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The Myth of the Best Interest of the Child

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ABSTRACT

One of the basic tenets of Family Law as applied to children is consideration of "best interest of the child" in making decisions. Standards for custody, termination, adoption, and all other matters affecting children are overlaid with consideration of best interest. Unfortunately, the promise of best interest is lost in the actual mechanics of making these critical decisions involving children. This Article explores the disconnect between the ideal of using the best interest of the child as a key factor in legal decisions affecting children and the practicalities of competing interests. The Article first explores the common concern of the indeterminacy of a best interest standard. One of the problems with best interest criterion is that almost anything that affects the child can be considered, and the weight to be given is not contained within the standard. Then, I look at the continuous elevation of parental rights over those of children in the areas of custody, the possibility of more than two parents, termination of parental rights, consent to medical care, and non-parent visitation. Next, I look at instances where societal interests are prioritized over the individual child interests—the Indian Child Welfare Act "ICWA") and the issues surrounding gender affirming care. I also consider the international perspective, looking at the Convention on the Rights of the Child ("CRC"). My conclusion is that children should be independently represented by counsel in complex, high conflict, or high stakes (for the child) cases.

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I. INTRODUCTION

I began teaching Family Law (formerly known as Domestic Relations) in 1985 after a stint in private practice. As the years progressed, I learned more about and experienced more Family Law, both in a personal and professional sense. In practice, I saw wealthy parents insist that ridiculously small (this was before mandatory child support guidelines were instituted) sums were sufficient for child support. I saw a father express hope that his ex-wife would remarry and someone else would take over the support of his children as their new daddy. I saw men (it was men, rather than women, in the 1980s) plan to divorce their "old" wives and abandon "old" families and start over with "new" ones, complete with pregnant girlfriends prior to the divorce. I saw the difficulties of adoption when adopting my daughter, who was born in another state. As a divorcing parent, I saw how easy it would be to blow up any possibility of effective co-parenting. One attorney advised my soon-to-be-ex-husband to stage photos of our children to indicate I was a bad parent. Fortunately, my ex was a decent person and declined to hire that attorney or follow her advice. We agreed to an even split of property; even time with the children; and no child support but shared extra expenses for camps, daycare, extracurricular activities, and trips. We did not have outside attorneys. I suspect, if we had, our divorce would not have been congenial or cooperative.

As an expert witness, I heard attorneys characterize themselves as "warriors," fighting to the finish for their side, without regard for the destruction left at the end of the divorce. I have come to believe that the system and the way it purports to approach families is either disingenuous or completely cynical. Courts and legislatures pay only lip service to the "best interests of the child" in most American law cases and statutes. This Article explores the ways that the law generally purports to consider the "best interests of children" but actually considers the best interests of parents and societal institutions, at the child's expense, when making decisions.

First, the indeterminacy and uncertainty of the actual meaning, factors for consideration, and weight of those factors of the best interest of the child is explored as a threshold problem. In many cases where the best interests of the child can be considered, particularly custody cases, the sheer breadth of the criteria that may be considered is stunning. Common factors might include the following: age of children and parents; education of children; keeping sibling groups together; living situations of both parents; disability of children or parents; remarriage of parents; domestic violence; employment situation of parents; finances of parents; wishes of children; moral issues involving parents (drug use, addiction, criminal conduct); religion of parents; race of parents; and placing children with same-sex parents (these last three raise some Constitutional

issues). Some stepparent and stepsibling issues may also be considered. At some level, if almost anything can be considered in evaluating best interests, then the meaning of best interests is lost.

Second, the elevation of parental rights over the rights and best interests of children through constitutional decision-making in the Supreme Court illustrates the bias implicit in the assumption that parents will act in the best interest of their children. This includes remainders of the historical notion that children are property in current parental rights law, the superiority of parental rights in the termination of the parent-child relationship, the preference for parental decision-making in health care, as well as the limitation of parental-type "rights" solely to individuals with biological or legal ties to the children.

Third, the Indian Child Welfare Act[1] presents one of the clearest ways in which the law dismisses the best interests of the child in favor of protection of institutional (that is) tribal interests and remediation of past misconduct. Fourth, recent state laws limiting the ability of parents to consent, and children to receive, gender-affirming care is another example. Finally, the Convention on the Rights of the Child ("CRC")[2] presents a modern international human-rights based view of the best interests of the child. I conclude with consideration of the independent child advocate model for evaluating best interest in contested cases.

II. THE INDETERMINACY OF BEST INTEREST OF THE CHILD

One over-arching problem with the use of the best interests of the child standard in any context is that it is not defined and thus can mean almost anything. As one author puts it:

> The best interests of the child standard has been criticized almost since adoption because its indeterminacy invites the use of cognitive shortcuts; these shortcuts include stereotypes and biases as well as the scripts and models left behind by metaphors and stories. . . . Once an unconscious and automatic knowledge structure has been activated, judgments are more likely to be based on assumptions derived from categories and schemas than on evidence of individual characteristics.[3]

Martin Guggenheim echoes this theme in stating:

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[1] Indian Child Welfare Act (ICWA), 25 U.S.C.A. §§ 1901–1963 (West, Westlaw through Pub. L. No. 118-90).

[2] Convention on Rights of the Child, *opened for signature* Nov. 20, 1989, 27531 U.N.T.S. 1577 (entered into force Sept. 2, 1990) [hereinafter CRC].

[3] Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 298 (2009).

> The vague and flexible nature of state BIOC [(best interests of the child)] standards makes them especially complex: On the one hand, these attributes allow space for judicial flexibility in addressing the exceptionally diverse circumstances presented by child custody disputes. On the other hand, the application of such a deferential standard is vulnerable to the mercy of varying judicial temperaments and biases, producing often unknown and unchallenged inequalities and unpredictability. "The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best."[4]

Even the American Law Institute has criticized the best interests of the child standard and called for revisions to make the standard more uniform and more inclusive of non-traditional families.[5] The criticism of the best interest standard as indeterminate is not new, going back to at least the 1970s.[6]

The idea of best interests of the child as a standard initially arose in the custody context in the 1840s.[7] Examples of what can and should be considered are abundant. Common factors include the following: wishes of parents and older children; resources of the parties; agreements between the parties; neglect or family violence concerns; and the existing education, community and family connections.[8] Other common factors include: keeping sibling groups together; the ability of a party to facilitate a loving relationship with the other parent; health of child and parents; employment of parents; gender of child; morality of parents; preference for shared parenting (joint custody); age of child and age of parents; and so on.[9] Consideration of these issues for the determination of best

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[4] Elisabeth Sheff, Kimberly Rhoten & Jonathan Lane, *A Whole Village: Polyamorous Families and the Best Interest of the Child Standard*, 31 CORNELL J.L. & PUB. POL'Y 287, 296 (2021) (quoting MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 38–40 (2009)).

[5] PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02 cmt. c (AM. L. INST. 2002) [hereinafter PRINCIPLES FAM. DISSOLUTION].

