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Recommended Citation
38 Cardozo L. Rev. 1 (2016)

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PROTECTING THE FREE-RANGE KID: RECALIBRATING PARENTS' RIGHTS AND THE BEST INTEREST OF THE CHILD

David Pimentel†

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INTRODUCTION

In January 2015, the Meitiv children, ages ten and six, were permitted to do a short walk on their own, from the neighborhood playground back to their home in Silver Spring, Maryland.[1] Their parents designed this exercise to help the children develop some independence and self-sufficiency, and did so only after the children had completed other smaller challenges to prepare them for this one.[2] But the parenting lesson was quickly disrupted when someone saw the children walking alone and reported it to the police.[3] The children were picked up by police, the father was threatened with removal of the children from his custody, and the State of Maryland commenced an abuse and neglect investigation.[4] The Meitivs identify their approach as

1 Donna St. George, *Parents Investigated for Neglect After Letting Kids Walk Home Alone*, WASH. POST (Jan. 14, 2015), https://www.washingtonpost.com/local/education/maryland-couple-want-free-range-kids-but-not-all-do/2015/01/14/d406c0be-9c0f-11e4-bcfb-059ec7a93ddc_story.html.

2 *Id.*

3 *Id.*

4 *Id.* ("[A] CPS worker required [Mr. Meitiv] to sign a safety plan pledging he would not leave his children unsupervised until the following Monday, when CPS would follow up. At first he refused, saying he needed to talk to a lawyer, his wife said, but changed his mind when he was told his children would be removed if he did not comply.").

"'free-range' parenting,"[5] a child-rearing philosophy that is a conscious reaction to and rejection of the recent trend toward "helicopter" parenting.[6] But the caller and the police apparently felt that the Meitivs were exposing their children to unacceptable levels of danger.[7]

At the core of the conflict is the ongoing debate about what constitutes responsible parenting in a world increasingly obsessed with child safety. While statistics show that children are dramatically safer today than ever before,[8] media sensationalization of stranger abduction cases, and other potential dangers in the world, are prompting parents to err on the side of overprotection.[9] There is mounting evidence that such overprotection does more harm than good,[10] but parents, like the Meitivs, who resist the hyper-parenting trend, are running afoul of the legal system.

The Meitivs' story is not an isolated one. Recent news items include other examples of parents arrested—or otherwise subjected to state intervention through the state's Child Protective Services (CPS) agency—for allowing their children to play in neighborhood parks,[11] or to walk to or from school,[12] or stay home alone,[13] without continuous

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5 *Id.*

6 LENORE SKENAZY, FREE-RANGE KIDS: HOW TO RAISE SAFE, SELF-RELIANT CHILDREN (2010). The term "helicopter parents" refers to parents "who hover over-protectively around their children." Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 536 (2013).

7 St. George, *supra* note 1.

8 BRYAN CAPLAN, SELFISH REASONS TO HAVE MORE KIDS: WHY BEING A GREAT PARENT IS LESS WORK AND MORE FUN THAN YOU THINK 96 (2011) ("Conditions today aren't merely better [than they were in the 1950s]. They improved so much that government statisticians changed their denominator [for youth mortality] from deaths per 1,000 to deaths per *100,000*.").

9 David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 963–66 (2012).

10 Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1274–78 (2011). Professors Bernstein and Triger have outlined numerous psychological effects that Intensive Parenting has on the first generation of intensively parented children. *Id.* These negative effects include dependency and inability to cope with life's challenges; inability "to manage their time, strategize, and negotiate open conflict during play"; decreased "creativity, spontaneity, [and] enjoyment . . . than children raised under different child rearing practices"; decreased empathy; and immaturity. *Id.* at 1275–76. If the law forces parents to subscribe to Intensive Parenting norms, it may undermine the critical role of parents to instill in their children a sense of independence and the ability to successfully separate from their parents. *Id.* at 1274; Hara Estroff Marano, *A Nation of Wimps*, PSYCHOL. TODAY (Nov. 1, 2004), https://www.psychologytoday.com/articles/200411/nation-wimps. "Harvard psychologist Jerome Kagan has shown unequivocally that what creates anxious children is parents hovering and protecting them from stressful experiences." *Id.*; *see also* L.J. Jackson, *Smothering Mothering: 'Helicopter Parents' Are Landing Big in Child Care Cases*, 96 A.B.A. J. 18, 18–19 (2010) (referencing "the psychological harm that overprotection may lead to in child rearing").

11 *E.g.*, Conor Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, ATLANTIC (July 15, 2014), http://www.theatlantic.com/national/archive/2014/07/arrested-for-letting-a-9-year-old-play-at-the-park-alone/374436.

12 *See infra* text accompanying notes 111–12 (discussing the Jonesboro, Arkansas case).

parental supervision. The spate of news items suggests a trend toward enhanced, arguably invasive, scrutiny of parents, with the state second-guessing the parenting decisions they make, and intervening whenever they disagree with the parents' judgment call.

The interventions are a problem not just for parents who have affirmatively chosen a "free range" approach to child-rearing. The degree of supervision demanded by these new highly protective parenting norms are simply beyond the reach of many families less privileged than the Meitivs. Single parents in low-paying jobs cannot afford nannies to do the helicoptering for them.[14] Children in large families—the larger family sizes correlating strongly with non-white ethnicities[15]—cannot expect to get the same level of individualized parental attention that upper-middle class white America now deems to be standard.[16]

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13 Leah Barkoukis, *Children Taken from Parents for a Month for Waiting Alone in Backyard*, TOWNHALL.COM (June 9, 2015, 6:04 PM), http://townhall.com/tipsheet/leahbarkoukis/2015/06/09/parental-rights-vs-government-boy-11-plays-basketball-in-own-yard-as-he-awaits-delayed-parents-cops-take-him--brother-away-for-a-month-n2010171; Lenore Skenazy, *11-Year-Old Boy Played in His Yard. CPS Took Him, Felony Charge for Parents*, REASON: HIT & RUN BLOG (June 11, 2015, 11:35 AM), https://reason.com/blog/2015/06/11/11-year-old-boy-played-in-his-yard-cps-t.

14 Shanesha Taylor attracted national attention when she, attempting to find work to support her two young children, left them in the car while she interviewed for a job. "To many she represented the plight of single and underemployed parents who face tough decisions each day related to child care." Emanuella Grinberg, *When Justice is 'Merciful' in Child Abuse Cases*, CNN (Aug. 7, 2014, 1:33 PM), http://www.cnn.com/2014/08/07/living/shanesha-taylor-plea-deal.

15 *Family Size, By Race and Ethnicity*, PEW RES. CTR. (May 7, 2015), http://www.pewsocialtrends.org/2015/05/07/childlessness-falls-family-size-grows-among-highly-educated-women/st_2015-05-07_childlessness-12 (showing that Hispanic women, ages forty to forty-four, are nearly twice as likely as white women to have four or more children (in 1994, 28% of Hispanic women aged forty to forty-four had four or more kids, and in 2014, that number was still at 20%, while only 11% of white women aged forty to forty-four had that many kids over that same twenty-year span)).

16 WASH. RISK ASSESSMENT PROJECT, MULTI-CULTURAL GUIDELINES FOR ASSESSING FAMILY STRENGTHS AND RISK FACTORS IN CHILD PROTECTIVE SERVICES 35 (Peter J. Pecora & Diana J. English eds., 1993).

> Issues of lack of supervision of young children surface most frequently in referrals for Native American and Hispanic families. Older, but still young children are expected to care for their younger siblings. In Native American families, being responsible for one's siblings, is an indication of maturity and ability. In Hispanic families, especially migrant families, caring for younger siblings may be [a] role associated with younger children's contribution to family survival.

Id. (citations omitted). Class is similarly correlated with levels of parental attention. Eleanor E. Maccoby, *Middle Childhood in the Context of the Family*, *in* DEVELOPMENT DURING MIDDLE CHILDHOOD: THE YEARS FROM SIX TO TWELVE 184, 207 (W. Andrew Collins ed., 1984) ("Major contrasts that have emerged with some consistency are that middle-class parents, compared with working- or lower-class parents: Have higher rates of interaction with their children and are more responsive to their children's bids for attention.").

The intrusions are made in the name of protecting children from harm, a public policy objective that is both easy to defend and hard to dismiss. But disruption of the family in this way—removing or even threatening to remove kids from their families—can do tremendous harm to children, the very children the state is trying to protect,[17] and in many cases contravene the family's fundamental liberty interests under the Fourteenth Amendment,[18] and/or their Fourth Amendment rights against seizure of their children.[19] Although the oft-cited "best interest of the child" standard, discussed in more detail *infra*,[20] has no legal application to interventions like that which supplanted the Meitivs' parenting choices, it appears that those doing the intervening are applying such a principle de facto to justify their actions.[21]

Parents caught in this nightmare are well advised to cooperate quickly, apologize profusely, and promise it won't happen again—effectively waiving their rights to raise their children as *they* see fit—in order to avoid having their children taken away from them.[22] But unless they assert their constitutional rights in these cases, those rights will not be litigated or adjudicated. Indeed, it appears that in many of these cases, those rights are being disregarded altogether.

What we need is a better conception of how the rights of parents come into play when the state attempts to rein in free-range parents, or any parent who does not fully implement the child-safety-obsessed orthodoxy of twenty-first century parenting. The existing case law suggests that the enforcement of overprotective parenting norms in society is, at worst, a gross violation of the constitutional rights of parents, and at best, a severe chilling of those rights. The legal system, therefore, is taking sides in the debate over what constitutes ideal parenting and, through individuals purporting to act in the best interests of children,[23] is bullying parents into adhering to hyper-

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17 *See* David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 274–75 (2015).

18 Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment [of the U.S. Constitution] protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

19 *In re* Stumbo, 582 S.E.2d 255 (N.C. 2003) (holding that an anonymous report that an unsupervised two-year-old was naked in the driveway was insufficient to constitute "neglect" under the state's and county's investigations policy, so CPS was not within its authority to effect a Fourth Amendment seizure of the family's children–separating them from their parents and interviewing them in private–as part of its required investigation.).

20 *See* discussion *infra* Section I.E.

21 *See, e.g.*, *infra* text accompanying notes 111–12 (discussing the police officer's explanation of his actions in the Jonesboro, Arkansas case).

22 *See infra* text accompanying note 92.

23 See Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), where the Iowa Supreme Court applied a "best interest of the child" standard to deprive a father of custody of his child, based on the court's own value-laden conception of what constituted a proper upbringing—turning

protective parenting norms. Lost in that process are the constitutional rights of parents, as well as the benefit—both to the children themselves and to society as a whole—that comes from respecting parental dignity and family integrity.[24]

A clearer articulation of parental rights, and a more robust assertion of those rights, is overdue.[25] Moreover, protecting the rights of parents to parent as they see fit—safeguarding their discretion in parenting, including issues of risk-management for their children—is likely to do far more to advance the interests of children than the emerging pattern of state intervention can hope to achieve.[26]

This Article proceeds in six parts. First is an explanation of why some parents choose to adopt a less-protective approach to parenting, a decision that may be prompted by free-range parenting philosophy, by resource constraints, or by cultural traditions. That Part also explores why the rights of these parents go unasserted, unadjudicated, and unenforced, as well as how the concept of the "best interest of the child" is often misapplied in these cases.

