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## State Representation of Children's Interests

Naomi R. Cahn

*George Washington University Law School, [ncahn@law.gwu.edu](mailto:ncahn@law.gwu.edu)*

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# State Representation of Children's Interests

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NAOMI CAHN\*

## I. Introduction

Who represents a child's interests? We generally believe that the parents have primary responsibility for a child and that, where parents are unable to assert responsibility, the state acts in *parens patriae* to protect the child's interests in a series of different contexts. But does the state always do this? What are the parameters of the state's role in representing and protecting children's interests? Although the role of attorneys and guardians *ad litem* in representing children has received a great deal of attention,<sup>1</sup> the role of the state—outside of a few settings, such as the foster care system—has been more presumed than explored. The state, as the ultimate third party—and outsider—to the parent-child relationship, affects the very definition of the family, and shapes the rights and status of parents and children.

In examining the role that third parties enjoy with respect to children and the role those claims play in defining family, this paper explores how the interests of minors are represented in both national and international law in three contexts: first, in restricting the abortion rights of minors, the state claims to be protecting them; second, in allowing parents to decide who will act as caretaker for their children if both parents are dead, the state defers to parents' wishes; and third, in countries where the state cannot protect children and the exercise of rights in court is virtually meaningless, it is nongovernmental organizations who speak on behalf of minors.

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\* Professor of Law, George Washington University Law School. Thanks to June Carbone, Joanna Grossman, Fred Lawrence, and Catherine Ross for all kinds of help and support.

1. See, e.g., Barbara Ann Atwood, *Representing Children: The Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. L. 183 (2005).

There is already skepticism about the state's ability to represent children's interests in a variety of contexts. Many have challenged the state's implementation of the abuse and neglect system, with questions about race and class,<sup>2</sup> and others have challenged conventional norms suggesting that the state is deferential to the nuclear family.<sup>3</sup> In examining the state's role in speaking for children, this article serves as both a critique and a defense. The state's actions and efficacy in advocating the interests of minors is context-dependent; there are contexts in which the state's stated agenda of protecting children really is primary, while in other situations, the state has another agenda or the state may be altogether incapable of acting at all. This article briefly reviews the development of state intervention on behalf of children and possible legal and conceptual frameworks for examining the rights of, and representation of, children before turning to the three different contexts for examining the efficacy and parameters of the state's role.

## II. State Intervention

This section provides a brief introduction to the parameters of state intervention. It will explore the constitutional basis for, and the limits on, state intervention into the parent-child relationship, and then explore the historical origins for such intervention. Supreme Court cases have held that parents are constitutionally entitled to raise a child in the manner that they choose and parents are generally better able, as a prudential, pragmatic matter, to judge what will benefit their children than is the state.<sup>4</sup> Although the rights were originally developed as extensions of the common-law liberty rights applicable to contract, more modern articulations have attempted to ground them in the Constitution.<sup>5</sup> In *Meyer v. Nebraska*, the Court held that the right of liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage

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2. See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992). Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER SOC. POL'Y & L. 55 (1999).

3. See, e.g., Joanna Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 100-02 (2004) (discussing impact of state variation in marriage laws); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 893-95 (2004) (discussing how welfare law may intimately affect family structure).

4. See, e.g., Emily Buss, *Allocating Developmental Control Among Parent, Child, and the State*, 2004 U. CHI. L. FORUM 27, 31.

5. Kurt T. Lash, *The Constitutional Convention of 1937: The Original Mining of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 472-73 (2001).

in any of the common occupations of life . . . to marry, establish a home and bring up children.”<sup>6</sup> The Court explained that, although it had never hazarded a definitive explanation of the liberty guaranteed pursuant to the Fourteenth Amendment, “[w]ithout doubt” that liberty included the right to raise children.<sup>7</sup> The cases that it cited for this proposition included the now somewhat discredited precedents of the *Slaughter-House Cases*, *Yick Wo*, *Allgeyer*, *Adkins v. Children’s Hospital*, and others.<sup>8</sup>

The rationale supporting parental rights in *Pierce v. Soc’y of Sisters* is phrased as harking back to *Meyer*: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. 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.”<sup>9</sup> And in *Yoder*, the final case of the trilogy, the Court notes: “This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce* . . .”<sup>10</sup> The Court observed that parental control over their children’s religious and educational upbringing has “a high place in our society,” and the state’s interest in education must be balanced against “the traditional interest of parents with respect to the religious upbringing of their children.” In *Troxel v. Granville*, the Supreme Court reiterated that parents have a basic right to raise their children, and that the decisions of fit parents should receive “special weight.”<sup>11</sup> Within the intact nuclear family, the strong presumption is that parents act in their child’s best interests.

Parents’ basic rights become attenuated as soon as the fitness of the parent(s) becomes questionable or once there is no longer an intact family.<sup>12</sup> Indeed, while courts pay deference to the notion of parental control,

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6. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

7. *Id.*

8. *Id.*

9. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). In a much less famous case decided shortly after *Pierce*, the Court held that restrictions on teaching foreign languages in Hawaii deprived “Japanese parents” of the right to direct their children’s education. *Farrington v. Tokushige*, 273 U.S. 284 (1927).

10. *Yoder v. Wisconsin*, 406 U.S. 205, 232 (1972).

11. *Troxel v. Granville*, 530 U.S. 57, 59 (2000).

12. *Wyman v. James*, 400 U.S. 309 (1971). Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I & II*, 16 STANFORD L. REV. 257, 258–91, 900 (1964 and 1965); Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1242–44 (1999); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

the state can remove children from their parents for abuse and neglect, require some form of schooling, and establish a minimum work age for children.<sup>13</sup> Moreover, the reasoning that supports parental autonomy even in intact families is, at best, somewhat questionable, given the difficulty evidenced in the earlier decisions in finding a constitutional basis for parents' fundamental rights.

In addition to the difficulty of finding a constitutional basis for parents' rights, the historical origins of the state's role in protecting children, and the parameters of that role, are somewhat obscure. The state's authority to protect children is generally traced through the historical development of the doctrine of *parens patriae* and the English Poor Laws.<sup>14</sup> Each of these provided a foundation for state intervention in the intact family. By the early seventeenth century, the English Poor Laws allowed the state to remove children from their parents' custody when their parents could not support them.<sup>15</sup> These laws were echoed in the American colonies' approach to poor children, who could be removed from their homes notwithstanding their parents' objections.<sup>16</sup>

The English Court of Chancery *parens patriae* authority probably developed from its jurisdiction as the guardian of the property of wealthy orphans, and expanded in the seventeenth century to include concerns over the child's care.<sup>17</sup> In the United States, the doctrine was used in the early nineteenth century to justify state removal of children from their homes, and, by the end of the nineteenth century, it had become the basis for the development of the juvenile court.<sup>18</sup> Today it is used as the basis for any state intervention on behalf of children in the family based on a belief that the state has a duty to act in the best interest of the child. For example, when parents choose not to seek medical treatment for their children based on religious beliefs, the state will often assert its *parens patriae* interest and seek a court order allowing the state to consent to the

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13. See e.g., Catherine Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1586 (1996).

