Child Parent State

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Table of Contents

[OVERVIEW 1](#_Toc312191448)

[Painter v. Bannister (IA, 1966) 1](#_Toc312191449)

[Judicial Allocation of Power Between Parents and the State 3](#_Toc312191450)

[Meyer v. Nebraska (US, 1923) 3](#_Toc312191451)

[Pierce v. Society of Sisters (US, 1925) 3](#_Toc312191452)

[Prince v. Massachusetts (US, 1944) 4](#_Toc312191453)

[Wisconsin v. Yoder (US, 1972) 4](#_Toc312191454)

[Barbara Bennett Woodhouse, Who Owns the Child? 5](#_Toc312191455)

[Parental Power to Decide Medical-Related Care 7](#_Toc312191456)

[In re Dubreuil (FL, 1993) 7](#_Toc312191457)

[In re Sampson (NY Fam Ct, 1970) 7](#_Toc312191458)

[In re Green (PA, 1972) 8](#_Toc312191459)

[In re Hofbauer (NY, 1979) 8](#_Toc312191460)

[Hermanson v. State (FL, 1992) 9](#_Toc312191461)

[Newmark v. Williams (DE, 1991) 9](#_Toc312191462)

[Cruzan v. Director, Missouri Dept. of Health (US, 1990) 10](#_Toc312191463)

[Juvenile Delinquency and Due Process of Law 11](#_Toc312191464)

[In re Gault (US, 1967) 11](#_Toc312191465)

[In re Winship (1970) 12](#_Toc312191466)

[McKeiver v. Pennsylvania (US, 1971) 12](#_Toc312191467)

[Schall v. Martin (US, 1984) 13](#_Toc312191468)

[Constitutional Rights of Children – At School 15](#_Toc312191469)

[New Jersey v. T.L.O. (US, 1985) 15](#_Toc312191470)

[Vernonia School Dist. v. Acton (US, 1995) 15](#_Toc312191471)

[Board of Ed. v. Earls (US, 2002) 16](#_Toc312191472)

[Roper v. Simmons, 543 U.S. 551 (2005) 16](#_Toc312191473)

[Graham v. Florida, \_\_ U.S. \_\_, 130 S.Ct 2011 (2010) 17](#_Toc312191474)

[J.D.B. v. North Carolina, \_\_ U.S. \_\_, 131 S.Ct. 2394 (2011) 17](#_Toc312191475)

[Safford Unified School District #1 v. Redding, \_\_ U.S. \_\_, 129 S.Ct. 2633 (2009) 17](#_Toc312191476)

[Speech and Expression – 1st Amendment and schools 18](#_Toc312191477)

[West Virginia State Board of Ed. V. Barnette (US, 1943) 18](#_Toc312191478)

[Tinker v. Des Moines Independent Community School Dist. (US, 1969) 18](#_Toc312191479)

[Bethel School Dist. v. Fraser (US, 1986) 19](#_Toc312191480)

[Hazelwood v. Kuhlmeier (US, 1988) 19](#_Toc312191481)

[Morse v. Frederick (US 2007) 20](#_Toc312191482)

[Constitutional Rights of Adolescents – First Amendment (Outside of School) 21](#_Toc312191483)

[Ginsberg v. New York (US, 1968) 21](#_Toc312191484)

[Brown v. Entertainment Merchants (SCOTUS 2011) 22](#_Toc312191485)

[Interim Report of the House Committee on the Judiciary (1955) 22](#_Toc312191486)

[City of Dallas v. Stanglin (US, 1989) 22](#_Toc312191487)

[Schleifer v. City of Charlottesville (4th Cir, 1998) 23](#_Toc312191488)

[Hodgkins v. Peterson (7th Cir, 2004) 23](#_Toc312191489)

[Constitutional Rights of Adolescents – Privacy and Sex-Related Health Care 25](#_Toc312191490)

[Planned Parenthood of Central Missouri v. Danforth (US, 1976) 25](#_Toc312191491)

[Bellotti v. Baird (US, 1979) [*Bellotti II*] 25](#_Toc312191492)

[Lambert v. Wicklund (US, 1997) 26](#_Toc312191493)

[Parham v. J.R. (US, 1979) 26](#_Toc312191494)

[Carey v. Population Services Int’l (US, 1977) 27](#_Toc312191495)

[Michael M. v. Superior Court of Sonoma County (US, 1981) 27](#_Toc312191496)

[State Authority to Remove Children from Parental Custody 29](#_Toc312191497)

[Stanley v. Illinois (US, 1972) 29](#_Toc312191498)

[In re B.K. (DC App, 1981) 30](#_Toc312191499)

[In re Jeanette S. (Cal. App, 1979) 30](#_Toc312191500)

[Steward v. State (IN, 1995) 30](#_Toc312191501)

[Matter of Philip M. (NY 1993) 30](#_Toc312191502)

[Nicholson v. Scoppetta (NY, 2004) 31](#_Toc312191503)

[State Authority to Remove Children from Parental Custody: Foster Care 33](#_Toc312191504)

[Smith v. Organization of Foster Families (US, 1977) 33](#_Toc312191505)

[Matter of Michael B. (NY, 1992) 34](#_Toc312191506)

[Guardianship of Philip B. (Cal. App, 1983) 34](#_Toc312191507)

[J.M.A. v. State (AK, 1975) 35](#_Toc312191508)

[Martin Guggenheim, Somebody’s Children 35](#_Toc312191509)

[Termination of Parental Rights 37](#_Toc312191510)

[Lassiter v. Dept. of Social Services (US, 1981) 37](#_Toc312191511)

[Santosky v. Kramer (US, 1982) 38](#_Toc312191512)

[In re Shirley B (Md. App 2011) 40](#_Toc312191513)

[NJ DYFS v. I.S. (NJ 2010) 40](#_Toc312191514)

[In re R.J.T. (Pa. 2010) 40](#_Toc312191515)

[Adoption, Custody and Visitation 41](#_Toc312191516)

[Bottoms v. Bottoms (VA, 1995) 41](#_Toc312191517)

[ Bennett v. Jeffreys (NY, 1976) 41](#_Toc312191518)

[In re B.G.C. (IA, 1992) 42](#_Toc312191519)

[DeBoer v. Schmidt (Mich. App. 1993) 42](#_Toc312191520)

[Lehr v. Robertson (US, 1983) 43](#_Toc312191521)

[Matter of Jacob (NY, 1995) 43](#_Toc312191522)

[Debra H. v. Janice R. (NY 2010) 44](#_Toc312191523)

[Lofton v. Secretary of Dept. of Children and Family Services (11th Cir, 2004) 44](#_Toc312191524)

[Miscellaneous Supreme Court Decisions on the Parent-Child Relationship 45](#_Toc312191525)

[Troxel v. Granville (US, 2000) 45](#_Toc312191526)

[Deshaney v. Winnebago County Dept. of Social Services (US, 1989) 46](#_Toc312191527)

[Nguyen v. Immigration and Naturalization Services (US, 2001) 46](#_Toc312191528)

[Michael H. (putative father) v. Gerald D. (biological mother's husband) (US, 1988) 47](#_Toc312191529)

[Representing Children and the Role of Counsel for Children 50](#_Toc312191530)

[Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children 50](#_Toc312191531)

[Matter of Jamie T.T. (NY App Div, 1993) 51](#_Toc312191532)

[In re Patricia E. (Cal. App, 1985) 52](#_Toc312191533)

[CONSIDER WHEN AND HOW MUCH CHILDREN EMERGE AND SEEM TO MATTER AT ALL 53](#_Toc312191534)

# 

# OVERVIEW

* Impossible to conceptually isolate the subject of children’s rights from thinking about adults
  + Children are interdependent on adults in most cases
    - Rules regarding children are simultaneously rules affecting adults – can be rephrased as laws about adults and their views about children
      * Can deny parents certain choices re: child-rearing
        + i.e. curfew laws may deny adults the opportunity to associate with children in public at night, or to choose to let their children stay out past midnight
      * Can benefit parents and the world they want to live in
        + i.e. child labor laws partly passed to ensure adults wouldn’t have to compete against children for much-needed jobs
    - Rules about children are always made by adults
  + Tension in children’s rights arena between adults deciding what is best for children by restricting their rights or enhancing them
    - i.e. child labor laws / compulsory education
      * Could be seen as great victories in terms of protecting children’s rights, but could also be seen as restrictions on a child’s freedom (if viewed from children’s liberation perspective of ‘60s children’s rights movement)
* Children’s rights is a slogan in search of a definition

Themes:

* Relationship between children, parents, and the state
* Does the court come up with answers by applying law, or are answers reached for lots of reasons, with law being the excuse?
* Meaning of “child” – defined by being under a certain age, also defined by being someone’s offspring

## Painter v. Bannister (IA, 1966)

* Issue: custody dispute between father and maternal grandparents
  + Father not present custodian – asked Bannisters to take care of Mark and 15 months later asked for custody back. Father is a hippie living an "alternative" lifestyle.
* Holding: court concludes that child’s BI will be better served if he remains with grandparents
  + Specifically says neither party is unfit
  + Mentions presumption of parental preference – but dubious that this presumption is sufficiently considered by the court
    - Based on presumption in favor of biological parent + mother’s preference for Mark to remain with his father = court has 2 legal bases to grant custody to father
      * Should need to disprove that such custody is in BI of the child to ignore these bases – doesn’t seem like court does given their reasoning
    - Defenses of court’s decision: grandfather treated as psychological parent, history of child development while at Bannister’s home
* Funny story – he ends up with his father anyways by choice
* Themes:
  + Court discriminates against the hippie father.
  + Psychological Parents – he's hold enough to know better
  + Best Interest v. Parent's Rights

Major issues that arise from this case 🡪

* **Rebuttable presumption 🡪 fit parents have a right to retain custody of their children**
  + Practicality / momentum concerns – law should presume that an ongoing custodial relationship which is successful should be maintained and not disrupted
    - But in *Painter v. Bannister*, granting custody to father would mean that Mark would be removed from the home where he was currently living (w/grandparents)
  + Why should we view the parent-child relationship as presumptively more valuable?
    - Dealing both with child’s AND parent’s rights
    - Marty would argue we don't want these to be rebuttable.
  + **Should we force children to suffer the cost/harm of the disruption of the psychological parent relationships in order to honor the antecedent relationship?**
    - Don’t want to say that a child should be forced at all costs to return to an antecedent parent, if it would have a serious and disturbing effect on the child
* **Do we want judges making custody decisions on a case by case basis, or do we want more of a standardized formula that will restrict their ability to pass judgment, but may be too rigid in certain circs?**
  + Maybe we think a best interest test is scary because it invites biases

Guggenheim’s ideal way for court to reach its conclusion (custody to grandparents) 🡪

Should say the lifestyle differences are irrelevant, and recognize that legally they should come out in favor of the father – but given the disruption this would cause in Mark’s life, they can’t justify taking him away from Bannisters

* Would remove the court’s values from the decision, base this on something more legal and scientific
  + Though not very legal / scientific in this instance
* Says instead the court is telling hippies they can live whatever lifestyle they choose, but they are going to have to face reality eventually
  + Says outright that it isn’t their prerogative to determine custody based on a value determination between the two lifestyles – but then next ¶ court looks at the type types of homes offered based largely on the background / lifestyle of the father vs. grandparents
* Lawless, violent decision by the court.

Outstanding questions:

* What if it was 10 months? 1 night? 1 week?
* Avoiding risk of harm v. best interest -

# Judicial Allocation of Power Between Parents and the State

First statements by SC that the authority of parents to raise their children as they see fit is constitutionally protected:

## Meyer v. Nebraska (US, 1923)

* + Issue: NE law prohibited the teaching of any language other than English to students before they passed 8th grade
    - Teacher challenged the statute
  + Holding: the law is unconstitutional
    - Certain laws regulating education are allowed – but differentiates teaching a foreign language because not harmful
      * So seems to be looking at children’s right to learn foreign language, as well as parent’s right to have child taught a foreign language
    - Also concerned about teacher’s right – teacher was being deprived of his lawful right to engage in employment.
      * *Lochner* era jurisprudence
      * Learning foreign languages “not injurious to the health, morals, or understanding of the ordinary child”
  + Alternative to giving the parent right's here is to give the state rights – and that's often a less desirable end.

