Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare

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INTRODUCTION • 382
I. PHILOSOPHY • 388
   A. Introduction • 388
   B. The Role of Government • 389
   C. Philosophy of Law • 393
   D. Philosophy of Family • 396
   E. Philosophy of Children as Individuals • 400
II. THE CURRENT LAW OF PARENTS PATRIAE • 403
   A. Introduction • 403
   B. Juvenile Courts • 404
   C. Custody • 410
   D. Adoption • 412
III. APPLIED PHILOSOPHY • 415
IV. SYSTEM BREAKDOWN • 418
V. MURDERED CHILDREN • 420
VI. DESTROYED FAMILIES • 421
   A. What Is a Family? • 421
   B. Feminist Critique • 424
   C. The Need for Family Autonomy • 428
   D. Lofty Aims—Danger to Children • 433
   E. Unrealistic Goals and Assumptions • 434
   F. Power Corrupts, and • 436
VII. FIXING A BROKEN CHILD WELFARE SYSTEM • 437

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Introduction

Parens patriae, literally "parent of the country," is the government's power and responsibility, beyond its police power over all citizens, to protect, care for, and control citizens who cannot take care of themselves, traditionally "infants, idiots, and lunatics,"¹ and "who have no other protector."² The doctrine took on (or reclaimed³) its protective character at the abolition of feudal tenures in 1660,⁴ and has been, since then, imbued with the solicitous concern typical of equity.⁵

Like most protection, governmental actions based in the parens patriae power result not only in protection but also in increased limitations and even hardship for those protected and for others. For example, protecting children from enforcement of their contracts for non-necessaries may make knowledgeable people unwilling to enter into such contracts with minors though the contract may be of advantage to the child.⁶ Mandatory court supervision of custody and

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¹ A.S. Oppé, Wharton's Law Lexicon 730 (14th ed. 1938). Only the doctrine's application to children will be discussed here, although much of what is said may apply to other protected groups as well.
⁴ See Act Abolishing Feudal Tenures and Imposing Hereditary Excise. 12 Car. 2, c.24 (1660) (Eng.). For a thorough history of the doctrine, see generally Clark, supra note 3.
⁶ See Halbman v. Lemke, 298 N.W.2d 562, 564–65 (Wis. 1980) ("Thus it is settled law in this state that a contract of a minor for items which are not necessities is void or voidable at the minor's option."). Courts generally recognize that the purpose of the "infancy doctrine" or "doctrine of incapacity" is to protect minors from entering into contracts with adults who may take advantage of them. See, e.g., Kiefer v. Fred
visitation to protect a child's best interests following divorce may preclude development of normal family respect, autonomy, and love. However, this doctrine also allows the minor to take advantage of an adult, in that such a contract is void or voidable at the option of the minor. Thus, an adult would understandably be somewhat reluctant to enter into any kind of contract with a minor. The *Hallman* court held that "absent misrepresentation or tortious damage to the property, a minor who disaffirms a contract for the purchase of an item which is not a necessity may recover his purchase price without liability for use, depreciation, damage, or other diminution in value." *Hallman*, 298 N.W.2d at 567.

7. *See infra* notes 179–184 and accompanying text.

8. Running away as a juvenile is a "status offense" in at least nineteen states. SCIENTIFIC ANALYSIS CORPORATION WITH REGIONAL INSTITUTE OF SOCIAL WELFARE RESEARCH, INC., THE LEGAL STATUS OF ADOLESCENTS 1980, 183–86 (1981). The Illinois statute on contributing to the delinquency of a child, 720 ILL. COMP. STAT., 130/1–2a (West 1998), does not specifically address aiding a runaway, but the court in *People v. Rauhauser*, held that a "house parent" at a private home for children did not contribute to the delinquency of a child by providing his apartment as a place for children who threatened to run away, in view of the fact that he insisted that the children return home. Presumably, had the "house parent" allowed the children to move in with him and not encouraged them to go home, he could have been found to have contributed to the delinquency of a minor. *See People v. Rauhauser*, 287 N.E.2d 78, 80 (Ill. App. Ct. 1972).


9. Child labor laws evolved to protect children from working in conditions injurious to their health. Several provisions of the federal act regulating labor, the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (West 1998), speak directly to the issue of child labor. Section 212(c) prohibits an employer engaged in interstate commerce or producing goods which will be moved in interstate commerce, from employing children in circumstances constituting "oppressive child labor". Section 215(a)(4) subjects an employer who violates Section 212(c) to criminal penalties. Section 203(1) defines "oppressive child labor" as the employment of children under a minimum legal age for a certain type of occupation or industry. Generally, that legal age is sixteen. *See 29 U.S.C. § 213(c) (West 1998). Although many of the concerns necessitating such legislation have now been alleviated, many state statutes
the children's being viewed as self-controlling if they are not first self-supporting. If children do manage to earn money, their earnings belong to their parents, and, while many parents choose to refrain from claiming that ownership, the choice is the parents'.

The parameters of acceptable child and parental behavior are narrowing, with definitions of neglect and dependency and the need for supervision allowing ever growing numbers of children to come appear to continue the prohibitions in much the same manner as in 1938. See generally Note, Child Labor Laws—Time to Grow Up, 59 Minn. L. Rev. 574 (1975).

It is quite true that the original child labor statutes were passed at a time when children were often employed for long hours at low wages to the detriment of their health, education, and general upbringing. Circumstances have changed. Children nowadays may be handicapped instead by the lack of opportunity for work experience at an early age.... But one purpose remains unchanged, that of preventing the injury and maiming of young children.


10. The definition of emancipation differs from case to case, according to the court's interpretation of the common law in its jurisdiction and/or the statutory guidelines. The following factors in determining emancipation were discussed in American Law Reports:

In general, even in the absence of statute, parents are under a legal as well as a moral obligation to support, maintain, and care for their children, the basis of such a duty resting not only upon the fact of the parent-child relationship, but also upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden. However, various voluntary acts of a child, such as marriage or enlistment in military service, have been held to terminate the parent's obligation of support, the issue generally being considered by the courts in terms of whether an emancipation of the child has been effectuated. In those cases involving the issue of whether a parent is obligated to support an unmarried minor child who has voluntarily left home without the consent of the parent, the courts, in actions to compel support from the parent, have uniformly held that such conduct on the part of the child terminated the support obligation.


When a child leaves the family home with the consent of the parents, the child will be considered emancipated. See Timmerman v. Brown, 233 S.E.2d 106, 107 (S.C. 1977).

within juvenile court jurisdiction and, thus, its protective activity. As the numbers of custody disputes rise, usually in divorce cases or paternity proceedings, courts acquire ongoing supervision of many childhoods, and the state attends to details of proper child rearing in new and more pervasive ways. It is sometimes asserted that the state

12. A succinct definition of child neglect is provided by the District of Columbia statute. This statute defines a neglected child as one who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his parent, guardian, or other custodian.


A less helpful definition is provided by an Alaska statute which defines abuse or neglect as "physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby." Alaska Stat. § 47.17.290(2) (Michie 1998 & Supp. 1999).

These statutes are illustrative of the difficulty encountered when attempting to define neglect. Margaret Meriwether raises the following questions with respect to defining neglect: Should the definition focus on the parental behavior or on the harm to the child? The author suggests two possible standards. See Margaret H. Meriwether, Child Abuse Reporting Laws: Time for a Change, 20 Fam. L.Q. 141 (1986). The higher standard is that a child should be afforded the equivalent to care by a reasonably prudent parent. The lesser standard would define neglect as "failure to provide adequate food, shelter, clothing, and medical care." Meriwether, supra, at 158.

The author highlights several effects of the reporting biases created by a statute's inclusion of particular definitions and/or standards. Certain races or socioeconomic groups are singled out—excluding equal treatment in the legal system for all groups. Poor, minority families are subjected to an increased number of unwarranted intrusions by the state. The under reporting of abuse in white, middle-class families leaves those children at higher risk. See Meriwether, supra, at 162.

The Illinois statute defines neglect as follows:

a dependent and neglected child shall mean any child who while under the age of 18 years, for any reason is destitute, homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or habitually begs or receives alms; or is found living in any house of ill fame or with any vicious or disreputable person; or has a home which be reason of neglect, cruelty or depravity on the part of its parents, guardian or any other person in whose care it may be is an unfit place for such child;...


14. The determination of custody is a difficult task for the court, particularly because the decision is to be based upon a determination of the child's best interests. While the
has the power to create or destroy families and has plenary parental power over all child-citizens, particularly when families differ from the cultural mainstream.\textsuperscript{15} Historically, the power arose only upon the unavailability of the natural guardian,\textsuperscript{16} but that is clearly not true of modern \textit{parens patriae}, which comes into play upon far lesser defaults of parental guardianship or child behavior.\textsuperscript{17} This gradual broadening

\textsuperscript{15} Uniform Marriage and Divorce Act § 402, 9A U.L.A. 282 (amended 1973) gives some very broad guidelines (see infra nn.112–113), the judge essentially must make a decision without specific statutory guidelines. Often, the judge will have to choose between two parents whose parenting ability is on a par. In those situations, the court seems to rely on external factors in making a custody determination. For example, the Illinois Supreme Court affirmed the lower court decision that the mother's cohabitation with a male lover may adversely affect her children's emotional health and therefore the father should have custody. See Jarrett v. Jarrett, 400 N.E. 421, 425–26 (Ill. 1979).

As a practical matter, a judge making a decision in a custody dispute is simply choosing the alternative which maximizes benefits to the child, or, alternatively, the judge is choosing the least detrimental alternative for the child. See Robert H. Mnookin, \textit{Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy}, \textit{Law \& Contemp. Probs.}, Summer 1975, at 226, 255–62. Of course, the judge's determination is influenced by his or her own personal values and beliefs about what is best for children.

There are custody cases which are easy to decide. As Mnookin states: "While there is no consensus about what is best for a child, there is much consensus about what is very bad (e.g., physical abuse); some short-term predictions about human behavior can be reliably made (e.g., chronic alcoholism or psychosis is difficult quickly to modify)." Mnookin, \textit{supra}, at 26.

\textsuperscript{16} \textit{See}, e.g., \textsc{Aristotle}, \textit{The Politics} at bk. VIII, ch. 1 (T.A. Sinclair trans., Penguin Books 1970) ("all citizens belong to the state"); \textsc{Donald Ford}, \textit{Children, Courts and Caring} 11 (Constable 1975) (community must increase "involvement in the lives of [those]... who... slip out of the mainstream or come into conflict with the norms prevailing in society"); Mercein v. People ex rel. Barby, 1840 WL 3648, *23 (N.Y.) ("There is no parental authority independent of [its source] the supreme power of the state.").

\textsuperscript{17} The state, under its \textit{parens patriae} power, can become a powerful coercive force on the family both by interfering with parental upbringing of children and by proscribing certain activities for children. "Acting to guard the general interest in youth's well being, the state as \textit{parens patriae} may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). While as a general proposition it may be true that such force is in the best interests of the children because it is a protective force, as a practical matter, the coercive force of the state may become disruptive of the family.

While the Supreme Court in \textit{Wisconsin v. Yoder} held that the state could not compel Amish parents to send their children to school until age sixteen, the Court emphasized the historically demonstrated religious conviction of the Amish people in holding that the state, through its \textit{parens patriae} power, could not intervene in the

\textsuperscript{15} See Clark, \textit{supra} note 3, at 109–10, 116.

\textsuperscript{17} The state, under its \textit{parens patriae} power, can become a powerful coercive force on the family both by interfering with parental upbringing of children and by proscribing certain activities for children. "Acting to guard the general interest in youth's well being, the state as \textit{parens patriae} may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). While as a general proposition it may be true that such force is in the best interests of the children because it is a protective force, as a practical matter, the coercive force of the state may become disruptive of the family.
of the government's *parens patriae* power calls for thoughtful attention and philosophical limitation if the family as we have thought of it is not to disappear altogether. The divorce rate and the acceptability of single parenthood have already led to a sharp increase in one-parent homes; even if we were to allow the state to replace the absent parent, it should be done intentionally and with forethought, not by accidental expansion of the governmental role without consideration of the effects of such actions or the broad principles involved.

This paper will turn to philosophy to seek material for limiting the exercise of *parens patriae* power. A significant reduction of the government's role will better serve the modern concern for child rearing which is this century's re-definition of best interests.


Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. *Yoder*, 406 U.S. at 235.

It would be very difficult for a small, more recently started religious group to use the rationale of *Yoder* either to remove children from school at the age of fourteen or to home school them.

Three years after *Yoder*, the Supreme Court summarily affirmed a district court decision that corporal punishment of a child in a school setting, expressly against the wishes of the mother, denied neither the child nor the mother any constitutionally protected rights. See *Baker v. Owen*, 395 F. Supp. 294, 296, 299–303 (M.D.N.C. 1975), aff' d, 423 U.S. 907 (1975). The mother argued that her right to make discipline choices as a parent was fundamental. See *Baker*, 395 F. Supp. at 298–99. The court stated that such decisions as *Meyer* and *Pierce* should not be interpreted so as to "enshrine parental rights." *Baker*, 395 F. Supp. at 299.

The state's power as *parens patriae* is probably most notorious in the area of neglect and abuse proceedings. Because abuse and neglect statutes are extremely inconsistent from state to state, the discretionary power of the court raises questions and concerns in these cases. See infra notes 98–99.


I. Philosophy

A. Introduction

Philosophers have long addressed the roles of government and law in society; some reference has been made to the role of family; little or no material discusses children's places vis-a-vis any of these. Generally, the difference of opinion over state supremacy or family supremacy and areas where each should be paramount is as present in philosophical history as in legal history. Therefore, the basic dilemma cannot be resolved by turning to the philosophers for guidance. It can, however, be further illumined: "[Q]uestions about the nature of family cannot be extricated from questions about the nature of the state and of the good society." 20 "[A]ssumptions based on one solution or another [to insoluble philosophical questions] are almost an everyday factor in the legislative, judicial and administrative processes," 21 and a rule or statute is a "concrete particularization of a consciously or unconsciously held ideal." 22

Law turns to philosophy for guidance, although philosophy has largely ceased to be concerned with law and extrapolation is necessary. 23 "Law as a field of speculative inquiry is a subject in which philosophers nowadays evince little interest. This is a relatively new attitude on the part of philosophers, and an unfortunate one in its consequences for both disciplines." 24

There will be no attempt made here to construct a history of the philosophy of law or government and no exhaustive report of the philosophy of the family or the child in society. The aim of this section is not to demonstrate that the dilemmas of balancing rights and duties of parent, child, and state are resolved in the realm of philosophy, but to show that philosophers can assist in asking the right questions to lead to individual resolutions, to collective solutions which avoid unnecessary trampling upon anyone's basic views, and to definition of areas where compromise is probably not possible.

21. HUNTINGTON CAiRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 18 (1967).
22. CAiRNS, supra note 21, at 19.
23. See CAiRNS, supra note 21, 27–28.
24. CAiRNS, supra note 21, at 1.
B. The Role of Government

Throughout most of human history, the task of resolving the most crucial social problems has been consigned to governments.... because of the widely held belief that only governments are competent to achieve just and efficient solutions to social problems...., but [history] also records a recurrent theme of dissent. [Some argue] that many of the social problems not actually caused by governments could have been expected to find their own resolutions if governments had not intervened.... Government does require justification. It is a human creation, the product of deliberate human action.\footnote{JOHN T. SANDERS, The Ethical Argument Against Government at vii–x (1980).}

Starting from the premise that coercion without good reason is morally unacceptable, philosophers supportive of anarchy conclude that "government is morally unacceptable; it should be abandoned,"\footnote{SANDERS, supra note 25, at 240.} because "coercion in society may be controlled without resorting to government,"\footnote{SANDERS, supra note 25, at xiv, n.7. See generally, Robert Nozick, Coercion, in Philosophy, Science, and Method (Sidney Morgenbesser et al. eds., 1969) (discussing the principles of coercion).} which ends up being more coercive of more people more often than is necessary. Social control by the threat of self-help retaliation, offers of reciprocity or threats to withdraw it, and social and supernatural sanctions (such as gossip and ridicule or witchcraft accusations) is possible in some communities.\footnote{See MICHAEL TAYLOR, Community, Anarchy and Liberty 91 (1982).} The transition to a stateless society could be made by neighborhood cooperation, cooperation of fellow employees, and other voluntary associations.\footnote{See TAYLOR, supra note 28, at 166–71.}

This line of philosophical thought would abolish the doctrine of parens patriae by obliterating the governmental power in which it resides. Child protection would revert to community control with norms and standards informally enforced in ways which might be reminiscent of the Anglo-Saxon kindred. Neighbors, friends, or relatives might rescue an abused infant; an older child might run away from home, without state interference. On the other hand, parents might abuse children, also without state interference. Rescuers and
parents might snatch a child back and forth between them. However, all these events occur in the present system, sometimes with the state as one of the harmful contenders.

