation of speech because of disagreement with the message it con-

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60 *Id.* at 733 (Butler, J., dissenting) (alteration in original) (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1880 (Boston, Little, Brown & Co. 5th ed. 1891)). The Supreme Court has consistently found a presumed lack of constitutionality for any injunction, issued either in the form of a statute or a judicial decree, that preemptively prohibits speech. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (holding that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," and invalidating the appellate court's order enjoining a racially integrated organization from distributing literature or picketing in the city (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968), and Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))).

61 130 S. Ct. 876, 895 (2010).

62 *Id.* at 896.

63 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1 (3d. ed. 2006).

64 *Id.* (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)).

65 *Citizens United*, 130 S. Ct. at 898.

veys,"[66] whereas a restriction is content-neutral "if it is justified without reference to the content of the regulated speech."[67]

A custody order prohibiting one parent-litigant from making negative comments about the other parent-litigant would constitute a content-based restriction. For example, directing a father to refrain from disparaging his ex-wife either in front of his children or publicly on the Internet constitutes a content-based restriction. The specific restrictions in *Morelli* are not merely content-neutral—they also target the content of the father's speech. For instance, he may talk to his children, he may post online, and he may talk about his ex-wife in front of their children, but he may not disparage his ex-wife in any of these fora. Thus, the restrictions do not dictate time, place, and manner, which would be content-neutral regulations, but rather the substance of the speech.

Classification "of speech restrictions between these two categories can be highly outcome-determinative, since the standard for determining the constitutionality of a content-based speech restriction [and a prior restraint] is much more exacting."[68] In *Turner Broadcasting Systems v. FCC*, the Court held that content-based restrictions must satisfy the high bar of strict scrutiny, whereas content-neutral regulations have to pass only intermediate scrutiny.[69] The court also noted that, under the standard of strict scrutiny, "[c]ontent-based speech restrictions are generally unconstitutional unless they are narrowly tailored to achieve a compelling state interest."[70] To satisfy the typical strict scrutiny requirements "[i]t is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal."[71] The presumption that content-based restrictions are unconstitutional is difficult to overcome.

Within the "pure" First Amendment framework articulated above, one particularly relevant government interest could potentially overcome the prohibitions on prior restraints and content-based restrictions: the government's parens patriae interest in protecting minors. In *Sable Communications*

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66 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted).

67 Hill v. Colorado, 530 U.S. 703, 720 (2000) (citations omitted).

68 Laurie S. Kohn, *Why Won't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 34, 11-12 (2001).

69 512 U.S. 622, 642 (1994); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (holding that content-based restrictions must be narrowly drawn to serve a compelling state interest).

70 *Turner*, 512 U.S. at 680.

71 *Id.*

of California, Inc. v. FCC, the Court explained that the "Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."[72] Thus, the Court explicitly held that if regulations designed to achieve this purpose were narrowly tailored to accomplish that goal, the content-based restrictions would not be found unconstitutional.[73] This rationale was used to uphold a federal statute permitting cable operators to decide whether to broadcast indecent television programming at certain times during the day.[74] Lower courts have also applied this principle to ordinances prohibiting the issuance of solicitation permits (such as for balloon performers or clowns) to convicted child molesters, as well as to other laws.[75]

These cases appear to be the exception, however, rather than the rule. Far more often, the State's interest in protecting children is insufficient to justify infringements on speech, as demonstrated by a series of Supreme Court decisions striking down laws meant to protect children by abridging adult speech.[76] With the proliferation of online child exploitation and sexually explicit or suggestive shows on cable television, state and federal legislatures are actively passing laws meant to prevent American children from being harmed. While this goal is noble, legislators have been unable to craft this legislation in a way that does not infringe on adults' constitutional

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72 492 U.S. 115, 126 (1989).

73 *Id.*

74 *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 754, 768 (1996) (permitting a regulation requiring thirty-days' notice to cable operators before broadcasting "patently offensive" programming).

75 *See, e.g.*, Hobbs v. County of Westchester, 397 F.3d 133, 150-54 (2d Cir. 2005) (holding that a permit requirement for street performers was content neutral because it targeted potentially harmful secondary effects).

76 *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738-42 (2011) (striking down as unconstitutional a California law restricting the sale of violent video games); Ashcroft v. ACLU, 542 U.S. 656, 665-73 (2004) (holding that the Child Online Protection Act would likely be found unconstitutional because filtering restrictions would achieve the same goal of limiting content while allowing for more potential access to web content); United States v. Playboy Entm't Grp., 529 U.S. 803, 825 (2000) ("Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech."); Reno v. ACLU, 521 U.S. 844, 874-79 (1997) ("[T]he [Communications Decency Act] lacks the precision that the First Amendment requires when a statute regulates the content of speech. . . . [T]he CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

right to free speech. In other words, the resulting statutes are not constructed in a way that is narrowly tailored to withstand judicial scrutiny.[77]

Custody orders restricting parental speech cannot be clearly differentiated from the First Amendment cases discussed above. Although the orders cite the need to protect the children's best interests, the custody orders are restricting *parental* speech and infringing on *parental* rights, which parents expect to be protected. After all, "when a parent seeks the divorce, it hardly follows that the government may require the parent to waive his constitutional rights as a condition of getting that divorce."[78] The Supreme Court's jurisprudence rejecting broad restrictions on adult speech as a means of protecting children suggests that the similar restrictions in custody orders would not be viewed favorably.

Custody orders that prohibit any future speech are prior restraints, and custody orders that enjoin speech expressing specific viewpoints are content-based. Given the incredibly high bar that content-based prior restraints on speech must meet, it is strange that this type of order was issued in *Morelli* without any discussion of the potential First Amendment issue and that these orders are rarely scrutinized by scholars and commentators. This subsection has described the key concepts for evaluating custody orders restricting parental speech under a "pure" First Amendment approach. The following subsection examines how reviewing courts are actually engaging in a balancing act that weighs parent-litigants' constitutional rights against the best interests of their children.

2. Compelling State Interests in the Context of Custody Orders: Current Case Law

Courts apply a predictable formula when determining whether a custody order violates the First Amendment. First, they consider the governing child custody statute; then, they determine whether the order is actually abridging parental speech; finally, they consider persuasive and mandatory authority to decide whether children's best interests constitute a compelling

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[77] Children's best interests are therefore not found sufficiently compelling to override the broad swaths of adult free speech restricted. The issues of compelling interests and narrow tailoring are intertwined in these instances because it is often not possible to draw the statutes any more narrowly while still accomplishing the goals of protecting children from allegedly harmful content. *See supra* note 76. This situation is similar to the judicial order in *Morelli*: the order likely fails the narrow tailoring test with the goal of protecting the children, but the only way to accomplish the type of overarching protection sought (the children not being exposed to any of their father's negative comments about their mother) is to ban all such speech entirely.

[78] Volokh, *supra* note 10, at 685.

state interest.[79] State courts struggle to evaluate these cases due to lack of precedent[80] and are often resigned to citing decisions and rationales from courts in other states.[81] Judges who find best interests to be a compelling state interest assume great latitude (potentially limitless discretion) to restrict parental speech under the vague best interests standard, whereas those who do not are unlikely to restrict parental speech despite its obviously detrimental effects on children.

a. *Case Law: Best Interests as Compelling*

The 1991 Florida case *Schutz v. Schutz* is a leading example of a child's best interests constituting a compelling state interest sufficient to satisfy the "pure" First Amendment test.[82] State courts that recognize children's best interests as compelling tend to agree with the rationale and outcome of *Schutz*, while states that reject this explanation tend to criticize the case.[83] In *Schutz*, the Florida Supreme Court carefully maneuvered around the First Amendment to uphold a divorce decree mandating that a mother "do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father . . . [and] to convince the children that it is the mother's desire that they see their father and love their father."[84] Florida is one of the thirty-five states that have a custody statute explicitly listing the child's best interests as the sole consideration in custody proceedings,[85] and the Florida Supreme Court noted that the acrimonious relations between their parents were threatening the children's best interests. The trial judge in *Schutz* noted the evident "acrimony and animosity between the adult

79 *See, e.g.*, *In re* Marriage of Candiotti, 40 Cal. Rptr. 2d 299, 303 (Ct. App. 1995).