[6] JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 53, 62–63 n.12 (1st ed. 1973) (advocating for a "psychological parent" model in custody cases); Andrea Charlow, *Awarding Custody: The Best Interest of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269 (1987); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 246 (1975).

[7] DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & LINDA C. MCCLAIN, CONTEMPORARY FAMILY LAW 794 (6th ed. 2023); *see also* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 241 (G. Edward White ed., 1985).

[8] *See* Sheff, *supra* note 4, at 303–07.

[9] *See generally* ABRAMS, *supra* note 7, at 812–90; *see also* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 694–730 (6th ed. 2016).

interest means that the standard is of little, if any, value in terms of consistency, predictability,[10] and other factors.[11]

Modern attempts to deal with the indeterminacy of the traditional best interest approach in parental custody disputes have had mixed results. During the 1980s, there was an attempt to move toward a "primary caretaker" standard.[12] This standard looked to the patterns that the parties established during the marriage to determine who should have primary custody of the children. For example, the court would look at who: made and attended the children's doctor visits; arranged for daycare, school, camps, and outside activities for the children; attended school functions; and cared for the children in the daily tasks of dressing, bathing, feeding, etc.[13] West Virginia adopted this standard in *Garska v. McCoy*.[14] The standard fell out of favor because it tended to favor mothers and was deemed to be a preference on the basis of gender.[15] It is still often used as a factor in determining custody.[16]

The current trend is a presumption in favor of joint custody in divorce cases, where both parents share decision-making responsibilities and parenting time. While this approach is fair and not based on gender, it may not be suitable for parents who live far apart, have very young children, or have instances of conflict.[17]

Some other efforts to incorporate a true analysis of the child's needs into a standard best interest in custody matters are represented by the "psychological parent" standard, or an "approximation" approach.[18] The "psychological parent" standard was developed by Joseph Goldstein, Anna Freud, and Albert Solnit in the book *Beyond the Best Interest of the Child*.[19] The book drew on the idea of "attachment theory" and emphasized that continuity and stability for children is critical for their well-being and should determine the primary bond between a parent and child in evaluating custody and other decisions affecting children.[20]

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10 *See* Mnookin, *supra* note 6, at 255–56; Sheff, *supra* note 4, at 296.

11 *See* Berger, *supra* note 3, at 299.

12 STEVE BERENSON, FAMILY LAW: DOCTRINE AND PRACTICE 483–84 (2d ed. 2023); D. KELLY WEISBERG & SUSAN APPLETON, MODERN FAMILY LAW 693–94 (6th ed. 2016).

13 BERENSON, *supra* note 12, at 483–84; WEISBERG, *supra* note 12, at 693–94.

14 Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

15 *Id.*

16 *See* Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J.L. & FAM. STUD. 1, 2 (1999).

17 Elizabeth Scott, *Pluralism, Parental Preference and Child Custody*, 80 Calif. L. Rev. 615, 615 (1992) (first proposing the idea); *see also* PRINCIPLES FAM. DISSOLUTION, *supra* note 5, at §§ 2.02 cmt. (b), 2.08(1).

18 Katherine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L. Q. 11 (2002).

19 GOLDSTEIN, *supra* note 6, at 17–20, 98.

20 *See* ABRAMS, *supra* note 7, at 796–801.

The "approximation" standard was developed by the American Law Institute, and it attempts to approximate family relationships prior to dissolution.[21]

III. THE SUPERIORITY OF PARENTAL RIGHTS

Before the mid-nineteenth century, children were either nonexistent in the legal system[22] or considered a form of property, an economic asset.[23] Parental rights have always been treated with special care in American jurisprudence. In two cases concerning a parent's right to make decisions about their children's education, the United States Supreme Court established a general right to privacy within the family and the right of parents to the care, custody, and control of their children.[24] In fact, the notion of parental rights in these cases was said to revitalize notions of parental ownership or possession.[25] The Court continued with the protection of parental rights regarding education in *Wisconsin v. Yoder*,[26] holding that the state compulsory attendance law violated the Free Exercise Clause of the First Amendment as applied to Amish children. In *Yoder*, Justice Douglas dissented in part:

> The court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand and those of the State on the other. The difficulty with this approach is . . . the parents are seeking to vindicate not only their free exercise claims, but also those of their high school age children. . . . On this important and vital matter of education, I think the children should be entitled to be heard. . . . It is the future of the student, not the future of the parents, that is imperiled by today's decision.[27]

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[21] *See generally* Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347 (2005).

[22] *See* BILLIE WRIGHT DZIECH & CHARLES B. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 23 (2004) ("Historical examination of the American legal system reveals little about children in the courts. What it does disclose is that they had no role.").

[23] *See generally* PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., Penguin 1979) (1960); *see also* LLOYD DEMAUSE, THE HISTORY OF CHILDHOOD (Rowman and Littlefield 2006) (1974); *see also* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 127 (1988).

[24] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (agreeing with the notion of parental rights).

[25] Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 996–97, 1113–14 (1992); *see also* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. STATE U. L. REV. 645, 649 (2014).

[26] Wisconsin v. Yoder, 406 U.S. 205, 213–15, 219, 234–35 (1972).

[27] *Id.* at 241–45 (Douglas, J., dissenting).

This is an early example of a judicially expressed concern for the child's opinion, an interest separate and apart from that of the parents.

A. Custody

In custody cases, the focus ultimately is on the rights of the parents, not the best interests of the child.[28] As one author notes:

> The adversary system tends to camouflage issues of concern to the child by directing the discussion at the rights of the parents. Commentators and practitioners in the custody dispute arena have expressed the sentiment that child custody matters are really not about the best interests of the child, but instead are about the interests of the parents (i.e. a contest between the rights of the two parents). Concerns regarding gender equality have further focused the discourse on parental rights; many believe the end product has been court orders which fail to honor family relationships.[29]

At least partially in response to the indeterminacy of the best interest of the child standard in custody cases, there is a trend toward joint custody (also known as shared parenting time).[30] While the support for joint custody reflects a sense that the child will in fact benefit from a continuing custodial relationship with both parents, the arguments for and against the joint custody standard have been largely gender-based.[31] The idea of a joint custody standard originated with fathers' rights groups, but many feminist groups opposed it as restricting divorced parents' autonomy and failing to acknowledge the primary caretaking role of many women in an intact relationship.[32] The focus of the discussion is still on the "rights" of one parent or the other, rather than the best interest of the child.

Prior to the best interests standard and the shared parenting time standards, courts and legislatures adopted other standards for determining custody of children. At common law, children were property of the father; later children of "tender years" belonged with the mother. The *pater familias* doctrine

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[28] Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIA. L. REV. 79, 88 (1997).

[29] *Id.*

[30] *See, e.g.*, J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 216–18 (2014); Joan B. Kelly, *The Determination of Child Custody*, 4 FUTURE CHILD. 121, 122–23 (1994); Elizabeth S. Scott & Robert B. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROBS. 69, 76–80 (2014) (explaining fathers have advocated for joint custody) [hereinafter Scott, *Gender Politics*].