The absence of government would not necessarily mean the end of formal dispute resolution, although it would bring the end of law enforcement as we know it. Private dispute resolution by arbitration and mediation could comfortably continue without government, and could be used, as is already common, in disputes concerning children.

A more widely held philosophical position is that government is necessary but should be limited. The aim of government is to protect liberty, to protect the weak from the strong, and to allow for the human truth that people are not governed by reason all or most of the time and must, therefore, sometimes be coerced by an authority with the power to carry out its threats. However, "that government is best which governs least." Government should be formed and controlled by the consent of the governed. Enforceable law is preferable to private force, and one or the other will prevail, but injustice done by the government itself must constantly be expected, prevented, and limited. Human beings will compete and use force against one another and need to submit to agreed restraints for mutual peace and benefit. This is, of course, the school of thought upon which United States democracy was founded and English monarchy reformed.

In such a system, parents are seen as primary protectors and nurturers of their children, but the state may interfere by assisting

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30. See BENEDICT DE SPINOZA, TRACTATUS THEOLOGICO-POLITICUS 270–86 (Tübner & Co. 1862) (1670).
31. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Please note that the Locke citations throughout this article refer to sections within "The Second Treatise of Government."
32. According to Locke: Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate and subjected to the Political Power of another, without his own Consent. The only way whereby any one devests himself of his Natural Liberty, and puts on the bands of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.

LOCKE, supra note 31, at § 95.
33. See CAIRNS, supra note 21, at 211–12 (discussing Francis Bacon’s theory of the origin of law and justice).
34. See THOMAS HOBBES, LEVIATHAN ch. XVII, at 87 (J.M. Dent & Sons 1973) (1651).
them in these tasks or by supplanting them as mandated by rules made with majority consent and limited by built-in safeguards against governmental injustice. *Parenspatriae* in such a system is a recognition that the child’s incapacity for self-care and self-protection demands special solicitude from governmental authority when parents fail both to provide the necessary care themselves and also to find others who provide it. Problems with this system include creating agreed-upon standards about both what are the limits of necessary care and what the state should do with the children for whom it becomes responsible.

A third common viewpoint is that government exists primarily to promote the common good, as well as to protect individuals insofar as is possible consistently with the welfare of the greatest number. It is assumed that common good and the good of the majority are the same. Government is a natural part of human life, and the public good is superior to individual rights. The modern welfare state is founded upon such views and co-exists, in today’s democracies, with the individuality of the preceding view—impossible to merge, but often able peacefully to co-exist.

In such a system, parents may or may not be the primary caregivers for children, depending upon what is seen as best for most citizens. The state may decide what is best and enforce its view. *Parenspatriae* in such a system is a recognition that children’s welfare, because of their natural dependence, may properly take precedence over the welfare of their parents or other adults. Here, the problem of determining what is best for the greatest number of children becomes the primary difficulty in deciding what should be the role of parents, communities, and government, and reliance upon divided expert opinion is virtually inescapable.

A fourth school of philosophical thought sees government as the benign ensurer of a transcendent rightness, be it the will of God or a collective good independent of the greatest good for the greatest number, to which the individual may properly be sacrificed. An hereditary monarchy allows the state to be a direct revelation of God.

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People are evil and self-destructive and need the absolute authority of church or state to be saved. Any despotism which ceases to accept citizens' ideas of what is good for them becomes such a system.

In such a system, *parenspatriae* is akin to the government's right to control all citizens, not a special doctrine for protecting the helpless; it merges with the police power. If the state is always paramount, because it represents and acts for transcendent rightness, it may properly act for or against any individual person as that rightness requires. Neither parents nor children have any right or power to interfere with the state's needs, since each person's highest duty and privilege are to serve, even by giving up life itself, that rightness expressed in government for the good of all. *Parens patriae* is swallowed up in the government's equal and absolute power over any and all individuals. The child's malleability is an incentive for the state to assure that each child will be taught to honor the state and, thus, the transcendent principle it expresses. Therefore, children may be special objects of governmental coercion, not because they need the state but because they are needed by the state. While an expressed solicitude for children might mask such a view, it must necessarily be an hypocrisy, for the welfare of individual children can never be paramount in such a system.

*Parens patriae*, then, can be a viable doctrine only in a society governed under some form of the second and third philosophies of government discussed above. With anarchy, there is no government to exercise it, and, with a transcendent state, there is no solicitude for individuals of any age or capacity, but only for their service to the state, or the collective values. There is no need for special power over children, since the state has plenary power over all citizens. The remainder of this paper will address variations within the second and third philosophies above, in which there must be government and government must protect either individuals or the general welfare, at least sufficiently to assure citizens' continuing peaceful consent to its governance. With either limited government or socially beneficent government, special rules and protection for children are likely to arise, and *parenspatriae* is a viable doctrine.

He clearly did not share de Maistre's distrust of rationalism. See supra III at 22; see also, R. Filmer, Patriarcha Or the Natural Power of Kings (Hafner 1947) (1680).

38. See Charlton, supra note 36, at 134. Rational justification, which can always be refuted, should, therefore, be avoided.
C. Philosophy of Law

Most philosophers have recognized that human beings are greedy and competitive, not always rational, inclined to use force if it will work, and otherwise imperfectly self-controlled. Therefore, a system of law may be necessary to set standards for interactions among people and to enforce those standards.

Some have believed that God, as creator, or the universalities in human nature itself and the givens of the physical world in which we live would, if we understood them thoroughly, lead to one particular system of law which would work perfectly for our governance. This system is called natural law. Its adherents recognize that human inability to discover fully that reality, or to agree upon what has been discovered, forces humanity, as a practical matter, to have a less than ideal system of law, and to limit the power of the imperfect legal system devised. Some also believe that some regulation in areas without significance in natural law may be based on arbitrary choices by the majority. Legal change will involve correcting mistakes and incorporating new discoveries as we strive to make the system ever more like the natural ideal.

The nominalists, on the other hand, believe that there is a wide variety of equally good and possible systems of law and that a society simply creates one of these as well as it can. Law, therefore, is made,

40. See de Spinoza, supra note 30, at 259–69.
41. See Cairns, supra note 21, at 211 (discussing Bacon's theory of the origin of law and justice).
42. See generally, Aristotle, supra note 15; Blackstone, supra note 5; Plato, The Republic (Henry Davis trans., M. Walter Dunne 1901) (circa 380 B.C.); de Spinoza, supra note 30.
43. See Cairns, supra note 21, at 556–57.
44. See, e.g., Locke, supra note 31, at §§ 134–42.
45. See, e.g., Blackstone, supra note 5, at 42. Blackstone's example is an interesting one. He suggests that regulation of the "exporting of wool into foreign countries" is one of these areas of indifference to God, the source of natural law. I suspect that most would not agree today, for the exporting of wool affects the well-being of domestic and foreign workers, the spread of disease, the distribution of wealth, the use of natural resources, and other areas of great concern to modern-day lawmakers. Better modern examples might include rules about whether to drive on the right or left side of the road or whether to stop, go, or proceed with caution when a traffic signal is red, green, or yellow. The nature of things may well be such that some rule is desirable, but is unaffected by whether red or chartruese means stop.
not given, and must be re-examined and changed whenever doing so can make the system work better. The ideal is a pragmatic one, and there is no search for natural perfection or for the right system of law. For the nominalist, there is no such thing. All law is of indifference to God and nature; law is a matter of human choice and convenience.

While members of these divergent schools of thought may grow infinitely weary of one another’s rhetoric, or angrily attempt to convert one another, they are hardly unable to work together at law-making. They are in perfect agreement in areas seen by the realists as having no impact on natural order, such as whether drivers are required to keep to the right or to the left, and both are ready to incorporate new wisdom into law, one group because it brings the system closer to natural law and the other because it makes the system work better. Problems arise over what is better and which new learning is part of natural law and which is new error. In those debates, those within each school of thought are likely to oppose one another, since their disagreements will be based on other values than views on the nature of law.

Within this middle philosophical ground, where governmentally enforceable law is seen as both necessary and potentially dangerous to desirable individual liberty or general welfare, there is a wide range of views on the extent to which government should make law for the good of individuals as opposed to fostering liberty by doing nothing and leaving them alone. Debate among holders of differing views on that issue constitutes most of the rhetoric on the exercise of the parens patriae power and most other important modern issues.

The philosophers have been less helpful in this area, perhaps because it poses unanswerable questions and elicits basic assumptions about the nature of human life rather than rational analysis. For example, under parens patriae, one question is: “Is it better that one child be killed by abusive parents or that “x” number of children, who would have survived in good health, suffer state severance of their parent-child bonds because their parents cannot reliably be distinguished from those who will kill their children?” Liberty favors letting one child die, at least if “x” is a fairly large number; the greatest good (or least harm) for the greatest number may favor removing “x” number of children unnecessarily, given the same number value of “x.” Moreover, this fairly simple question assumes that death is worse than loss of parents which is probably not universally agreed upon. It also completely ignores the rights of parents. It is also silent about both
tolerance towards parents who encourage early sexual experience, homosexuality, criminal behavior (i.e., teaching children techniques of armed robbery, buying a child a “fuzzbuster,” including a child in actions of civil disobedience); and about different views on effective parenting (i.e., those who practice strict discipline with corporal punishment, isolation in a closed or locked room, burning a child with a match to demonstrate that matches are dangerous, repeatedly telling a child she is stupid or lazy or bad, or letting a child do whatever she will if it’s not immediately dangerous). It is clear that any discussion of specifics will lead to differences even among those who can agree upon a theoretical balance between individual and collective protection. The statements of philosophers on individual liberty versus common good do not take us very far.47

Perhaps the primary proponent of individual liberty as it was seen at the formation of American law was John Locke. According to his view, all human beings are equal in nature, and none has the right to coerce or injure another as to life, health, liberty or possessions.48 He believed law must include safeguards against government coercion beyond that necessary to limit citizens’ coercions of one another.49 Some modern philosophers see his ideas as no longer influential,50 but his legacy is certainly still present in the legal system.51 Both the balance of powers among the three branches of United States

47. See, e.g., 2 Henrici de Bracton, On the Laws and Customs of England 26 (George E. Woodloine ed., S.E. Thorne trans., 1968) (“Private law is that which pertains primarily to the welfare of individuals and secondarily to the res publica . . . . [T]hat which is primarily public looks secondarily to the welfare of individuals.”); Blackstone, supra note 5, at 124 (emphasis in original) (“[T]he first and primary end of human laws is to maintain and regulate these absolute rights of individuals.”); Blackstone, supra note 5, at 123 (“[Rights are] of two sorts, absolute and relative. Absolute, which are such as appertain [sic] and belong to particular men [sic], merely as individuals or single persons: [sic] relative, which are incident to them as members of society, and standing in various relations to each other.”); 2 Thomas Aquinas, Summa Theologica 208 (Father of English Dominican Province trans., Encyclopedia Britannica 1952) (St. Thomas Aquinas died in 1274) (“Law is an ordinance of reason for the common good, made by him [sic] who has care of the community, and promulgated.”).


49. See generally, Locke, supra note 31, at §§ 163–64.

50. See Cairns, supra note 21, at 336 (saying that Locke’s practical influence was gone by World War II).

51. Locke’s principles “were embalmed in the Constitution of the United States which survives like an ancient family ghost haunting a modern sky-scraper [sic].” C.D. Broad, John Locke, 31 Hibbert J. 249, 256 (1933). The civil rights explosion of the 1960s and 1970s might have changed Broad’s mind.
government and the Bill of Rights in the United States Constitution serve to limit government's actions by preserving individual liberty, even of those whom the majority would oppress, and assuring that elected officials remain responsive to the public. The more prevalent view today, however, appears to be the general welfare view.

D. Philosophy of Family

Family has been little discussed by philosophers, but two clearly divergent schools of thought emerge from the few references found. One view holds that families need and create the state by compact or agreement, and the other, exemplified in Roman law, holds that the state, by marriage and adoption laws, creates the families it needs to serve the common good.52

According to sociologist W.J. Goode,

[t]he earliest moral and ethical writings suggest that a society loses its strength if people fail in their family obligations . . . [P]hilosophers, reformers, and religions, as well as secular leaders, have throughout history been at least implicitly aware of the importance of family patterns as a central element in the social structure. . . . 53

For example, Blackstone believed that “[S]ingle families . . . formed the first natural society, among themselves.”54 The purpose of natural law

is to preserve and further the natural community . . . . The community of husband and wife serves ‘to preserve the human race.’ . . . The community of parents and children is cultivated and preserved by the parents for the pleasure of enjoying grateful children, and by the children in order that they themselves may reach perfection.55

52. See J. B. Moyle, Imperatoris Instiniani Institutionum, Libri Quattuor, with Introductions, Commentary, and Excursus 16–19 (2d ed., Clarendon 1890) (1877) (Justinian first wrote this material in about 532 A.D.).
54. Blackstone, supra note 5, at 47.
55. Cairns, supra note 21, at 329 (discussing the ideas of Leibzig).
Men and women are brought together by their sex drive, which produces children, which leads to human societies because parents cannot meet all family needs alone. Some societies are organized in larger kinship groups, and kinship feeling, not sex drive, may be the basis of human society. Procreation gives parents the duty to rear their children, which gives parents the right to control their children until the latter are self-supporting. The family existed before the political organization of society, but only the political powers have lawmaking authority, which distinguishes government authority from a father's authority over children. "The state is intended to enable all, in their house-holds and their kinships, to live well, meaning by that a full and satisfying life. . . . [I]t is not right . . . that any of the citizens should think that he belongs just to himself; all citizens belong to the state. . . ." All children should be taken from their parents and raised together by specialists in child care.

It is clear from this hodge-podge of views that family-state tensions have a long history and little hope of theoretical resolution. If families exist as sub-divisions of the state, the state may interfere with family relationships at will. If families are the basic, natural societal unit, with government a creature serving at their will, it would be inconsistent for government to interfere in family relationships at all. Clearly a middle way has been chosen in modern human societies, but the basic theoretical difference remains unresolved.

Several modern writers have struggled with this issue at some length, attempting to justify parens patriae intervention to protect children from some parents and, at the same time, to preserve and protect families which are not a danger to the children who live in them. Parents "sometimes fall unacceptably short of the moral minima that limit their paternalistic [sic] role, and children sometimes rebel against the wisdom that is exercised on their behalf. And so the

57. See Cairns, supra note 21, at 377 (criticizing Hume).
59. See Locke, supra note 31, at §§ 52–94.
60. See Aristotle, supra note 15, at bk. III, ch. 9.
state also exercises a *parens patriae* function . . .”, and compels both parent and child for the child’s good.63 “Domestic life is only partially governed by political law, which leaves the greater portion of its rights and duties to be ruled by the less tangible dictates of the moral law . . . [because] the relations governed by the code of the Family are natural, and essential to the existence of the human race. . . .64

All families have dependent children, for every child is born completely dependent and remains so for years . . . . [T]he children in even the most affluent families do need assistance. They obtain it, of course, from their parents or from other members of the family . . . . In short, every major public welfare program is a supplement to similar forms of welfare benefits normally provided by the family. . . . [T]he most important welfare institution in our society is the family . . . 65 [N]ot every hungry child has an ethical claim against me to be provided with adequate nutrition; my child does because of his or her need for food together with the fact that he or she is related to me as my child. And an orphan might well have an ethical claim against his or her state to be provided with food because of his or her relation as a citizen or a subject of that state.66

Family law in England and the United States was derived largely from Roman Catholic canon law which was, in turn, derived from Roman law. The Roman law’s view that families were created by the state to assist social organization survived well into this century. The state’s interest in marriage prevented its dissolution except upon proof in court of serious marital fault by one spouse against the other or against the marriage itself. Families were protected from intrafamily tort actions or any other court interference in on-going marriages.67

63. JOHN KLEINIG, PATERNALISM 143 (1983).
64. GAIUS, ELEMENTS OF ROMAN LAW 47 (Edward Poste trans., 2d ed., Oxford Univ. Press 1875) (Gaius first wrote this material in about 161 A.D.). Gaius goes on to compare human and animal families and concludes that family care of offspring is the natural order of things.
66. WELLMAN, supra note 65, at 35.
Contraception and abortion were prohibited. Only recently have these rules given way to no-fault divorce, abrogation of tort immunities, property and contract actions between still-married spouses, and legalized use of contraceptives and abortion. Those who had children without having been married were not legal families, and they and their illegitimate children were without legal family status. Only recently have these rules given way to rights of illegitimate children and unwed fathers; to enforcement of cohabitation contracts; and to artificial insemination statutes, sperm banks, and surrogate mother contracts. This shift allows individuals much more freedom to arrange their natural, biological and affinity relationships as they will, and it substitutes protection of natural families or of individual liberty for protection of legal families. In startling deviation from the trend the United States Supreme held that, since the state has no say in a woman's first-trimester abortion decision, it cannot delegate any say to the father of the unborn child. This assumption that parental

69. See Clark, supra note 11, at 155–56.
70. See Clark, supra note 3, at 126–28.
71. The question of what constitutes a family will be discussed in a later section. The issue is of central importance to modern family law, but was not, apart from the non-family definition for unwed parents and children, of interest in earlier times. The power of a Roman paterfamilias and the Anglo-Saxon kindred rules both suggest a legally extended family which is notably absent in modern family law. See Clark, supra note 3, at 111–19.
   This case established that a requirement of spousal consent in order for a woman to undergo an abortion was unconstitutional in light of Roe v. Wade, 410 U.S. 113 (1973), which held that the right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

Roe, 410 U.S. at 153.
Although the Supreme Court in Roe and in Doe v. Bolton, 410 U.S. 179 (1973), expressly reserved the decision on the question of whether a requirement of spousal or parental consent was unconstitutional, in this case the Court expressly answered that question. "We now hold that the State may not constitutionally require the consent of the spouse . . ." Danforth, 428 U.S. at 69. The Court further stated that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." Danforth, 428 U.S. at 69. The Court in this opinion makes clear that the spouse may
rights have the state as their sole source flies in the face of the idea that biological families have inherent rights with which the state may only sparingly interfere.