## Pierce v. Society of Sisters (US, 1925)

* + Issue: Oregon law required that all children attend public school
    - Challenge brought by religiously-affiliated private schools and military schools
  + Holding: the law is unconstitutional
    - The act unreasonably interferes with the liberty of parents to direct the upbringing and education of their 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”**
      * Court again mentions how private schools are not inherently harmful, but actually regarded as useful and meritorious
    - States have an interest in regulating schools and content (and attendance) but not the type of schools.
  + Argument against the state's intervention
  + THEME: exposing kids to the world is good? Balancing that against the parent's right in keeping them secluded and the state's interest in a uniformly educated populace.
* Why do *Meyer* and *Pierce* survive the *Lochner* era?
  + The statutes at issue violate SDP
    - Must be a fundamental right to fall within SDP protection
    - Parental rights not mentioned in Const – so are they protected?
      * Asking ourselves how we feel about a particular right, why we feel that way, what the consequence would be if it weren’t declared fundamental
      * **Court says 14th Amend liberty rights include the right to bring up children**
  + If decided these cases today, would need a different logic than fundamental rights a la *Lochner*
    - Maybe right to rear children is partly enumerated in Const
      * Right to observe your religion carries with it a right to inculcate your religion in your children 🡪 way of maintaining Framers’ vision that multiple religions will flourish in this country
        + *Prince* and *Yoder*
      * Or right to freedom of speech includes right to teach certain things to children
    - Also compelling cultural and biological reasons to default to parents as the ones who should make decisions for children, rather than the State

## Prince v. Massachusetts (US, 1944)

* + Issue: Jehovah’s Witness aunt convicted of violating child labor law – her niece sold copies of religious magazine on the street
    - Law restricts parent’s right to control details of child’s upbringing
  + Holding: law is constitutional
    - Announces rule that *Meyer* and *Pierce* survive *Lochner* era 🡪 there is a private realm in which the state cannot enter
      * Parental rights are fundamental rights, and therefore subject to heightened scrutiny 🡪 **“the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”**
    - Also announces limiting principle 🡪 parents can’t raise their children as they see fit when their choice of child-rearing endangers the child
      * Parent’s privacy right trumps except when it endangers the child – then state as parens patriae may restrict that right
        + Says street preaching can cause harm to children
      * Case still in line with *Meyer* and *Pierce* because they didn’t have any reason to articulate this – rights at issue there didn’t harm children
  + Child is a nonentity – the child is "condemned" to hell because she cannot proselytize
  + Holding is limited to the actions in public.
  + To understand this holding, must keep in mind:
    - Court not as uncomfortable now upholding a law that regulates liberty rights as post-*Lochner* court was
    - Jehovah’s Witnesses never narrowed their case – always forced court to rule on the facial constitutionality of the law at issue

## Wisconsin v. Yoder (US, 1972)

* + Issue: compulsory education law required parents to send their children to school until age 16
    - Amish parents challenged law saying it interfered with their freedom of religion – said children’s attendance at HS was contrary to their religion / way of life
  + Holding: court finds the law unconstitutional as applied to these facts
    - Importance placed on facts about Amish life
      * Looks at value of education specifically for Amish children
        + Need to be prepared for a different kind of life
        + Amish don’t collect Social Security – uneducated Amish children won’t end up on public dole
    - State argument was that education is necessary so citizens can participate in politics and be self-reliant
      * Court says this is an insufficient compelling state interest to justify applying this law to the Amish – the schooling they receive is applicable to the life that they're going to lead.
      * Guggenheim: state should have said education important so children can acquire the necessary skills to participate in their enumerated rights. This argument is less valid past the age of 14.
      * Douglass's dissent – need to ask the kids if they want to be oceanographers or Amish. First case we've read in the class that mentions child's right to have a voice. Age is obviously a factor
    - Amish did not object to schooling through 8th grade.

Meyer and Pierce substantive Due Process right – but still good law because it's still against the law to have the state get kids to go against their parents. Could argue that Meyer does give the state some right to govern curriculum.

Barbara Bennett Woodhouse, Who Owns the Child?***: Meyer and Pierce and the Child as Property* (1992)**

* Argues that *Meyer* and *Pierce* reflect a conception of children as the property of their parents, although they appear to be liberal responses to legislation that was conceived in prejudice

Main issues:

* **Looking broadly at who should be making decisions with regard to child-rearing**
  + Many legal questions in this area focus on whether, in a particular context, the parents or the states have authority to make decisions on behalf of the child
    - Under American law, the rearing of children generally takes place in families and is principally the responsibility of parents
    - The role of the state is a subsidiary one of support and supervision
  + Analysis of policies regulating the family often takes the form of a rather inexact balancing of parents’ interest in the authority to rear their children against the state’s interest in children’s welfare
    - Parameters of parent and state authority not only defined by consideration of what policies serve the state’s objective of protecting children but also subject to constitutional definition and constraint
* What are the states’ interests in children?
  + State as parens patriae
  + Concern about the well-being of the individual involved
  + Concern with making sure children grow up to be self-sufficient, not burden on the state

# Parental Power to Decide Medical-Related Care

**When and under what theory can the state trump parental decision-making?** (looking for rules)

## In re Dubreuil (FL, 1993)

* + Issue: lower court held that a married but separated woman who chose not to receive a transfusion for religious reasons could be compelled to receive medical treatment because her death would cause the abandonment of her minor children
  + Holding: no abandonment found, and no proper showing that there might have been
    - State claimed compelling interest to intervene – preventing abandonment
      * But court says the lower court improperly assumed that because parents were separated and mother was primary caregiver, her death would = abandonment
        + Should have looked into father’s or extended family’s situation
        + Says court shouldn’t assume there is some essential status involved in being a mother
    - This ducks the real issue – if abandonment were found, would it be a sufficient reason for the state to intervene?
      * Abandonment doctrine prioritizes the rights of children to be raised by biological family member over her right to reject treatment
      * But we have liberal rules for surrendering parents’ rights, and abandonment doesn’t fit in
  + Court says “[t]he State’s only concern is that the children would be cared for and would not be a burden on the State.” (FN12)
    - Guggenheim: doesn’t seem state would ever have a compelling interest to intervene

## In re Sampson (NY Fam Ct, 1970)

* + Issue: mother refuses for religious reasons to allow a blood transfusion for her son
    - Consented to surgery to remedy his facial deformity, issue was whether he could have a blood transfusion if the need arose during surgery. Mother is alright with the procedure but not the transfusion if necessary.
      * Doctors recommended surgery for the betterment of Kevin’s life, but none said it would better his medical condition and it was also very risky
    - Is it child abuse to not allow the child to have it? – Parent centered question
    - Can the judge force it over the parent's objection if the child wants it? (and what if the child is too young to "want it"?) – child centered question
  + Holding: although mother’s religious beliefs are sincerely held, they must give way to the state’s paramount duty to insure the child’s right to live and grow up without disfigurement
    - Guggenheim: religious issue here makes court more comfortable with interfering
      * Not saying they are limiting parental rights—rather limiting religious rights
      * They won’t allow a parent exercising her religious freedom to make a decision that will harm her child
    - Court thinks they are addressing what is in the BI of the child – sound mind and sound body.
      * Guggenheim: this isn’t the right question to be asking – deep flaw is that what the mother did to constitute parental unfitness isn’t developed in a principal way
    - Yes – the court has the right to authorize the procedure. Like Prince – you have the right to your religious beliefs but you can't make the child suffer.
      * Had to find the child neglected in order to authorize the surgery
      * Arrogance against the JW's "illogical" beliefs.
    - Undermines parents right but in the way that is consistent with Prince.

## In re Green (PA, 1972)

* + Issue: again dealing with a mother who consented to surgery but not to blood transfusions
  + Holding: state doesn’t have an interest of sufficient magnitude outweighing a parent’s religious beliefs when the child’s life is not in immediate danger
    - **1st question 🡪 whether or not Ricky is a neglected child**
      * **Can’t ask what is in the child’s best interest without something like neglect allowing the state to enter the private realm of the family**
        + **Fit parents are allowed to make decisions for their children**
        + Means parents have the right to do a lot of awful things that are below good but above unacceptable
      * Though court is loathe to conclude that child is neglected
    - 2nd question 🡪 how strong must the state’s interest be when dealing with non-fatal options? (child will continue to live if procedure isn’t surgically corrected)
      * Court looking at how this case will be applied down the line – so more inclined with fatal/nonfatal distinction
      * As opposed to *Sampson* court, which just looked at what was right in this particular situation in the opinion of the court
  + **Real tension in *Sampson* and *Green* 🡪 validity of the BI standard**

## In re Hofbauer (NY, 1979)

* + Issue: did parents who opted for a lesser regarded treatment for their son exercise due care he had Hodgkin's disease by giving him a metabolic treatment.
  + Holding: state can’t intervene here – parents’ conduct was lawful
    - **1st question 🡪 is Joseph a neglected child?**
      * **Court inquiring into whether this is tolerable parenting or not**
        + **Where parents are thoughtful, deliberately not treating their child a certain way, court is likely to find that they are sincere and did something their religious judgment led them to do**

Here bases that on parents’ education and careers – so may be court making a judgment about parents’ value system

TEST: minimum degree of care.

* + - * + As opposed to *Sampson* where courts found the parents’ choice to be un-thoughtful
      * Court says parents must make a reasonable effort to provide a course of treatment for their child
        + Here sufficient that they took him to a **licensed** doctor
        + As long as alternative treatment is legal, it is acceptable parental choice
  + High standard in *Hofbauer* really same question as in *Sampson* – so they should have been inquiring into whether Kevin was a neglected child or not
    - The physician's other course of action only had 40% chance of success.

## Hermanson v. State (FL, 1992)

* + Issue: parents convicted of murder because they failed to provide their daughter with conventional medical treatment, which resulted in her death
  + Holding: state legislature didn’t clearly indicate the point at which parent’s reliance on religious beliefs in the treatment of his children becomes criminal conduct
    - Legislature must clearly indicate when parent’s conduct becomes criminal – without notice to parents when their reliance on spiritual healing becomes negligent.
  + First introduction to idea of punishing parent for his failure to do something on behalf of child
    - Neglect (civil) vs. criminal prosecution
    - Guggenheim: inflicting punishment gets away from what the State is supposed to care about – should be most concerned with the safety and welfare of the child

## Newmark v. Williams (DE, 1991)

* + Issue: parents refused treatment for their child who had a significant facial tumor. Deference granted to parents in part (we assume) because of their status (white/graduate degrees).
  + Holding: state can’t intervene in this situation
    - **1st question 🡪 is Colin a neglected child?**
      * **Court says no – so state has burden of proving by clear and convincing evidence that intervening is necessary to ensure health and safety of child**
    - 2nd question 🡪 is state’s interest strong enough to outweigh parents’ right to decide what is best for Colin and Colin’s own right to a dignified life?
      * Says state’s interest diminishes as risks of treatment increase / benefits decrease
      * Court stressed the negative aspects of treatment, essentially ignoring the fact that Colin was likely to die imminently without the surgery

## Cruzan v. Director, Missouri Dept. of Health (US, 1990)

* + Issue: pro-life state insisting on the right to prefer life, even at the cost of the Cruzan family living with their daughter in a vegetative state. Cruzan's wanted to remove feeding tube – did Missouri need clear and convincing evidence to remove the feeling tube.
  + Who pays? Can the state force the family to take on the burden of keeping the person on life support?
  + Holding: state may apply clear and convincing standard to whether guardian’s decision is right

Main issues:

* Limits of freedom to make decisions about continuing life
* Relationship of an adult’s right to live the life she wants vs. parent’s right to do the same

**How much do we want to constrain judges to abide by a rule of law at cost of doing right in particular cases?**

🡪 Family court used to function less like criminal court – maximized flexibility and opportunity to serve children, but now relies on precedent, legal reasoning, etc.

# Juvenile Delinquency and Due Process of Law

**History of the Juvenile Court**

Juvenile Justice Reform 🡪

* Shift from classical criminology to positivism
  + Classical criminology: believes that people choose what they do and the law can serve as a deterrent by calculating where people make the choice to commit a wrongful act
  + Positivism / positive criminology: view that conditions independent of the individual cause criminal behavior, and so want to treat person and change those conditions
* Juvenile Court founded in 1899
  + Called for specialized proceedings to handle cases involving children who deserve to come before the court for some reason outside of the criminal court process
* *Gault* had a huge impact – changed the juvenile justice system in many ways

Brief Primer:

* Parens patrie – child is always in custody of the state in some capacity.
* Should the state assign children based on their wealth/education – courts have to decide after a movement.
* In Loco Parentis – state as a babysitter, what we moved to after reforms.
* Parens patrie – the state is always the parent.
* Chicago created the first juvenile courts.
* Move to due process model: original movement was to increase punishment because crimes didn't decrease. Then it came to be understood that poverty can cause crime.