The second Part sets forth the constitutional basis for the rights of parents over the care, custody, and control of their children, arguing that encroachment of such fundamental liberty interests must be subjected to strict scrutiny.

Third, the Article explores the tension inherent in a parent's rights vis-à-vis the competing rights of children, of the state, and of the other parent, in light of the fact that the parent is not typically exercising these

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its nose up at the father's "unconventional, arty, Bohemian" life, in favor of the more "stable" and conventional environment offered by the grandparents. As a rule, a court should not apply a "best interests of the child" standard unless and until the parent is found by a court to be "unfit." *See Troxel*, 530 U.S. at 68 (Justice O'Connor observed "there is a presumption that fit parents act in the best interests of their children."); Stanley v. Illinois, 405 U.S. 645 (1972) (discussing unfitness). But this constitutional limit is not consistently applied, as the State of Washington violated this principle in *Troxel*, more than twenty-five years after *Stanley*. *Troxel*, 530 U.S. 57.

24 MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 37, 47 (2005).

25 The British legal system presents a cautionary tale, as expanded recognition of the rights of children has threatened to swallow up the concept of parents' rights altogether. Noted British scholar Alexander McCall Smith observes:

> So strong has the best interest principle become that the question needs to be addressed as to whether there is anything left of parental rights . . . . The gradual demotion of parental rights . . . may be viewed as another example of the gradually encroaching power of the interventionist state in the area of the bringing up of children.

Alexander McCall Smith, *Is Anything Left of Parental Rights?*, *in* FAMILY RIGHTS: FAMILY LAW AND MEDICAL ADVANCE 9, 18 (Elaine Sutherland & Alexander McCall Smith eds., 1990).

26 *See, e.g.*, GUGGENHEIM, *supra* note 24, at 37–38 ("Parents . . . receiving maximum discretion to carry out their responsibilities [are] free from the worry that their behavior will be monitored and second-guessed by a third party. Children obviously benefit from rules that are calculated to reduce stress in their home.").

rights for his own benefit (and in that sense, they may not be "his" rights), but for the benefit of another, namely his child.

The fourth Part explores how parental duties are inseparably connected to those rights. Here, the principle of fiduciary duty offers some insight into the roles and rights of parents to exercise their judgment, for the benefit of another, without fear of liability or of being second-guessed by the state.

Fifth, the Article notes that solutions to the problem of unenforced rights may lie in the implementation of parents' procedural rights in these cases, most notably the right to counsel.

The sixth Part highlights the overarching problem that the system's failure to enforce and protect parents' rights in these cases threatens to chill their exercise. Fear of state intervention will force parents' hands in their parenting choices, undermining family autonomy as well as the best interests of the children.

I. THE PROBLEM OF PARENTAL RIGHTS FOR FREE-RANGE PARENTS

A. *What is Free-Range Parenting?*

To a large degree, free-range parenting is a reaction to the present-day obsession with child-safety, and the emerging parenting norms that reflect those fears. Despite the fact that "stranger danger" is an irrational fear that has been largely debunked,[27] it is widely considered unsafe to let kids play in parks or walk to school without the constant supervision of an adult.[28] Preteen babysitters, sandlot baseball, bike riding in the neighborhood, and tree-climbing, once staples of childhood in America, are now relics of history.[29] If children get outdoors at all these days, it is

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[27] A simple web search of "Stranger Danger Myth" draws dozens of hits. *E.g.*, David Finkelhor, Opinion, *Five Myths About Missing Children*, WASH. POST (May 10, 2013), https://www.washingtonpost.com/opinions/five-myths-about-missing-children/2013/05/10/efee398c-b8b4-11e2-aa9e-a02b765ff0ea_story.html.

[28] This preconceived notion that children are not safe without constant parental supervision may be correlated to a study illustrating a trend that Americans today are far less trusting of others compared to previous generations. Specifically, a study has shown that Americans born before the 1930s were twice as trusting of others and likely to engage in community projects, in comparison to their grandchildren. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995). See further discussion of Putnam's work *infra* text accompanying notes 31–33.

[29] Dennis Cauchon, *Childhood Pastimes are Increasingly Moving Indoors: Fishing, Biking and Sports Giving Way to Video Games*, USA TODAY (July 12, 2005), http://usatoday30.usatoday.com/educate/college/education/articles/20050717.htm ("The fundamental nature of American childhood has changed in a single generation. The unstructured outdoor childhood—days of pick-up baseball games, treehouses and 'be home for dinner'—has all but vanished.").

typically in organized sports leagues, with redundant parental supervision, which they travel to and from in minivans or SUVs, strapped into car seats.[30]

The appeal of the "stranger danger" myth, and the obsession with child protection, may have complex and multi-faceted roots. Robert Putnam's 2000 book *Bowling Alone* documents a profound societal shift, describing "how we have become increasingly disconnected from family, friends, neighbors, and our democratic structures."[31] This waning sense of community is another reason that people may not allow their children out in the neighborhoods; people are less likely to know their neighbors, much less trust them.[32] In an environment of increased alienation and distrust, it is only natural that parents would close ranks around their kids, sealing them off from the community that had, for previous generations, provided some kind of informal social safety net.[33] Disconnected from their communities, families are far more likely to "go it alone," assuming full responsibility for their children's welfare, rather than relying on the community as a whole to join in the oversight, protection, and nurturing of the neighborhood's children.[34]

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[30] *Id.* ("When children do go outside, it tends to be for scheduled events—soccer camp or a fishing derby—held under the watch of adults. In a typical week, 27% of kids ages 9 to 13 play organized baseball, but only 6% play on their own, a survey by the Centers for Disease Control and Prevention found.").

[31] *About the Book*, BOWLING ALONE, http://bowlingalone.com (last visited Jan. 28, 2016) (describing Robert D. Putnam's book *Bowling Alone: The Collapse and Revival of American Community*).

[32] Thomas H. Sander & Robert D. Putnam, *Still Bowling Alone? The Post-9/11 Split*, 21 J. DEMOCRACY 9, 9–10 (2010).

[33] Putnam speculates about the causes of this trend, including (1) the entry of women into the workforce, (2) geographic mobility that "disrupt[s] root systems," (3) demographic changes ("fewer marriages, more divorces, fewer children" etc.), and (4) "the technological transformation of leisure" including a shift from socialization toward TV watching. Putnam, *supra* note 28, at 73–75. Exactly *why* it has happened is not particularly important to this analysis; the fact that it *has* happened appears to be having an enormous effect on modern conceptions of parenting.

[34] The 1996 book *It Takes a Village*, by then-First Lady Hillary Clinton, took its title from the African-attributed proverb "It takes a village to raise a child," and promoted the idea that responsibility for a child goes far beyond the child's immediate family–that outside people and groups can have great impact on a child's life as well. HILLARY RODHAM CLINTON, IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US (1996). The message was promptly politicized, however, when Senator and presidential candidate Bob Dole referenced it in his acceptance speech at the Republican National Convention that year, pushing back on the notion of community responsibility:

> And after the virtual devastation of the American family, the rock upon which this country was founded, we are told that it takes a village . . . . [W]ith all due respect, I am here to tell you it does not take a village to raise a child. It takes a family to raise a child.

Senator Robert Dole, Speech to the Republican National Convention (Aug. 15, 1996), http://www.cnn.com/ALLPOLITICS/1996/conventions/san.diego/transcripts/0815/dole.fdch.shtml.

This shift is also evident from the fact that neighbors, seeing young children unattended, respond not by trying to help the kids, but by calling the police and reporting the parents.[35]

Free-range parents, in contrast, mourn the loss of freedom for today's kids, and argue that kids are actually far worse off because of these "safety" measures. Today's kids spend far more time indoors on sedentary activities, including "screen time," contributing to a spike in the problem of childhood obesity, and a range of other developmental problems.[36] Others have argued that today's coddled kids not only lose a sense of discovery and exploration when they are kept home and under nonstop adult supervision, they are deprived of an opportunity to develop self-sufficiency and or to learn to take responsibility for themselves.[37] Infantilizing kids as they grow up, in an attempt to keep them safe, has also contributed to problems at universities, where undergraduate deans complain that freshmen depend on their parents to solve their problems and navigate the system.[38]

Senator Dole's message, however, was not pushing back on neighborhood and community support for parents and their children, but on state interventions in the family:

> [W]e are told that it takes a village, that is collective, and thus the state, to raise a child. The state is now more involved than it ever has been in the raising of children. And children are now more neglected, more abused and more mistreated than they have been in our time. This is not a coincidence.

Id.

35 *See, e.g.*, Donna St. George, *supra* note 1 (discussing the Meitivs' story); *see also* Nicole Comstock, *Sacramento Mother Faces Child Endangerment Charges for Allowing 4-Year-Old Son to Play Outside Alone*, FOX 40 (Nov. 19, 2015, 10:53 PM), http://fox40.com/2015/11/19/sacramento-mother-faces-child-endangerment-charges-for-allowing-4-year-old-son-to-play-outside-alone ("A Sacramento mother faces jail time for letting her 4-year-old son play alone at an outdoor playground 120 feet from her front door. 'He was outside and the neighbor called the cops on us,' the boy's mother, Sonya Hendren, said.").

36 *See, e.g.*, Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963–1965 Through 2007–2008* (2010), CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf.; *Television Watching and "Sit Time"*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH: OBESITY PREVENTION SOURCE, https://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/television-and-sedentary-behavior-and-obesity ("This article briefly outlines the research on how TV viewing and other sedentary activities contribute to obesity risk, and why reducing screen time and sedentary time are important targets for obesity prevention.").

37 LENORE SKENAZY, FREE-RANGE KIDS: GIVING OUR CHILDREN THE FREEDOM WE HAD WITHOUT GOING NUTS WITH WORRY, at xx–xxi (2009); *see also* Bernstein & Triger, *supra* note 10, at 1275 (stating that the heavy monitoring involved in "Intensive Parenting" has been shown to prevent children from developing independence, self-sufficiency, and the coping skills needed to handle the hardships of life).

