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# How Parents and Children Disappear in Our Courts - And Why It Need Not Ever Happen Again

James A. Cosby

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HOW PARENTS AND CHILDREN ‘DISAPPEAR’ IN OUR COURTS — AND WHY IT NEED NOT EVER HAPPEN AGAIN

JAMES A. COSBY<sup>1</sup>

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#### I. INTRODUCTION

One conflict has plagued parents forever: While on the one hand they must teach their children to become responsible and independent individuals, on the other hand, they must also provide their children with structure, discipline and physical protection. Thus, while children are utterly *dependent* on others in protecting their most basic interests, they are also extraordinarily *vulnerable* to all manners of abuse and neglect. It is the balancing of these two seemingly conflicting dynamics then that perhaps makes parenting the most complex and challenging job on the planet.

And this conundrum complicates the U.S. legal system in its dealings with the family, as well. While parents clearly have a fundamental right to determine how to best provide for their children,<sup>2</sup> the state must also ensure that parents meet their “high duty”<sup>3</sup> to ensure their children’s well being. The critical question addressed in this Article is how can the state efficiently and effectively act to ensure that children are, in fact, being provided for in their homes—while avoiding intruding on the rights of parents in the process?

Currently our courts and legislators attempt to resolve cases involving the parent-child relationship under either of two legal doctrines. One approach recognizes that as children are so vulnerable and because childhood development is so critical, sometimes *the best interests of the child* must be the primary focus of the law. Under this doctrine, the law may both protect the most defenseless of individuals, as well as protect the future health of society itself, at the same time.

Yet, anytime children are made the top priority in the legal analysis, or if any *affirmative* rights are asserted on their behalf, there is a risk that the state may totally override the basic rights and authority of parents in the home. Therefore, the second approach to these cases is a doctrine of *parental autonomy*.<sup>4</sup> This approach is generally characterized by the state’s broad deference to the interests and authority of parents (often under the Due Process Clause of the Fourteenth Amendment),<sup>5</sup> and by an avoidance of granting children any affirmative rights.<sup>6</sup> This primacy of parents’ rights under the law can generally be described as follows: “Parents have a fundamental liberty interest, which gives them the right to establish a home, raise

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<sup>2</sup>Stanley v. Illinois, 405 U.S. 645, 651 (1972).

<sup>3</sup>Pierce v. Society of the Sisters, 268 U.S. 510, 535 (1925).

<sup>4</sup>Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) (referring to “parental autonomy” as being where the state creates “a zone of private authority within which each parent, whether custodial or noncustodial, remains free to impart to the child his or her religious perspective.”); Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004) (“In this case, the exceptions covering a broad variety of circumstances do give parents greater flexibility to allow their children to stay out after hours and in that way minimize the interference with parental autonomy.”); Doe v. School Dist. of the City of Norfolk, 340 F.3d 605 (8th Cir. 2003) (holding that parents’ asserted right to protect child from prayer at public school graduation ceremony treated as a substantive due process right to “parental autonomy”); and Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (acknowledging the heightened constitutional protection of parents in setting curfews for their children as part of a right to “parental autonomy.”).

<sup>5</sup>See Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see also Pierce, 268 U.S. at 534-535 (“The liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” *Id.*; see also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody and management of their children”); Stanley, 405 U.S. at 658 (holding that an unwed father’s unfitness as a parent cannot be presumed, and due process demands a hearing).

<sup>6</sup>See, e.g., Santosky, 455 U.S. at 745 (1984); DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989). Further illustrative is that of the 189 members of the United Nations, only the U.S. and Somalia continue to refuse to ratify the Convention on the Rights of the Child granting children a basic level of affirmative individual rights. Somini Sengupta, *U.N. Session Begins to Tally The Perils of Being Young*, NEW YORK TIMES, May 9, 2002, A-14.

children, and control their education and upbringing. As long as parents are 'fit,' the state has no reason to interfere with the exercise of this interest."<sup>7</sup> While these two doctrines do work well in most cases, in too many others, however, they fall short altogether.

The problem is that the law has never been able to adequately reconcile these approaches with one another. In fact, and amazingly enough, our courts have yet to even define the "exact metes and bounds" of the individual liberty interests of parents, or children.<sup>8</sup> Thus, in the more complex of these cases, often there are no clear nor consistent tests for determining *when* exactly the law should rely on one doctrine or the other; for adequately *balancing* the interests of parent and child; nor for recognizing the most obvious of exceptions to the above doctrines.

Currently, this vital area of the law is unsettled, ambiguous and arbitrary. To give a few examples, while children currently *do not* enjoy constitutional recourse as to food, shelter, or even freedom from assault, they *do* enjoy constitutional recourse as to free speech, emergency medical care and a right to abortion.<sup>9</sup> And while the states' often shocking failures to protect even the most basic interests of children is (or should be) a national embarrassment,<sup>10</sup> in other situations, critics note an overly-intrusive "child abuse industry," where the constitutional rights of parents can be infringed on by the state in a relatively arbitrary manner.<sup>11</sup> Simply put, this most critical area of the law is ripe for re-evaluation.

In cases involving the parent-child relationship, the law must contend with numerous moral, factual, and legal issues as challenging as any our courts face. As a few illustrations, parents who appear to be neglecting a child may be criminally neglectful, or may be mentally ill, or may simply be very poor.<sup>12</sup> Inappropriate parental practices to one person may make perfect sense in a different cultural or religious community. A child with mysterious bruises may be a victim of abuse, or may just be an extremely active child.<sup>13</sup> And a runaway youth may be characterized as a juvenile delinquent, but may only be escaping a home life that actually makes

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<sup>7</sup>Joanna Grossman, *Can the Fifty States' Grandparent Visitation Statutes Survive in the Wake of the Supreme Court's Decision in Troxel v. Granville?*, available at <http://writ.findlaw.com/grossman/20020312.html> (visited February 10, 2005).

<sup>8</sup>*Troxel v. Granville*, 530 U.S. 57, 78 (2000) (Souter, J., concurring) ("It is true that in our cases we have never set out the exact metes and bounds to the protected interest of a parent in the relationship with his child."); *Michael D. v. Gerald D.*, 491 U.S. 110, 130 (1989) (reserving question of setting the bounds of the interests of children in the parent-child relationship).

<sup>9</sup>Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 29 (1994).

<sup>10</sup>*See, e.g., supra* note 5.

<sup>11</sup>MARY PRIDE, *THE CHILD ABUSE INDUSTRY* (1989); CHRISTOPHER J. KLIKA, *THE RIGHT CHOICE*, 268 (1993).

<sup>12</sup>Michael Compitello, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135, 147-48 (1997) (discussing "lingering colds" and "thin child" accusations).

<sup>13</sup>*See, e.g., id.* (discussing misuse of child abuse hotlines and related issues).

life on the streets a reasonable alternative.<sup>14</sup> Thus, the use of bright-line legal tests in these cases can be highly impractical, at best.

What the doctrines of *parental autonomy* and the *best interest of the child* attempt to do is to simplify these immense ambiguities in the most rational ways possible. In their current forms, however, these approaches are overly broad and overly rigid. Instead of resolving ambiguities, the toughest questions are simply ignored. The doctrine of *parental autonomy* is defined so broadly that in some cases the interests of children are actually eclipsed from the legal analysis—and vice versa under the *best interests of the child* standard.

These approaches rarely unravel the interests of parent and child so as to allow for a very clear analysis. In this way, sometimes what are known to be incredibly abusive parents, for example, inexplicably enjoy the strongest of constitutional protections, while state actors may effectively and arbitrarily assert their own, personal views of parenting into the home, in place of a parents'. In other words, parents and children are alternately excluded from any given case—that is, their interests 'disappear,' altogether.

Part One of this Article further examines those moral, factual and legal dynamics in the family that make these cases so difficult. Part Two summarizes the present state of the law, and demonstrates precisely where and why the current legal approach is falling short. I will show how the law specifically fails to adequately define the rights of parents, substantively as well as procedurally and, I will furthermore demonstrate how, in their current forms, the doctrines of *parental autonomy* and the *best interests of the child* are far too broad and too rigid for many cases involving the parent-child relationship.<sup>15</sup>

Finally, Part Three advances an original and more just constitutional analysis for examining the parent-child relationship. In short, under this approach the best aspects of both the doctrines of *parental autonomy* and *the best interests of the child* are incorporated into one, more comprehensive and more cohesive, analysis.

This approach will provide two main improvements over the current legal analysis. First, the constitutional rights of parents in governing their families will be greatly clarified and strengthened. Second, under this analysis the individual interests of both parent and child will at the least be *acknowledged* in every case, thus the interests of neither will ever actually be allowed to "disappear" from the analysis. As the sole purpose of this approach will be to better advance the interests of the family as a whole, it will be termed the *Single Objective Analysis*.

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<sup>14</sup>See, e.g., *Homeless Youth: The Saga of "Pushouts" and "Throwaways" in America. Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 15 (1980); U.S. DEP'T OF JUSTICE, *AMERICA'S MISSING AND EXPLOITED CHILDREN: THEIR SAFETY AND THEIR FUTURE* (1986).

<sup>15</sup>The *best interests of the child* doctrine has been widely criticized for its ambiguity. See A.L.I. Principles of the Law of Family Dissolution 2, note 2 (Tentative Draft No. 3, Mar. 20, 1998); Fitzgerald, *supra* note 9, at 60; Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Jon Elster, *Solomonic Judgments: Against the best interests of the child*, 54 U. CHI. L. REV. 1 (1987); Elizabeth S. Scott, *Pluralism Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

PART ONE: THE CHALLENGE OF THE LAW AND THE FAMILY

II. THREE HURDLES

As evidenced in the above factual scenarios, the law and the family can be a most awkward mix. The problem is three-fold. First, these cases often touch on the most deeply held personal beliefs of individuals, such as matters regarding morality or religion, for example. Thus, many of these cases touch on issues that society may not want decided in a court of law.

Second, often these cases are factually ambiguous. Many key events may occur behind closed doors, such as in many cases of physical or sexual abuse, for example, while other cases may hinge on highly ambiguous determinations, such as psychological factors, or on a determination as to a parent's state of mind. Thus, these are often not issues that are easily quantified for the purposes of litigation, either.<sup>16</sup>

Finally, it is sometimes difficult to determine precisely where it is that a parent's most personal and most critical rights of authority and to privacy in the home ends and where the state's duty to protect children must begin. This balancing act is perhaps the most challenging aspect of these cases.

Due to the above factors, cases involving the parent-child relationship are particularly susceptible to inappropriate individual biases and procedural errors. Arbitrary factors, such as the socio-economic status of a family, or the individual cultural, moral or religious beliefs of any one particular parent, social worker or judge, all may alter the outcomes of cases.<sup>17</sup> Yet, even when such mistakes may seem relatively minor, they can have a devastating impact on the lives of those involved. While the margin of error may be small in these cases, the stakes can be enormous.

III. THE CURRENT SOLUTION

As parental rights are as highly valued as any rights afforded under the Constitution,<sup>18</sup> most issues involving the parent-child relationship are governed by the doctrine of *parental autonomy*. Generally speaking, in any case where important rights of parents are deemed to be at risk, various broad and rigid legal rules and procedural safeguards will be cited to favor the parent. In this way, the critical interests of parents are largely protected from individual judges, social workers, or other state actors, who might otherwise resolve these ambiguous issues against

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<sup>16</sup>See, e.g., *Santosky*, 455 U.S. at 762-763 (pointing out the inherent ambiguity of family law cases, such as due to latitude given to individual judges). The Court raised a concern as to racial and socio-economic factors entering the analysis, which most certainly lead to a disparity in how family rights are respected. *Id.* at 762 n.12.

<sup>17</sup>See *id.* at 762 (noting that determinations as to a parent's fitness are "unusually open to the subjective values of the judge").

<sup>18</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

parents in an arbitrary or discriminatory manner.<sup>19</sup> Because the parent's interest in the home is understood to be so crucial, it is said that any risk of legal error or bias must instead be absorbed either by the children, or by the state.

As an example, in visitation cases, there is a strong presumption that visits with a legally "fit," biological parent will in fact be in the "best interests" of the child.<sup>20</sup> Absent fairly extreme, extenuating circumstances,<sup>21</sup> the practical effect of this assumption is to render most factual ambiguities and potential procedural problems *moot*. This is true because regardless of whether such difficulties are present in a case or not, the law is going to safely err on the side of protecting the parental interest. Instead, it is the child's interest that effectively absorbs any errors and the basic structure of the family is maintained.

An ideal illustration is the 2000 Supreme Court visitation case of *Troxel v. Granville*,<sup>22</sup> often referred to as the grandparents' rights case. In *Troxel*, a pair of grandparents had petitioned for increased visitation rights with their grandchildren, but the children's mother had then opposed that petition. (The children's father, the grandparent's son, was deceased).<sup>23</sup> The grandparents' claim was supported, in part, by the fact that the grandchildren had stayed with their father when he had lived in the grandparents' home. The grandparents thus argued that this contact was evidence of the important relationship they had with the children and, therefore, that increased visits would be in the children's "best interests."<sup>24</sup>

In granting the grandparents' petition, the trial court had not explicitly<sup>25</sup> relied on any hard evidence to override the mother's preference, but instead relied on an assumption that children "normally" benefit from visits with their grandparents.<sup>26</sup> The U.S. Supreme Court, however, then held that it is a general deference to the wishes of parents that determines these cases.<sup>27</sup> Clearly, it is a *mother's* preference as to who may visit her children, and how often, that is presumed to be in the children's best interests, and the law must err against such requests by third parties

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<sup>19</sup>*Santosky*, 455 U.S. at 765 (in a case concerning the termination of parents' rights, the Supreme Court overruled the State Court that had "suggested that a preponderance standard properly allocates the risk of error between the parents and the child. That view is fundamentally mistaken").

<sup>20</sup>*Troxel*, 530 U.S. at 68.

<sup>21</sup>"Even a fit parent is capable of treating a child as a mere possession." *Id.* at 86. (Stevens, J., dissenting).

<sup>22</sup>*See supra* note 8.

<sup>23</sup>530 U.S. at 60.

<sup>24</sup>*Id.* at 71.

<sup>25</sup>Justice Stevens did raise the question as to whether certain factors had indeed been granted weight and were perhaps implicit in the lower court ruling. 530 U.S. 82 fn 3.

<sup>26</sup>*Id.* at 69.

<sup>27</sup>"It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better decision.'" *Id.* at 63 (quoting *In Re Custody of Smith*, 969 P.2d 21, 31 (Wash. 1998)).



when opposed by a parent.<sup>28</sup> This presumption thus encapsulates the doctrine of *parental autonomy*.

Conversely, in a case where it is the critical interests of a *child* that are most at risk, the doctrine of the *best interests of the child* is cited to similarly favor the child. Here, the law broadly errs on the side of *allowing* state intrusions into the family in order to prevent obvious and unnecessary harms to a child. Consider the following illustration: If there is strong evidence of imminent danger from abuse or neglect in a home, social workers and police officers are granted relatively broad latitude under Fourth Amendment search and seizure requirements in order to temporarily remove children from such environments.<sup>29</sup> If, after an adequate investigation, it is shown that no such danger exists, the child is returned to his or her home. While such an action can be a tremendous disruption to a family, this potential harm is outweighed by the state's inability to otherwise save a vast number of children from unnecessarily enduring what may be devastating psychological and physical damage,<sup>30</sup> and even fatalities.<sup>31</sup>

The rationale driving both of these doctrines is that while there is always a risk in relying on such broad legal rules and assumptions, this is unavoidable given the complex nature of the parent-child relationship. While the law cannot guarantee *perfect* outcomes for all cases, the current doctrines do ensure that in even the most complex or ambiguous of circumstances, the most vital interests will be strongly protected. Therefore, it can safely be said that these doctrines do provide the *most* just results, in the vast majority of cases.