*Gault*, *Winship*, *McKeiver* and the evolution of the juvenile court

## In re Gault (US, 1967)

* + Issue: child charged with being a delinquent minor (being lewd in the presence of a woman over the phone), found guilty on evidence of his confession
    - Problems: no transcript (so not clear what he confessed to), no lawyer/advocate for him in the room, and sentenced indeterminately up to 6 years when punishment for this crime for an adult would have been 2 months. No parents were even notified.
    - Gault's lawyer brought the judge in as a witness in an habaes hearing – there wasn't even an appellate level because it's a juvenile court.
  + SCOTUS said they hadn't thought about this before but that juvenile court system is in shambles.
  + Holding: there must be (1) notice of charges, (2) right to counsel, (3) right to remain silent, and (4) right to confront and cross-examine
    - **Court says the Constitution forbids adjudication and placement without due process that closely resembles the criminal justice system**
      * Thrust of the case was plainly to rule in a manner that would permit Juvenile Justice to survive – didn’t want to transform it so dramatically that it would cease to exist
      * Court preserves a great deal of what is special and different about JJ – but also has potential to be applied so that juveniles won’t get the help they need
    - Ultimately says JJ system is a quasi-criminal proceeding and that judge's can't be counted on to look out for the child.
    - They go so far as to make a holding for the future – this is the floor not the ceiling.
  + Black v. Harlan
    - Harlan – notice, counsel, and record
      * They just labeled him. Parents rights were violated too.
      * Black disagrees with the Winship analysis – no right to proof beyond a reasonable doubt.

## In re Winship (1970)

* + Issue: is the standard of proof beyond a reasonable doubt constitutionally required?
  + Holding: court says yes – all juveniles must have their cases dismissed unless there is proof of their wrongdoing beyond a reasonable doubt
    - Prefer to err on the side of being wrong about concluding someone’s innocence rather than erroneously concluding guilt

## McKeiver v. Pennsylvania (US, 1971)

* + Issue: are jury trials required as a matter of fundamental fairness?
  + Holding: jury not required in juvenile justice system
    - *Duncan v. Louisiana* held that the essentials of fundamental fairness require a jury trial whenever someone is subject to a loss of liberty for more than one year
      * So fundamental fairness test would mean this issue has already been decided
      * But seems like court changed the *Gault* test 🡪 from whether it measures fundamental fairness to whether the procedural requirement under consideration might threaten the JJ system in its entirety
        + Opinion doesn’t make clear why this decision might be a sensible compromise for those who believe that JJ should survive – but it is to some degree
      * Focus on the impact of the jury – in JJ system the jury the same impact. The fact-finding interest is unique in a quasi-criminal proceeding.
      * 6-3 Plurality opinion. Harlan's concurrence – kids don't get everything adults get; also mentions the trauma of submitting a child to a jury trial.

***Gault* relies on Due Process Clause “fundamental fairness” test in determining juvenile rights** (selective incorporation case)

* Could have also used Equal Protection route
  + Black’s concurrence in *Gault* goes in this direction – thinks “fundamental fairness” gives judges too much discretion
  + But majority worried that EPC might cause the destruction of the JJ system
    - Would have to bring in every element of adult criminal trials when EPC applies
    - *McKeiver* worries about this – would have to mandate jury trials for juveniles under EPC
      * Black dissents from *McKeiver* – says that since adults have jury trial rights, juveniles must have them as well
* Black in greatest disagreement with Harlan (concur-in-part, dissent-in-part in *Gault*)
  + Harlan sees JJ as a rare experiment in social justice – keenly interested in its purpose
    - Black didn’t care about the purpose – for him proceedings were sufficiently criminal-like
  + Harlan relishes the opportunity for judges to go out and create a fair justice system
    - Says the only 3 procedural requirements required for state juvenile courts should be: (1) notice of the proceeding, (2) counsel, and (3) a written record
      * Allows state the flexibility to determine if more is required

***Gault*, *Winship*, *McKeiver* juvenile justice model 🡪 conceived of juvenile court as an individualized system**

* Traditionally less interested in whether you did it, but why you did it
  + Focus on the *why* meant open-ended sentencing
  + No preconceptions that you deserve something – instead figure out what the individual needs and give it to him

Changing juvenile justice system

## Schall v. Martin (US, 1984)

* + Issue: NY preventative detention statute allowed any juvenile to be detained pre-trial on the reasoning that there would be a “serious risk” if released
    - Argument was that since there were no diagnostic tools to determine who is a serious risk, this only occasionally / accidentally prevented crime
      * Not a challenge to the power to detain pre-trial as such – mostly a procedural challenge to an arrangement that resulted in an arbitrary exercise of power
  + Holding: preventative detention serves a legitimate state objective, and the procedural protections afforded to pretrial detainees satisfy DPC requirements
    - Parens patriae (repudiated in *Gault*) is awakened and strengthened – idea that the court is preventing the child from doing something so terrible that he will one day be grateful (Thanks a lot, Rehnquist.)
      * Protecting the child, not punishing him
    - **Doesn’t take seriously the idea that child’s liberty is even being imperiled**
      * **Children are always in custody, so being at home with their parents treated as constitutionally similar to being in prison**
  + *Gault* court says state can’t defend its action by merely stating their purpose to serve children well
    - Court instead more candidly appraised what the state was doing
    - If candidly appraise what state is doing here, hard to believe the court when they say they are detaining juveniles to help them
      * This is a repudiation of much of what *Gault* was meant to stand for
  + **Notion that children are always in some form of custody.**

Evolution of criminal justice system 🡪

* Pre-modern: *Gault*, *Winship*, *McKeiver* case law
* Modern: overreaction – “tough on crime” politics and victims’ rights movement
  + **Trend for many who were once prosecuted as juveniles in juvenile court now being prosecuted as adults in criminal court**

Prosecutor commonly has discretion about where to bring case, court determines if transfer of juvenile to criminal court is in the BI of the child and the community

* + - * Literally deciding whether it’s in the BI to be subject to the death penalty

Opportunity for kinds of cases and the lower age of individuals who can be transferred has changed dramatically

* + **Shift in the purpose clause from quaint trend to fashion punishment that fits the individual person/situation to harsher system of punishment with other purposes**
* Post-modern: youth court reaction
  + Reaction to the harshness of criminalizing juvenile wrongdoing, desire to get back to the roots of the juvenile justice system
    - Pre-*Gault* was a time when children didn’t have legally recognized rights, but it was also a kinder, gentler time – children were forgiven more than they are today
    - America has chosen to treat children in harsher ways than in before they had rights

# Constitutional Rights of Children – At School

Parallel trend between these cases and JJ generally – heavy emphasis on children’s rights in the 60s, waning in the 70s/80s, and disappearing in the last 15 years

**Privacy – 4th Amendment and schools**

## New Jersey v. T.L.O. (US, 1985)

* + Issue: proper standard for assessing the legality of searches conducted by public school officials
  + Holding: the search didn’t violate the 4th Amend
    - Legality of a search of a student depends simply on the reasonableness of the search under all of the circumstances (variable standard)
      * (1) must consider whether the action was justified at its inception
        + Will be when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated/is violating either the law or the rules of the school
      * (2) must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified it in the first place
        + Will be when measures are reasonably related to the objectives of the search and not excessively intrusive in light of student’s age/sex
    - **Faithful to *Tinker* vision that schoolchildren have rights – but enacts a compromise**
  + Court notes that in carry out disciplinary functions pursuant to school policies, school officials act as representatives of the state – not merely as surrogates for the parents
    - Doesn’t mean that states can’t enact a higher standard of privacy – but under fed const only reasonable belief that student has violated law/school rule is required
      * Says there was such a reasonable suspicion here, so search was legal

## Veronia School Dist. v. Acton (US, 1995)

* + Issue: is drug testing of student athletes constitutional?
    - School board found that student athletes were leaders of a “drug epidemic” in the community, so requires anyone who wants to participate in school athletics to consent to an initial drug test and then random drug testing
    - Was it lawful to deny a 7th grader a place on the team because he didn't take a drug test.
  + Holding: the school’s policy is reasonable and hence constitutional
    - Factors considered are: decreased expectation of privacy, relative unobtrusiveness of the search, severity of the need met by the search including the optional nature of a sport.
      * **Scalia views schoolchildren as having lesser expectations of privacy, and even lesser for student athletes**
        + Resembles *Schall v. Martin* – court said children always in some form of custody and therefore have a diminished liberty interest
      * Also takes into account school board’s justification based on drug epidemic
    - **When children’s rights are constrained for the twin justifications of protecting the children being constrained AND because the state has a duty to protect others who might be impact by the actions of those children 🡪 becomes a stronger argument**
  + Guggenheim: very often court’s first question is “what do we want” – then asking “what should the law say”
    - In trying to answer the second questions, your view on children’s rights comes into play
    - Those who think the power to test should be quite broad believe there is a pro-child purpose behind the power
    - Those who think the power should be very restricted will begin inquiry by saying a child’s right in full becomes a right to thwart the state’s desire to help him
    - Vision of Gault has not survived – now they are just kids. The parent's choice rules here – parents like drug tests.

## Board of Ed. v. Earls (US, 2002)

* + Issue: school extends drug testing requirements to students involved in all extracurricular activities
    - Though no drug problem in school (as opposed to “epidemic” in *Vernonia*) just have kids plus the possibility of drug use.
  + Holding: the requirements are constitutional
    - Court retains fiction that we can test these kids because they are making a choice to participate in an extra curricular.
      * Fiction that we will only burden students who volunteer for something
    - But **the larger power to search comes from the idea that children are always in someone’s custody, and therefore while in school are in the school’s custody** 
      * Ignores the fact that school custody isn’t voluntary

## Roper v. Simmons, 543 U.S. 551 (2005)

* Issue: should there be a death penalty for juveniles?
  + Should we have death penalty for kids
    - Diminished culpability
    - Hard to predict what they're going to do in the future.
    - The goals of punishment do not apply.
    - Tied to culpability – the system failed the kid.
  + A2 a 1989 case that said you could execute 16 and 17 year olds.
* Holding: no death penalty for juveniles.
  + If they're not responsible for anything else why do we make them responsible now.
  + All the reasons we want a quasi-criminal court for juveniles is why we can't kill'em.
* Kent v. U.S.: Juvenile Court was a privilege not a right. But there needs to be a procedure for moving from juvenile to criminal.
* Historical move during the '80s to hold kids more responsible and trying juveniles as adults.

## Graham v. Florida, \_\_ U.S. \_\_, 130 S.Ct 2011 (2010)

* Life without parole for non-homicide crimes.
* Holding: Can't do it.
  + 5 justice majority with not much analysis.

## J.D.B. v. North Carolina, \_\_ U.S. \_\_, 131 S.Ct. 2394 (2011)

* Ratifies the "science of being a juvenile"
* Roper and Graham put limits on punishments. What remains is the question of what sanctions are allowed.
* Rule: Children are different than adults in ways that affect the procedural requirements of the Constitution for interrogation.
  + When you interrogate a child you cannot assume that they understand that they are/are not in custody.
  + There is a different procedural rule for children than in adults.
* Unique from Graham – because it's about the science of being different.
* Consequences:
  + Police will warn kids earlier
  + Court will determine when an interrogation is happening
  + Translation of Miranda rights to kids.
  + However, JDB won't matter if we have a "kid's Miranda"

## Safford Unified School District #1 v. Redding, \_\_ U.S. \_\_, 129 S.Ct. 2633 (2009)

* Strip search of a teen – checked her bar for OTC pain killers.
* Was the search reasonable?
* Holding: NO
  + Not reasonable to think that it was in her bra or panties
  + No DANGER
* Ginsberg played a role in making sure that the violative nature of the search was recognized by the other justices.
* Court doesn't address the rule against Advil because that's an issue for local control.

