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Family Privacy and Parental Rights as the Best Interests of Children

by Brandon Logan, J.D., CWLS
Director, Center for Families and Children

Key Points

- Parents possess natural rights to direct the upbringing of their children.
- The state should only intervene in the parent-child relationship when serious physical or emotional harm to the child is imminent and the intervention is likely to be less detrimental than the status quo.
- State best-interest statutes should defer to parents by presuming that parents act in their children's best interests.
- Parents possess a fundamental liberty interest in the care, supervision, upbringing, and education of their children, which should be protected against claims by the state and others.

Parents possess a natural and moral right to privacy and liberty in carrying out their parental responsibilities. Children, rather than parents, receive the ultimate benefit of parental rights. The parent-child relationship in the family context supplies an ecology of intimacy that serves the best interests of children while insulating its members from state intrusion.

Historically, American jurisprudence has protected the liberty of parents by recognizing they possess the fundamental right to raise their children as they see fit—subject to state intervention only as a last resort when parents pose a risk to their children's health or safety.

In light of recent U.S. Supreme Court precedent, which obscures a rich tradition upholding the fundamental rights of parents and inherent autonomy of families, states should enact legislation that limits state intervention in the family, clearly defines and protects parental rights, and creates a legal presumption that parents act in the best interests of their children.

Parent-Child Relationship as Natural Government

The parent-child relationship embodies the very essence of a natural relationship—one not grounded in social convention, political institution, and law. The relationship is sufficient unto itself and does not require outside authority for its creation or maintenance. The parent-child relationship predates the state in the same way that natural individual rights predate the state in American political philosophy (Hafe, 616).

The rights of parents stem from a duty incumbent on them "to take care of their off-spring, during the imperfect state of childhood" (Locke, 129 §58). "...All parents ... [are], by the law of Nature, under an obligation to preserve, nourish, and educate" their children (Locke, 128 §56).

Locke recognized parental authority as "that which parents have over their children to govern them, for the children's own good, till they come to the use of reason" (Locke, 180 §170). These obligations and the resultant powers are not a creation of the state (Locke, 135 §71). Rather, Locke considered parental power a form of natural government (Locke, 180 §170). Unlike the parent-child relationship, the state is an artificial creation of citizens for limited purposes (Locke, 159 §123). Except as required to preserve children against harm, parents retain their authority against the claims of the state (Locke, 135 §71):

> *...These two powers, political and paternal, are so perfectly distinct and separate, and built upon so different foundations, and given to so different ends, that every subject that is a father has as much a paternal power over his children as the prince has over his. And every prince that has parents owes them as much filial duty and obedience as the meanest of his subjects do to theirs, and can therefore contain not any part or degree of that kind of dominion which a prince or magistrate has over his subject.*

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The State's Interest in Children

Historically, the government has claimed authority to intervene in the family based on two sources of state power: (1) police power and (2) the *parens patriae* doctrine. These two sources of government authority serve as the basis for juvenile and family court jurisdiction (Myers, 321).

Police Power

The only legitimate source of state authority over parents might be found in the government's limited and purposeful exercise of its police power—to protect from harm those presumed to be incapable of protecting themselves. The appropriate use of police power preserves citizens against harm and protects the safety of those in society (Epstein, 15; Locke, § 129-130). Through its police power, the government derives the authority to protect children from abuse and exploitation committed not only by parents but also by others (Myers, 321).

The natural rights of parents do not include the authority to abuse their children. Rather, parents have a natural obligation to protect children from harm. The police power secures the liberty of the child against parents in cases of abuse by empowering the state to intervene in the parent-child relationship.

Parents, not the state, bear the natural authority over their children necessary to discharge the high duty incumbent upon them.

At the same time, the proper balance of power between citizens and the state requires a narrow definition of harm in the government's exercise of its police power. This is especially true in the context of the parent-child relationship, where a natural tendency exists to intervene in the moral failings of parents (Schoeman, 8). Those outside this intimate relationship are inclined to criticize parents and find them short of the love, attention, and security they think parents should provide (Schoeman, 8). A policy of restraint and tolerance is warranted because parents frequently lack the full spectrum of knowledge and choices necessary to perfectly discharge their responsibilities to children. Parents must simply do their best within the constraints of their limited knowledge and choices. Oftentimes it is impossible to accurately predict the circumstances that contribute to remote forms of harm (i.e., long-term or psychological) (Schoeman, 10).

