Children - Individuals without Rights?

Sanford N Katz, Boston College Law School
In this era of growing government involvement in the lives of its citizens, the problem of state intervention into family situations is especially sensitive. When the state uses its authority to invade the parent-child relationship or usurp the parental function, what happens to individual rights?

The parent-child relationship, although frequently referred to in quasi-sacred terminology, is the least secure from outside interference. The husband-wife relationship and sibling relations are much more immune from governmental intervention. It would be extraordinary to think of a third party's bringing a legal action to sever the husband-wife relationship (although this sometimes seems desirable) against the wishes of either spouse.

While the trend in divorce reform is toward a no-fault basis for dissolution, no recommendations have gone so far as to suggest divorce against the wishes of both parties. Only death or confinement in a mental or penal institution provides involuntary separation. Nor is there a recognized special legal proceeding, short of adoption of one of the siblings, for brothers or sisters to terminate their relations with each other or to have the state terminate it for them.

The integrity of the husband-wife relationship was underscored in *Griswold v. Connecticut*, the famous Connecticut birth control case. Justice Arthur Goldberg wrote in his concurring opinion:

> Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the state from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization — surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from the abridgement by the Government though not specifically mentioned in the Constitution.

The history of the law's treatment of the parent-child relationship, however, reveals an inherent contradiction. On one hand, there are statements about the natural tie between parent and child; on the other, there is the feeling, incorporated in the historic doctrine of *pars pro patria*, that the state is the ultimate keeper of children's welfare.

The application of this doctrine is not altered by the fact that its probable origin had more to do with the state as keeper of a child's money and property than it did with the child's well-being. Hence, even with this background, we still read court opinions using this doctrine in a benevolent fashion.

Essentially, *pars pro patriae* is an excuse for the government to replace a parent in controlling the destiny of a child. This use of authority is most apparent in cases dealing with medical treatment for children.

In 1952, the Supreme Court of Illinois was probably the first high court to establish criteria for compelling medical treatment for children over the objections of the parents. In *People v. Labrenz*, the court was asked to assume the role of parent in granting permission for a child to receive a blood transfusion. Physicians had advised the parents of Cheryl Linn Labrenz, a child born with an Rh blood condition, that unless she received an

---

*Sanford N. Katz*, Professor of Law at Boston College Law School, is the author of *When Parents Fail*, Chairman of the Adoption Committee of the American Bar Association, and Editor-in-Chief of Family Law Quarterly.
immediate blood transfusion, she would almost certainly die. Her Jehovah’s Witness parents refused to permit the transfusion. It was their belief that such medical intervention was contrary to the tenets of their religion.

When the child was six days old, a petition was filed in the Circuit Court of Cook County, alleging the dependency of the child because of the absence of proper parental care and guardianship. Medical testimony established that the child would probably die unless the transfusions were given and, even if she lived, she would have permanent brain damage. The court appointed a probation officer as the child’s guardian. It was his duty to consent to the necessary medical procedures. The transfusions were given and, three days later, the child was out of danger. Afterwards, Cheryl Linn was released to her parents.

Cheryl Linn’s parents appealed the dependency issue and appointment of the guardianship to the Supreme Court of Illinois. The court affirmed the lower court’s decision and rejected the parent’s contention that they were deprived of freedom of religion and of their rights as parents in violation of the Fourteenth Amendment. The court held that neither parental rights nor freedom of religion provided absolute immunity from state intervention. Turning to the statutes of Illinois, the court stated,

We entertain no doubt that this child, whose parents were deliberately depriving it of life or subjecting it to permanent mental impairment, was a neglected child within the meaning of the statute.

The Labrenz case illustrates the prevalent view that the state will not permit parents to refuse to consent to emergency medical treatment for their children. Parental rights are subordinate to state authority in these cases. It has been said that parents may make martyrs of themselves but not of their children.