E. Philosophy of Children as Individuals

Family relationships have come "to be evaluated in terms of their contribution to individual welfare." The new focus on individual family members, particularly on the children, is a twentieth century phenomenon. Children were formerly seen simply as dependent members of families or the state, and most references to them as individuals were related to their occasional incursions upon the body politic, not to their individual welfare. It was thought that children should not be held to adult criminal standards because they have not yet had the opportunity to develop virtuous habits, nor should their testimony carry much weight because of their insufficient reason. Children are subject to criminal laws if able to understand general ideas and able to deduce consequences from them. Yet, this general principle would result in punishing pre-schoolers, who have this capability, and we should not hang three-year-olds. All are born equal because all can reason (except lunatics, idiots and children) and therefore no one should be subject to another unless a clear sovereignty comes from God. "[I]nterference with a person's liberty of action [is] justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced." So-called paternalistic relationships are those in which parents act on the presumption that they know better than the child what is best for the latter. It is for this reason that

attain the right to prohibit his wife's decision only by deriving that right from the state.

74. See AQuinAS, supra note 47, at 229; Cairns, supra note 21, at 190.
75. See Cairns, supra note 21, at 86-87 (discussing Locke's theory).
76. See Cairns, supra note 21, at 87 (criticizing Locke).
77. See Locke, supra note 31, at §§ 4, 54-63.
paternalism toward adults or older children is so frequently regarded as offensive or insulting. It is supposed that adults and older children have a reasonable idea of what is good for them, or, if not, are at least competent to take advice on the matter. And so to treat them as young children is to derogate from their capacities and standing.19

Parents frequently extend childhood . . . beyond the time when it should be necessary.80

Deep divisions in both professional and secular opinion over the right approach to the problems of juveniles . . . derive largely from the dialectic between the demands of justice on the one hand, and of welfare on the other, which has informed the continuing debate about how to deal with children in trouble.81

Our welfare interests include, besides health, the development of our intellectual and emotional capacities, the fostering of significant relationships with others, and the accumulation of sufficient, stable resources to enable the execution of flexible life plans.82

The best and most complete discussion of this subject found was part of a book by Dingwall, Eekelaar, and Murray.83 Their lengthy discussion of the philosophical issues raised here explores the views of "socialists" and "liberals," as they label the two extremes of the middle position between what have here been called government to protect the individual's rights and government for the general welfare. In a hierarchical society with a head of household who could serve as the family's link to the state, family-state relationships presented fewer problems. However, conflict now arises because now the socialists say law should forget the family and deal with each citizen "on the basis of need rather than kinship" while "[l]iberals [want to preserve] the family as an important check on the excess of state power."84

79. KLEINIG, supra note 63, at 4.
80. KLEINIG, supra note 63, at 74.
82. KLEINIG, supra note 63, at 143 (citation omitted).
83. See DINGWALL ET AL., supra note 20, at 211–44.
84. DINGWALL ET AL., supra note 20, at 212.
The peculiarly intractable difficulty presented by children [as opposed to the old, the ill, the mentally ill, and the handicapped] . . . is their social potential, the way in which their moral and physical welfare represent matters of concern to the future survival and character of the nation but whose maintenance depends upon the invisible actions of a myriad [of] caretakers.\textsuperscript{85}

Because young children cannot seek help for themselves, "[p]arental power can be restrained only by external surveillance,"\textsuperscript{86} and family autonomy is lost.\textsuperscript{87} However, because a "charge of mistreatment" of one's child is seen as an allegation that one is outside the common humanity of natural family relations which work, and because intervention is so often resisted and cooperation may be secured only by kept promises not to do much, agencies often fail to do what is needed;\textsuperscript{88} even though neither liberals nor socialists object to such surveillance. "Scrutinizing the discharge of power by one citizen over another is one of the proper roles for the state recognized by most liberal theorists. . . . The only body with the legitimacy to survey the whole population is that which, in liberal principle, is accountable to the whole population—the state."\textsuperscript{89}

The authors are suspicious of the "moral panic about child mistreatment" because "[i]ts objects are not children as victims of mistreatment, but mistreated children as threats to civil order, the dominant image in English social policy since the Tudors."\textsuperscript{90} However, they conclude that parents' rights are "duty-rights," like trusteeship, and must be exercised for their children's benefit\textsuperscript{91} but that the state, before it is allowed to intervene significantly, must show both lack of responsibility in the parents and harm to their children.\textsuperscript{92}

It is clear that the philosophical views before this century saw children almost as the property of either their parents or the state, and, probably because little study was undertaken or knowledge avail-

\begin{itemize}
  \item \textsuperscript{85} Dingwall et al., supra note 20, at 215.
  \item \textsuperscript{86} Dingwall et al., supra note 20, at 216.
  \item \textsuperscript{87} See Dingwall et al., supra note 20, at 217.
  \item \textsuperscript{88} See Dingwall et al., supra note 20, at 218–19.
  \item \textsuperscript{89} Dingwall et al., supra note 20, at 219–20.
  \item \textsuperscript{90} Dingwall et al., supra note 20, at 220.
  \item \textsuperscript{91} See Dingwall et al., supra note 20, at 224.
  \item \textsuperscript{92} See Dingwall et al., supra note 20, at 229. The rest of the section cited, Dingwall et al., supra note 83, proposed specific changes in English law.
\end{itemize}
able on the needs of children beyond physical sustenance, their rights and needs were given no close attention. Now these rights and needs are given a great deal of attention, but attempts to fit them into the traditional philosophical frameworks have been less than wholly successful. Also, ideas of what is right and proper in family life, or even what constitutes “family,” have become more diverse, making moral-philosophical discussion along traditional lines much more difficult and, simultaneously, more important.

II. THE CURRENT LAW OF PARENS PATRIAE

A. Introduction

Wherever children are treated differently from adults in law, the parens patriae doctrine is the likely justification, although civil and contractual disabilities of children precede parens patriae, logically and historically. The sovereign’s feudal right to the use of minor heirs’ estates—the original royal prerogative called parens patriae—arose because minors were presumed incapable of managing their own property, a presumption firmly established from at least Roman times onward and long predating the historically traceable use of parens patriae. That very young children are incapable of managing property, participating in citizenship, or entering into business relationships must have been apparent from the time of the first civilizations in which people engaged in such transactions, and their disability must have been recognized in law whenever and wherever legal systems arose. Extension of that disability beyond the age of physical maturity was a Roman phenomenon reborn in feudal times and continued into modern society.

What is clearly derived from post-feudal parens patriae is direct care and protection by the state. During the nineteenth century, the role of the state began its expansion, moving to today’s governmental activism and changing what at the beginning of the century had been

93. See, e.g., Schneider, supra note 19, passim; Teitelbaum, supra note 19, passim.
94. See Clark, supra note 3, at 110–12.
95. See Clark, supra note 3, at 112–13 and n.96.
96. See Clark, supra note 3, at 120–21, 123.
the most private of public law into the most public of private law. 97
"Judicial maintenance replaced patriarchy during the course of the
nineteenth century, and the fate of the family . . . became a matter of
public regulation. Judges and legislators emerged as custodians of the
family, carving out a new legal status for children and married
genres." 98

This "custodianship" finds modern expression in juvenile court
acts, custody determinations, and infant-child adoptions. There is no
attempt here to present exhaustive descriptions of these areas of law,
but only to address the principles which prevail in their modern appli-
cation.

B. Juvenile Courts

The history of juvenile court acts demonstrates the ambivalence
of society in regard to child "protection." The reformers who cooper-
ated to create the first such statutes 99 included those who objected
to the failure of juries to convict children of serious crimes because of
jurors' reluctance to visit upon children severe criminal sentences,
those who wanted special efforts made to rehabilitate young and still-
malleable criminals, those who wanted to get gangs of loitering and
often immigrant youths off city street corners, those who wanted to
save or send away children of poor and therefore presumptively de-
praved parents, and those who wanted to stop physical cruelty by
parents to children. 100 Jurisdiction over minors in need of supervision
allowed attempts to identify as pre-delinquent, and to intervene in the

97. See Michael Grossberg, Governing the Hearth: Law and the Family in
99. Illinois adopted the first juvenile code with passage of the Juvenile Court Act in
1899. Since then, almost every state in the union, the District of Columbia, and
Puerto Rico have all followed suit and adopted similar acts. See Samuel M. Davis et
Al., Children in the Legal System 742-43 (2d ed. 1997).
100. See Davis et Al., supra note 99, at 742. The early reformers viewed children as es-
sentially good and were appalled by the fact that young "criminals" could be given
harsh prison sentences and jailed with adults. The reformers thought that juveniles
should receive care and concern from the state rather than be treated as criminal of-
fenders. See Davis et Al., supra note 99, at 743-44. Rules of criminal procedure were
not deemed appropriate to meet the end of treating juveniles as persons in need of
care rather than punishment and therefore such rules were discarded. The reformers
pronounced that children were to be "rehabilitated" and any procedures employed
were to be to that end. See Davis et Al., supra note 99, at 743-44.
lives and families of children who were truant, habitually disobedient, or immoral. Jurisdiction over children who were neglected, including those actively abused or dependent, allowed the state to protect children from bad parents or from self-care when parents were absent.

Many such statutes did and do express a preference for keeping the child's family intact once the court finds it has jurisdiction to act. Most make the child's welfare the sole or primary objective (over societal protection) of the court's choice among dispositional alternatives, which always include returning the child to the family home, with or without conditions such as good behavior, family counseling, etc. Juvenile criminals have come, over the last several years,

102. See Fox, supra note 101, at 1189.
103. The following New York statute is typical of state statutes expressing a preference for keeping natural families intact.

[I]t is generally desirable for the child to remain with or be returned to the
natural parent because the child's need for a normal family life will usually
best be met in the natural home, and... parents are entitled to bring up
their own children unless the best interests of the child would be thereby
endangered.

104. One example which provides for the disposition of the delinquent child as follows:
2. Placing the child on probation under the supervision of the juvenile
supervisor, probation officer, or other appropriate officer of the
court...;
4. Placing the child in an institution, camp, or other facility for delin-
quent children operated under the direction of the court...; or
5. Committing the child to the state industrial school or to a state de-
partment to which commitment of delinquent or unruly children may
be made.

Arizona's statute provides for the placement of a delinquent child by the juve-
nile court to the following: 1) the care of his parents, subject to supervision by
probation; 2) probation, subject to court-imposed conditions; 3) a reputable per-
in the community, subject to supervision by probation; 4) a private agency or in-
istitution, subject to supervision by probation; 5) department of corrections; 6) the care
of relatives, subject to supervision by probation; or 7) to the care and supervision of
an official of the child's home country. See ARIZ. REV. STAT. ANN. § 8-341(A) (West
1999); California's statute provides for any of the following dispositions, listed in ascen-
ding order of severity: supervision by probation; commitment to the care of a
responsible adult; commitment to the custody of an agency, private or public; place-
ment in a foster home; commitment to a juvenile home, ranch camp or forestry
camp; commitment to juvenile hall; all of the above plus restitution or community
to be treated differently from other children before the court in that a) they may be tried as adult criminals are and in the criminal courts under some circumstances and b) protection of society may supersede care and rehabilitation of the child if need be. Also, in addition to juvenile court supervision of the child, parents and others who abuse children may be charged with various crimes. Criminal prosecutions of children or their abusers only indirectly involve the parens patriae power of government.

Parens patriae allows the state to establish for children requirements with which adults need not comply. These include school attendance, obedience to parents or guardians, disability to purchase liquor, cigarettes, or near-pornography, and prohibition of work, will making, voting, seeking public office, and engaging in sexual activ-

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105. A state may not “elect to proceed against a juvenile as if he were an adult” unless the juvenile was represented by counsel at the waiver hearing. Kemplen v. Maryland, 428 F.2d 169, 170 (4th Cir. 1970).

The statutory framework for dealing with juvenile offenders contemplates that those under the age of eighteen are to be treated as juveniles and that juvenile jurisdiction is to be waived only where the offender is found, by an exercise of sound judicial discretion based upon a thorough investigation, to be an unfit subject for juvenile rehabilitative measures.

Kemplen, 428 F.2d at 175.

MD. CODE ANN., CTS. & JUD. PROC. § 3-817(e) (1999) mandates five factors which must be considered by a judge in a juvenile court in determining whether the juvenile should be tried as an adult. The factors are: “(1) Age of the child; (2) Mental and physical condition of the child; (3) The child’s amenability to treatment in any institution, facility or program available to delinquents; (4) The nature of the offense and the child’s alleged participation in it; and (5) The public safety.” MD. CODE ANN., CTS. & JUD. PROC. § 3-817(e)(1)-(5) (1999).

106. The protection of society is one of the factors held determinative in a waiver hearing (in which the juvenile court decides whether or not to waive its jurisdiction and send the case to adult criminal court) by the United States Supreme Court. See Kent v. United States, 383 U.S. 541 App. at 566 (1965). The factors articulated by the court in Kent are: 1) “The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.” 2) The aggressive, violent, premeditated or willful manner of the alleged offense. 3) Whether the alleged offense was against property or person, with greater weight being given to an offense against the person resulting in physical injury. 4) Merit of the criminal complaint. 5) Whether codefendants in the alleged crime are adults. 6) The maturity and sophistication of the juvenile. 7) The juvenile’s previous record. 8) The likelihood of rehabilitation and adequate protection for society if the offender remains in juvenile court. See Kent, 383 U.S. 541 App. at 566–67.

107. See, e.g., COLO. REV. STAT. § 18-6-401 (1986); 720 ILL. COMP. STAT. § 5/11-6 (West 1992); UTAH CODE ANN. § 76-5-404 (1999).
ity. Failure of a child to comply may lead to a finding that she or he is in need of supervision by the juvenile court or other agents of the state.

Findings of neglect necessarily involve the state in defining adequate parenting. It may intervene only if the child is without proper parental care as defined by the legislature or the juvenile court.

108. "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment." Prince v. Massachusetts, 321 U.S. 158, 168 (1943); see also, supra notes 1–10 and accompanying text.

109. A person in need of supervision may be defined as "a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of . . . the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." N.Y. Fam. Ct. Act, § 712(a) (McKinney 1999).

In New York, a parent or other person in an authoritarian position with respect to the child initiates formal court action by filing a petition setting forth the allegations of the child's non-compliance. The child, as respondent, is then assigned a lawyer. A number of preliminary hearings may occur prior to the adjudicatory hearing, where the child may either admit guilt or have a full trial. Subsequent to the adjudicatory hearing, there is a dispositional hearing for a determination of whether or not the child requires supervision or treatment. See R. Hale Andrews, Jr. & Andrew H. Cohn, Note, Ungovernability: The Unjustifiable Jurisdiction, 83 Yale L.J. 1383, 1387–90 (1974).