However, as currently conceived, these doctrines also rely on rules and assumptions that are so sweeping, and so formalistic, that ultimately they can rely on some rather dubious logic—and even result in opinions that *ignore* the very facts presented! As will be further demonstrated in Part Two of this Article, sometimes these doctrines are even *incapable* of dealing with the most relevant of issues.<sup>32</sup> A

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<sup>28</sup>*Id.* at 68-69 (“there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

<sup>29</sup>See KLICKA, *supra* note 11 at 264.

<sup>30</sup>See *infra* section IX, D.

<sup>31</sup>A report from the Centers for Disease Control and Prevention suggested that 5.4 of every 100,000 children under four-years-old in America die from abuse or neglect. Administration For Children and Families, U.S. Department of Health and Human Services, *A Nation’s Shame: Fatal Child Abuse and Neglect on the U.S., a report of the U.S. Administrative Board on Child Abuse and Neglect*, xxi (1995).

<sup>32</sup>Symbolic of this dilemma is that in some cases even the most basic interests of children have been neglected to the point where in one particular case an abused child was “never seen outside the home until autopsy.” A NATION’S SHAME, at xv. In other high-profile cases, children supposedly under the care of the state have been horribly neglected, even to the point of starvation. See, e.g., *New Jersey: Trenton: State May Settle Starvation Lawsuit*, *THE NEW YORK TIMES*, B-5, September 2, 2004. Yet, the over-involvement of the state into the affairs of families has created what one commentator has described as a “child abuse industry.” Michael Compitello, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135, at (1997), quoting CHRISTOPHER J. KLICKA, *THE RIGHT CHOICE* 252, 268 (1993); see also MARY PRIDE, *THE CHILD ABUSE INDUSTRY* (1989).

telling example again occurs in visitation matters. While in every State it is the “best interests of the child” that specifically governs the analysis, the current reality is that “[e]ven parents that fail to support their children and physically abusive parents . . . retain their constitutional visitation rights, enforceable against the child’s will and regardless of the child’s ‘best interests.’”<sup>33</sup> And, as another example, protections of parents from state searches and seizures under the Fourth Amendment may effectively be defined by overzealous—and almost always understaffed—social workers with little “fluency” in actually defining such legal standards.<sup>34</sup> In short, under the current approach, all logic may be lost.

#### PART TWO: THE CURRENT STATE OF THE LAW

#### IV. THE DOCTRINE OF *PARENTAL AUTONOMY*

The legal analysis of the family in America begins with the interests and authority of parents. What is clear throughout this area of the law is that the state will consistently err on the side of protecting some very strong parental interests in the home.<sup>35</sup> Thus, while this general doctrine is not always specifically referred to as the doctrine of “*parental autonomy*,”<sup>36</sup> this term accurately and conveniently encapsulates a large body of law.

##### A. *The Foundation of Parental Autonomy: Meyer and Pierce*

The foundation for *parental autonomy* was established in the two seminal parental rights cases of the 1920’s: *Meyer v. Nebraska*<sup>37</sup> and *Pierce v. Society of Sisters*.<sup>38</sup> *Meyer* and *Pierce* were the first U.S. Supreme Court decisions to recognize the individual liberty interests of parents as fundamental rights, protected under the Due Process Clause of the Fourteenth Amendment.<sup>39</sup>

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<sup>33</sup>Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, at 60 (1994) (emphasis in original) In fact, “the best interests of any particular child always yield to the constitutional interests of their parents,” in almost every area of the law. *Id.* See also, Fitzgerald at 76-77, discussing *DeBoer v. Schmidt*, 114 S. Ct. 1 (1993)(adoption context).

<sup>34</sup>*Frantz v. Lytle*, 997 F.2d 784, 831 (10th Cir. 1993).

<sup>35</sup>See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Yoder*, 406 U.S. at 232 (“This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

<sup>36</sup>See, e.g., *supra* note 4.

<sup>37</sup>262 U.S. 390 (1923).

<sup>38</sup>268 U.S. 571 (1925).

<sup>39</sup>*Stanley*, 405 U.S. at 651 (Court held that an unwed father’s unfitness as a parent cannot be presumed and due process demands a hearing); see also *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 574-575 (noting that “the liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”); *Santosky*, 455 U.S. at 753 (discussing “[t]he fundamental liberty interest of natural parents in the care, custody and management of their children”).

At issue in *Meyer* was a Nebraska law banning the teaching of foreign languages to grade school students. The intention of the law had been to promote the use of the English language in America at a time of enormous post-World War One, European immigration.

Challenging the law was a teacher, Meyer, who had been instructing immigrant schoolchildren using Bibles written in their native-languages.<sup>40</sup> Meyer argued that for many religious families such Bible instruction was critical to lessons of morality and discipline concurrently being taught in the home. If an ability to read the Bible were not at least then facilitated in the schools, it would logically follow that those children would have great difficulty in developing those religious/moral lessons in their lives. It was thus argued that the state law restricted a basic ability of parents into governing their homes—an interest said to be of far greater import than was the promotion of the English language.<sup>41</sup>

A unanimous Supreme Court agreed with *Meyer* and struck down the statute. The Court held that the ban on foreign languages violated a fundamental right of parents to “establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy . . . the orderly pursuit of happiness.”<sup>42</sup>

Two years later, in *Pierce*, the Court invalidated an Oregon law requiring children to attend public schools, as opposed to religious or other private schools. The purpose of the compulsory state school system had mirrored the purpose in *Meyer* to “promote civic development” and patriotism in all school children in a post-World War One America.<sup>43</sup> Yet, this law too, was held to be an impermissible state intrusion into a private (and what was largely seen as a religiously-motivated) family decision.<sup>44</sup>

In *Pierce*, the Court articulated the rights of parents as follows: “The child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>45</sup> Thus, the right to determine whether religious, private or public schools were best for children was said to fall under a broad, fundamental right of parents to “direct the upbringing and education of children under their control.”<sup>46</sup>

In the years since *Meyer* and *Pierce*, these fundamental parental rights have been further entrenched under various circumstances, from determining visitation rights,

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<sup>40</sup>Establishment Clause challenges in the schools would come later. See *School Dist. of Abington Township v. Schempp* 374 U.S. 203 (1963) (holding that the government may not affirmatively oppose or show hostility toward religion in public schools).

<sup>41</sup>262 U.S. at 394.

<sup>42</sup>*Id.* at 399.

<sup>43</sup>*Id.* at 401.

<sup>44</sup>*Id.* at 535.

<sup>45</sup>*Id.* at 535.

<sup>46</sup>*Id.* at 534-35.

to home-schooling cases, to the denying of certain medical care for children in non-life threatening situations, as examples.<sup>47</sup>

*B. The Basic Parameters of Parental Rights*

Simply put, the doctrine of *parental autonomy* forces the state to take a “hands-off” approach to the American family,<sup>48</sup> thereby allowing parents to raise their children as they see fit. Under the First Amendment, parents enjoy fundamental rights of speech, belief, and religion in the home, as well as rights of privacy, under either the Fourth or the Fifth Amendments. Thus parents are protected from intrusions by the state into their homes. These interests are protected as fundamental rights under the Constitution.

Parents also enjoy fundamental, individual “liberty” interests under the Due Process Clause of the Fourteenth Amendment,<sup>49</sup> which are generally defined as rights to the “care, custody, and control” of ones children.<sup>50</sup> These are, in fact, the rights most often in dispute in our courts.

All fundamental rights are then protected from state intervention under the Supreme Court’s most stringent legal analysis: of *strict scrutiny*. The only “significant”<sup>51</sup> state infringements allowed upon a parent’s fundamental rights under this test are those “narrowly tailored to serve a compelling state interest,” and where a “less restrictive” means is not available.<sup>52</sup>

The strict scrutiny test is so difficult to overcome, in fact, that the practical reality is that once the specific actions or preferences of a parent are deemed to be

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<sup>47</sup>See, e.g., Baruch Gitlin, *Parents’ Criminal Liability for Failure to Provide Medical Attention to their Children*, 118 A.L.R.5th 253 (2005) (“It is generally recognized that parents have a duty to provide medical attention to their children.”); see also *State v. Jones*, 778 So. 2d 1131 (La. 2001) (convicting a father of manslaughter where the mother had actually struck the fatal blows to child, but the father did not get medical attention); *Priego v. State*, 658 S.W.2d 655 (Tex. Ct. App. 1983) (stating in dicta that parents have duty to provide medical attention to their children).

<sup>48</sup>Also, as local legislatures and local courts are often better acquainted with the communities involved, the individual parties, and the factual records of each of these individual cases, more specific details and issues may be better left to local courts and lawmakers to deal with on a case-by-case basis. *Troxel*, 530 U.S. at 101 (Kennedy, J., dissenting). “We must keep in mind that family courts in the 50 States confront these factual variances each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise.” *Id.*; see also *Ankenbrandt v. Richards*, 504 U.S. 689, 703-704; *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting) (“I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantage of doing more harm in a circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.”); *Troxel*, 530 U.S. at 90 (Stevens, J., dissenting) (“It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.”).

<sup>49</sup>See *Troxel*, 530 U.S. 57.

<sup>50</sup>*Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>51</sup>*Fair Political Practices Com. v. Superior Ct.*, 25 Cal. 3d 33, 47 (1979).

<sup>52</sup>See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993).

fundamental in a case, that parental interest effectively becomes almost *immune* from any and all state intrusions.<sup>53</sup> For example, a parent has a First Amendment right to indoctrinate his or her children with his or her religion of choice, and the U.S. government clearly has no discernible interest in otherwise imposing its own religious beliefs, or lack thereof, upon a family. Therefore, strict scrutiny will protect this parental choice almost no matter what circumstances may be present in any given case.

At the same time, any state intrusions that do not “significantly curtail” a parent’s fundamental rights, or any intrusions that infringe on what are lesser, *non-fundamental* rights in the home, are not analyzed under strict scrutiny.<sup>54</sup> Parental choices in the family will still be immune from unlawful state intrusions, but they are protected under a lesser judicial standard called the *rational basis* test. Under this standard, state intrusions are allowed so long as they are “rationally related to a legitimate government purpose.”<sup>55</sup> And once this test is cited in a case, government intervention is rarely denied.<sup>56</sup>

Therefore, a parent does not have an “absolute” right to keep the state out of his or her affairs.<sup>57</sup> Simply put, certain parental actions clearly exceed the scope of any legitimate rights to the actual “custody, control and care” of children, such as if there is strong evidence of abuse in a home, for example. Furthermore, intrusions under the more extreme of circumstances probably cannot be said to be a “significant” intrusion on one’s legitimate ability to raise a family, either.

Unfortunately, while the above rules do simplify this analysis, they do *not* provide an adequate legal framework for analyzing the parent-child relationship. While *parental autonomy* is critical, determining the actual scope of this doctrine has proven difficult, to say the least. Presently there is no clear idea as to what the precise scope of a parent’s rights to the “custody, control and care” of a child really are. Furthermore, nor is there any clear test for determining which state intrusions on parental rights are actually “significant,” and which are not. In practice, all of the above terms vary widely in meaning from case-to-case.

The realm of visitation rights again provides a prime illustration. If a biological parent opposes a third parties’ requests for visits with a child, our State Courts will cite to the basic and very broad parental rights of “custody” or “control” of one’s child. In this way our courts attempt to further strengthen the critical authority of

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<sup>53</sup>See, e.g., *infra* notes 60 and 74.

<sup>54</sup>See, e.g., *Bowen v. Gilliard*, 483 U.S. 587 (1987) (upholding the “rationality” of the “Government’s separate interest in distributing benefits among competing needy families in a fair way.”); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (“the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”). *Id.*

<sup>55</sup>*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

<sup>56</sup>See, e.g., DAVID KAIRYS, *WITH LIBERTY AND JUSTICE FOR SOME* 33-34 (1993) (“Courts will defer, examining the validity of government actions only superficially to determine whether there is any rational basis or rational relationship to some legitimate government interest. If there is – and there almost always is – the government’s action is valid. Invalidation of government action based on rational-basis judicial review has been extremely rare.”).

<sup>57</sup>*Troxel*, 530 U.S. at 93 (Scalia, J., dissenting).

parents in the home by presuming that the parent's preferences are, in fact, in the child's best interests. This is of course logical and leads to sound outcomes in the vast majority of cases. But currently such key terms are so ill-defined that often they only serve to gloss over the most relevant of factual inquiries. Thus, certain assumptions will preclude an adequate legal analysis.

In fact, in visitation cases a parent's *actual* track record with his or her child is regularly ignored. Instead, our courts assume that because the "natural bonds of affection lead parents to act in the best interests of that child," parents are likely to act appropriately in the future.<sup>58</sup> Yet, often this is an irrational and totally unnecessary assumption.<sup>59</sup> At least one state court has specifically noted the failings of this approach:

Finding that the continuation of a poor, strained or nonexistent parent-child relationship will be detrimental to a child's future welfare is difficult. No one can divine with any assurance the future course of human events. Nevertheless, past actions and relationships over a meaningful period serve as good indicators of what the future may be expected to hold.<sup>60</sup>

These assumptions can not only be illogical, but dangerous, as well. Often, a court will be better served to more thoroughly examine all of the facts actually before it assumes anything. The parent-child relationship is simply too deep and too complex for such superficial solutions.

Interestingly enough, the Supreme Court has noted the shortcomings of such broad and rigid presumptions in protecting *parental* interests: "[Such presumptions can] foreclose the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."<sup>61</sup> Yet, such assumptions are common.

In short, while "[p]rocedure by presumption is always cheaper and easier than individualized determination,"<sup>62</sup> a court can and must rationally examine all of the evidence before making a final decision—as best it can. I would suggest that the real problem in this area of the law is simply that often the law is too quick to cut off this analysis. And this avoidance of difficult legal and factual determinations naturally leads to unnecessary and illogical outcomes in all areas of the parent-child relationship.

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<sup>58</sup>*Id.* at 68 (quoting *Parham v. J.R.*, 442 U.S. 548, 602 (1979)).

<sup>59</sup>This is an extremely severe, relatively rare, and time-consuming determination in every state. See *Santosky*, 455 U.S. 745; see also ORE. REV. STAT. ANN. § 419B.504 ("[T]he parent or parents are unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change."). Further, the reality in many cases is that "even a 'fit' parent is capable of treating a child like a mere possession," or worse. *Troxel*, 530 U.S. at 90 (Stevens, J., dissenting).

<sup>60</sup>*Linkous v. Kingery*, 390 S.E.2d 188 (Va. 1990).

<sup>61</sup>*Id.* (invalidating a presumption against granting visitation rights to unwed parents).

<sup>62</sup>*Stanley*, 405 U.S. at 657.

I would further suggest that if a parent has consistently shown his or herself to be a very poor or even abusive parent in past visits with a child, then the relevant question is not whether a parent is or is not entitled to rights of “custody,” “control,” or “care” of his or her children. Such *general*, fundamental parental rights are beyond dispute. Instead, the primary focus in these cases should be to determine at *precisely what point* does a parent’s actions clearly exceed the legitimate scope of “custody,” “control,” or “care” and, if so, when might state infringement in such a case clearly be “significant,” or not? These are the types of questions that may not even be asked in these cases currently—but will in fact be the focus of Part Three of this Article.