Child abuse and child neglect provide the most common reasons for governmental abrogation of the rights of parents. Nevertheless, because it is said that parents have the right and, indeed, the responsibility to raise their children to have respect for authority, the state allows parents wide latitude in instilling this respect, even including the use of physical force and violence. Indeed, not only is force an acceptable method of reinforcing the parental authority position, it has also been held that force is an appropriate way of building character. A Montana statute states:

Use of force not unlawful. To use or attempt or offer to use force or violence upon or toward the person of another is not unlawful in the following cases: . . . When committed by a parent, or an authorized agent of any parent, or by a guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice, or pupil, and the force of violence used is reasonable in manner and moderate in degree.

And, the Restatement of the Law of Torts (1962) states:

Force applied or confinement imposed for any purpose other than the proper training or education of the child or for the preservation of discipline is not privileged although applied or imposed in an amount and upon an occasion which would be privileged had it been applied for such purpose.

It is thus clear from the law that, while adults have the right to have their bodies protected from assault, children have only limited rights in this respect. The home, which is almost sanctified in our culture, is also a place which permits the use of force and violence against children. Excessive force, however, is condemned.

Thus, in People v. Stewart, the state of California prosecuted a father of a seven-year-old boy for assault and battery after he had become angered when the child refused to spell the word “the” at the dinner table. The father slapped the boy three times about the face and head, “knocking him to the floor and either by accident or by design his boot struck the boy’s back.” The boy was examined by a physician later that evening and was found to be emotionally upset and to have had “bruises on his left face and jaw, reddened ears, a mild swelling over the left cheek and bruised, swollen and abraded area, approximately the size of a silver dollar, on the small of his back.” Mr. Stewart was found guilty.

In State v. Weber, the Minnesota Supreme Court affirmed the conviction of a father for second degree assault on his son. The court vividly described the child’s injuries. When brought to the hospital, Jimmy was bleeding from a cut on his right temple, was unconscious, and his respiration was low and somewhat deep. Further examination revealed a cerebral contusion or bruising of the brain, otherwise known as a concussion; he had minor bruising about the chest and upper part of the arm and a little redness on the buttocks. Jimmy remained unconscious for about one week. On the morning following his entry into the hospital, Jimmy’s buttocks had turned a dark purple and increasing discoloration appeared around his chest, arms and to a lesser degree on one of his thighs. There was also discoloration between his legs, and his testicles were discolored and swollen.

The school is another institution to which the state allows almost the same kind of assault. In Death At An Early Age, Jonathan Kozol outlined the continual psychological and physical abuse vented upon grade school children in Boston’s Gibson School. Several physical beatings left permanent “raised scars.” One child described his ordeal by saying:

I was talking and I was sent down to the cellar and when I got the stick I was scared and I must have pulled back my hand a little so I got it on the knuckle instead of on the other part. I already had a bad infection. They said it was my fault for not keeping my hand still.

The child was subsequently hospitalized for several days. The extent of the teacher’s regret was to send the child a “get well card.”

Although the Boston Teacher’s Handbook requires a formal report of all corporal punishment inflicted in schools, Mr. Kozol reported that disregard was flagrant and abuse frequent. He quoted a few statements of teachers concerning the rattan (punishing stick): “When you do it, you want to snap it abruptly, or else you are not going to get the kind of result you want . . . Leave it
overnight in vinegar or water if you want it to really sting the hands... Don't worry about the law. Just make damn sure that no one's watching." Such attitudes culminated in situations like the one Mr. Kozol reported:

But when you hear of a 60 lb. mentally-ill fourth grader being guarded by two men and whipped by a third for acts that are manifestly crazy, and when the teacher who prepares the punishment [is]... gleaming with excitement...

Child neglect cases are perhaps less dramatic than those of child abuse, but the effect on parental rights may be the same. If a parent deprives a child of health, shelter, financial security, education or other necessities, he or she may be subjected to governmental intervention resulting in the infringement of parental rights. A neglecting parent may find that the government might require that he or she be supervised or, in extreme cases, the child may be removed from the home.