14. See, e.g., Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971); Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 12-25 (2001) (tracing the development of modern juvenile dependency laws); John Seymour, *Parens Patriae and Warship Powers: Their Nature and Origins*, 14 OXFORD J. LEGAL STUD. 159 (1994).

15. Bean, *supra* note 14, at 14-16.

16. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702-03 (1998); Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 939 (2004).

17. See, e.g., Rendleman, *supra* note 14.

18. See Bean, *supra* note 14.

treatment on behalf of the sick child.<sup>19</sup> The state justifies its actions by articulating a “best interest of the child” standard.

The Supreme Court, in recognizing the state’s authority to act in *parens patriae*, cautioned against governmental overreaching. In *Gault*, the court stated:

We [have] stated that the Juvenile Court Judge’s exercise of the power of the state as *parens patriae* was not unlimited. We said that the admonition to function in a “parental” relationship is not an invitation to procedural arbitrariness.<sup>20</sup>

Nonetheless, the basic precept that the state can act to protect children remains unquestioned; it is the manner in which that protection is exercised that creates potential constitutional conflict.

### III. Frameworks for Addressing the State’s Representation of Children’s Rights

This section articulates various conceptions of the nature and strength of children’s rights. It then discusses various theoretical frameworks for considering the substantive goals that the state should, or does, pursue in its representation of children’s interests. These substantive goals depend on different perspectives on the relative weights of parents’ and children’s interests.

#### A. Children’s Rights

Given the strong recognition of the rights of both parents and the state, children can be difficult to situate within the legal system. Although they have clearly recognized rights in some contexts, their rights are not identical to those of adults.<sup>21</sup> When children’s interests in a particular legal proceeding may be different from their parents’ or the state’s, they are sometimes entitled to their own attorneys, although the most common context for representing children involves articulating their rights against the state, as in juvenile delinquency or other criminal cases.<sup>22</sup> If a third

19. See, e.g., Michelle Oberman & Joel Frader, *Dying Children and Medical Research: Access to Clinical Trials as Benefit and Burden*, 29 AM. J.L. & MED. 301, 314 n.42 (2003); see also Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL’Y 251, 262–69 (2005) (discussing other exceptions to the general rule of parental consent to medical decision-making, such as a minor’s emancipation).

20. *In re Gault*, 387 U.S. 1, 30 (1967).

21. See, e.g., Annette Apell, *Uneasy Tensions Between Children’s Rights and Civil Rights*, 5 NEV. L.J. 141 (2004); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 265 (1999).

22. See, e.g., Catherine Ross, *Implementing Constitutional Rights for Juveniles: The Parent–Child Privilege in Context*, 14 STAN. L. & POL’Y REV. 85 (2003); Mary Berkheiser, *The Fiction*

party claims to be representing children's interests, as a child's attorney, guardian *ad litem*, or when the child is part of a larger group (such as by a nonprofit nongovernmental organization),<sup>23</sup> there are difficult issues concerning the parameters of that representation. As a background to the dispute over the state's representation, this section briefly reviews these other possible representatives.

Parents, who have the right to the "care, custody, and control" of their children, can ordinarily be expected to act in their children's interests. Whether children have reciprocal rights against their parents is, however, much less settled. While children are recognized as capable of holding and exercising constitutional rights, such rights are most practically asserted where parents and children agree or where the child seeks to exercise rights in criminal or administrative proceedings. Asserting a separate right on behalf of the child realistically requires the willingness to recognize tensions with established parental decision-making rights.<sup>24</sup>

Constitutional decision-making has, instead, overwhelmingly focused on parents' rights: Do unmarried fathers have the right to veto the adoption of their newborn children? Do custodial parents have the right to determine the terms of grandparent visitation? Do biological parents have constitutional rights with respect to their children? Such rights nonetheless involve a measure of reciprocity with children's interests. Family law decision-making for younger children generally involves a triad of parties: either mother–father–child, or parent–child–state. The assertion of a right by one almost inevitably involves restricting the rights of the others. If, for example, the parents have a thick constitutional right to decide what is in their children's best interests, then the child lacks a corresponding right to compel parents to act in accordance with that best interest standard. The absence of a right, on the other hand, does not necessarily dictate a particular outcome. Instead, it may leave the issue open to public-policy balancing. If, for example, a parent does not have a constitutional right to veto an abortion favored by the child, then a state may still choose to permit the parent some involvement in his daughter's decision. In such

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*of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002); Barbara Bennett Woodhouse, *Enhancing Children's Participation in Policy Formation*, 45 ARIZ. L. REV. 751 (2003).

23. For the classic discussion of how an individual client's interests might conflict with those of other group members or the lawyer's agenda, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

24. See, e.g., Kristin Henning, *Loyalty, Paternalism and Rights: Client-Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 253–55 (2005); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

a setting, the formal recognition of children's rights may be less critical than the question of what public policies influence the child's ability to exercise that right.<sup>25</sup>

With the development of constitutionally based familial rights, it is tempting for child advocates to seek enhanced rights on behalf of children.<sup>26</sup> But many of these rights, as conventionally understood, are ill-suited to address the needs of many children<sup>27</sup> because they fail to address the reality of children's lives, particularly their dependence on adult caretakers, and the immaturity of children's brains. Indeed, Professor Annette Appell usefully distinguishes between two different aspects of children's rights: "civil rights," which involve children's rights to autonomy, expression, and freedom from state action, and "protective" or "dependency" rights, which involve others deciding what is best for children because of children's dependency on others.<sup>28</sup>

Children require not only continuing and dependent<sup>29</sup> relationships but also connections to others.<sup>30</sup> Legal doctrines and processes must help create and sustain these interconnected relationships, but also ensure that children are protected when those relationships go awry. Protecting children takes different forms: if children need to be protected from their state, then the conventional discourse provides the primary role to parents,

25. See *infra* for further discussion of minors' abortion decision-making rights and parental involvement.

26. For some of the eloquent commentary on the need to establish children's rights, see, e.g., Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421 (2000); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1996); Ross, *supra* note 13; Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

27. See, e.g., Huntington, *supra* note 24, at 655–56.

28. Appell, *supra* note 21 at 141, 143, 153. "The distinction between these two rights categories reflects both the difference between rights applied to children despite their minority and rights applied because of their minority." In this sense, children's rights differ from those of adults. In the United States context, the Due Process Clause thus protects against government overreaching and undue state interference with fundamental personal decisions and beliefs. It has not, however, been generally interpreted to require that the government act affirmatively. See *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005); *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2318–20 (1990); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 486 (1997); Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122–23 (1969).