80 *See, e.g.*, *In re* Marriage of Olson, 850 P.2d 527, 532 (Wash. Ct. App. 1993) ("Few other cases around the country have dealt with this issue.").

81 For instance, many state courts outside of Florida cite *Schutz v. Schutz*, 581 So. 2d 1290 (Fla. 1991), in adjudicating similar issues in custody cases. *See, e.g.*, *Marriage of Candiotti*, 40 Cal. Rptr. at 303 n.7 (citing *Schutz* to uphold an order preventing parents from disseminating information obtained during discovery, but allowing them to disseminate any information they obtained independently); *In re* Marriage of Geske, 642 N.W.2d 62, 70 (Minn. Ct. App. 2002) (citing *Schutz* to support restriction on disseminating images of children); Kessinger v. Kessinger, 829 S.W.2d 658, 663 (Mo. Ct. App. 1992) (citing *Schutz* generally to support limitations on parental speech); Borra v. Borra, 756 A.2d 647, 651 (N.J. Super. Ct. Ch. Div. 2000) (citing *Schutz* for authority to compel affirmative speech from parents); *Marriage of Olson*, 850 P.2d at 532 (citing *Schutz* for the proposition that parental speech can be limited to serve important government interests).

82 581 So. 2d at 1290-93.

83 *See, e.g.*, *Kessinger*, 829 S.W.2d at 663.

84 *Schutz*, 581 So. 2d at 1292.

85 *See* FLA. STAT. ANN. § 61.13(2)(b)(1) (West 2010); *see also* Dwyer, *supra* note 23, at 907-10 (listing states with similar custody statutes).

parties"[86] present, and ultimately opined, "the cause of the blind, brainwashed, bigoted belligerence of the children toward the father grew from the soil nurtured, watered and tilled by the mother"[87] before issuing the controversial divorce decree.

Justice Kogan, writing for the majority of the Florida Supreme Court, handled the free speech issue more delicately. He explained,

> [W]e read the challenged portion of the order at issue to require nothing more of the mother than a good faith effort to take those measures necessary to restore and promote the frequent and continuing positive interaction . . . between the children and their father and to refrain from doing or saying anything likely to defeat that end.[88]

The trial court ordered the wife in *Schutz* not to say anything in the future that could potentially impair her children's relationship with their father[89]: this is a clear case of a content-based prior restraint. The Florida Supreme Court did not address this issue. Instead, it focused on the positive free speech rights *not* offended by the order, explaining, "There is no requirement that petitioner express opinions that she does not hold, a practice disallowed by the first amendment."[90] These legal gymnastics avoided an explicit holding that the order constituted a content-based prior restraint that would be subject to strict scrutiny.[91]

Several other state courts, often citing *Schutz*, have followed the Florida Supreme Court's lead in restricting parents' speech in the name of their children's best interests. For example, in *In re Marriage of Geske*, the Minnesota Court of Appeals, citing *Schutz*, acknowledged that "several other states have noted that the best interests of children can be a compelling state interest justifying a prior restraint of a parent's right of free speech."[92] Premising its decision upon the lower court's finding that the father was psychologically harming his children by distributing their pictures to the media in connection with a story about visitation rights, the court upheld an injunction prohibiting the father from providing his children's pictures to the media.[93] Similarly, in *Borra v. Borra*, a New Jersey court, citing *Schutz*, upheld a lower court's order prohibiting an ex-husband from filing an

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86 *Schutz*, 581 So. 2d at 1291 (citations and quotation marks omitted).
87 *Id.* at 1292 (quotation marks omitted).
88 *Id.* (emphasis added).
89 *Id.*
90 *Id.* (citations omitted).
91 *See supra* notes 56-57 and accompanying text.
92 642 N.W.2d 62, 70 (Minn. Ct. App. 2002) (citations omitted).
93 *Id.* at 70-71.

objection to his ex-wife's membership at a country club the family frequented.[94] The court asserted, "The exercise of *parens patriae* jurisdiction is always foremost, such that when presented with a choice between parent's rights and children's rights," courts will always find "children's welfare and best interests . . . paramount."[95] Thus, citing the children's continued interest in attending the club with their mother and the State's interest in encouraging a healthy relationship between parents and children, the court explained, "In this context, despite the husband's argument that the Court has infringed upon his rights of freedom of speech, the court's first and primary concern must be the welfare of the children."[96]

The citations in these cases to decisions of courts in other states demonstrate that courts are struggling with a lack of precedent or comparable case law in their own states to resolve conflicts between restrictive custody orders and the First Amendment.[97] Courts accepting the *Schutz* reasoning tend to hold best interests as a compelling state interest and permit the speech restriction. The next subsection addresses the courts that reject the *Schutz* best interests rationale.

b. *Case Law: Best Interests as Insufficient*

Several states have rejected *Schutz*'s best-interests-as-paramount approach. In *In re Marriage of Olson*, a Washington court of appeals suggested that the same interests at stake in *Schutz* were present in *Olson*.[98] It explained, "Counter-balancing Mr. Olson's loss of First Amendment rights is the State's and Mrs. Olson's interest in preserving and fostering healthy relationships between parents and their children."[99] The court, however,

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94 756 A.2d 647, 651 (N.J. Super. Ct. Ch. Div. 2000).

95 *Id.* at 650 (citations omitted).

96 *Id.* Separate from the *Schutz* line of cases, in *In re Marriage of Hartmann*, 111 Cal. Rptr. 3d 242, 245 (Ct. App. 2010), a mother challenged a speech restriction not to interfere with or undermine a custody order. The court noted, "In family law cases, courts have the power to restrict speech to promote the welfare of the children. Thus courts routinely order the parties not to make disparaging comments about the other parent to their children or in their children's presence." *Id.* The court held that because the order at issue prohibited only speech that interfered with the custody order, it was not an unconstitutional restraint on her freedom of speech. In this case, the compelling state interest was a combination of enforcing court orders and advancing the children's best interests. It does not appear that other states have adopted this same approach.

97 In cases where the parent whose speech is restricted by the custody order does not challenge the restriction on constitutional grounds, courts have affirmed the order without question. *See, e.g.*, Gifford v. Tuggle, No. CA 06-601, 2007 WL 266443, at *1 (Ark. Ct. App. Jan. 31, 2007) (affirming an order restricting a mother and her fiancé from taking any action that would "alienate the minor child from his father").

98 850 P.2d 527, 532 (Wash. Ct. App. 1993).

99 *Id.*

rejected *Schutz*'s approach: "Although the welfare of children is the State's paramount concern in dissolutions, restraining speech merely on the basis of content presumptively violates the First Amendment."[100] The court then concluded, "Because freedom of speech is a paramount constitutional right, we interpret the trial court's prohibition against 'disparaging remarks' to be those which are defamatory of his former wife. So interpreted, we find no First Amendment violation."[101] The court refused to embrace the children's best interests approach if it meant inhibiting their father's right to free speech. In *Kessinger v. Kessinger*, a Missouri court of appeals reached a similar decision in regard to a custody order that required a mother and father to "take no action . . . which would demean the other" through speech or conduct in front of their child.[102] The court noted that the legislature made it the public policy of the State to ensure that children have contact with both parents after divorce, and that trial courts can order parents to comply with custody orders. Citing *Schutz*, the court ultimately determined, however, that there was no authority to suggest that the First Amendment would permit prior restraints on parental speech even if it might harm children.[103]

Other courts have strongly rejected *Schutz*'s ideological underpinnings. These cases are especially relevant because they involve orders restricting parental speech to the public, like the order regarding the "Psycho Ex-Wife" blog in *Morelli*. In the Nebraska case *In re Interest of T.T.* and the Indiana case *In re Paternity of K.D.*, the courts found juvenile court orders that prohibited parents from disseminating information regarding their son's past and ongoing medical treatment to the public,[104] and that restricted a mother from discussing her child's paternity case with the media,[105] respectively, to be unconstitutional prior restraints. In both cases, the courts noted that prior restraints were presumptively unconstitutional and only a compelling state interest could overcome such a presumption.[106]

