CHILD LAW AND RELIGIOUS EXTREMISTS: SOME RECENT DEVELOPMENTS

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In an earlier article comparing the judicial attitudes prevalent in the United States and Australia towards religion in custody disputes[1] this writer suggested that courts should be more willing to protect children from their parents' unbalanced and extravagant[2] religious beliefs than they seem to have been in the past. Accordingly, the purpose of this commentary is to examine recent case law in the United States, Australia and Canada in order to ascertain whether the judicial approach suggested earlier is being carried out, and furthermore, to determine how proper such an approach is in view of the findings of some empirical investigations.

Recent years have seen religious organizations seeking to attract children away from their families and into religious communities, although this is by no means a new phenomenon.[3] As a result parents, particularly in the United States, have sought the help of the law to regain their children. Using 1975 as the starting point for discussion, the first case to arise in relation to disputes between religious communities and parents was *Halender v. Unification Church*,[4] where the District of Columbia Superior Court Family Division refused to grant a petition for *habeas corpus* sought by parents who claimed that their daughter had been held against her will by the followers of the Reverend Sun Myung Moon, known as the Unification Church. The parents' major claim was that, in the words of Belson J., "respondents, through psychological methods approaching hypnosis, have effectively deprived their daughter of her ability to make a choice with respect to the manner in which she exercises her rights to liberty".[5] Expert evidence from a psychiatrist was called on behalf of the parents, and evidence was given to the effect that the church engaged in a conscious pattern of activity designed to push any reference to the outside world from its converts'

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[1] Bates, *Religion in Custody Disputes — A Comparison of American and Australian Judicial Attitudes*, 7 COMP. & INT'L L. J. S. AFR. 231 (1974).

[2] The phrase used by Selby J. of the New South Wales Supreme Court in *Re* Paul, [1963] N.S.W.R. 14, at 20, 80 W.N. (N.S.W.) 557, at 562 (S.C. Chambers), when describing a member of the Exclusive Brethren.

[3] *See* Lough v. Ward, 173 L.J. 181, [1945] 2 All E.R. 338 (K.B.). However, the relevant action has been abolished in England by s. 5 of the Law Reform (Miscellaneous Provisions) Act, U.K. 1970, c. 33.

[4] 1 Fam. L. Rep. 2797 (D.C. Sup. Ct. Fam. Div. 1975).

[5] *Id.*

minds. In addition, several former members of the church gave evidence that

> they worked long hours performing church assignments, were usually poorly fed, were always in the company of other church members, and were too fatigued to reason or question intelligently the doctrines of the church. One stated flatly that while in the program she could not exercise her free will because of the factors just mentioned. Most stated that they would have lied and did lie for the church in connection with solicitation of contributors.[6]

All of these witnesses had ultimately left the church as the result of family pressure, which, in most instances, had included virtual imprisonment. On the other hand, a psychiatrist, whose fees were paid by the church, testified that he had found the daughter to be in effect a normal person. He found no indication that she was the unwilling subject of systematic indoctrination by the church and concluded that she seemed able to resist the suggestions of others. After considering the facts, Belson J. failed to find any evidence that the church had employed impermissible methods in gaining and retaining Miss Halender's adherence to the church. The judge also commented that "the evidence of record is insufficient to establish the application by respondents to Miss Halender of any techniques substantially different from those which are used by other religious organizations for purposes of converting or proselytizing."[7] With all respect to Belson J. and the District of Columbia Superior Court, this last comment is a most remarkable statement when one takes into account the evidence of the psychiatrist called on the parents' behalf and that of the former church members. No evidence appears to have been called regarding the practices of other churches and such practices would not appear to be a proper subject for judicial notice.[8]

However, a rather different view was taken in the more recent case of *In re Katz*[9] by Vavuris J. of the California Supreme Court. In that case, the court ordered that five adult members of the Unification Church should be given into the custody of their parents for thirty days. This order, the court explained, required that the parents and children have constant contact but did not preclude the children from seeing their legal representatives or from practising their religious faith. Vavuris J. pointed out that there was little or nothing in the way of previous authority to guide him and went on to say:

> It's not a simple case. As I said we're talking about the very essence of life here, mother, father and children. There's nothing closer in our civilization. This is the essence of civilization.

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[6] *Id., per* Belson J.