Finally, even in those cases where the parental rights may be fairly clear, the critical decision as to whether to protect parents’ rights under either the strict scrutiny or the rational basis tests, too, is a relatively arbitrary process. No less than Supreme Court Justice Scalia has opined that generally these tests “are no more scientific than their names suggest, and a element of randomness is added by the fact that it is largely up to us which test will be applied in each case.”<sup>63</sup> And the practical reality for the parent-child relationship then is that once *parental autonomy* is cited to govern a court’s analysis and what are the currently ill-defined parental rights of “custody, control and care,” the outcome of a case is predetermined in favor of the parent—sometimes no matter what the evidence might otherwise indicate.<sup>64</sup>

In summary, currently our courts have relatively few clear or consistent guidelines for adequately dealing with the parent-child relationship. While the concepts of “custody,” “control,” and “care,” as well as the tests of strict scrutiny and rational basis tests themselves, all sound reasonable enough and are all cited regularly—each of these terms is relatively ambiguous and amorphous.

The challenge for the parent-child relationship then is to achieve the following: (1) a consistent and just legal framework that is applicable to a wide array of problems and circumstances; (2) respect for the critical authority of parents in the home; and (3) ensuring that the basic interests of children. As Supreme Court Justice Kennedy stated: “The principle [of broad deference to the rights of parents] exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to this right.”<sup>65</sup>

Yet, “[o]ur nation’s history, legacy, traditions, and practices’ do not give us clear or definitive answers”<sup>66</sup> nor have they even “set out the exact metes and bounds to the protected interest of a parent in the relationship with his child.”<sup>67</sup>

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<sup>63</sup>United States v. Virginia, 518 U.S. 515 (1996).

<sup>64</sup>This has long been a criticism of these tests. For example, under the strict scrutiny analysis, only one case concerning racial bias has ever upheld state intrusion, the highly controversial, Japanese-American internment case from World-War II. *See Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>65</sup>*Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting).

<sup>66</sup>*Id.* at 96 (quoting *Glucksberg*, 321 U.S. at 721).

<sup>67</sup>*See supra* note 5.

## C. Troxel v. Granville

While not all of the issues raised in the above mentioned *Troxel* case are relevant to this Article, the Justices did indeed identify the most crucial, unsettled issues of the parent-child relationship. A more detailed analysis of *Troxel* follows in Part Three of this Article.

While *parental autonomy* controlled the *Troxel* analysis, the four Justice plurality, as well as two dissenting Justices, all were wary of applying any overly broad conception of that doctrine. In fact, those six Justices chose not to protect the parental preference with strict scrutiny under the facts in *Troxel*.<sup>68</sup> Instead, the Court specifically looked to a conception of *parental autonomy* that would indeed be strong, but that would ensure that the interests of children would not be completely eclipsed from the analysis either.<sup>69</sup> The problem is that strict scrutiny is ill-suited for resolving matters when there are multiple individuals whose rights will be impacted by a decision.<sup>70</sup>

For example, in his dissent, Justice Kennedy noted that sometimes in visitation cases the petitioning third party is the person who has effectively raised the child (often a relative or foster parent) while the objecting biological parent has perhaps been absent from the child's life almost entirely.<sup>71</sup> In short, often times granting a third party visitation rights means preserving the only positive relationship a child has ever known. Such a decision would then certainly seem to be the most just and the most in line with a child's actual "best interests."

Sometimes, however, the current approach to *parental autonomy* is incapable of accounting for even the most obvious of legal distinctions and factual variances. While in *Troxel* this flaw was not necessarily alarming—as the third party claim was not particularly strong<sup>72</sup>—this flawed logic is all too apparent in essentially every area of the parent-child relationship.

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<sup>68</sup>See, e.g., *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice KENNEDY and Justice SOUTER recognize such a [fundamental parental] right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny . . ."). The plurality instead required that "some special weight" be given to the preference of a "fit" parent. *Id.* at 70.

<sup>69</sup>The plurality explicitly agreed with Justice Kennedy on this point in that the constitutionality of any given standard will vary, depending on how it is applied and that the constitutional protections in this area are best "elaborated with care." *Id.* at 73 (citations omitted).

<sup>70</sup>In the words of constitutional expert Professor David Meyers of the University of Illinois School of Law, "[I]mplicitly the answer is it just doesn't work here," Susan Dominus, *The Father's Crusade*, *The New York Times Magazine*, <http://www.nytimes.com/2005/05/08/magazine/08FATHER.html?6tonef=login>.

<sup>71</sup>*Id.* at 85 ("there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the 'person' among 'any' seeking visitation is a once-custodial caregiver . . ."). "Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of children by protecting the relationships those children form with such third parties." *Id.* at 64.

<sup>72</sup>*Id.* at 72 (noting the Trial Court's "slender findings" in support of the grandparents' claim).



While the mandate in America for strong protections of parental rights is clear, it is equally clear that the rights of parent's are not absolute. Simply put, if the barriers protecting the rights of parents from state intrusions are placed too high and are made to be completely rigid, then even minimal interests of children do, in fact, "disappear" from the legal analysis.

But this need not be the case. There is nothing in the Constitution that requires the state to blindly protect any and all parental actions—particularly if such actions are utterly irrational, or cause the wellbeing of a child to be made irrelevant. As Justice Stevens further noted in *Troxel*: "The constitutional protection against arbitrary exercise of state interference with parental rights should not be extended to prevent the States from protecting children against arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."<sup>73</sup>

Too often, though, broad strokes have indeed rendered irrelevant some of the most critical of distinctions in these cases.

## V. PROBLEMS IN DEFINING THE RIGHTS OF PARENTS

The problems plaguing the doctrine of *parental autonomy* are manifested in two, very specific ways. First, often under the doctrine of *parental autonomy*, a parent's substantive rights are not defined with any real clarity. When these rights are amorphous, they are naturally more likely to either eclipse, or be eclipsed by, the interests of children.

Second, currently the law is also failing to adequately differentiate a parent's substantive rights from a parent's procedural rights. These are indeed very distinct rights to be treated very differently under the Constitution. Confusing these two analyses also guarantees injustices.

### A. Identifying the Substantive Rights of Parents

#### 1. Factual Ambiguities and the Family

Many cases involving the parent-child relationship hinge on highly ambiguous factual determinations. Thus in these cases there is a particular high risk that a court may misread a vague factual record and erroneously decide a case against a parent's wishes.<sup>74</sup> Yet, not only are parental rights fundamental, but they also have specifically been deemed to outweigh the "lesser" interests of children in the home.<sup>75</sup> Therefore, the doctrine of *parental autonomy* serves to ensure that whenever there is factual ambiguity in a case, the law should err on the side of protecting the substantive interests of the parent, even if this comes at the expense of a child's lesser interests.<sup>76</sup>

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<sup>73</sup>*Id.* at 89 (Stevens, J., dissenting).

<sup>74</sup>*See, e.g., supra* note 4 and 455 U.S. at 762 (noting that [n]umerous factors combine to magnify the risk of erroneous fact-finding in the context of fermenting parental rights).

<sup>75</sup>*Id.* at 765. The court held that a "balanced" view of parents' and children's interests wrongly assumes that "society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights." *Id.*

<sup>76</sup>*Id.*

For example, in the context of termination cases, where a parent has allegedly been severely abusive or neglectful and faces having his or her children taken away permanently, parental autonomy provides exceptionally strong safeguards. In these cases, parents enjoy an increased evidentiary standard of clear and convincing evidence, as opposed to the usual standard for civil cases of a preponderance of the evidence, amongst many other protections.<sup>77</sup>

And in the visitation example once again, there is an automatic and very strong presumption that what a parent wants for a child is, in fact, in the child's "best interests." The state cannot interfere "any time it thinks it can do better" than a parent, but it instead must respect a parent's preferences.<sup>78</sup> Therefore, to ensure the integrity of parental rights and authority in even the most factually difficult and ambiguous of cases, sometimes our courts must simply assume that a parent's actions or preferences are legitimate, rational, and deserving of the highest of constitutional protections.

The fatal flaw of this approach, though, is that currently these assumptions are made before the facts have been examined. There is no question that those actions of parents that generally serve to educate children, or that teach children basic lessons in morality or discipline, or in physically protecting children, are always critical and fundamental, substantive rights. Indeed, such actions are usually rational, and are usually made with a child's best interests in mind. Yet, by automatically making such assumptions, this approach ignores many cases where it is entirely unambiguous that a parent's actions are patently irrational, abusive, or worse.<sup>79</sup> Under the current logic there can be no room for any thorough and rational analysis of the facts; thus, any distinctions as to the varying degrees of a parent's interests and the enormous array of factual distinctions involved in these cases are ignored entirely. A better understanding of this problem begins with revisiting the *Meyer* and *Pierce* cases.

## 2. Revisiting *Meyer* and *Pierce*

The sole concern of the Supreme Court in both *Meyer* and *Pierce* had been—for the first time in U.S. history—to affirmatively establish the constitutional rights of parents in the home. Due to its focus on this rather historic objective, in neither opinion did the Court bother to address how defining parental rights too broadly could ever actually cause the interests of children to be eclipsed altogether. Therefore, the Court used some extraordinarily broad and rigid language in establishing those parental rights in as strong of terms as possible.

For example, the Court's sole concern in *Meyer* was that allowing state intrusions in that case would literally lead to the end of the family. The Court specifically cited the teachings of Plato whom, in one of his less popular theories, had proposed that children not even have individual parents, but instead that they should be made

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<sup>77</sup>*Id.* at 777-80 (Rehnquist, J., dissenting) (documenting lengthy hurdles, including adequate and timely notice at all stages of not only termination process, but the initial temporary removal of the children, evidentiary safeguards, multiple hearings, supplying of attorneys to indigent parents, etc.).

<sup>78</sup>530 U.S. at 78 (Stevens, J., dissenting).

<sup>79</sup>For a sampling of such injustices, see *supra* note 35.

“common property” of the state.<sup>80</sup> Thus, solely in an effort to ensure that children were kept entirely out of the reach of the state and this potential nightmare, the Court established the broad and effectively unlimited right of parents “to establish a home and bring up children.”

And the more direct effect of such rules on children was not addressed in *Pierce* either. In fact, in *Pierce* it had been argued that parents should be living their lives “through [their children]” to attain “[a]ll that we missed, lost, failed of”. Yet, by that logic, there would be no need to ever acknowledge how a court’s decision actually affected a child. Children would literally be made irrelevant. Thus, parents were again granted what was a broad and effectively unlimited right to direct the “upbringing” and “education” of children “under their control.”<sup>81</sup>

Of course, the substantive parental rights recognized in *Meyer* and *Pierce* could easily have been defined in more concise terms considering the facts of each case. In *Meyer*, the parental right was simply a right to determine if one’s younger children may be taught foreign languages in their public schools. And in *Pierce*, the right at stake was simply the right to choose private schools for one’s children. Thus, in both cases the parental rights could have been just as easily defined more specifically—probably as fundamental, First Amendment freedoms of “speech,” “belief,” or “religion”—instead of as broad and amorphous parental rights of “liberty,” under the Fourteenth Amendment.

While the result of this broad language has been to expand the rights of parents in many desirable ways, it has also expanded those rights in some very irrational ways, as well. As Justice Kennedy noted in his dissent in *Troxel*:

*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment interests protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they have long been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the “custody, care and nurture of the child,” *free from state intervention*.<sup>82</sup>

It is because of such broad protections from “state interventions,” however, that the state is often prevented from protecting children, at all. Thus, while *Meyer* and *Pierce* firmly establish the critical autonomy of parents in the home, as stated, such logic can also be extremely limited and too easily distorted.

### 3. Reciprocity

Put in most simple terms, what *Meyer*, *Pierce*, and the current conception of *parental autonomy* itself all ignore is the special reciprocal nature of the parent-child relationship. To begin with, while children are, of course, dependent on their parents

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<sup>80</sup>262 U.S. at 399.

<sup>81</sup>Brief by William D. Guthrie for Appellee at 68, *Pierce*, 268 U.S. 510. In fact, this approach has sometimes amounted to a “most dangerous form of liberty, the right to control another human being.” Barbara Bennet Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child As Property*, 33 WM. & MARY L. REV. 995, 1001 (1992) (referring to *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

<sup>82</sup>*Id.*

for their basic sustenance, moral guidance, and their emotional and physical wellbeing, they are indeed inherently vulnerable to all types of harm. Therefore, parents largely regulate any opportunity children have to enjoy "life and liberty."<sup>83</sup> What follows then is that any time parents are granted either an irrational or otherwise overly broad amount of protection from the state, children are being completely cut off both from the state and the Constitution, as well. That is, children disappear.<sup>84</sup>

The Bill of Rights "life and liberty and the pursuit of happiness" at the very least afford all persons a status of actually existing.<sup>85</sup> Ensuring this minimal status of children in America is as compelling as any interest as there could ever be. While strict scrutiny may very well be the appropriate standard for protecting most interests of parents, this can only be so if the state is recognizing the existence of children, at the same time.

And this is only the first part of the problem. Because the current conception of *parental autonomy* is so broad, so rigid, and so ambiguous, often the only way to recognize any interests of children has simply been to ignore the doctrine altogether. Too often, exceptions to *parental autonomy* too are asserted by the state without any clear or consistent guidelines. As a result, sometimes the interests of parents needlessly, arbitrarily and effectively disappear under this analysis, as well.

So long as the doctrine of *parental autonomy* remains unclear, there will always be an equally harmful and reciprocal impact on the substantive interests of parents. And, so long as the primary method of analyzing these substantive rights is the use of the more abstract legal rules instead of a clearer focus on the facts, this will remain the case.

#### *B. Distinguishing a Parent's Substantive Rights From a Parent's Procedural Rights*

The current legal analysis also fails to adequately distinguish the substantive rights of parents (either under the First, Fourth, or Fifth Amendments, or under the substantive component of the Due Process Clause of the Fourteenth Amendment) from a parent's procedural rights (under the procedural component of the Due Process Clause of the Fourteenth Amendment).

To illustrate, any and all interests of parents enjoy certain procedural protections under the Due Process Clause of the Fourteenth Amendment. Before the state may

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<sup>83</sup>U.S. CONST. amend. XIV. More to the point, there is also "the pursuit of happiness" in the Declaration of Independence.

<sup>84</sup>530 U.S. 57, at 89 (Stevens, J., dissenting) ("counseling against . . . a constitutional rule that treats a biological parent's liberty interest as an isolated right that may be exercised arbitrarily"); *Schall v. Martin*, 407 U.S. 253, at 265 (1984) ("children are always in some form of custody."); *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (determining liberty interests of a parent not based on "isolated factors," but within the context of its impact on the family as whole).

<sup>85</sup>Not only do children "exist," but they have also been afforded certain fundamental rights under the Constitution. See *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (children granted a liberty interest in avoiding involuntary confinement); *Planned Parenthood of Missouri v. Danford*, 428 U.S. 52, 74 (1976) ("minors as well as adults are protected by the Constitution and possess Constitutional rights"); and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07 (1969) (establishing a First Amendment right to free speech for minors).

ever conclude that the actions of a parent have, in fact, exceeded the parameters of his or her legitimate, substantive rights, it must first ensure that in making that determination, any “undue risk” of procedural error has been reduced to “realistic and acceptable” constitutional levels.<sup>86</sup> That is, the state must simply be fair and efficient before it intrudes on any individual’s rights.