38 *E.g.*, JULIE LYTHCOTT-HAIMS, HOW TO RAISE AN ADULT: BREAK FREE OF THE OVERPARENTING TRAP AND PREPARE YOUR KID FOR SUCCESS 6–7 (2015) ("What will become of young adults who look accomplished on paper but seem to have a hard time making their way in the world without the constant involvement of their parents?"). Lythcott-Haims served as Dean of Freshman and Undergraduate Advising at Stanford University before writing her book. Kate Chesley, *Lythcott-Haims Stepping Down as Dean of Freshmen and Undergraduate*

Yet free-range parents are coming under attack, for endangering their children, when they refuse to hover or to coddle their kids. Much of the problem comes from failing to appreciate the risk-management role of parents. Anything a parent does to protect a child from one risk is likely to increase another risk. Driving a child to school may protect him from the nearly negligible risk of stranger abduction, but it also subjects the child to the far more likely dangers of traveling in a motor vehicle, of developing a sense of dependency, and of lack of exercise. Indeed, the American Academy of Pediatrics has published statistics suggesting that "being driven to school in a passenger vehicle is by far the most dangerous way to get there."[39]

The Meitivs, of course, are consciously choosing to give their kids a long leash, based on their own convictions about what is best for their kids. Kids who are capable of fending for themselves, the theory goes, are far safer (not to mention happier and more successful) than kids who are sheltered from the world by the smothering safety constraints imposed by hovering parents.[40] The latter kids are more vulnerable to the world, and seriously at risk, the minute their parents are not present. But the self-sufficient, free-range kid will be in a position to deal with unanticipated difficulties in life, and navigate them without parental hand-holding.[41]

The legal issue arises only because free-range parents, like the Meitivs, are being targeted by law enforcement authorities and by Child Protective Services agencies. Other parents, who may not adhere to the free-range philosophy per se, but who have engaged in more relaxed approaches to child supervision—because of, *e.g.*, cultural factors or socio-economic factors—have been similarly implicated. Fueled by the growing obsession with child safety in our society, police now appear to be responding whenever someone who disapproves of another's parenting calls 911 and reports an "endangered" child. The parents are then threatened with devastating consequences: criminal records and jail time; having their children taken away from them (temporarily or

Advising, STANFORD NEWS (Mar. 28, 2012), http://news.stanford.edu/news/2012/march/lythcott-haims-leaving-032812.html.

39 Jane E. Brody, *Turning the Ride to School into a Walk*, N.Y. TIMES (Sept. 11, 2007), http://www.nytimes.com/2007/09/11/health/11brod.html. "Driving your third-grader to the store is vastly more dangerous than leaving him home without a bodyguard." CAPLAN, *supra* note 8, at 29.

40 *See* Ramon Resa, *Problems with Overprotective Parents*: *Why Letting Children Play in Dirt is Healthy*, HUFFINGTON POST (Nov. 17, 2011), http://www.huffingtonpost.com/ramon-resa-md/problems-with-overprotect_b_262209.html.

41 CARL HONORÉ, UNDER PRESSURE: RESCUING OUR CHILDREN FROM THE CULTURE OF HYPER-PARENTING 248 (2009) ("Children are a lot more resilient and robust than we give them credit for. . . . [A] few knocks along the way are unlikely to scar anyone for life; they might even make them stronger.").

permanently); and even when charges are dropped, getting listed on "child abuse" registries.[42]

The structure of our legal system has created and exacerbated these problems as explored in my two earlier articles.[43] Among the key points in those articles is recognition of the fact that parenting is an exercise in risk management. When parents act to protect their children from one danger, they almost always subject that child to another one. Allowing a child to walk to school unaccompanied creates some risk, however small, of stranger abduction; but driving a child to school to insulate her from that risk puts her in a moving vehicle, arguably the most dangerous place for a child today.[44] Allowing children to play in the neighborhood, ride bikes to the park, and join in outdoor games with other neighborhood children, certainly exposes them to some risk; but keeping them indoors where they will be "safe," watching TV or playing video games, certainly exposes them to a variety of other harms including the newest epidemic of child obesity.[45] Allowing a teenager to play high school football is certainly dangerous,[46] but given the social advantages high school athletes enjoy, as well as the physical exercise and the potential to keep young men busy and out of trouble,[47] a large number of parents opt to let them play. If parents face liability for exposing children to risk, they have lost before they begin, because the risks cannot be eliminated, only managed, and the state appears to be all too ready to second-guess their judgments.

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[42] Listing on these registries can have serious consequences for those listed. Once a person is listed, it is typically impossible for her to get a job teaching or working with children, or caring for the elderly or vulnerable. If presently employed in such a profession, she is likely to be fired summarily. Also, inclusion in a registry can have devastating consequences to the parent in child-custody disputes that may arise later. *See* Eric D. Lawrence, *Change is on the Way for Registry of Neglect: Some Critics Call Michigan's Database a Permanent Blacklist*, DETROIT FREE PRESS, (Mar. 24, 2014), http://freep.newspapers.com/image/105074767. *See also infra* note 95 (discussing how and when the state's stigmatizing of individuals in this way can trigger due process protections).

[43] Pimentel, *supra* note 17; Pimentel, *supra* note 9.

[44] The American Academy of Pediatrics has published statistics suggesting that "being driven to school in a passenger vehicle is by far the most dangerous way to get there." Brody, *supra* note 39. "Driving your third-grader to the store is vastly more dangerous than leaving him at home without a bodyguard." CAPLAN, *supra* note 8, at 29.

[45] *Childhood Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION (June 19, 2015), http://www.cdc.gov/obesity/data/childhood.html; *Television Watching and "Sit Time"*, *supra* note 36.

[46] *See* Ken Reed, Opinion, *Game Over for Concussion Debate*, USA TODAY (Mar. 6, 2015, 12:26 PM), http://www.usatoday.com/story/opinion/2015/03/06/youth-sports-avoidance-behavior-column/24383229.

[47] RYAN HEDSTROM & DANIEL GOULD, INST. FOR THE STUDY OF YOUTH SPORTS, RESEARCH IN YOUTH SPORTS: CRITICAL ISSUES STATUS 4–8 (2004), http://www.pysc.org/projects/documents/ResearchinYouthSports-CriticalIssuesStatus.pdf.

Again, these issues and problems have been addressed elsewhere, but the constitutional rights of these parents, faced with accusations and investigations, is a matter demanding further attention.

B. *Imperfect and Struggling Parents*

The problem is not limited to those who consciously identify themselves—like the Meitivs—as "free-range" parents. Most of the parents who run afoul of the new parenting orthodoxy, and who endure state intrusions into their homes and families, are just ordinary people attempting to do something that is extraordinarily difficult, i.e., raising young children. Parents have been faced with similar child-rearing challenges for millennia, and it does not appear to be getting easier. In the process, most (I daresay all) parents suffer momentary lapses of judgment and make mistakes, prompted perhaps by exhaustion, frustration, or limited resources (both material and emotional).[48] Human weakness, even human frailty,[49] can be forgiven in almost every endeavor, it would appear, *except* parenting which, ironically, may be the most difficult thing most people will do in their lives.[50] Put on top of the fact that a large percentage of parents in America are doing this for the first time,[51] and the unfairness of holding parents to standards of

48 The Supreme Court has addressed this concern in the context of parental termination proceedings. In raising the constitutional minimum standard to clear and convincing in these proceedings, a factor the Supreme Court considered was "the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." Santosky v. Kramer, 455 U.S. 745, 764 (1982) (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).

49 In the classic film, *The Philadelphia Story*, the character flaw of Tracy Lord was that she had no "regard for human frailty." *The Philadelphia Story: Comprehensive Storyform*, DRAMATICA, http://dramatica.com/analysis/the-philadelphia-story (last visited Feb. 19, 2016). Her ex-husband calls her out on it: "You'll never be a first class human being . . . until you've learned to have some regard for human frailty." *The Philidelphia Story: Quotes*, IMDB, http://www.imdb.com/title/tt0032904/quotes (last visited July 16, 2016).

50 *See, e.g.*, Kirsten Brunner, *Yes, Parenting IS the Hardest Job*, HUFFINGTON POST (Dec. 14, 2014), http://www.huffingtonpost.com/kirsten-brunner/yes-parenting-is-the-hardest-job_b_5974712.html.

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> The problem may be exacerbated by demographic shifts to smaller families. It means that inexperienced parents are raising a far greater proportion of children. When it was common to have four children in a family, 75% of children were raised by parents who had 'done this before,' raising an older sibling. When the average family size in the United States—for families with children—drops to less than two children per family, a majority of children in the United States will be raised by parents doing this for the first time. And if those parents grew up in small households themselves, the likelihood that they participated in or even witnessed the rearing of younger siblings is dramatically diminished as well.

Pimentel, *supra* note 17, at 288–89 (footnotes omitted).

perfection—where nothing less than the "best" interest of the child is sufficient to meet legal requirements—is manifest.

The parents who are struggling—particularly single parent families of limited means—are particularly vulnerable, as they can't afford to be stay-at-home parents, or to hire nannies,[52] to provide the constant supervision now expected. Even simple matters like Shanesha Taylor's seeking a job,[53] Debra Harrell's going to work,[54] or Kim Brooks's making a quick run into the store,[55] when they couldn't or didn't take their kids with them, have generated horrific encounters with the law. Both Taylor and Harrell were poor, single, women of color.[56] Taylor was employed only part time, and left her kids in the car while she interviewed for a desperately-needed job.[57] As one commentator put it, "To many she represented the plight of single and underemployed parents who face tough decisions each day related to child care."[58]

Harrell was employed at McDonald's, and her nine-year-old daughter begged to be allowed to play at the park rather than hang out in McDonald's during her mother's full shift.[59] Both of these moms faced very few options before these incidents, and even fewer options after they had been charged with serious crimes for what amounts to "parenting while impoverished."[60]

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52 *See* CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE (2014), http://www.arizonachildcare.org/pdf/2014-child-care-cost-report.pdf; Danielle Paquette, *The Staggering Cost of Day Care When You Make Only the Minimum Wage*, WASH. POST: WONKBLOG (Oct. 6, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/06/the-staggering-cost-of-daycare-when-you-make-only-the-minimum-wage.

53 *See* Grinberg, *supra* note 14 (discussing the story of Shanesha Taylor, an unemployed mother who left her kids long enough to interview for a job, only to be arrested for leaving them). Taylor was ultimately sentenced to eighteen years probation. Sarah Jarvis, *Mom Who Left Kids in Car Sentenced to 18 Years Probation*, USA TODAY (May 15, 2015, 8:39 PM), http://www.usatoday.com/story/news/nation/2015/05/15/shanesha-taylor-kids-in-car/27375405.

54 Debra Harrell, of South Carolina, was arrested after letting her nine-year-old play in the park while she went to her job at McDonald's. Friedersdorf, *supra* note 11.

55 Kim Brooks, *The Day I Left My Son in the Car*, SALON (June 3, 2014, 7:00 PM), http://www.salon.com/2014/06/03/the_day_i_left_my_son_in_the_car ("I made a split-second decision to run into the store. I had no idea it would consume the next years of my life.").