Many of these petitions are withdrawn by the parent or dismissed by the judge. See Andrews & Cohn, supra at 1390. Other possible dispositions are informal supervision or probation. Only a relatively small number of such children are removed from home. Such placement may be with a relative, private agency, social service, or training school. See Andrews & Cohn, supra at 1390–91.

In the case of State ex rel. Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977), the petitioner was adjudicated a delinquent child for failure regularly to attend school and was sent to an industrial school for boys. Among other charges, petitioner alleged that the juvenile commitment procedure violated the due process clauses of both the state and federal constitutions. This court held unconstitutional the incarceration of children for status offenses when such incarceration is substantially similar to that for criminal offenses. In order to do so, the court must expressly find that there is no other reasonable alternative available and that the child is so totally ungovernable that he or she is not amenable to any other type of treatment. See Harris, 233 S.E.2d at 329. This case is reflective of the movement begun in the 1970's to deinstitutionalize status offenders. See Robert H. Mnookin & D. Kelly Weisberg, Child, Family and State 956 (2d ed. 1989).

110. See statutes cited supra note 12. Further complications arise in defining neglect and/or abuse when the socioeconomic differences in our society are considered within the framework of defining abuse and neglect. The District of Columbia statute, D.C. Code Ann. § 16-2301(9)(B) (1973), specifically states that the deprivation of care must not be a result of the parent's financial inability. In other words, a parent's inability, due to poverty, properly to care for his or her child should not place him or her in jeopardy of violating a neglect statute. Another difficult situation which
Standards vary widely and change with time,\textsuperscript{111} and most appeals involve cases where the court's disposition has been to remove the child from the family temporarily or permanently.\textsuperscript{112} The question on appeal, then, is often not primarily the definition of neglect but the appropriateness of the chosen disposition in light of the level or type of neglect found.\textsuperscript{113} Questions about the limits on parental choices also arise in neglect cases is one where the parents are physically, emotionally or mentally handicapped. Should the standard be different for parents who are handicapped? Or should their handicap be a sort of mitigating factor in a neglect proceeding? In a case of mentally handicapped parents, the District of Columbia Court of Appeals affirmed a neglect finding which led to the placement of the child in the custody of the maternal grandparents for a period of two years. See \textit{In re B.K}, 429 A.2d 1331, 1331 (D.C. 1981). The father challenged the neglect statute on the grounds of vagueness and the court held that a neglect statute must necessarily allow the court some latitude in making such decisions. See \textit{In re B.K} 429 A.2d at 1334.

\textsuperscript{111} Because of the inconsistencies from state to state in the neglect and abuse statutes and the necessity of latitude for the court in making decisions in cases brought under those statutes, experts are calling for a reexamination of the criteria for neglect and abuse proceedings. The authors of \textit{Before the Best Interests of the Child} suggest the following as some of the grounds for intervention in the family unit:

1) A refusal by the parents to comply with such laws as immunization, education and labor laws with regard to their child.

2) The adjudication of a child as delinquent.

3) A request by the parents for the court to determine custody.

4) A request by the parents for the court to terminate the parents' legal relationship with the child.

5) Death or absence of one or both parents together with their failure to have provided for their child's future care prior to their death or absence.

6) The parents' conviction of a sexual offense against their child.

7) Serious bodily harm inflicted on the child by the parents.

8) Some cases of refusal of medical treatment for the child by the parents.

\textsc{Joseph Goldstein \textit{et al.}, \textit{Before the Best Interests of the Child} 193–96 (1979) [hereinafter \textsc{GOLSTEIN \textit{et al.}, \textit{Before}}].}

\textsuperscript{112} Indeed, parents usually choose to avoid the difficulty and expense of appealing even clearly wrong findings of abuse or neglect if no serious intervention is sought by the child-protective agency, thus leaving intact an apparent record of long-time neglect or abuse which may support wholly unwarranted removal of children later on.

\textsuperscript{113} In order for a court to terminate parental rights, there must have been parental consent to the adoption of the child, parental abandonment of the child, neglect of the child, or proven unfitness of the parents. It is not enough to find that an adoption would be in the child's best interests. See Corey L. v. Martin L., 380 N.E.2d 266, 270 (N.Y. 1978). The very term "unfitness" has been attacked as unconstitutionally vague. The Supreme Court of Kansas rejected such an attack on the grounds that the term "unfit," "is not impermissibly vague as previously construed by the appellate courts of Kansas." \textit{In re Brooks}, 618 P.2d 814, 820 (Kan. 1980). The court held that the termination of parental rights is dispositional in nature because a court cannot
may be subordinated to factual disputes about what happened, particularly in cases involving allegations of sexual improprieties stopping short of forced intercourse. Courts tend to approve state intervention whenever the child-protective agency recommends it. Such recommendations are often far too readily made by those who hope to assure every child an ideal upbringing, by those whose long dead idealism has been replaced by healthy self-interest in making sure they have "cases" (i.e., other people's children) to work on, and by those whose unhealthy co-dependence makes them want to fix every flaw they can find, however small.

Dependency cases involve different kinds of questions. A child is dependent when the parents are dead, incarcerated in jail or hospitals, or otherwise not available. Some such cases raise issues of what constitutes unavailability, and these are reasonably analogous to neglect issues. Others raise issues about what constitutes parental provision of care (namining a non-parent guardian or other caretaker or giving the

reach the issue of termination until there has been a showing that the children had suffered a substantial degree of harm. See In re Brooks, 618 P.2d at 820.

115. See Armstrong, supra note 114, at 20–23, 95–106.
117. Parental unavailability may arise in a number of different ways. The most obvious cases of parental unavailability would be those in which the parents have died, leaving the children orphaned, or have abandoned the children. Less obvious perhaps are cases where the parents are disabled either physically, mentally, or emotionally. In these situations, the parental unavailability may not be complete, as it is in abandonment or death cases.

Generally, the state becomes involved in such cases upon an allegation of neglect. However, physically, mentally or emotionally disabled parents are not, by definition, neglectful. "There are many families in which one parent is incapacitated or only one parent is living, but this does not justify the leviathan power of the state to descend upon it and snatch away a child." In Re Adoption of Hyatt, 536 P.2d 1062, 1069 (Ariz. Ct. App. 1975).
child to a relative or neighbor for care), and these cases often arise outside of juvenile courts and their jurisdictional definitions.

C. Custody

Many potential dependency cases come before probate courts or trial courts of general jurisdiction as custody cases, where, for example, parents have died or been sentenced to lengthy jail sentences or require long-term hospitalization, and other relatives of the child are fighting one another for custody.

The overwhelming majority of custody disputes, however, arise between two parents who are seeking or have been granted a divorce or who were never married but both want to raise their child. The courts decide between the disputing parents on the basis of the child's best interests and, thus, become involved in definitions of good par-

118. Usually, courts will hold that abandonment must be willful or must demonstrate a conscious disregard for the child's welfare. See, e.g., In re Ayres, 513 S.W.2d 731, 735 (Mo. Ct. App. 1974). Where a parent has made adequate provisions for others to provide care for his or her child, it is not abandonment. See DS v. Dept. of Public Assistance and Social Serv., 607 P.2d 911, 922 (Wyo. 1980). However, failure to return for the child at the appointed time may constitute abandonment. See, In re Robert P, 132 Cal. Rptr. 5, 9 (Cal. Ct. App. 1976). There is no abandonment where the mother leaves her children with relatives who properly care for them. See Hofick v. Smith, 685 S.W.2d 18,21 (Tex. 1985).

119. Guardianship statutes may be found in probate, domestic relations, and other types of civil proceedings as well as in juvenile proceedings. See ANN. M. HARALAMBIE, HANDLING CHILD CUSTODY CASES 220-21 (1983).

120. See CLARK, supra note 11, at 580-82, 596-97.

121. It is fairly obvious that most custody disputes are necessarily between married, biological parents of children. Between the years of 1970 and 1980, the number of divorcing couples increased to exceed one million divorces per year. See BUREAU OF THE CENSUS, U.S. DEP'T OF COM., CURRENT POPULATION REP. SERIES P-23 NO. 84, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT 7 (1979); see also, NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUM. SERVICES, PUB. NO. 81-1403, NATIONAL ESTIMATES OF MARRITAL DISSOLUTION & SURVIVORSHIP, (1980). The U.S. National Center for Health Statistics projected that 48% of marriages from the 1970s to 1980s would end in divorce. See Lenore J. Weitzman, Changing Families Changing Laws, 5 Fam. ADVOCATE 2, 4 (1982). Approximately one-half of those divorcing families would have children. See Weitzman, supra at 5. From 1954 to 1975 the number of children whose lives had been touched by divorce had more than tripled. See Weitzman, supra at 5.

122. "It is in the best interests of the child that . . . professionals [involved in children's cases] always keep in mind that they are not the child's parents." JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD: PROFESSIONAL BOUNDARIES 154 (1986) [hereinafter GOLDSTEIN ET AL., BEST INTERESTS]. This statement flies in the
venting. Unlike neglect cases, these are mostly situations where there has been no prior challenge to the adequacy of either parent or question about the child’s well-being. The courts nonetheless retain jurisdiction to exercise continuing supervision of the child’s best interests, at the request of either parent, throughout the child’s minority face of the practice of the courts in the adjudication of child custody, visitation, and placements. The authors share a preference for a “policy of minimum state intervention in parent-child relationships.” Goldstein et al., Best Interests, supra, at 11. “The risk that actions and decisions in child placement will rest on personal values presented in the guise of professional knowledge is therefore great—and all the more important to recognize.” Goldstein et al., Best Interests, supra, at 17.

There is no magic formula for determining the best interests of the child. The authors emphasize that courts should consider “conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.” Goldstein et al., Best Interests, supra, at 62–63 (quoting Or. Rev. Stat. § 107.137 (1981) (emphasis added)). Minimum intervention by the court is the best policy, according to these authors. See Goldstein et al., Best Interests, supra, at 11.

The question then becomes, “when should the court intervene?” According to a prior book by the same authors as above, the goal of justifiable intervention must be to create or reinforce a family for the child. See Goldstein et al., Before, supra note 111, at 9. The child’s best interests cannot be a justification for the intrusion itself since best interests is not clearly defined as a standard. “The goal of every child placement . . . is to assure for each child membership in a family with at least one parent who wants him.” Goldstein et al., Before, supra note 111, at 5. The authors believe that the danger to the family’s integrity is great where the court can intervene almost at will. See Goldstein et al., Before, supra note 111, at 16–17. The authors therefore propose that the state should only intervene by setting limits on parental judgment with respect to matters which society generally agrees upon. See Goldstein et al., Before, supra note 111, at 16. In these situations, the parents are thus afforded fair warning of what will constitute a breach and to what extent the state may intervene. See Goldstein et al., Before, supra note 111, at 16. Legislation with respect to matters about which society does not necessarily agree, such as most neglect and abuse statutes, extends the doctrine of parens patriae to the point of almost complete discretion in the lives of families which come before the court. Such discretion may necessarily invite abuse of discretion as well as discrimination by the courts, based upon the individual judge’s personal biases and beliefs. See Goldstein et al., Before, supra note 111, at 17.

123. See, e.g., Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981); In re Marriage of Hadeen, 619 P.2d. 374 (Wash. Ct. App. 1980). If the court suspects that both parents are inadequate, the case can be referred to the juvenile court. If the court finds that neither parent is a proper custodian for the child, the court may place the child with relatives, if it is found that they are willing and proper custodians. In re Marriage of Nolte, 609 N.E.2d., 381, 383, 387 (Ill. App. Ct. 1993); Ballard v. Ballard, 377 P.2d 24, 25 (Or. 1962). Or, as in the case of Wilson v. Wilson, 153 S.E.2d 349, 351 (N.C. 1967), the court may find both parents unfit and place the child with an agency.
and beyond, and will protect that jurisdiction by preventing the child’s removal from the state even by the lawful custodial parent.

Other custody cases involve parents versus long-term caregivers to their child, and here, too, the child’s best interest is the standard for decision. Some of these involve neglect, past or present, by the parents, and others involve non-neglectful but lengthy absence of the parents.

D. Adoption

Adult adoption was common in the Roman Empire for inheritance purposes, but the adoption of infants and children by those

124. Most child support orders have been limited to the child’s minority. See Clark, supra note 11, at 494–498. The states are divided on the question of whether and under what circumstances it is in the court’s jurisdiction to order support which extends beyond majority. Clark, supra note 11, at 717. Some states have had no statutes authorizing the support of adult children, but many courts have authorized support for adult children who are either disabled or incompetent. See Clark, supra note 11, at 495, 505. The Illinois statute does provide for the divorce court to order support for an adult child’s education and maintenance “as equity may require.” 750 Ill. Comp. Stat. 5/513(a)(2) (West 1998). However, the states have been divided on the question of whether the courts should order a parent to pay for a child’s college education. See Clark, supra note 11, at 498.

125. See Clark, supra note 3, at, 139 n.185.

126. In 1966 the Supreme Court of Iowa was faced with a custody dispute between the child’s father and the child’s maternal grandparents. The court found that the child’s best interests were served by remaining with the grandparents, with whom he had been living for two years. Although the court found that the presumption of a preference for the natural parent still existed in the state, and that the child’s deceased mother had named her husband as the child’s guardian in her will, and that the grandparents were older and might find child care a strain, the court still held that the best interests of the child overrode any and all of these other considerations. See Painter v. Bannister, 140 N.W.2d 152, 156, 158 (Iowa 1966).

In the case of foster families, it is less clear whether “best interests” is the standard the court will use in determining custody or whether the court will require termination of parental rights before considering the possibility of a custody award to non-parents. In an Illinois case, however, the children were allowed to state their preference as to with whom they would live—the foster parents or their natural parents. The children in question were 12- and 14- years-old and had lived with their foster parents for 6.5 years. The children appealed from a lower court decision which would have returned them to their natural parents. The appellate court reversed and remanded for further proceedings to determine what would be in the children’s best interests with great weight given to their stated preference to remain with their foster parents. See, In re Ross, 329 N.E.2d 333, 343 (Ill. App. Ct. 1975).

127. See Clark, supra note 11, at 602, 652. In modern American cases of adult adoption, there is no need to terminate the parental rights of the parents of the adoptee. The
who are willing to provide parental care is an American creation based on the state's *parens patriae* power. If a child is without parents because they have died or had their rights terminated by a juvenile court, if parents have abandoned their child or been declared unfit, or if parents voluntarily relinquish their child for adoption and that relinquishment is accepted by the state, the court may enter a decree making another person or couple the legal parent(s) of the child. The court must first find that the natural parents are surely out of the picture so that the child is available for adoption and then must find


129. A minor, defined as a person under 18 years of age, is available for adoption if each of his/her parents has properly executed a consent for adoption or has surrendered the child for adoption. See 750 ILL. COMP. STAT. 50/8(a)(3), (b)(1)(A), (b)(1)(B) (West 1999). In some circumstances, a parent's consent is not needed, most frequently where a parent has been found unfit. See, e.g., 750 ILL. COMP. STAT. 50/8(a)(1) (West 1999). *In re Cech*, 291 N.E.2d 21, 23 (Ill. App. Ct. 1972). The rights of both parents of a minor child must be terminated in order for the child to be available for adoption (even if the parents were never married to each other), *People ex rel. Slavek v. Covenant Children's Home*, 284 N.E.2d 291, 292 (Ill. 1972), except, of course, where one of the minor's parents is a party to the petition for adoption. See, e.g., 750 ILL. COMP. STAT. 50/8(b)(5) (West 1999).

In addition to the procedures set out above, the Illinois statutes provide that the process in the termination of parental rights cases is allowed even where the identity of a parent is unknown. See 750 ILL. COMP. STAT. 50/7(A) (West 1999). Also, where parents have surrendered the child to an agency or where the court has terminated parental rights and appointed a guardian for the minor child, the consent of that guardian or agency is required in order for the child to be adopted. See 750 ILL. COMP. STAT. 50/8(b)(3), (4) (West 1999).