[7] *Id.* at 2798.

[8] In the U.S., McCORMICK ON EVIDENCE 775 (2d ed. E. Cleary 1972), states: "Current trends would indicate that this [modern] consensus will, if it comes to fruition, involve reducing judicial notice to narrow confines within an adjudicative context."

[9] 3 Fam. L. Rep. 2359 (Cal. Sup. Ct. 1977).

> The family unit is a micro-civilization. That's what it is.
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> A great civilization is made of many, many great families, and that's what's before this Court. It's not the regular run-of-the-mill case that involves some money, or some kind of damage. It is the very essence of life.[10]

The judge also remarked that one of the reasons for which he made the decision was the observable love of the parents for their children. Unfortunately, Vavuris J. did not consider the merits, or otherwise, of the Unification Church, but it seems to be implicit in his highly unlegalistic judgment that, whatever its tenets were, they could not compare with the benefits of the nuclear family. In view of the evidence in the *Halender* case, referred to earlier,[11] such a conclusion seems to be almost inescapable. The *Katz* case, however, is not without difficulties as Vavuris J. was utilizing a Californian conservatorship law designed to protect the senile and incompetent and it may well be that its application would not strictly extend to a situation where parents were seeking to force children to renounce religious beliefs which they considered to be unacceptable. In a later proceeding,[12] counsel for the children obtained a modification in the order from the California Court of Appeals to the effect that 'deprogrammers' should be prevented from dealing with the children during the thirty day period.[13] The issue of deprogramming was also raised through the evidence given by the former church members in *Halender v. Unification Church*[14] and is fraught with difficulties. Surprisingly, perhaps, there is effectively no legal literature specifically relevant to the topic.

Finally, the California Court of Appeals overturned the decision[15] on the grounds that the legislation had been improperly used. Sims J. laid considerable emphasis on the issue of general freedom of religion when he said:

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.[16]

Clearly, the issue of deprogramming is further complicated by the legally amorphous nature of the parent and child relationship: in the words of Freeman, "the whole adult-child relationship is obfuscated in

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[10] *Id.*

[11] *Supra* note 4.

[12] *Supra* note 9.

[13] *Id.* It also appears that the parents are currently threatened with a contempt violation for permitting some "deprogramming" to take place.

[14] *Supra* note 4.

[15] Katz v. San Francisco Superior Court, 3 Fam. L. Rep. 2774 (Cal. Ct. App. 1977).

[16] *Id.* at 2775.

tangled terminology".[17] The nature of that relationship changes with the age of the child. As Lord Denning has said in *Hewer v. Bryant*, a parent's right to custody ends when the child reaches the age of eighteen and "even up till then it is a dwindling right which the court will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."[18] It will be remembered that the children in *In re Katz* were all adult. As was pointed out in *Halender v. Unification Church*,[19] the deprogramming techniques used by parents involved virtual imprisonment and the difficulties of applying reasonable parameters to the confinement of children by parents are apparent. It is well established that a child may sue his parent in trespass[20] as well as in negligence.[21] However, courts in the United States have not been inclined to permit intrafamilial actions of this kind and, indeed, the seminal case was one involving an action for false imprisonment.[22] There does, however, according to Prosser[23] appear to be some kind of retreat[24] from the general principle prohibiting these actions. The difficulties have been well pointed out by Street who writes:

> It is suggested, however, that there is only a right to detain where it is reasonable in the circumstances; and that whereas a parent, who locked up his thirteen-year-old daughter at night to prevent her from associating with soldiers, might have a defence to an action of false imprisonment, a parent, who detained a twenty-year-old daughter whereby she was prevented from sitting a university examination, would have no defence.[25]

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[17] Freeman, *Child Law at the Crossroads*, [1974] CURRENT LEG. PROB. 165, at 168.

[18] [1970] 1 Q.B. 357, at 369, [1969] 3 All E.R. 578, at 582 (C.A.). *See generally* Eekelaar, *What are Parental Rights?*, 89 L.Q.R. 210 (1973). *See also* Bates, *Redefining the Parent/Child Relationship: A Blueprint*, 12 U.W.A.L. REV. 518 (1976).

[19] *Supra* note 4.