[31] Scott, *Gender Politics*, *supra* note 30, at 70.

[32] *See generally* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 101 VA. L. REV. 79, 83–84, 104, 121–34 (2016).

was rooted in Roman law and English common law. It considered the father the master of the family, who controlled both their wives and their children.[33] Married women became part of their husband's identity at common law. Mothers were not entitled to any power over their children, but only to reverence and respect.[34] By the mid to late nineteenth century, the tender years presumption was applied, giving custody of young children to mothers.[35] By the 1970s, states moved away from tender years and into the best interests standard. But throughout history, the custody of children was primarily considered an issue of parental rights, not one of child welfare. The notion of parental "ownership" of children is more pronounced in the area of paternity litigation.[36] At common law a child born outside of marriage was *fillius nullius*, a child of no one (at least not of a father), although mothers had an obligation to support their non-marital children.[37] At common law, the children of slaves had no status since the marriage of slaves was not recognized.[38] The legal difference between marital and non-marital children continued under American law (particularly in the area of inheritance) until recently.[39] The Uniform Parentage Act codifies a policy of equal treatment of marital and non-marital children.[40] The 1990 and 2008 versions of the Uniform Probate Code provides that a child is the child of their natural parents, "regardless of the parents' marital status."[41]

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[33] *See* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L. J. 1448, 1457–59 (2018); Woodhouse, *supra* note 25, at 1037.

[34] *Ex parte* Devine, 398 So. 2d 686, 688–89 (Ala. 1981).

[35] *Id*. (describing the history of the *pater familias* and the tender years doctrines and abrogating the tender years doctrine as unconstitutional).

[36] UNIF. MARRIAGE AND DIVORCE ACT, § 402 (UNIF. L. COMM'N 1973).

[37] WEISBERG, *supra* note 9, at 445.

[38] ABRAMS, *supra* note 7, at 306.

[39] The Supreme Court began systematically chipping away at the legal distinctions between marital and non-marital children in several contexts beginning in 1968 with Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (holding unconstitutional statute permitting, marital children, but not nonmarital children, to sue for the wrongful death of the mother). Subsequent cases eliminated the marital/non-marital distinction. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173–76 (1972); Gomez v. Perez, 409 U.S. 535, 537–38 (1973); Jimenez v. Weinberger, 417 U.S. 628, 632, 635–38 (1974); Clark v. Jeter, 486 U.S. 456, 463–65 (1988). But the inheritance from fathers for non-marital children was more complicated. *See* Lalli v. Lalli, 439 U.S. 259, 271–75 (1978) (holding that the state could require a judicial declaration of paternity for a non-marital child to inherit from the father). *See generally* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

[40] UNIF. PARENTAGE ACT § 202 (UNIF. L. COMM'N 2017).

[41] *See* UNIF. PROB. CODE § 2-114 (amended UNIF. L. COMM'N 2008); UNIF. PROB. CODE § 2-117 (UNIF. L. COMM'N 2008). *See also* Paula A. Monopoli, *Toward Equality: Nonmarital Children and Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1000–01 (2012).

B. Multiple Parents

The marital presumption of paternity persists in the areas of fathers' rights, particularly in the reluctance of courts and the legal system to recognize more than one father or mother or more than two parent figures. As one author argues:

> Despite the collective view in law and social practice that it is intrinsically taboo to consider human beings as chattel, the law persists in treating children as property. . . . [L]egal paternity exposes a rhetoric of ownership, possession, and exchange. The law presumes that a child born to a married woman is fathered by her husband, even when irrefutable proof exists that another man fathered the child. Attempts by non-marital biological fathers to assert parental rights regularly fail, as states allow only one father to "claim" the child.[42]

The paternal rights cases decided by the Supreme Court arguably support this view. In *Michael H. v. Gerald D.*,[43] the Supreme Court's plurality opinion concluded that the non-marital father did not have his due process rights violated by a statute that definitively presumed the mother's husband to be the child's father.[44] The plurality opinion by Justice Scalia also dismisses any notion that the child might have a due process right to maintain her filial relationship with her biological father.[45] Four justices dissented and Justice Stevens concurred in the result, largely on a procedural basis.[46]

Child psychology tells us that children are capable of forming more than two primary relationship attachments.[47] Also, children can successfully develop when parents are of the same gender.

> Research on the socioeconomic development of children in lesbian mother families . . . has consistently shown that children

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[42] Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 101, 225 (2010).

[43] Michael H. v. Gerald D., 491 U.S. 110 (1989).

[44] *Id.* at 131–32.

[45] *Id.* at 130–31 ("[The child] claims a due process right to maintain [a] filial relationship[ ] with both [her father] and [the mother's husband]. This assertion merits little discussion . . . the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country.").

[46] *Id.* at 132–36.

[47] *See* JEREMY HOLMES, JOHN BOWLBY AND ATTACHMENT THEORY 55 (Taylor & Francis, 2nd ed. 2014) (1993) ("[A] small child's attachment can best be thought of as a hierarchy, usually, but not invariably, with the mother at the apex, followed by the father, grandparents, older siblings, aunts, god parents, child minders and so on."); *see also* Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 249–52 (2011) (discussing Attachment Theory and literature).

> do not differ from children in heterosexual parent families . . . . Studies of adoptive gay father families have shown that gay fathers can parent as competently as can lesbian or heterosexual mothers, and that children in adoptive gay father families are functioning well.[48]

Some jurisdictions are beginning to recognize that children's best interests may involve more than one male and one female parent.[49] The 2017 Uniform Parentage Act has a multi-parent option.[50] Yet many jurisdictions continue to limit parental status to two parents, preferably of opposite genders.

C. Termination of Parental Rights

Another way in which American jurisprudence elevates the rights or interests of the parents over those of children is in the burden of proof standard for termination of parental rights. In *Santosky v. Kramer*,[51] the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires proof of grounds for termination by clear and convincing evidence, rather than preponderance of the evidence.[52] The majority stated, "[t]he 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 . . . . [P]arents retain a vital interest in preventing the irretrievable destruction of *their* family life."[53] The majority declined to consider the separate interest of the child until parents are found to be unfit and the case is in the *dispositional* stage.[54]

In contrast, the dissent noted that the removal of the children in the case was in response to "shockingly abusive treatment."[55] The dissent goes on to discuss the separate interest of the child in termination cases:

> A stable, loving homelife is essential to a child's physical, emotional and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into

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48 *See* Susan Golombok & Fiona Tasker, *Socioemotional Development in Changing Families*, *in* HANDBOOK OF CHILD PSYCHOLOGY AND DEVELOPMENTAL SCIENCE, SOCIOEMOTIONAL PROCESSES 452 (Richard M. Lerner & Michael E. Lamb, eds., 7th ed. 2015).

49 *See* Haim Abraham, *A Family is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 4 AM. U. J. GENDER, SOC. POL'Y, & L. 405, 434 (2017); Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2575 (2022) (citing many articles on multi-parent families); Sheff, *supra* note 4.