Again, in termination cases, for example, before the state may take this most drastic of actions, it must: (1) clear enormous procedural hurdles in showing that a child has, in fact, endured immense abuse and/or neglect; and (2) also show that the state has given the parent an adequate opportunity to rehabilitate the familial situation.<sup>87</sup> Thus, the termination process has understandably been made a long and meticulous process, usually lasting multiple years.<sup>88</sup>

However, often the sole purpose of these procedural hurdles is simply to ensure that the state is clear in making these factual determinations as to the actual scope of a parent’s substantive rights. Therefore, once the state has vast evidence, or even actual knowledge, both of continuous and horrific abuse of a child, as well as such evidence of a parent’s total failure to improve the situation, such procedural hurdles no longer serve any real purpose.

At this point, such additional hurdles are not actually protecting any legitimate parental right to raise one’s family, but only serve to keep the state from protecting the most helpless of children. And, indeed, in many of these cases there simply are no such ambiguous issues to be resolved.

The following analysis of the Supreme Court case of *Santosky v. Kramer*<sup>89</sup> will clearly illustrate this problem, as well as the above problems in defining the substantive rights of parents.

## VI. ILLUSTRATION #1 - *SANTOSKY V. KRAMER*

### A. *The Opinion*

The *Santosky* case began with a determination by a New York state social agency that the Santosky parents had, for years, both been “terminally neglecting,” as well as horribly abusing, three of their children.<sup>90</sup> The state finally determined that the children were in danger of “irreparable harm” and ordered proceedings to determine whether or not to legally and permanently terminate the Santosky’s parental rights.<sup>91</sup> It is only once those parental rights are legally terminated that children can then be placed for permanent adoption.

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<sup>86</sup>*Santosky*, 455 U.S. at 776 n. 4 (Scalia, J., dissenting).

<sup>87</sup>*See, e.g., Santosky*, 455 U.S. at 778 (Rehnquist, J., dissenting); and *Santosky*, 455 U.S. at 776 n.4 (Scalia, J., dissenting).

<sup>88</sup>For example, it took three years to terminate a fathers parental rights in a recent case where the father had murdered his son’s mother. <http://bostonherald.com/localregional/view.bg:articleid=75023> “N.A. couple officially adopts boy who divorced mom-killing dad,” Thomas Caywood (last visited March 25, 2005).

<sup>89</sup>455 U.S. 745.

<sup>90</sup>A fourth Santosky child, an infant when the termination proceedings began, was not involved in the termination process. *Id.* at 752.

<sup>91</sup>*Id.* at 747.

In New York state, termination hearings are divided into two stages: one stage for ensuring the due process rights of parents and one for then actually determining the best interests of the child (this bifurcated analysis is generally mirrored in most every state).<sup>92</sup> In *Santosky*, the state had, indeed, met its threshold burden at the first, “fact-finding,” stage and had shown by a preponderance of the evidence both that it had: (1) provided the parents ample opportunity and assistance in rehabilitating their “parental relationship” with their children,<sup>93</sup> but that, despite doing so, (2) the parents had still failed to adequately improve their familial situation.<sup>94</sup> Thus, the Santoskys’ case was headed to the second, “dispositional”, stage where the court would make a final decision as to whether or not termination of their rights would, in fact, be in the children’s best interests.<sup>95</sup>

Prior to that hearing, however, the Santosky parents challenged the constitutionality of the preponderance of the evidence standard at the fact-finding stage. While this is indeed the evidentiary standard used in most civil cases, the Santoskys argued that the critical and fundamental interests of parents required greater safeguards – especially in the context of termination.<sup>96</sup> Because the taking of one’s children is so traumatic and damaging to a parent, it was argued that the law must take extraordinary steps to ensure the justness of such a decision.<sup>97</sup>

The State of New York countered that: (1) its State legislature had already determined that there were vast procedural measures in place that more than adequately protected the due process rights of parents; and (2) that the state legislature had already lowered the standard because previously there had, in fact, been far too many children unnecessarily being left to severe abuse and neglect.<sup>98</sup> In fact, the parents in *Santosky* had already benefited from four-and-a-half years of hearings and appeals that specifically ensured them every chance to improve their situation.<sup>99</sup>

Thus, what was clear in the *Santosky* record was not only that the children had endured years of brutal abuse and neglect and that the Santosky parents had rejected all help for four and-a-half-years. The State of New York had further argued that the only effect of raising the evidentiary burden to the clear and convincing standard was to make it even harder to save the most desperate of children and proceedings would once again be drawn out far longer than necessary. As a result, more children would

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<sup>92</sup>See, e.g., *Bowen*, 483 U.S. at 587 (upholding the “rationality” of the “Government’s separate interest in distributing benefits among competing needy families in a fair way.”); *Casey*, 505 U.S. at 846 (“the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”).

<sup>93</sup>*Santosky*, at 748.

<sup>94</sup>*Id.* (noting that parents are required to “substantially and continuously or repeatedly to maintain contact with or plan for the future of the child though physically and financially able to do so.”).

<sup>95</sup>*Id.*

<sup>96</sup>*Id.* at 756.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at 761 n. 11, 763, n.13.

<sup>99</sup>*Id.* at 776 n.4.

be left to their broken homes or to a horribly broken foster care system, for much longer periods of time, as well.<sup>100</sup> It would seem particularly true in termination cases that “justice delayed is truly justice denied.”<sup>101</sup>

New York’s state appellate and superior courts<sup>102</sup> agreed with the state and affirmed the “preponderance” standard. The Santosky parents then appealed to the U.S. Supreme Court.

The Supreme Court majority in *Santosky* relied on *Meyer* and *Pierce*, and their progeny, in invalidating the preponderance of the evidence standard.<sup>103</sup> First, the Court determined that because the harm to the parental interest from termination is so “grievous,”<sup>104</sup> as well as “permanent,”<sup>105</sup> and because there is such a strong societal preference to err on the side of keeping families “united,”<sup>106</sup> the interests of the Santosky parents were deemed to be “greater” than the interests of the Santosky children.<sup>107</sup> The majority thus held that the “only” way to ensure that the greater status of parents—and thus to properly reflect “the value society places on individual liberty” (meaning the liberty of the Santosky parents)—was the clear and convincing evidentiary standard.<sup>108</sup> In contrast, the “preponderance” standard was said to only afford parents an equal status with children and, therefore, it was declared to be “constitutionally intolerable.”<sup>109</sup>

The majority specifically identified how the higher evidentiary standard serves to protect both the substantive and the procedural components of a parent’s Due Process rights under the Fourteenth Amendment.

### 1. The Substantive Rights of Parents

The *Santosky* majority held that the clear and convincing standard was necessary so as to ensure the substantive interests of parents. The Court’s reasoning was that under the clear and convincing standard, obviously the state would be failing to meet its burden at the fact-finding stage. As the second hearing will thus not be occurring as often, there will again be less intrusion and more families left intact, as per the parent’s wishes.

In other words, in many cases a court will leave a family intact and not allow termination based only on an assessment of a parent’s rights in the “custody, control and care” of their children. As the harms inflicted on the children as a result of

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<sup>100</sup>*Id.* at 790 n.15.

<sup>101</sup>*The Quotations Page* (quoting William Gladstone) available at <http://www.quotationspage.com/quote/28904.html> (last visited on February 9, 2005).

<sup>102</sup>*Matter of John AA*, 427 N.Y.S.2d 319, 320 (1980).

<sup>103</sup>455 U.S. at 757.

<sup>104</sup>*Id.* at 756.

<sup>105</sup>*Id.* at 759.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* at 758 n.4.

<sup>108</sup>*Id.* at 756.

<sup>109</sup>*Id.* at 768; *see also id.* at 766 (“A standard that allocates the risk of error nearly equally between these two outcomes does not reflect properly their relative severity.”).

leaving the family together are thereby totally ignored in such decisions, those interests are effectively relegated to a “lesser” constitutional status. In this way the analysis was said to be further “balanced” in favor of the greater parental interests.<sup>110</sup>

The majority did acknowledge the obvious in that both children (as well as foster parents) are “deeply interested” in the outcome of that fact-finding hearing.<sup>111</sup> Yet, the Court further decided that at the initial stage “the focus is emphatically not on them,”<sup>112</sup> but on the due process rights of the parents only.

## 2. The Procedural Rights of Parents

Because of the factual ambiguities of termination cases (such as those discussed in the first part of this Article), the *Santosky* majority noted that there is a particularly high risk that a procedural error committed by a social worker, psychologist, lawyer, or judge, could cause a parent’s rights to be terminated.<sup>113</sup> However, because termination is so devastating to a parent, the Court held that the procedural safeguards in these cases must be increased accordingly, as well.<sup>114</sup> While it is true that even if the risk of error can never be eliminated altogether, the clear and convincing standard can at least ensure that the analysis is favoring the more valued parental interest. Thus, any potential procedural error in these cases is made less likely to harm a parent, and the state is more likely to leave the family intact, as per the parent’s wishes.

Of course, while the higher evidentiary standard also ensures that the state will be unable to intervene on behalf of nearly as many abused and neglected children, or in anywhere near as timely a fashion,<sup>115</sup> precedence was given to further favor the more valued parental interest.

### B. The Problem With Santosky

The *Santosky* analysis relies on two flawed conclusions, which are addressed in the next two section of this Article.

#### 1. The “Disappearing” Substantive Interests

The first problem in *Santosky* is that the analysis fails to “balance” the substantive interests of parents, children, and the state, at all. In reality, the children were simply eclipsed from the analysis altogether.

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<sup>110</sup>*Id.* at 768.

<sup>111</sup>*See* 455 U.S. at 759.

<sup>112</sup>*Id.*

<sup>113</sup>*See supra* note 9; *see also Santosky*, 455 U.S. at 776 n.4. (Rehnquist, J., dissenting) (noting the realities of the law and that the goal of due process is not perfection but to remove “undue certainty”).

<sup>114</sup>The parental interest is deemed “commanding.” *See Santosky*, 455 U.S. at 759 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981)).

<sup>115</sup>Fitzgerald, *supra* note 9. “Instead of seeking timely termination of parental rights to free these children for adoption, after *Santosky*, state agencies now maintain more children in foster homes and for longer periods while accumulating “clear and convincing evidence” of abuse or neglect.” *Id.* at 63.



Under a bifurcated hearing process, decisions are being made to defer to parents and leave families intact prior to any second hearing even occurs. Therefore, in many cases the analysis ends before there has been any consideration of how leaving the family together will actually impact the children, the foster parents, or the state.<sup>116</sup> These interests are made irrelevant.

In fact, this flaw exists even under the lower “preponderance” standard, as well—the clear and convincing standard only exacerbates the problem. For example, where the evidence is clear under any standard that there has been “shockingly abusive treatment,” as in *Santosky*, over any period of time, one wonders exactly what additional due process hurdles would be needed to prevent terminating those parents’ rights? How much terror does a parent have a right to inflict on a child? How many years of one’s childhood must one be forced to forfeit? Yet, under the bifurcated process, our courts may take years to further examine what they already know beyond any reasonable doubt. In fact, it is specifically because the interests of the child are not present in the analysis that there is no way to clearly determine the bounds of what the parental rights actually consist of, or have any reference point for keeping them in check, they are unlimited.

Even further, under the current conception of *parental autonomy*, the bifurcated process inexplicably ensures that even those facts most relevant to a termination decision may never even enter the court’s analysis. Never even factored into the *Santosky* opinion was an evidentiary record that in no uncertain terms documented the “shockingly abusive treatment” of the Santosky children, including years of regular and extreme emotional abuse as well as beatings, including, as one example, one child’s femur being broken and then treated with a homemade splint, as well as cuts, blisters, “pin pricks” on one child’s back, severe malnutrition, and so on.<sup>117</sup>

Thus, the *Santosky* analysis is utterly out of touch with the very facts that were before the Court. As a result, the majority was left to try to force the facts to fit into its formalistic analysis. Illustrative is that the majority ultimately determined that to leave the children with the Santosky parents, or, at best, to otherwise needlessly keep those children stuck in a horribly broken foster care system indefinitely, was merely the maintaining of an “uneasy status quo.”<sup>118</sup> Reflecting the deep flaws both of the majority analysis, and the current conception of *parental autonomy* itself, the importance of the interests of the Santosky children was dismissed as being only “comparatively slight” in relation to the “greater” interests of parents in the home.<sup>119</sup>

Finally, it is also worth noting that the majority rationalized its exclusion of the interests of the children and the foster parents from that first hearing simply by stating that the “focus” was not yet on them.<sup>120</sup> Yet, obviously the children and the foster parents are impacted by that decision. The only reason the “focus” was not on either was because the majority itself had chosen to ignore them.

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<sup>116</sup>*Santosky*, 455 U.S. at 763 n.13 (Rehnquist, J., dissenting); *see also id.* at 766 n.14.

<sup>117</sup>*Id.* at 781 n. 10.

<sup>118</sup>*Id.* at 758.

<sup>119</sup>*Id.* at 781 n. 10.

<sup>120</sup>*Id.* at 759.

## 2. A Nominal Increase in the Procedural Protections of Parents

The second major flaw in *Santosky* was that the majority assumed that increasing the evidentiary standard to one of clear and convincing evidence would actually then better protect parents in a meaningful sense. In truth, however, New York already had other “exhaustive” safeguards in place that prevented any procedural errors from actually causing parental rights to be erroneously terminated. Therefore, any actual increase in protections for parents is nominal, at best.

As Justice Rehnquist discussed at length in his dissent, a narrow focus solely on one aspect of those procedural safeguards—the evidentiary standard—is a clear misreading of the true requirements of due process.<sup>121</sup> Simply put, the real test is whether the “overall effect”<sup>122</sup> of the entire “scheme of procedural protections”<sup>123</sup> in place do, in fact, reduce the risk of error to “realistic and acceptable constitutional levels” or not.<sup>124</sup>

And there can be no doubt as to whether the *Santosky* parents were protected by “realistic and acceptable” safeguards. The facts of *Santosky* were entirely unambiguous both in showing that the parents had horribly abused and neglected their children, for years, and, further, that the parents had then benefited from “exhaustive” procedural safeguards, including the four-and-a-half years<sup>125</sup> of appointments, meetings, court hearings (seven full hearings, to be exact) and appeals, all to no avail.<sup>126</sup> Even further it was equally clear that the *Santosky* parents had completely “rebuffed,” and had even been “hostile” towards all such state help.<sup>127</sup> Long before their final “fact-finding” hearing, the *Santosky* parents had enjoyed what must have seemed to be an endless series of opportunities and safeguards.

Any risk, then, that a significant procedural error would not have been exposed at some point during the termination process in *Santosky* (and then actually been the proximate cause of an erroneous termination) had effectively been eliminated. This means that there was no logical nor legal reason for the majorities’ “obsessive” focus on the evidentiary standard by itself.<sup>128</sup>

Finally, and as Justice Rehnquist again noted, this nominal risk of error can be clarified even further. What is not at risk at termination hearings is that the state will ever arbitrarily take away someone’s children. The only parents actually facing even this nominal additional risk of error under the “preponderance” standard at these hearings would be parents already known to be incredibly disturbed; known to have already subjected their children to an “irreparable threat of injury,” for years; and

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<sup>121</sup>*Id.* at 777.

<sup>122</sup>*Id.* (emphasis added).

<sup>123</sup>*Id.* at 775.

<sup>124</sup> “[N]ot all situations calling for procedural safeguards call for the same kinds of procedures.” *Santosky*, 455 U.S. at 774-75, (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1992)) (Rehnquist, J., dissenting).

<sup>125</sup>*Id.* at 782.