29. See SARAH BLUFFER HRDY, *MOTHER NURTURE: MATERNAL INSTINCTS AND HOW THEY SHAPE THE HUMAN SPECIES* (1999).

30. See Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150 (1999). Children who have higher levels of care and connectedness also have diminished rates of health-threatening illnesses. Gregory Loken, *Throwaway Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715, 1759 (1995).

and secondarily to the discourse of rights; if children need to be protected from their parents, then the conventional discourse recognizes the state's role. The puzzle of representing children is also evidenced in questions of when children should be entitled to counsel, and the role of counsel in these proceedings.<sup>31</sup>

There are persuasive arguments that minors deserve counsel in all civil proceedings.<sup>32</sup> For example, Professor Katherine Federle argues that to truly respect children's rights, we must treat the children as parties to any dispute that affects them, and, to ensure adequate representation, appoint them counsel. She believes, for example, that children must approve any custodial outcome that affects them.<sup>33</sup> By contrast, Professor Martin Guggenheim expresses deep reservations about how children are represented and their entitlement to representation.<sup>34</sup> Indeed, in his most recent article, he argues that children's advocates may serve state interests in the context of abuse and neglect.<sup>35</sup> Consequently, rights discourse, particularly given children's psychological and neurological immaturities,<sup>36</sup> may function as an imperfect method for describing the realities of children's lives. Moreover, when no one can help children exercise those rights, then children must be protected in other ways. If children do not have separate representation or adequate recognition of their rights, then this places an increased burden on the state and parents to ensure both procedural and substantive protections.

### *B. Conceptual Framework*

The parameters and appropriateness of the state's role in making claims for children depends not just on the deference to be accorded parents but also on a series of (overlapping) conceptual categories: parental authority versus children's autonomy, self-fulfillment versus fulfilling a higher purpose,<sup>37</sup>

31. See generally Ross, *supra* note 13 (using a discussion of rights to argue that children should be appointed counsel in civil litigation).

32. See, e.g., *id.*

33. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1564 (1994).

34. See, e.g., Martin Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488 (1999).

35. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. (Spring 2006).

36. The conceptual framework and the need for representation of children's interest is supported by neuroscientific research, which shows that children are especially vulnerable. See Elizabeth S. Scott and Thomas Grisso, *Development Incompetence, Due Process and Juvenile Justice Policy* 32-33 (2004), available at [http://law.bepress.com/uvalwps/uva\\_publiclaw/art11](http://law.bepress.com/uvalwps/uva_publiclaw/art11); Jennifer Drobac, "Developing Capacity: Adolescent Consent at Work, at Law, and in the Sciences of the Mind," 10 J. JUV. L. & POL'Y (2006).

37. Edward Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1 (2005).

hierarchy versus respect for individuality, and family versus community. If parental authority is full, then there is no need for children to ever represent themselves (or for their interests to be represented by a third party), and state intervention should be limited strictly; on the other hand, respect for individuality and children's autonomy might require broader parameters for state intervention, with separate representation for children in most situations.

In thinking about different concepts of the state's role in this potential morass of conflicting interests, it is useful to refer to the conceptual categories articulated by George Lakoff.<sup>38</sup> He argues that many social, political, and cultural attitudes can be explained through the paradigm of "strict father" versus nurturant parent. To articulate their particular vision of the family, people generally have two different conceptions of the relationship between parents and children. Under the "strict father" mentality, the world is dangerous; children need to be protected, but will not act in their best interests because they have not yet developed a sense of morality; and it is the responsibility of the strict father to impose discipline on his children.<sup>39</sup> Children are born bad and learn through punishment.<sup>40</sup>

By contrast, the nurturant parent mentality views the world as basically safe, with parents responsible for nurturing their children with empathy and responsibility.<sup>41</sup> The role of the state is similarly based on "empathy" and "responsibility," on taking care of and protecting each other.<sup>42</sup> The state would support parents in nurturing their children, but also support children in fulfilling their lives by, for example, providing college loans<sup>43</sup> or offering sex education beyond abstinence programs.<sup>44</sup>

Under the "strict father" mentality, children will not have interests independent from those of their parents; if they did, children still could not represent their own interests because this undermines their parents'

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38. GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004); *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002).

39. *MORAL POLITICS*, *supra* note 38.

40. Interview of George Lakoff (2003), available at [http://www.berkeley.edu/news/medial\\_releases/2003/10/27\\_lakoff.shtml](http://www.berkeley.edu/news/medial_releases/2003/10/27_lakoff.shtml).

41. *MORAL POLITICS*, *supra* note 38.

42. George Lakoff, *Framing the Dems: How Conservatives Control Political Debate and How Liberals Can Take It Back*, AM. PROSPECT, Sept. 1, 2003, available at <http://www.prospect.org/print/V14/8/lakoff-g.html>.

43. George Lakoff, *The Body Politic*, available at [http://www.findarticles.com/p/articles/mi\\_m0GER/is\\_1999\\_Fall/ai\\_56457597/pg\\_2](http://www.findarticles.com/p/articles/mi_m0GER/is_1999_Fall/ai_56457597/pg_2).

44. LAKOFF, *MORAL POLITICS*, *supra* note 38, at 186–87. Abstinence education is based on a worldview that sees the problem of teen pregnancy as based in a lack of self-discipline and strong moral values. Nurturant parents might instead provide comprehensive sex education and distribute condoms, recognizing that adolescence is a time of experimentation, and that maximizing teens' chances for a fulfilling life requires helping them manage their sexuality.

authority. Instead, the state's role should be limited to protecting children from themselves, or intervening only when their parents are unable to act. But these actions are designed to punish the parents rather than, as under a nurturant parent morality, to support both parent and child. For example, the call to remove children from welfare mothers and place them in orphanages represents a "strict father" approach because the mothers are seen as immoral, while the orphanages will be able to instill the appropriate values in children.<sup>45</sup>

How the state should handle children's interests, then, depends on different views of parental authority and the parent-child relationship. Although there is much overlap between the two conceptual categories, such as the belief that the state should act in the absence of parents, there remain two different roles of the state comparable to the underlying vision of the family: should the state act as strict father, reinforcing hierarchy within the family, or as nurturant parent, helping children and parents actualize themselves. Research on which approach is best for children is, of course, contested, and manuals on bringing up children reflect both the stern disciplinarian model and the nurturant, promote-self-reliance model. Ultimately, however, the research on nurturing parents shows that their children are better equipped to handle life's stresses.<sup>46</sup>

#### IV. The State's Representation

As the above discussion shows, the state is supposed to act when parents cannot, or when there is a strong need to override parental authority to protect a child. The standard for state intervention, however, is not whether parents are acting in their children's best interest, but whether there is some showing of parental unfitness (at least outside of poor families and those receiving federal benefits) or the unavailability of parents. The state justifies its actions as promoting the best interests of the child, which is a similar standard to that for appointing a guardian, and differs from the responsibility of attorneys to represent their clients' interests as articulated by the client.<sup>47</sup> But deciding on the parameters of when the state should act turns on different visions of how the state should respond.

This section provides three illustrations of state actions that suggest the

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45. *Id.* at 185-86.

46. See LAKOFF, *supra* note 38, at 348-365); Drobac, *supra* note 36 (discussing permissiveness and limits on adolescent autonomy).