Strict criteria should be met before the state exercises coercive authority in the family under police power. Schoeman (10) recommends a standard akin to clear-and-present danger. Specifically, coercive state intervention in the family should be limited to cases where "(1) serious physical or emotional harm to the child is imminent and (2) the intervention is likely to be less detrimental than the status quo" (Schoeman, 10).

Parens Patriae Doctrine

Although a narrow exercise of police power in the parent-child relationship finds a reasonable basis in securing our "unalienable rights" of "life, liberty and the pursuit of happiness" because no parent has authority to abuse a child, other sources of state authority over the family lack democratic foundations and amount to little more than second-guessing parents or meddling in families. The state asserts an interest in the care and custody of children and, thereby, limits the authority of parents through the doctrine of *parens patriae*. The doctrine, originally formulated in 13th-century England, literally establishes the king as the parent of the realm and its inhabitants (Hubin, 126).

From its inception, *parens patriae* failed to acknowledge the proper relationship between parents and the state. The doctrine originally considered the fundamental right to determine the care and custody of children to reside with the crown (and, later, the state), which delegates a cluster of rights to the child's parents, who merely act as trustees of the state interest. As the holder of the fundamental authority, the state determines the ends to be served by parental rights and may withdraw those rights when their exercise does not serve the state (Hubin, 127).

American courts have tempered application of the *parens patriae* doctrine—merely asserting that the state has an interest in the care and rearing of children. Although the rights of natural parents do not derive from the state, the state may invoke its interest to protect children from harm (Hubin, 127). Nevertheless, current federal law permits extensive, coercive interference with the parent-child relationship, including forced separation of children from their parents, based on a mere finding that "continuation in the home … [is] contrary to the welfare of the child" (42 U.S.C. § 672 (a)(2)(A)(ii)).

Efforts to expand intervention in the family under the *parens patriae* doctrine should be resisted. Parents, not the state, bear the natural authority over their children necessary to discharge the high duty incumbent upon them. That authority is not absolute, nor should it be, but is properly restricted through the state's police power to prevent imminent harm to children, when the state's intervention is likely to be less detrimental than the status quo.

The Best Interests of Children

Rather than requiring imminent harm and the state's intervention to be less detrimental than the status quo, family courts frequently resort to the "best interests of the child" when called upon to make decisions affecting children. The best-interest standard is a hopelessly vague and insufficient guide to determine whether state intervention in the family is appropriate (Appell & Boyer, 76). The standard not only leads to arbitrary decision-making but also raises significant concerns about social engineering (Appell & Boyer, 66).

An absence of clear guidelines combined with even a beneficent desire to help children weaponizes the best-interest standard against families. The standard introduces "bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child" (*Smith v. Organization of Foster Families*, 834). The use of the standard as a metric for decisions by nonlawyer, volunteer advocates for children may even allow elements of structural racism and classism to take hold in the child protection system (Mulzer & Urs, 71).

English common law adopted the best-interest standard in cases involving the guardianship of children receiving inheritances. Guardians had decision-making authority over children "for the benefit of the infant" and often exercised that authority in contradiction to parents. From its very beginning, the best-interest standard served as a means for court-appointed guardians to supersede parental authority and coercively intervene in families (Carbone, 112).

In 1989, the United Nations (UN) General Assembly adopted the UN Convention on the Rights of the Child (CRC), which incorporated the best-interest standard. Specifically, Article 3 provides (UN CRC, Art. 3):

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Article 9 allows "competent authorities" to separate children from their parents when "such separation is necessary for the best interests of the child" (UN CRC, Art. 9). The CRC has been widely adopted around the world. Although the U.S. played a significant role in developing the CRC and was an early signatory, states have resisted ratification of the treaty by the U.S. Senate for almost three decades. Nevertheless, American best-interest jurisprudence has mirrored globalist policy favoring an expansive and preponderant application of the best-interest standard (Hafen & Hafen).