<sup>126</sup>*Id.* at 771 (Rehnquist, J., dissenting) (emphasis added).

<sup>127</sup>*Id.* at 784 (Rehnquist, J., dissenting) (noting the Family Court’s finding).

<sup>128</sup>*Id.* at 785 (Rehnquist, J., dissenting).

that are known to have subsequently and utterly failed to take advantage of “exhaustive” opportunities to make changes.<sup>129</sup>

Thus, in light of the risk of incredible harm to children, it is beyond question that the risk of procedural error in New York had, in fact, been reduced to “realistic and acceptable constitutional levels” of due process.<sup>130</sup> As Justice Rehnquist put it simply, at some point the Court must finally say, “enough is enough.”<sup>131</sup>

### 3. *Santosky* in Summary

In summary, *Santosky* affords no more than a nominal increase in procedural protections for parents—parents already known to be horribly disturbed, yet incredibly well protected by the law. Yet, the opinion has otherwise caused thousands of helpless and hopeless children to unnecessarily endure physical, emotional and psychological torment, for far longer periods of time, if not indefinitely, to be left in a horribly broken foster care system for longer;<sup>132</sup> and, ultimately, to be denied even a minimum of the emotional development and those basic “opportunities for growth into free and independent well-developed . . . citizens” usually enjoyed in one’s childhood years.<sup>133</sup> Thus, under this logic, the interests of many children are not just minimized under the legal analysis, but they truly disappear.

## VII. WHAT PARENTAL AUTONOMY IS SUPPOSED TO MEAN

What has been made clear in Part Two of this Article then is that too often the current legal analysis of the family has lost sight entirely of the true purpose of the doctrine of *parental autonomy*. This doctrine can really be summarized by two very simple rules. First, the substantive rights of parents in the home must be strong and clearly defined. Second, all evidentiary and procedural standards governing the parent-child relationship must also be strong, and must generally favor protecting the actions and preferences of parents in the home.

At the same time, common sense dictates that the only way there can ever be real justice in any case is if the facts themselves are examined before any such assumptions or final determinations are made. If after thoroughly analyzing the facts in a case it is still either: (1) ambiguous as to whether or not a legitimate, substantive

<sup>129</sup>*Id.* at 790. (Rehnquist, J., dissenting). Justice Rehnquist also noted that the requirements of due “process are to be as realistic as possible,” yet not necessarily “perfect.” *Id.* at 776 n.4. (Rehnquist, J., dissenting).

<sup>130</sup>*Id.* at 776 n.4. (Rehnquist, J., dissenting).

<sup>131</sup>*Id.* at 783. (Rehnquist, J., dissenting). Also worth noting is that the *Santosky* majority argued that termination proceedings must have the same level of due process as traffic offenses, which also use the clear-and-convincing standard. *Id.* at 767-768.

<sup>132</sup>The suffering endured in the American foster care system is shocking by any measure. See, e.g., Timothy Roche, *The Crisis of Foster Care*, TIME, Nov. 13, 2000 at 74 (“Five years ago, there were about a quarter of a million children in the country’s foster care systems. Today that number has doubled, to between 550,000 and 560,000 children . . . . However, neglect and a quagmire of child-swallowing bureaucracies plague the system”); see also Fitzgerald, *supra* note 9, at 63 (documenting the effects of *Santosky* in causing children to be removed from homes less often and left in foster care for even longer).

<sup>133</sup>*Santosky*, 455 U.S. at 790. (Rehnquist, J., dissenting).

parental right is actually at stake, or not; or, (2) if it remains ambiguous as to whether a child is actually being harmed, then the law must in fact assume that parental actions or preferences at issue require constitutional protections.

However, in any case where it is clear that there is not any legitimate, substantive parental right even at stake, and it is clear that a child in fact is actually and unnecessarily being harmed, then no assumptions need to be made. A court need not assume that the parent is doing a “good” job or that there should be more hoops to be jumped through. To otherwise blindly make such unnecessary or irrational assumptions such as these will always violate any standard of constitutional due process.

Part Three of this Article sets forth an analysis that puts these basic ideals back to the forefront of the legal analysis.

### PART THREE: A SOLUTION

#### VIII. INTRODUCTION TO THE SINGLE OBJECTIVE ANALYSIS

It is well established under the law that parents have a fundamental constitutional right to make most day-to-day decisions affecting a child. Any factual and legal ambiguities that arise in cases involving the parent-child relationship are generally resolved in favor of the actions and preferences of parents. Further, parents have a basic duty toward the “high care” of their children,<sup>134</sup> while the state may have some corresponding level of duty to provide for children when their parents do not.<sup>135</sup> And, finally, under certain circumstances, children themselves have been granted fundamental rights.<sup>136</sup>

None of the above would change under the Single Objective Analysis. First, the law would still be following the doctrine of *parental autonomy* the vast majority of the time. Primarily what would change under this analysis is simply that: (1) the facts of these cases would always be the initial focus of any legal analysis; and (2) the interests of every parent and child would at least be acknowledged, in every case.

After an initial examination of the factual record, the next step under this analysis would be to then either cite to *parental autonomy*—and the analysis would simply end with the parental interest prevailing—or, certain circumstances could trigger a further analysis under the Single Objective Analysis itself, so as to determine if state intervention may or may not be appropriate.

Such “triggering events” are already clearly established under the law. For example, in the termination context, the Single Objective Analysis would only be triggered with a finding of “permanent neglect,” or a threat of “irreparable harm,” to a child – such as in *Santosky*. What would trigger this analysis in other aspects of the parent-child relationship would continue to vary depending on the interests at stake.

In visitation cases, for example, a likely requirement would be a showing that the third party petitioner had a major role in the child’s life, perhaps such as having

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<sup>134</sup>*Pierce*, 268 U.S. at 535.

<sup>135</sup>*Reno*, 507 U.S. at 302 (“where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so.” (emphasis in original)).

<sup>136</sup>*See supra* note 83.

actually raised the child for a substantial period of time; and perhaps also requiring a showing that the third party represented one of the only strong relationships the child had in his or her life.<sup>137</sup> In short, only when the potential harm to a child was clearly and sufficiently great enough, and the risk to a parent clearly and relatively low would state intervention ever be an option under the Single Objective Analysis.

#### IX. THE SINGLE OBJECTIVE ANALYSIS

The Single Objective Analysis itself is grounded in the following simple premise: The true purpose of the family is to produce happy, well adjusted, and disciplined children. This represents what I will call the “Single Objective” of the family. This goal is stated broadly enough so that it will be able to be applied in any legal or factual context; yet, it is focused enough so that the law need not ever lose sight of the most critical interests of the family. Further, here the most important interests of the family: parental authority and the basic well-being of children; are the very foundation of the analysis. Additional guidelines further ensure an optimal analysis.

To demonstrate, the first step under this analysis will simply be to examine the facts themselves and objectively determine what would best achieve the Single Objective. For example, severe abuse, over a long period of time would suggest that termination of a parent’s rights would best achieve the Single Objective. This initial determination would then be further qualified under a second stage of analysis. Certain “Key Principles,” each traditionally accepted as essential for healthy families, will then provide this analysis with optimal safeguards and parameters.

To illustrate, the first such principal is to always maintain the critical importance of *parental authority* in the home. Therefore, no initial determination could be valid if it undermined the legitimate authority of parents. For example, a judge could not override a parent’s preferences for who visits one’s child, or how often, except under very clearly defined and special circumstances, such as those given above.

How parental authority and the basic interests of children would further be defined then is that our courts would establish certain rules, beginning with only the most obvious of parental rights of authority and the most minimal interests of children, and gradually clarify those definitions on a case-by-case basis, when appropriate.<sup>138</sup> The remainder of this Article will set forth the foundation for such an analysis.

Ultimately, the Single Objective Analysis not only will best ensure the authority of parents in the home, but it will also best ensure the most basic interests of children, as well. These interests will then be analyzed within the most logical, most just, and most consistent legal framework possible.

The Single Objective Analysis is stated as follows:

Parents have a fundamental right to raise and enjoy their families, as well as a corresponding duty to support and protect their children. Before state intervention

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<sup>137</sup>See, *infra*, the analyses of *DeShaney* (state liability in protecting children), *Troxel* (visitation), and *DeBoer v. Schmidt* (adoption and custody). In other words, the state is not intervening in the family anytime a child could get a “better deal” down the street with the Jones’, but only in those cases where there is an obvious and legitimate reason for doing so.

<sup>138</sup>This process will mirror what modern philosopher John Rawls’ referred to as a “reflexive equilibrium.” JOHN RAWLS, *A THEORY OF JUSTICE* (1971). In fact, the Single Objective Analysis will hopefully mirror Rawls’ theories in several ways.

can be considered in any given scenario involving the parent-child relationship, the state must first weigh the risk of harm of any intrusion on the parental interest against the potential risk of harm to a child if no state action is taken. If a legitimate reason to consider state intervention, further analysis will be required under the Single Objective Analysis.

#### A. *The Single Objective*

The Single Objective of the law is to help parents provide their children an opportunity to be happy, well adjusted, and disciplined. Thus, the individual liberty interests of parent, child, and state in a given case are those interests that do, in fact, best advance the Single Objective itself.

The interests of parent and child identified above are then qualified by each of the following five Key Principles: (1) Parental Authority; (2) Evidentiary and Procedural Safeguards Favor Parents; (3) The Direct Effect of Every Decision on the Basic Interests of Parents and Children are Examined Individually; (4) Time-Tested Principles; and (5) Relevance of a Parent's Financial Situation are Minimized.

#### B. *The Key Principles*

##### 1. Parental Authority

*Parental authority* is the paramount interest in the family. Any acts or preferences of a parent that effectuate legitimate discipline and guidance in the home always supersede any other interest in the home.

##### 2. Evidentiary and Procedural Safeguards Favor Parents

The various evidentiary and procedural standards that govern the parent-child relationship will generally favor parental rights (under the Due Process Clause of the Fourteenth Amendment) so that legal or factual ambiguities in the record are resolved in favor of parents. The appropriate level of substantive and procedural protections for parental rights will continue to vary depending on the risk at stake (i.e. higher protections for parents in termination cases; relatively lower protections when determining visitation rights).

##### 3. The Direct Effect of Every Decision on the Basic Interests of Parents and Children are Examined Individually

The individual liberty interests of parent and child are distinct from one another. No final decision affecting the parent-child relationship can be made before its direct impact on both parent and child has been acknowledged. Therefore, the interests of any parent or child are never allowed to "disappear" in any given case. Further, the identifying of these distinct individual liberty interests will better allow the law to hold parents, children, and the state, all accountable for their respective actions, as well, thus leading to more lasting solutions to problems in the family.

##### 4. Time-Tested Principles

Generally, the only rights in the family that enjoy status as fundamental rights under the constitution will continue to be those "traditionally" recognized as being

beneficial to families.<sup>139</sup> The relatively arbitrary preferences of a single Justice or of a single opinion are prevented from having a disproportionate impact in determining how the family is treated under the Constitution.

#### 5. Relevance of a Parent's Financial Situation Minimized

The only financial factors that can be weighed against the interests of a parent will be those that rise to levels of abandonment or neglect. The Single Objective only requires minimum levels of financial stability in the home.

In short, a child's constitutional right is simply to enjoy a minimal opportunity to be happy, well adjusted, and disciplined. A parent's right is the ability to provide his or her child the same.

The remainder of this Article will be devoted to demonstrating the immense practicability of the Single Objective Analysis. This will be demonstrated through re-examining *Santosky* and *Troxel*, as well as through the examination of some other important family law cases.

### X. APPLICATION OF THE SINGLE OBJECTIVE ANALYSIS

#### A. Illustration #1: Revisiting Santosky Under the Single Objective Analysis

In the termination context, the Single Objective Analysis would again only be triggered by findings either of "terminal neglect" or of a threat of "irreparable harm" to a child. Thus, the facts in *Santosky* clearly would have triggered the analysis.

Based upon the vast and unequivocal evidence of abuse and neglect of the Santosky children, and in light of the four-and-a-half years of completely failed attempts by the Santosky parents to rehabilitate their behavior, the Single Objective of happy, well adjusted, and disciplined children was clearly not being attained in the Santosky home. The factual record in *Santosky* speaks for itself and the Santosky children's best chance at the Single Objective would lie in the termination of their parents' parental rights.<sup>140</sup>

The justness of a decision to terminate is made even clearer when examined under the five Key Principles:

1. *Parental Authority*: The actions of the Santosky parents went far beyond the scope of any conceivable conception of parental authority or discipline.
2. *Evidentiary and Procedural Safeguards Favoring Parents*: Under any evidentiary standard, and despite exhaustive procedural safeguards, the actions of the Santosky parents were known to directly negate the Single

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<sup>139</sup>This principle is already established under *Michael H.*, 491 U.S. at 123 (recognizing only those individual liberty interests enjoying the "historic respect . . . traditionally accorded to the relationships that develop within the unitary family."). Of course, the thrust of the Single Objective Analysis is that there has never been any legitimate, fundamental right of parents to actually *negate* the recognition of a child's very existence, and *vice versa*. Any opinion or law that interprets a parent's or a child's rights to exceed or fall short of such rational boundaries is clearly in error and, as a direct contradiction of the Bill of Rights itself, must be unconstitutional. See Part Two of this Article, *supra*.

<sup>140</sup>The Single Objective itself, by definition, will result in the best interests of not only parents, children and the state, but also of foster parents. Thus, the interests of foster parents under each of the Key Principles would simply be one more factor to be included in the analysis.

Objective. In short, as there is nothing factually ambiguous in the *Santosky* record, there is no reason to otherwise err on the side of the Santosky parents' stated wishes of keeping the family intact. Thus, so long as other exhaustive procedural protections are in place, there is no reason to suggest that the preponderance of the evidence standard is not constitutional in this context.

3. *The Direct Effect of Every Decision on the Basic Interests of Parents and Children are Examined Individually:* The effect of not terminating the Santoskys' parental rights was to completely negate the individual liberty interests of the Santosky children. Instead, the Santosky children must be granted at least a minimal opportunity to have childhood years free from severe suffering, abuse, and neglect, and to obtain basic life skills to take into adulthood. Additionally, the Santosky parents had no "right" to continue to ruin the lives of their children once afforded exhaustive help to change their situation.

Also, bifurcated termination hearings, at least as set forth in *Santosky*, would not be constitutional, as in some cases the interests of children will be totally eclipsed from the final decision under even the lowest of evidentiary standards.

4. *Time-tested Principles:* Under the given facts, curtailing severe abuse and neglect and providing children permanent adoptive homes as soon as possible is clearly of benefit to those children, as well as to society.<sup>141</sup>
5. *The Relevance of a Parent's Financial Situation is Minimized:* The abuse and neglect of the Santosky children transcended any socio-economic issues.

In short, the preponderance of the evidence standard could be constitutional in the termination context, while the bifurcated hearing process likely would not.

And to reiterate, the only parents facing even a remote chance of a nominal increase in risk of an erroneous termination decision under the preponderance standard would be those already known to have had extraordinary problems, for years, and whose problems had then continued unabated despite exhaustive state help. Yet, the trade-off is to otherwise recognize the most minimal interests of thousands of children otherwise never to be heard at any hearing. The only significant effect then of lowering the evidentiary standard, and of restructuring the bifurcation process, is to prevent children from actually disappearing under the law.