50 UNIF. PARENTAGE ACT § 613 (UNIF. L. COMM'N amended 2023).

51 Santosky v. Kramer, 455 U.S. 745 (1982).

52 *Id.*

53 *Id.* at 753 (emphasis added).

54 *Id.* at 760.

55 *Id.* at 781 (Rehnquist, J., dissenting).

> responsible, productive citizens. The same can be said of children who . . . are passed from one foster home to another with no constancy of love, trust, or discipline.[56]

Santosky clearly demonstrates the Court's willingness to elevate the interests of the parents over those of children who are seriously harmed by parental conduct. As one author notes:

> The question presumes that the child's best interest subsists within the best interest of the parent. This presupposition, however, is erroneously over-expansive. It does not consider the best interest of the child. At the present time, nevertheless, it is the controlling principle in cases involving efforts by states to terminate parental rights. . . . [T]he clear and convincing standard adopted by the Court deprives the child of his or her due process rights.[57]

D. Consent to Medical Treatment

In *Parham v. J.R.*,[58] the Supreme Court held that an adversary-type proceeding was not required when parents voluntarily commit their children to mental institutions for treatment. The majority noted that:

> Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child. It is one thing to require a neutral physician to make a careful review of the parents' decision in order to make sure it is proper from a medical standpoint; it is a wholly different matter to employ an adversary contest to ascertain whether the parents' motivation is consistent with the child's interests.[59]

The dissent was concerned about post-admission hearings, noting:

> The presumption that parents act in their children's best interests, while applicable to most child-rearing decisions, is not applicable in the commitment context. Numerous studies reveal that parental decisions to institutionalize their children often are the results of dislocation in the family unrelated to the children's medical condition.[60]

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56 *Id.* at 788–89.

57 Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1211 (1994).

58 Parham v. J.R., 442 U.S. 584 (1979).

59 *Id.* at 610.

60 *Id.* at 632 (Brennan, J., concurring in part and dissenting in part).

The dissent's note about family dislocation is important. Parents will sometimes decline to consent to medical care for a child since it might result in problems for other children in the family.[61] Disabled children are more often abused or neglected than their healthy siblings.[62]

E. Nonparent Visitation

In 2000, the Supreme Court decided *Troxel v. Granville*,[63] involving the right of the parents of a deceased father to visit with their grandchildren.[64] The case arose in Washington State, where the statute in question permitted courts to order visitation with any person when such visitation would serve the best interest of the child.[65] A plurality of the Court held that the statute infringed on the fundamental right of the parent to make child rearing decisions concerning the child.[66] The effect of the decision is somewhat diluted in that two justices concurred in the result but for different reasons, and three justices dissented, all on different grounds.[67] One author notes:

> The reasoning of the plurality in *Troxel* depends on a set of traditional, and increasingly problematic, presumptions about parents and children. For example, the presumption that fit parents—even parents experiencing great tensions and instability in their domestic lives—serve their children's interests better than any one else, which was invoked in *Troxel* (as it has been in other Supreme Court and lower federal court decisions involving children), reflects nostalgia for a safer, more stable past. Yet, the plurality in *Troxel*—more aware or, perhaps, simply more desperate than the Court was in 1979 when it voiced the presumption in *Parham v. J.R.*—recognized that the conception of family it preferred (and then proceeded to assume in rendering its decision) is widely challenged by alternative understandings of family.[68]

In fact, the reason that the mother in *Troxel* wanted to limit visitation with the children's paternal grandparents was related to her very complex blended family,

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61 *See* Guardianship of Phillip B., 139 Cal. App. 3d 407, 417–18 (1983); Robert H. Mnookin, *The Guardianship of Phillip B.: Jay Spears' Achievement*, 40 STAN. L. REV. 841, 843–44 (1988).

62 Margaret F. Brinig, *Explaining Abuse of the Disabled Child*, 46 FAM. L.Q. 269, 277–80 (2012).

63 Troxel v. Granville, 530 U.S. 57 (2000).

64 *Id.* at 60.

65 *Id.*

66 *Id.* at 72.

67 *Id.* at 76–102.

68 Janet L. Dolgin, *The Constitution as Family Arbiter, A Moral in the Mess?*, 102 COLUM. L. REV. 337, 392–93 (2002) (emphasis added).

with children from three different fathers, including her husband, and the husband's children from his previous marriage.[69] The decision to limit visitation with the grandparents made her life less complicated.

After *Troxel*, many courts and state legislatures have evaluated the issue of grandparent rights and non-parent visitation statutes.[70] Courts agree that a parental decision is entitled to great weight in these cases but differ on the issue of whether visitation should be granted upon a showing of best interest or whether harm to the child upon a denial of visitation is required.[71]

Other significant non-parent visitation issues involve stepparents,[72] lesbian couples,[73] and cohabitants.[74] Many authors argue for an expansion of who is recognized as a parent based on the child's interest—a radical notion in the law.[75] Terms for such persons may include *de facto* parent, equitable parent, or parent by estoppel.[76]

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69 *See* Ariela R. Dubler, *Constructing the Modern American Family: The Stories of Troxel v. Granville*, *in* F. L. STORIES 95, 103–04 (Carol Sanger ed., 2008).

70 *See* Sarah J.M. Cox, *Grandparent and Third-Party Visitation Rights: A 50 State Survey*, 40 CHILD.'S LEGAL RTS. J. 76 (2020); Barbara Atwood, *Marriage as Gatekeeper: The Misguided Reliance on Marital Status for Third-Party Standing*, 99 FAM. CT. REV. 971 (2020); Courtney Koenig, Note, *A Uniform System of Grandparents' Rights: A Call for All States to Adopt a Uniform Permissive Law*, 30 ELDER L.J. 231 (2022).

71 David D. Meyer, *Parental Rights After Troxel v. Granville*: *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 713 (2001).

72 Many states already provide stepparent visitation rights. *See* Chart 6, *Third Party Visitation*, 46 FAM. L. Q. 537 (2013); *see generally* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81 (2006).

73 *See generally* Bethany v. Jones, 378 S.W.3d 731 (Ark. 2011); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1 Dist. 11991); Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *In re* Mullen, 953 N.E.2d 302 (Ohio 2011); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

74 *See generally* Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES L. 127, 129, 136–46 (2012).

75 *See* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857 (2006); *see also* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988); Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615 (2012); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

76 *See*, *e.g.*, PRINCIPLES FAM. DISSOLUTION, *supra* note 5, at § 2.03(1)(b) (defining parent by estoppel or de facto parent); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 450 (2013); *see generally* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY, 49–51 (1993) (explaining the "negotiated family"); Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103 (2010).

IV. SOCIETY AND BEST INTERESTS

The Indian Child Welfare Act ("ICWA") and various state laws concerning gender affirming care serve as three examples displaying the tension between the best interest of the child and broader societal concerns. ICWA demonstrates a strong favoring of tribal placements for adopted children, while gender affirming care laws prevent proper care for transgender children.