47. See MODEL RULES OF PROF'L CONDUCT R.1.14., comment [1] provides: "The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor . . . [the client] often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."

differing roles that a state may assume. As the first example involving minors' abortion rights shows, the state's actions in *parens patriae* may say more about the state's more general morality interests than the state's obligations to children, and seems to be in accord with a "strict father" mentality of reinforcing the parental role because the minor is unable to make her own decisions. The second example, involving state deferral to parents' choice for a guardian when both parents have died, shows the traditional respect for parental control and autonomy although with the requirement that the appointment of the guardian be in the best interest of the child, shows the state acting in the true meaning of *parens patriae*, and is probably in accord with a vision of the state shared by adherents of both the "strict father" and nurturant parent moralities. Here the state really is acting in the child's best interest, with appropriate deferral to parental authority. The final example highlights the situation where the state is unable to act either in its own interests or on behalf of children; other entities, such as multilateral institutions or nongovernment organizations must fulfill the paternal/parental role. Through these examples, we see differing contexts in which the state intervenes, and can evaluate the efficacy and values of these interventions.

#### 1. WHEN THE STATE USES MINOR'S INTERESTS AS A POLITICAL COVER

Most states have enacted statutes that require one or both parents to be involved in their daughters' abortion decision-making process through either parental consent or notification provisions, unless a limited set of exceptions apply.<sup>48</sup> Nevertheless, "a State may not restrict access to abortions that are necessary in appropriate medical judgment, for preservation of the life or health of the mother."<sup>49</sup> In 1976, the Supreme Court first considered parental involvement laws, striking down a Missouri statute that required parental consent, unless the abortion was necessary to save the life of the child.<sup>50</sup> The Court's language, however, acknowledged that the state could limit the rights of children in a manner not applicable to adults, but concluded that the medical decision-making restriction in that case was unconstitutional.<sup>51</sup>

In subsequent cases, the Court has upheld statutes requiring parental consent, so long as they include a judicial bypass procedure that would allow a mature minor to make her own abortion decision, or that would

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48. *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 966 n.1 (noting that forty-four states have enacted laws mandating parental involvement). In four of those states, there is no exception to the parental involvement requirement based on an emergency concerning the minor's health.

49. *Id.* at 976 (cites omitted).

50. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

51. *Id.* at 74–75.

permit an abortion to occur if it were in the child's best interest.<sup>52</sup> The Court has similarly upheld parental notification statutes that include a judicial bypass proceeding, although some notification laws may be constitutional even without a bypass procedure.<sup>53</sup> The Court has also stated that parental notification laws must include an exception where the abortion is necessary to the life or health of the minor. Pursuant to most judicial bypass statutes, a minor will be permitted to proceed with an abortion if she shows either: (i) she is sufficiently mature and informed to make the abortion decision herself; or (ii) even if she is not sufficiently mature and informed, the abortion is in her best interest.

An overwhelming majority of states require some form of parental involvement, generally subject to the judicial bypass option. In twenty-one states, parental consent is required before a minor can obtain an abortion, with two states mandating that both parents consent, while in thirteen states, parental notification is required.<sup>54</sup> In another nine states—Alaska, California, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico—enforcement of statutes requiring parental involvement has been permanently enjoined.<sup>55</sup> Seven states—Connecticut, Hawaii, Maine, New York, Oregon, Vermont, and Washington—do not require any form of parental involvement in minors' abortion decisions.<sup>56</sup>

The parental involvement laws are generally justified as protecting children by ensuring that they communicate with their parents, rather than as flat-out restrictions on abortion.<sup>57</sup> Nonetheless, the Court has observed that state regulation of abortion which "express[es] a profound respect for the life of the unborn child are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."<sup>58</sup> Indeed, in their implementation of the judicial bypass, judges may mandate that the minor receive counseling from an anti-abortion organization.<sup>59</sup>

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52. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899–900 (1992); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Bellotti v. Baird*, 4443 U.S. 622 (1979).

53. In *Hodgson*, six Justices would have voted to uphold the validity of a one-parent notification requirement with a bypass procedure, *see* 497 U.S. at 480 (Scalia, J., concurring in the judgment in part and dissenting in part), while five justices would have voted to uphold a two-parent notification with a judicial bypass. *Id.* at 390. *See* Richard Storrow & Sandra Martinez, "Special Weight" for Best-Interests Minors in the New Era of Parental Autonomy, *Wis. L. REV.* 789, 796 (2003).

54. Guttmacher Institute, *Parental Involvement in Minors' Abortions* (Jan. 1, 2006), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf).

55. *Id.*

56. All of these states are "blue" states, meaning that they voted Democratic in the 2004 election.

57. *See, e.g., Planned Parenthood of S.E. Pa.*, 505 U.S. at 895; *Hodgson*, 497 U.S. at 417.

58. *Planned Parenthood of S.E. Pa.*, 505 U.S. at 877 (plurality).

59. *See* Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings*

In its 2006 decision in *Ayotte v. Planned Parenthood*, the Court considered, but deferred decision on, a parental involvement law that required notification unless the abortion was necessary to prevent the minor's death, or the abortion is authorized pursuant to a judicial bypass procedure.<sup>60</sup> In *Ayotte*, New Hampshire justified its parental notification statute, noting that it could enact a law which:

“create[s] a structural mechanism by which the State, or a parent or guardian of a minor, may express profound respect for the life of the unborn . . . if they are not a substantial obstacle to the woman's exercise of the right to choose.” [] New Hampshire's Act does not create a substantial obstacle to any woman's choice to have an abortion; it provides minors with the benefit of parental guidance and assistance in exercising a tough choice. . . .

[D]espite . . . this Court's clear recognition of the important role parents play in assisting their unemancipated daughters in exercising their right to choose, the court of appeals struck down New Hampshire's entire notification act.

According to the state, parental notification statutes serve several compelling state interests, including protecting the emotional and physical health of the pregnant mother, vindicating the importance of the parent-child relationship, and promoting the family unit.<sup>61</sup>

Research on the effectiveness of these laws, however, challenges whether the parental involvement statutes actually do protect children, or whether they serve, instead, state interests in banning abortion and conformance to a strict father mentality. In his dissent in an earlier case including a minor parental notification statute, Justice Blackmun charged, the legislature has essentially proclaimed, “If the courts of the United States insist on upholding a limited right to an abortion, let us make that abortion as difficult as possible to obtain.”<sup>62</sup>

There are no studies that show improved parental communication as a result of parental involvement laws.<sup>63</sup> While the statutes generally contain

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to Waive Parental Consent for Consent to Abortion, 7 U. PA. J. CONST. L. 473, 492–93 (2004) (discussing practice in three Alabama counties to require counseling from “pro-life counseling” at the “Sav-A-Life” center).

60. *Ayotte*, 126 S. Ct. 961

61. *Ayotte v. Planned Parenthood*, Brief for Petitioners, 2004 U.S. Briefs 1144, (2005) (pp. \*10–\*12). Teresa Stanton Collett notes that parental notification laws can benefit minors through improving medical care and providing protection from sexual assault. Teresa Stanton Collett, *Protecting Our Daughters: The Need for Parental Notification Law*, 26 VT. L. REV. 101, 102 (2001).