# Speech and Expression – 1st Amendment and schools

## West Virginia State Board of Ed. V. Barnette (US, 1943)

* + Issue: can state compel all students and teachers to salute the flag?
    - *Minersville v. Gobitis* (1941) upheld the power to discipline Jehovah’s Witnesses to salute the flag as part of their religion
      * But here court reverses on other grounds – never reaches the question of religious freedom (although Jehovah’s Witnesses are bringing suit)
  + Holding: compelled salute/pledge is unconstitutional
    - **Case stands for the** **rule that the state can’t make anybody speak** – court says compelled salute/pledge transcends constitutional limitations on state power and invades the public sphere of intellect and spirit which is protected by the 1st Amend
    - Maybe not about children’s rights at all – but about the state’s inability to standardize youth, the state’s limited ability to control its citizens
      * Then maybe recognizes child’s right only as a corollary of gov't limitations / power – because its authority is limited here, the children have rights
  + *Barnette* isn’t celebrated as a children’s rights case and isn’t really celebrated in US at all
    - Celebrated by America when showing off its “freedom” to other countries
    - But children in public schools are never affirmatively told that that they don’t have to participate in the pledge of allegiance
    - Marty hates that we still say the pledge in schools

## Tinker v. Des Moines Independent Community School Dist. (US, 1969)

* + Issue: children decided to object to Vietnam War by wearing black armbands to school
    - School created policy that students were required to remove armbands, and refusal would lead to suspension
  + Holding: **unless the conduct substantially interferes with the operation of the school or with the rights of other students, the school doesn’t have a right to restrict the speech**
    - Novel notion that students in school as well as out of school are “persons” under Const
    - Famous idea that students don’t shed their constitutional rights at the schoolhouse gate (the unmistakable holding of this court since 1920).
      * Fortas (maj.) specifically views school as a world of freedom for children – fundamentally a place for students to express their opinions
      * Doesn’t mention the fact that there are very young children involved
    - Interesting Note:
      * A child does not have the right to the free exercise of religion (Prince/Barnett) but as of Tinker have the right to free political exercise.
    - "But the kids are just proxies for their parents." A2: Aren't all kids proxies for their parents.
  + Justice Fortas (also author of *Gault* and *Kent*) establishes himself as the leading children’s rights justice ever to sit on the Court
    - Black’s dissent – extremely upset at the idea of children having power over teachers
      * Also stresses the young age of some of the children involved –concerned that this is about children being a mouthpiece for their parents’ speech

## Bethel School Dist. v. Fraser (US, 1986)

* + Issue: can school discipline a student who gave a lewd speech at a school-wide assembly?
  + Holding: school does have this power
    - Two justifications:
      * Educational interest in teaching boundaries of socially appropriate behavior
      * Protective interest in students who were the recipients of the speech – they were a captive audience.
    - Court doesn’t say whether there was a disruption of the operation of the school / rights of other students (which *Tinker* held to be the standard)
      * Differentiates *Tinker* because of the content of the speech – “obscene” speech vs. political speech. Obscenity gives the schools more latitude.
        + However, most people wouldn't say that this is obscene.
        + Tinker was about the substance of the conversation, Fraser is about the manner

## Hazelwood v. Kuhlmeier (US, 1988)

* + Issue: did principal’s removal/censorship of articles from the school newspaper violate the students 1st Amend rights?
    - Masthead of school paper promises the world that only speech that materially and substantially interferes with the requirements of appropriate discipline can be found unacceptable and therefore prohibited (resembles *Tinker*’s requirements)
    - But principal sees potential problem with certain articles, so censors entire pages
  + Holding: educators don’t offend 1st Amend “by exercising editorial control over style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”
    - Concerned about the rights of the other students in the school, over whom the principal holds a guardianship responsibility
      * But simultaneously must be concerned about rights of students involved
    - **Meta-conversation is about whether we want children to make mistakes or learn good behavior by the force of power – ECHOED IN MORSE**
  + Message plainly delivered from case 🡪 **the court has given power back to school officials to decide what they want to do**
    - *Tinker* hasn’t been overruled (court makes exception for “school-sponsored speech”), but court has a very different attitude
      * In *Fraser* and *Kuhlmeier* court pulls back children’s rights
      * Like *Barnette* – game in which we pretend we value rights in the schoolhouse, but we actually don’t

## Morse v. Frederick (US 2007)

* + Bong hits for Jesus! School sanctioned trip across from the school to watch the Olympic parade.
    - Sign was removed and they were suspended for 10 days and served 3
  + Issue: Can the school punish? Can the school be held liable?
  + Holding:
    - School cannot be held responsible for damages. There were no damages, never mind qualified immunity.
    - School reasonable authority to remove the sign and discipline the student.
      * Drugs are scary and deserve special attention which is a reasonble response
  + Marty's Musings:
    - Are we losing a chance to teach?
    - Abandoning the clear and present danger test.
    - Morse is about content of the speech.
      * And the manner – the publicity of it. And the lack of seriousness.
      * What about new public speech – the internet.

# Constitutional Rights of Adolescents – First Amendment (Outside of School)

These issues are also deeply connected to adults 🡪

## Ginsberg v. New York (US, 1968)

* + Issue: Ginsberg convicted of violating NY statute by selling a girlie mag to a juvenile
    - What are the rules regarding sexually explicit material and children’s access to it? And what burden does that impose on store owners.
  + Holding: court upholds the statute based on legitimate state interest in safeguarding the well-being of children by concluding that some material is harmful to children
    - **Justified in part by state as parent – looking out for parents’ interests**
      * Notes that parents can still buy dirty magazines for their children if they want
    - **Also justified by state concern for children’s well-being**
      * Says restricting access to certain materials advances their moral development
        + But does this really make sense? Will they be harmed by this stuff?
        + Also can’t they still get it in other ways?

Not clear whether a law restricting parents’ ability to buy these materials for their children would also be upheld

* + - * Do we know what is obscene? What if the legislature makes it more restrictive? Does it makes sense that there's the ban when parents can give their kids thing.
        + First Amendment makes this special: parents can give out smut but not cigarettes or booze to their kids.
        + Default conservative parent is aided by this and the wacky liberal parent can buy all the smut they want.
  + Brennan writing for majority – not usually associated with censorship
    - Guggenheim: Brennan partly restricting children’s access to assure that adults can still read dirty magazines
      * Political idea that you can give adults a lot as long as children won’t have access
    - Could also say this contraction of children’s rights is a way of securing that same child’s right to access this material when he grows up
      * Then could say decision is also friendly to children
    - And also partly concerned that people think he is responsible for making the world a dirtier place – so scaling back a bit in this area
  + Stewart’s concurrence: comes up with a simple justification for this law that says it’s not about equality – children really are different because they lack full capacity for individual choice
    - Which is the presupposition for the 1st Amend
      * See similar reasoning in *Roper*
  + Fortas’ dissent: has no problem with the abstract rule that children should possibly be denied access to some things that adults enjoy – be he wants to know what they are being denied access to in this particular case before signing on to such a rule
    - Says court must define what is obscene for minors

## Brown v. Entertainment Merchants (SCOTUS 2011)

* + Facts: the law similar to Ginsberg – under 18 can't buy violent video games without parental supervision
  + Holding: Overturn the ban.
    - Turns on our culture of violence. We never ban violence culturally
    - Compared to Ginsberg, sex will mess you up, but violence is fine.
    - Scalia sounds like a children's rights advocate which is messed up considering is vote on the Playboy and putting the burden on the seller.
  + Alito's Dissent
    - Wants the threshold to be clearer for what is violent material but agrees that violent games may be harmful
  + Breyer's Dissent
    - Weird that you can't buy porn as a child but can bind and gag women in a video games.
* Comparison to Prince: Why can we keep kids safe from proselytizing but not violent games.
  + We like restricting: obscenity (Ginsberg), martyrdom (Prince, Samson), and drugs (Morse, Veronia, Earls)
  + We never restrict: violence
* Marty's Musings:
  + Studies tell us that violence is bad
  + Studies tell us that sex is good (Court says we don't require evidence to know that obscenity is bad)
  + Studies tell us drugs and alcohol are bad
  + SO WTF SCOTUS?
  + Also Notice to Stores was lax – how does he know what's ok to sell. What about restricting kids access to these constitutionally protected things.

## Interim Report of the House Committee on the Judiciary (1955)

* + Even with the bad image it painted of American's and how it was being used by the Nazi's to depict us as monsters we couldn't restrict it
    - Examples of Canadian attempt to restrict and the futility of it all.
  + Historical: we're always afraid that something is sending a bad message and ruining the kids.

## City of Dallas v. Stanglin (US, 1989)

* + Issue: city ordinance restricted admission to certain dance halls to juveniles
    - Lower court held that the ordinance violated the 1st Amend right of juveniles to associate with people of different ages
  + Holding: there is no such 1st Amend right
    - The city adequately justified the ordinance’s modest impairment of teenagers’ liberty
      * Limiting contact between juveniles and adults would make less likely illicit or undesirable involvement with alcohol, drugs, and promiscuous sex

## Schleifer v. City of Charlottesville (4th Cir, 1998)

* + Issue: challenge to the constitutionality of a juvenile nocturnal curfew ordinance
    - In this case, the ordinance has an exception for minors exercising their 1st Amend rights
  + Holding: curfew ordinance is upheld
    - State can limit parental freedom/authority when child welfare is at stake
    - Ordinance doesn’t “implicate the kinds of intimate family decisions” involved in *Yoder* and *Meyer*
    - Purpose of the curfew is to protect children from harm. There is a legitimate state interest in doing this – They used intermediate scrutiny, but even with strict scrutiny still would win
      * Because of first amendment right to assemble and travel – heightened scrutiny but because a child and not an adult not strict scrutiny.
  + Consistent with Schall – not removing a ride "children are always in custody"
  + Court doesn't use "parent's rights" to get rid of the law – instead focuses on balancing state interests against children's minimal rights as compared to adults.
    - Assertion of state interest over the parents – affirmative stomping on parents rights.
    - Tyranny of the majority
  + *Don’t argue that a 16 year old is different from a 17 year old – Marty will not be persuaded*

## Hodgkins v. Peterson (7th Cir, 2004)

* + Issue: challenge to the constitutionality of IN’s nighttime juvenile curfew law
    - Claim that the law violates minors’ 1st Amend rights and impinges on the SDP rights of parents to raise and control the upbringing of their children
    - Case becomes a story about reminding people of the collateral costs of being arrested – interweaving of privacy, parental rights, and limitations on state power
  + Holding: the curfew law reaches a substantial amount of protected conduct and is thus invalid
    - **Minors have 1st Amend rts – have to balance those rts with legitimate gov interests**
    - Must show that curfew law is no more restrictive than necessary to further gov interests
      * Here any juvenile participating in a late-night religious or political activity runs the risk that he will be arrested if stopped by the cops – so the ordinance takes away minors’ ability to engage in this protected speech/conduct
  + Guggenheim: curfew laws tap into what we think of as freedom
    - Usually associate curfews as being extraordinary powers invoked only in emergencies
      * But can think of curfew ordinances as reflecting a constant state of emergency
      * Justified as a protection from children being hurt – either from being victims of crime or from committing crimes themselves
        + Saying we have created a society sufficiently dangerous that we want to keep children locked up to keep them safe
    - Curfew laws also affect youthful-looking adults
      * We’re supposed to live in a society where we don’t have to justify who we are – but curfew laws imperil the freedom of young-looking adults
    - This case became about the indignity of the arrest – you get arrested and interrogated before you can assert your defense.

Artificial distinction between rights in the school / laws that impact children outside of school

* Can talk about as rights of children or as power of state officials
  + 1st Amendment
  + Movement
  + Privacy
    - 4th Amend
    - Curfew laws
* Can phrase this in two different ways 🡪 **either we will make children do something because it’s good for them, or because it’s good for us**

# Constitutional Rights of Adolescents – Privacy and Sex-Related Health Care

Again children’s rights best recognized through the lens of “what’s in it for the adults”?

## Planned Parenthood of Central Missouri v. Danforth (US, 1976)

* + Issue: for minor to obtain an abortion, law required the consent of one parent or person in loco parentis, unless the abortion is declared necessary to preserve the mother’s life
  + Holding: the state designated to parents a power that it doesn’t have in the first place
    - **“The State does not have the constitutional authority to give a 3rd party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient”**
      * But MO viewed this context as no different than requiring parental consent for a nose job, braces, etc – enacted law merely to make explicit what was implicit
      * Guggenheim: delegation argument fails – can’t be unconstitutional for parental rights to be exercised in the name of the Const
        + So maybe saying that parent’s constitutional right must bend when it is being applied to an individual who also has a constitutional right

Can say pregnant minors have a right of privacy and self-determination / autonomy

* + Guggenheim: think about Brennan’s logic in *Ginsberg* – would adults who favor strong abortion rights be willing to weaken them for children in order to hold onto them for themselves?

## Bellotti v. Baird (US, 1979) [*Bellotti II*]

* + Issue: MA law said minors can seek judicial bypass to obtain consent for abortion only after asking both parents for permission; judge must determine whether abortion is in the minor’s BI
  + Holding: court strikes down both of these provisions
    - Strikes down req that children first seek permission from both parents
      * Concern about the chilling effect this will have
    - Also strikes down req that judges rely on BI determination
      * Constitutionalized the idea that the mature minor has a right to self-determination – if judge determines that minor is mature, can’t overrule her decision to have an abortion
        + Only if minor found immature can judge engage in BI consideration
    - Powell essentially writes an advisory opinion – says come back with a law authorizing judges to grant petitions when the minor is mature or the procedure is in the minor’s BI
      * States don't have to have a parental consent provision but if you do it has to have a waiver
  + Guggenheim: how do we get from *Danforth* that says parents don’t have an arbitrary veto power to *Bellotti II* which says the court has such an arbitrary veto power?
    - Isn’t a judge’s determination of minor’s maturity / BI an arbitrary decision?
    - Says if somebody is to exercise the consent req for pregnant minors, he would choose parent over judge every time
      * In other contexts, presumption that a fit parent will make decisions in the BI of their children
    - **These cases about transferring power of children from parents 🡪 judges**
      * Not about expanding rights of adolescents, which is commonly thought
  + Is this case saying there is a privacy interest of which abortion is merely an example? Or is it the odd rule, in which the constitutional right isn’t the right to privacy but right to an abortion?
* After Bellotti and Danforth
  + Judge can give a waiver: if the child is mature OR if it's in the best interest of the child.
    - This is still a weird right because the system of judges giving waivers is still fuzzy.