56 *See* Friedersdorf, *supra* note 11; Chris Branch, *An Important Conversation About the Mom Arrested for Leaving Her Kid at A Park*, HUFFINGTON POST (July 16, 2014, 5:33 PM), http://www.huffingtonpost.com/2014/07/16/single-mom-jail-child-unattended-park_n_5592799.html; Grinberg, *supra* note 14. The fact that Harrell was employed at McDonald's supports the inference that she was low income. Branch, *supra*. The fact that Taylor was employed only part time while actively seeking full-time employment supports a similar inference. Shaila Dewan, *A Job Seeker's Desperate Choice*, N.Y. TIMES (June 21, 2014) http://www.nytimes.com/2014/06/22/business/a-job-seekers-desperate-choice.html?.

57 *See* Dewan, *supra* note 56; Grinberg, *supra* note 14.

58 Grinberg, *supra* note 14.

59 Friedersdorf, *supra* note 11.

60 *See* Noah Remnick, Opinion, *Debra Harrell and the Mythology of Bad Black Mothers*, L.A. TIMES (July 18, 2014, 1:47 PM), http://www.latimes.com/opinion/opinion-la/la-ol-debra-harrell-mythology-black-mothers-20140718-story.html. Commenting on Debra Harrell's case in particular, Remnick exposed the harsh judgments of society against poor women of color:

In *Santosky v. Kramer*, which involved an attempt to terminate parental rights, the Supreme Court echoed this very concern: "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias."[61]

Kim Brooks's experience was not so much related to poverty and race as coping the pressing demands of parenting young children, which is difficult for anyone. Attempting to meet deadlines, forestall tantrums, and meet family needs, she "did a quick risk-benefit analysis," and then acceded to her four-year-old's demand to remain in the car while she dashed into the store "for about five minutes."[62] The desperate anxiety of a parent in the moment—running late on a hard day—may have clouded her judgment.[63] But parents of small children live their lives continually in such clouds of sleep deprivation, "anxiety, confusion, frustration, [and] depression."[64]

> Unfortunately, the low-wage jobs attainable for most mothers lead to a parental quagmire. Between low paychecks and inflexible work schedules, how is one to arrange for adequate child care? With no apparent options, the answer is often that they simply cannot. Such women, it's been repeated to you, are bad mothers who deserve to be punished, and increasingly we're doing just that. Indeed, the mythology of bad black mothers was never just a part of our cultural folklore—it's entrenched in our legal system.

Id. The absent fathers in these stories, ironically enough, escape liability and blame because they have successfully foisted responsibility for the children on their mother. The mothers who are trying to do everything get blamed, and sometimes prosecuted, because they *can't* do everything. The father, who does absolutely nothing, stands in the clear.

61 Santosky v. Kramer, 455 U.S. 745, 763 (1982) (citation omitted).

62 Brooks, *supra* note 55. In her words,

> [My 4-year-old] glanced up at me, his eyes alight with what I'd come to recognize as a sort of pre-tantrum agitation. "No, no, no, no, no! I don't want to go in," he repeated, and turned back to his game.
>
> I took a deep breath. I looked at the clock. For the next four or five seconds, I did what it sometimes seems I've been doing every minute of every day since having children, a constant, never-ending risk-benefit analysis. I noted that it was a mild, overcast, 50-degree day. I noted how close the parking spot was to the front door, and that there were a few other cars nearby. I visualized how quickly, unencumbered by a tantrumming 4-year-old, I would be, running into the store, grabbing a pair of child headphones. And then I did something I'd never done before. I left him. I told him I'd be right back. I cracked the windows and child-locked the doors and double-clicked my keys so that the car alarm was set. And then I left him in the car for about five minutes.

Id.

63 As she describes the circumstances, however, it is difficult to identify any significant risk that she exposed her child to: (1) not abduction, as the child was secured in a locked and alarmed car, (2) not heat, as the day was cool, the windows cracked, and the time in the car limited to "about five minutes." *Id.*

64 Alice G. Walton, *How to Enjoy the Often Exhausting, Depressing Role of Parenthood*, ATLANTIC (Jan. 9, 2012), http://www.theatlantic.com/health/archive/2012/01/how-to-enjoy-the-often-exhausting-depressing-role-of-parenthood/250901.

Accordingly, the issues of the rights of parents are not limited to the privileged few, who choose to indulge in free-range parenting as a favored approach to child-rearing. Any parent, facing the burdens and challenges that come with caring for children, will have a bad day, and will make a poor judgment call; he or she deserves some slack. And the rights of parents become, perhaps, most compelling in the case of the struggling parent who is desperately trying to hold her family together and for whom free-range parenting is not so much a conscious choice as a last resort.

C. *Families from Other Cultural Traditions*

Enforcement of the new child-safety obsessed orthodoxy threatens not only those who are less advantaged socio-economically, it is also an attack on cultural and religious pluralism in America. Parenting methods and philosophies typically reflect the values of the family—their faith and traditions—which may or may not align with modern parenting trends.

In *Wisconsin v. Yoder*, the Supreme Court recognized the cultural and religious foundation for, and afforded constitutional protection to, the parents' decision to keep their daughter out of high school, in order to pursue a more traditional life in their Amish community.[65] The decision came over the objections of the State, which argued that public policy, and the girl's own interests, required school attendance, arguing that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence," and that "education prepares individuals to be self-reliant and self-sufficient participants in society."[66] But the Supreme Court was sensitive to the cultural and religious foundations of the Amish community, according them a certain degree of deference and respect: "There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society."[67] Moreover, the Court readily acknowledged the value of cultural pluralism in our society, something that would be lost if we forced every family to conform to society's preferred approach: "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."[68]

It is not just the Supreme Court that has given formal recognition to the legitimacy of diverse cultural traditions in child-rearing. Congress

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65 Wisconsin v. Yoder, 406 U.S. 205 (1972).
66 *Id.* at 221.
67 *Id.* at 224.
68 *Id.* at 226.

passed the Indian Child Welfare Act (ICWA) in 1978,[69] precisely to defend the cultural claim of Native American communities to their own children. The statute was enacted "to address the long-standing practice of removing Indigenous children from their families and placing them with non-indigenous families in an effort to assimilate them into the majority culture."[70] The statute created strong presumptions for indigenous custody, granting parents a right to publicly funded counsel,[71] and imposing a "clear and convincing evidence" standard for foster care placements, and a "beyond a reasonable doubt" standard for terminations of parental rights.[72] The ICWA goes even further in the protection of cultural interests, recognizing not just the rights of indigenous parents, but also of the tribes, whose courts enjoy exclusive jurisdiction over child custody cases on their respective reservations.[73]

Of course, beyond the defined communities of the Amish and of the sundry Native American tribes, American society is a conglomeration of diverse cultural traditions whose core values are often reflected in their approaches to family.[74] Portions of the United States include large concentrations of Scandinavians, for example, for whom it may be traditional to have infants take their naps outdoors, often in sub-freezing conditions.[75] The practice is not rooted merely in tradition, but in promoting health:

> The theory behind outdoor napping is that children exposed to fresh air, whether in summer or the depths of winter, are less likely to catch coughs and colds—and that spending a whole day in one room with 30 other children [at a day-care center] does them no good at all.[76]

It is difficult to criticize these Scandinavian parenting norms, as all four of these countries are among the nine countries in the world with the lowest infant mortality rates (Finland first, Sweden fourth, Norway

69 Indian Child Welfare Act, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

70 NAT'L INDIAN CHILD WELFARE ASS'N, THE CONTINUED REMOVAL OF INDIGENOUS CHILDREN FROM THEIR FAMILIES AND COMMUNITIES AND ITS IMPACT ON THE RIGHT TO CULTURE 1 (2014).

71 25 U.S.C. § 1912(b) (2012).

72 § 1912(e)–(f).

73 § 1911(a).

74 "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977).

75 Helena Lee, *The Babies Who Nap in Sub-Zero Temperatures*, BBC NEWS (Feb. 22, 2013), http://www.bbc.com/news/magazine-21537988. Americans of Scandinavian descent may not practice this widely after a generation or more in the United States, but the practice is very much alive in those countries today. *Id.*

76 *Id.* There is research that shows that the children also sleep longer in the cold air. *Id.* ("While indoor naps lasted between one and two hours, outdoor naps lasted from 1.5 to three hours.").

sixth, and Denmark ninth).[77] The United States, where such a practice might be viewed as dangerous, is twenty-seventh.[78]

Consistent with this, in Denmark it is also a generally accepted parenting practice to leave sleeping babies in their carriages outside a store or café, while the caregiver goes inside.[79] The clash of cultures got a Danish mother into serious trouble in the 1990s when visiting New York.[80] When she left her child in a stroller on the sidewalk to enter a restaurant, she was arrested for it, and her child was taken away.[81] But the problem was largely one of perception and cultural expectations rather than parental neglect;[82] it is unlikely that anyone would characterize Danish parenting as inherently inferior to American parenting, particularly given the excellent outcomes in Denmark.[83]

In Japan, it is common for very young children to venture out, taking subways to and from school and otherwise running errands, unsupervised by an adult.[84] "It's a culturally indoctrinated

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77 Christopher Ingraham, *Our Infant Mortality Rate is a National Embarrassment*, WASH. POST: WONKBLOG (Sept. 29, 2104), https://www.washingtonpost.com/news/wonk/wp/2014/09/29/our-infant-mortality-rate-is-a-national-embarrassment.

78 *Id.*

79 *Id.*; Emily Lodish, *Global Parenting Habits That Haven't Caught On in the U.S.*, NPR (Aug. 12, 2014, 2:14 PM), http://www.npr.org/sections/parallels/2014/08/12/339825261/global-parenting-habits-that-havent-caught-on-in-the-u-s.

80 Tony Marcano, *Toddler, Left Outside Restaurant, Is Returned to Her Mother*, N.Y. TIMES (May 14, 1997), http://www.nytimes.com/1997/05/14/nyregion/toddler-left-outside-restaurant-is-returned-to-her-mother.html.

81 *Id.*

82 And in this case, the American legal system was willing to respect the cultural difference. When the situation was explained and understood, the charges were dropped and the child was returned to her parents. John Sullivan, *Charges Against Danish Mother Are Dropped,* N.Y. TIMES (May 17, 1997), http://www.nytimes.com/1997/05/17/nyregion/charges-against-danish-mother-are-dropped.html.

83 One might argue that what constitutes good parenting in Denmark would be bad parenting in the United States, essentially because the higher U.S. crime rate places unattended children at much higher risk in the United States than in Denmark. The argument has some initial appeal, until the statistics are examined, and we see that kidnapping rates are about the same in Europe as on this side of the pond. Steven Perlberg, *The 20 Countries Where People Get Kidnapped the Most*, BUSINESS INSIDER (Dec. 12, 2013, 3:58 PM), http://www.businessinsider.com/top-20-countries-by-kidnapping-2013-12. Once again, *fear* of kidnapping in the United States is far higher, but not necessarily because the risk is commensurately higher. Moreover, to the extent that crime rates are lower in Denmark, that fact would suggest that Danish child-rearing is getting something right, as their kids grow up to be law-abiding citizens, and perhaps U.S. parents should be doing more to emulate the Danes.