Practice has shown that more emphasis is put on the issues surrounding removal than on the succeeding part of the governmental intrusion, that is, the placement of the child. Also, it should be pointed out that in removal proceedings, great emphasis is placed on assuring that parents are given all the procedural safeguards available in other civil matters. Some states go so far as to furnish legal counsel for parents unable to afford it themselves. In contrast, there is little evidence that the same respect is given to the child's rights.

The usual placement for children removed from their natural parents' home is in foster care or in adoptive homes. Both placements raise important questions about individual rights and the authority of child welfare agencies.

Foster care is considered a temporary placement for children. Its importance and the care given children varies considerably according to location and, perhaps more importantly, whether it is part of a public or private function. Some private child welfare agencies in large metropolitan areas are able to attract stable and secure persons as foster parents. Other agencies are not always so fortunate.

Often there is a harmonious relationship between agencies and foster parents, but sometimes the foster parents view the agency as the enemy because they feel that agencies misuse their power. They say that agencies use the foster child as a pawn to compel the foster parent to conform to the agency's wishes. The agency is indeed almost all-powerful in these situations, not only because of its having financial control but through its legal authority. Foster parents are in an especially weak position to attack any agency rules. The only power foster parents have is the physical possession of the child, which, of course, is often the most important.

There is some merit to the charge that child welfare agencies abuse their power in regard to foster care. Child welfare agencies, for a variety of reasons—lack of personnel being perhaps the most prevalent—do not maintain contact with foster children. It is inevitable, then, that foster parents become attached to their foster children and want to turn what was originally thought of as a temporary placement into a permanent one.

The foster parents' request for adoptive status is often met by the agency's preparing to remove the child. The result is a struggle for power over the child. The outcome in many of these cases is tragic, especially for the child. Somehow agencies lose sight of the whole point of the intervention and the placement, which is to secure the child's best interests no matter what one labels the setting.

It is not only grossly unfair, but really a breach of trust when agencies use technical maneuvers to outsmart foster parents and regain custody of a child. Agencies cannot have it both ways. They cannot expect foster parents to act like real parents and not become emotionally attached. In many publicized cases, child welfare agencies have placed their reputation and their regulations over the child's best interests. Respect for the agency's authority has often been set up in opposition to securing the child's protection.

Adoption provides child welfare agencies with the most appropriate solution to cases where return of the child to the natural parents is impractical or impossible. Unlike societies in which temporary placement is not uncommon, our society considers permanent placement the norm.

In adoption, as well as in foster care, we also often lose sight of the ultimate purpose: child protection. Instead, we tend to get caught up in the entanglements of the so-called legal rights of the other participants—the natural parents. For example, when a question arises as to the extent to which a mother can place certain conditions on her giving up a child, it is said that these conditions are allowable because of her rights.

Consider the role of religion in the placement process. Some maintain that a mother may choose the religion of the adoptive parents as part of her parental rights. Logically, this position is unsound. Once parental rights are terminated, as they must be for adoption to take place, the desires of the natural parent about the child should be irrelevant. Religious considerations should be relevant only when they further a child's best interests. This means that religion should be respected and its continuity encouraged when a child has been reared in a particular religion or when the child has a religious preference. In these cases, placement with parents who have a different religion might therefore be confusing or emotionally upsetting to the child. However, religion should not be the criterion merely because of parental rights.

This paper began with the question: what happens to individual rights when the government intrudes in the parent-child relationship? Although we continue to pay lip service to children's rights, the truth of the matter is that we emphasize parental rights. On balance, children have very few legal rights in the matters discussed. A child can steal a dollar and almost the whole machinery of the courts is available to see that his rights are protected. That same child can have his liberties curtailed by being removed from his natural parents and placed with others, and no one seems to be looking out for his custodial interests. The result is that the child is not included in the phrase "individual rights" even when the social services being offered are theoretically for his welfare.