Courts freely employ the best-interest standard in divorce cases to settle questions on child rearing when parents cannot. The use of the best-interest standard in divorce cases is problematic but not as pernicious as when the standard is employed against parents by others. Justice Scalia distinguished the role of the best-interest standard in cases between parents (i.e., divorce, custody) from those involving nonparent third parties, including the government (*Reno v. Flores*, 303-304):

> *'The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole constitutional criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately. Similarly, 'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.*

The best-interest standard is a seductive reflection of our beneficent desires to engage in child-centered decision-making (Hubin, 131). Although the overall goal of our system of justice should be the best interests of children, application of the best-interest standard as a mode of decision in a specific case often has the opposite effect (Hubin). It introduces bias and uncertainty in family matters, which causes parents to shrink away from their responsibilities (Schoeman).

In *Parham v. J.R.*, the U.S. Supreme Court restated as a best-interest presumption the legal custom of trusting the motives and decisions of parents (602):

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

The Court confirmed that a finding of abuse or neglect would rebut the presumption (*Parham*, 602). Nevertheless,

the Court reasoned that just because "some parents 'may at times be acting against the interests of their children,' … is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests" (*Parham*, 602-603).

In place of parents' best-interest determinations, the best-interest standard offers no assurance that the interests of children are better served by the substituted judgment of courts and nonparents. John Stuart Mill's liberty principle supplies one of the most persuasive arguments against government action based on the best-interest standard (Mill, 83):

> *...The strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place.*

Because we cannot trust the state to interfere with liberty at the right times and in the right ways, social utility is served by placing restrictions on the government's power to pursue

In a consistent line of cases dating back to 1923, the U.S. Supreme Court has confirmed the fundamental rights of parents and the associational and privacy rights of families by applying strict scrutiny to questions involving the upbringing of children:

Meyer v. Nebraska (1923) – The Constitution protects "the right of the individual … to marry, establish a home and bring up children" (399).

Pierce v. Society of Sisters (1925) – "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" (535).

Prince v. Massachusetts (1944) – "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (166).

Ginsberg v. New York (1968) – The right of parents to make decisions for their children is "basic in the structure of our society" (639).

Wisconsin v. Yoder (1972) – "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition" (406).

Cleveland Board of Education v. LaFleur (1974) – The Supreme Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (639-640).

Smith v. Organization of Foster Families (1977) – "The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition'" (845).

Moore v. East Cleveland (1977) – The U.S. Constitution "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural" (503-504).

Parham v. J.R. (1979) – "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. … Simply because the decision of a parent is not agreeable to a child, or because it involves risks, does not automatically transfer the power to make that decision from the parents to some agency or officer of the state" (603).

Santosky v. Kramer (1982) – "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents …" (753).

Hodgson v. Minnesota (1990) – "The family has a privacy interest in the upbringing and education of children … which is protected by the Constitution against undue state interference" (446).

M.L.B. v. S.L.J. (1996) – "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' … rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect" (116).

social utility (Hubin, 131). It is important to recognize that state interference has costs and risks of its own—many of which cannot be appreciated until much later, if ever.

Although parents can make decisions that are not in the best interests of their children, it does not follow that the state, acting coercively, serves the best interests of children any better. Therefore, the best interests of children are best achieved by placing constraints on the power of government to promote the best interests of children (Hubin, 132). "The state must tread lightly and interfere reluctantly precisely because it is inherently clumsy and it carries a big stick; the use of this stick has consequences besides those of the behavior coercively brought about" (Hubin, 133).

State best-interest statutes should defer to parents by recognizing that parents act in their children's best interests. Clear and convincing evidence that a parent abused or neglected a child would indicate unfitness and overcome the legal presumption. Only then could the court substitute its judgment of the child's best interests for that of the child's parents.

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The Rights of Parents and the Family

A heightened level of judicial scrutiny of state intervention in the family, known as strict scrutiny, serves as an important hedge against government overreach in the parent-child relationship. Strict scrutiny demands the state prove that the objective it seeks is compelling (i.e., undeniably necessary) and that the means employed to achieve that objective are the least restrictive available.

Against the historical background of its reasonably stringent parental rights doctrine, the Supreme Court took up a Washington state law in 2000 that permitted a court to order visitation rights for any party (including nonrelatives) based only on a finding that the child's best interests would be served by the visitation (*Troxel v. Granville*).

The Supreme Court considered the history of and recent changes in family structure and function, including the changing role of grandparents (*Troxel*, 64). Observing that "the nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family, states have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties" by recognizing "an independent third-party interest in a child" (*Troxel*, 64). Yet, the extension of rights to persons other than a child's parents "comes with an obvious cost" by placing a "substantial burden on the traditional parent-child relationship" (*Troxel*, 64).