130. In order to terminate parental rights, the court must find that a natural parent is unfit. The standard of proof applied is clear and convincing evidence. See 750 ILL. COMP. STAT. 50/8(a)(1) (West 1999); see also, *In re Drescher*, 415 N.E.2d 636, 640 (Ill. App. Ct. 1980). Grounds of unfitness in Illinois include the following:

- Abandonment of the child;
- Failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare;
- Desertion of the child for more than [three] months next preceding the commencement of the Adoption proceeding;
- Substantial neglect of the child if continuous or repeated;
- Extreme or repeated cruelty to the child;
- Two or more findings of physical abuse;
- Failure to protect the child from conditions within his environment injurious to the child's welfare;
- Other neglect;
- Depravity;
- Open and notorious adultery or fornication;
- Habitual drunkenness or addiction to drugs;
- Failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child;
- Failure by a parent to make reasonable efforts or... reasonable progress;
that adoption by the petitioner(s) is in the child's best interests. In most jurisdictions, the child is thereafter the legal child of the adopters, just as though she or he had been born to them. In most states, where the adopters are neither stepparents nor relatives and the adoptee is an infant, neither natural parents nor the adoptee have any right to information about the other, even after the adoptee is emancipated, although this rule is changing.

131. For example, in Illinois, the best interests of the child are to be the prime consideration in selecting adoptive parents. See 750 ILL. COMP. STAT. 50/15.1(b), (c) (West 1999).

132. Almost every state has a statute requiring the court to seal a child's birth certificate and records of adoption proceedings. See OKLA. STAT. ANN. tit. 10 § 7505-6.6(c) (West 1998 & Supp. 2000); MO. ANN. STAT. § 193.125(1) (West Supp. 2000); W. VA. CODE § 48-4-10(a) (1999). A showing of good cause is required to obtain a court order to obtain access to the records. According to William Pierce, president of the National Committee for Adoption in Washington, the legal trend is to give adopted persons access to their birth certificates if both parties (meaning the adoptee and the birth parent) consent to such access. See Silas, Reunions: Laws Open Adoption Records, 70 AMER. PSYCH. ASSN. J. 38, 44 (1984). The argument against such access is that the adoptive parents need privacy in their family life. Closed records foster the freedom to develop bonds within the adoptive family without the past intruding on the present. Closed records promote "stability in adoptive families and integrity in the adoption system." Susan E. Simanek, Adoption Records Reform: Impact on Adoptees, 67 MARQ. L. REV. 110, 113 (1983).

Adoptees have an emotional and psychological need to know "who they are." This need may arise for many reasons, including: 1) problems with personal identity, 2) feelings of isolation, 3) medical crises, 4) fear of incestuous marriage. See Simanek, supra, at 118-120.

Various constitutional arguments have been made in this arena. The first is the right under the First Amendment to receive information. Also, privacy issues have been raised under the Ninth and Fourteenth Amendments. Finally, there may be Equal Protection and Due Process violations. See Simanek, supra, at 125. Constitutional challenges have not met with great success. Most likely, adoption reform will continue as it has begun, legislatively, state by state.

III. Applied Philosophy

In all the current law discussed above, the parents, not the state, have primary care and control of the child. Government intervenes in the parent-child relationship only upon request of the parents, submission of some arguably relevant matter to a court by the parents, an alleged dereliction of the parents, or absence of the parents. Children, then, in our legal system, are, consistently, first the children of their parents and then children of the state. Thus, family appears to have primacy over state.

However, the state creates and defines family, which argues the opposite conclusion. Government decides who can and cannot marry, creates and enforces familial support duties and property rules, decides who can be divorced and upon what conditions, permits and defines familial inheritance of property, defines paternity and, increasingly, maternity and creates both by operation of law or court decree, defines childhood or minority, and defines and limits emancipation other than by attainment of legal age. This has much more the flavor of the view that the state creates and regulates the family as a unit of society and in accord with prevailing majority views of what a family ought to be. Government creates families, albeit with the voluntary cooperation of some of the individuals involved, and forces them to exercise the responsibilities of parens patriae on its behalf as to most children most of the time. Finally, it is the government that decides when it should reclaim the power to act directly and parentally in children’s lives.

In this area of law, the balance between government protection of individual rights and liberty and governmental care for children’s, and even the general, welfare seems to be struck in favor of the latter. First of all, the doctrine of parens patriae itself gives government the power to act parentally towards children, beyond its police power over adult citizens and beyond protecting them from its own or others’ coercion. Second, government subjects children to parents’ coercion by a rule of law giving parents custody and control backed up by laws prohibiting children from self care. Children are forbidden to earn a living, both (1) by giving parents ownership of children’s earnings and (2) by foreclosing them from most jobs and from freely choosing non-parent supporters and caretakers and by allowing parents to assault and batter children to inflict reasonable corporal punishment. Third, it denies children the vote and thus the power to affect the laws under which
they live, denies them the right to seek elective office, forces them to attend school, and denies them various pleasures of life deemed harmful, at least to the young. Fourth, government itself oversees or exercises parental control when parents fail, as government defines failure. While it might be argued that these things protect the child’s later exercise of adult liberties, it cannot be said that they presently protect the child from coercion. They are designed to promote the state-defined welfare, not the liberty, of children or families.

It is difficult, and probably meaningless, to define liberty and freedom from coercion vis à vis a newborn baby. If no one provides food and shelter, the baby will die, and, society has more recently learned, if no one provides love, the baby will be emotionally handicapped. However, it is perfectly clear that the legal changes which occur at emancipation, usually at age eighteen, do not reflect a sudden, concomitant change in the capacities of the person emancipated. Somewhere between infancy and adulthood each child gains abilities which the law does not allow her or him to exercise free of parental and governmental coercion, although some gradual increase in legal powers is permitted. Liberties which would be meaningless at six months of age are not meaningless at five or at ten or at fifteen.

134. Emotional abuse or neglect is very hard to define and quantify. What is known at this time is that newborn infants need to form an attachment to an adult, usually the mother, who becomes a psychological parent to that child. See Joseph Goldstein et al., Beyond the Best Interests of the Child 17–20 (2d ed. 1979) [hereinafter, Goldstein et al., Beyond]. The continuation of the relationship between the psychological parent and the infant is extremely important in the baby’s growth and development. See, Roberta Gottesman, The Child and the Law 37 (1981). The child’s needs for physical caretaking are rather obvious but he/she also has emotional needs for affection, companionship and intimacy. See Goldstein et al., Beyond, supra, at 17–20. “Where these [needs] are answered reliably and regularly, the child-parent relationship becomes firm, with immensely productive effects on the child’s intellectual and social development.” Goldstein et al., Beyond, supra, at 18.


Driving privileges are extended to children between the ages of 15 and 17 depending on the state, with the usual age being 16. These driver’s licenses for minors still limit their freedom in that such “licenses do not extend to driving for hire, driving oversized vehicles . . . or driving a school bus.” See Robert H. Mnookin & D. Kelly Weisberg, Child, Family and State 851 (2d ed. 1989). Most states also further limit the extension of driving privileges by requiring parental consent before a
The welfare of society is arguably promoted by assuring that those young enough to be expected to be nuisances without external control will be controlled by someone, that young adults will be educated to vote and work responsibly, and that the unemployment ranks will not be swelled by those under eighteen. However, it is often apparent that the welfare, let alone the liberty, of individual children may not be served by parental or state control, mandatory school attendance, or prohibitions of employment. As always, the line between protection and disadvantaging coercion blurs into oblivion.\textsuperscript{136} Parens minor can receive a driver's license as well as the minor's parent's signature on the application for a driver's license.\textsuperscript{3} MNOOKIN \& WEISBERG, supra, at 856.

Other cases increasing the legal powers of minors include: Tinker v. Des Moines Sch. Dist., 393 U.S. 503 \textit{passim} (1969) (a minor's constitutional right to free speech); Brown v. Board of Educ., 347 U.S. 483 \textit{passim} (1954) (a minor's equal protection against racial discrimination in education); \textit{In re Winship}, 397 U.S. 358, 361–68 (1970) (a minor's right to requirement of proof beyond a reasonable doubt, even in juvenile court, for a criminal offense); and \textit{In re Gault}, 387 U.S. 1, 34–55 (1967) (a minor's right to counsel and right against self-incrimination in juvenile proceedings where a crime is charged).

Almost all states have enacted statutes establishing a minimum age for marriage of 18 for both men and women. See CLARK, supra note 13, at 89. Courts have also increased the legal rights of minors in the area of reproductive freedom. An unmarried woman under the age of 18 does not have to obtain parental consent in order to have an abortion. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72–75 (1976). However, several later cases have limited the minor's right to abortion to "mature" minors. See H.L. v. Matheson, 450 U.S. 398, 408–10 (1981); Bellotti v. Baird, 443 U.S. 622, 647–48 (1979).

\textsuperscript{136} In many cases, it is difficult to ascertain whether the interests being protected are those of children or those of society. Given the fact that the interests of society and children are not necessarily mutually exclusive, it is possible that both children's and society's interests are being protected by laws enacted under the doctrine of \textit{parens patriae}. The Supreme Court of Illinois, reversing an appellate court decision, upheld the conviction of two Illinois teens for curfew violation. The court stated: "The primary interest advanced by the State to justify the restrictions of the statute as to time, place and circumstance is the traditional right of the State to protect its children." People v. Chambers, 360 N.E.2d 55, 57 (Ill. 1977). Here, the court acknowledged that the assumption that a child is protected from harm by curfew statutes is not always correct, but it held that the state was justified in basing the statute on that assumption. See \textit{Chambers}, 360 N.E.2d at 57.

Compulsory education statutes can fairly easily be justified as beneficial to children. As the court in \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972), stated: "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society." \textit{Id.} at 221. Child labor laws emerged out of deplorable conditions in which child labor was exploited to the child's severe detriment. However, today child labor laws may well serve to exclude children from the labor market to their detriment rather than to their benefit. See supra note 9 and accompanying text. Society's interests are well
patriae has been, since 1660, defined as exercisable only for the protection and benefit of individual children.\textsuperscript{137} Today it would be impossible to sort the rules of current law to determine which are for children’s benefit and which for society’s as a whole, for many serve both interests or shift from one to the other over time or from one case to another.

**IV. System Breakdown**

There is growing recognition in all segments of society that children are not well aided or protected by current law. Both federal and state governments have attempted to fix glaring errors such as parental kidnapping,\textsuperscript{138} non-support,\textsuperscript{139} over-intervention,\textsuperscript{140} and child

served by both of these types of laws in that children are not taking jobs which might arguably be needed by adult members of society.

On balance, these statutes probably work to the benefit of most children. But the balance remains fluid, changing as society changes.

\textsuperscript{137.} See supra note 4 and accompanying text.

\textsuperscript{138.} See, Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994). Estimates of the number of children kidnapped by a family member are both contradictory and shockingly high: 50,000 to 100,000 between 1985 and 1988, see Andrea S. Charlow, Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act, 25 Fam. L. Q. 299, 301 n.10 (1991), and 354,100 during 1988, see David Finkelhor et al., U.S. Dep't of Justice, Missing, Abducted, Runaway Children in America 4 (1990). The latter reports that 163,200 of these children were concealed or taken out of state with the intent permanently to alter custody. See Finkelhor et al., supra, at 4.


\textsuperscript{140.} "Surveys found that in states with large Native American populations, ... 25 to 35 percent of all Native American children were removed from their homes and placed in foster or adoptive homes at one time in their lives. ... In South Dakota the number of Native American children in foster care was, per capita, sixteen times greater than the rate for other children." B. J. Jones, The Indian Child Welfare Act HANDBOOK 2 (1995). The problem was remedied by the Indian Child Welfare Act of 1978, which required Native American children removed from their homes to be placed in homes that reflect their own cultures. See 25 U.S.C. §§ 1901–63 (1994).

After the famous Baby Richard was returned to his natural father after several years with adopters, the Illinois legislature precluded a recurrence by enacting a statutory registry for unwed fathers, requiring them to register within thirty days after the births of their children or lose all claim to those children forever. See 750 ILL. Comp. Stat. 50/12.1 (West 1998).

Endless litigation about the custody of children is limited by statute in many states. For example, see 750 ILL. Comp. Stat. 5/610 (West 1998), which precludes any motion to modify a custody determination earlier than two years after it is made
abuse. Custodial parents, visiting parents, parents on welfare, and parents litigating paternity or custody usually describe the system negatively. Taxpayers are growing ever more concerned about the high cost of a system which they see as nearly useless in saving children from juvenile crime, homelessness, abuse, and incapacity for self-support when they become adults. Politicians respond with repression and rhetoric. There is little to suggest that repealing all child protective laws and eliminating all relevant agencies immediately would greatly worsen the fate of our children. Some would die, although perhaps not more than are killed now by abuse and neglect, but many would be left alone to grow up in good enough families free unless both parents agree or one furnishes affidavits that the child is endangered by the present environment.

141. Most states have statutes requiring various citizens to report suspected child abuse. See, e.g., Illinois Abused and Neglected Child Reporting Act, 325 ILL. COMP. STAT. 5/4 (West 1998). Also, recent research revealing that some children suffer ritual abuse has led to the enactment of special statutes that define this kind of abuse and protect children from it. See, e.g., 720 ILL. COMP. STAT. 5/12-33 (West Supp. 1999).

142. Welfare parents deserve separate mention here because they are pulled into the child protection system at disproportionately high numbers and because "welfare" itself is part of that system, its statutory name being "Aid to Families with Dependent Children." 42 U.S.C. §§ 601-17 (1994). Between caseworkers' inspections and impossible choices between leaving children without care while one works or seeks work and watching them go hungry for want of money for food, welfare families are peculiarly susceptible to intervention and unable to fight over-intervention successfully. See ARMSTRONG, supra note 114, at 8-14.

143. Welfare rolls have climbed sharply with the maturing of each generation. Numbers went from just over 800,000 recipients in 1960 to just under 3,000,000 in 1972. See MIMI ABRAMOVITZ, UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES 73 (1996).

A report on Morning Edition in 1995 included the following:

The rate of crime is down across the United States, but a trend appears to be forming. While the adult homicide rate is down by ten percent since 1990, criminal acts by the young are on the rise. Dr. James Fox, Dean of Criminal Justice at Northeastern University, refers to the next generation as the "young and the ruthless." Morning Edition (NPR radio broadcast, Aug. 31, 1995).

This concern was echoed in the Washington Post, in an article reporting that, in 1980, adults in their thirties and forties were arrested for 110,000 violent felonies and that in 1994 that number had risen to 270,000, with much of the violence occurring in the home. Parents and other caregivers inflicted 500,000 serious injuries on children and youths in 1993, four times the number in 1986. See Mike Males, Scapegoats for Their Parents; Hype About Teen Crime Hides the Real Culprits, WASH. POST, Oct. 13, 1996, at C1.

144. For comments from former Speaker of the House of Representatives Newt Gingrich, see Katharine Seelye, Gingrich Looks to Victorian Age to Cure Today's Social Failings, N.Y. TIMES, Mar. 14, 1995, at A19. See also, ARMSTRONG, supra note 114, at 7-15.
of debilitating, destructive involvement of judges and caseworkers. The liberals, though probably not the libertarians, still have hope of making better ways for governments to protect endangered children and would, therefore, reform the system rather than eliminate it, but no one seems content with things as they are.

Why has it come to this? A growing body of work suggests three causes: unrealistic assumptions and expectations about the outcomes of intervention, frightened self-preservation by child-protective agencies, and legislative and judicial failure to recognize that one parent, usually the mother, and children constitute and function as a family.\textsuperscript{145} All three causes lead us to look at peripheral issues and to ignore the children themselves.

V. Murdered Children

Anyone with access to daily news can remember reports of children killed by abuse in their homes, sometimes after intervention by child-protective services. In 1994, almost one-half of murdered preschool children died at the hands of other family members, and many were killed by other people known to them; only about twenty percent were murdered by strangers or unknown offenders.\textsuperscript{146} Some of these murders, along with injuries leading to lesser physical damage than death, are the result of abuse by foster caregivers appointed within the child-protective systems.\textsuperscript{147} It is not possible to say with any confidence whether children murdered by parents after being returned following temporary removal by the state faced equal danger in foster care or whether those injured or killed in foster care faced greater or equal danger before removal from their parents’ homes. The system’s own records are inadequate,\textsuperscript{148} and confidentiality hinders investiga-

\textsuperscript{145} See infra notes 152–188 and accompanying text.
\textsuperscript{146} See Lawrence A. Greenfield, U.S. Dept of Justice, Child Victimizers: Violent Offenders and Their Victims 17 (1996). For a sample of specific cases, see Goldstein et al., Before, supra note 111, App. at 141–86, for the appendix titled On Children Killed By Their Parents. For a discussion of the Lisa Steinberg case, see Armstrong, supra note 114, at 26–32.
\textsuperscript{147} See Armstrong, supra note 114, at 29; U.S. Dept, of Health and Human Services, Child Maltreatment 1993: Reports from the States to the National Center on Child Abuse and Neglect 2–7 (1995).
\textsuperscript{148} “It is still not possible to do any comparative analysis of foster care and adoption data among states even on such simple issues as the number of children in care.” Foster Care, Child Welfare, and Adoption Reforms: Joint Hearings Before the Subcomm. on
tion utilizing the records that do exist. It is also, of course, impossible to say how many more or fewer children would be murdered without the system. What is known is that many children harmed by family or other caregivers were known to the system via some intervention long enough before death for life-saving intervention to have occurred. The system is not working.