84 Amy S. Choi, *How Cultures Around the World Think About Parenting*, TED TALKS (July 15, 2014), http://ideas.ted.com/how-cultures-around-the-world-think-about-parenting.

understanding that children are supposed to be independent by the time they start grade school, really, so that's age six."[85] Parents who split time between Japan and the United States have to alter their parenting to conform to the expectations of others. As one Japanese mother observed: "'If I let them out on their own like that in the U.S., I wouldn't just get strange looks,' she says. 'Somebody would call Child Protective Services.'"[86]

Families in Hispanic and Native American communities are far more likely to expect older children to take responsibility for younger children.[87] Hispanic families have been larger on average,[88] so the cultural practice may be born in part from practical necessity. Professors Bernstein and Triger, in their article on over-parenting, give a variety of other examples of cultural differences:

> Childrearing practices vary considerably across cultures. Many alternative formats of childcare exist where it is not necessarily the mother, the parents, or even a particular adult providing the care. In many societies across the world, siblings play a central role in providing care and instruction. While European-American families rarely use a babysitter under the age of twelve, in many societies five to ten year olds care for toddlers. In some cultures, grandparents play a central role in child rearing. In other societies, the children of several mothers mingle, and whoever is free takes care of them, regardless of whether they are her children or not. In many cultures, the assumption is that "the mother is often too busy to tend to the child." In some cultures, "a mother is chastised by peers if she is overly fond of her child."[89]

In fact, there are many approaches to parenting, rooted in diverse cultural traditions, and parents should have a right to raise their

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> In Japan, where Gross-Loh lives part of the year, she lets her 4-year-old daughter run errands with her 7-year-old sister and 11-year-old brother—without parental supervision. Her kids don't hesitate to take the Tokyo subways by themselves and walk on busy streets alone, just like their Japanese peers. But when she comes back to the States, Gross-Loh doesn't allow the same. "If I let them out on their own like that in the U.S., I wouldn't just get strange looks," she says. "Somebody would call Child Protective Services."

Id.

[85] *In Japan, First Graders Travel Solo to School on the Train*, CBS NEWS (Dec. 15, 2015, 8:26 AM), http://www.cbsnews.com/news/japanese-young-children-solo-commute-subway-school (quoting Teru Clavel, a Japanese-American sociologist featured in the story).

[86] Choi, *supra* note 84.

[87] WASH. RISK ASSESSMENT PROJECT, *supra* note 16, at 35.

[88] *Hispanic Family Size in USA Shrinking*, POPULATION RES. INST. (June 10, 2015), https://www.pop.org/content/hispanic-family-size-usa-shrinking (noting "the long tradition of large Hispanic families" and that "Hispanic immigrants are presently helping to bolster the U.S. birthrate").

[89] Bernstein & Triger, *supra* note 10, at 1267; *see also id.* at 1266–69 (section entitled "Intensive Parenting and Cultural and Ethnic Differences").

children in a manner consistent with their means and their own cultural values. The suggestion that everyone in America must conform to the highly-protective norms that have emerged in mainstream American society runs contrary to pluralistic values. When the norms are enforced with threats to break up families or impose criminal punishment, it moves beyond mere ethno-centrism, and becomes a form of cultural imperialism.

D. *The Unexamined Constitutional Rights of Parents*

While the Supreme Court has recognized that parents enjoy a fundamental liberty interest in their decisions about how to raise their children, those Fourteenth Amendment rights are not being adequately protected in the cases being brought against free-range parents. There is reason to believe that they are not even being asserted, and certainly not pressed at an appellate level in a way that might generate precedent for these cases in the future.[90]

Typically, when parents are reported and either law enforcement or CPS arrives to assess the situation, the parents are likely to be afraid, desperately afraid, of one thing: having their children taken away from them.[91] They understandably try to cooperate and to reassure the investigators that they can be trusted with the continuing care of their children.[92] That often means the following: (1) ready admissions of

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[90] Guggenheim and Sankaran suggest that there may be issues of standing that would prevent parents from challenging the constitutionality of the state's action in taking their children from them. MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 36 (2015).

[91] After publishing my first article on this subject, in which I speculated that fear of criminal liability may prompt parents to opt for an overprotective parenting style, I received a steady stream of email traffic from parents concerned about the issue, and they were *not* afraid of criminal liability. Their primary fear was that their children would be taken away from them. It is a curious thing because the intervention and investigation is based on suspicion that these parents do not care enough about their kids to protect them adequately. The ones who care about those kids, in the reporting scenario, are the neighbor who calls 911, or the authorities who intervene. But these same parents, accused of being so neglectful, are willing to make enormous sacrifices of their dignity, freedoms, and rights, in the hope of hanging onto these same kids that they are accused of caring so little about.

[92] In 2000, the American Bar Association published a guide to representing parents in child welfare cases that advised attorneys to urge cooperation and to avoid confrontation:

> Although you must zealously represent the parent, experience shows that confrontational and obstructionist tactics often tend to be counterproductive to the parent's interests. Since the agency and the court wield enormous and continuing power over the life of the child and, therefore, the parent, it benefits your client when you are selective in deciding which issues to contest.

DIANE BOYD RAUBER & LISA A. GRANIK, REPRESENTING PARENTS IN CHILD WELFARE CASES 4 (Mimi R. Laver ed., 2000). "[A] productive working relationship with the agency . . . may help . . . minimize needlessly contentious relationships between the parents and agency

wrongdoing, (2) abject apologies, and (3) promises never to do it again. On that basis, the matter gets settled, and the parents, though shaken by the experience, are allowed to keep their children. After all, it is easier to persuade the authorities that this is not likely to happen again than to persuade them that there is nothing wrong with the judgment call the parent made, or that the parental judgment is within constitutionally-protected bounds. As a result, the parents' right to raise their children with a hands-off, long-leash parenting philosophy is never litigated, and it is very effectively chilled.[93] Indeed, the parents in these cases can end up with a record of some kind, either a criminal record from their guilty plea to a child-neglect offense,[94] or at least a listing on the state's registry of child abusers, which can have huge consequences for these individuals' employability in certain professions, and in child custody disputes that might arise in the future.[95] At the same time, they have promised to abandon their free-range parenting practices, despite any beliefs they may have that long-leash parenting is what is best for their children.

The impact is not limited to that family. Neighbors, onlookers, and anyone who has learned of the story in the media may be similarly intimidated, profoundly chilling the exercise of the parents' constitutional rights. Parents learn from these incidents that they are

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caseworkers, and facilitate negotiated settlements that ensure the protection of the child without unnecessarily infringing on the family's integrity." *Id.*

[93] Constitutional challenges may be overdue in other contexts where parental rights have been undervalued. Vivek Sankaran notes:

> [C]hild welfare systems continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations and who thus have done nothing wrong other than to have a child in common with a parent who allegedly abused or neglected the child. These parents are presumed to be unfit based simply on their association with the other parent.

Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Non-Offending Parents*, 82 TEMP. L. REV. 55, 57 (2009). "These systems are ripe for constitutional challenges." *Id.* at 78.

[94] *See, e.g.*, Bridget Kevane, *Guilty as Charged*, BRAIN CHILD (Jan. 14, 2014), http://www.brainchildmag.com/tag/bridget-kevane (describing the Bozeman, Montana case); *infra* text accompanying notes 111–12 (discussing the Jonesboro, Arkansas case).

[95] *See* Lawrence, *supra* note 42 (discussing the serious impact of being listed on such registries). The stigma associated with such a listing may trigger procedural due process rights. Applying the "stigma plus" test, the reputational harm *plus* a legal disability that is caused by a government action, courts may find that a liberty interest was infringed, and that procedural due process must be afforded. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (public school students suspended for alleged misconduct, given the harm to the students' reputation, may have suffered a loss of a liberty interest); *see also* Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41, 44–45 (2d Cir. 1987) (teacher accused of sexual misconduct with students suffers constitutionally cognizable harm because of the impact on his future job prospects); RICHARD HENRY SEAMON, ADMINISTRATIVE LAW: A CONTEXT AND PRACTICE CASEBOOK 435 (Michael Hunter Schwartz ed., 2013); James L. Buchwalter, *Application of Stigma-Plus Due Process Claims to Education Context*, 41 A.L.R. 6th 391 (2009).

not permitted to trust their own instincts in parenting their kids. They may feel like they have to keep their kids from playing outside, climbing trees, riding bikes in the neighborhood, walking to school, or a range of other activities—any activity that a busybody observer might deem inappropriate and report to authorities.

Of course, the chilling of parental rights is a serious problem, but the circumstances of these cases are such that the cases almost always settle quickly without any adjudication of the parents' rights. Because any attempt to dig in one's heels and assert constitutional rights and prerogatives is only likely to delay or jeopardize the return of one's children, it is not surprising that the parents' rights in these cases have been overlooked.

Moreover, to the extent that parents are waiving their constitutional rights in these cases, be they civil or criminal, it is not at all clear that the waivers are voluntary. In *Vaughn v. Ruoff*, a mildly retarded woman, whose two children were already in state custody, was coerced into a waiver of her rights in the decision whether to submit to tubal ligation.[96] The social services worker was found to have violated her rights by promising her that she could get her two kids back if she agreed to the procedure: "A sterilization is compelled, not voluntary, if it is consented to under the coercive threat of losing one's children, and hence unconstitutional."[97] It follows that Mr. Meitiv's consent to a "safety plan" for his children, and the waiver of his parenting rights in that moment, may not have been voluntary, as it was coerced by the threat of removal of his children.[98]

The result is a failure of constitutional checks and balances. If the executive branch is overreaching in these cases, it is the role of the judicial branch, unexercised whenever parents decline to assert their rights, to check the executive's power to disrupt families in this way.[99] At the same time, courts can be overly deferential to the executive agencies.[100] There may be potential for legislative intervention, as seen

[96] Vaughn v. Ruoff, 253 F.3d 1124 (8th Cir. 2001).

[97] *Id.* at 1130. The force of that promise—or the implied threat that refusal to submit to sterilization would keep her children from her—may be sufficient to render the consent involuntary. *Id.* at 1129 ("A jury could reasonably find that Ruoff's comments about getting the two children back implied that the children would not be returned to the Vaughns if they did not agree to sterilization. A jury could properly conclude from such a finding that Margaret's sterilization decision was not voluntary but rather was coerced, and this, we hold, implicates due process concerns."). Nothing in the *Vaughn* decision suggests that the finding of coercion was based in any way on Vaughn's limited mental capacity. The holding suggests that *anyone* would be coerced by the threat of taking one's children away, or the promise of their return. *Id.*

[98] St. George, *supra* note 1.