In *Interest of T.T.*, the court agreed with the juvenile court that the medical disclosures being made to the media by the parents about their child were not in his best interests; however, the court asserted, "The fundamental difficulty is that the child's best interests are not the standard . . . [for] allowing the lawful entry of a judicial order imposing a prior restraint on

100 *Id.* (citation omitted)
101 *Id.*
102 829 S.W.2d 658, 663 (Mo. Ct. App. 1992).
103 *Id.*
104 *In re* Interest of T.T., 779 N.W.2d 602, 609 (Neb. Ct. App. 2009).
105 *In re* Paternity of K.D., 929 N.E.2d 863,865 (Ind. Ct. App. 2010).
106 *Paternity of K.D.*, 929 N.E.2d at 868-69; *Interest of T.T.*, 779 N.W.2d at 614.

speech."[107] Citing the heavy burdens placed on justifying prior restraints on speech, the court in *Interest of T.T.* ultimately held that "[a] restraint on speech against disclosure to the public of information about a juvenile because it is in the juvenile's 'best interest,' as the juvenile court found, is an insufficiently justified prior restraint on speech."[108] The State's interest in protecting children simply was not strong enough to overcome parental rights to free speech. The same result was reached in *Paternity of K.D.*, in which the court found that, although the mother's discussions with the media about an ongoing paternity case were not in her child's best interest, a child's best interest is simply not enough to overcome the heavy presumption against prior restraints on speech.[109]

These cases focus on the rights of parents rather than on the potential detriment to the children and the interest of the State in promoting family harmony. Additionally, while *Olson* and the *Schutz* line of cases demonstrate that state courts disagree as to whether best interests can be compelling enough to overcome parental claims to free speech ("speech to the children" cases), *Interest of T.T.* and *Paternity of K.D.* also bring an important, potentially distinguishing element into the discussion. In the latter two cases, the courts struck down orders restricting parents from speaking not just to their children, but also to the media ("speech to the public" cases). This difference may relate to different understandings of the protections of the First Amendment. Professor Volokh, for instance, would permit courts to prohibit parents from making disparaging remarks about their ex-spouses in front of their children because he believes these remarks do not contribute to public debate.[110] Under this understanding of the First Amendment, rather than a right-to-receive-information-freely paradigm or a right-to-speak-freely paradigm, the audience affects the legitimacy of the speech. "Speech to children" is of relatively little value, but "speech to the public" weighs more heavily. The public nature of the comments in *Paternity of K.D.* and *Interest of T.T.* (not present in the *Schutz* line of cases) may, in some courts' views, add additional value to one parent's speech, even if it is disparaging to the other parent and harms their children.

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107 *Interest of T.T.*, 779 N.W.2d at 620.

108 *Id.* at 620.

109 *Paternity of K.D.*, 929 N.E.2d at 869.

110 *See* Volokh, *supra* note 10, at 716 (noting that restrictions on nonideological speech "seem unlikely to materially interfere with public debate, and likely to protect both the children's best interests and the other parent's rights").

3. Irreconcilable Differences in State Courts' Analysis of Custody Orders and the First Amendment

State courts currently disagree about several elements of custody order disputes. First, courts diverge on whether custody orders or divorce decrees constitute prior restraints when they mandate that parent-litigants *not* say specific things to each other, their children, or the media. In *Schutz*, *In re Marriage of Hartmann*, *Kessinger*, and *Olson*, clear content-based restrictions on parental speech were either not addressed as prior restraints or quickly skipped over. In other cases, the orders are explicitly referred to as prior restraints. Second, the courts that venture into strict scrutiny analysis do not agree on whether the best interests of the child can constitute a compelling state interest that outweighs parental rights to free speech. The courts in *Schutz* and *Borra* concluded that advancing a child's best interest is a compelling state interest that justifies restricting parental speech, whereas the courts in *Olson*, *Kessinger*, *Interest of T.T.*, and *Paternity of K.D.* all reject that idea.

As described above, under a "pure" First Amendment analysis, custody orders prohibiting criticism of one parent by the other are content-based prior restraints that must be evaluated under a strict scrutiny standard. The problem with this "pure" First Amendment approach is that it does not recognize the realities of the family law courtroom or the children that the parens patriae power is meant to protect. In cases in which children's best interests are identified as compelling, the "pure" First Amendment analysis, when combined with the vague and amorphous best interests standard, provides judges with too much discretion to restrict or compel parental speech that may not actually harm the children. In *Schutz*, for instance, the court required the mother to engender in her children a loving feeling toward their father by not making any negative statements about him and actively assuring her children of her love for him.[111] But whether the environment the court ordered was actually in the children's best interest is unclear, and the best interests standard does not seem to provide adequate constitutional safeguards for parents. By focusing almost solely on the children, the standard allows parents' constitutional speech rights to be lost in the fray.

Yet something in the best interests standard seems worth saving: the recognition of the State's parens patriae interest in rearing children safely. Courts that do not recognize children's best interests as compelling produce decisions that may harm the children involved. In *Kessinger*, a speech to the

111 Schutz v. Schutz, 581 So. 2d 1290, 1292 (Fla. 1991).

children case, the court refused to recognize the children's best interests as compelling, thus allowing the parents to say demeaning things about each other in front of the children and to the public despite the lower court's *explicit* finding that this would not be in the best interests of the children.[112] The speech to the public cases also demonstrate the harsh results of this approach. In *Interest of T.T.*, the mother told the media the details of her child's medical treatment, and, while the reviewing court explicitly recognized that this would likely be humiliating and result in unwanted, negative attention to her child, it ultimately held that the child's best interests were insufficient to uphold orders imposing prior restraint.[113] In the speech to the public cases, the potential First Amendment public debate implications are elevated, but so too is the potential harm to the child. In those cases, the child's story is disseminated widely, yielding more negative attention and potential humiliation than if the information were given privately. By focusing only on parents' rights, this paradigm often ignores children's interests.

Thus, the "pure" First Amendment approach in conjunction with the best interests standard is both too stringent and too weak—problematically both overinclusive and underinclusive depending on the court's approach. Where courts recognize best interests as compelling, the resulting decisions often infringe on parental speech without a correlative reduction of harm to the children. Conversely, where courts do not recognize best interests as compelling, parental speech is unrestrained at the potential cost of harm to the children. This standard is thus inadequate for the resolution of the constitutional problems this Comment has identified.

B. *Stepping Outside the Constitution*

The strict scrutiny approach examined above seems out of touch with the current practice in family law courts, in addition to being constitutionally problematic and ambiguous when combined with the best interests standard. The judge in *Morelli* issued the order without reference to its constitutionality, and it appears from the case law that many other judges are issuing similar orders.[114] This may be the nature of family court: a revolving door of grievances premised upon intimate relationships, emotion, and anger. Perhaps a radical new doctrinal approach to the role of the judge in family

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112 Kessinger v. Kessinger, 829 S.W.2d 658, 663 (Mo. Ct. App. 1992) (noting that the trial court "found that [the] mother had alienated the child from [the] father by making false accusations about him").

113 *Interest of T.T.*, 779 N.W.2d at 620 (holding that restricting disclosure of information because it is in the child's best interests is an insufficiently justified prior restraint on speech).

114 *See supra* Section II.A.

court proceedings would resolve the inherent First Amendment problems. Professor James Dwyer has proposed one such normative idea: the judge as fiduciary for the child. To Dwyer, judges should cast aside constitutional limits and do what is best for the child by acting exactly as the child would act if he or she could.[115] Although this idea has attracted little mainstream attention and has been quickly dismissed by Professor Volokh without much consideration of potential precedential support,[116] Professor Dwyer's idea provides a potential solution to the conundrum addressed by this Comment and may be more aligned with actual family court practice than the intensive exercise of strict scrutiny review.

The immediate and obvious problem with Dwyer's idea is that judges, as state actors, cannot simply remove themselves from constitutional boundaries. Dwyer himself does not appear to lay out any type of state action doctrine, and Volokh does not consider it, merely seeing a "recipe for broad state control over what views children are taught . . . in the name of serving children's best interests" and "the coercive homogenization of public opinion that the approach would yield" while focusing on First Amendment violations rather than Fourteenth Amendment justifications.[117] What Volokh does not question, but will be addressed below, is whether a judge is actually a state actor in his role as fiduciary for the child; if not, the First Amendment does not bind him as Volokh assumes.