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<sup>141</sup>The issue has been raised that because the foster care system is in such a sorry state, that termination of parental rights should perhaps be a less attractive of an option for courts. See Roche, *supra* note 128; *Santosky*, 455 U.S. at 765 n.15 ("permanent removal from that home will not necessarily improve his welfare."). First, however, the solution is clearly not for the courts to abandon the foster care system, but for the state to finally make it a priority. Further, the plight of the Santosky children was so extreme that the chances of them enduring equivalent abuse and neglect in any given foster home was still unlikely. More importantly, the courts should not abandon logic, to accommodate a system that is failing even minimal standards. The issue becomes whether or not these children are worth extra attention and resources?



B. *Illustration #2: DeShaney v. Winnebago*

1. The Opinion

A second Supreme Court case, *DeShaney v. Winnebago*,<sup>142</sup> further illustrates how the Single Objective Analysis could transform this area of the law.

Throughout a two-year period, Randy DeShaney had severely and continuously physically abused his four-year-old son, Joshua. In the end, Joshua was beaten into a coma, suffered permanent brain damage, and was ultimately confined to an institution for the profoundly retarded for the rest of his life.<sup>143</sup>

Throughout the period of Joshua's abuse, the Wisconsin social agency involved in his case had knowledge both of what was happening to him, as well as the further danger he was in. Yet, for various reasons, the agency failed to remove Joshua from his home.<sup>144</sup> Joshua's mother then filed a lawsuit against the state, on Joshua's behalf. The mother asserted that because the state failed to perform its job, it had violated Joshua's substantive due process rights to "life and liberty" under the Fourteenth Amendment.<sup>145</sup>

On appeal, the U.S. Supreme Court rejected the mother's claim. The Court held that the state's duty to protect individuals under the Fourteenth Amendment applied only to affirmative state actions, such as harms committed by state actors themselves, or for harms to children in the actual physical custody of the state, such as in state-sponsored foster homes.<sup>146</sup> While the Court acknowledged that state liability may be created if there is a special relationship involved, such as with incarcerated criminals or the institutionalized mentally ill, Joshua DeShaney did not qualify for such treatment.<sup>147</sup> The majority held that while "the state may have been aware" of the environment Joshua was living in, the dangers he faced there, and then knowingly allowed him to be severely beaten for over two years, it "played no part in [the] creation of that environment."<sup>148</sup> Therefore, the state was not liable.

However, the *DeShaney* Court's focus on a distinction as to whether the state's failures were merely a long series of gross omissions – as opposed to being "affirmative" mistakes – was pure semantics.<sup>149</sup> The effect then, and just as in *Santosky*, was to render the most minimal interests of the child nonexistent.

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<sup>142</sup>*DeShaney*, 489 U.S. 189.

<sup>143</sup>*Id.* at 193.

<sup>144</sup>The only explanation given in the opinion was that the social agency "team" had decided that there was not enough evidence of abuse to intervene. *Id.* at 192. The majority defended the team's decisions by saying that they were probably leery of being sued for intruding on Randy DeShaney's rights. *Id.* at 203. Of course, given the facts of *DeShaney*, the problem is not over-intrusive social workers, but how the given facts could leave any such concern?

<sup>145</sup>*Id.*

<sup>146</sup>*Id.* at 197.

<sup>147</sup>*Id.*

<sup>148</sup>*Id.* at 201.

<sup>149</sup>*Id.* at 197 (Blackmon, J., dissenting).

The truth of the matter is that Joshua, like any toddler, was utterly helpless at the hands of his father, both legally and physically. This is precisely what makes the parent-child relationship “special.” The Court has even acknowledged this basic truth under other circumstances: “[J]uveniles, unlike adults, are always in some form of custody,’ and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so.”<sup>150</sup>

Yet, here the state chose to do nothing. And, of course, no private citizen could have helped Joshua by removing him from his home as the state would most definitely arrest such a person for kidnapping, and then return Joshua to his father.<sup>151</sup> Therefore, the state itself had effectively ensured that Randy DeShaney – and Randy DeShaney alone – was to be responsible for the “life and liberty” of Joshua DeShaney. Of course, the reality was that it had long been common knowledge amongst the DeShaney’s neighbors, Joshua’s mother, social workers, and numerous medical personnel, that for years Randy DeShaney had been horribly violating the interests of Joshua.

## 2. *DeShaney* Under the Single Objective Analysis

*DeShaney* would, of course, come out completely differently under the Single Objective Analysis. First, the severe abuse endured by Joshua would obviously trigger this analysis. Next, evidence indicating that the Single Objective was not being attained in the DeShaney home reads as follows: (1) seven independent reports from social workers and doctors indicating an extreme likelihood of child abuse; (2) a complete and extended lack of any cooperation from the parent; (3) multiple independent reports from neighbors of severe abuse; (4) three trips to the emergency room, each strongly suspected to be abuse by medical personnel;<sup>152</sup> and (5) a social worker’s testimony that she had known that Joshua was being severely harmed and that she had known that the situation was to get far worse without intervention.<sup>153</sup>

The only rational conclusion from these facts then is that knowingly allowing a child to be severely and continuously beaten does not best ensure the Single Objective. Where the state even had actual knowledge that it could easily ensure the Single Objective, and it was the only entity that could do so, it must be held accountable for its conduct. Whether one characterizes that conduct as “omissions,” “inactions,” “carelessness,” or “recklessness,” etc., is irrelevant. The truth of the matter is that anything less than a minimum level of state accountability means that children such as Joshua DeShaney needlessly disappear. This is the special and unique nature of the parent-child relationship.

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<sup>150</sup>*Reno v. Flores*, 507 U.S. 292 (quoting *Schall v. Martin*, 467 U.S. 253 (1984)) (citations omitted) (emphasis in original).

<sup>151</sup>*DeShaney*, 489 U.S. at 209 (Brennan, J., dissenting) (noting that the State “law invites – indeed, directs – citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse”).

<sup>152</sup>*Id.* at 192.

<sup>153</sup>*Id.* at 209 (Brennan, J., dissenting) (citing social worker’s testimony: “I just knew the phone would ring one day and Joshua would be dead.”).

Further, state liability is the all-too clear result when *DeShaney* is examined under each of the Key Principles, as well:

1. *Parental Authority*: Randy DeShaney's actions far exceeded any conceivable conception of parental authority.
2. *Evidentiary and Procedural Standards Favoring Parents*: The state had actual knowledge that the Single Objective was not being attained.
3. *The Direct Effect of Every Decision on the Basic Interests of Parents and Children are Examined Individually*: If the state is not held accountable at some level, then Joshua DeShaney's constitutional interests disappear. As for Randy DeShaney, under the given facts there was no conceivable, legitimate parental "right" upon which state intervention would have infringed.
4. *Time-Tested Principles*: Abuse as was endured by Joshua DeShaney is unacceptable.
5. *Finances*: There were no financial considerations to be weighed in the *DeShaney* analysis.

Due to the special nature of the parent-child relationship, under some circumstances the Constitution mandates state intervention in the home.

However, the "semantics" argument, there is a more practical concern in that the creation of state liability in cases like *DeShaney* could lead to massive government liability in other cases. The fear is that such an increased exposure to lawsuits could create a financial disincentive for social agencies that may otherwise become more reluctant to extend their services to as many children. Thus, the ultimate impact of such a decision would actually be harmful to children.

Yet, this logic fails. First, similar laws creating state liability—under a standard of actual knowledge—have not seen unusual increases in litigation.<sup>154</sup> Even further, the most important question to ask here is simply what price to place on the lives of children? All that is being asked of the state in this scenario is that if it has actual knowledge that a human being's life is in imminent and grave danger; that individual is utterly helpless; the state can easily help; the state is the only entity that can do so; then the state should, in fact, help.<sup>155</sup> To suggest that such a standard is onerous or not worth taxpayer money is absurd. In fact, given the special nature of the parent-child relationship, such logic renders the Fourteenth Amendment and the Bill of Rights itself.

### C. Illustration #3: Revisiting Troxel

Bringing the Single Objective Analysis current, this approach is also easily applied in the previously discussed *Troxel* case.

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<sup>154</sup>See Steven F. Heufner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940, 1961-62 (1990) (citing studies examining litigation since the 1988 promulgation of 42 U.S.C. § 1983, which created liability for deprivation of constitutional rights under color of state law). *But see DeShaney*, 489 U.S. at 196-97.

<sup>155</sup>In fact, it is hard to imagine the same argument being made to save a few dollars in this manner were it the life of an adult that was at stake.

### 1. Background

Again, in *Troxel* two grandparents had petitioned for increased visits with their grandchildren, which the children's mother had then opposed.<sup>156</sup> At issue was an exceptionally broad Washington state visitation statute that allowed "any" person to apply for visitation rights with a child. According to this law, visitation would then be granted any time a judge deemed such visits to be in a child's best interests.<sup>157</sup>

In deciding in favor of the grandparents, the trial judge had noted that children usually benefit from such contact with their grandparents, and even added that as a child he himself had greatly benefited from visits with his own grandparents.<sup>158</sup> Thus, as no evidence had been presented to show otherwise, the trial court presumed that the increased visits with the grandparents would be in the children's best interests.<sup>159</sup>

Yet, the Supreme Court reversed that decision in favor of the mother's preferences. Again, the fact that no evidence had shown that the mother's preference was not in her children's best interests meant that her preference must be protected under the doctrine of *parental autonomy*.

Furthermore, the *Troxel* Court also noted that the statute in question was so broadly worded that a court could essentially ignore parents' wishes anytime it disagreed with a parental decision.<sup>160</sup> This would mean that a court could arbitrarily replace its judgment for that of a parent's anytime it was believed that he or she could do a "better" job of parenting,<sup>161</sup> a clear violation of *parental autonomy*. As a result, the statute itself was struck down as an overly broad infringement on the constitutional interests of parents.<sup>162</sup>

### 2. *Troxel* Under the Single Objective Analysis

Under the Single Objective Analysis, the mother's preferences for her children would have still prevailed in *Troxel*, although for slightly different reasons than those given by the plurality. The Washington state visitation statute would not be constitutional, but it could be saved with some fairly simple revisions.

To begin, the reason the visitation statute had been made so broad was to account for the wide array of living situations of children in society today, such as where a third party is the only positive relationship the child has ever known.<sup>163</sup> Thus, any such statute must not only account for the more common familial situations, but also for the more complex, as well.

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<sup>156</sup>*Troxel*, 530 U.S. at 72.

<sup>157</sup>*Id.* at 61.

<sup>158</sup>*Id.* at 72 (explaining that the Trial Judge referred to his childhood visits with his grandparents: "I look back on some personal experiences . . . it happened to workout in our family that [it] turned out to be an enjoyable experience.").

<sup>159</sup>*Id.*

<sup>160</sup>*Id.* at 63.

<sup>161</sup>*Id.*

<sup>162</sup>*Id.* at 73.

<sup>163</sup>*See id.* at 63-64 (citing WASH. REV. CODE § 26.10.160(3)).

Yet, and as specifically noted by two of the Justices, the plurality's goal of preventing inappropriate persons from petitioning for visitation rights is more easily and more effectively achieved through other means.<sup>164</sup> For example, many states simply require third parties to make a *prima facie* showing that the petitioner already has at least a "substantial relationship" with the child.<sup>165</sup> In this way, frivolous applications are still easily eliminated, but the law is able to retain a necessary flexibility.

In *Troxel*, as the children had spent considerable time visiting their father at the grandparents' home, this perhaps could have been enough to get the grandparents to the Single Objective Analysis.

Again, the real problem in these cases is that some factual ambiguities are not easily clarified.<sup>166</sup> Of course, whether a parent can prove that he or she has a good reason for a decision or not, *parental autonomy* would still control the outcomes. In *Troxel*, as no evidence was presented to show otherwise, the mother's rejection of the increased visits would still be assumed to be in her children's best interest. Given the "slender findings" supporting the grandparents' argument in *Troxel*, this would be the appropriate decision.<sup>167</sup>

Yet, while the outcomes of the vast majority of cases would not be altered under the Single Objective Analysis, in at least some cases asking the better questions would indeed lead to more just results. For example, did the mother oppose the visits for what she personally believed to be the best interests of the child, or perhaps it was for some clearly irrational reason? And exactly what evidence was there to show what the children's relationship was with their grandparents? If the grandparents had actually been raising the children (which they apparently had not), what evidence then was there to suggest that this home was a healthy place to live, or not?

In short, all the Single Objective Analysis really requires is that a court actually examine the entire factual record before assuming anything.

### 3. Shifting the Focus

By shifting the initial focus of every case to the facts, the law can then utilize evidentiary and procedural safeguards that better correspond to the realities of each case. For example, instead of a less clear, and too often irrationally broad presumption that favors parents, a more realistic solution would simply be to analyze all of the facts for what they are, and objectively determine the Single Objective. In the visitation context, the parental interest could perhaps be protected by what may be a better-defined standard of "substantially clear" evidence (falling between the

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<sup>164</sup>*See id.* at 77 (Souter, J., concurring) (citing *In re Custody of Smith*, 969 P.2d 21, 25-27 (Wash. 1998) "most notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child."). This requirement is already in place in at least ten States. *See id.* at 94 (Kennedy, J., dissenting).

<sup>165</sup>*Id.*

<sup>166</sup>Justice Kennedy raised this issue in his concurrence where he opined that a remand was in order so that the trial court could actually determine some of these basic and critical factual issues. *Id.* at 101 (Kennedy, J., dissenting).

<sup>167</sup>*See supra* note 70 (referring to "slender findings" favoring grandparents request).

preponderance of the evidence and the clear and convincing evidence standards). This standard would be a more rational acknowledgment of the important, yet ambiguous, nature of these interests.<sup>168</sup>

Therefore, a third party seeking visitation rights under the Single Objective Analysis would first have to make a *prima facie* showing of a substantial relationship with a child; and then must further show that: (1) granting visitation would clearly not be an unnecessary infringement on any legitimate rights of the parent; and, that (2) such visits would clearly be in the child's "best interests." The parental interest would still prevail except under some very unusual circumstances. Therefore, the state would never be infringing on the interests of parents in an "arbitrary" or "oppressive" manner, but only when the facts presented very special and easily identifiable circumstances.

#### D. Asking the Right Questions—DeBoer v. Schmidt

The highly publicized adoption case of *DeBoer v. Schmidt*<sup>169</sup> serves as a final illustration as to how the analysis of the parent-child relationship could shift the focus to the most relevant facts of each case. *DeBoer* involved a biological mother who had legally relinquished her child for adoption upon birth, but who then had a change of heart; a biological father who had abandoned two previous children, but who had wanted to raise the child in this case; a caring adoptive family that had formed a close relationship in raising that same child for two years; and the young girl caught in the middle.<sup>170</sup>

For the purposes of this Article—but at the risk of oversimplifying a fairly complex case (the *DeBoer* analysis also concerned a conflict of state and federal laws)<sup>171</sup>—the Supreme Court's analysis in *DeBoer* ultimately amounted to a balancing of the individual liberty interests of the birth parents (i.e. *parental autonomy*) against the third-party rights of adoptive parents. In the end, *parental autonomy* prevailed, and the birth parents regained their parental rights and custody of the child.

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<sup>168</sup>A recent case that raises some interesting issues is the Pennsylvania case of *Douglas v. Wright*, 801 A.2d 586 (Pa. Super. Ct. 2002). In *Douglas*, three children had had daily contact with their maternal grandparents for years. When the children's mother then died in a car accident, the father moved to block visits by the grandparents. The appellate court held that the trial court had appropriately placed the burden on the grandparents both to show that the visits would be in the children's "best interests," and that such visits would not interfere with the parent-child relationship. What is interesting is that even based on the facts given above, it is easy to imagine the potential for some wildly varying circumstances in these cases. On the one hand, such a case could be about a bitter and selfish father who would look to hurt his in-laws – even if it meant hurting his already grieving children. Yet, on the other hand, perhaps the grandparents – while having never been physically abusive to the children, could well be emotionally disturbed or hurtful individuals, as well. The point, is that such situations require a solid protection of a parent's wishes which a standard of substantially clear evidence should be able to provide. Another fascinating question is what weight to give a mother's wishes for her children, even though deceased?