62. *Ohio v. Akron Ctr. for Reprod. Servs.*, 497 U.S. 502, 541–42 (1990) (Blackmun, J. dissenting).

63. Cynthia Dailard & Chinue Turner Richardson, Teenagers' Access to Confidential Reproductive Health Services, *Guttmacher Report on Public Policy* (8)(4), 6, 9 (2005), available at <http://www.guttmacher.org/pubs/tgr/08/4/gr080406.pdf>.

procedural protections for minors by requiring the state to appoint an attorney or guardian *ad litem* to help them through the process, these processes do not necessarily translate into substantive protection of the rights of minors.<sup>64</sup> In a careful study of the effectiveness of various “pro-life” laws in reducing a state’s abortion rate, Michael New found that abortion rates decreased in states where notification laws were in effect, as opposed to states where notification laws, while enacted, had been judicially enjoined.<sup>65</sup> The study hypothesized that the political climate in both sets of states were similar, as each had enacted comparable statutes, and noted that enactment of these laws was “not a random occurrence.” Given the same set of enactments but differential effectiveness, the decline in abortion rates, thus, must be traced to the impact of the laws, rather than cultural and religious attitudes towards abortion.

Other studies have examined the correlation between parental involvement statutes and teen birth and pregnancy rates; interpreting these studies in light of the state’s political orientation provides additional information as to the rationale for the parental involvement statutes. The states that have enacted these laws tend to be more conservative, at least based on voting patterns from the most recent national elections. The birthrates were highest in those states that had enacted parental consent laws and that voted Republican in the 2004 election (Mississippi, where both parents must consent; Texas; Arizona, Arkansas, and New Mexico, although the parental consent law has been enjoined there); the abortion rates were highest in New Jersey, New York, Maryland, California, and Nevada, only one of which (New York) does not have a parental involvement statute

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64. See, e.g., TEX. FAM. CODE § 33.003 (2005); KAN. STAT. ANN. § 65-6705 (2005); 18 PA. CONS. STAT. § 3206 (2005); FLA. STAT. ANN. § 390.01114 (2005). In Texas, the court must appoint a guardian *ad litem* for the minor, who may also be appointed as the minor’s attorney. See generally Elizabeth Susan Graybill, Note: *Assisting Minors Seeking Abortions in Judicial Bypass Proceedings: A Guardian ad Litem Is No Substitute for an Attorney*, 55 VAND. L. REV. 581 (2002).

65. Michael J. New, *Using Natural Experiments to Analyze the Impact of State Legislation on the Incidence of Abortion* (2006), available at [www.heritage.org/Research/Family/cda06-01.cfm](http://www.heritage.org/Research/Family/cda06-01.cfm). He found:

when a parental involvement law is enacted, the abortion rate decreases by 16.37 abortions for every thousand live births [the abortion ratio] and the abortion rate decreases by 1.15 abortions for every thousand women between the ages of 15 to 44 [the abortion rate]. Parental involvement laws that are passed and then nullified by the judiciary result in modest increases in the abortion rate and a modest decline in the abortion ration.

*Id.* at 11.

Of course, proponents of these laws would argue that a decrease in the number of abortions is in children’s best interests, rather than the state’s. Yet given the lack of research on effectiveness in increasing parental-child communication, and the impact of having a child on a minor’s future life choices, these arguments are not entirely convincing.

(although the statutes have been enjoined in New Jersey, California, and Nevada), and only one of which voted Republican in the 2004 election; and the abortion rates were lowest in Utah, South Dakota, Kentucky, and North Dakota, each of which mandates some form of parental involvement, and each of which voted Republican in the 2004 election.<sup>66</sup> Of the five states with the lowest teen-pregnancy rate, four of them (Vermont, New Hampshire, Minnesota, and Maine) voted Democratic in the 2004 election, and two of them (Vermont and Maine) did not have parental notification laws, whereas a third, New Hampshire, has a parental notification statute that has been permanently enjoined.<sup>67</sup>

As Carol Sanger persuasively argues, these laws are framed as representing children's interests; instead, she explains, they represent a political decision on behalf of third parties to prevent minors from obtaining abortions, to reinforce parental authority, and to punish girls for their sexual behavior.<sup>68</sup> This political decision itself is a reflection of other beliefs concerning the family and minors. The different positions on abortion represent different approaches to girls and women's role in contemporary society, with the anti-choice advocates representing an attempt to "'swing the pendulum back' to more traditional lifestyles."<sup>69</sup>

These cases seem to acknowledge a child's right to an abortion, but the role of the mandatory judicial bypass procedures in parental involvement statutes is simply to substitute another authority figure for the parents.<sup>70</sup> As Lakoff explains:

There are two classical kinds of cases [of women who want abortions]. Unmarried teenage girls who have been having sex but have been careless or ignorant in the matter of birth control; women who want careers or independent lives . . . According to Strict Father morality, an unmarried teenage girl should not be having teenage sex at all. . . . She has to be responsible for the consequence of her actions if she is to learn from her mistakes. An abortion

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66. Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race and Ethnicity, and State-by-State Information* (2004), available at [www.guttmacher.org/pubs/state\\_pregnancy\\_trends.pdf](http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf). and Parental Involvement, *supra* note 54.

67. AGI, *U.S. Teenage Pregnancy Statistics*, *supra* note 66. North Dakota, which is a red state that requires that both parents consent to a minor's abortion, had the lowest teen-pregnancy rate in the country. Nevada, which had the highest teen-pregnancy rate in the country, is a red state whose law has been enjoined.

68. Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INTL. J.L. & POL'Y & FAM. 305, 315 (2004).

69. KRISTEN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 239 (1984).

70. See Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 639 (2002) ("The abortion cases are simply a use of state power to reorder society, shifting power over children from parents to judges when it serves an instrumental value wholly apart from a child's rights. . . . For those minors who, for whatever reason, choose not to seek parental consent, a new adult was vested with the power over them").

would simply sanction her immoral behavior. In both of the classical stereotypical cases, abortion violates Strict Father morality. . . .<sup>71</sup>

By restricting access to abortion, states are imposing one vision of the appropriate family on all children, overriding the liberty and privacy rights of children in the interest of upholding discipline.

Although the laws are claimed to buttress parents' already strong rights to consent to their children's medical treatment, all states already exempt certain types of medical treatment from the requirement of parental consent or knowledge. No state requires that a doctor notify parents when a child is receiving medical care for sexually transmitted diseases (although one state requires notification for a positive HIV test), and only 11 states even permit physicians to notify parents in this situation;<sup>72</sup> twenty-one states allow a minor to obtain contraceptive services without notifying a parent. The states that focus on restrictions on the abortion decision, rather than other kinds of medical treatment, suggest that there is something special and symbolically different about abortion.