Professor Dwyer conceptualizes the judge's role as a child's fiduciary or proxy.[118] This conception places children's rights at the center of the proceedings and casts aside parental rights as irrelevant. Just as adults can pick their relationships freely, children, or their proxies—in this case, the judge—should be permitted to do so as well, regardless of *any* constraints, including those imposed by the Constitution.[119] The *sole* consideration for the judge is what the child would choose. Nothing else—especially the rights of parents—is relevant. Dwyer explains, "[t]he state should not even recognize, let alone act on, rights of anyone other than the children in these cases and . . . the state should be viewed in these cases as stepping outside the bounds of the Constitution to a large extent."[120] Under Dwyer's conception, only the judge is suited to be the child's fiduciary: "Surely if a private party were acting in a similar fiduciary role for a child, that private decision

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115 JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 131 (2006).

116 *See* Volokh, *supra* note 10, at 694-97 (calling Professor Dwyer's proposal "a mistake" and asserting that it would lead to inappropriate government intrusion).

117 *Id.* at 696-97.

118 DWYER, *supra* note 115, at 131.

119 *Id.* at 124, 172.

120 *Id.* at 192.

maker would not be constrained by interests of third parties in nondiscrimination or religious freedom or required to act so as to advance social equality."[121]

Although this conception may sound constitutionally "dangerous,"[122] especially to those who believe that a judge must always be bound by social equality and religious freedom in all of his actions on the bench, Dwyer reminds readers that rules often assumed to be "natural," beginning with the right to take one's child home from the hospital,[123] are all actually engineered by the State. The State defines parentage,[124] determines who has a right to visit children,[125] and regulates numerous familial issues. Dwyer opines that the legal landscape "makes plain that the state is deeply involved, in a complex way, in ordering children's relational lives. Idyllic views of the family occupying a private sphere untouched by the coarse hands of the state, absent serious dysfunction, are simply fiction."[126] This may not sound as "dangerous" if judicial decisions in the area of custody orders are not actually deemed to be exercises of state actions for the purposes of the Fourteenth Amendment.

1. State Action

In the case of a judge issuing a custody order, "[a]t first blush, the requisite 'state action' would here seem obvious,"[127] because the judge, endowed with state power, is acting in his official judicial capacity to adjudicate the rights and obligations of the parent-litigants before him. It has thus generally been assumed that judicial orders, such as the ones at issue here, constitute state action.[128] Establishing state action, however, is vital to a demonstration of the potential constitutional conflict between judicial issuance of orders that restrict parental speech and the First Amendment's guarantee of free speech.

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121 *Id.* at 193.

122 Sekulow, Panel Discussion, *supra* note 21, at 498.

123 *See* DWYER, *supra* note 115, at 26-35, 135-40 ("From the perspective of children's rights, then, maternity rules clearly do not confer on newborn children an absolute right in connection with formation of a mother-child relationship.").

124 *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 126 (1989) (denying the illegitimate father of a child born to a married woman "parental prerogatives" such as visitation).

125 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 67 (2000) (invalidating a statute granting grandparents the right to visit their grandchildren over parents' objections).

126 DWYER, *supra* note 23, at 985.

127 Dahl v. Akin, 630 F.2d 277, 280 (5th Cir. 1980).

128 *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 n.1 (1984) (noting that "the actions of state courts and judicial officers . . . have long been held to be state action governed by the Fourteenth Amendment").

The issuance of custody orders is exclusively within the purview of state courts because the domestic relations exception prohibits federal courts from adjudicating this type of family law issues under diversity jurisdiction.[129] States are still bound to the guarantees of the Bill of Rights through the Court's incorporation doctrine, and the right to freedom of speech as articulated in the First Amendment was incorporated against the states in *Gitlow v. New York*, when the Supreme Court decreed that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[130]

Courts' general treatment of judicial orders on appeal suggests that judicial decrees are implicitly understood to qualify as state action; often, the issue of state action is assumed satisfied rather than explicitly discussed.[131] In *Ex parte Virginia*, the Supreme Court explained, "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to

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129 *See* Barber v. Barber, 62 U.S. 582, 584 (1858) (holding that federal courts cannot exercise diversity jurisdiction over suits requesting divorce or alimony); *see also* Ankenbrandt v. Richards 504 U.S. 689, 716 (1992) (Blackmun, J., concurring) (explaining that there are four types of "domestic relations" actions: those involving declarations of status such as "marriage, annulment, divorce, custody, and paternity"; those involving "declarations of rights or obligations arising from status" such as "alimony, child support, and division of property"; "secondary suits to enforce declarations of status, rights, or obligations"; and "suits not directly involving status or obligations arising from status but that nonetheless generally relate to domestic relations matters"). The domestic relations exception has been interpreted rather strictly, which likely contributes to the lack of attention these cases receive from federal courts, scholars, and commentators. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 13 (2004) ("While rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law[,] . . . in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." (citation omitted)). However, violations of federal constitutional rights appear to qualify as the type of rare instance cited in *Elk Grove*, so appeals to federal appellate courts premised on violations of vital First Amendment free speech rights could potentially be heard. *See, e.g.*, *Palmore*, 466 U.S. at 433 (deciding equal protection issue arising under the Fourteenth Amendment in child custody case).

130 268 U.S. 652, 666 (1925).

131 *See, e.g.*, *In re* Marriage of Hartmann, 111 Cal. Rptr. 3d 242, 245 (Ct. App. 2010) (entertaining First Amendment challenge of restraining order and assuming, without discussion, state action); *In re* Marriage of Candiotti, 40 Cal. Rptr. 2d 299, 303 (Ct. App. 1995) (striking down a restraining order and assuming, without discussion, state action); Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991) (hearing an appeal of post-dissolution order based on a free speech challenge and assuming, without discussion, state action); *In re* Marriage of Geske, 642 N.W.2d 62, 67 (Minn. Ct. App. 2002); Borra v. Borra, 756 A.2d 647, 649 (N.J. Super. Ct. Ch. Div. 2000) (hearing a First Amendment challenge of a family court order and assuming, without discussion, state action); *In re* Marriage of Olson, 850 P.2d 527, 527-28 (Wash. Ct. App. 1993) (same); Dickson v. Dickson 529 P.2d 476, 477 (Wash. Ct. App. 1974) (same).

enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or *judicial*."[132] There, the Court concluded that a judge's refusal to permit African American jurors to serve on the jury constituted state action in violation of the Fourteenth Amendment's Equal Protection Clause.[133] The natural conclusion that a judge must be exercising state power when acting in his official judicial capacity has been essentially unexamined and unquestioned, at least at the Supreme Court level.[134] Further, the Court has continued to assert this ideal in passing, noting that judges are "beyond all question . . . state actor[s],"[135] and finding that judges, as branches of the sovereign state exercising state action in their official capacities, are absolutely immune from suit.[136] In one of the few Supreme Court cases addressing child custody, *Palmore v. Sidoti*, the Court considered whether a judge's custody order constituted state action, stating tersely in a footnote, "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment."[137] In *Palmore*, the Court struck down the custody order award based solely on racial considerations and forbade lower courts from utilizing race in this manner in custody proceedings.[138]

Perhaps one of the most analogous judicial–state action cases is the celebrated *Shelley v. Kraemer*, which held that state court judges cannot enforce racially discriminatory restrictive housing covenants signed by private parties.[139] "Enforcement" in that case meant that the trial judge approved the covenants, declared them legal, and engaged state machinery to enforce them. On the issue of whether judicial enforcement of a private party's agreement could constitute state action, the court began by noting that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."[140] The Court asserted that judicial enforcement of a covenant

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132 *Ex parte* Virginia, 100 U.S. 339, 346 (1879) (emphasis added).

133 *Id.* at 348.

134 See *supra* subsections II.A.2.a–b for an examination of lower court decisions on the subject.

135 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991).

136 *See, e.g.*, Butz v. Economou, 438 U.S. 478, 508-09 (1978) (reaffirming the established principle that judges are afforded absolute immunity); Stump v. Sparkman, 435 U.S. 349, 355 (1978) (same); Pierson v. Ray, 386 U.S. 547, 554 (1967) (same), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

137 466 U.S. 429, 432 n.1 (1984) (citing Shelley v. Kraemer, 334 U.S. 1 (1948); *Ex parte Virginia*, 100 U.S. at 339).