<sup>169</sup>*DeBoer v. Schmidt*, 509 U.S. 1301 (1993).

<sup>170</sup>Fitzgerald, *supra* note 9, at 70.

<sup>171</sup>*Id.* at 74.

However, and regardless of whether the end-result in *DeBoer* was necessarily the best decision or not, the Court's analysis again really hinged on over-simplified and overly formalistic legal rules. As one commentator summarized, "Like property owners resisting a DeBoer adverse possession claim, the Schmidts sought quiet title in and exclusive possession of the child."<sup>172</sup> In fact, the Court never even took into account how each of the interested parties would actually be impacted by its decision. The same commentator further commented on *DeBoer* as follows:

From the Schmidts [the biological parents] I heard a plea for vindication, some compassionate understanding of how in distress Cara Schmidt could relinquish her baby, a plea for recognition that the Schmidts would now fight to rectify past mistakes and attempt redeem a scarred family. I heard the Schmidts' plea to Jessica to understand that—win or lose—her parents had not abandoned and forgotten her, but were willing to expose themselves to public calumny to prove their love for her. From the DeBoer's perspective I heard the sheer horror of losing a child they had raised since birth, never to see her, hear her, or embrace her again, and relinquishing their cherished daughter to people whose lives were shaped by brutality and guilt. I heard the DeBoer's despair, once having nurtured Jessica's unquestioning trust and security in them, now to breach that trust and destroy that security, as though they, Jessica's seemingly omniscient parents, had willingly let her go.<sup>173</sup>

Observers, including the millions of Americans following this drama on television,<sup>174</sup> were all left to wonder how it was that under the *best interests of the child* standard the actual impact of the decision on the girl's well-being was nowhere to be found in the court's opinion?

While *DeBoer* was not an easy case, the Single Objective Analysis could have at least zeroed in on the actual facts themselves and asked the most relevant questions. Thus, the court could have factored into its analysis the following: (1) the immense psychological harm inflicted on a small and uncomprehending child being torn from her caring home (damage characterized by expert psychologists in *DeBoer* as "devastating" and "permanent");<sup>175</sup> and (2) the harm to those adoptive parents that had committed their lives to that daughter.<sup>176</sup> These interests could then be weighed against: (1) the benefit/pleasure that the birth parents would enjoy in stepping in to raise that child; further considering that (2) those parents had had a genuine change of heart; but (3) whom the child had never known; and (4) where the father allegedly had previously abandoned two other children.<sup>177</sup> At least acknowledging these factors would guarantee more just opinions. Otherwise, outcomes are always reliant on abstract legal rules that are blind to the facts and the parties themselves.

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<sup>172</sup>*Id.* at 79.

<sup>173</sup>*Id.* at 76-77.

<sup>174</sup>See, e.g., Bill Hewitt, *Losing Jessi*, PEOPLE, July 19, 1993, at 49-54; Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 48-49.

<sup>175</sup>Fitzgerald, *supra* note 9, at 79.

<sup>176</sup>*Id.* at 16-18.

<sup>177</sup>See Fitzgerald, *supra* note 9, at 400.

Again, from here the law could then gradually establish more concrete guidelines for such cases. As a few examples, our courts and psychologists can continue to better quantify the levels of trauma involved in breaking up established and stable adoptive families. At some of the earlier stages of childhood development there are lesser levels of trauma caused by tearing a child away from a family. In these cases a biological parent's claim can be given greater weight. In later stages of a child's development, however, it may make little or no sense at all to upturn these lives, thus the biological parent's interest would decline accordingly.

Further, already being implemented are longer waiting periods before mothers may relinquish their children for adoption, thus eliminating many hasty decisions that later may be regretted. And when there are any objections to adoptions, there can be expedited judicial review, which also reduces the time children spend bonding with families they may ultimately be torn away from.<sup>178</sup> Thus, under the framework provided by the Single Objective Analysis, our courts could thus shift their approach to such questions and a more logical and more humane analysis.

As further examples, and returning to *Troxel* again, applying the Single Objective Analysis there would have allowed our courts to ask the following: (1) what involvement the third party actually had in the children's lives; (2) the effect the decision would actually have on the parent; and (3) the effect the decision would actually have on the children (and – perhaps, also to ask (4) what the mother's reason was for denying the visits).

The only questions that needed to be asked in *DeShaney* would have concerned the state social agencies' complete breakdown: Were those social workers under-trained, under-funded, under-qualified or understaffed? There were no other issues. The only reasonable solution would be to hold the state liable, thereby giving it a maximum incentive to identify exactly where it had failed so horribly; to bring a child belated justice; and to provide an improved social system for all future children.

And parents such as the Santoskys would finally be forced to either make positive changes in their home, or otherwise be held accountable, while the well being of those children could finally be acknowledged under the law.

#### XI. THE DEPENDENT NATURE OF CHILDREN AND AUTONOMY

One particular aspect of the Single Objective Analysis requires additional discussion. The third of the Key Principles states that: "The Direct Effect of a Decision on the Interests of Parents and Children are Examined Individually." Thus, within a framework of legitimate and well-defined parental rights, this analysis will indeed acknowledge a minimal level of affirmative interests for children. Of course, the potential problem in such an approach is the risk of jeopardizing parental authority, altogether. The concern is that children not firmly under the "control" of their parents will then fail to receive the critical moral direction and necessary structure necessary in their lives, and thus become alienated and/or out of control.

Yet, the Single Objective Analysis indeed makes parental authority the paramount interest in the home. The very foundation of this analysis is the single goal of producing not only happy children, but also well-adjusted and disciplined ones, as well. Therefore, under this analysis our courts could never simply give

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<sup>178</sup>*See id.* at 399.



children free reign to do anything they wish. In fact, the Single Objective Analysis does not even necessarily expand on the interests of children, but merely helps the law more accurately define those interests.

#### A. Discipline and Autonomy

Before examining this third “Key Principal” in more detail, it will be helpful to first address certain past mischaracterizations of the parent-child relationship that have hindered this analysis. At times, the very notion of any affirmative “children’s rights” or autonomy has been distorted to the point that even acknowledging the very well being of children is attacked as being akin to the promotion of anarchy in the home.<sup>179</sup>

One example is the comments of then-presidential candidate Pat Buchanan, and others, at the 1992 Republican National Convention to the effect that an increased recognition of children’s rights (specifically referring to a 1972 law review article written by now-Senator Hillary Rodham Clinton), would ultimately lead to children suing parents over mundane matters, such as taking out the garbage.<sup>180</sup> While this more general concern for sustaining *parental autonomy* is clear, the given hypothetical was far removed not only from the law review article at issue, but also from the actual state of the law, as well.

All politics aside, Senator Clinton’s ideas clearly were “only applicable to cases of severely abused and neglected children,” such as Joshua DeShaney and the Santosky children.<sup>181</sup> Senator Clinton’s article then cannot in good conscience be cited to support the above hypothetical.

A similar example was the high-profile 1994 case of *Kingsley v. Kingsley*.<sup>182</sup> In *Kingsley*, the national media had widely reported that a Florida child had actually “divorced” his parents.<sup>183</sup> The facts, however, told quite a different story. First, in *Kingsley* it was the parents who had abandoned the child.<sup>184</sup> Young Gregory K. had been bouncing from foster family to foster family for years. The man who then

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<sup>179</sup>In fact, a strong aversion to the most rudimentary of affirmative rights for children has long plagued the U.S. legal system. Illustrative is that the first case of legal child abuse in America was not brought until 1874. Representing the abused little girl in that case was the American Society for the Prevention of Cruelty to Animals. (ASPCA). The ASPCA represented the child because while the laws of the day did protect animals against cruel and unusual treatment, they did nothing for children. N.Y. TIMES, April 10, 1874, at 8.

<sup>180</sup>Eleanor Clift & Pat Wingert, *Hillary Clinton’s Not-So-Hidden Agenda*, NEWSWEEK, Sept. 21, 1992, at 70.

<sup>181</sup>*See, e.g., id.* (“Clinton’s theories clearly are only applicable to severely abused and neglected children.”).

<sup>182</sup>623 So.2d 780 (Fla. Dist. Ct. App. 1993).

<sup>183</sup>*See, e.g.,* Pat Wingert & Eloise Salhoz, *Irreconcilable Differences*, NEWSWEEK, Sept. 21, 1992; Mark Hansen, *Boy Wins ‘Divorce’ From Mom: Critics Claim Ruling Will Encourage Frivolous Suits By Dissatisfied Kids*, 78 A.B.A. J. 16 (Dec. 1992); Jacqueline D. Stanley, *Concerns For Termination of Parental Rights*, 32 AM. JUR. PROOF OF FACTS 3d 83, 84 (1995) (“The inaccurate labeling of these cases as ‘divorces’ initiated by children against their parents was probably responsible for much of their notoriety.”).

<sup>184</sup>*Kingsley*, 623 So.2d at 787.

finally attempted to adopt Gregory happened to have been a lawyer himself who then "helped" Gregory in hiring his own attorney.<sup>185</sup>

While the actual legal process involved in *Kingsley* did raise some legitimate concerns,<sup>186</sup> it was also "less revolutionary than it sounds – while Gregory may be the first child to hire his own lawyer, it is standard for foster parents to do so in the child's stead."<sup>187</sup> Thus, that Gregory had hired his "own" attorney in this case was an anomaly.

More significantly – and as to the alarming characterization of a "divorcing" – Gregory was not even granted standing in his case; nor was he allowed to file his case on his own behalf; nor did his rights ever even rise to a level where he could deny his mother his "obedience and service."<sup>188</sup> In short, *Kingsley* cannot remotely be said to resemble a "divorce."

Yet, while probably few people ever actually understood all of the circumstances of *Kingsley*, many remember the attention grabbing headlines where it is was the child/"divorcer" effectively portrayed as a sort of home-wrecker. The end-result in *Kingsley* was simply that after years without a family, Gregory was finally placed in a permanent home where he was very much wanted.

In any event, both of the above stated concerns are easily disposed of under the Single Objective Analysis. First, no court would ever consider either creating for a child any "rights" to be free from family chores in the home, nor to actually "divorce" his parents. The Single Objective Analysis would never be triggered under these circumstances.

Yet, the first hypothetical is, in fact, most helpful in demonstrating just how clear and exceptional the protections for parental rights actually are under the Single Objective Analysis. Assume that a child has decided that a parent's order to take out the garbage is not in his or her "best interests." Unfortunately for that child, however, all rational persons can agree that children need a certain measure of discipline and responsibility in their lives (a *time-tested principle*) in order to fully develop as happy, well-adjusted, and disciplined individuals (the *Single Objective*). So long as the chore is reasonable (*procedural and evidentiary safeguards protect parents*), as taking out the garbage surely is, there can be no argument that the order (*parental authority*) is not ultimately in the child's own (*separate*) best interests.

Whether the child should happen to appreciate his or her best interest at any particular moment in time is irrelevant under this analysis. Instead, a child's "right" is simply a right to an opportunity to benefit from reasonable discipline and structure, while a parent has the distinct right to be able instill the same.<sup>189</sup> Thus, the

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<sup>185</sup>See Clift & Wingert, *supra* note 180, at 70.

<sup>186</sup>On the one hand, the mother was incapable of caring for Gregory but for a few months over an eight-year period; on the other hand, some argued that had the state provided the mother financial assistance directly, instead of giving the assistance to a foster family, the family perhaps could have stayed together. See Fitzgerald, *supra* note 9, at 75.

<sup>187</sup>Clift & Wingert, *supra* note 180, at 84(*quoting* family law expert Robert Mnookin).

<sup>188</sup>Fitzgerald, *supra* note 9.

<sup>189</sup>With an *opportunity* not being the same thing as an *entitlement*.

individual interests of parent and child would not only coexist under the Single Objective Analysis, but they would also actually complement one another, as well.<sup>190</sup>

*B. Autonomy vs. Alienation*

Of course, there are indeed very real challenges in recognizing even a minimal level of affirmative interests for children. Again, the problem is how to ensure that autonomy cannot be equated to anarchy or alienation. As one commentator has observed:

The individual tradition is at the heart of American culture. Yet the fulfillment of individualism's promise of personal liberty depends, paradoxically, upon the maintenance of a set of corollary traditions that require what may seem to be the opposite of personal liberty: submission to authority, acceptance of responsibility, and the discharge of duty. The family tradition is among the most essential corollaries to the individual tradition, because it is in families that both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms. When individualism breaks loose from its corollaries, however, its tendency to destroy personal fulfillment and human relationships is exposed . . . . Perhaps it is no coincidence that the recent period of expansive egalitarianism is also the period of the most widespread loneliness and alienation Western culture has known.<sup>191</sup>

The question presented by the above passage is that once limits are placed on the conception of parental control since extrapolated from *Meyer* and *Pierce*, how then can the state otherwise ensure that the family will not simply fall apart?

First, under the Single Objective Analysis, children would still enjoy the same legitimate discipline and could be provided the same guidance and support as they are currently allowed. The only difference here would be that more logical and better-defined safeguards and parameters would be in place to deal with the more difficult of issues.

Second, the autonomy described in the Single Objective Analysis is not anarchic, but is merely an acknowledgement of the most minimal possible conception of human rights.

Still, there are, of course, many situations where control and coercion are absolutely necessary in raising and protecting children. Yet, what the Single Objective Analysis challenges is not the notion of authority, but any notion of total control one could ever truly have over a child. The current logic is that granting parents total control of children will actually serve to eliminate any and all ambiguities or potentially negative outcomes in the parent-child relationship. This

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<sup>190</sup>In fact, *DeShaney* perfectly illustrates how the Single Objective Analysis may provide an optimal balance of the true individual interests of parent and child with the smallest risk for legal error possible. Under this approach the goal of the parent is ultimately the same as that of the child: for the child to be *happy, well adjusted and disciplined*, or, in Joshua's case that means trying to even save a child's life. Thus, not only would state intervention have been in Joshua's best interests, but it would have also been in his *parent's* best interests.

<sup>191</sup>Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 656-657 (1976).

approach, however – while it certainly sounds nice – is not grounded in reality. Instead of an idealized family, such logic merely glosses over the very real and very difficult issues presented in the real world. In many cases the current approach even has little or no practical value, at all.<sup>192</sup>

For example, did the Santosky parents' rights of custody and control really mean that their children's actual well being should be made irrelevant to the courts' decision? And, in *DeShaney*, at what point was the state effectively deferring to the doctrine of *parental autonomy* and leaving the family alone – and at what point did the state simply allow Joshua to disappear?

In fact, the recognizing of the basic, healthy individual autonomy of family members is an optimal state for all families. And this principal only becomes more important in those families, such as *Santosky* or *DeShaney*, where serious legal problems, as well as social, emotional, or psychological ones, have clearly been identified. In fact, the principal of individual autonomy has been traditionally accepted throughout history and around the world, as evidenced anywhere from the doctrines of all of the world's major religions to the current leading academic literature,<sup>193</sup> and from the historical practices of Native Americans<sup>194</sup> to modern twelve-step programs.<sup>195</sup>

For example, often the most vocal group to oppose any such affirmative interests of children has been the Christian far right.<sup>196</sup> Yet, perhaps no source has spoken

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<sup>192</sup>Further, children may still be severely harmed even if their bare societal minimums of "care," of food, clothing and shelter are met. See, e.g., *Reno*, 507 U.S. at 304 (requiring that as long as parents meet "certain *minimum* requirements of childcare," any interests of the child may be subordinated to the doctrine of *parental autonomy*) (emphasis in original)); see also *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) ("But even a fit parent is capable of treating a child like a mere possession.").