The legal restrictions on minors' abortion rights show the state acting based on adults' interests in disciplining children, not children's interests, using an approach that punishes children for sexual experimentation and for making their own decisions. Rather than acting as a guardian for children, the state is imposing a certain morality. While these restrictions can be justified under the perspective of an authoritarian state, the state's role in representing minors' interests has typically been much more complex, protective, and nurturing than morality-enforcer.

## 2. ACTING IN THE BEST INTERESTS OF MINORS

While they are alive, of course, parents are presumed not just to have authority over their children but also to serve as their legal guardians.<sup>73</sup> If one parent dies or has had his/her parental rights terminated, then the surviving parent becomes the sole legal guardian.<sup>74</sup> When both parents die or are incapacitated, children need caretaking. In responding to this situation, most states act pragmatically to protect children and to respect parents' wishes. States have developed three different methods by which parents can direct how to care for their children in this situation: by will, by petition, or through another statutorily created mechanism, such as the

71. LAKOFF, MORAL POLITICS, *supra* note 38, at 267-68.

72. Alan Guttmacher Institute, *Minors' Access to STD Services* (2006), available at [http://www.agi-usa.org/statecenter/spibs/spib\\_MASS.pdf](http://www.agi-usa.org/statecenter/spibs/spib_MASS.pdf).

73. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

74. See, e.g., CONN. GEN. STAT. § 45aB606 (2004); R.I. GEN. LAWS § 33-5-4 (2004); TENN. CODE ANN. § 34-1-102(c) (2004).

increasingly available option of “standby guardianships.”<sup>75</sup> A guardianship by will only comes into effect when both parents are dead, and it is the selection of the last surviving parent that controls. The other two means of creating long-term guardianships can occur while one (or both) parents are living.

Parents select a testamentary guardian through their will. Under the Uniform Probate Code, the Uniform Guardianship & Protective Proceedings Act (UGPPA), and in some states, a parent can also select a guardian through an “other signed writing,” which includes durable powers of attorney and other specific documents for appointing guardians.

If the parents have named a guardian in their will, courts will generally defer to the parents' wishes. Nonetheless, courts retain discretion to disapprove of the parental choice, and statutes in some states, such as Arkansas, merely direct that the court give “due regard” to the parents' testamentary request. In Florida, the court must consider the preferences of a minor who is fourteen years or older as well as the person designated by will.<sup>76</sup>

Courts typically apply a presumption in favor of the testamentary appointment, but allow the presumption to be overcome based on, in the words of a Pennsylvania court, “convincing reasons.”<sup>77</sup> Moreover, regardless of what a will provides, the proposed guardian must file a request to be named guardian and request that the court confirm the parent's wishes. Thus, the guardian must accept the appointment before it becomes effective; appointment is not automatic upon probate of a will.

When minors are fourteen or older, the UGPPA will defer to their choice of guardian, unless the appointment is not in the best interest of the child.<sup>78</sup> Moreover, minors fourteen and older (and in some states, including Colorado and Texas, twelve or older) as well as a limited group of interested others can object to the guardian nominated by a parent in a will.<sup>79</sup>

If the parents have not appointed a guardian or the appointed guardian declines to accept the appointment, then courts will typically choose a rel-

75. Joyce McConnell, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIMONIAL L. 253 (2002).

76. FLA. STAT. ANN. § 744.312 (3) (2005). See *In re Lewis Will*, 74 N.Y.S. 2d 865 (Surr. 1947); *Shanks v. Ross*, 173 Ga. 55 (1931); *Gardner v. Hall*, 132 N.J. Eq. 64, 26 A.3d 79, *aff'd*, 31 A.2d 805 (1942); *Bristol v. Brundage*, 589 A.2d 1 (Conn. Ct. App. 1991) (holding that testamentary guardian was presumptive guardian unless the appointment would be detrimental to the child).

77. *In re Slaughter*, 738 A.2d 1013, 1017 (Pa. Super Ct. 1999); but see *In re Heym*, 19 Pa. D. & C. 3d 748 (1980) (testamentary appointment only one of several considerations in applying a best-interest-of-the-child standard).

78. Uniform Guardianship & Protective Proceedings Act (UGPPA) § 206 (1997).

79. See *id.* § 203.

ative who is the “next of kin.” Gay and lesbian parents and parents with partners who have not legally adopted the children can try to protect the surviving partner’s ability to serve as a guardian, but courts do not always respect such testamentary choices.<sup>80</sup> Guardians typically take physical custody of the minor, decide where the child will live, make educational and medical decisions, and decide on religious training. Because they function as the parent, they may also consent to the minor’s marriage or adoption in most states.<sup>81</sup> As guardians of the person, however, they do not have the same financial responsibility as parents. Guardians are not legally obligated to provide from their own funds for the minor and may receive money payable for the support of the minor to the minor’s parent or guardian under the terms of any statutory benefit or insurance system or any private contract, devise, or trust; a minority of states permit a guardian to petition the court for a reasonable compensation for their services as guardian. Additionally, guardians are not liable to third persons by reason of the parental relationship for acts of the minor.

The guardianship typically ends when the child is no longer a minor. In addition, the child or another person may petition the court for removal of the guardian, and the court will hold a hearing. To remove a guardian, the petitioner must meet a strict standard; generally, removal is justified only where the guardian has neglected her duties, rather than where removal would be in the best interest of the child. In some states, in recognition of the seriousness of the petition, such as Connecticut, the guardian is entitled to representation in removal proceedings.

By nominating a guardian, a parent can exercise strong control over the future of the minor and can indicate her choices concerning the future care of the minor.

On the other hand, there are several uncertainties associated with testamentary guardians.<sup>82</sup> First, the parent cannot be certain that the court will accept her nomination because the appointment only takes effect once the will is probated. Consequently, the parent cannot advocate on behalf of her choice of guardian because she is dead when the will is probated. To overcome this uncertainty, Colorado, Hawaii, and a few other states allow

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80. See *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995), *appeal denied*, 546 N.W. 2d 256 (Mich. 1996) (although biological mother had named lesbian partner as testamentary guardian and as guardian through power of attorney, she did not have standing to challenge an award of temporary custody to the biological father, even though the mother had explicitly stated that she did not want the father to have custody because of his lack of relationship with the children).

81. See, e.g., UNIF. PROB. Code § 5-208.

82. See generally Carolyn McAllaster, Carol Suzuki, and Jeffrey Selbin, *Issues in Family Law for People with HIV*, in *AIDS AND THE LAW* 393, 416–18 (2004).

for court confirmation of the appointment prior to the parent's death in certain limited circumstances. In California, parents can request that the court appoint a joint guardian who will serve concurrently with the parent during her lifetime and who assumes sole responsibility when the parent dies.<sup>83</sup> This option is available however, only if the parent has a "terminal condition."<sup>84</sup>

The conventional approach to guardianships shows the state literally acting in *parens patriae*, to protect minors like a parent. Although states defer to the choices made by parents, courts also reserve the right to overturn those decisions when not in the best interests of the child. Take the recent Colorado case involving Ripley Mae Flom-Sherwood, the fifteen-month-old daughter of Sara and Stephen Sherwood.<sup>85</sup> Her father, who had just returned from a tour of active duty in Iraq, killed Sara, and then shot himself. Ripley, who was at a neighbor's during the shooting, went to live with her maternal aunt and uncle, Sherry and Brian Villers.