138 *Id.* at 434.

139 334 U.S. at 19-20.

140 *Id.* at 14.

which violated the Equal Protection Clause of the Fourteenth Amendment constituted unconstitutional action by a state actor.[141]

The state enforcement action challenged in *Shelley* is analogous to situations in which parent-litigants are issued a custody order or divorce decree and then are held in contempt for violations of that order. When a litigant is held in contempt, judges may engage the State's machinery to force the litigant to comply with the court order. In California, for instance, there are special procedures for violations of family court orders, with punishments including imprisonment.[142] Although these consequences may not be quite as permanent as the state action in *Shelley*, it clearly involves a drastic loss of liberty. Commentators have argued that, where a party has been ordered to take his child to church or to refrain from saying certain things about the child's other parent citing the child's interest in maintaining religious involvement, imprisonment for failure to do so seems constitutionally problematic.[143] The framework as constructed thus far reveals that the First Amendment applies to states, that judicial decrees restricting parental free speech are state actions and may be unconstitutional, and that the enforcement of these decrees may infringe upon the liberty of parent-litigants. This possible loss of liberty for exercising rights that are potentially constitutionally protected lends a heightened sense of urgency to the determination of whether custody orders restricting parental speech violate the First Amendment.

Despite *Shelley*'s prominence in the realm of state action doctrine, several commentators have noted that lower courts are reluctant to apply *Shelley*'s holding to cases where race is not involved, which suggests that the race cases are perhaps sui generis.[144] The Fifth Circuit has stated:

> [W]hile . . . judicial action can constitute "state action" under the Fourteenth Amendment . . . it has never been held that all state court litigation must therefore result in dispositions that, if undertaken by state agents, would be constitutional . . . . Precisely when, as in Shelley, judicial involvement in

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141 *Id.* at 23.

142 *See* CAL. CIV. PROC. CODE § 1218(c) (Deering 2012) (authorizing penalties of community service, fines, and imprisonment up to 120 or 240 hours for violations of orders issued pursuant to the Family Code).

143 *See* Volokh, *supra* note 10, at 716-17 (arguing that restrictions should be tailored to permit religious or ideological speech).

144 *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 463-64 (2007) (arguing that *Shelley* has been ignored because it blurs the distinction between public and private action).

> private litigation assumes constitutional dimensions is a problem that has perplexed courts and scholars for decades.[145]

Professor Volokh's criticism of Professor Dwyer's theory includes an assertion that "not only the First Amendment but also *Palmore v. Sidoti* stand in the way of Professor Dwyer's proposal."[146] But if the Fifth Circuit and other commentators are correct, when values of racial equality are not involved (as they were in *Palmore*), then perhaps a judge's order in private litigation is *not* state action subject to the restraints of the First Amendment. This idea has also been suggested in several cases, in both majority and dissenting opinions, and these precedents serve to challenge current assumptions regarding the nature of the Fourteenth Amendment and state action doctrine.[147]

One case that yields the type of counterintuitive result demanded by Professor Dwyer's theory is *Polk v. Dodson*, in which the Supreme Court held that public defenders are not state actors.[148] In that case, the Court noted the unique function that the public defender serves and asserted that "a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'"[149] Although the public defender is paid by the State, assigned by the State, and for all intents and purposes appears to be a state actor, his function dictates that he is not. He is *solely* focused on the interests of his client, thus it would not make any sense to say that he is working to advance the purposes of a government that is actively prosecuting his client.

Dwyer's concept of judge-as-fiduciary seems to fit naturally into *Dodson*'s function-based test. Dwyer's premise is that judges trying to determine what is in the best interest of children should focus only on the child's best interests and ignore all other parties involved, including the State's social goals and the parents' constitutional rights. Under this conception, the judge, when acting as an agent for the child, and tasked *solely* with advancing the child's interests, seems quite similar to the public defender advancing the undivided interests of his client. Thus, both public defender and judge are deprived of their state actors status as a result of their fiduciary functions.

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145 Dahl v. Akin, 630 F.2d 277, 280 (5th Cir. 1980).

146 Volokh, *supra* note 10, at 697.

147 *See, e.g.*, Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281, 1289 n.3 (7th Cir. 1990) (Ripple, J., dissenting) ("It is also clear that [in a] criminal trial where the court inquires into the reasoning of the prosecutor for the use of a peremptory challenge, the Supreme Court would not consider the trial judge to be a state actor for the purposes of equal protection analysis.").

148 454 U.S. 312, 318-19 (1981) (noting that courts of appeals agree that a public defender is not a state actor merely by virtue of being an officer of the government's court).

149 *Id.* (citation omitted).

Envisioning the judge as a fiduciary would resolve fears that children's best interests get lost in a system that is focused only on parents' grievances.[150] Instead, what a child would decide becomes paramount. In contrast to the "pure" First Amendment approach that does not recognize best interests as compelling, this approach recognizes children's interests as the most important element of custody decisions.

2. Viability of Professor Dwyer's Judge-as-Fiduciary Concept: Descriptive Accuracy and Social Costs

The public defense system has not coercively homogenized the public.[151] Thus, despite Volokh's quick dismissal,[152] the judge-as-fiduciary concept is not completely alien to current precedent. In fact, given relevant case law and the nature of custody proceedings (especially where courts view best interests as compelling enough to override parental free speech rights), it is fair conjecture that judges *do* view themselves as fiduciaries for confused children caught in the crossfire of warring parents. In *Morelli*, for instance, the judge did not seem to consider the implications of her order on the free speech rights of the father; instead, she considered only how the children would choose if they could and which outcome would benefit them the most. Recall the judge's assertion that the children "don't want to hear that dad is a bastard . . . [or] mommy's a bitch [because] [t]hat's someone they love[,] [a]nd when you say something about someone they love, you hurt them."[153] The judges' orders in cases like *In re Marriage of Hartmann*, *Borra v. Borra*, and *Schutz v. Schutz* seem to reflect similar child-centered reasoning.[154] By acknowledging that this may be how family judges *actually* approach these situations, the judge-as-fiduciary conception goes a long way in making the custody adjudication process more transparent. Under the "pure" First Amendment approach, judges often privately view themselves as children's fiduciaries, but then publicly stretch and shape their orders to

150 *See, e.g.*, Weinstein, *supra* note 35, at 88 (arguing that the adversarial nature of the child custody system shifts the focus to parents' rights instead of the best interests of the children).

151 *See* Volokh, *supra* note 10, at 696. Just as each public defender is different and, thus, gives his client different advice, each judge is different and different life experiences will inform his role as fiduciary for a child. Similarly, each child is different, and when a child is old enough, he can express his preferences to the judge, mitigating any homogenizing effect of the judge-as-fiduciary. Custody adjudications are *already* fact-bound inquiries, so, as Dwyer suggests, it would not waste judicial resources to consider what the child would pick. Additionally, even if there were a homogenizing effect to the rule that no divorced parent could disparage the other parent, such a rule may reduce the conflict and tension felt by the children of those parents.

152 *Id.*

153 Transcript of Order, *supra* note 2, at 11.

154 *See supra* Section II.A.

fit an alleged constitutional mold, which can make it difficult for reviewing courts to understand the underlying factors of the decisions and thus evaluate those decisions properly. By acknowledging that family court judges view themselves as fiduciaries for the children in their courtrooms, the process becomes more transparent for all parties.

Yet even if this model is descriptively accurate, it does not follow that it is desirable to recognize judges as "stepping outside" the Constitution when adjudicating custody issues in family court.[155] Negative social implications seem to follow when family law judges refuse to consider parental constitutional rights. For instance, although the Court in *Palmore* ruled that judges could not take race into account when making custody decisions, Dwyer explicitly rejects the notion that social goals should influence judges' decisionmaking.[156] While that may be necessary in his judge-as-fiduciary model, it is certainly troubling in a society that strives to be as color-blind as possible and that rightly hailed *Palmore* as a pathbreaking case.