## Lambert v. Wicklund (US, 1997)

* + Issue: statute requires minor seeking abortion to notify her parents, but allows for judicial waiver of notice req if not in minor’s BI
  + Holding: statute is constitutional
    - Requiring court to determine if notification is not in minor’s BI sufficiently like requiring them to determine whether abortion is in the BI (*Bellotti*)

## Parham v. J.R. (US, 1979)

* + Issue: challenge to procedures by which parents or social workers can sign children into voluntary care at a psychiatric facility
    - Specifically is an adversary proceeding required before or after commitment?
  + Holding: Const doesn’t require a judicial proceeding
    - There is already a neutral decision-maker (doctor) who gets to review whether child should be admitted
      * *Bellotti* said since some parents might make arbitrary decisions, unconstitutional to require children to seek parental consent
      * Here since there is a secondary check, the risk is acceptable
        + But are doctors never going to be arbitrary? Hospitals have a financial stake in being occupied
    - Also says courts shouldn’t review these decisions
      * Doctors in better position, this is outside of judicial expertise
        + But judges exercise this kind of decision-making all the time
  + Ultimately ***Bellotti* and *Parham* come out differently because the court was comfortable risking over-institutionalization of children, but abortion context was more complicated**
  + Marty's Musings: Reference to Schall – children are only in custody so

|  |  |
| --- | --- |
| **Parham – Committing Children** | **Bellotti – Parental Consent for Abortion** |
| Reasonable exercise of parental authority | Arbitrary veto |
| Record of over institutionalization of youth | No record |
| Court defers to: Doctors expert and know when to commit a child | Doctors are dangerous because the only people who do abortions are doctors who do abortions and they'll abort anything sometimes not in the best interest of the child. |
| Burger's Strongest argument: untrained judges shouldn't make the choices (BUT THEY DO ALL THE TIME) | Here judges are wise and benevolent, they will reject parent's right to consent or be notified if in the best interest of the child. |
| Right that is infringed upon: physical liberty, a right that children possess. | Right that is infringed upon: Abortion lite - it's not even a right.  Girls get a girly version of the autonomy right that women get |
| We assume parents have child's best interest in mind because we're erring on the side of over-intervention | We default that parents will not make the best decision for their child (comes from Danforth – vestige of we don't like underage parenting) |

## Carey v. Population Services Int’l (US, 1977)

* + Issue: state criminalizes distributing contraceptives to minors under 16
  + Holding: since state can’t impose a blanket req of parental consent, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a *fortiori* foreclosed
    - Concerned about state interfering with parental choices / guidance
    - Also concerned about causing harm to children
      * Not saying they have an inherent right to sex, but they have a right to minimize negative consequences when they do have sex
        + If wanted to argue they had an SDP-protected right to engage in sex, would cite *Griswold* and *Eisenstadt*
* Special categories in which minors don't need parental consent:
  + STI
  + Drug abuse treatment
  + Psychological Treament
  + NOT ABORTION
    - You can require parental consent (optional) but with an escape hatch

## Michael M. v. Superior Court of Sonoma County (US, 1981)

* + Issue: state statute prohibits a male from having sex with a minor female
  + Holding: the statute is constitutional
    - It is sufficiently related to the state’s objectives of protecting women and preventing illegitimate pregnancy
  + Reconciling this ruling with *Bellotti* requires some attention
    - If *Bellotti* recognized broader privacy right, this case seems wrong
* MORE NOTES FROM OCTOBER 31ST\*\*\*\*\*\*\*\*\*\*\*

# State Authority to Remove Children from Parental Custody

Cases that address the question “what is unfitness?”

## Stanley v. Illinois (US, 1972)

* + Issue: unwed father wants custody of his biological children
    - Had lived with them and their mother all their lives; she died and the children became wards of the state under IL law
      * IL law says all parents treated alike – but question is who is a parent?
        + Mothers and Wed Fathers ONLY
      * Says Stanley isn’t a parent, so no process due
        + Making generalization about what kind of parents unwed fathers are
  + Holding: all parents are entitled to a hearing on their fitness before their children are removed from their custody – denying such a hearing to Stanley and unwed fathers similarly situated violated EPC
    - Unwed fathers must be treated like mothers and wed fathers
      * Convenience of presuming unwed fathers unfit is insufficient justification for denying them a hearing
      * Equal protection
    - State argues that Stanley could have petitioned the court for custody of children
      * Court says this doesn’t cut it because he wouldn’t have the rights of a legal parent, but merely an interested party
      * Would be a dramatically different legal inquiry 🡪 would be required to show that it is in the children’s BI to live with him, not merely that he is sufficiently fit to get custody
  + **Law after *Stanley* 🡪** **rule that unwed fathers entitled to a hearing on parental fitness before the court can remove their children**
    - Burden is on state to affirmatively prove that father is unfit
    - Stands for the rule that a deeper inquiry must be made
      * Seen as laying the groundwork for an expanded definition of “parent”
      * But unclear at time of decision whether *Stanley* was about biological parents or de facto parents
    - Left with law that says men who procreate outside of marriage will be held legally responsible for the financial upbringing of their children irregardless of how they behave, but whether they have rights when someone prefers them not to depends on the actions they take after birth
    - Marty's Musings:
      * Could have cited *Meyer* because in dicta gives parents a right to raise their kids – and this is also raising your kid.
      * What about the child's right to be raised by the parent but the court doesn't go there.

## In re B.K. (DC App, 1981)

* + Issue: statute grants DC the authority to protect a “neglected child” by removing that child from the custody of his parents
    - “Neglected” means child is without proper parental care and control, as necessary for his physical, emotional or mental health
      * Father of child found to be “neglected” challenges that finding and the constitutionality of the statute – parent was shitzophrenic and they found the parent outside with the baby in the cold with no jacket.
  + Holding: **statute is constitutional because requires an investigation into the circs of the particular case and provides clear guidelines for determining whether a child is neglected. Have to use preponderance of the evidence to declare a parent as unfit.**
    - Guggenheim: isn’t this inconsistent? How can it provide clear boundaries AND allow for fact-specific inquiry?
  + Court differentiates individual’s liberty interest from custody interest – particularly as compared to state’s interest
    - Natural parent has strong rights, but state can overstep them when necessary to protect the welfare of a child
  + Delegates powers to law enforcement – won't that be discriminatory and capricious? Risk the court is willing to take.

## In re Jeanette S. (Cal. App, 1979)

* + Issue: child declared dependent of the court based on determination that she had no parent capable of providing her with a suitable home
  + Holding: court requires trial court to conduct another dispositional hearing
    - Must have clear and convincing proof of parental inability to provide proper care for the child, and resulting detriment to the child if it remains with parent, before custody can be awarded to a non-parent
  + Courts want to encompass enough behavior to protect children who are really in danger – can’t predict all possible parental behaviors / omissions that might constitute unfitness
    - So laws drafted broadly

## Steward v. State (IN, 1995)

* + Issue: in prosecutions for child molesting, is child sexual abuse syndrome, profile, or pattern evidence admissible to prove that child abuse occurred?
  + Holding: may be used depending on the circumstances / reasons for bringing it in
    - When relevant inquiry is the syndrome’s reliability and probative value for rehabilitative purposes, such evidence may harm def but isn’t unfairly prejudicial
      * Merely informs jurors that commonly held assumptions aren’t necessarily accurate and allows them to fairly judge credibility
    - Once child’s credibility is called into question, expert testimony may be appropriate

## Matter of Philip M. (NY 1993)

* + Issue: all children removed from home because two found to have STD
    - State’s evidence of parental responsibility was that they allowed this to happen – child can be deemed “abused” even where parent didn’t cause the abuse
    - Who is culpable for the presumed abuse?
    - Was it negligence to not treat the other two children in light of the positive chlamydia test.
  + Holding: **establishment of prima facie negligence doesn’t require court to find parents culpable – merely establishes a rebuttable presumption of parental culpability**
    - Court may accept parental culpability or not considering all evidence in the record
    - Parents may rest without attempting to rebut the presumption and permit court to decide case on strength of state’s evidence, or they may present evidence which challenges the establishment of a prima facie case
      * Parents can present an explanation for how the injury happened, or a reasonable explanation for how it happened
      * Or can just present circumstantial case – essentially saying infer from parent’s character and behavior that he didn’t do anything to cause it
        + Kind of like defense saying “I’m a good parent”
    - **NY neglect statute requires: (1) some showing of harm or imminent danger of harm to children, and (2) parental responsibility / parental behavior that is inadequate**
      * Parent who says “I don’t know how it happened” can still win after *Philip M.*
      * But best defense is to present evidence about how injury did happen

## Nicholson v. Scoppetta (NY, 2004)

* + Issue: challenge against ACS removals of children from mothers who were victims of domestic violence because they allowed children to witness the violence / suffer abuse
    - Lawsuit about a pattern of practice which resulted in children being removed from their parents’ homes extra-judicially, parents being charged and courts approving the removals by finding the parents neglectful
  + Holding: this practice is unlawful
    - **(1) There must be a causal connection between the neglect and parental behavior**
      * Says there is no connection between mothers’ actions and the child’s harm – the mothers were victims too
      * Mothers being present is not a proper cause of action for pleading abuse
        + Key facts about what they did / didn’t do necessary to bring the charge
    - **(2) Removal as an almost invariable response held to be inconsistent with NY law because imminence of harm required – and not shown in most of these cases**
      * For removal, NY law requires imminent danger, risk to child’s life / health
      * State was presuming that child was in imminent harm whenever witnessed domestic violence without making an individual interpretation
        + So removals were in violation of statutory law
  + *Philip M.* presumed an inference of wrongdoing from a certain kind of harm – but merely having a child present when violence occurs doesn’t permit a reasonable inference of parental failure
    - Causality req 🡪 court stresses that this fault-based law requires that parents exercise a minimum degree of care with respect to their children
      * This is what unfitness means – conduct below which parents may not go
  + Many ACS employees dislike *Nicholson* and prefer the prior law that resulted in more removals
    - Arguable concern that a battered mother won’t be able to care for her children as a reasonable parent would – not because she doesn’t want to, but because she is unable to in light of the circs
      * So no one is looking after the children’s interests, and thus the state needs to

# State Authority to Remove Children from Parental Custody: Foster Care

Most important poverty law field involving the family

## Smith v. Organization of Foster Families (US, 1977)

* + Issue: challenge to NY’s procedures involving transfer of foster children
    - Plaintiffs seek more thorough procedure before removal is allowed – claim that foster family has a liberty interest in staying together
      * Theory is that children know who their family is through experience – like a “psychological family” claim
  + Holding: procedures are constitutionally adequate
    - Court is wary of reasoning that this is a familial unit like other protected family units
      * Foster family has its origins in the power of the state – you don't have a right to something that the state invented.
      * Also foster parents entered agreement knowing it would be temporary
        + Leg specifically says it doesn’t want attachments between foster parent and the foster children to run too deep. Stewart's concurrence emphasizes that if this bond becomes too deep then the system has failed.
    - If foster parents acquire rights to these children, it would be at the cost of the right of the birth parents 🡪 so related question is what are the rights of birth parents?
      * Parent who puts child in foster care voluntarily can get child back at any time
      * Parents who lose custody because of unfitness still retain rights – have right to get child back when she accomplishes the tasks that were articulated at removal (Stewart's concurrance).
      * "No squatter's rights to kids"
      * Goal should always be return to parent
* What will happen at a post-*Smith* hearing regarding the return of a foster child to her parent?
  + Argument would be that *Smith* was a substantive decision – must now look at what is in the child’s BI, i.e. ought to permit psychologist’s evidence about what is in the BI of the child re: her relationship to her foster parents
    - Can make this argument – but don’t know if it will hold up because the *Smith* courtdidn’t tell us
  + Also *Smith* court only spoke in procedural DP terms – but there is a SDP claim here too
    - Because there is a liberty interest that deserves protection, the case must be about more than procedure
    - Also would be no need to have a hearing if just checking to see if parent met the tasks articulated at removal
      * So unless this was a substantive case, would be no need for a hearing
      * **What was really being sought in *Smith* was the claim that the child’s relationship, formed however, eventually deserves substantive protection**
* Foster system has abandoned the system which involved temporary placements constantly until return to parent was no longer an option – now have current planning which allows for less upheaval but is also schizophrenic.