A. The Indian Child Welfare Act

The Indian Child Welfare Act[77] was adopted by Congress in 1978, as a response to, and in redress of, long-term government removal of Native American Indian children from their homes and their tribes. Children were frequently placed in an American boarding school for Indian children.[78] Later, various entities engaged in a practice of placing Indian children with families outside of Native American culture and life.[79] The purpose of the ICWA is found in the statute:

> [T]o protect the best interests of Indian children and to promote the stability and the security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.[80]

The ICWA applies to custody proceedings involving a member of a tribe or eligible member of a tribe, including foster care placement, termination of parental rights, pre-adoptive placement, and adoption.[81] Tribes, biological parents, and potential parents (but not non-Indian foster or adoptive parents) have the right to intervene in such cases if the child is a member of the tribe or may have membership eligibility (based on the status of the biological parent).[82] The Act requires that courts attempt to place such children with a relative, another

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77 Indian Child Welfare Act (ICWA), 25 U.S.C.A. §§ 1901–1963 (West, Westlaw through Pub. L. No. 118-90).

78 *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/about-icwa/ (last visited Oct. 24, 2024); *Understanding the ICWA*, ICWLC, https://www.icwlc.org/education-hub/understanding-the-icwa/ (last visited Oct. 24, 2024); Indian Child Welfare Act, ASS'N OF AM. INDIAN AFFS, https://www.indian-affairs.org/icwa.html#history (last visited Oct. 24, 2024).

79 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–37 (1989) (discussing the history of the ICWA); *see also* Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 133–39 (2008).

80 25 U.S.C.A. § 1902 (West, Westlaw through Pub. L. No. 118-90).

81 25 U.S.C.A. § 1911 (West, Westlaw through Pub. L. No. 118-90).

82 25 U.S.C.A. § 1914 (West, Westlaw through Pub. L. No. 118-90).

member of the tribe, another Indian home, or a tribally approved institution in cases of foster care.[83]

The Indian Child Welfare Act is one of the most dramatic examples of a situation where lip service is paid to the best interests of the child; however the statute may actually harm the Indian children it is supposed to protect. As one author states:

> [T]he Indian Child Welfare Act may harm Indian children] by making it harder for state child welfare agencies to protect children who are deemed "Indian" from abuse and neglect and virtually impossible to find these children stable, loving foster and adoptive homes when needed . . . . Supporters of the ICWA status quo regularly play the race card to stifle questions about ICWA's constitutionality and effectiveness, even though this results in worse outcomes for actual children of Native ancestry. The result is like something from *The Twilight Zone*: even though those seeking to reform ICWA wish to provide *stronger* legal protections for children deemed "Indian," and to eliminate the race-conscious elements whereby the Act deprives "Indian children" of the security and resources they need, these advocates are characterized as racist or "anti-Indian."[84]

The United States Supreme Court has decided three cases involving the ICWA. In *Mississippi Band of Choctaw Indians v. Holyfield*,[85] the Court held that because children's parents were domiciled on the reservation, the children were subject to the ICWA. This was true even though the parents left the reservation to make arrangements for an adoption by a non-Indian couple.[86] The children were with the adoptive parents for three years after the original placement. Justice Brennan's majority opinion notes: "[i]t is not ours to say whether the *trauma* that might result from removing these children from their adoptive family should *outweigh the interest of the Tribe*—and perhaps the children themselves—in having them raised in the Choctaw community."[87]

In *Adoptive Couple v. Baby Girl*,[88] Justice Alito's opinion seemed to create an "existing family" exception to ICWA. In the case, the non-Indian mother placed her child with a non-Indian couple, who sought to adopt the child

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83 25 U.S.C.A. § 1915 (a)–(b) (West, Westlaw through Pub. L. No. 118-90).

84 Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L & POLS. 55, 56 (2021). *See also In re* C.H., 997 P.2d 776, 782 (Mont. 2000) (stating that the best interests of the child as a factor in custody decisions under ICWA is inappropriate because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the [statute's] preferences.").

85 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

86 *Id.* at 52.

87 *Id.* at 54 (emphasis added).

88 Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

in South Carolina state court after the father relinquished his rights. Later the father, who was a member of the Cherokee Nation, sought custody.[89] The Court held that since the father had no relationship with the child before or after birth, the ICWA provisions on custody and adoption did not apply. The majority opinion expresses concern for the best interests of the child:

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was Indian . . . . [A] biological Indian father could abandon his child *in utero* and refuse any support for the birth mother . . . and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests.[90]

The existing family exception has been criticized.[91]

The Supreme Court decided the third case this year. In *Haaland v. Brackeen*,[92] the Court granted certiorari in a case appealed from the Fifth Circuit, heard by a panel and then re-heard *en banc*. The decision of the Fifth Circuit resulted in seven different opinions, spanning 325 pages.[93] The case originated in a District Court in Texas. Foster and adoptive parents, as well as the states of Texas, Louisiana, and Indiana, brought an action to declare the ICWA unconstitutional. In ordering a summary judgment, the trial court held that the Act violated the following: (1) the equal protection doctrine (mandatory placement preferences related to Indian ancestry of child); (2) the non-delegation doctrine (Indian tribes may reorder federal placement preferences in adoption); (3) the Tenth Amendment (states must apply federal standards to state created claims); and (4) other statutory and procedural rules.[94] A panel of the Fifth

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89 *Id.* at 641–46.

90 *Id.* at 655–56.

91 *See, e.g.*, Allison E. Burke, *Adoptive Couple v. Baby Girl: From Strict Construction to Serious Confusion*, 43 HOFSTRA L. REV. 139, 152–55 (2014); Shannon M. Morris, *Baby Veronica Ruling: Implications for Indian Child Welfare Act in Indian Child Removals and Adoptions by Non-Indian Custodians*, 72 NAT'L L. GUILD REV. 1, 12–17 (2015); Shreya A. Fadia, Note, *Adopting "Biology Plus" in Federal Indian Law: Adoptive Couple v. Baby Girl's Refashioning of ICWA's Framework*, 114 COLUM. L. REV. 2007, 2030 (2014).

92 Haaland v. Brackeen, 599 U.S. 255 (2023).

93 Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021); *cf.* Glennas'ba Augborne Arents & April E. Olson, *Bent, But Not Broken ICWA Stands: A Summary of Brackeen v. Haaland*, ARIZ. ATT'Y, July–Aug. 2021, at 62, 63 (quoting Justice James Dennis as follows: "There is a term for a judicial decision that does nothing more than opine on what the law ought to be: an advisory opinion. This what the roughly 300 pages you just read amount to.").

94 Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018); *see also* Katie J. Gojevic, Note *Benefit or Burden?: Brackeen v. Zinke and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF. L. REV. 247 (2020).