If judges were no longer bound by the restraints of the Constitution, their orders could violate several constitutional rights. A line could be drawn short of First Amendment violation, but that may implicate other constitutional provisions. Perhaps Americans are willing to endure limited incursions into parental rights in relation to free speech or the exercise of religion in the context of divorced families. But what if judges began interfering in the lives of intact families or deciding to give away people's genetic children at birth to better suited parents with more resources? Professor Dwyer's suggestion that parent-child relationships are malleable creations of the State rather than intimate genetic relationships[157] leads to the conclusion that the latter scenario could be a reality. The meddling of the State with intact families raises immediate concerns of violations of constitutional guarantees of privacy in the home.[158] Similarly, taking away babies from a genetic mother who intends to keep her child to give them to better suited but unrelated parents raises immediate due process problems.[159] The line-drawing problems of such a system deserve serious consid-

155 *See, e.g.*, Volokh, *supra* note 10, at 694-97 (criticizing Dwyer's conception).

156 *See* Dwyer, *supra* note 115, at 152.

157 *See supra* note 123 and accompanying text.

158 *Cf.* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (striking down a state law prohibiting the possession of birth control by a married couple due to the constitutionally protected privacy interests at stake).

159 *Cf.* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (striking down a law automatically taking away custody of children from an unmarried father upon the death of the mother on equal protection grounds). *But cf.* Michael H. v. Gerald D., 491 U.S. 110, 121-27 (1989) (explaining that a merely genetic parent-child relationship without continued parent-child contact does not confer a due process right to a parent-child relationship); Lehr v. Robertson, 463 U.S. 248, 261 (1983) (same).

eration, and may be fatal to Dwyer's theory. Certain aspects of family life, including the right to take one's genetic child home from the hospital and govern one's intact family as one wishes (as long as no harm is caused to anyone) are deeply ingrained in American culture.

It seems that even though Dwyer's conception is innovative and perhaps justified by precedent, America is not ready for a standard that ignores parental rights in order to advance children's best interests. The judge-as-fiduciary model is simply fraught with too much potential for abuse of discretion and too removed from any constitutional mooring to be widely accepted. Thus, despite its potential, this Comment rejects this approach for a standard that remains constitutionally bound and consistently considers both children's interests *and* parental rights.

C. *The Substantial Harm Standard*

The final framework to be examined is the substantial harm standard, which courts currently use to resolve the tension between parents' liberty interest in the free exercise of religion and their children's best interests.[160] The substantial harm standard mandates that "courts may restrict the parent's right [to the free exercise of religion] only when the evidence demonstrates a substantial threat of physical or mental harm to the child."[161] Because courts already use this standard to negotiate the thorny issue of restricting parental rights to protect children, and it stems from a strict First Amendment free exercise analysis requiring the presence of a compelling state interest to restrict parental rights,[162] it seems well equipped for adoption in the context of restrictions on parental free speech.[163]

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160 *See, e.g.*, Kendall v. Kendall, 687 N.E.2d 1228, 1232 (Mass. 1997); LeDoux v. LeDoux, 452 N.W.2d 1, 5-6 (Neb. 1990); Shepp v. Shepp, 906 A.2d 1165, 1173-74 (Pa. 2006).

161 David E. Cherny & Matthew W. Perkins, *Religious Issues in Child Custody Proceedings: Separation of Church and State in Determining the Best Interests of the Child*, BOS. B.J., Sept./Oct. 1997, at 6, 17. Some courts have characterized this threshold as a "grave threat of harm." *See, e.g.*, *Shepp*, 906 A.2d at 1174.

162 Just as the compelling state interest in First Amendment free speech doctrine (analyzed in subsection II.A.2, *supra*) stems from the State's parens patriae duty, so too the parens patriae doctrine provides the basis for the compelling state interest in the substantial harm standard in First Amendment free exercise analysis. *See* Cherny & Perkins, *supra* note 161, at 17.

163 This suggestion that a free exercise standard be imported into what is essentially a free speech jurisprudence may raise the question of whether the First Amendment free speech analysis is being abandoned entirely, and thus whether speech is not being recognized as speech and therefore is being inadequately protected. This approach also stems from a compelling interest standard within the First Amendment free exercise context and is *more* rigorous and protective of speech than the current First Amendment free speech best interests analysis. There are, however, two potential responses to this claim. First, I have objected only to the traditional First Amendment strict scrutiny analysis in conjunction with the amorphous child's best interests standard.

The roots of this standard are generally traced to *Yoder v. Wisconsin*, a 1972 case in which the Supreme Court held a Wisconsin statute requiring children to attend at least two years of high school was a violation of the Amish plaintiffs' right to free exercise of religion.[164] *Yoder* was analyzed in a heightened scrutiny context similar to the "pure" First Amendment analysis.[165] The *Yoder* court, utilizing this "pure" free exercise analysis, explained, "[I]n order for Wisconsin to compel school attendance . . . against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear . . . that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[166] The Court held that none of the State's several concededly strong proffered rationales were sufficient to overcome plaintiffs' free exercise rights.[167]

Although *Yoder* was not decided in the custody context, courts determining whether to restrict parental religious liberties have cited it.[168] Additionally, a commentator citing the connection explains, "Following *Yoder*, most courts require a showing of harm to the child, or a substantial threat of harm to the child, before placing any restrictions on exposure to a parent's religious beliefs and practices."[169]

In a Pennsylvania Supreme Court case decided under the substantial harm standard, *Shepp v. Shepp*, the court took notice of the constitutional magnitude of the rights involved and the evident conflict, explaining, "This case implicates two highly important values: the free exercise of religion as guaranteed by the First Amendment . . . and the public policy of this Commonwealth . . . to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of marriage."[170] In *Shepp*, the mother objected to her child being taught the father's polygamous

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Substituting the substantial harm standard in place of the best interests standard would be the functional equivalent of what I am suggesting be adopted in this section. Second, the Court has been willing to limit protection of speech, such as child pornography, where the creation of that speech has harmed children. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 765-66 (1982). Because this speech harms children, it may be categorized as lesser-protected or unprotected, which justifies eliminating the traditional First Amendment strict scrutiny analysis in favor of the substantial harm standard.

164 406 U.S. 205, 234-35 (1972).

165 *Id.* at 214.

166 *Id.*

167 *Id.* at 234.

168 *See, e.g.*, Shepp v. Shepp, 906 A.2d 1165, 1169-70, 1173 (Pa. 2006) (citing the *Yoder* standard in determining whether a father should be forbidden from teaching his daughter his religion-based ideas regarding polygamy).

169 Shulman, *supra* note 20, at 173.

170 *Shepp*, 906 A.2d at 1168-69.

values, and the lower court ordered that the father refrain from doing so.[171] After explaining the relevance of the *Yoder* standard in the custody context, the court explained, "The state's compelling interest to protect a child in any given case . . . is not triggered unless a court finds that a parent's speech is causing or will cause harm to a child's welfare."[172] The court then focused on what the father was actually saying to his young daughter and encouraging her to do, before determining whether a restriction on his free exercise was justified.[173] The court found that the father was not forcing the child to engage in polygamy and discussing it with her did not seem to cause any emotional distress and held that "[w]here . . . there is no finding that discussing such matters constitutes a grave threat of harm to the child, there is insufficient basis for the court to infringe on a parent's constitutionally protected right to speak to a child about religion as he or she sees fit."[174] The court reprimanded the lower court for "[e]ngaging in speculation that Father's statements to his stepdaughter might lead to insistence that his own child engage in polygamy," and for substituting "its judgment for that of the trial court, [in] conclud[ing] that the teaching of plural marriage constituted a grave threat."[175] Ultimately, the court held that because there was no grave threat to the daughter, the lower court "erred in restricting Father from teaching [his daughter] about polygamy."[176]

In a related case, *Kendall v. Kendall*, the Massachusetts Supreme Court explained that the "overriding goal" in accommodating diverse religious practices of separted parents "is to serve the best interests of the children even where the attainment of that purpose . . . involve[s] some limitation of the liberties of one . . . of the parents"[177] and noted that "[t]he determinative issue is whether the harm found to exist in this case [is] so substantial so as to warrant a limitation on the defendant's religious freedom."[178] In *Kendall*, a fundamentalist Christian father and an Orthodox Jewish mother battled over their children's religious upbringing.[179] The court found that the children were becoming emotionally distraught after attending the father's religious services because the services suggested that non-Christians