[99] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[100] *See, e.g.*, discussion *infra* Section V.D (discussing the hearings in removal cases).

recently with the passage of the Every Student Succeeds Act,[101] signed into law on December 10, 2015, which included a provision that

> [N]othing in this Act shall . . . prohibit a child from traveling to and from school on foot or by car, bus, or bike when the parents of the child have given permission; or expose parents to civil or criminal charges for allowing their child to responsibly and safely travel to and from school by a means the parents believe is age appropriate.[102]

This language was proposed by Senator Mike Lee of Utah, who made a point that he was pushing back against the legal trends discussed above:

> Our amendment protecting parents who allow their kids to walk to school is definitely a silver lining. Unsupervised moments are a huge part of how children learn, grow, and build the skills that prepare them for the rigors of citizenship and the adventure of adult life. America faces great challenges today. Kids walking to school with their parents' permission is not one of them.[103]

At the same time, however, the legislative branch is vulnerable to the popular hysteria/paranoia over child safety, and can be expected to respond to and validate the fears of their constituents. This is evident from the spate of new legislation criminalizing leaving kids in cars.[104] The statutes are, by and large, unnecessary, since it is already a crime to neglect or endanger a child in every state. More likely, these statutes are likely passed either (1) to pander to a public obsessed with child safety, or (2) merely to publicize and highlight the dangers of leaving kids in cars. The latter rationale raises the question of whether passing harsh criminal legislation is an appropriate means of conducting a public education campaign. But this is precisely the purpose of such legislation according to child safety advocate Janette Fennell: "The purpose of the laws is not to be the parent police. . . . What they're really meant to do is to say, maybe you don't know this is serious, but it is."[105] In either case, the legislative branch is not, for the most part, playing a meaningful role

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101 Pub. L. No. 114-95, 129 Stat. 1802 (codified as amended at 20 U.S.C.A. §§ 6303b–7934 (2015)).

102 FreeRangeKids.Com, *President Obama Signs First Federal "Free-Range Kids" Legislation*, PR NEWSWIRE (Dec. 10, 2015, 3:16 PM), http://www.prnewswire.com/news-releases/president-obama-signs-first-federal-free-range-kids-legislation-300191494.html.

103 *Id.*

104 As of August 2014, there were twenty states with laws addressing leaving a child in a parked car, most of them criminalizing the practice. Josh Harkinson, *Where Is it a Crime to Leave a Kid Alone in a Parked Car?*, MOTHER JONES (Aug. 7, 2014, 6:00 AM), http://www.motherjones.com/politics/2014/08/parents-arrested-leaving-kids-alone-cars; *State Laws*, KIDSANDCARS.ORG, http://www.kidsandcars.org/resources/state-laws (last visited Aug. 2, 2016).

105 A. Pawlowski, *From Errand to Crime: Parents Now Face Hard Consequences for Leaving Kids in Car*, TODAY (July 12, 2013, 8:03 AM), http://www.today.com/parents/errand-crime-parents-now-face-hard-consequences-leaving-kids-car-6C10584642.

as a check on the executive in these cases; no one wants to run for re-election having "voted against child safety" protections.

In most jurisdictions, child protection agencies, police and prosecutors are unlikely to overreach, and meddle in the lives of parents who choose to give their kids a long leash. Many of the state actors are overwhelmed by their caseloads already, dealing with serious problems, kids who are coming to harm or facing genuine threats to their health and safety. But if, and whenever, these authorities decide to target a free-range parent, or anyone else who fails to buy into the intensive parenting norms, the parents are likely to be intimidated, quickly cave, and let the state run roughshod over their parental rights and prerogatives.

E. *The Best Interest of the Child Standard*

The jurisprudence of parents' rights has been complicated somewhat by the occasional misapplication of the legal standard of the "best interest of the child."[106] This standard, which shows up in a variety of statutes, can be problematic because, if applied in a free-range parenting scenario, it marginalizes parental prerogatives, constitutional and otherwise, suggesting that the court, rather than the parent, can and should be the arbiter of what is best for a child.[107] In *Quilloin v. Walcott*, the Supreme Court acknowledged the constitutional problem with applying the best interest of the child standard as a basis for infringing on parental rights:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[108]

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106 *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000); the case cited *infra* note 107. For a good discussion of how the standard has been applied see CHILDREN'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD (2012).

107 It is reported, for example, that in the State of Washington, a 13-year-old was removed from his family and placed in foster care after the child complained that his parents made him go to church too often. The judge agreed that the parents' church attendance requirements were excessive, and allowed the parents to recover custody of their son only after the parents agreed to less-frequent church attendance. ParentalRights.org, *The Threat: Attacks on Parental Rights*, http://www.parentalrights.org/index.asp?SEC=%7B81C1F260-4A9F-4013-8164-68A360E295A5%7D (last visited July 13, 2015).

108 Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)); *see also* Stanley v. Illinois, 405 U.S. 645, 657–58 ("The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father.").

For the most part, states narrowly limit its application by statute,[109] frequently suggesting that it is applicable only after parents are found to be unfit,[110] but the concept seems to color the actions of state authorities in parenting situations. In Jonesboro, Arkansas, for example, a mother was arrested for child endangerment after making her fourth grader walk to school, in an effort to teach him a lesson after he had been suspended from the school bus for misbehavior on it (a fifth offense).[111] The arresting officer explained his decision to intervene:

> "You ask yourself the question, is that safe for the child?" said Jonesboro Police spokesman Sgt. Lyle Waterworth.
>
> "And if you wouldn't want your child doing it, you probably don't need some (other) child doing it."
>
> "There were a number of things that could have happened to the child. The child could have been injured, abducted," said Sgt. Waterworth.[112]

The officer obviously thought that he was acting in the best interest of the child, and perhaps he was. But in so doing, he completely undermined the mother's authority with the child, as well as

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109 In Utah, for example, after a finding that a parent is "unfit," the court may apply the best interest of the child standard to determine whether to terminate parental rights. UTAH CODE ANN. § 78A-6-503(12) (West 2016). The language of the statute otherwise emphasizes the importance, in terms of child welfare, of preserving the integrity of the family:

> (8) It is in the best interest and welfare of a child to be raised under the care and supervision of the child's natural parents. A child's need for a normal family life in a permanent home, and for positive, nurturing family relationships is usually best met by the child's natural parents. Additionally, the integrity of the family unit and the right of parents to conceive and raise their children are constitutionally protected.
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> * * *
>
> (12) Wherever possible family life should be strengthened and preserved, but if a parent is found, by reason of his conduct or condition, to be unfit or incompetent based upon any of the grounds for termination described in this part, the court shall then consider the welfare and best interest of the child of paramount importance in determining whether termination of parental rights shall be ordered.

Id. § 78A-6-503(8), (12).

110 *See, e.g.*, *id.*; *see also Troxel*, 530 U.S. at 68 ("[T]here is a presumption that fit parents act in the best interests of their children."); *infra* text accompanying notes 120–22. However, courts have also struggled with the concept of "fitness," which is undoubtedly a vague and subjective standard. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (striking down an Alabama state law stating, "When is a home an 'unfit' or 'improper' place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. . . . Because these terms are too subjective . . . the statute is unconstitutionally vague.").

111 *Mother Who 'Forced 10-Year-Old Son to Walk 5 Miles to School Faces Jail Time for Endangerment'*, DAILY MAIL (Feb. 19, 2012, 12:54 PM), http://www.dailymail.co.uk/news/article-2103412/Mother-forced-10-year-old-son-walk-5-miles-school-faces-jail-time-endangerment.html.

112 *Id.*

undermining the specific lesson the mother was attempting to teach him.

The "best interest" standard is an appealing one at face value because children are viewed as innocent and vulnerable parties who cannot protect their own interests; it may seem obvious that the courts and the "system" should be looking out for the child. Indeed, the relevance and applicability of the standard is sometimes assumed, as reflected in the opening of a recent article in the Washington State Bar Association's magazine:

> "Best interest of the child." This is a standard familiar to many attorneys. It's used in the application of a number of different laws . . . . Employment of this standard demonstrates the state's concern for the most vulnerable members of society *Decisions made in the child's best interests often trump whatever rights may be held by adults, and rightly so.*[113]

The suggestion that this standard *should* be employed to trump "whatever rights may be held by adults" is presented as axiomatic.[114] No defense or explanation is needed.

But application of this standard, at least in situations where parents are in agreement on their parenting decisions,[115] and not otherwise "unfit," invites courts to disregard parental interests and rights, to second-guess parental determinations of what is best for their family and for their children, and to intervene, for the sake of children, whenever parental actions are not up to scratch.[116] Moreover, the standard does little to constrain the judge, as Justice Stevens explained in his concurring opinion in *Bellotti v. Baird*, which dealt with a minor's right to an abortion:

> [T]he only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable

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113 Elizabeth Polay, Diane Wiscarson & James Gayton, *Raising the Floor: Advocating for Special Education Services*, NWLAWYER, Nov. 2015, at 13 (emphasis added). The article goes on to advocate the use of this standard in the provision of special education services. *Id.*

114 *Id.*

115 When parents separate from each other, and have differing visions of how their child should be raised—most commonly, who should have custody—it becomes impossible for the state (or the court) to defer to parental judgment. In those cases, the parents' dispute must be settled by a court, and the court may properly invoke the "best interest of the child" in deciding between the parents' separate and inconsistent visions for their child. *See infra* Section III.C.

116 GUGGENHEIM, *supra* note 24, at 40 ("The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out.").

> decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.[117]

If courts are going to second-guess parenting decisions based on a "best interest" standard, they will, in effect, be applying a *de novo* review of the parenting decision itself, and doing so with "little real guidance."[118] Their decisions similarly will "reflect personal . . . values and mores" that may be at odds with the interests underlying the constitutional protections parents should otherwise enjoy.[119]

This is essentially what happened in the Supreme Court case of *Troxel v. Granville*, in which grandparents were seeking access to their grandchildren, despite the parent's objections.[120] The Washington State statute allowed "*[a]ny person*" seeking visitation rights to apply to the court "*at any time*," and that the court could grant such visitation rights whenever "visitation may serve *the best interest of the child*," and the first-instance court had granted such visitation to the grandparents.[121] The Supreme Court upheld the reversal of this decision, holding that this "breathtakingly broad" statute could not constitutionally be applied to second-guess the parents' judgment on what is in their child's best interest.[122]

Of course, part of the problem with the "best interest" standard is the word "best."[123] If that were to become a legal standard for state interventions, then it doesn't matter how good a parent's parenting is, intervention could be justified anytime a "better" alternative is identified. The legal standard for judging and second-guessing parental choices—to justify state intervention—has to be articulated in terms of a *minimum* standard rather than an aspirational ideal. Even marginal parents are entitled to some deference; the state shouldn't be able to intervene unless the parenting falls below minimum standards of adequacy. The concept of "best interest" is meaningful only after the prospect of entrusting the child to the parents is off the table. If the parents are splitting up, and custody of the child is in dispute, the court should settle the custody dispute in an effort to do what is best for the child. If the parents have been found to be unfit, the court must decide

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117 Bellotti v. Baird, 443 U.S. 622, 655–56 (1979).