Circuit reversed the District Court decision, then vacated the decision, and the Fifth Circuit granted rehearing *en banc*.[95] The *per curiam* opinion of the Fifth Circuit upheld the validity of the ICWA against challenges concerning Congressional authority under the Indian Commerce Clause, federal preemption of state law concerning child placement standards and termination of parental rights, equal protection, and other procedural issues of standing and authority of the Bureau of Indian Affairs under the Administrative Procedure Act. The Fifth Circuit also held that the individual parties and the state parties had standing to challenge ICWA.[96]

In *Haaland v. Brackeen*, the United States Supreme Court upheld the validity of the ICWA under the exercise of Congressional power of the Constitution, citing a plenary power to legislate with respect to the Indian tribes, the Indian Commerce Clause, the Treaty Clause, "principles inherent in the Constitution's structure," and "the trust relationship between the United States and the Indian people."[97] *Brackeen* is a complicated case: it addresses basic congressional authority to regulate in the area of child custody, foster placement, and adoption; it also addresses anticommandeering challenges; equal protection and nondelegation were issues that the Court declined to reach. The Court declined to address the equal protection issue in holding that the individual petitioners lacked standing to seek relief in this case because the state courts apply the rules and placement preferences under ICWA and a decision in this case would not bind the state nonparty actors in the judgment.[98] Six other justices agreed with Justice Barrett's majority opinion. Justice Gorsuch wrote a lengthy history concerning the ICWA in his concurring opinion.[99] Justice Kavanaugh was concerned about the equal protection issue raised in the case in instances of foster care or adoption proceedings: "[u]nder the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race—even if the placement is otherwise determined to be in the child's best interests."[100] Justice Thomas dissented on the basis of Congressional encroachment on the police powers of the states, particularly in the area of family law and child custody.[101]

Only Justice Alito's dissent directly addressed the issue of best interests of the child as an issue in the case:

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95 Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) (granting rehearing en banc).

96 Brackeen v. Haaland, 994 F.3d at 267.

97 *Brackeen*, 599 U.S. at 273–76, 280–91 (rejecting the "anticommandeering" challenges raised by the State petitioners).

98 *Id.* at 292–94; *see also id.* at 291 (declining to decide the issue of nondelegation on the basis of standing).

99 *Id.* at 296–333 (Gorsuch, J., concurring).

100 *Id.* at 333 (Kavanaugh, J., concurring).

101 *Id.* at 334 (Thomas, J., dissenting).

> But in many cases, provisions of the Indian Child Welfare Act (ICWA) compel actions that conflict with this fundamental state policy, subordinating what family-court judges—and often biological parents—determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe . . . . Whatever authority Congress possesses in the area of Indian affairs, it does not have the power to sacrifice the best interests of vulnerable children to promote the interests of tribes in maintaining membership. Nor does Congress have the power to force state judges to disserve the best interests of children or the power to delegate to tribes the authority to force those judges to abide by the tribes' priorities regarding adoption and foster-care placement.[102]

At least at this time, it appears that the Court is willing to allow the elevation of the politics, history, and interests of the Indian tribes over the best interests of specific children. The majority opinion concedes (of course) that children are not part of commerce under the Commerce Clause but that the point is legally irrelevant since Congress has the power to regulate Indian affairs.[103] The majority also expresses sympathy for the petitioners.

> We recognize that our case law puts petitioners in a difficult spot. We have often sustained Indian legislation without specifying the source of Congress's power, and we have insisted that Congress's power has limits without saying what they are. Yet petitioners' strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law—that would at least give us something to work with.[104]

B. Gender Affirming Care

The issue may be described as part of the latest chapter in the culture wars in the United States.[105] The most obvious source of the movement to restrict parental and medical decision making in this area originated with a news story from 2019.[106] A seven-year-old child was the subject of a custody battle between

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102 *Id.* at 372–74 (Alito, J., dissenting).

103 *Id.* at 278.

104 *Id.* at 279.

105 *See Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Health Care for Minors*,134 HARV. L. REV. 2163, 2175–78 (2021) [hereinafter *Outlawing Trans Youth*]; *see generally* David L. Hudson, *States Drives a Wave of Bills Affecting Transgender Youth*, AM. BAR ASS'N J., Aug. 2021, at 14.

106 *See* Matthew A Holman, *Physicians, Parents, and Transgender Child: Does the State Have a Legitimate Interest in Prohibiting Gender-Affirming Treatment in Minors?*, 56 FAM. L.Q. 95, 95–96 (2022-2023); Nicole Scott, Note, *Trans Rights Are Human Rights: Protecting Trans*

parents. The child who was born a male, wished to be called "Luna," and identified as a girl. The mother, a pediatrician, supported the child in her identification, but the father did not. The father alleged that the child was being coerced by the mother to assume a female role and sued for custody.[107] The mother eventually won sole custody.[108]

Many of the children and adolescents diagnosed with gender dysphoria experience an internal discord between the gender identity assigned at birth and perceived internal gender identity.[109] Gender dysphoria can lead to serious physical and emotional symptoms, including depression, anxiety, substance abuse, and self-harm.[110] As a result of the national attention drawn to the serious issues presented by the case, legislation has been considered in several states preventing doctors from providing certain "gender affirming" treatments to minors, even with parental consent.[111] Gender affirming treatment can include social transitioning, counseling, therapy, hormone blocking drugs for puberty suppression, cross-sex hormone therapy for development of gender identity physical characteristics (usually prescribed for minors nearing adulthood), and finally surgery to result in a physical appearance in line with gender identity (minors are very rarely considered for surgery).[112] Proposed laws vary in the types of treatment that would be banned. Some bills prohibit therapy or counseling and prescribing of medications, including medications for hormone therapy; others prohibit only prohibit medical or surgical care.[113] The consequences for medical providers that do not follow these laws include criminal charges, civil liability, or suspension or revocation of their professional

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Minors' Right to Gender-Affirming Care, 14 DREXEL L. REV. 685, 701–03 (2022) [hereinafter Scott, *Trans Rights Are Human Rights*]; *Outlawing Trans Youth*, *supra* note 105, at 2172.

107 Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 701–03.

108 *Id*.

109 *See* Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 691.

110 *See Outlawing Trans Youth*, *supra* note 105, at 2168–70; Holman, *supra* note 106, at 99–101; Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 690–93.

111 *See* Alexa Sussmane, *The Far-Right Push to Outlaw Gender-Affirming Treatment for Minors*, 30 TUL. J.L. & SEXUALITY 91, 97–101 (2021); Breean Walas & Shenoa Payne, *Fight Back Against Bias and Fear*, TRIAL, Sept. 2022, at 34, 36–37; Greg Mercer, Note, *First Do No Harm: Prioritizing Patients Over Politics in the Battle Over Gender-Affirming Care*, 39 GA. STATE U.L. REV. 479, 485–87 (2023); Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 704–08 (discussing The Save Adolescents From Experimentation Act (SAFE Act) passed in Arkansas in 2021, banning transgender minors from gender-affirming care); Holman, *supra* note 106, at 105–07 (discussing the Alabama Vulnerable Child Compassion and Protection Act, signed into law in 2022).

112 *See* Holman, *supra* note 106, at 102–05; *Outlawing Trans Youth*, *supra* note 105, at 2164–67; Sussmane, *supra* note 111, at 94–97; Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 694–701.