[20] *See* Ash v. Lady Ash, Comb. 357, 90 E.R. 526 (K.B. 1697). *See also* Roberts v. Roberts, Hard. 96, 145 E.R. 399 (Ex. 1657), where an infant obtained an injunction against his father to prevent waste.

[21] *See* Young v. Rankin, [1934] Scottish Sess. Cas. (6th) 499; Deziel v. Deziel, [1953] 1 D.L.R. 651 (Ont. H.C.); Dolbel v. Dolbel, [1963] S.R. (N.S.W.) 758, 80 W.N. (N.S.W.) 1056 (1963); McCallion v. Dodd, [1966] N.Z.L.R. 710 (S.C.); Hann v. Conley, 126 C.L.R. 276 (H.C. 1971).

[22] Hewlett v. George, 9 So. 885 (1891). *See also*, in cases involving intentional torts, McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242 (Sup. Ct. 1905); Cook v. Cook, 232 Mo. App. 994, 124 S.W. 2d 675 (1939); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (Sup. Ct. 1924); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924). For cases involving negligence, *see* Villaret v. Villaret, 169 F. 2d 677 (1948); Stevens v. Murphy, 69 Wash. 2d 939, 421 P. 2d 668 (1966); Chaffin v. Chaffin, 239 Or. 374, 397 P. 2d 771 (1961); Hastings v. Hastings, 33 N.J. 247, 163 A. 2d 147 (1961); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W. 2d 37 (1952). *But see* Falco v. Pados, 444 Pa. 372, 282 A. 2d 351 (1971).

[23] W. PROSSER, HANDBOOK ON THE LAW OF TORTS 865 (4th ed. 1971).

[24] *See* Brown v. Cole, 198 Ark. 417, 129 S.W. 2d 245 (1939); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913).

[25] H. STREET, THE LAW OF TORTS 87 (6th ed. 1976).

Between these poles, where one draws the line in particular cases must largely be a matter of taste. Would a reasonable parent be justified in locking up his seventeen-year-old son to prevent him from associating with people holding extravagant and unreasonable religious beliefs? The reaction of the present writer is that the reasonable parent would be so justified but, as will later be seen, courts today would be unlikely to share this view.

A further analogy can be drawn with the parent's apparent right to inflict reasonable punishment.[26] Experience, however, both in this specific area and the allied area of persons having quasi-parental authority, such as school teachers,[27] is not particularly helpful as the cases have tended to be concerned with the level of force used,[28] rather than the general circumstances which led up to its infliction. Writers and courts have not concerned themselves with the kind of acts which justify physical punishment, although there is American authority that teachers, at any rate, may be justified in using considerable force in situations involving incorrigible pupils,[29] and Prosser[30] suggests that the nature of the offence is to be taken into account in deciding whether the degree of force used is reasonable. Again, however, as will be seen from an examination of recent case law in the United States, Canada and Australia, religious practice would almost certainly not be regarded as justifying acts of force out of the ordinary. Likewise, Prosser notes[31] that the age of the child is a further factor to be taken into account: children involved in organizations such as the Unification Church would tend to be of relatively advanced age and, thus, when the comments of Lord Denning in *Hewer v. Bryant*[32] are taken into account, infliction of physical force would seem to be legally even less justifiable.

The more usual situation in which religious extremism and child law come together is in relation to custody disputes, in which Jehovah's Witnesses and the Exclusive Brethren have been notable litigants.[33] In

[26] *See* Eekelaar, *supra* note 18, at 223-24.

[27] *See, e.g.*, Cleary v. Booth, [1893] 1 Q.B. 465, 41 W.R. 391, 37 Sol. Jo. 270 (Div'l Ct.). There is some dispute as to the basis of this authority: the current editor of WINFIELD AND JOLOWICZ ON TORTS 611 (10th ed. W. Rogers 1976), bases his view on delegation. *But see* STREET, *supra* note 25, at 87, where Street bases his view on the maintenance of order. This distinction is irrelevant, however, for the purposes of this article since, although deprogrammers are often employed by parents, they would have, in most cases, received express or implied authorization for their actions.

[28] *See* Samuels, *Never Hit a Child*, 7 FAM. L. 119 (1977), for a recent commentary. Samuels concludes by suggesting, at 120, that the defence of reasonable chastisement should no longer be available.