## Matter of Michael B. (NY, 1992)

* + Issue: custody determination between foster parents and birth father. Father wasn't on birth certificate but really tried to get his kids back.
    - Centers on the meaning of “BI of the child” and the weight to be given a child’s bonding with his long-time foster family in deciding what placement is best
  + Holding: inquiry should be closer to merely whether parent complied with foster care plan, but court should also inquire into whether immediate return will be harmful to the child (emotionally harmful because of child’s relationship to foster parent / lack of relationship to biological parent)
    - As opposed to what father wanted (no inquiry – just asking if parent complied) and what foster parents wanted (complete BI determination – an “unwinnable beauty contest”)
    - Court distinguishes *Bennett v. Jeffreys* – says that was about unsupervised private placement whereas foster care is governed by NY statute
      * If *Bennett* controlled, would have a modified BI argument – BI with a soft understanding that we preference birth parents, but are OK when they lose
      * Court says NY Leg didn’t intend that when children are in foster care for significant period of time, court should have the power not to return to their biological parents if not in their BI
    - Dad did not take the kid ultimately because he got caught with cocaine and all the kids he had earned back got taken away.
    - Concurrence wants a final determination.
  + Guggenheim: this is pretty much the best that child-centered advocates have gotten out of the foster care scheme
    - **But if we are ultimately trying to serve children, ought to be able to consider all elements necessary to determine what is in the child’s BI**

## Guardianship of Philip B. (Cal. App, 1983)

* + Issue: custody battle between mentally retarded child’s parents and the people who have been caring for him / have essentially become his family
    - Child was put in institution where the H family were volunteers; his parents essentially never visited him or cared at all about him, whereas the Hs welcomed him into their family and home for weekend visits, and helped him progress in school, etc
    - Parents claimed custody when H’s wanted to adopt, so child has been living with them for the duration of trial (not happily)
  + Holding: H’s challenged order of custody must be upheld in order to avert potential harm to the child likely to result from his parents maintaining custody and to serve his best interests
    - Court notes that it wasn’t the parents’ institutionalization of Philip, but the emotional abandonment of him that cased grant of custody to the Hs
      * Lack of parent-child bond will cause developmental injury to Philip
      * Also potential physical harm to Philip because of parental neglect of his medical condition
    - There is a high burden in favor of the parents but here the parents were so bad and the harm would be so much to Phillip that the presumption was rebutted.
  + **Before a court can award custody to a non-parent without parental consent, must make a finding that an award of custody to parent would be detrimental to the child, and that the award to a non-parent is required to serve the child’s BI**
    - Shift in emphasis from parental unfitness to whether placement is in the child’s detriment
    - But still a preference for parents – could will only grant custody to non-parents in unusual or extreme cases
  + NY law resembles this – supposed to decide fitness first, then presumptive rule that children be returned to parents immediately, but allowed to delay return if there are reasons to believe that the child will be harmed
    - If court says it is satisfied that the child has/will suffer harm, can delay placement as long as necessary – but in NY always working towards reunification

## J.M.A. v. State (AK, 1975)

* + Issue: is foster parent an agent of the state – specifically does the 4th Amend prohibition against unreasonable searches and seizures apply to a foster parent?
    - Foster parent found marijuana in foster child’s pocket, and consulted social worker who called police; child was adjudged delinquent
  + Holding: foster parents are not agents of the state
    - Duties of foster parent don’t encompass responsibilities of law enforcement officers
    - Also policy reasons against treating foster parent as state agent
      * Excluding the evidence wouldn’t deter future searches by foster parents, since that conduct has nothing to do with having child adjudged a delinquent
    - Court does note that foster parents are kind of parent – state agent hybrids
      * Their homes are licensed and regulated by state, and they are paid by state
      * But they also act in a private capacity in managing their home and family

Martin Guggenheim, Somebody’s Children: ***Sustaining the Family’s Place in child Welfare Policy, Review of Elizabeth Bartholet’s “Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative”***

(Bartholet advocates for an aggressive foster care system)

* Guggenheim says foster care system celebrates the termination of biological parent-child relationships
  + Foster care isn’t acknowledged as offsetting anything – has an affirmative goodness to it
  + What really bothers him is the easy dismissal of biological parents
    - Maybe children can have “two parents,” but can only ever have one legal parent
* Bartholet is also the greatest proponent of the international adoption movement
  + She says the conditions under which these children would be raised and obliged to live are so inadequate that we can observe the degree / quantity to which their lives are better if they are raised in America by adoptive families
    - Counterarg: this is neo-colonialism, trading in and exploiting children like commodities
  + Says many parents are willing to adopt – want to provide these children with a better life
    - Counterarg: this is equivalent to making the argument that people are willing to be paid substandard wages just to have a job, so we should let them
    - Poverty deeply connected with exploitation
* Disease model vs. public health model
  + Bartholet characterizes the problem as one of individual parents’ failures / problems
    - Foster care is about protecting children from serious harm inflicted by their parents
    - This strengthens the idea that parents are bad, makes it easier to see foster care leading to adoption as a celebratory outcome
  + Guggenheim argues instead that we should see this is a societal failure / problem
    - By helping people believe that children are in foster care because of defects in their individual homes, advocates of foster care make it difficult to talk about broad remedies
    - Public health paradigm is about more than what is best in this individual system
      * About systematically correcting problems / addressing them on a societal level

Paradigmatic questions 🡪

* **When / on what basis should the state have the power not to return children to a currently fit parent?**
  + At issue in *Bennett*, *Matter of Michael B.*
  + Answer might be different depending on the context
    - Might say we are interested in what’s best for the child when parents give up children voluntarily, but for involuntary foster care placements are more focused on public policy (paramount goal of reunification)
* **When / on what basis should the state have the power to sever the parent-child relationship?** 
  + Comes up in termination of parental rights readings
  + Think about how this question should be answered and embraced within the larger framework of who gets in to foster care and why

# Termination of Parental Rights

What should be done before removal?

* Inquiry into evidence of harm / imminent risk of harm
  + Not merely did the child suffer anything, but also is it likely that the child will suffer again if not removed from parental care
* Also must look at alternatives to removal
  + Imminent risk + BI
  + Even when there are other grounds to remove, can’t do so unless also in child’s BI (meaning no other options are available)

Summary of intervention cases

* Always pay attention to what the law / standard is
* And the interrelationship between conduct and harm to children

Why do we terminate parental rights?

* So that other people can adopt their children
  + This is about banishing birth parents permanently from children’s lives
    - Non-punitive judgment that has a forward-looking purpose 🡪 to place the child in a position to become a fully integrated member of a new family
    - Based on the presumption that permanent removal will be better for the children, and will be easier for the children – but these haven’t been proved
  + Separate from the question of why we intervene in the family relationship to begin with
    - Answer to that question would be unfitness, parental failure, etc
* We want to re-create the primal family
  + And we do this through a fiction that is very deep – we will doctor the birth certificate, obliterating the original, so there is no record that the child was ever related to her biological parent

Guggenheim: **there is a loss here – there are sound reasons to look toward adoption as a desired outcome, but that goal is often described without any appreciation of the unavoidable ugliness and pain associated with it**

* Modern preference / trend in favor of termination, or at least ambivalence about what outcome is reached so long as it is permanent

Parental termination proceedings

## Lassiter v. Dept. of Social Services (US, 1981)

* + Issue: mother argues that because she is indigent, DP entitles her to counsel in proceeding for termination of her parental status
    - DSS petitioned court to terminate parental rights because mother hadn’t had contact with child for 3 years, had left child in foster care for more than 2 years without showing any progress in correcting the conditions which led to child’s removal, and had not shown a positive response to DSS’ efforts to strengthen her relationship to her child
  + Holding: **CBC decision whether DP calls for appointment of counsel for indigent parents in termination proceedings to the trial court—no guarantee**
    - Right to counsel has only been recognized where the liberty interest is at stake
      * As a litigant’s interest in personal liberty diminishes, so does his right to counsel
      * Differentiates *Gault* because it was a civil case involving a quasi-criminal loss of liberty
    - Ultimately must ask whether *Mathews v. Eldridge* factors outweigh this presumption 🡪 (1) private interests at stake, (2) gov’s interest, and (3) the risk that the procedures used will lead to erroneous decisions
      * Notes that counsel is generally required by courts at termination proceedings because parent’s interest couldn’t be higher, and state’s interest is miniscule
      * But no discernible bright-line rule because factors will vary CBC
    - Court takes Bartholet's perspective on this – the reason that the parent is a failure is personal – there are no systemic issues.
  + Stevens’ dissent: there is in fact a liberty interest at issue here
    - Mother lost the most sacred right in the Const, and the majority basically agreed – but still said they aren’t going to always require lawyers
    - Stevens says that the same Mathew's test comes out the other case and Marty would agree with this.

## Santosky v. Kramer (US, 1982)

* + Issue: NY allows states to terminate parental rights when a “fair preponderance of the evidence” supports the finding that the child is “permanently neglected”
  + Holding: **DP requires at least a “clear and convincing” evidence standard before parental rights can be completely and irrevocably terminated**
    - Applies *Eldridge* test 🡪
      * (1) Private interest affected weighs heavily against use of preponderance std
        + Parent’s interest is a commanding one – facing severe and irreversible loss of parental rights
        + And can’t presume that interests of parent and child diverge until parent is adjudged unfit
      * (2) Preponderance standard balances risk of error between parent and child
        + This doesn’t properly reflect the relative severity in the risk of error – essentially parents’ rights need to be more strongly protected here
      * (3) Stricter std of proof consistent with both state interests implicated – parens patriae interest in preserving and promoting the child’s welfare and a fiscal / administrative interest in reducing the cost and burden of such proceedings
        + What risk are we willing take? Leaving more parental rights intact or removing more kids.
    - **What must now be established to justify a finding of permanent neglect 🡪**
      * **Agency efforts to strengthen parental relationship + parental failure**
  + Gives us the rule that you can defeat a prosecution affirmatively
    - Can win by showing that you have done what you were required to do
    - Can also raise an affirmative defense 🡪 saying that you screwed up but so did the agency, and the agency’s failure to do its statutory obligation defeats the case
      * So an affirmative obligation on the state to help – can prove that the state wasn’t diligent by showing what a diligent person would have done in that case
    - Standard needs to be high because there is no double jeopardy – the state can keep coming back at you which says there needs to be a high bar.
  + How is *Lassiter* not a barrier to this holding?
    - Unanimity among the justices that a strong constitutional interest is at stake
    - Different liberty interest (interest in care and management of your child v. physical liberty).
    - Standard needs to be higher because you're already "disadvantaged" by not having a lawyer – better to eliminate the risk of wrongful termination by raising the standard.
  + Dissent: Rehnquist – these were bad parents and preponderance is enough and the family court judges know the case and know the facts and are able to make the best choice with just preponderance.

***Santosky* is a procedural DP case – doesn’t tell us what the constitutional minimum for terminating parental rights is so we don’t know what is a constitutionally permissible basis for terminating parental rights**

* Maybe BI of the child?
  + But in *Troxel*, O’Connor says unfitness is part of the SDP standard – without a showing of unfitness, can’t be deprived of your parental rights
    - Since SC held that you can’t require parents to allow their children to visit with grandparents merely because it’s in their BI – so obviously you can’t sever parental rights on these grounds
  + But what about when child is already in foster care, primarily because there has been a finding of parental unfitness?
  + And what about when there is no unfitness but inability to care for the child?
    - Intuitively seems unconstitutional, but SC has never spoken on the subject
* Some states are moving towards using timelines for termination – but is time a legitimate basis?
  + OH requires child to have been in foster care for 18 months + BI showing with clear and convincing evidence
    - Is this any more fair than the NY law held unconstitutional in *Santosky*?

*Lassiter* and *Santosky* are the only SC cases to address parental termination proceedings – and they only addressed process, not the substantive limits for terminating parental rights

## In re Shirley B (Md. App 2011)

* + Parents mildly retarded, roaches coming out of backpack. For two years they try to do their thing but then the state runs out of money. House was covered in cat feces.
  + Is it the state's responsibility to continue the programs?
  + Holding: no – the state met its burden. It's not the agency's fault that the state ran out of money. They can ultimately still terminate.
    - The child's interest come first. And the social services agency really tried to do what they could do.
  + It's legitimate that economic resources have curtailed or adjusted reasonable efforts. This time we look to the agency's best efforts based on what was available.

## NJ DYFS v. I.S. (NJ 2010)

* + Parental rights terminated from the father. Father had to choose between his spouse and four kids and his illegitimate child. He had the child out of wedlock and didn't know. Father tried to offer up alternative solutions but they court still said no. The court wanted him to take parenting classes even though he was a 50 year old father of 4.
  + Holding: the appellate court rejects
    - Is the child causing harm
    - Is the parent unwilling to eliminate the harm
    - In this case DYFS didn't put forth enough effort.