VI. DESTROYED FAMILIES

A. WHAT IS A FAMILY?

The first crucial issue here is defining what our society sees as a family. The law, based on Roman law inherited via Roman Catholic and Anglican Canon law, has traditionally defined family as those related by blood, by marriage, or by adoption. Absent marriage of the parents when the children were conceived or born, no family was created; if a marriage was dissolved (which required, in our early legal tradition, an act of Parliament declaring the marriage ended), the family ceased to be. Modern jurisprudence perpetuates this view by classifying determinations of parentage separately from the rest of "family" matters, intervening to "protect" children when a marriage is dissolved, and ruling in many settings that cohabitation can never make a family, even if children are part of the non-marital household and even if (or especially if) the adult partners want to wed and are


149. See Armstrong, supra note 114, at 311-19 (suggesting that confidentiality, touted as protective of children, is really protective of the system itself and is permitted because coercive intervention is described as "help," "service," and "professional treatment").

150. See, e.g., Clark, supra note 11, at 281-82.

151. The court system in many states keeps adoption and divorces—truly "family" matters—separate from parentage determinations, neglect, abuse, non-support, and dependency cases—post "family" matters for the most part. In some states, the latter are juvenile court cases, while in other states, all are "family court" cases. However, when the same court does hear both types of cases, the calls are separated in time. The respectable divorce and adoption clientele are generally not required to encounter not-so-respectable parentage or abuse and neglect clientele. See William M. Kephart, The Family Court: Some Socio-Legal Implications, 1955 Wash. U. L.Q. 61, 62; Paul A. Williams, A Unified Family Court for Missouri, 63 UMKC L. REV. 383, 383-91 (1995).

152. See supra notes 121-126 and accompanying text.
At common law, most families were formed by cohabitation plus intent to live as husband and wife, but most modern states now require a couple to obtain a license and participate in a marriage ceremony to make a legal marriage. The way to formation of a legal marriage and, therefore, family has changed; government has intruded more into the process, but family creation still depends upon marriage.

However, change can be seen in some areas. Zoning and housing laws recognize non-marital "families." Child support, custody, and visitation fall within the same UMDA sections whether or not parents were ever married to each other. "Illegitimate" children are entitled to equal protection with "legitimate" children in many circumstances. Some states allow step-parent-type adoptions by non-


Inheritance cases have allowed some differential treatment of legitimate and illegitimate children, apparently based on the possibly difficult determination of the decedent's parentage in a probate proceeding. The cases are not entirely consistent with one another, but it is clear that intestate succession is not guaranteed equally to children of married and unmarried parents. See Lalli v. Lalli, 439 U.S. 259, 261–64 (1978). But see, Trimble v. Gordon, 430 U.S. 762, 766–76 (1977); Labine v. Vincent, 401 U.S. 532, 535–40 (1971). No United States Supreme Court cases address the meaning of the term "children" in a will in this context, perhaps because testators and testators define the term within the documents, or perhaps because the courts make assumptions to deal with children of the unmarried (probably, if so, opposite assumptions for fathers and mothers!).
marital partners. Innovations in reproductive technology have led to new rules for creation of legal parent-child relationships. A mother’s consenting husband, not the sperm donor, is the legal father of a child born to a married woman as the result of artificial insemination with sperm from a donor not her husband. In some states, a sperm donor’s wife may become the legal mother of a child who has been born to another woman who was artificially inseminated with the father’s sperm pursuant to a surrogate mother contract. In vitro fertilization makes possible the separation of pregnancy from genetic motherhood, creating maternity disputes between egg donors and birth mothers and various familial disputes over frozen zygotes. A few courts are creating new applications of old rules about challenging paternity


158. See Unif. Parentage Act, § 5, 9B U.L.A. 301 (1987). The statute requires mother’s husband’s written consent to the artificial insemination, but at least one court has held that a husband who did not consent was estopped to deny paternity. His consent would be presumed unless he could meet the burden of proving that he did not consent. See, In re Marriage of Adams, 528 N.E.2d 1075, 1082-89 (Ill. App. Ct. 1988). But see, In re Marriage of Adams, 551 N.E.2d 635, 637-40 (Ill. 1990) (reversing appellate court decision).

159. See Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (intention of the parties enforced to give egg donor and sperm donor, a married couple, custody against the claim of the surrogate mother); In re Marriage of Buzzanca, 72 Cal. Rptr. 2d. 280, 281 (Ct. App. 1998) (baby is child of couple intending his birth, not of egg donor, sperm donor, or surrogate mother); McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (App. Div. 1994) (divorcing wife held to be mother against husband/father’s claim to sole custody where egg donor was not the wife). But see In re Baby M., 537 A.2d 1227, 1234-35 (N.J. 1988) (custody to father and visitation to surrogate who was also the egg donor; father’s wife not legal mother and contract unenforceable); In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 893 (Ct. App. 1994) (child raised by father and wife, but, upon their divorce, joint custody awarded to father and surrogate mother/egg donor; no rights to wife who had acted as mother for several years).

160. See, e.g., Calvert, 851 P.2d at 776-78.

161. See Davis v. Davis, 842 S.W.2d 588, 601-04 (Tenn. 1992) (holding that divorced parents have equal rights in frozen embryos, and father’s right not to procreate prevailed over right of mother to have the zygotes implanted, since she could possibly procreate again with a new husband as the father); Karin Mika & Bonnie Hurst, One Way to be Born? Legislative Inaction and the Posthumous Child, 79 MARQ. L. REV. 993, 1007-08 (reporting that an Australian court held that frozen zygotes surviving their parents could be implanted in a surrogate but that the resulting children, if any, would not be heirs of the genetic parents).
where no new technology is involved. This has led to both legally recognized biological fatherhood for genetic fathers even when the mother's husband was someone else, and to legally recognized biological fatherhood for mother's husband even when he is not the genetic father and no "artificial insemination" occurred. These new issues, arising from new science, have greatly complicated definitions of "family."

In some settings, of course, family has wider meaning than parents, spouses, and children or relatives within one household. In cases involving inheritance or familial foster/adoptive placements, family means the wider kinship relationships. These relationships also include some legal rights such as the power to consent to medical treatment, or heirship of the next of kin, or favored status in seeking agency placements of children, or court appointment of guardianship. These applications of kinship/family concepts are beyond the scope of this paper.

B. Feminist Critique

There is a growing literature which asserts that governmental intrusion is directly related to the inability of institutionalized sexism in the child welfare and legal systems to see a mother and her children as an autonomous functioning family. Why else would the courts engage in ongoing supervision of post-divorce parental choices, oversight of parental agreements when divorce or a parentage decision is granted, and intrusion into vastly more single-mother families than others? Why else would courts so routinely substitute the judge's view of what is best for children for the single mother's view? The situation is not only unfair to single mothers; it is also, and more importantly, destroying the lives of too many women and children.

Single mothers are often well aware of this problem:

And our lifestyle is different. Like I tell the kids, we have a whole different family structure. That doesn’t mean we're

164. See ARMSTRONG, supra note 114, at 14–20, 32–33.
not a family. And the message they’re still getting—like from Social Services and staff—is that we’re not. 165

In this mothering, you are engaged in a second marriage—to Superpop, the state. Like the Victorian father, Superpop’s tone is that of absolute ruler, unwilling to acknowledge his own transgressions but holding those in his charge to a rigid standard of morality, behavior, and the following of his dictated procedure. 166

Courts and social agencies intervene into mother-headed family life in two different settings. For divorced mothers with custody of children, the most common intrusions arise from fathers’ motions to change custody, enforce or enlarge visitation orders, or reduce child support; or from mothers’ motions to enforce child support already ordered, and, in those states requiring them, mothers’ petitions to remove children from the forum state. For foster mothers, the oversight by social agencies and the effort to preserve the genetic family bring about the most intrusions. For children who are physically and sexually abused, (in single-parent families and otherwise) intrusion comes when child protective agencies remove them (and not their abusers, even when one parent would still be available) from their families and place them in other homes, often with strangers.

The legal system’s reasons for intruding are different in each setting. When divorced parents seek enforcement or modification of a divorce decree, the court is simply resolving disputes—disputes which at least one party has asked it to adjudicate. Foster caregivers do not usually have legal custody of children in their care. Legal intrusion occurs because the children are seen as wards of the court committed to the temporary custody of child welfare agencies with the goal of fixing the families of origin and returning the children to their parents’ homes. Finally, when the system responds to abuse of children, it presumably seeks only to protect them from further harm, whatever that may require.

For years, the law has accepted the idea that a child’s “primary caretaker” and “psychological parent” should be the favored

165. ARMSTRONG, supra note 114, at 261 (quote from a single foster mother).
166. ARMSTRONG, supra note 114, at 134.
However, although the definition of custody as including the care and control of a child persists, the shift from mostly paternal custodians to mostly maternal ones has been accompanied by a shift of “control” to former spouses, judges, social workers, and police. Our entrenched cultural stereotypes can easily see “care” in mothers’ hands; indeed, the new emphasis on nurturing undoubtedly caused the custodial gender shift. However, maternal “control” sounds strange and unnatural, and the system has prevented it. Judges, police, and out-of-custody parents are mostly men, and social workers, while many are female, are at least professional. “Mother” is the last bastion of the feminine image—passive, emotional, irrational, weak, and helpless—obviously unfit to control the next generation and to be head of a significant portion of American families. The word “family” is rarely used in this context except for the pejorative use of “single parent families.” So control has been taken from custodians; families have been destroyed by the separation of care from control; and now everyone from Congress to media newscasters, to some parts of the church tell us that mothers are the cause of family failure, the national deficit, and juvenile crime.

The custodial mother must feed, house, and clothe her children without money, or she must earn money without neglecting her child care duties. She must also cooperate with childless social workers who tell her how “to parent” and require her to attend meetings for which she may have no transportation and lose pay, and she must go to court to defend herself and her children whenever their father decides to summon her there, again with possible lost wages and no transportation. Maybe mothers will learn to, or at least suggest to still-married women, that they should stay with men who abuse them and their

167. See, e.g., In re Marriage of Ford, 563 N.W.2d 629 (Iowa 1997); Blankenship v. Blankenship, 489 S.E.2d 756 (W.Va. 1997); see also Goldstein et al., Beyond, supra note 134, at 17–20, 30.
168. See Clark, supra note 11, at 573–75.
169. See Clark, supra note 11, at 584–85.
170. See generally, Gloria Steinem, Revolution from Within 217–20 (1992) (arguing that across cultures and throughout history that which is feminine has always been associated with weakness).
children, are addicted to drugs or alcohol, or have affairs. Or, maybe they will suggest that they somehow keep at home men who desert them, or refrain from having children without sufficient unearned income or free child care to keep up adequate financial resources. If they can’t manage all that, maybe they will learn to go away and not bother anyone, and relinquish their children for adoption or into the care of orphanages. 172

Another particular area of attack on mothers is seen in all-too-common events witnessed again and again by this author and commonly discussed when battered wives, welfare mothers, and feminists meet. Mothers who report that their children’s fathers are sexually abusing them are accused of manipulating the courts and child protective agencies to gain control over fathers in divorce, property division, visitation and custody, or other matters before the court. If the allegations cannot be proven in criminal court, mothers are presumed to have lied; if parents are not living together, child protective agencies often refer mothers to civil courts in the assumption that those courts will restrict visitation and that caseworkers might better spend their efforts on families where children are living with alleged abusers. If caseworkers do testify and have not found enough evidence to find that abuse has occurred, the court takes their caution over mothers’ certainty. Women do not understand why the courts do not care what is happening to their children, and they often have no idea why, or even that, they were not believed. Some judges have even expanded their distrust to encompass the counselors (chosen by mothers) who have been helping the abused children to cope with abuse and system inaction. The children may often blame mothers for not protecting them; if not, they may see their mothers as powerless, and lose the confidence born of family autonomy. The child protective agencies, too, blame mothers for failing to protect children from abusive parents (when the agencies do believe that abuse has

172. See Armstrong, supra note 114, at 7–15. Armstrong describes her own reactions to Newt Gingrich’s suggestion “that the children of young unmarried mothers on welfare should be removed to orphanages.” Armstrong, supra note 114, at 7.

My excitement stemmed from hope. And my hope was this: that in placing the issue of welfare for single mothers in such intimate apposition to the issue of state removal of children, the connections would finally be made by women. That it would finally become clear: These are feminist issues.

Armstrong, supra note 114, at 8; see also, William Ryan, Blaming the Victim 86–91 (1971) (observing that welfare mothers, not poverty and social stratification, are clearly seen as threats to budgets and values).
occurred). This may be so even when mothers have moved out of fathers’ homes and gone to different towns to protect their children. If mothers leave in order to protect their children, the divorce court may not believe their allegations of abuse; if they stay, they may lose their children because they are not protecting them. In many cases both events occur, and mothers are ordered by divorce courts to cooperate in visitation of their children with the children’s abusers. At the same time, they are threatened by caseworkers and juvenile courts with termination of their parental rights for not protecting their children from abuse occurring before they left.  

C. The Need for Family Autonomy

Adopting a functional, rather than legal, definition of “family” when the issue is the needs and best interests of children leads us to examine intervention itself as a serious threat. What is the effect on children when social workers, judges, hostile non-custodial parents, and other relatives are allowed and encouraged to interfere with family/household decisions? Under removal statutes and in litigation about custody, visitation, and child support, the court becomes involved in ongoing supervision of custody agreements, even though, in over ninety percent of divorce cases, the family has made its own custody determination in a settlement agreement before the court hearing required to obtain a divorce. These familial custody agreements are the result of both the parents’ relationship with each other and the child-parent relationships. 

The Revised Uniform Marriage and Divorce Act, written as a model for state legislatures, stipulates that the court ‘shall determine custody in accordance with the best interests of the child.” In determining a child’s best interests, the Uniform Marriage and Divorce Act provides these guidelines: 1) wishes of the child’s parent(s) as to his/her custody; 2) wishes of the child; 3) interaction and interrelationship of the child and the parent(s), siblings and any other person who may affect the child’s best interests signifi-

173. In many years of working with victims of domestic violence, this author has seen these events occur repeatedly, but she has not seen one instance of such disbelief or presumed omnipotence directed at a father.
174. See MARILYN LITTLE, FAMILY BREAKUP 2 (1982).
175. See LITTLE, supra note 174, at 3.
cantly; 4) child’s adjustment to home, school and community; and 5) mental and physical health of all persons involved.\textsuperscript{177}

The complexity of family life is accentuated during the period of separation and divorce.\textsuperscript{178} The issue is one of whether or not the court’s exercise of retained jurisdiction inhibits the parent/child relationship in a significant way. “When family integrity is broken or weakened by state intrusion, ... [the child’s] needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely.”\textsuperscript{179}

When a parent cannot make a decision so fundamental to the family’s functioning as location of residence without obtaining approval from the court, the legal process has usurped the parent’s ability to be effective and to appear “all-powerful” to her young children. The same is true when grandparents and non-custodial parents can summon the family (i.e., custodial parent and child[ren]) into court and persuade the judge to veto the parent’s decisions.\textsuperscript{180}

\begin{footnotesize}
\begin{enumerate}
\item See Little, supra note 174, at 115–16. During this highly stressful time, the quality of parents’ relationships with children may be more important than the physical custody of the children. See Little, supra note 174, at 116. “A study of children in divorcing families ... found that the children’s behaviors were strongly affected by the quality of their relationships with their parents.” Little, supra note 174, at 166. Children who maintained a “high-quality relationship with both parents showed less aggression, had better social relationships, and were more productive in their schoolwork.” Little, supra note 174, at 166–67. Those children who maintained a high-quality relationship with only one parent showed only slightly less efficient functioning than those with high-quality relationships with both parents. See Little, supra note 174, at 167. However, children who experienced poor relationships with both parents showed the most difficulties socially and academically. See Little, supra note 174, at 167.
\item See, e.g., Colo Rev. Stat. § 19-1-117 (1996); Neb. Rev. Stat. § 43-1802 (1998); Williams v. Spears, 719 So. 2d 1236, 1239–41 (Fla. Dist. Ct. App. 1998) (no grandparent visitation right where divorced parents both opposed to it); West v. West, 689 N.E.2d 1215, 1220–21 (Ill. App. Ct. 1998) (paternal grandparents given visitation right over mother’s objection; father had died; court said no order if objection had been from an intact family); Williams v. Williams, 501 S.E.2d 417, 417–18 (Va. 1998) (grandparents’ visitation rights denied when married parents both opposed to it).
\end{enumerate}
\end{footnotesize}
the purpose of retention of jurisdiction is protecting the child's best interests, this outcome is unacceptable. While the function of the legal process is not necessarily to assist in the children's adjustment to the divorce, surely its function should not be to impede such adjustment.