[29] *See* Drake v. Thomas, 310 Ill. App. 57, 33 N.E. 2d 889 (1941); Andreozzi v. Rubano, 145 Conn. 280, 141 A. 2d 639 (1958).

[30] *Supra* note 23, at 137.

[31] *Id.*

[32] *Supra* note 18.

[33] *See* Bates, *supra* note 1. *See also*, in the United States, Smith v. Smith, 90 Ariz. 190, 367 P. 2d 230 (1962); Levitsky v. Levitsky, 190 A. 2d 621 (1963). *See*, in Australia, Strum v. Strum, 14 F.L.R. 284 (N.S.W.S.C. 1969), and *supra* note 2.

recent United States case law, there has been some judicial dispute regarding Jehovah's Witnesses: in *Johnson v. Johnson*,[34] Burke J. of the Alaska Supreme Court was of the opinion that to deny a mother custody simply because she intended to bring up the children of the marriage as Jehovah's Witnesses would be a violation of the mother's right to freedom of religion under the First Amendment to the United States Constitution.[35] The father contended that the mother's religious beliefs would result in the children not receiving a college education and would substantially interfere with his visitation privileges.[36] However, Burke J. remained unimpressed. Although Burke J. did not refer to previous authority in relation to the issue of religion, his apparent view seems to be substantially in accord with the approach adopted by Struckmeyer C.J. of the Supreme Court of Arizona in the leading case of *Smith v. Smith*.[37] There, the view was expressed that the mother could not be regarded as being unfit to have custody of her child on the basis of her religious beliefs regarding the saluting of the flag and the child's participation in school Christmas plays, to which she objected. The Chief Justice said:

> We can but reflect that if government through its courts can lawfully place the individual in the extreme of choosing between the active practice of a religious belief or suffering a burdensome loss, whether liberty, property or a child's association and companionship, what profit the people of this nation from thousands of years of bigotry and intolerance?[38]

Struckmeyer C.J. rejected the suggestion that the mother's religious practices were injurious to the child's natural health. Although commenting that the court was not unaware that deviation from the normal often resulted in ridicule and criticism, he did not regard such as the basis of neuroses: "Criticism", he states, "is the crucible in which character is tested. Conformity stifles the intellect fathering decadency."[39] It is hard to justify these pretentious remarks in legal terms. The Chief Justice appears to regard custody as a right existing in the parent, rather than considering the "welfare" or "best interests" of the child as is today generally required by statute. These cases do suggest one possible approach, even though it was rejected in both *Johnson* and *Smith*, and one which is by no means new to American law. It involves the recognition of a distinction between freedom of religious belief and the secondary manifestations of that belief. This distinction was drawn

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[34] 3 Fam. L. Rep. 2501 (Alas. Sup. Ct. 1977).

[35] *Id.* at 2502.

[36] *Id.* at 2501. The father had, in fact, been excommunicated, (or to use their own term, 'disfellowshipped'), from the Jehovah's Witnesses for wilfully smoking cigarettes.

[37] *Supra* note 33.

[38] *Id.* at 193, 367 P. 2d at 233.

[39] *Id.*

by Waite C.J. of the United States Supreme Court in *Reynolds v. U.S.*,[40] who said that while laws could not interfere with religious belief, they could interfere with its practice, an instance being a hypothetical religious sect which practises human sacrifice. When one takes this distinction into account, together with the usual statutory formulation, a proper theoretical basis may exist for depriving extravagantly religious parents of custody of their children on the grounds, not of the beliefs themselves, but of the social consequences of those beliefs.

One well known aspect of the beliefs of the Jehovah's Witnesses arises in relation to their attitude towards medical treatment, especially blood transfusions, for their children. In this area, the American courts have taken a different view. In *Levitsky v. Levitsky*, Brune C.J. of the Maryland Court of Appeals stated that "[t]o deny one's child medical care necessary to save his life because of one's religious views, falls within the kind of conduct which is not protected by the guaranty of religious freedom".[41] Nevertheless, custody of three children was granted to the mother, a Jehovah's Witness, although on the condition that blood transfusions could be given to any of the children without her consent. A similar view was more recently taken by the United States District Court for Northern Illinois in *Stalens v. Yake*,[42] which held that a lower court's order appointing a guardian to ensure that the complainant parents' son could receive blood transfusions did not deny the parents religious freedom, deprive them of due process nor deny them "a personal and parental right to select ... medical treatment of their choice". The court went on to note that "the right to practise religion freely does not include liberty to expose ... the child ... to ill health or death".[43] However, in view of the opinions expressed in *Johnson* and *Smith*, this laudable principle would not seem to extend to risk of mental ill health, which, it is suggested, is likely to be a matter of some real importance.[44]