## In re R.J.T. (Pa. 2010)

* + Foster parents wanted to give him away, then they agreed to have him. Mom tried to get better for kid and dad was doing better – everyone's doing visits and making progress but the agency says they didn't meet the goals (ignoring the progress).
  + CYF then wanted to change the goal from reunification to adoption based on this. Also some adoptive family drama.
  + Example of concurrent planning
    - How long in foster care (15/22 months)
    - Aggregated circumstances
  + Holding: Shouldn't change the goal because when the goal is changed no more services provided to the parents. Can't finalize it until all the other circumstances have happened (15/22 months). HOWEVER, you can start planning for TPR while the goal is still reunification.

# Adoption, Custody and Visitation

Rights of biological and de facto / custodial parents

## Bottoms v. Bottoms (VA, 1995)

* + Issue: custody dispute between mother and maternal grandmother. The facts were not great for mom but that's not what the court decided on.
  + Holding: custody awarded to grandmother
    - To win custody, grandmother **must show clear and convincing evidence of unfitness**
      * This is meant **to be a standard with definable boundaries and content** – only subjective when the test for unfitness is open-ended
      * **As opposed to BI standard – which is completely open-ended**
    - Problem with this case is that the court talks the good talk, but then the unfitness found is essentially that the mother is a lesbian
      * Trial court’s language highlights her lesbianism above all other possible factors
      * Guardian ad litem tells mother she shouldn’t be in a lesbian relationship during the case – treats as an error of putting herself before her child
      * Grandmother will be able to provide a better moral climate.
* Bennett v. Jeffreys (NY, 1976) / **Bennett v. Marrow** (2nd Dept, 1977)
  + Issue: mother wants custody of her daughter from custodial parent (mother’s parents/grandmother essentially forced her to give up child to a family friend at birth).
    - Lower court says state can’t
    - **Step 1: trial to determine whether there are extraordinary circumstances**
      * Lower court says state can’t deprive a parent of the custody of her child absent surrender, abandonment, persisting neglect, unfitness or other extraordinary circumstances
        + Extraordinary circs here (prolonged separation for almost all of child’s life) require inquiry into child’s BI
    - **Step 2: BI of the child inquiry**
      * Says family court didn’t inquire enough into qualifications / background of the custodian and app div didn’t inquire enough into qualifications / background of the mother – so new hearing is required
  + Holding: Court cannot terminate without surrender, abandonment, finding of neglect or unfitness or extraordinary circumstances. They looked here to extraordinary circumstances. That's when you look at the BI of the child and in this case they require that custody be awarded to the custodial parent
    - Concern about mother’s ability to be there for her child emotionally
    - Also concerned about bond with custodial parent and lack of bond with mother
  + Important to take away court’s treatment of presumption in favor of biological parents
    - Used to be “parents are entitled to raise their children as they see fit *unless* there is a finding of parental unfitness”
    - Now treated to mean “*unless* there are circs in which we don’t feel like applying the rule”
      * Result of the case probably couldn’t have been reached given the old test
  + Sent back because there wasn't enough fact finding on the record.

## In re B.G.C. (IA, 1992)

* + Issue: father (Schmidt) wants custody of his daughter (Baby Jessica) from custodial parents (DeBoers). Mother gave up baby with a boyfriend who wasn't the father. The real dad never gave up his rights. Mother gave up baby with a boyfriend who wasn't the father. The real dad never gave up his rights
  + Holding: father awarded custody.
    - Preliminary issue 🡪 **should unwed fathers have comparable rights as birth mothers?**
      * Here court says biological connection is paramount
    - Step 1: birth parents have statutory and constitutional right to the care and custody of their children unless (1) they have abandoned them or (2) they are unfit
      * Can’t argue derivative unfitness based on father’s treatment of his other children
        + This differs from derivative neglect, which is allowed
      * So only abandonment claim left – raises question of what must unwed fathers do to secure a legally recognized interest in their biological children?
        + Substantive question TBD – comes up again in *Lehr*
        + Court says he didn’t abandon his daughter

## DeBoer v. Schmidt (Mich. App. 1993)

* + Issue: *In re B.G.C.* case prosecuted in MI – arguing that IA court’s decision should be overturned because the court neglected to consider the child’s BI. Baby Jessica.
    - This argument says that father has no right to raise his child here – that the determination of custody is only about the right result for the child
    - Attempt to repudiate the idea that there are constitutional rights for parents
  + Holding: upheld the IA court’s custody ruling in favor of the father
    - Right honored is the right that the rule of law will be the basis upon which custody disputes are decided
      * This is child-friendly in that it discourages people from taking children and then thinking that if they keep them long enough, courts will rule in their favor
      * DeBoers essentially argued that since litigation had taken so long, they had bonded with the child and she should stay with them for her BI
        + But court doesn’t want to encourage parties to stretch out litigation
    - Other situations where we are clearly ok with applying the rule of law even when it causes harm to the child because removes from current custodian
      * i.e. baby snatching, kidnapping

## Lehr v. Robertson (US, 1983)

* + Issue: does a biological father have an absolute right to interfere in child’s adoption proceedings?
    - Lehr and child’s mother cohabited until birth, mother acknowledged throughout that Lehr was child’s father, but when she left hospital she concealed her whereabouts from him and put the child up for adoption
  + Holding: adoption was valid – **essentially state can choose to give unwed fathers the bare minimum constitutional right and nothing more**
    - Court says the father has a right above all other men to raise the child, but he didn’t act on that right quickly enough
      * Biological relationship allows father to take responsibility – but he must do so in order to be afforded constitutional protection
      * In this case, in order to sufficiently take responsibility Lehr needed to:
        + Sign up for the putative father registry (the "I GOT LAID REGISTRY"
        + Marry child’s mother
    - Ordinarily to give up a child for adoption, need termination of parental rights via (1) consent, (2) unfitness, or (3) abandonment
      * Lehr denied right to veto the adoption, and also denied basic notice and opportunity to be heard
  + **States are very free in the area of unwed parenthood to disadvantage fathers**
    - NY has two categories of unwed fathers: notice fathers and consent fathers
      * Lehr was trying to be considered a notice father
    - Very different from IA, which is very deferential to paternal rights

Rights of others who want to establish parental status

## Matter of Jacob (NY, 1995)

* + Issue: can the unmarried partner of child’s biological mother, who is raising the child together with the biological parent, become the child’s second parent by means of adoption?
  + Holding: yes – statute shouldn’t be read to make the unwarranted, detrimental distinction between “nonmarital children” and those whose parents are married.
    - **Case fixes a large gap left by *Alison D.* –** **non-biological parents can acquire statutory rights by adopting children**
      * But flaw is that they can only adopt when the legal parent gives consent
  + *Alison D.* is still good law – so similarly situated petitioners can’t sue for visitation
    - But Guggenheim says the law can’t stay this way for much longer when there are so many families of this type today

## Debra H. v. Janice R. (NY 2010)

* + Got a civil union in VT but lived in NY
  + Got together a month before the child was born
  + Mother expressly barred nonbio parent from adopting child
  + If she's a parent in VT, is she a parent in NY?
  + Section 70 - either parent can apply for habeas corpus
  + NYC Ct App. Says parent means biological parent - but NY has a law that says some nonbiological parents can apply for custody: Grandparents and siblings. They say this is ok because they allow non biological parents to adopt - so you either make yourself a parent or not.
  + Presumption of paternity is invoked because of civil union.

## Lofton v. Secretary of Dept. of Children and Family Services (11th Cir, 2004)

* + Issue: about the rationality of a rule that prohibits adoption by homosexuals
    - Part of ongoing debate about the compatibility of homosexual conduct with the duties of adoptive parenthood
  + Holding: nothing in the Const forbids the state from making this policy judgment – court concludes that state is advancing a legitimate interest in restricting to heterosexuals. Florida's law is legitimate.
    - This is a hard case because of the state’s broad authority to act in accordance with the child’s BI – and that standard includes whatever biases a decision-maker happens to have
    - Also hard because right to form relationships with children has never been held to exist
  + Guggenheim: no question that Judge Kaye’s dissent in *Alison D.* has to prevail eventually

# Miscellaneous Supreme Court Decisions on the Parent-Child Relationship

Obligations of the state / social services

## Troxel v. Granville (US, 2000)

* + Issue: paternal grandparents petition for visitation after death of children’s father
    - Had been visiting children all along; mother not opposed to continued visitation, but grandparents want greater time spent with children. (She remarried and new husband adopts kids).
  + Holding: statute that allows "any person" to petition for visitation at any time is unconstitutional as applied here
    - As-applied illegality is that, at a minimum, law is unconstitutional because it doesn’t give any special weight to the parents’ views
      * Before courts can intervene, must do something that was missing in this case
        + Part of that is to give weight to parents’ position – overcome some presumption in favor of biological parents
        + Can cite *Parham* 🡪 presumption that fit parents make decisions in the BI of their children
      * Here not only did court not give any weight to mother’s wishes, but seemed to make a contrary presumption in favor of granting access absent a reason not to
    - Opinion is confusing – O’Connor keeps stressing the breathtakingly broad nature of the statute, but breadth doesn’t matter in a challenge to statute’s application to grandparents
      * Breadth issue has to do with fact that *anyone* can petition for visitation – but this isn’t an issue here, the Troxels were real stakeholders
  + Court divided over whether they can permit visitation orders after giving weight to parental judgment, but disagreeing with it, without finding harm to the child
    - BI vs. fitness standard
      * Harm principle (state can’t interfere unless parent is unfit – not merely acting in a manner that fails to further child’s BI) would mean parents would win in these cases more frequently than if rule was only that courts must give appropriate deference to their position in determining child’s BI
      * The court does not presume here that mom is making a choice in the best interest of her child – it's just that this particular law was way overbrad.
    - So *Troxel* clarifies a rule other cases have implied 🡪 **in the absence of harm or unfitness, can’t interfere with parents’ liberty interest in child-rearing**
  + Stevens’ dissent: explicitly says must consider the child’s interests
    - Resembles Douglas’ dissent in *Yoder* –says majority is talking about adults, but this is a child’s right to maintain a deeper relationship with grandparents than mother might want
  + *Michael H.* and *Troxel* could be said to be about children, or not 🡪 part of the struggle is to figure out how much they are or aren’t about children

## Deshaney v. Winnebago County Dept. of Social Services (US, 1989)

* + Issue: challenge to the conduct of state officials
    - Mother’s claim against county and DSS for serious injuries done to Joshua while in his father’s custody. There were many indications that the father was abusing the child and even a couple of investigations and the complaints and dismissed them before the child is beaten to the point of retardation.
  + Holding: no right was violated – no cause of action against the county / DSS
    - 14th Amend protects against state action – but here the private actor caused the harm
      * The person who struck him was his own father—a private actor imbued with constitutional liberty interests to protect against intervention
      * Rehnquist uses positive / negative rights arguments – says state didn’t hit him and can’t be held accountable for it
        + Issue also comes up in *Michael H.* and *Troxel*
    - **For Joshua to prevail, would have to show that the state owed him something which if failed to give**
      * But Larry Tribe argues that the modern child welfare system has permanently changed society – we have told citizens that they discharge their responsibility to children by notifying the State
        + People don’t expect the state to do nothing more than record child’s injuries – they expect them to protect children!

Can’t call this purely private action because once State was notified, people expected them to be involved

* + - * + Says can’t now ask what would have happened if the community had been more in charge of the welfare of its children
      * Also this wasn’t a truly private relationship
        + Joshua was living with his father based on State custody judgment

Citizenship and the parent / child relationship

## Nguyen v. Immigration and Naturalization Services (US, 2001)

* + Issue: statute imposes different requirements for child’s acquisition of citizenship depending on whether the citizen parent is the mother or father
    - Nguyen being deported because doesn’t meet statutory requirements, even though he has lived his whole life in the US with his father
  + Holding: statute is consistent with requirements of EPC
    - For the justices, this is a case about whether the father was discriminated against on the basis of his marital status
      * Treated as a case about the parents’ rights as opposed to the person actually being affected by the case—the child being deported, removed from father
      * Court doesn’t even permit inquiry into whether there was a real relationship here
    - Guggenheim: child has a powerful EP claim to be treated as similarly situated persons in terms of citizenship – outrageous that court ignores child’s constitutional rights
      * Doesn’t matter to this child that his father wasn’t married to his mother – his life was identical to all other children raised by their fathers in the US
  + How can this case fail to cite *Stanley* (held unwed fathers equal to all other parents)?
    - Immigration context is different – Congress freer to write the rules
    - Also child not a minor – not about removal from parents
      * But still about breaking up a family
  + **Both *Nguyen* and *Deshaney* deal only with father’s and the mother’s constitutional rights (respectively) – not the children’s constitutional rights**
  + O'Connor would strike this down on Equal Protection grounds.
  + Bottom Line: Fathers are held to a different standard.