118 *Id.* at 655; GUGGENHEIM, *supra* note 24, at 39–41.

119 *Bellotti*, 443 U.S. at 655; GUGGENHEIM, *supra* note 24, at 40–41 ("*Painter* demonstrates that unless judges are constrained by principles, they will always be unleashing an unfettered, uncontrollable power."). *See* Pimentel, *supra* note 9, at 49 ("[I]t has been independently confirmed that women who are mothers are harder on other mothers who 'have failed to protect their children.'" (quoting Ann T. Greeley, *Women on the Jury: Stereotypes and Reality*, 2 ATLA Ann. Convention Reference Materials 2689 (2003))).

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

121 *Id.* at 67 (quoting WASH. REV. CODE § 26.10.160(3)).

122 *Id.*

123 Conversation with Barbara Glesner Fines (Jan. 8, 2016).

what to do with the child, in terms of custody and services; those decisions should be made in consideration of what is best for the child. But as long as there are fit parents on the scene, who agree on the parenting of their child, there should be no reason for the authorities to be considering the best interests of the child. The law presumes that fit parents act in the best interests of their child,[124] and promotes the children's interest most effectively by deferring to those parents. The concept was explained by the Supreme Court in *Santosky*:

> At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.[125]

Not only are interventions, justified solely by the "best interest of the child," constitutionally problematic, they also threaten to disrupt the family and to undermine parental authority. In so doing, ironically enough, these actions may cause considerable harm to children, and for a variety of reasons.[126] First, the intervention itself is likely to upset the child's sense of stability and security.[127] It is undoubtedly terrifying for a child to see his or her parent placed under arrest, or threatened with arrest. Second, although parents are likely to make mistakes from time to time, the state is no less likely to make mistakes; the intervention itself—justified by what the state perceives to be "the best interest of the child"—may reflect the state's own misjudgment of the situation. Indeed, there are compelling reasons to trust the parents' judgment more than the states' on issues of child welfare, as (a) the state lacks the intimate knowledge of this child's particular personality, capabilities, and needs, and as (b) the state lacks the level of commitment a parent typically demonstrates to the happiness and well-being of his or her child.[128] Finally, while there will no doubt be instances when state

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124 *Troxel*, 530 U.S. at 68 ("[T]here is a presumption that fit parents act in the best interests of their children.").

125 Santosky v. Kramer, 455 U.S. 745, 760 (1982) (citations omitted).

126 GUGGENHEIM, *supra* note 24, at 40–41 (discussing Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), "This case brilliantly demonstrates what is unleashed when courts are free to decide a case based on the judge's perception of a child's best interests. . . . The case is described to show that one's views of a child's best interests are contingent upon the decisionmakers' beliefs and values and that it is impossible to separate their views from those beliefs and values. . . . *Painter* demonstrates that unless judges are constrained by principles, they will always be unleashing an unfettered, uncontrollable power.").

127 Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 418–19 (2005).

128 GUGGENHEIM, *supra* note 24, at 35–38.

intervention is necessary to protect children from serious neglect or abuse, a general policy of quick and early intervention will affect virtually every family—many that will suffer unjustified interventions, and the rest which will live in fear of such interventions.[129]

The upshot is that an interventionist policy is not in the best interest of children, even if individual interventions could be justified on a "best interest" basis. Accordingly, legislatures, agencies, and courts must resist the temptation to resort to a simple appeal to the best interest of the child in justifying state intervention in the parent-child relationship. There is a proper time and place to apply this standard, as discussed *infra*, but courts and legislatures must be careful to limit its application otherwise, both as a matter of good public policy, and of respecting the constitutional rights of parents.

II. Constitutional Foundations for Parents' Rights

The constitutional foundation for parents' rights in these free-range parenting cases follows from Rousseau's social contract,[130] understanding the delineation between what government is designed to do (i.e., spheres of authority granted to the government, and those retained by the people).[131] "[O]nly those rights individuals intend to submit to government authority are properly within that authority to regulate. John Locke developed similar ideas, arguing that many natural rights of men and women, including the parental power to raise children, are beyond government's power to invade."[132] The Supreme Court has identified an array of these rights, retained by the people, worthy of particular protection because they are "implicit in the concept of ordered liberty"[133] or "deeply rooted in this Nation's history and tradition."[134] These "fundamental rights and liberty interests" are entitled to "heightened protection against government interference,"[135] and include the "rights to marry, to have children, *to direct the*

129 *Id.*

130 *Id.* at 21 ("Since, according to Rousseau, this form of government depends on the consent of the governed, only those rights individuals intend to submit to government authority are properly within that authority to regulate.").

131 1 ANNALS OF CONG. 438 (Joseph Gales ed., 1789) (quoting James Madison's summary of an argument offered by Federalist defenders of the Constitution during the ratification debate: "[I]t follows, that all [powers] that are not granted by the Constitution are retained; that the Constitution is a bill of powers, the great residuum being the rights of the people.").

132 GUGGENHEIM, *supra* note 24, at 21.

133 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

134 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

135 Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion."[136]

A. *Strict Scrutiny Under the Fourteenth Amendment*

Absent a fundamental right, the state's interference can be justified in terms of a "reasonable relation to a legitimate state interest," but in the case of a fundamental liberty interest, it requires "complex balancing of competing interests in every case."[137]

Specifically, the state action is subject to "strict scrutiny," meaning that the government must demonstrate (1) a compelling state interest in the action it is taking, and (2) that the action is narrowly tailored to serve that interest.[138] Some cases have added the requirement that the state action must also be the "least restrictive alternative to advance the Government's compelling interest."[139] This would be a formidable hurdle for the state to clear in the free-range parenting cases, if the state were called upon to defend its interventions in the family against such a demanding constitutional test. But for the reasons stated above, the state's actions against parents are rarely subjected to this close examination, despite the fact that such actions seriously encroach upon the fundamental liberty interests of parents.

The compelling state interest would likely be asserted as child safety, and it may seem obvious that protecting children from harm is sufficiently compelling. But in the free-range kid cases, the state should have to prove that the children are actually in danger when, for example, playing in the park without an adult present to supervise. That may be much more difficult to do, especially given the statistics that show that "stranger danger" incidents in the United States are statistically negligible.[140] Some courts have glibly asserted the child safety justifications as self-evident, and declined to examine actual risks and dangers, such as a New Jersey court that concluded "we need not describe at any length the parade of horribles that could have attended [this] neglect," denying the mother a hearing in which she had hoped to show that her children were not, in fact, in any significant danger for the few minutes she left them alone in the car.[141]

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136 *Id.* at 720 (emphasis added) (citations omitted).

137 *Id.* at 722.

138 City of Richmond v. J.A. Croson Co., 488 U.S. 470, 470–72 (1989).

139 Am. Civil Liberties Union v. Mukasey, 534 F.3d 181, 198 (3d Cir. 2008); *see also* Sable Commc'ns of Cal. v. F.C.C., 492 U.S. 115, 126 (1989).

140 CAPLAN, *supra* note 8, at 102.

141 Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O, 82 A.3d 330, 334 (N.J. Super. Ct. App. Div. 2014), *rev'd*, 121 A.3d 832 (N.J. 2015).

Even more difficult to defend may be the heavy-handed approach sometimes taken by authorities when intervening in the family, as these are unlikely to be sufficiently "narrowly tailored" or the "least restrictive means" for protecting the children.[142]

> States must show both that (1) their actions further a compelling state interest *and* (2) they have chosen the least restrictive means to advance it or they are violating the Constitution. *See City of Boerne v. Flores,* 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").[143]

Arrests, confrontations with parents, threats of incarceration or of removal of the children, and condemnations *in front of the children*, seem to be difficult to justify, as such confrontations can do irreparable damage to parental authority and to children's sense of security and stability.[144] "Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control."[145] Taking custody of the children, and keeping them for hours—and causing them to miss dinner—before even notifying the parents, as was done in the Meitivs' second encounter with the state,[146] seems to be a particularly disproportionate response to the speculative danger of stranger abduction which presumably prompted the police action in the first place.[147] And if the governing principle is the well-being of the children, the state would need to be rescuing the children from a genuinely grave

142 *See Mukasey*, 534 F.3d 181. In *Mukasey* child protection interests came into direct conflict with First Amendment rights, specifically in the context of access to pornography on the Internet. The Third Circuit applied strict scrutiny analysis, and held that even something as compelling as child protection could not justify state action that was not narrowly tailored, or the "least restrictive means" of pursuing the state interest: "In addition to failing the strict scrutiny test because it is not narrowly tailored, [the challenged law] does not employ the least restrictive alternative to advance the Government's compelling interest in its purpose, the third prong of the three-prong strict scrutiny test." *Id.* at 198.

143 GUGGENHEIM & SANKARAN, *supra* note 90, at 12–13.

144 *See* Coleman, *supra* note 127.

145 GUGGENHEIM, *supra* note 24, at 38 (quoting JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 25 (1979)).

146 Kelly Wallace, *Maryland Family Under Investigation Again for Letting Kids Play in Park Alone*, CNN (Apr. 24, 2015, 12:43 PM), http://www.cnn.com/2015/04/13/living/feat-maryland-free-range-parenting-family-under-investigation-again ("Meitiv wrote, 'The police coerced our children into the back of a patrol car, telling them they would drive them home. They kept the kids trapped there for three hours, without notifying us, before dropping them at the Crisis Center, and holding them there without dinner for another two and a half hours.'").

147 "Children need and greatly benefit from a sense of security. That sense of security therefore deserves prominent protection." GUGGENHEIM, *supra* note 24, at 37 (citing Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 487 (1989)).

situation for them to justify subjecting them to the harms that the intervention itself will inflict upon them.

Enforcement of a state requirement that children be under the watchful eye of an adult every minute of the day would be overkill as well, not sufficiently narrowly tailored to survive strict scrutiny. Parents should be able to put an infant down for a nap and then turn their attention to other things, or grab a nap of their own,[148] while the child sleeps. Parents of older kids should be allowed to give them windows of minimally-supervised or unsupervised play time, increasing with the age and maturity of the child.[149] If the parents' actions are genuinely creating unacceptable risks to a child, a least restrictive means of addressing that problem may be to offer educational opportunities to the parents on safety issues, to help the parents be more attentive to the dangers their child faces. Threats to arrest the parents or to take their children from them—actions that are deeply disruptive of the family, of parental and child security, and of family autonomy—are unlikely to be narrowly tailored or the least restrictive means for creating a safer environment for the child.