Although Sara had not yet signed her will, the draft designated Kathleen Taylor Nace, Stephen's mother, as the testamentary guardian; Stephen, who died shortly after Sara, had also designated his mother as the guardian in his signed will.<sup>86</sup> Although the grandmother accepted the appointment, the Villers filed suit to challenge the testamentary guardianship.<sup>87</sup> The court ultimately upheld the challenge and directed that, based on this legally permitted intervention by an interested party, a judge should appoint a guardian "pursuant to the best interest of the child"<sup>88</sup> who need not be the testamentary guardian that had been designated by the last surviving parent.

A "strict father" approach might suggest that states require courts to appoint, without any further review, the guardian designated by the parent, and thus would advocate for a change in current laws to preclude objections by other interested adults. Challenges by nonparents would interfere with familial structure. Moreover, strict father adherents might argue that children could never challenge a parentally designated appointment, as this would undermine the family hierarchy.

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83. CAL. PROB. CODE § 2105(f) (2005).

84. *Id.*

85. *In re R.M.S.*, 128 P.3d 783 (Colo. 2006); Monte Whaley, *Soldier's Marriage Was in Trouble*, DENVER POST, Aug. 7, 2005, p. C1.

86. *R.M.S.*, 128 P.3d at 784 n.2. At any rate, the designation of the parent who dies second controls.

87. The governing Colorado statute allows a person who has the "care or custody of the minor" to prevent or terminate a parental testamentary appointment. COLO. REV. STAT. § 15-14-203(1) (2005).

88. *R.M.S.*, 128 P.3d at 788; *see* COLO. REV. STAT. § 15-14-204(2) (2005) (allowing for judicial appointment to be made in the "minor's best interest").

By contrast, a nurturant parent approach might allow for children younger than twelve to be consulted with respect to the appropriate guardian choice, to ensure their involvement in the process and fundamental fairness to them. It would counsel continuance of the current approach of allowing those interested in the child's welfare to object to testamentary appointments.

### 3. WHEN THE STATE CANNOT PROTECT MINORS

The ability of a state to act in any manner—the country governance context—is critical in an examination of state capacity to represent children's interests. The first two examples discussed in this paper, adolescent abortion and orphan guardianship, involve an effective state that is regulating the family. But what happens when the state is either unable or unwilling to regulate? In the United States, the *DeShaney*, *Suter*, and *Castle Rock* Supreme Court decisions concern the inability to enforce various seemingly mandated state actions and are examples of an unwillingness to regulate and enforce.<sup>89</sup> But there are countries that are unable to act.

Consider the problem of child “sorcerers.” In several sub-Saharan Africa countries, there is an epidemic of child “witchcraft.”<sup>90</sup> Witchcraft is not, of course, a new phenomenon in sub-Saharan Africa; there were accounts of Africans blaming witches for various misfortunes throughout the twentieth century.<sup>91</sup> It is accusations against children, however, that distinguish these new forms from previous witchcraft epidemics.

The process of accusing children generally begins when an important family member, such as the child's mother, dies. The father may take a new wife, or the children may be sent to other family members, thereby beginning the process of treating such children differently. When a family seeks advice from a preacher to help in curing its problems, the pastor may blame these children, particularly if they are handicapped in some way. The family may then hire the priest to exorcise the household of the child sorcerer. After the exorcism, the child is sent out of the home, unable

89. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989); *Suter v. Artist M.*, 503 U.S. 347 (1992); *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

90. The following account is drawn from a variety of sources, including LYNNE CRIFE ET AL., ABANDONMENT AND SEPARATION OF CHILDREN IN THE DEMOCRATIC REPUBLIC OF THE CONGO 16–18 (2002); Human Rights Watch, *What Future? Street Children in the Democratic Republic of Congo*, available at <http://hrw.org/reports/2006/dr0406>.

91. ADAM ASHWORTH, WITCHCRAFT, VIOLENCE, AND DEMOCRACY IN SOUTH AFRICA 89 (2005). Ashworth suggests that at times of social change, witchcraft is more likely to be perceived because “there is manifestly more misfortune to be explained; conditions conducive to fomenting jealousy and hatred arise; procedures that previously served to hold jealousy and resentment in check decline in effectiveness; and alternative interpretations of misfortune lose credibility.” *Id.*

to return. In this context, family members and the church attempt to assert claims on behalf of children, either by accusing them of sorcery or "healing" them of sorcery.

In countries, such as England or the United States, it is the state that protects these children through the child abuse and neglect system and the criminal prosecution system.<sup>92</sup> In England, there have been several highly publicized cases of state involvement in protecting children from accusations of witchcraft. Child protection authorities have taken custody of the children, and the accusers and torturers have been criminally prosecuted.<sup>93</sup> High-level governmental commissions have been established, news media have reported on the issues extensively, and the state has handled the few reported cases carefully.

By contrast, in countries such as the Congo and Angola, the state is dysfunctional and cannot provide protection to these children.<sup>94</sup> Very few, if any, parents or pastors have been, or could be, prosecuted, even though individual members of the government may recognize the problem.<sup>95</sup> There may be no applicable laws that define child abuse and neglect, no authority charged with child protection, and no facility to house endangered children. In such a state, multilateral institutions, bilateral aid agencies, and international nongovernmental organizations can exert pressure on the national government and other institutions within a country where they have programs. Moreover, indigenous nongovernmental organizations, individuals, and responsible government officials can pressure institutions from within the country (often with external support).

Thus, while states may be unable, or unwilling, to protect children, nongovernmental organizations have been successful in drawing attention to the problems facing children, and in providing services to help them.<sup>96</sup> Nongovernmental organizations also have been successful in fostering

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92. See generally Stewart Tendler and Nicola Woolcock, *Police Fear for Children Abused by Religious Sects*, THE TIMES (Dec. 12, 2005), available at <http://www.timesonline.co.uk/article/0,,2-1921773,00.html>.

93. See, e.g., BBC News, "Witch" Child Trio Guilty, June 3, 2005, available at <http://news.bbc.co.uk/1/hi/england/london/4607435.stm>.

94. International Crisis Group, *Cote d'Ivoire: Peace as an Option*, May 17, 2006, available at <http://www.crisisgroup.org/home/index.cfm?id=3848&f=1>; BBC News, *Angola Witchcraft Child's Victims*, July 13, 2005, available at <http://news.bbc.co.uk/1/hi/world/africa/4677969.stm> (four days after reporter who contacted Angolan child abuse authorities about the mistreatment of an alleged child witch was assured that situation would be handled quickly, the child died without any intervention).

95. See Julie-Ann Davies, *Witch-Hunt*, NEW HUMANIST (Mar. 1, 2004), available at [http://www.newhumanist.org.uk/volume119issue2\\_more.php?id=589\\_0\\_26\\_0\\_C](http://www.newhumanist.org.uk/volume119issue2_more.php?id=589_0_26_0_C).