Further definition of the parent / child relationship

## Michael H. (putative father) v. Gerald D. (biological mother's husband) (US, 1988)

* + Issue: crazy fact pattern – ultimate issue is that child and biological father are petitioning for visitation rights, and mother doesn’t want them to see each other because she is married to another man who recognizes daughter as his own
    - Biological Father seeking legal recognition as child’s father
  + Holding: court rules against granting him visitation rights / establishing him as legal father
    - **Scalia defends his ruling by talking about what is natural 🡪 says illegitimacy is a legal—not natural—construct, and isn’t natural to have two fathers**
      * **In the end, "unnatural" family is formed by state edict over the natural family**
      * And Scalia fails to appreciate how much the state constructed this family that he deems a “natural unit”
    - Scalia says the liberty interest at issue is the father who sired a child while the mother was married to another man—which isn’t very great (FN 6)
      * Incredibly controversial FN in substantive due process law
      * Brennan takes this FN to task in dissent – says liberty interest involved is parenthood, so father has a constitutionally protected liberty interest
      * Even if they assume he has the right – they're not going to meddle with an established right.
    - Court permits the truth to be irrelevant here
  + Guggenheim cares less about the outcome than the analogies / terminology used
    - If anything here is a “natural unit,” it must involve the “natural” father!

**If the standard is that the child has a right to some relationship beyond what her parents agree to, what case law could you use to support the idea that the parents’ position is properly trumped?**

🡪 Need to make argument that client’s mother’s right must bend to client’s right to have the relationship

* Argument that state may intervene before a finding of neglect
  + Can say *In re Sampson* supports this – but we were critical of that reading b/c it conflicts w/ the notion that must find unfitness before interfering in child-rearing
    - So may be aberrational, or may stand for a new line of reasoning
    - Also can distinguish *Sampson* – parents’ position was rooted in religion
      * Religion often gets less weight in cases than other justifications for parental decisions, b/c of *Prince*’s martyr principle
  + Can analogize child’s freedom of expression right to freedom of association – building an argument out of 1st Amend case law (rather than intra-familial disagreement)
    - *Tinker* 🡪 upheld child’s freedom of expression right
    - Also cite *curfew cases* 🡪 broad 1st Amend entitlements, not based on pure speech alone
      * But problems w/ couching this in 1st Amend right b/c requires state interference w/ child’s right, state vs. child claim
        + This is a parent interfering – no state action
  + Can also cite *abortion cases* 🡪 already have precedent that permits trumping of fit parents’ arbitrary decision-making (Stevens cites *Danforth* in *Troxel* dissent)
    - But will have to draw the line as to what rights children will be able to exercise over their parents – and get right to relationship w/ others aligned w/ abortion
      * Maybe say when dealing w/ irreparable loss – relationships that children have form who they are, and once they are denied that relationship w/ someone they are forever and irreparably changed
    - Abortion analogy is an example of court trumping parents’ preference, but distinguishable b/c involves a different set of rights
      * Don’t want to open the door to challenge any time a parent makes an irrevocable decision regarding his child – difficult to defend any parental child-rearing decision as not arbitrary
  + Can also cite cases that deal with recognition of a formed family
    - *Shondell* 🡪 trumping parental preference once something has come into being
    - *Stanley* 🡪 rejects state’s effort to define what is a family
      * State can’t decide who is a family b/c said families form beyond the state
        + Case can be read as simply privileging biology—but if stress the formative relationship rather than the biological one, one of the court’s reasons was the child-centered one
      * Even birth grandparents could cite *Stanley* – family had formed!
    - Also cite *Bennett v. Jeffreys* 🡪 state can’t deny that a relationship formed
    - And also *Alison D.* 🡪 Guggenheim says this case is really *Stanley*, but without the limit of biology
      * *Stanley* never says it is limited to biology – now can view it as unnecessarily limiting if the rule is that we are only talking about biological parents
      * *Alison D.* involved a real, established family – why wasn’t it protected?
        + In NY equivalent of *Alison D.* non-biological parent wins
* There are costs to letting this kind of claim proceed
  + Kennedy points out these costs in *Troxel* – disruptive to child, may be harmful to child’s welfare
    - Cost of hiring lawyer to defend grandparent visitation could easily by $50K – Kennedy says parents going to have to divert valuable funds, no small thing to defend a lawsuit
  + Resembles Rehnquist’s concerns (from another case) – don’t want to invite too many lawsuits, don’t want to federalize family relationships, don’t want to lightly make something a constitutional right

**Effects of *Troxel* 🡪**

If *Troxel* said harm is always required, would be back in the realm of non-interference w/ family

* *Troxel* seems to say no—it is one thing to say harm is required to remove children from parental care, but we sometimes permit judicial interference w/ child-rearing when the consequences are less than removal

# Representing Children and the Role of Counsel for Children

Proceedings one talks about in this field:

* Cases in which children are accused of wrongdoing – criminal or incorrigibility cases
* Child welfare cases – neglect, abuse, termination and foster care review
* Child is not a party to the proceeding but rather the subject of the proceeding
* Domestic relations litigation
* Again child is the subject of the proceeding, rather than a party to it
* No jd allows a child’s opinion to be more than a weight on the scale of the BI test in domestic relations cases
  + - But might want an intermediary to safeguard the child from feeling like she is caught in the middle – protector’s role, but not really a lawyer
* Most likely to affect wealthy families, who can afford these suits

How can the children’s lawyers figure out what to advocate for?

* Can follow what the child wants, what the parent wants, or can make their own determination
  + Theoretically – but as applied to some cases, the choices may be fewer
    - i.e. Guggenheim represented 3-day old child in a parental unfitness proceeding – in that context, he can make his own determination or can merely act as an aid for fact-finding
* So antecedent question 🡪 whether the lawyer ought to be advocating for anything in a particular case
  + Maybe more like an amicus curiae to the court
  + Often lawyers end up working with the prosecution
* We are either adding co-lawyers to make sure the adversary system works better OR we are asking lawyers to follow what their client wants or what the personally want to advocate
  + Lawyer can pick sides to make it more likely that case will come out in a particular way
  + Or can say child’s interests aren’t being protected by the plaintiff/def paradigm
    - When def wins in criminal case, the public share the risk in a broader way (at least domestic violence cases aside) – here the child suffers the risk in a very focused way
  + How could lawyer decide for himself?
    - Could engage expert
      * But not asking what should happen for an abused client—asking what happened in the past, so can’t really go to experts
    - Could focus on BI of the child
      * These aren’t even the questions before the court—only asking whether the child was abused!

Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children(1996)

* Very stagnant, conservative position b/c deprives lawyers of opportunity to argue that laws should change
  + But very deferential to legislature – what happens if leg is wrong and enacts a bad law?
    - He is denying lawyers the opportunity to make arguments that might move the law progressively when the law isn’t good enough
    - But says there are greater costs associated w/ allowing lawyers to trash legislation
      * Once you open this up, can’t limit it in either direction

## Matter of Jamie T.T. (NY App Div, 1993)

* Trial court unable to resolve issue of whether child is abused or not – said couldn’t determine whether the child or the her step-father was telling the truth. Does she have the right to effective counsel?
  + Court says NY law guarantees an allegedly abused or neglected child indep. legal representation
* Is there a constitutional rt for child counsel in child welfare cases? In child custody disputes? What cases are pertinent to consideration?
  + Distinguishing *Lassiter* 🡪 *Lassiter* court said no rt to counsel in every case b/c no liberty interest at stake
    - Held that when a litigant who is not at risk of loss of physical liberty, apply the *Betts* rule – not the *Gideon* rule
    - Here directly deals w/ child’s physical liberty interest – so there is a rt to counsel
  + So the litigant who is exposed to risk of loss of physical liberty has a rt to counsel
    - But this would mean that the def here (the parent) doesn’t have a rt to counsel – but the child does – so procedure is a little askew w/ substance
  + In New York you get a lawyer
* Guggenheim: **better view is that *Jamie TT* is wrong to hold that this is a loss of physical liberty, which the *Lassiter* court says then triggers a right to counsel**
  + If *Lassiter* court had heard this case, would have likely said that Jamie TT doesn’t have a stronger rt to counsel than Ms. Lassiter
* Says here the prosecutor is really the one who didn’t do enough – so why couldn’t the rule be that we assume the child won’t need her own lawyer, but in some cases she will?
  + Then *Jamie TT* might be an example of where child would have a rt to counsel – b/c the prosecuting agency let her down
    - But wouldn’t this be difficult to know until after the fact?
  + To say that children have a rt to counsel in all child protection cases b/c children won’t otherwise have the wherewithal to participate / be in court implies more than is true about child protection cases, and is saying children have a role in the proceedings—which we may disagree with
    - Children in these cases resemble the victims in criminal cases – and victims don’t have a constitutional rt to be represented; they are represented by the state / prosecutor

Does this case come out the same way if Jamie recanted on the eve of trial and her lawyer didn’t present new evidence? Was she then ineffectively represented?

* Court here says IAC b/c lawyer failed to gather the evidence to support petitioner’s case
  + Essentially court equates effective assistance as being a co-prosecutor
  + But wouldn’t a true fact-finding role mean the lawyer would assist both the prosecutor and the defense? Then lawyer would not really be there to serve Jamie but would be for the court – to place them in the best position to know the whole case
* Nothing in the case goes into the facts of what Jamie said to her lawyer
  + So if this had been a (likely un-true) recantation case, what would IAC mean?
    - Would we be comfortable concluding that Jamie had a lawyer in a meaningful way if that lawyer was free to ignore Jamie’s request for case not to go forward, even when lawyer knows full well that the abuse really happened?
      * Would we really call the lawyer *Jamie’s lawyer* then? Or a co-prosecutor who specifically ignored what Jamie wanted?
      * She wasn't called by the prosecution.
    - Would be very different than if she told her lawyer the one thing she wanted was to never live with her stepfather again—then lawyer can take that fact into account

🡪 **Ultimately it’s irrelevant what the child wants – the question is was she abused!**

* Following the advice of the child as client isn’t consistent with substantive law if it will make it more likely that the case will come out in accordance with the lawyer’s own advocacy – undermines substantive law if he permits child’s preference to interfere with the result
  + Legally abused children are children who have been abused – irregardless of whether or not they want to be protected
  + Why would we let loose lawyers for children to seek dismissals of those cases when there is a factual basis for intervening, when that is inconsistent with the purpose of these proceedings?

**Guggenheim has trouble making sense of *Jamie TT* – especially nervous about the possibility that it will be interpreted as whenever a child is abused you must seek a finding**

* Maybe we like the adversarial system to a point—but not in all circumstances
  + When it affects kids we don’t want “good advocacy” – we want “good justice”

## In re Patricia E. (Cal. App, 1985)

* Dependency proceeding – daughter adjudged a dependent of the court
  + Father challenges b/c counsel was appointed to represent both welfare dept and the child
* Court holds 🡪 it was error to fail to appoint independent counsel in the absence of an affirmative showing that the child’s interests would be adequately represented
  + Affirmative showing of absence of need for independent counsel is required – otherwise must appoint independent counsel for child
  + Duties and role of independent counsel aren’t merely acting as a mouthpiece for the gov agency

………………………………………………………………………………………………………

# CONSIDER WHEN AND HOW MUCH CHILDREN EMERGE AND SEEM TO MATTER AT ALL

Emphasis on rights of children

* Murphy’s dissent in *Prince* emphasizes **child’s right to practice its religion** (p.16)
  + Burden on state to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of this type
* Douglas’ dissent in *Yoder* emphasizes **child’s right to choose not to go to school** (p.27)
  + While the parents normally speak for the entire family, the education of the child is a matter on which the child will often have decided views
    - Guggenheim: at what point are child’s choices truly hers and not her parents’?
  + “It is the future of the student, not the future of the parents, that is imperiled by today’s decision”
* Rehnquist’s dissent in *Santosky*
* Stevens’ dissent in *Troxel*
  + Must consider child’s interests – child has a right to maintain a deeper relationship with his grandparents than his mother might want
    - Parents’ liberty interest must be balanced against the child’s interest in preserving relationships that serve her welfare and protection, and the state’s parens patriae interests
    - Says majority treats children as mere chattel

Reframing cases in terms of children’s rights might add something—but won’t add anything for justices who don’t believe in viewing in terms of children’s rights

* *Michael H.* court rejects child’s right’s argument
  + Can say child was being discriminated against because she was illegitimate
    - But Scalia says this is nonsense – she’s not illegitimate
  + Can say child had a right to maintain the relationship with her biological father
    - But Scalia says no right to have two fathers – ok for court to choose one over the other
    - Scalia says child’s rights are exactly the observe of her father’s rights – if he doesn’t have one, she doesn’t have one
* But in *Troxel* we have a justice who affirmatively says we have reason to frame the issue in terms of the child’s right, and both Stevens and Kennedy say they wouldn’t support a harm principle