113 *See* Mary Kelly Persyn, *The Quality of Mercy*, L.A. LAW., Feb. 2023, at 28, 30; *Outlawing Trans Youth*, *supra* note 105, at 2172–74; Holman, *supra* note 106, at 105–07 (discussing Alabama law); Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 705.

licenses. Additionally, parents may be subject to investigation and removal of their children under the umbrella of child abuse if they pursue gender affirming care.[114]

In the debate surrounding the issue, the "best interest" of the child is often presumed to be the same (remaining in the gender identity assigned at birth) for all children. This is in spite of recognition of gender dysphoria as a mental disorder[115] and evidence of harm to children when it is not treated.[116] It is arguably a situation where a societal interest in resisting transgender rights is elevated over the best interests of individual children, including situations where the parents agree with the child's decision.

There are already challenges underway in states where legislation had been enacted.[117] The Due Process and Equal Protection Clauses of the Fourteenth Amendment are usually used as the basis of such litigation. The Due Process Clause involves the fundamental right of a parent to direct the upbringing of their child and possibly the right of the individual child to express their gender identity. The Equal Protection clause is invoked because the legislation engages in sex-stereotyping on its face and has a discriminatory impact on transgender individuals. The First Amendment is also used as a challenge to statutes that prevent health care professionals from speaking to their patients about gender dysphoria and related treatments.

V. THE CONVENTION ON THE RIGHTS OF THE CHILD

Interest in children's "rights" originated in the United States in the 1960s when it was being used by child advocates; during this time, there was a certain amount of distrust in the legal system for the treatment of children.[118] A "Children's Rights" movement evolved, as evidenced by two Supreme Court cases: *In re Gault*[119] and *Tinker v. Des Moines Independent School District.*[120] In *Gault*, the Court required that fundamental due process rights be given to

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[114] *See* Persyn, *supra* note 113, at 32; *Outlawing Trans Youth*, *supra* note 105, at 2173–74, discussing the protections California law provides parents coming to California for gender-affirming care); Walas, *supra* note 111, at 36–37.

[115] *See* Holman, *supra* note 106, at 97–102; Scott, *Trans Rights Are Human Rights*, *supra* note 106, at 690–94.

[116] *See* Holman, *supra* note 106; Scott, *Trans Rights Are Human Rights*, *supra* note 106; *Outlawing Trans Youth*, *supra* note 105, at 2167–70; Sussmane, *supra* note 111, at 99–101.

[117] *See* L.W. by & through Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. granted*, United States v. Skrmetti, 144 S.Ct. 2679 (2024); Abbot v. Doe, 691 S.W.3d 55 (Tex. App.–Austin 2024); Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021); K.C. v. Individual Members of Med. Licensing Bd. of Ind., 112 F.4th 604 (7th Cir. 2024).

[118] *See* HARRY D. KRAUSE, LINDA D. ELROD & J. THOMAS OLDHAM, FAMILY LAW 504 (8th ed. 2018); Martin Guggenheim, *Maximizing Strategies for Pressuring Adults to Do Right by Children*, 45 ARIZ. L. REV. 765, 771–74 (2003).

[119] *In re* Gault, 387 U.S. 1 (1967).

[120] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

juveniles in criminal juvenile proceedings.[121] In *Tinker*, the Court held that students (who are children) are persons under the Constitution and have fundamental rights (freedom of expression in this case).[122] The discussion about children's rights and advocacy continued in the 1970s; Congress passed a law that required children to be represented in a child protection proceeding.[123] Some authors were fairly assertive in their advocacy of children's rights.[124] For example, in 1972, two authors proposed a Bill of Rights for Children,[125] including the following rights: to earn and keep earnings; to seek and obtain medical care treatment and counseling; to be free of legal disabilities unless it is necessary and protective of the actual best interests of the child; and "to receive special care, consideration, and protection in the administration of law or justice so that his best interests are always a paramount factor."[126]

The Convention on the Rights of the Child was adopted by the United Nations General Assembly in 1989.[127] It is a notable treaty, with almost universal adoption world-wide with 191 state parties.[128] The United States signed the Convention but did not ratify it. This means that the United States will not act in contravention of the Convention but does not follow any obligations under the treaty.[129]

The Convention on the Rights of the Child is briefly described by one author:

> The CRC is comprehensive, with provisions that address children's economic, social, and cultural rights, as well as civil and political rights. . . . Four general provisions, sometimes described as the soul of the treaty, set out overarching principles that guide the interpretation of CRC. Parties are required to respect the rights of all children, without discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[sic] In all actions concerning children, "the

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121 *Id.*

122 *Id.*

123 Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C.A. §§ 5101–5119c (West 2019).

124 *See* A.S. Neill, *Freedom Works*, *in* CHILDREN'S RIGHTS: TOWARD THE LIBERATION OF THE CHILD 127, 137–38 (1971).

125 Henry Foster & Doris Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972).

126 *Id.*

127 CRC, *supra* note 2.

128 *See* Cynthia Price Cohen, *An Introduction to the Developing Jurisprudence of the Rights of the Child*, 6 SAINT THOMAS L. REV. 1, 23–24 (1993); Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 292 (2002); Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 140 (1998).

129 *See* Estin, *supra* note 128, at 292.

> best interests of the child shall be a primary consideration." Parties recognize that "every child has the inherent right to life," and are obligated to "ensure to the maximum extent possible the survival and development of the child." A child "capable of forming his or her own views" has the right to "express those views freely in all matters affecting the child," and has the particular right to an opportunity to be heard in any judicial or administrative proceedings affecting the child.[130]

The Convention sets out important norms that differ significantly from previous notions of children's rights. Prior to the adoption of the Convention on the Rights of the Child, children's rights were largely focused on the child's right to care and protection from parents and society.[131] The Convention expands the notion of children's rights from this care and protection standard to personal and individual rights. Four major themes are contained in the Convention: (1) the "best interests of the child standard" is the key to compliance with all articles in the Convention; (2) a child's "evolving capabilities" means that the child's rights to care and protection must be balanced and re-balanced against the child's individual rights; (3) non-discrimination (including gender); and (4) respect for the child's "human dignity."[132]

Results of the adoption of the Convention are mixed. Partially as a result of the success of the Convention, other treaties and protocols affecting children have been proposed and adopted in the international arena.[133] However, the United States has remained a consistent hold-out in its refusal to ratify the Convention. While the United States often declines to ratify important treaties,[134] the reasons affecting the decision in this case are also due to the opposition by parental rights groups.[135] In the international arena, children are still subject to horrific violations of their human rights.[136] Often children do not have the capacity to exercise their rights, so even if children's rights are recognized, the

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130 *Id.* at 293.

131 *See* Cohen, *supra* note 128, at 9–10.

132 *Id.* at 18–19.

133 *See generally* Rios-Kohn, *supra* note 128, at 147–55 (discussing changes at the international, regional, and national levels).