171 *Id.* at 1168.
172 *Id.* at 1173.
173 *Id.*
174 *Id.* at 1174.
175 *Id.* at 1173
176 *Id.*
177 Kendall v. Kendall, 687 N.E.2d 1228, 1231 (Mass. 1997) (quoting Felton v. Felton, 418 N.E.2d 606 (Mass. 1981)).
178 *Id.* at 1232.
179 *Id.* at 1230.

would be "damned to go to hell."[180] Additionally, the father threatened several times to remove or prohibit the children's signs of adherence to Judaism.[181] Relying heavily on a statement by the appointed guardian ad litem, who found that the children (the oldest of which self-identified as Jewish) were extremely distraught by the father's religion and religious-based convictions, the court held that there was "substantial evidence of current and imminent harm."[182] Thus, despite the restrictiveness of the lower court's order prohibiting the father from teaching the children to reject Judaism, the reviewing court affirmed that order.[183]

The court in *Kendall* stressed the importance of the constitutional right infringed upon by the lower court's order and balanced this interference with the potential harm to a child living in such a conflicted and emotionally distressed state.[184] The lower court noted that, despite the importance of parental free exercise, it was not required "to wait for formal psychiatric breakdown" to limit the father's freedom of expression.[185] It further noted that "the evidence painted a strong picture of the reasonably projected course if the children continue to be caught in the cross-fire of their parents' religious difference . . . . At a minimum, they will be called upon to 'choose' between their parents, in itself a detrimental result."[186]

In *LeDoux v. LeDoux*, the Nebraska Supreme Court reviewed a trial court's order prohibiting a father, who was a Jehovah's Witness, from exposing his children to the tenets of his faith conflicting with the Catholic faith of his ex-wife.[187] The court took note of expert testimony that the father's religiously oriented actions were causing the children psychological stress.[188] According to expert testimony, the stress the seven-year-old child, Andrew, was feeling manifested itself in troubling ways, such as bedwetting and nightmares after visits with his father, anxiety regarding future visits with his father, and desires to avoid seeing his father at all.[189]

The Nebraska Supreme Court carefully noted the conflicting values evinced by the facts, explaining that "[a]lthough the prohibition against infringement of religious belief is absolute, the immunity afforded religious

180 *Id.*

181 *See id.* at 1233 (noting that the father shaved off his son's payes and threatened to cut off the fringe of his prayer shawl).

182 *Id.* at 1235.

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 LeDoux v. LeDoux, 452 N.W.2d 1, 4-5 (Neb. 1990).

188 *Id.* at 4-5.

189 *Id.* at 4.

practices by the first amendment is not so rigid. A state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom."[190] The court explained that it could fashion an order prohibiting a parent from teaching a child religious practices that "pose an immediate and substantial threat" to the child's well-being.[191] After a close examination of the record, and in light of the constitutional rights at issue, the court held,

> A de novo review of the record discloses no abuse of discretion on the part of the trial court. There is ample evidence to conclude that the stress Andrew was experiencing posed an immediate and substantial threat to his well-being. The stress that Andrew was experiencing was neither hypothetical nor tenuous. In Dr. Rizzo's words, Andrew's stress is serious. The fact that the involuntary exposure to disparate religions was but one factor in the source of Andrew's stress does not detract from the trial court's conclusion that these religious differences have and will continue to have a deleterious effect on Andrew . . . .[192]

Thus, the court balanced the constitutional rights at issue with the harm to the child.[193] The substantial harm standard permitted the court to restrict the parent's free exercise of religion not through an amorphous standard but rather with concrete evidence of harm to the child; and thus to fulfill the State's parens patriae duty.

The common concerns evidenced in both the free exercise line of cases and the free speech line of cases are the parents' liberty interests and the State's parens patriae duty (and, by extension through the parens patriae duty, the children's interest in being free from harm). Courts adjudicating the free exercise cases analyze the cases using the same First Amendment terms observed in the "pure" First Amendment analysis: "strict scrutiny," "compelling state interest," and "narrowly tailored,"[194] which flow from the *Yoder* strict scrutiny doctrine.[195] These similarities suggest that the standard

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190 *Id.* at 5 (citation omitted).

191 *Id.* (citations omitted).

192 *Id.*

193 For a critical examination of the court's decision in *LeDoux*, see R. Collin Mangrum, *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?*, 24 CREIGHTON L. REV. 445 (1991); *see also id.* at 446-57 (arguing that despite Andrew's bedwetting, nightmares, and anxiety, preventing his stress was not sufficient to constitute a compelling state interest and thus override the father's free exercise rights).

194 *See, e.g.*, *LeDoux*, 452 N.W.2d at 5-6.

195 Although cases and commentators do not use the term "strict scrutiny" as in the First Amendment free speech context, the analysis—finding a compelling state interest to justify overriding a parental constitutional right—is the same. *See, e.g.*, Joanne Ross Wilder, *Resolving*

from *Yoder* and its progeny lends itself to the parental speech context. It is odd that the Free Exercise clause provides an abundance of parental rights protection in the context of custody orders, immediately signaling heightened scrutiny, but that the Free Speech clause seemingly signals no such standard of review.

The difference between the "pure" First Amendment strict scrutiny analysis, which refuses to recognize children's best interests as compelling, and the heightened scrutiny in the "substantial harm" context is that the substantial harm standard has been adapted from its strict scrutiny roots in *Yoder* to apply to the custody order context. The "pure" First Amendment free speech analysis, meanwhile, has not been adapted in this manner—courts that refuse to recognize best interests as compelling lose the ability even to factor children's best interests in the analysis. In comparison, the adapted First Amendment free exercise analysis has been molded over time to consider how children might be negatively affected by the (potentially conflicting) religious beliefs of their parents and the communication of those beliefs to them. To ensure that parental liberty interests are protected and children are not harmed, courts should import the substantial harm standard from free exercises cases into free speech cases. Utilizing this standard will ensure that, where children are being harmed, the State can exercise its parens patriae duty to stop the parents' harmful speech and protect the children. It will also ensure that where children are *not* being harmed (for example, where an abstract best interests of the child without further elaboration is invoked to prohibit certain parental speech), parental free speech rights are not unnecessarily trampled.

Some argue that the substantial harm standard in the context of free exercise is too restrictive because it requires too great a showing of harm before free exercise is curtailed.[196] In the typical free exercise custody order case where one parent practices one religion and the other parent practices another, the court must deal with tricky determinations, such as which religion is "correct," how the tenets of both religions conflict (especially whether the child will believe one parent will go to hell for not believing the other parent's religion),[197] or how hearing about both religions will affect a child. These are admittedly difficult decisions that evoke establishment clause concerns, but in the free speech context the situation is much clearer

Religious Disputes in Custody Cases: It's Really Not About Best Interests, 22 J. AM. ACAD. MATRIM. LAW. 411, 421 (2009) ("Absent substantial harm to the child, the best interest standard is insufficient to support a compelling state interest that supersedes the parents' fundamental rights.").

196 *See, e.g.*, Shulman, *supra* note 20, at 173.

197 *See, e.g.*, Kendall v. Kendall, 687 N.E.2d 1228, 1233-35 (Mass. 1997).

and less constitutionally problematic. If the father tells his children (or posts on the Internet) that their mother has borderline personality disorder[198] or that she is a bad parent who is wrong about everything,[199] a court will more easily determine whether the children are being harmed.[200]

It does not take a trained psychologist to know that when a parent speaks of the other parent in disparaging terms in front of his children, the children are hurt. It is equally evident that such actions could lead to a situation where, as in *Kendall*, the children are forced to choose between their parents.[201] Writing nasty, disparaging comments on a blog where the children, ages ten and twelve,[202] could easily find them is practically the same as saying it to them; it may also humiliate the children if their peers discover the blog and question them about it. A close analysis would likely find these children will be damaged by such parental speech and thus justify the order. The substantial harm standard—by assuming the importance of parental free speech rights and raising red flags of heightened scrutiny—requires judges to think carefully and fully explain their decisions, unlike the seemingly off-the-cuff reasoning in *Morelli*.[203]

D. Morelli *Under the Three Standards*

A study of the potential outcomes of the *Morelli* case under the three potential analyses cements the substantial harm standard as the best standard for resolving the tension between parental free speech and children's best interests. Under the traditional First Amendment strict scrutiny analysis, the first question would be whether the Pennsylvania court recognizes children's best interests as a compelling state interest justified by the valid exercise of the State's parens patriae power.[204] If Pennsylvania law does hold

198 Morelli, *supra* note 1, at 1.

199 *Id.* at 1-4.