The whole issue has been raised in a particularly graphic form by the Mississippi Supreme Court's decision in *Harris v. Harris*.[45] In that case, the mother was a practising member of the Free Will Holiness Pentecostal Church, a fundamentalist sect which regarded the handling of snakes as an act of faith.[46] In delivering the judgment of the court,

[40] 98 U.S. 148 (1874). For a comment on some of the implications of this and other cases, *see* Bates, *The Enforcement of Marriage*, 3 ANGLO-AM. L.R. 75 (1974).

[41] *Supra* note 33, at 626. *See also* Gluckstern v. Gluckstern, 17 Miss. 2d 83 (1956); State v. Perricone, 37 N.J. 463 (1962); Raleigh Fitkin-Paul Memorial Hospital v. Anderson, 42 N.J. 421, 201 A. 2d 537 (1964).

[42] 3 Fam. L. Rep. 2525 (Ill. Dist. Ct. 1977).

[43] *Id.*

[44] *Infra* note 71.

[45] 3 Fam. L. Rep. 2414 (Miss. Sup. Ct. 1977).

[46] This belief is based on the passage in *Mark* 16:18, which states: "They shall take up serpents and if they drink any deadly thing it shall not hurt them; they shall lay hands on the sick, and they shall recover."

which set aside the lower court's decision depriving the mother of custody, Gillespie J. noted that the free exercise of religion was protected by the constitutions of both the United States and Mississippi and that those constitutions protected every variety of religion.[47] The judge went on to say that the mother "believes in the doctrine of her church and she has a right to practice [*sic*] her faith as she believes it, and to indoctrinate her child in her religious beliefs so long as she has his custody.... These rights, of course, do not include the right to expose the child to physical danger."[48] The evidence, in fact, showed that there was little risk of the child being exposed to the possibility of a snake bite during attendance at church, as the members of the particular church attended by the mother were not required to handle snakes at services. The judgment concluded with a statement that the lower court "had no authority to dictate to Mrs. Harris what religion she should teach her child so long as it did not involve exposing him to physical danger or to what society in general deems immoral practices."[49] Although it might not be easy to describe the practices of Mrs. Harris' Church as "immoral", it might just be possible to subsume it within the very wide description enunciated by Winn L. J. in the English case of *Crook v. Edmondson*, "conduct which has the property of being wrong rather than right in the judgment of the majority of contemporary fellow-citizens".[50] Such practices would, at least, be at substantial odds with the social and religious practices of the majority of contemporary citizens and would be repugnant to them. It must equally be borne in mind that a practice, whether polygamy (an issue in the *Reynolds* case)[51] or snakehandling, is not necessarily moral simply because it is cloaked in the trappings of religion. Both Gillespie J. and the judge at first instance were of the opinion that apart from her religious belief, the mother was a proper custodian, but the judge at first instance had taken the view that, in Gillespie J.'s words, the doctrines of the church were "detrimental to the growth, welfare and intellectual development of a five year old child".[52] This is the only part of this unfortunate case where reference was made to the welfare or best interests of the child as opposed to the rights of the mother.[53] There was no appraisal of the attitude of the community at large toward the snakehandlers, whether the child would have found himself isolated

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[47] *Supra* note 45, at 2415.
[48] *Id.*
[49] *Id.*
[50] [1966] 2 Q.B. 81, at 90, [1966] 1 All E.R. 833, at 835.
[51] *Supra* note 40.
[52] *Supra* note 45, at 2415.
[53] *See id.* It is also arguable, in any event, whether a change in parental custody would have had much real effect as there was evidence that the child's father was also involved in the church.

from companions of his own age because of his mother's involvement with the sect or, indeed, anything which bore on the child's real welfare. In the context of cases of this kind considerations of morality and the child's welfare are inextricably connected. Despite its apparent support for freedom of religion, *Harris* is, in reality, an unsatisfactory decision in that it elevates the alleged rights of the mother above the interests and welfare of the child.