<sup>193</sup>See generally, ANDREW THOMPSON, GUIDE TO ETHICAL PRACTICE IN PSYCHOTHERAPY 13 (1990); Judith C. Daniluk & Beth E. Haverkamp, *Child Sexual Abuse: Ethical Issues For the Family Therapist*, 42 FAM. REL. 134, 134 (1993).

<sup>194</sup>Upon reaching adolescence, the boys of the Pueblo and Hopi tribes were freed from parental supervision for training in their respective tribal religions. Algonquin boys were separated from their parents for a nine-month period, sometime between the ages of ten and fifteen, for their introductions to tribal spirituality and religion. HARVEY MARKOWITZ, AMERICAN INDIANS 634 (1995).

<sup>195</sup>Modern "twelve-step" programs clearly make individual autonomy the foundation of group success. For example, in Al-Anon (for family and friends effected by alcoholics), "The family members must first learn to cope with their own problems before any beneficial effects can reach the alcoholic." A GUIDE FOR THE FAMILY OF THE ALCOHOLIC 8, AL-ANON FAMILY GROUPS. For recovering alcoholics in Alcoholics Anonymous (AA), "Let no alcoholic say he cannot recover unless he has his family back . . . his recovery is not dependent on [specific] people." ALCOHOLICS ANONYMOUS 99 (Alcoholics Anonymous World Services, Inc., 3d ed., 1993). And Co-Dependants Anonymous (for those seeking healthy relationships, romantic and otherwise) also discusses the opposite of autonomy. "We hear enmeshment phrases every day, such as, 'You're my everything' . . . 'I need you,' or 'You make me whole . . . .' Enmeshment doesn't allow for individuality, wholeness, personal empowerment, healthy relationships with ourselves or with others." CO-DEPENDENTS ANONYMOUS 106-107 (Co-Dependants Anonymous, 1995).

<sup>196</sup>As one example, the failed House Bill: The Parental Rights and Responsibilities Act of 1995, made no mention of children's rights. Much of the Bill's language was apparently taken

more strongly or more clearly toward the importance of individual autonomy within the family than Jesus Himself:

Think not that I am come to send peace on earth: I came not to send peace, but a sword. *For I am come to set a man at variance against his father, and the daughter against her mother, and the daughter in law against her mother in law. And a man's foes shall be they of his own household.* He that loveth father or mother more than me is not worthy of me: and he that loveth son or daughter more than me is not worthy of me. And he that taketh not his cross, and followeth after me, is not worthy of me. He that findeth his life shall lose it: and he that loseth his life for my sake shall find it.<sup>197</sup>

In other words, even the “honoring” of one’s mother and father has never been meant to suggest that blindly endorsing unhealthy or destructive behavior is a path to truth or happiness.<sup>198</sup> This identical point is articulated in the Koran, as well: “We have charged man that he be kind to his parents, but if they strive with thee to make thee charged association with Me that whereof thou hast no knowledge, then do not obey them; unto me you shall return, and I shall tell you what you are doing.”<sup>199</sup>

In short, sometimes the doctrine of *parental autonomy* simply marks the starting point for any logical legal analysis of the family.

Healthy autonomy need not ever undermine a parent’s ability to instill rules in the home or to discipline children. Autonomy merely means preventing parents from violating or invalidating children. Conversely, autonomy prevents children from disrespecting legitimate parental rights and authority, from harming themselves, or from harming the interests of the family as a whole.<sup>200</sup> Thus, healthy autonomy always allows for legitimate discipline, structure, and guidance in the home.

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from a book put out by the Christian Coalition. Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 398 (1996).

<sup>197</sup>Matthew, 10:34-38 (emphasis added).

<sup>198</sup>And this sense of individual autonomy is central to the teachings of the Buddha, as well: “Therefore, Ananda, be ye lamps unto yourselves, be ye a refuge to yourselves. Betake yourselves to no external refuge. Hold fast to the truth as a lamp; hold fast to the truth as a refuge. Look not for a refuge in any one beside yourselves.” JACK KORNFELD, TEACHINGS OF THE BUDDHA IN SACRED BOOK OF THE BUDDHISTS (1993).

<sup>199</sup>Koran, Book II, 97:8.

<sup>200</sup>For a detailed description as to how toxic bonds and a lack of autonomy among even moderately dysfunctional families can perpetuate the problems of individuals see Michael A. Kerr, *In Chronic Anxiety and Defining A Self*, ATLANTIC MONTHLY, Sept. 1988. “Each person’s mode of functioning reinforces the others. The overfunctioning parents, who are usually perceived as ‘normal,’ and the underfunctioning patient, who is perceived as ‘sick,’ actually perpetuate, unwittingly for the most part, each others behavior.” *Id.* Dr. Kerr’s analysis could be summarized in one word: Enmeshment. “Not only was it difficult therefore, to think of mother and patient as separate people, but it was difficult to think of any family members that way.” See also Michael A. Kerr, *Darwin to Freud to Bowen*, GEORGETOWN, Spring, 1988. Until such toxic bonds are broken, no one in a family is likely to get better.

### C. *Autonomy and Accountability*

The unavoidable truth is that it is only through recognizing some minimum level of individual autonomy that there can ever be individual accountability. Under the Single Objective Analysis, blame and excuses for problems in the home are best eliminated – and replaced with an increase in personal responsibility.

For example, even a child coming from a horrible home environment need not ever be excused from adhering to any basic societal and familial norms, such as regular attendance at school or in refraining from the use of drugs or alcohol. The bottom line is that holding children responsible for their actions fosters individual responsibility and growth and, therefore, is crucial to their being happy, well adjusted, and disciplined.

In ignoring any notion of autonomy, the current analysis actually ignores the core problems that often make these cases so difficult in the first place. For example, many families are in court specifically because those above mentioned family dynamics of “authority,” “responsibility,” and “duty,” have never existed in the home, or at least not in any healthy sense. For example, and unfortunately, in too many homes “authority” has meant dehumanization; “responsibility” has meant blame; and any sense of “duty” may have been nonexistent. Anytime these are the dynamics that exist within a family, blindly deferring to an overly broad and overly rigid conception of *parental autonomy* will only exacerbate problems.

Therefore, the state must have an ability to assert itself into the affairs of that family under certain circumstances. Or, the state must at least be able to offer family members access to social, emotional or psychological help outside of that family structure. To otherwise demand change without offering adequate help or solutions outside that family system will only foster frustration, blame, and a lack of individual accountability. Thus, problems are guaranteed to get worse.

### D. *Autonomy and Effectiveness*

The beauty of healthy individual autonomy is that once the most just legal framework and assistance is in place, and individuals still choose not to take positive action in their lives, then there is nobody for that individual to blame.<sup>201</sup> At this point the law finally may act, or not act, with a maximum of effectiveness and legitimacy.

For example, children are utterly dependent on having protectors and healthy role models in their lives. Without such help, children will have an extraordinary, uphill battle in simply learning how to live in society in a healthy manner. It is better established now than ever that children from dysfunctional homes are far more likely to abuse alcohol or drugs; to have worse physical health; to be depressed; to engage

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<sup>201</sup>Acknowledgment of freewill is also the key to Rawls' A THEORY OF JUSTICE. Rawls' ideal society comes “as close as a society to being a voluntary scheme, for it meets the principles which free and equal persons would assert to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize are self-imposed.” RAWLS, *supra* note 134. And in the words of Albert Schweitzer, “Example is not the main thing in influencing others. It is the only thing.” ALBERT SCHWEITZER, THE WORLD OF ALBERT SCHWEITZER (1995); *see also* JOHN LOCKE, A LETTER ON TOLERATION, POLITICAL WRITINGS OF JOHN LOCKE (David Wooten ed.) (1983) (“It is only light and evidence that can work a change in men's opinions, and that light can in no manner proceed from corporal sufferings or any other outward penalties.”).

in self-destructive behavior, including suicide;<sup>202</sup> to engage in criminal behavior;<sup>203</sup> and to eventually pass emotionally dysfunctional behaviors on to their own children.<sup>204</sup> Therefore, to hold a troubled child accountable and expect that child to change his or her behavior without some type of assistance or support from outside what may be a horribly troubled home is analogous to sending someone to France to learn to speak Spanish. And, for example, if in a particular case a parent is known to have serious emotional or behavioral problems, he or she must have some sort of access to counseling or similar help if he or she can really then be held accountable for improving his or her family life.<sup>205</sup>

Thus, if the basic, and historically established concept of individual autonomy is not acknowledged in our legal system, the law will not only lack any sense of legitimacy, but it is also doomed to be highly ineffective, as well.

## XII. SOCIETIES' MOST DESERVING, MOST DEFENSELESS, AND MOST FORGOTTEN CITIZENS

Finally, while the Single Objective Analysis could improve the analysis of any case involving the parent-child relationship, the most logical starting point to instill

<sup>202</sup>Two recent studies link adverse childhood factors (e.g., psychological, physical or sexual abuse, member in family incarcerated, abused or a substance abuser) with cancer, heart disease, having fifty or more sex partners, severe obesity, etc. AMERICAN JOURNAL OF MEDICINE, October 1999; Anda, R.F., Edwards, V., et al., *Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults*, 14 AM.J. OF PREVENTIVE MED. 245-258, May 1998.

<sup>203</sup>PEGGY SMITH, ET AL., *California State University of Long Beach, Synopsis, LONG-TERM CORRELATES OF CHILDHOOD VICTIMIZATION: CONSEQUENCES OF INTERVENTION & NON-INTERVENTION 4* (1982) (on file with the Harvard Law School Library) (finding that abuse victims are more likely to have arrest records and adult convictions than comparison subjects); RAYMOND H. STARR, JR., ET AL., *LIFE-SPAN DEVELOPMENTAL OUTCOMES OF CHILD MALTREATMENT, IN EFFECTS OF CHILD ABUSE AND NEGLECT*, 11-12, 14-16 (Raymond H. Starr & David A. Wolfe eds., 1991).

<sup>204</sup>RUTH S. KEMPE & C. HENRY KEMPE, *CHILD ABUSE*, 12-14 (Jerome Bruner, Michael Cole & Barbara Lloyd eds., 1978) ("The most consistent feature of the histories of abusive families is the repetition from one generation to the next of a pattern of abuse, neglect and parental loss or deprivation."). Also, 38% of perpetrators of abuse in one study were found to have been sexually abused as children. JEAN RENVOIZ, *INNOCENCE DESTROYED: A STUDY OF SEXUAL ABUSE* 107 (1993). An illustrative example of this vicious cycle is the dynamic of sexually abused young girls being more likely to become mothers on welfare. Jason DeParle, *Early Sex Abuse Hinders Many Women on Welfare*, N.Y. TIMES, Nov 8, 1999, at A-1. While the issue has never been adequately examined, its prevalence in so-called "hard cases" seems unmistakable. Often the pattern is sexually abused girls being more likely to be teen mothers, who are more likely to be drop-outs, who are ultimately more likely to be on welfare. *Id.*

<sup>205</sup>*See, e.g., Children Left Behind*, THE WASHINGTON POST, Nov. 19, 2004, A.28 ("Congress had no trouble finding 'savings' to supposedly offset new costs when the costs were in a corporate tax bill stuffed with special-interest provisions," yet, "when it comes to health care for poor children, different, stricter rules seem to apply."); Clea Benson, *Rallying to Save Rehab Programs*, PHILADELPHIA INQUIRER, March 28, 2003, B5 (quoting Philadelphia Police Commissioner with regards to budget cuts for drug treatment centers, "All I know is that treatment works . . . . If you have a war against drugs, how can you fight it if you don't give us the ammunition?").

change is to begin to protect the interests of our least politicized, yet most helpless of individuals: children. Today the U.S. is plagued by an embarrassing lack of legal representation for children, a long ignored and disintegrating foster-care system, and understaffed, under-funded, and often under-trained, social workers and agencies.

Our societal failures in this area is evidenced both in some high-profile stories, such as of starvation or even dungeon-like abuse of children supposedly under state "supervision," in homicidal parents never held accountable for their actions,<sup>206</sup> or in broader, system-wide failures on a rather staggering level. A recent report by the Child and Family Service Reviews, for example, found that, "Not a single state has passed a rigorous test of its ability to protect children from child abuse and to find permanent homes for kids who often languish in foster care."<sup>207</sup> Thus, it is long overdue to ask precisely what "family values" really means to this nation.<sup>208</sup>

Due to the inherently vulnerable and utterly dependent nature of children, our current approach is immoral, illogical, unconstitutional, and, in fact, directly negates the Bill of Rights itself. Until society decides to adequately acknowledge its most desperate and most helpless members, dysfunctional family values will continue to be perpetuated in future generations.

### XIII. CONCLUSION

While nowhere is it stated that the process of establishing healthy individual boundaries within the family is easy or painless,<sup>209</sup> doing so will best ensure the

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<sup>206</sup>In a series of articles, CHICAGO TRIBUNE columnist Bob Greene told the story of a child brutally beaten to death by his parents. At no time was anyone allowed to speak on behalf of the child (such as the treating medical professionals, for example). Ultimately the parents were released after three years of prison (due to a legal mechanism unique to that court) by a judge who attributed the torturous death not to malice, but simply to "bad parenting." Bob Greene, *Words That the Judge Would Not Allow to be Spoken*, available at <http://chicago.tribune.com/news/columnists/chic00107greenepj.column> (visited Feb. 19, 2002)(on file with author).

<sup>207</sup>*States Failing New Test of Child Welfare System*, available at <http://new.wset.com/news/stories/0803/99105.html> (visited February 12, 2005)

<sup>208</sup>Often the political will of this country is to avoid the "enabling" of poorer parents with public assistance and to avoid using tax dollars to cure the problem of what maybe seen as ineffective parents. The idea is to empower those individuals either to lift themselves out of poverty and/or to remove any disincentive for those parents in becoming more accountable for their situations.

First, however, and no matter to what degree one might accept this approach; such a policy can ever be transferred to children. Such an effort tells these already violated children that, while they already have little reason to trust anyone, society does in fact value their lives and will in fact attempt to put them into the real world with some life skills and at least a little hope.

Finally, the monetary cost to society for providing for the social needs and counseling of parents, as well as the legitimate social service protections of children and the foster care system, may be the best long-term economic investment this country ever makes. It is very likely that for many of these parents, such as the Santoskys, for example, have emotional and psychological problems that run far deeper than any presumed financial disincentive that may arise from the state saving their children for them.

<sup>209</sup>"There is but one neurosis, many manifestations and one cure—feeling...Feeling pain is the end of suffering." Dr. Arthur Janov's Primal Center (quoting DR. ARTHUR JANOV, WHY



interests of every individual. Yet, the Single Objective Analysis still cannot guarantee that children never become alienated or out-of-control. Instead, this analysis can provide the American family with the strongest and healthiest structure and support possible, which is the most that the law could ever hope to do. All that is really left for society and parents to do then is to take a mandatory leap of faith—and to believe in children.

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YOU GET SICK—HOW YOU GET WELL (1996) *available at* <http://www.primaltherapy.com/> (last visited February 15, 2005).