134 *See* Charlotte Gavin, *Opposing Viewpoints: The U.S. Should Not Ratify the United Nations Convention on the Rights of the Child*, 39 CHILD.'S LEGAL RTS. J. 198, 198–200 (2019) (noting that international treaties are difficult to ratify due to our process—the same as amending the Constitution of the United States—as well as concerns about sovereignty).

135 *See id.* at 199–200; Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55, 57–59 (1997); Alison Dundes Rentel, *Who's Afraid of the CRC: Objections to The Convention on the Rights of the Child*, 3 ILSA J. INT'L & COMPAR. L. 629, 632–35 (1997).

136 *See* Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT'L L. REV. 57 (2009); Rios-Kohn, *supra* note 128, at 154–55.

strategy for effective implementation (and consideration of the child's best interests, as well as the child's need for care and protection) needs to be in place. As one author notes, ratification of the Convention is desirable, but "when we expend too much energy on trying to obtain U.S. ratification of the Convention, we may be taking valuable time and effort away from building any consensus within the country about what a just society for children should mean."[137]

VI. CONCLUSION

The concept of child advocacy (at least in divorce and child protection cases) began in the 1960s, when a group of judges became concerned with the effect of the adversary model on children and the determination of their best interests.[138] The call for recognition of children's rights, accompanied by child advocates, ramped up in the 1980s and 1990s.[139] It was fueled by the divorce rate increase, along with the rise of fathers' rights groups, and the influence of mental health professionals in the divorce context.[140] Further evidence of the push for children's rights is shown by the promulgation of the U.N. Convention on Rights of the Child discussed in the section above.[141] For many years, the focus was on the expansion of children's rights and the legal representation in certain circumstances. The issue then became the role of counsel in representing children, which was, as one might expect, haphazard and ill-defined.[142] Eventually, the bar came to consensus on representing children: when children are capable of expressing their choices, the lawyer should pursue those objectives. When children are not capable of choosing desired results, the lawyer

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137 Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles*, 20 EMORY INT'L. L. REV. 43, 51 (2006).

138 *See generally* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 95–108 (1991) (discussing the topic of child advocacy); Robert F. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101 (1962) (discussing the idea of a child advocate); Robert W. Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1 (1966).

139 *See, e.g.*, Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757 (1990); Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991); Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute: A Unique Legal Situation, A Necessarily Broad Standard, The Child's Constitutional Rights, The Role of the Attorney whose Client is the Child*, 19 FAM. L. Q. 53 (1985); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53 (1992); Monroe L. Inker & Charlotte Anne Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Shannon L. Wilber, *Independent Counsel for Children*, 27 FAM. L. Q. 349 (1993); Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005).

140 *See* FINEMAN, *supra* note 138, at 98.

141 CRC, *supra* note 2.

142 *See* Kenneth G. Raggio, *Report to the House of Delegates*, 110A A.B.A. SEC. FAM. L. 2, 4–5 (1992) (indicating attorneys are confused about their roles in visitation, custody, or child protection cases).

should pursue a clearly correct position, and where there is more than one option, all alternatives should be presented to the court.[143]

In the years since the introduction of the idea of independent advocacy for children, some legal authorities are highly critical of the idea. Martha Fineman criticizes the "illusion of neutrality" that a legal advocate gives to the process. She argues that (in the custody area):

> Submerged in the rules and processes are political and ideological conflicts between "mothers" (or nurturing and caretaking values) and "fathers" (or independence and financial security values); between the legal profession (or advocacy and adversariness as values) and the helping professions (or treatment and therapy as values); between the moralists (. . . discourage divorce and . . . punish those who seek to divorce) and the secularists (. . . ensured no one lost too much in deciding to leave a marriage).[144]

Martin Guggenheim, a clinical professor of law and children's advocate, notes that in cases where the child is unable (due to age, for example) to direct the attorney in choosing objectives:

> [T]he child's lawyer can be a dispositive influence on the outcome in the vast majority of cases . . . judges freely admit to listening very carefully to the child's representative, sometimes confusing the representative's voice with the child's and other times regarding the voice as "neutral" . . . [a]llowing children's lawyers to make law as they see fit on a case-by-case basis sets into motion a version of private lawmaking by randomly chosen lawyers.[145]

Another issue with appointed child advocates is the bias sometimes inherent in the attorney appointment process. One author discusses the "parentified attorney" as one with biases, whether conscious or unconscious, to act in the "best interest" of the child, to protect the child, but in line with the attorney's own values. This is in contrast to act in accordance with the child's wishes, or a more generalized view of best interest.[146]

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143 *See* Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 310–12 (1998) [hereinafter Guggenheim, *Reconsidering*]; *see also* Linda Elrod, *Client-Directed Lawyers for Children: Is it the "Right" Thing to Do*, 27 PACE L. REV. 869, 872–82 (2006) [hereinafter Elrod, *Client-Directed Lawyers*]; Linda Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 AM. BAR ASS'N FAM. L.Q. 105, 119 (2003).

144 FINEMAN, *supra* note 138, at 108.

145 Guggenheim, *Reconsidering*, *supra* note 143, at 317–19.

146 Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 602 (2011).

Yet the promotion of child advocacy and child-directed representation remains. "In high conflict custody cases, a lawyer for the child can protect the child from becoming a casualty in a zero sum game . . . . [A] child's voice should be heard in cases that involve maintaining relationships with persons who have a positive significance in their lives."[147] Even in cases where the child is unable to direct the attorney, a lawyer can "maintain professional boundaries and still ensure that the decisionmaker acts with knowledge of the child's perspective."[148]

Some authors advocate for expanding children's rights by suggesting a revision of the constitutional framework to incorporate a child-centered perspective. They propose a "new law of the child" that would address children's interests in various areas, including their relationships with parents and other adults, interactions with peers, exposure to new ideas, expressions of identity, personal integrity, and privacy, as well as participation in civic life.[149]

While I would not be opposed to a separate set of children's rights, I doubt that the United States is ready for such a discussion, particularly in a time of great political divide. On the other hand, many lawsuits affecting children would benefit from a hard look at child representation. While most parents and parent substitutes look out for the best interests of their children, many others assume that best interest of a child coincides with the parent's best interest or society's best interest. Ultimately, I think the way forward is with separate representation for children only in complex, high conflict, or high consequence cases. The representation should be client-driven and child-centered except in cases where the child is unable to direct the representation. I believe that the best interests of children will not actually be heard in such cases unless an advocate is specifically designated to assist the decision maker with understanding the distinct and important issues affecting the child, unclouded by the interests of the parents, the "family," or the state.

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147 Elrod, *Client-Directed Lawyers*, *supra* note 143, at 892–93.

148 Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interest Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 381 (2011).

149 Dailey, *supra* note 33; *see also* Cheryl Bratt, *Top-Down or From the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J. F. 917 (2018); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. F. 942 (2018) (two critiques of the New Law of the Child); Laura A. Rosenbury, *Toward a New Law of Early Childhood*, 71 FLA. L. REV. 37 (2019) (focusing on the rights of children age five and under).