96. For thoughtful discussions of the role of civil society, see, e.g., Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289 (2004).

recognition of children's rights internationally and in pressuring countries to ratify the Convention on the Rights of the Child (CRC).<sup>97</sup> Especially where the government cannot protect children, civil society actors play an important role, but even in countries with stable governments, civil society has become more active in advocating and protecting children's rights. Civil society groups play multiple roles in both developed and developing countries: they may advocate on behalf of specific children or on behalf of groups of children, operate centers for children, or lobby for enactment of the CRC.

For example, the nongovernmental organization, Save the Children, has investigated child witches, operated centers for helping to rehabilitate them, and then attempted to reunite them with their families in Kinshasa, Congo. In the United States, we would expect the state or federal government to provide these services or at least to fund them.<sup>98</sup> But Save the Children receives funding from other governments and does not operate under a contract with the Congolese government. Human Rights Watch recently advocated enactment of a children's code that would criminalize accusations of sorcery against children and create facilities for juveniles that would serve as alternatives to imprisonment.<sup>99</sup>

The state's obligations are clear under international law. Various international documents assign the state the responsibility of protecting children. The International Covenant on Economic, Social, and Cultural Rights (which has been signed but not ratified by the United States), requires that states undertake "[s]pecial measures of protection and assistance on behalf of children,"<sup>100</sup> the International Convention on the Rights of the Child (to which the U.S. is not a signatory, although all other countries in the world are), states that the government of each signatory nation is ultimately responsible for taking care of the children within its borders.<sup>101</sup> In other words, the government of each country that has ratified the Convention assumes direct responsibility for taking care of children and protecting them against abuse and neglect. Notwithstanding

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97. Jude L. Fernando, *Children's Rights: Beyond the Impasse*, 575 ANNALS 8, 13 (2001).

98. On the private provision of public services for children, see Susan Vivian Mangold, *Protection, Privatization and Profit in the Foster Care System*, 60 OHIO ST. L. J. 1295, 1312-13 (1999).

99. Tony Tate, *Summary of Comments on Street Children and Juvenile Justice Issues in the Democratic Republic of Congo* (Nov. 8, 2005), available at [http://www.jubileecampaign.org/home/jubilee/street\\_children/Tony\\_Tate\\_statement.pdf](http://www.jubileecampaign.org/home/jubilee/street_children/Tony_Tate_statement.pdf).

100. International Covenant on Economic, Social, and Cultural Rights, art. 10 (3). Jan. 3, 1976, 993 U.N.T.S. 3.

101. Convention on the Rights of the Child, art. 2, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (1989).

the rhetoric of responsibility, these obligations are impossible to enforce where there is no functioning state, including no noncorrupt judicial system and no legal representation for children.

Instead, the lesson of focusing on rights discourse for work overseas is that the debate has to be grounded in the empirical data on children's needs for health, education, training, and shelter, not in constitutional and public conflicts;<sup>102</sup> and that the state may be unable to provide these basic needs that recognize children's "dependency" rights.<sup>103</sup> Establishing state-recognized rights by, for example, suing to enforce provisions of international or even domestic charters granting children the right to freedom of expression, is less urgent than enforcing the dependency right to universal and free education;<sup>104</sup> and the enforcer as well as the provider may well not be the state, but nongovernmental organizations and civil society actors.

Accordingly, rather than the paradigmatic triangle of parents, children, and the state, we must think of a rectangular pyramid that places children at the top, but has a base that includes family, state, international actors, and, as the final point, civil society and other nongovernmental actors.<sup>105</sup> Unlike the situation in most developed countries, the main actor in developing countries is not the government, but nongovernmental organizations<sup>106</sup> and the aid community (including multilateral institutions such as the World Bank and the International Monetary Fund (IMF), which are often significant players in advocating for reform).<sup>107</sup>

Civil society organizations are highly relevant to discussions of how to

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102. See Naomi Cahn & Anne T. Goldstein, *Roe and Its Global Impact*, 6 U. PA. CONST. L.J. 695 (2004) (arguing that the culture wars over *Roe v. Wade* are dangerous to the health of adolescents).

103. See Appell, *supra* note 21.

104. The justiciability and content of economic, social, and cultural rights, including rights to adequate food, clothing, housing, health, medical care, and education is questionable. See Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 464 (2004).

105. See Naomi Cahn, *Poor Children: Child "Witches" and Child Soldiers in Sub-Saharan Africa*, 3 OHIO ST. J. CRIM. L. 413 (2006). The paradigmatic triangle of parent, child, and state has certainly been questioned by others. In focusing on rights-holders within the dependency system, Professor Susan Mangold has called for attention to private, nonprofit services provider agencies and has suggested a model of concentric circles around a child, rather than the linear triangle. Susan Vivian Mangold, *Challenging the Parent-State-Child Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1397-98 (1999); Barbara Bennett Woodhouse, *Reframing the Debate about the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL FORUM 85, 91.

106. E.g., see Cahn, *supra* note 105.

107. See generally JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005); James C. Owens, Note, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1037B, 1038 (2003).

advance children's rights in developing countries. When governments are not democracies and are not accountable to their citizens, nongovernmental organizations and international, multilateral organizations and institutions represent possible sources of advocacy for children because they function outside of the state bureaucracy.<sup>108</sup> To some extent, conceptual categories of strict father and nurturant parents are irrelevant, because both the state and the family are themselves nonfunctioning, and any differing visions of each with respect to representing children simply cannot be implemented. Instead, it is the role of others, of entities aside from the state or parents, who must intervene to support children.

## V. Conclusion

The state's claim that it can represent children's interests plays a significant role in defining the structure of families, the relationships within families, and the development of children's interests. Depending on the context, the state may be serving its own interest when it claims to be acting in a child's best interest, as when it regulates minors' abortions, it may be according primary value to children's interests, as is the case with guardians appointed once both parents are dead—or the state may be completely unable to serve anyone's interests. Children have different needs for third-party understanding of their situations, depending on the posture of state, parent, and other institutional actors. And the state's role ranges from nurturing independence in children, allowing them to make decisions for themselves, to reinforcing authoritative decision-making by their parents, or, in the absence of parents, by the state itself. The state asserts various claims on behalf of children—and itself—that, at times, reinforce parental authority or children's independence. In the United States, in culturally contested areas such as abortion, states have adopted different policies that reflect specific moral views of families, and that either support parental hierarchy or children's development.<sup>109</sup> Outside of the United States, in dysfunctional countries, it is the entities outside of the traditional triangle of child, parent, and state that are helping to respect children's interests.

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108. Peter Spiro, *The Democratic Accountability of Non-Governmental Organizations: Accounting for NGOs*, 3 CHI. J. INT'L L. 161, 162 (2002) ("international law and international institutions, however, are still largely premised on a world in which states have the last word").

109. See June Carbone & Naomi Cahn, *Examining the Biological Basis of Family Law: Lessons to be Learned from Evolutionary Biology* (2006) (unpublished manuscript).