Although a plurality of the Court found the Washington statute to be an unconstitutional abridgment of parents' Fifth and Fourteenth Amendment rights to make decisions concerning the care, custody, and control of their children, the Court failed to apply the strict scrutiny standard in striking down the law. Rather, the Court subjected the rights of parents against interference by others to a case-by-case balancing test by judges (70):

> *...If a parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.... We would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a* per se *matter.*

Admittedly, the *Troxel* ruling is a narrow one—invalidating one state statute, which granted exceedingly broad powers. Nevertheless, the decision of the fractured Court revealed a willingness on the part of eight justices to qualify the rights of parents against competing relational claims (Buss, 279). Although not a sea change, the decision represents a significant shift in parental rights jurisprudence that (1) recognizes associational claims of nonrelatives and (2) increases the power of courts to allocate child-rearing authority among competing claimants, including nonparents (Buss, 280).

In dissenting, Justice Scalia recognized the right of parents to direct the upbringing of their children is "among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men ... are endowed by their Creator,'" and "is also among the 'othe[r] [rights] retained by the people'" under the Ninth Amendment (*Troxel*, 91). Nevertheless, Scalia was wary of both judicial activism in adjudicating the parameters of that right, generally, and a federal role in family law, specifically (*Troxel*, 93). Rather, Scalia preferred to leave the matter to the elected officials of the people in state legislatures, who "have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people" (*Troxel*, 93).

In the wake of *Troxel*, 10 states[1] have responded to Justice Scalia's guidance by enacting statutes that define and protect parental rights. Those statutes differ in effect and application but share a foundational declaration that parents possess a fundamental liberty interest in the upbringing of their children, to be protected at all costs against state intervention—expressed as follows in Arizona statutes:

> *The liberty of parents to direct the upbringing, education, health care and mental health of their children is a fundamental right.*
>
> *This state, any political subdivision of this state or any other governmental entity shall not infringe on these rights without demonstrating that the compelling governmental interest as applied to the child involved is of the highest order, is narrowly tailored and is not otherwise served by a less restrictive means.*

Parental rights reinforce a relationship that is natural and independent of the existence of the state and serve to protect both parents and children from undue interference (Hubin, 130). To confirm this essential liberty interest, bring stability to family policy, and minimize the role of the courts in allocating the interests of families, states should enact parental rights legislation, using the language above as a starting point.

Parental Rights Serve Children's Interests

The balance of power between parents and the state on the care, custody, and control of children requires recognition of the primacy of the parent-child relationship against all other claims. Parents act in the best interests of children and should be free from interference by others, except in cases where abuse or neglect is proved.

The liberty of parents to direct the upbringing of their children is a fundamental right. The government does serve a secondary, protective role through its police power. However, infringement on the rights of parents should be strictly limited to cases involving an imminent risk of harm, where the state intervention offers a less detrimental alternative.

A legal ecology that strikes the correct balance of power between parents and the state and that situates each in his proper role in relation to children protects parents and children by strengthening family bonds and increasing intimacy. To cultivate a stable, protective ecosystem around the parent-child relationship, state legislatures should enact legislation that:

1. Recognizes a fundamental liberty interest in the upbringing of their children, giving rise to a right to raise children as parents see fit;
2. Creates a legal presumption that parents act in the best interests of their children, absent a finding based on clear and convincing evidence that they have committed abuse or neglect; and
3. Limits government intervention in the parent-child relationship to cases in which physical or emotional harm is imminent and state intervention is less detrimental than the status quo. ✩

1 Arizona, Colorado, Kansas, Idaho, Michigan, Nevada, Oklahoma, Utah, Virginia, and Wyoming.

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About the Author

Brandon J. Logan, J.D., CWLS, is the Director of the Center for Families and Children at the Texas Public Policy Foundation. Before joining the Foundation, Brandon represented hundreds of children as attorney and guardian in child welfare courts throughout Texas. He is certified as a Child Welfare Law Specialist by the National Association of Counsel for Children. Brandon has also represented parents, grandparents, and foster families in custody and adoption cases across the state.

Brandon earned his undergraduate degree from Texas A&M University and his law degree from Texas Tech University. He is currently completing his dissertation in Human Development and Family Studies at Texas Tech University, where he also taught courses in child welfare policy and family dynamics.

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