In order to determine whether the court's ongoing retention of jurisdiction in custody cases inhibits the development of normal family functioning, it is necessary to define a healthy family. Family systems theory provides a useful working definition. A functioning family includes the following characteristics: 1) it is able to adapt to change; 2) emotional problems are viewed as existing within the unit, not within a single member; 3) differences between family members are fostered; 4) there is an emphasis on maintaining and preserving a positive emotional climate; and 5) the family is a source of feedback and education.\textsuperscript{181}

Irene and Herbert Goldenberg define the healthy family as one whose members are able effectively to communicate both thoughts and feelings. Members within the healthy family expect that their interactions will be open, trusting, and caring. Within the healthy family there exists a respect for each other's views and each individual feels free to disagree with the others.\textsuperscript{182} The authors state, "[t]he most capable families demonstrate open, direct expression of humor, tenderness, warmth, and hopefulness."\textsuperscript{183}

These definitions of family will nearly always exclude non-custodial parents and often exclude joint-legal-custodial parents who do not live with their children or joint-physical-custodial parents during the time the children live with the other parent. It will also exclude other relatives who do not live with a child and, sometimes, those who do. It often will exclude one parent before a divorce or custody or support action is commenced, sometimes even while the parents are living together. If, for example, one parent works long hours or travels on business or, more harmfully, where one parent is controlling and abusive. Sometimes children will have two healthy families, one with each parent, or perhaps more than two if they have lived for significant time periods with others. Custody means one of

\textsuperscript{181} For a discussion of these and other characteristics of a functioning family, see Thomas F. Fogarty, M.D., \textit{System Concepts and the Dimensions of Self}, in \textit{Family Therapy} 144, 149 (Philip J. Guerin, Jr., M.D., ed. 1976).


\textsuperscript{183} Goldenberg & Goldenberg, supra note 182, at 42.
these will be primary, and the one chosen needs to be autonomous. By failing to recognize that a custodial parent and child(ren) or foster caregiver(s) and child(ren) can quickly become a family, the system destroys that family’s autonomy to the serious detriment of the children whose best interests it claims to protect.

184. The time it takes for children to let go of interrupted parental relationships and form new ones is two months for those under five, six months for “the younger school-age child,” a year for “the older school-age child,” and adult-like time periods for children from adolescence to adulthood. See Goldstein et al., Beyond, supra note 134, at 40–41.

185. In infancy... any change in routine leads to food refusals, digestive upsets, sleeping difficulties, and crying. ... Such moves from the familiar to the unfamiliar cause discomfort, distress, and delays in the infant’s orientation and adaptation within his surroundings.

Change of the caretaking person for infants and toddlers further affects the course of their emotional development... [They suffer] setbacks in the quality of their next attachments, which will be less trustful. Where continuity of such relationships is interrupted more than once, ... the children’s emotional attachments become increasingly shallow and indiscriminate.

For young children... every disruption of continuity also affects those achievements which are rooted and develop in the intimate interchange with a stable parent figure. ... After separation from the familiar mother, young children are known to have breakdowns in toilet training and to lose or lessen their ability to communicate verbally.

For school-age children, the breaks in their relationships with their psychological parents affect above all those achievements which are based on identification with the parents’ demands, prohibitions, and social ideals. ... [Made to wander from one environment to another, they may cease to identify with any set of substitute parents. Resentment toward the adults who have disappointed them in the past makes them adopt the attitude of not caring for anybody; or of making the new parent the scapegoat for the shortcomings of the former one. In any case, multiple placement at these ages puts many children beyond the reach of educational influence, and becomes the direct cause of behavior which the schools experience as disrupting and the courts label as dissocial, delinquent, or even criminal.

With adolescents, the superficial observation of their behavior may convey the idea that what they desire is discontinuation of parental relationships rather than their preservation and stability. ... It is true that their revolt against any parental authority is normal developmentally since it is the adolescent’s way toward establishing his own independent adult identity. But for a successful outcome it is important that the breaks and disruptions of attachment should come exclusively from his side and not be
Even when courts think it best to leave the family alone, the legal rights of extra-familial parents, grandparents, legal parents, child welfare agencies, and even the public require results the judge may despise. The system has assumed that single parents can not succeed alone and has thus destroyed their "uninterrupted opportunity to meet the developing physical and emotional needs of their child[ren] so as to establish the familial bonds critical to every child’s healthy growth and development."\(^8\) For children in foster care, those bonds are often destroyed over and over again as courts and agencies move them from home to foster care to home again or to placement with adopters, each change doing further harm.\(^7\)

While the legal system accepted other recommendations offered in *Beyond the Best Interests of the Child,*\(^8\) it emphatically rejected the firm statement that:

Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits. What we have said is designed to protect the security of an ongoing relationship—that between the child and the custodial parent. At the same time the state neither makes nor breaks the psychological relationship between the child and the noncustodial parent, which the adults involved imposed on him by any form of abandonment or rejection on the psychological parents' part.

Adults who as children suffered from disruptions of continuity may themselves, in “identifying” with their many "parents," treat their children as they themselves were treated—continuing a cycle costly for both a new generation of children as well as for society itself.

\(^{186}\) See Goldstein et al., *Before,* supra note 111, at 9–10.

\(^{187}\) See Goldstein et al., *Before,* supra note 111, at 39–51; Goldstein et al., *Beyond,* supra note 134, at 39.

\(^{188}\) Goldstein et al., *Beyond,* supra note 134.
may have jeopardized. It leaves to them what only they can ultimately resolve.\textsuperscript{189}

At the time the book was written, there were no statutory grandparent visitation rights, but one may infer that these, too, are detrimental to children’s best interests, which are supposed to be the court’s top priority even when the “rights” of (politically powerful) fathers and grandparents are at stake. Sixteen years after that first edition was published, the same authors wrote another book demonstrating that the state’s intervention into families was destroying children pulled into the child welfare system.\textsuperscript{190} The rights of children’s agencies, genetic parents, and the courts themselves have often been given higher priority than the best interests of the children involved in abuse, neglect, and failed adoptions. Once again, the harm overlooked in the system was the damage done to family integrity and children’s need for continuity by the very act of intervention itself. Such harm can only be justified when intervention is the only way to prevent even worse harm likely to occur if the state fails to intervene.

\textbf{D. Lofty Aims—Danger to Children}

The present child welfare system and post-divorce-decree litigation involving children frequently substitute the judgment of social workers, lawyers, and judges for that of parents in settings where there is no serious risk of harm greater than interruption of continuity and loss of family integrity.\textsuperscript{191} It also disbelieves serious abuse claims articulated by both parents and children and substitutes its inventions for both truth and facts, allowing sexual abuse and beatings clearly beyond reasonable discipline to continue until children die, run away successfully, or reach adulthood.\textsuperscript{192}

Yet most of the people in the system hold, at least when they begin to work in the system, a good-faith belief that they are saving children, or at least improving their lot, and that their work is good and necessary. The explanation, in addition to the political and

\textsuperscript{189} Goldstein, Beyond, supra note 134, at 38 and accompanying notes (discussing the author’s opposition to contrary language in the Uniform Marriage and Divorce Act, and comparing this law to the custody law in Japan).

\textsuperscript{190} See Goldstein et al., Best Interests, supra note 122.

\textsuperscript{191} See infra notes 210–212.

\textsuperscript{192} See infra note 213.
gender issues already discussed, lies in unrealistic goals, false and unexamined assumptions, and the mixed motives always present in human action.

E. Unrealistic Goals and Assumptions

Our need... to check one another's treatment of children is not limited to the... minimalist agenda of protecting children from physical violence or brutal conditions of deprivation. Because society's future is always in its children's keeping, we must focus as well on affirmative conditions of well-being. In various ways, our society expresses its visions of what its children should be: well-housed, well-fed, healthy, physically fit, well-educated, well-rounded, competitive, caring, and culturally enriched.¹⁹³

"Human services has a utopian outlook."¹⁹⁴ The ancient Greeks knew that utopias were unrealizable ideals; the word can be translated as "nowhere."¹⁹⁵ Lawyers, law professors, social workers, and politicians often believe that unrealistic goals can be achieved for all children. They believe it in the face of hundreds and thousands of dismal failures, and, believing, they do untold harm to children, intervening in the names of neglect and treatment to destroy the best parent-child relationships available to countless children. The goals cannot be attained, but the system keeps trying, hoping the next dream will come true.

At the same time, the perfectibility of families is a cherished myth, and return to the family of origin or adoptive placement are the two ends of the rainbow. The system pronounces the parent(s) either fixed or hopeless, moves the children again, and declares the case successfully closed, sometimes immediately and sometimes after a few more weeks or months or years of supervision-treatment-intrusion. But genetic families that work well while the children are away in foster care often don't work any better than they did before children

¹⁹⁴. ARMSTRONG, supra note 114, at 281.
were removed once the children are returned to live with their parents again. And the children once returned may suffer renewed sexual or physical abuse which leaves them their lives but destroys their spirits. The process may take long enough that the children may suffer twice (or more) the destruction of continuity—once when they are removed from home into foster care and again when they are removed from foster homes into the families they came from or adoptive families.

Also, agencies, and statutes drafted under their influence, prefer compliant parents who cooperate in making the efforts dictated by the agencies and who find ways to protect children, even where the state and the society are unable to do so, from an abusive other parent. It is unrealistic to assume that the parents’ views of what their children need are always inferior to the agencies’ views or that parents who have done everything humanly possible to protect children, with little or no help from courts or agencies, should nonetheless lose their children because they cannot do something that works. The system is biased against parents who resist intervention because it is assumed that the state knows best.

“A child can’t wait five years for a home. So they make a home. They settle in wherever you put them. Unless it’s really awful. Even if it’s pretty awful, they settle in.” Wrongly believing that every child can and should have the social mainstream’s idea of a good home, the system itself destroys the homes children do have. This is how the system makes so many errors of both under-intervention and over-intervention. First, it assumes it can fix families; then, it assumes that only the compliant can be fixed, and then, it assumes that reasonably cooperative families are fixed.

196. The Illinois statute, for example, includes as grounds for a finding of unfitness a parent’s “[f]ailure to protect the child from conditions within his [the child’s] environment injurious to [his/her] welfare” and failure to make efforts “to correct the conditions which were the basis for the removal.” 750 ILL. COMP. STAT. 50/1(D) (West 1998). Thus, a parent who disputes the state’s allegations and suggestions from the beginning—asserting family autonomy—is more likely to be found unfit; so is a parent whose best efforts are not sufficient to protect the child from the other parent, despite the fact that the state has also failed to protect the child from those actions—actions caused by neither the parent before the court nor the state.

197. ARMSTRONG, supra note 114, at 281.
Humanity's "dark side" has been recognized since the beginning of recorded history.\textsuperscript{198} It is easily seen in those who seriously abuse or neglect their own children. It is less readily apparent in the helping professionals of law, medicine, and social-work, but it is there. Its low visibility, born of scientific myths and false expectations, makes it insidiously more dangerous.

When someone threatens another's perceptions of the way things are and ought to be, the perceiver wants to make the "misfit" either fit her world view or go away.\textsuperscript{199} If it is possible to do either with little enough struggle so that she can keep her expectations intact, she will be strongly motivated to do it.\textsuperscript{200} This motivation, especially if it is not recognized and addressed, leads directly to unnecessary intervention, not, as interveners believe, to help anyone, but to restore the intervener's level of comfort. The intervener refers the "problem" to others—social agencies, foster parents, state's attorneys, doctors, residential care facilities, counselors, etc.,—and escapes. If not—if she remains involved—she asserts power to control the "misfit" and the "misfit's" family and uses it, in ever increasing cycles, to distance these non-persons from herself.\textsuperscript{201}

Societal "co-dependence" allows "enablers" to avoid dealing with their own issues by attending to others' issues. Since no one can, in fact, control anyone but herself, this activity can continue indefinitely, allowing everyone involved to be non-responsible for the absence of positive change and unaware of the dynamic at work.\textsuperscript{202} The power imbalance, distancing helper from helpee, coupled with self unawareness can keep the \textit{status quo} operative for years—certainly for the whole time of many children's development from birth to adulthood.

However, someone, probably another powerful player in the legal-political-agency child welfare world, may well ask what is being

\begin{itemize}
\item \textsuperscript{198} See, e.g., \textit{Genesis} 3:1–4:16 (Adam's and Eve's sin leading to "the fall" of humankind, and, some say, of all creation, and Cain's murder of Abel).
\item \textsuperscript{199} See \textsc{Robert A. Burt}, \textit{Taking Care of Strangers} vi (1979).
\item \textsuperscript{200} See \textsc{Burt}, \textit{supra} note 199, at 22–45 (explaining, for example, the confinement to hospitals of the mentally ill who presented no threat beyond their difference from the normal).
\item \textsuperscript{201} See \textsc{Burt}, \textit{supra} note 199, at 22–45.
\item \textsuperscript{202} See \textit{generally}, \textsc{Schaef}, \textit{supra} note 116, at 29–33 (discussing the addictive system and co-dependence).
\end{itemize}
accomplished. Society's faith in science\textsuperscript{203} has led the actors in the system to call their work "treatment," which allows the intervenor to persuade the other players to leave her alone because 1) only she has the needed expertise and 2) her machinations are presumptively helpful and medical, not intrusive, controlling, or destructive.\textsuperscript{204} The fellow-intervenors can be justified in escaping to a safely distant vantage point to wait for science to solve the problem of the "misfit's" difference.

A crasser, more familiar problem is self-interest. If child welfare workers leave good-enough families alone and protect seriously endangered children by removing the endangerors or finding permanent placements with new caregivers, their current caseloads will no longer justify the plethora of social workers, juvenile court employees, and bureaucrats currently working within the system. The real possibility of losing her job may be sufficient to distract the intervenor from exploring questions about the efficacy, good sense, motivations, and ethical stance of her work, if and when such issues arise.

It would be easy to classify intervenors as "they" and protect children from "their" dark sides, but, by definition, the person who makes the suggestion and undertakes the proposed "protection" becomes an intervenor.\textsuperscript{205} \textit{All} human beings have the motivations described above; reform of the system requires awareness of their presence and ways to minimize their effects.

\section*{VII. Fixing a Broken Child Welfare System}

It would be difficult to find anyone who does not see any need to improve the current child welfare system in the United States. Republicans want to stop spending so much money on it and to preserve families. Democrats want to identify and remove its weaknesses to

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\item[203.] See generally, Burt, \textit{supra} note 199, at 81–83 (discussing a variation of Milgram's shock-experiment where a non-scientific person orders the volunteer to continue administering shocks to a protesting person. In this variation, significantly fewer people obeyed the order to continue the shocks); Stanley Milgram, \textit{Obedience to Authority} 93–97 (1974).
\item[204.] See Armstrong, \textit{supra} note 114, at 245–84.
\item[205.] It should be noted that intervention often pits a partnership of intervenors—judges, caseworkers, police, etc.—against parents. It is easy to do damage to a good-enough family if all participants outside the family cooperate to make the family look bad and reinforce their own self-justifications.
\end{itemize}
\end{footnotesize}
benefit children and save money. Libertarians want families left alone. Socialists want a more effective system with visible benefits for children. The philosophies discussed above translated into political parties can all agree that the system is broken. Its clients hate it; other participants agree that it only sometimes works. Agreement breaks down, however, when discussion turns to agenda for reform.