A similar approach to that described as taking place in the United States may also be found in recent Canadian decisions. In *McQuillan v. McQuillan*,[54] O'Leary J. of the Ontario Supreme Court granted the custody of a four-year-old boy to his maternal grandmother, where his mother had become a member of the Hare Krishna sect. However, despite the ultimate decision, the judge was at pains to point out that the mother's religious beliefs did not form the basis of the decision. He said:

> The Court obviously has no right to dictate to parents the religious philosophy they choose for themselves and their children, let alone the right to deny custody to a parent because of his or her religious beliefs. In any event, it would be difficult to find fault with a philosophy by which large numbers, if not the bulk of Christendom, profess to be guided.[55]

The judge based his decision on the child's existing bond with his grandmother[56] and the mother's lack of maturity and stability.[57] However, the last two issues were, to some degree at least, manifested in the mother's religous beliefs. In the words of O'Leary J.:

> She professes to be a devout adherent of the Krishna movement, yet it seemed obvious from the evidence she did not correctly understand some of its basic teachings. She was quick to classify all who were not devotees of Krishna as demons, although it later became apparent that is not the Krishna philosophy. She attempted to teach her son the Krishna philosophy too quickly and deeply for his tender years and, it would appear, even erroneously.[58]

Thus, although affirming the principle that the courts could not make value judgments about varieties of religions, O'Leary J. did at least take the secondary manifestations of the mother's religious beliefs into account to some degree.

Jehovah's Witnesses figured again in the decision of Johnson J. of the Saskatchewan Court of Queen's Bench in *Tardif v. Tardif*,[59] where custody of two boys, one aged six and one aged two, was awarded to

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[54] 21 R.F.L. 324 (Ont. H.C. 1975).
[55] *Id.* at 330.
[56] *Id.* at 331.
[57] *Id.* at 330.
[58] *Id.*
[59] 24 R.F.L. 283 (Sask. Q.B. 1975).

their father who had been a member of the sect for approximately three years. The judge, in arriving at this decision, commented:

> The fact that he is a member of Jehovah's Witnesses and does not believe in blood transfusions is not a factor which enters into my considerations. Circumstances requiring a parent's decision in the event such medical procedure came into question are merely the substance of pure speculation and do not bear any weight in my decision.[60]

The present writer's immediate reaction is that, particularly in the light of the American cases,[61] the attitude of Jehovah's Witnesses to blood transfusions is far removed from speculation; it is well known and has given rise to not inconsiderable litigation. Another factor which becomes apparent from a reading of *Tardif* is that Johnson J. laid considerable emphasis on his perception of the mother's morality,[62] a view which is arguably at odds with modern judicial trends.[63] *Tardif*, it is suggested, is not a particularly satisfactory decision in that the judge specifically declined to take a factor into account which, by any reasonable objective standards, must be regarded as relevant.

In Australia, there have been three recent cases on the matter. In *In the marriage of Jurss*,[64] Demack J. of the Family Court of Australia was required to comment on the religious beliefs of the young woman who was living with the father and who normally had care of the children; she was a Seventh Day Adventist. On awarding custody of the children to the father, Demack J. commented that "[w]hile the Seventh Day Adventist faith may be regarded by some as heretical, it does not appear to act as a divisive influence within families." Great stress was laid on this matter in the earlier Australian cases of *Re Paul*[65] and *Mauger v. Mauger*,[66] in which the divisive effect of the Exclusive Brethren sect's belief had been regarded as crucial. *Jurss*, particularly in view of the fact that neither of the parents had strong religious beliefs, would seem to be unexceptionable.

The decisions of Walters J. of the South Australian Supreme Court in the case of *Dodd v. Stuart*[67] and Mitchell J. of the same court in *Wellington v. Wellington*,[68] both emphasize that the courts will not

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[60] *Id.* at 287.

[61] *Supra* note 41.

[62] *Supra* note 59, at 287-88.