200 This standard could also be broad enough to allow courts to consider different conceptions of the First Amendment. Under the substantial harm standard, the court can weigh the parents' rights to engage in speech, the children's rights, and the value of the speech to public debate against the children's interest in not having the parent make the speech. In a case like *Morelli*, where the speech is on a publicly accessible website, the court might weigh the value of that speech as a contribution to public debate against the harm that the children could endure by the public nature of the online speech.

201 *Id.*

202 Transcript of Order, *supra* note 2, at 8.

203 *Id.* at 9.

204 Although it is clear from *Shepp v. Shepp*, 906 A.2d 1165, 1170 n.5 (Pa. 2006), that First Amendment free exercise claims would be examined through the lens of strict scrutiny, compelling interests, and the substantial harm standard, it is not clear from the case law what standard the court would use to examine First Amendment free speech claims.

the children's best interests to be compelling (assuming, as this Comment does, that the court also found that disparaging parental comments harm children[205]), it is highly likely that the analysis would end there.[206] Since a compelling state interest would be enough to override Morelli's liberty interest in free speech, the court would not have to carefully weigh the psychological harm to the children against the constitutional harm to Morelli. Although it is clear that the children will be harmed, it is not clear that this harm does or should outweigh Morelli's free speech rights, and it is constitutionally troubling that there is not a closer examination of this issue. It seems that Morelli's free speech rights are unduly restricted without a genuine showing that the best interests of his children outweigh his First Amendment rights. If Pennsylvania law does not hold the children's best interests to be compelling, then, by definition, there is no compelling state interest to outweigh Morelli's right to free speech under the strict scrutiny standard, and he would be permitted to make the disparaging comments.[207] While this is less constitutionally problematic because no free speech rights are damaged, the issue of harm to the children does not appear to be addressed carefully enough. Ignoring the potential harm to children and the State's parens patriae interest in protecting children without evaluating the value of the speech at issue or the potential that *in this particular case* the children's interests might outweigh protected speech is troubling because it could sanction harm to children. Thus, the traditional First Amendment strict scrutiny analysis is both overinclusive and underinclusive, depending on its application.

Under the second paradigm identified in this Comment, Professor Dwyer's judge-as-fiduciary model, the judge would step into his role as fiduciary for the Morelli children and determine what they would choose if they were old enough to make the decision themselves. In light of the assumption that Morelli's comments are actually harming the children (and the practical recognition noted by the judge in *Morelli* that no child wants to view disparaging comments by one parent he loves about the other parent he loves),[208] it is likely that the judge-as-fiduciary would restrict Morelli's

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205 *See supra* note 53 and accompanying text.

206 Courts tend to be highly deferential to the findings of lower courts regarding the best interests of the child. *See, e.g.*, Joshua D. Abbott, *Family Law*, 45 WAYNE L. REV. 973, 1048 (1999) (noting as an example that the custody cases of one state supreme court advocate deference to trial courts' first-hand interpretation of the evidence). Here, where it is assumed that such disparaging comments actually *do* harm children, deference is even more likely.

207 *See supra* subsection II.A.2.

208 *See supra* note 2 and accompanying text.

speech in the name of the children's best interests. While this protects the children from harm, it ignores any First Amendment issues.

Finally, under the substantial harm standard, the judge would perform a careful examination (perhaps aided by a guardian ad litem or expert psychologist testimony)[209] of whether Morelli's comments will immediately physically or psychologically harm the children. Because this scenario involves an examination of the *actual* negative effects of the speech on the children, rather than the amorphous question of what is "best" for the children, it cuts to the real question at issue: Are the children being harmed by this speech? If the children are being harmed by Morelli's disparaging posts about his ex-wife, then the judge should restrict his speech, but if not, the judge should allow it to continue. Utilizing this paradigm centers the analysis on the crux of the constitutional issue because it can protect children from *legitimate* harm and ensure that the State's coercive power is exercised only to restrict free speech where children are *actually* being harmed—that is, where there is a sufficient government interest.

The substantial harm standard is superior to the strict scrutiny and best interests approach explicated in subsection II.A.2.b because it always allows the court to consider how the child is affected by the parents' speech. Additionally, it is superior to the strict scrutiny and best interests analysis addressed in subsection II.A.2.a because it always weighs the value of parental free speech rights and requires significant deference to those rights. The substantial harm standard is also superior to the judge-as-fiduciary model because it works within constitutional bounds and safeguards parental constitutional rights. By assuming that parental free speech rights are extremely important, the substantial harm standard avoids the problematic constitutional jumps necessary to make the judge-as-fiduciary concept work in practice. The substantial harm standard captures the child-centered model by taking into account the harm that may befall the children if parents are allowed to make damaging remarks. By focusing on both parents and children in a constitutionally approved framework, the substantial harm standard is the best approach to custody orders restricting parental free speech.

This Comment therefore advocates for the adoption of the substantial harm standard in the context of custody orders restricting parental speech because the standard provides the optimal balance between parents' rights and children's interests. It is apparent from cases like *Shepp* and *Kendall* that

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209 *See, e.g.*, Mangrum, *supra* note 193, at 448-50, 484 (suggesting the potentially pivotal role psychologist testimony could play in trial court custody decisions made under the substantial harm standard).

courts recognize the constitutional significance of free exercise rights, and that family court judges are far less likely to overrun religious liberties. Extending the same deference to free speech liberties would be the first step in forcing courts to recognize the importance of parental free speech. Once family court judges note the importance of these rights, they will weigh the rights and interests involved more carefully. Only if the free speech is shown to substantially harm the children should the parent's free speech be restricted. As in *Kendall*, these determinations can be aided by a guardian ad litem or psychologist appointed by the court, a neutral observer who can determine whether the children are likely to be psychologically scarred.[210]

CONCLUSION

> [O]ftentimes, the children demonstrate more friggin' common-sense and understanding than one of the persons primarily responsible for their upbringing . . . .[211]

This Comment has endeavored to explore and expose the elements that make the family law courtroom a constitutional twilight zone. By examining the vague best interests standard, the status of family law judges in terms of state action doctrine, and the current disarray of state jurisprudential constructs for determining the constitutionality of custody orders restricting parental speech through content-based prior restraints, this Comment has demonstrated that this area of law needs more attention. Because the family court judge wields an immense amount of power over the everyday lives and actions of divorced parents and their children, his or her actions should be confined by the Constitution, but should also protect children from harm.

This Comment has considered three potential frameworks for analyzing orders restricting parental speech in the name of children's best interests. First, applying a "pure" First Amendment analysis has resulted in courts deadlocking over whether the children's best interests are compelling enough to override parental free speech rights. Where courts permit best interests to be compelling, the standard is so vague and easily manipulated that it does not adequately safeguard parental free speech rights. Where courts refuse to recognize children's best interests as compelling, children are removed from the equation, and courts thus sanction speech harmful to the children. Second, while Dwyer's normative judge-as-fiduciary framework descriptively models the current family law system, this radical, constitutionally unhinged understanding of the family law courtroom is problematic. Finally, the substantial harm standard, crafted in light of First

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210 687 N.E.2d 1228, 1230 (Mass. 1997).

211 Morelli, *supra* note 1.

Amendment free exercise demands and molded to fit the custody order context of the family law courtroom, provides a natural framework for the analysis of these issues. It considers both parents' rights and children's interests within the confines of the Constitution's demands and can be easily adapted to address the free speech challenges to custody orders. Because of the ease with which it can be adapted, the standard's clear "harm" guidelines, and its weighing of the interests and rights involved, the substantial harm standard should be used to analyze custody orders restricting parental speech.