A. What a Century²⁰⁶ of Child Welfare Work Should Teach the Law about Best Interests

Vastly increased divorce rates of the last fifty years, rising numbers of births among unwed parents, non-payment of child support, and (mis)classification of households of divorced parents and single parents as *per se* dysfunctional have combined to overwhelm the child welfare system. It has mushroomed into a many-headed monster that can do nothing but grow as long as reform is sought to be accomplished by adding things. The system itself has become part of the problem, perhaps more often than it participates in solving problems for children. Alarm bells have been sounding for a quarter of a century,²⁰⁷ but the system has changed for the worse more than for the better. It has intervened to destroy continuity of care and parental autonomy, both of paramount importance to child development, in the lives of steadily increasing numbers of children.²⁰⁸ The best interests of children must be redefined to promote continuity and autonomy for all children not seriously and imminently endangered in their current living situations, and to protect those things in the new placements chosen for seriously endangered children unless they are again seriously endangered there.²⁰⁹ It is not in the best interests of children to destroy the bonds and security they have in order to provide larger living quarters;²¹⁰

²⁰⁶. Custody cases have been around for well over 100 years, but the child welfare system is more a product of juvenile court acts, the first of which was enacted in 1899. See supra note 99 and accompanying text.

²⁰⁷. See, e.g., GOLDSTEIN ET AL., BEFORE, supra note 111, at 3–14.

²⁰⁸. See supra notes 180–190 and accompanying text.

²⁰⁹. See GOLDSTEIN ET AL., BEYOND, supra note 134, at 6–8.

²¹⁰. See, e.g., ARMSTRONG, supra note 114, at 340 n.1 (discussing the case of a woman who placed her child in foster care for two weeks while she had necessary surgery and spent two years seeking return of her child because, the agency said, her house was too small for her, her son, her father, and her brother). Can anyone doubt that this un-
cleanliness,\textsuperscript{211} genetic connections;\textsuperscript{212} restoration of long broken ties;\textsuperscript{213} or parents’ legal rights.

Changes in the understanding of best interests have happened many times, but the child’s interests have always been said to be paramount. Ironically, the very rejection of balancing children’s best interests against any other considerations has driven such balancing underground. Judges presume that contact with both parents is best warranted intervention and removal (failure to return) did vastly more harm than good?

211. I recently learned of a case in the Chicago suburbs where children were summarily removed from a filthy home with rotting food and other debris all over the floor and the furniture. DCFS was called by a neighbor whose son had been invited into the filthy home by one of the children who lived there. Should children live in filth? No. Should the house be cleaned and the parents’ depression treated? Yes. Should the active, healthy children have been snatched from their lifelong home and handed to strangers? In my opinion, no. It seems cavalier at best to interrupt established continuity and autonomy by removing children where such things are the only risks of harm. An evidentiary hearing should precede removal where, as here, there is no immediate danger. Horrified social workers or police, perhaps gently reared and filled with idealistic notions of a home like their own for every child, should not be free to make such a momentous decision on the spur of the moment and on their own.

When the author was about ten years old, a classmate of hers was being repeatedly dragged by one arm through a backyard fire by his angry father. A passer-by called the police, and they took the child to the county farm until the court could act. That is an appropriately immediate removal; court review within days after removal is sufficient. However, if another adult caregiver—e.g. mother—had been present, it would be a better, less intrusive intervention in the child’s best interests to remove the abusive father.

212. See, \textit{In Re Kirchner}, 649 N.E.2d 324, 338–40 (Ill. 1995) (the famous "Baby Richard" case) (granting custody to blood father who had never met his child after child lived from infancy to age four with adoptive parents).

213. See \textit{Goldstein et al., Before, supra} note 111, at 144–82. Maria Caldwell, a British girl, died at the age of seven at the hands of her stepfather after having spent almost ten consecutive months of roughly the first fifteen months of her life with her aunt and uncle, returning to them as official foster caregivers under the authority of the government’s child protection agency four months later and remaining there for the next five years. The aunt and uncle wanted to adopt her. The agency thought they were good parents to Maria, but, after forced visits to her mother’s household over several months, six-year old Maria was returned to her mother, despite her consistent but futile resistance. Maria’s mother had remarried some years earlier. Neighbors and teachers said that Maria was losing weight, that she was locked in her bedroom for long periods of time, and that she was seriously bruised on several occasions. Moreover, these reports went to different offices and were not coordinated in time to save her life. Maria Colwell was born March 25, 1965, and died January 7, 1973. See \textit{Goldstein et al., Before, supra} note 111, at 144–82.
for children even when one parent is abusive. Judges presume that it is in the best interests of the child that other parents be deterred from child-snatching. Legislators presume that it is in children's best interests to be with their genetic parents even if flawed adoption proceedings or long-term foster care have allowed stronger ties to form with non-genetic parents. If courts and agencies were allowed overtly to balance parental interests against children's interests, for example, the weight of serious sexual abuse might more readily be seen to be greater than abusers' rights to see their children.

Juvenile courts have survived failed claims to predict delinquency, failed claims that child-criminals can be rehabilitated, and failed claims that every child can have a utopian childhood. It should be clear by now that families should be kept together in the first place unless children are seriously endangered and a better placement than the child's present situation is known to be available. It should be clear that intervention damages family autonomy and that removal damages continuity. The longer each continues, the greater the damage done. Those factors should be important in determining what a "better" placement is. If the child is not seriously endangered, no action should be taken. If a home is filthy, it should be cleaned, but children should not be removed from a stable environment unless the danger from that environment clearly exceeds the inevitable damage to continuity that removal will bring. No action should be taken unless the danger in the present situation clearly exceeds the inevitable damage to family autonomy any ordered or coerced alternative will bring.

Courts hearing custody and visitation disputes should have learned that those who have been good parents, involved in children's lives before the dispute arose, are likely to be good parents after it is resolved, and those who haven't are likely to continue not to be. They should have learned that post-decree litigation usually results from ongoing animosity or ongoing attempts by one parent to control the other. Where these factors are not present, parents work out ways to cope with changed circumstances. If the parties are told to work it

214. See e.g., supra Part VI.B. The author has encountered several such cases over twenty years of advising battered spouses and their children, and the current controversy over allegations of sexual abuse by visiting parents is indicative of problems here.

215. See e.g., supra Part VI.E.

out themselves, and the custodial parent's decisions govern if they can't agree, the court need do nothing. Parties will lose an important weapon fostering ongoing animosity and control.

It is antithetical to everything in the history, philosophy, and tradition of parens patriae (except the notion that one-parent families are per se dysfunctional) for courts to second guess parents who have reached agreements on custody, child support, visitation, and place of residence of their children; even if the parents are before the court to seek a divorce or determination of parentage, and even if other issues are contested. If parents seek court resolution of a dispute between them as to custody, child support, or parentage, the court should decide that dispute, at least if mediation or other conciliatory resolutions have not resolved the conflict. Parents who never sought divorces or paternity orders could agree to live apart, trade visitation for money, or whatever else they chose to do. It is both unjust and irrational that those who do seek one of these remedies should have to accept state intrusion into their joint parental decisions as part of the price of that dispute resolution.

Culturally, such intrusions are highly likely to favor keeping the cultural mainstream intact, an arguably impermissible exercise of the state's parens patriae power, and pose a serious threat to family auton-

217. See Goldstein et al., Beyond, supra note 134, at 37 (asserting custody decisions should not be modifiable). The authors proposed, in 1973, that custodial parents should decide visitation issues, because of the importance of protecting the relationship between the custodial parent and the child, thus fulfilling the child's need for continuity. See Goldstein et al., Beyond, supra note 134, at 37-38. At that time, this author was among the many lawyers and others who thought it would give custodial parents a license to use children to hurt former spouses and their families. Both experience and reading Burt's Taking Care of Strangers have changed this author's view. If courts refuse to declare winners and losers, parties will work things out, especially once all parties become accustomed to being thus empowered. This accords with the views of Burt in other areas, like consent to medical treatment. See, Burt, supra note 116, at vi-vii. Parents, like doctors, families, and patients, are more likely to create balanced, sensible agreements if the courts refuse to coerce them or decide for them. Court actions are a club the legal system should not use. It is contrary to parens patriae theory to intervene when the (new, single-parent) family has not failed. It is harmful to children to destroy parental power and autonomy and to live with endless hostilities. In my opinion parents can manage post-decree custody conflicts at least as well as courts can. The rule proposed would, for example, destroy the incentive to make false claims of child abuse against noncustodial parents and would save children from ongoing abuse where true claims are recognized by custodial parents but badly handled or disbelieved in court. Where two parents have been healthily involved with their children, they will work out ways to continue that involvement; where they have not, forcing involvement is far more likely to do harm than good.
omy, particularly when one considers how many children have parents who seek divorces. The proper setting for establishing parameters of acceptable parental conduct are neglect cases, tort actions, and criminal cases, with strict and mostly statutory guidelines, not in divorce cases where judicial discretion is legendary and statutory factors notoriously broad and general.

Those whose expertise is in child psychology and development have been saying these things for many years. It is time for law to hear their voices before the system directly damages thousands more children. The importance of continuity and of family autonomy, supported by history and philosophy as well as by experts discussing children’s basic needs, should be recognized. Best interests of children should be paramount in decision-making and not just in rhetoric.

The last lesson to be explicated here is that only the youngest of children are as helpless and voiceless as the law often presumes all minors to be. Children’s wishes can be ascertained, and their motivations evaluated, from the time they can say meaningful sentences until they come of age. The system should learn to seek those wishes more often and to place the children’s perspectives before decision-makers. As children develop, their knowledge increases and their judgment matures. Just as the best predictor of future behavior of a violent spouse is probably the opinion of the victim, so also may the child’s opinion be a reliable guide to parental dangerousness. The system’s experience also teaches much about how to solicit children’s input, and that literature too should be used within the legal system more than it has been to date.

218. See Goldstein et al., Best Interests, supra note 122, at 11, 17, 62–63; Goldstein et al., Beyond, supra note 134, at 37–38.

The child welfare system needs to shrink, to intervene in fewer families, to close cases more quickly, to recognize the damage done by its very attempts to help children as well as by its authoritarian meddling and bureaucratic self-preservation. It needs, in far more cases than it does now, to do nothing. Utopian goals, false assumptions, too-facile definitions of family “dysfunction,” the dark side within each person involved in every case, and habit all combine to encourage unnecessary interventions that can only make children’s lives worse and move us to return children, after too long, to families which are not “fixed” and will endanger them again. Rules and heavy caseloads lead the system to demand cooperative compliance and to discourage self-help, especially if it goes against mainstream stereotypes. Privately working things out is often the best solution and compliance bespeaks a surrendering of family autonomy, a giving up, which bodes ill for children.

Some of the changes proposed here should or must be statutory, but if every person involved in child welfare agencies, juvenile court non-delinquency cases, custody disputes, and post-divorce litigation were to begin today seriously to consider doing nothing as a real option in those situations, the positive impact on the welfare of countless children would be breathtaking. It would be a good beginning.

**Conclusion**

Consideration of legal philosophies, the history of *parens patriae*, the number of children damaged by the child welfare system, and those it fails to help when they need it leads to several proposals for reform. Their adoption would facilitate a real focus on the well-being of children.

In a custody dispute between parents, married or not, the court should first determine whether or not anyone is a psychological parent to the child. The preferred custodian is a parent who is also a psychological parent unless that person presents a serious danger to the child. If there are two (or more) such parents, or if there is no psychological parent, the court should place the child with the parent who is the least detrimental available alternative. If all parents present a serious threat, the case should be referred to the juvenile court.
If custody is not disputed, but parents are in court to seek divorce, parentage determination, child support, or any other family remedy, the court should not inquire into the child’s best interests as to custody and should, as in all other related matters, order whatever the parties have agreed unless it is unconscionable. Once custody has been determined, by the court or by agreement-made-court-order, the court should close the custody case. It should not determine visitation or retain jurisdiction to modify or enforce its custody order, to hear removal petitions, or to continue oversight of the child’s best interests. This should not change present methods of enforcing other provisions in the order.

Where sole custody is awarded to one parent, all subsequent parental decisions should belong to the custodial parent. Where parents are awarded joint custody, the court may order parental participation in mediation to resolve future disputes, but, if one parent refuses to participate without good cause, the other parent’s decisions should govern. Only a showing of serious endangerment in juvenile court should trigger intervention into the new, post-divorce family, just as such a showing can bring intervention into any other family.

In juvenile court cases of neglect, abuse, and dependency, the existing placement should be continued unless it presents serious endangerment to the child. Pending determination of juvenile court jurisdiction, the child should remain where she is unless there is an immediate risk of serious harm likely to occur before the hearing can be held. If a child’s placement is proposed to be changed during the intake process, a court hearing should be held first or, if immediate removal is necessary under the standard above, within a few days afterward. Time is different for children, and continuity is important. Great harm is often done before any harm resulting from inaction has been reasonably found to have occurred or even to be likely. The standard for destroying the continuity in a child’s life, even temporarily, should be a demonstrated risk of serious endangerment. That demonstration should be made to a court. If a juvenile court has authorized removal of a child from her present living situation, changing physical custody, after the child has come to treat her new caregivers as family, should require the same process as any other removal. When a child has lived in one family for the time it takes to form psychological parenthood at that child’s age, the juvenile court

should close the case, and any child welfare agencies involved should leave the new family alone unless or until the foster caregivers are unable or unwilling to continue.

When parents seek help from juvenile courts or child welfare agencies, whether or not the help sought is available, the state and its agents should not, without the same cause required in other cases, launch a general investigation of the family. Seeking specific help is not equivalent to family failure and should not set in motion the exercise of parens patriae powers and duties. Redirection of a portion of resources presently used to intervene inappropriately to provide the varied help which families might seek as a part of autonomous family decision making might work wonders in society. The cost of unwanted parenting classes, for example, might be spent on babysitters or new tires for safe transportation of children or the expenses of sending children to “free” public schools—or whatever families need and can’t afford.

Children themselves should be consulted by courts whenever they are able to communicate. The court should seek both their placement preferences and reasons for those preferences and their opinions on parental or other caregiver dangerousness, strengths, and weaknesses. This input from the children should be accomplished in accord with the best methods and safeguards agreeable to child-development psychologists on the one hand and parental parties’ constitutional rights advocates on the other. Simple means should be created to allow children to initiate proceedings on their own behalf, although care must be taken to discourage children from “crying wolf,” either on their own or at the behest of non-custodial parents disempowered by these reforms.

Finally, a lot of bureaucratic expense could be saved with more trusting cooperation among the layers of government and citizens. Federal funding may be necessary to redistribute money from richer states to poorer states, and state funding to do the same within states, but there is no need for the strings always attached to distributions of such money. Reports and statistics (with identifying information, addresses, etc., removed) produced at the level where services are provided should be made available, preferably electronically, to whomever needs them, and computers can produce whatever organization of them is needed. It is not a benefit to children whose families have truly failed to have multiple layers of staff rewrite and reorganize and regulate all the information anyone can think of wanting about
their lives and troubles. Good enough parenting is good enough, and is the best society can do. Good enough accounting is all society needs to afford; we don't need to spend millions of dollars to keep track of every dollar of public money spent on the welfare of children (or any other program). Citizens who are intended to benefit can be trusted to complain about misuse of benefits or services if a useable process is in place, and local distributors of benefits can be trusted to complain if clients cheat. When cooperative skulduggery happens, local people are more likely to notice than are distant bureaucrats reading (probably falsified) reports. When decisions are made by those affected by them, things work out; when the uninvolved take control, both the dark side of “help” and self-interested preservation of control are given opportunity to flourish. The best interests of children are not served.

Both governmental philosophies consistent with parens patriae are well served by the reforms proposed here. Limited government proponents must applaud that government may intervene in familial decision-making only when family members seek court adjudication or when a court is satisfied that children are seriously endangered. General welfare proponents must applaud that government may intervene in familial decision-making only when its intervention will do more good than harm or when families seek government help. Consulting children when courts do become involved fosters both their liberty and their well-being. Empowering custodial, single parents likewise fosters their liberty and the well-being of them and their children. Closing cases sooner, reducing governmental costs and bureaucracy, and lightening caseloads allow for both smaller government and more efficient governmental function.

Parens patriae is a doctrine which says that children whose families fail should be protected and cared for by government. It is not, and should not become, a doctrine of public oversight of all child-rearing in the paternalistic mode. The destruction of family autonomy and continuity of care for children who come to the attention of government through cases of divorce, parentage, dependency, neglect allegations, or abuse allegations, seem far more likely candidates than single-parent families to be among the causes of dangerous disaffection among young adults. They are also an abuse of government’s power and a perversion of parens patriae. If family failure is realistically defined and required to be demonstrated in court
before children are removed from homes or parents are removed from decision-making, children whose families have truly failed can be helped without vast expenditure or ongoing government supervision. Such reform is, indeed, in the children's best interests. §