[63] *See, e.g.*, in Canada, Richardson v. Richardson, 4 R.F.L. 150, 17 D.L.R. (3d) 481 (Sask. Q.B. 1971); Laberge v. Laberge, 16 R.F.L. 60 (B.C.S.C. 1974); Bell v. Bell, [1955] O.W.N. 341 (C.A.); Kajtar v. Kajtar, 27 R.F.L. 85 (Ont. Fam. Ct. 1976). *See*, in Australia, Barnett v. Barnett, [1973] 3 N.S.W.L.R. 403, and in England, H. v. H., [1969] 1 All E.R. 262, [1969] 1 W.L.R. 208 (C.A. 1968); *Re* L. (Infants), [1962] 3 All E.R. 1, [1962] 1 W.L.R. 886 (C.A.).

[64] 9 A.L.R. 455, at 459, F.L.C. 90-041 (Aust. Fam. Ct. 1976).

[65] *Supra* note 2.

[66] 7 F.L.R. 484 (Qd. S.C. 1966), *aff'd* 10 F.L.R. 285 (Qd. C.A. 1966).

[67] F.L.C. 90-085 (S.A.S.C. 1976).

[68] 14 S.A.S.R. 321, F.L.C. 90-277 (S.C. 1976).

prefer one variety of religion to another. In *Dodd*, however, an aboriginal mother who was a Jehovah's Witness was deprived of the custody of her youngest child because the court was of the view that the mother's sister and brother-in-law, who had had charge of the child for five years, were more stable than the mother. Walters J. said:

> It is not my function to prefer one type of religious upbringing to another ... and thus I make no discrimination against the respondent by reason of her wish to have [the child] brought up as one of the Jehovah's Witnesses. Nevertheless, I think it is more likely than not that if the applicants had chosen to become members of the Jehovah's Witnesses, as the respondent exhorted them to, she would have been content to allow them to retain the care and control of the child.[69]

Matters of both custody and access arose in *Wellington*, where Mitchell J. gave the custody of two of the children of the marriage to the wife, who was a Jehovah's Witness, and the other two to the father, who was a member of the Church of England. On the question of custody, the judge reiterated the view that it was not the function of the court to prefer one type of religious upbringing to another and, on the question of access, that it was undesirable that the children should have conflicting religious education. Accordingly, she ordered that the access of either parent would be conditional on the non-custodial parent not attempting to indoctrinate the children. Thus, from the Jehovah's Witness mother's point of view, Mitchell J. said that "it is a condition of the order for access in favour of the petitioner that neither [child] will be sent or taken to meetings of the Jehovah's Witnesses or on 'door knocking' expeditions during the periods of access."[70] Taken together with her reiteration of the principle that one variety of religion should not be preferred over another, the conditions imposed by Mitchell J. would seem sensible in that they would tend to lessen the risk of confusion in the children.

Conclusions

The basic question which remains after a discussion of the recent case law, all of which seems to reaffirm the courts' unwillingness to make value judgments on matters of religion, is how far this judicial policy is justified by some of the available empirical evidence. It is, in fact, rather surprising that so little research into the psychology and family life of religious extremists has been done. As regards relations with children, it seems from work done by Gil,[71] and by Steele and

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[69] *Supra* note 67.

[70] The father was likewise not permitted to send the other children to Anglican Sunday School during his periods of access.

[71] D. GIL, VIOLENCE AGAINST CHILDREN 106 (1973).

Pollock,[72] that there is little correlation between religion and the incidence of child abuse, although the latter writers and Van Stolk[73] note, in Van Stolk's words, that "among those people who were actively involved in their religion there was a greater than average adherence to a very strong, rigid, authoritative, fundamental type of belief".[74] Further, the psychiatrist Sula Wolff has commented[75] on the stress-producing situations in which children from minority religious sects tend to find themselves and that these situations are very frequently the product of feelings of isolation which develop from the social practices of such groups. Children in these circumstances, Wolff writes, cope with their difficulties

> by means of reaction formation: they become excessively devout adherents of the particular beliefs and practices of their group and they proclaim their pride to be members of it. With these attitudes they counter the curiosity and disbelief of other children and the headshaking of adults. Yet they cannot altogether identify with the beliefs and traditions of their own sub-group that deprive them of so many opportunities in the wider world. At the same time they are not allowed to identify completely with the standards of "the others". The result is a latent division within the personality which often does not become manifest until adolescence.[76]

There have been various studies on the social background of members of minority religious groups. The French writer Seguy has described[77] the general characteristics of the Jehovah's Witnesses movement as including a working class background, rudimentary education and a strong tendency to compensate for lack of personal social success by collective messianic success. In this context, Beckford's finding[78] that only 3% of his sample of British Jehovah's Witnesses had deliberately sought contact with the movement, the remainder's association being the result of the movement's proselytizing activities, is interesting. Similarly, both Breckwoldt[79] and Schneiderman[80] have examined two manifestations of the Krishna movement and have noted

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[72] Steele and Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in THE BATTERED CHILD 106 (eds. R. Helfer and C.H. Kempe 1968).

[73] M. VAN STOLK, THE BATTERED CHILD IN CANADA 17 (1973).

[74] *Id.*

[75] S. WOLFF, CHILDREN UNDER STRESS 156 (Rev. ed. 1973).

[76] *Id.*

[77] Seguy, *Messianisme et échec social: les Témoins de Jéhovah*, 11 ARCHIVES DE SOCIOLOGIE DES RELIGIONS 89 (1966).

[78] Beckford, *Organization, Ideology and Recruitment: The Structure of the Watch Tower Movement*, 23 SOCIOLOGICAL REV. N.S. 893 (1975). For other comments by Beckford on the organization of the Jehovah's Witnesses sect, *see New Wine in New Bottles: a Departure from Church-Sect Conceptual Tradition*, 23 SOCIAL COMPASS 71 (1976) and *Structural Dependence in Religious Organizations: From "Skid-Road" to Watch Tower*, 15 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 169 (1976).

[79] Breckwoldt, *The Hare Krishna Movement in Australia*, 9 AUST. AND N.Z.J. SOC. 70 (1973).

[80] Schneiderman, *Ramakrishna: Personality and Social Factors in the Growth of a Religious Movement*, 8 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 60 (1969).

its appeal for alienated personalities. The most telling finding, it is suggested, again concerns Jehovah's Witnesses and results from a survey conducted by Spencer in Devon, England, and the state of Western Australia.[81] Spencer suggests, as a result of his survey, that Jehovah's Witnesses are more likely to be admitted to psychiatric hospitals than the rest of the community, are three times more likely to be diagnosed as suffering from schizophrenia and nearly four times more likely to suffer from paranoid schizophrenia than the rest of the population at risk. Spencer concludes by saying that "either the Jehovah's Witnesses sect tends to attract an excess of pre-psychotic individuals who may then break down, or else being a Jehovah's Witness is itself a stress which may precipitate a psychosis. Possibly both of these factors may operate together."[82] Spencer's findings are particularly disturbing and suggest that the courts have been operating on a factually erroneous basis in regard, at the very least, to Jehovah's Witnesses.

The recent cases involving the interplay of child law and minority religious groups display a general tendency by the courts of the Australian, American and Canadian jurisdictions to subordinate the welfare considerations of the child to the preservation of religious freedom where it is the mental well-being of the child which is at issue. This would appear to be a high price to pay for the preservation of religious freedom: it would appear to be a more judicially and socially desirable approach for the courts to distinguish between religious belief and religious practice and apply constitutional protection to religious belief only. This would alleviate the problem of having to condone religious practice by the parent which threatens the physical or mental well-being of a child in his care because of an unwillingness to upset constitutional safeguards with respect to religion. This distinction between religious belief and practice has, in fact, been drawn, perhaps less properly,[83] in other areas of law.

In the social science area, a number of studies have demonstrated that children raised in minority religious groups are at a substantially greater risk than others of developing psychological problems. Such findings, it is suggested, should be utilized by the courts in determining whether a child's welfare is best being served. To paraphrase the well known *dictum* of Holmes C.J. in *Buck v. Bell*,[84] the principle which covers medical treatment for physical illness[85] should extend to medical treatment for mental illness.

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[81] Spencer, *The Mental Health of Jehovah's Witnesses*, 126 BRIT. J. PSYCH. 556 (1975).

[82] *Id.* at 558.

[83] *Supra* note 40.

[84] 274 U.S. 200, at 207 (1926).

[85] In the United States at any rate, *supra* note 41.

In short, the courts should not be willing to sacrifice the welfare of the child in favour of freedom of religion where a parent's practice of his religious conviction seriously endangers either the mental or physical welfare of the child. Constitutional freedom of religion is not an excuse for failure to protect children from the consequences of their parents' beliefs and actions.