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148 There have been recent incidents where parents have been arrested, when their child wanders off while the parents are asleep. *E.g.*, Scott Powell, *Mother Arrested for Sleeping While Her Three Year-Old Wanders the Streets*, WTNH (Dec. 19, 2014, 9:32 PM), http://wtnh.com/2014/12/19/mother-arrested-for-sleeping-while-her-three-year-old-wanders-the-streets (describing a mother charged with "risk of injury to a minor"); Terri Sanginiti, *Mother Charged After Tot Wanders Off*, DELAWARE ONLINE (June 21, 2011), https://web.archive.org/web/20110701094051/http://www.delawareonline.com/article/20110621/NEWS01/106210351/Mother-charged-after-tot-wanders-off ("A Glasgow woman who took a nap after putting her 3-year-old daughter down for one was arrested on child endangerment charges after the child was found wandering around the neighborhood, police said."); Dan Schrack, *3-Year-Old Child Wanders Route 5, While Mother Sleeps*, WIVB (June 14, 2015, 8:24 AM), http://wivb.com/2015/06/14/3-year-old-child-wanders-route-5-while-mother-sleeps (describing how a mother was arrested for endangering the welfare of a child).

149 JULIE LYTHCOTT HAIMS, *supra* note 38, at 153 ("If you feel the need to observe your kid playing . . . practice being at a greater distance than usual, and continually increase that distance as your child ages.").

> [T]he systemic problem of overparenting is rooted in our worries about the world and about how our children will be successful in it without us. Still, we're doing harm. For our kids' sakes, and also for our own, we need to stop parenting from fear and bring a more healthy . . . approach back into our communities, schools, and homes.

Id. at 8; *see also* Dorothy O'Keefe Diana, *Helicopter Parents, It's Up to You to Let Go Now as Your Teens Get Ready for High School*, HUFFINGTON POST (July 7, 2016), http://www.huffingtonpost.com/dorothy-okeefe-diana/helicopter-parents-its-up-to-you-to-let-go-now-as-your-teens-get-ready-for-high-school_b_7736806.html.

B. *What Is Included in Constitutionally-Protected Parents' Rights?*

The rights of parents have been elaborated in a variety of disparate cases. In *Moore v. City of East Cleveland*, the Court considered the case of a grandmother, who lived with her son and two grandsons (who were not brothers but cousins to one other), convicted for a criminal violation of a housing ordinance that limited dwellings to a single family.[150] The Court overturned the conviction, saying that the ordinance's purposes—to reduce overcrowding, traffic congestion, and undue burdens on the local schools—were not sufficiently compelling to warrant "slicing [so] deeply into the family itself."[151]

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. [152]

Pierce v. Society of the Sisters, decided in 1925, involved attempts to enforce mandatory school attendance policies, against the parents' preferences for an education more consistent with their own cultural and religious values.[153] The law requiring students to attend public schools, as opposed to parochial schools, was struck down as "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control,"[154] relying on *Meyer v. Nebraska*, another public education case decided just a couple of years earlier.[155]

Almost fifty years later, in *Wisconsin v. Yoder*, the Supreme Court added, "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."[156] As explained above, the Court went on to hold that an Amish family could not be compelled to send their daughter to high school,[157] showing considerable cultural sensitivity in its analysis.

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150 Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion).

151 *Id.* at 498.

152 *Id.* at 503–04.

153 Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925).

154 *Id.* at 534–35.

155 Meyer v. Nebraska, 262 U.S. 390 (1923).

156 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). For a more thorough discussion of the case see *supra* text accompanying notes 65–68.

157 In *Yoder*, however, the Court was careful to note that "[t]his case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred," distinguishing it from cases where the Court had upheld vaccination requirements and mandatory blood transfusions, over the

Enforcing intensive parenting norms leads down a road toward de facto prohibitions on large families,[158] since no one can offer that level of supervision to so many children at once, or toward treating children as a luxury good, since low-income families cannot afford the level of intensive child care that would be required of them. The right to have children has been recognized as a fundamental human right,[159] but if the legal system will punish parents who don't, or can't, provide intensive parenting to all their children, the system will effectively force people to curtail their family size, chilling the exercise of their fundamental right to procreate.[160]

This outcome is not consistent with American core values, which celebrate and protect religious and cultural diversity, respecting the diverse traditions in our pluralistic society, through protecting parental autonomy.[161] The assumption that there is only one correct way to parent, and that safety is of such importance that other cultural values *must* yield to the safety imperative, is a rather offensive form of cultural imperialism.

Some of the Supreme Court's strongest rhetoric about the constitutional rights of parents comes from the 2000 case of *Troxel v. Granville*, discussed above, in which grandparents were seeking visitation rights with their grandchildren, over the objection of the parent. The Court had no problem dismissing the grandparents' claims, recognizing the parents' fundamental rights over the "care, custody, and control of their children"[162]:

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objection of the parents. *Yoder*, 406 U.S. at 230. In free-range kid cases, the state will urge that the child faces physical harm from walking home from school or playing in the park because the child *could be* abducted. Parents in those cases will have to persuade the court that the risk of harm to the child is negligible; the evidence is overwhelmingly in favor of the parents on this point, but because people, including judges, seem to trust their own irrational fears more than the hard data, it may still be a hard sell.

158 Of course, limitations on family size have been widely condemned as a violation of fundamental human rights. "When China announced the end of its one-child policy [in October 2015], the general response . . . was positive, with many articles appropriately and unequivocally condemning the policy and praising its demise." Jeremy Carl, *China's Children and Climate Change–The Left Is Against Them Both*, NAT'L REV. (Nov. 2, 2015, 3:00 PM), http://www.nationalreview.com/article/426458/chinas-children-and-climate-change-left-against-them-both-jeremy-carl.

159 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation is "one of the basic civil rights of man"); *see also* Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001) ("Sterilization results in the irreversible loss of one of a person's most fundamental rights . . . . [Defendant]'s conduct violated [Plaintiff]'s Due Process Clause right to be free from coerced sterilization without appropriate procedures."); *supra* text accompanying notes 96–97; *cf.* Buck v. Bell, 274 U.S. 200 (1927) (upholding compulsory sterilization as constitutional in very limited circumstances).

160 The right to procreate has been recognized as "one of the basic civil rights of man." *Skinner*, 316 U.S. at 541.

161 *See* discussion *supra* Section I.C.

162 Troxel v. Granville, 530 U.S. 57, 66 (2000); *see also* Washington v. Glucksberg, 521 U.S.

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "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." *Id.* at 166.[163]

Following *Troxel*, state courts too have subjected infringements of parents' rights over the "care, custody, and control of their children" to strict scrutiny.[164] This has been held to prohibit state authorities from second-guessing parenting decisions simply because a state judge believes a better decision could have been made.[165]

Against this backdrop, it seems clear that the parenting decisions of the Meitivs, and of other free-range parents, are entitled to strong constitutional protections.[166] This is an example of parents who were

702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to . . . direct the education and upbringing of one's children . . . .").

163 *Troxel*, 530 U.S. at 65–66.

164 *See, e.g.*, Dutkiewicz v. Dutkiewicz, 957 A.2d 821, 830 (Conn. 2008) ("[A] parent's interest in the care, custody and control over his or her child is a fundamental right."); *see also* Punsly v. Ho, 105 Cal. Rptr. 2d 139, 144–45 (Cal. Ct. App. 2001) (describing parents' fundamental right to raise their children by stating "the custody, care and nurture of the child reside first in the parents" (citing Lulay v. Lulay, 193 Ill.2d 455, 474 (Ill. 2000))); Cent. Tex. Nudists v. Cty. of Travis, No. 03-00-00024-CV, 2000 WL 1784344, at *3 (Tex. App. Dec. 7, 2000) (recognizing that parents have a general right, under the Fourteenth Amendment, to direct the upbringing of their children).

165 *Troxel*, 530 U.S. at 71.

166 The Second Circuit has gone further to suggest that the right of the family to stay together is shared not just by parents, but also by children. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]he right of the family to remain together without the coercive interference of the awesome power of the state. . . . encompasses the reciprocal rights of both parent and children."); *see also* Tenenbaum v. Williams, 193 F.3d 581, 600 (2d Cir. 1999) (opining parents and children share a fundamental liberty interest to "remain together without the coercive interference of the awesome power of the state.").

attempting to "prepare [their children] for additional obligations,"[167] and to "inculcate" them with values, including the values of responsibility and self-sufficiency.[168]

III. TENSIONS INHERENT IN THE RECOGNITION OF "RIGHTS"

It is important to put the rights of parents in context. These are not rights that parents typically assert in a self-interested manner, as they are often exercised for the benefit of others: namely, their children. At the same time, parenting is a right and a privilege claimed by every species that raises their own young, and the joy and fulfillment that comes with raising a family, with seeing one's children grow up and, hopefully, do well may be one of the most fundamental privileges of the human experience, unattainable in any other pursuit.[169] Accordingly, the sanctity of the family and of the parent-child relationship is something that parents are unlikely to surrender lightly, even to state authorities who purport to be acting in the interest of those very same children.

Under a Hohfeldian analysis, the parents' rights might be characterized as an "immunity," to the extent that it is a "freedom from the legal power or 'control' of another as regards some legal relation," i.e., as regards the parent's legal relation to her (or his) own child.[170] Non-parents cannot typically intervene or interfere with issues of child-rearing, as that would be exercising control over the parent, interfering with that parent's rights, or as Hohfeld might put it, that parent's "immunity" from such control.[171] But that characterization only highlights the fundamental problem in our characterization of parents' rights: from whose control is the parent immune?

Indeed, an archetypal framework for consideration of rights issues is the overlapping of one person's rights with his neighbors: I enjoy freedom to exercise my rights, but that freedom is limited precisely by the need to respect *your* rights. The minute that the exercise of my rights interferes with the exercise of your rights, my rights have reached their logical and protectable limit.[172] The limitation on a parent's right might

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167 Pierce v. Soc'y of the Sister, 268 U.S. 510, 535 (1925).

168 Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977).

169 *See, e.g.*, Lawrence Rifkin, *Is the Meaning of Your Life to Make Babies?*, SCI. AM.: GUEST BLOG (Mar. 24, 2013), http://blogs.scientificamerican.com/guest-blog/is-the-meaning-of-your-life-to-make-babies.

170 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913).

171 *Id.*

172 *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, ¶ 29(2) (Dec. 10, 1948) ("*In the exercise of his rights and freedoms, everyone shall be subject only to such*

be viewed from a variety of perspectives, including (1) the rights of the child, (2) the rights of the state, and (3) the rights of the child's other parent or legal caregiver. Each will be considered in turn.

A. *Parents' Rights v. Children's Rights*

At the outset, it is tempting to consider the question of parental rights as limited by the rights of the children: that the parents' rights come *at the expense* of children's rights.[173] For example, a farmer's right to put his children to work in his fields and barns may be limited by the children's right not to be exploited, as well as rights children enjoy under statutes barring child labor. A parent's right to discipline the child is limited by the child's right not to be abused, limiting the parent's discretion to inflict severe physical punishments.

Applying this concept to free-range parenting, the state justifies its interventions in the family, its second-guessing of parenting decisions, as necessary to protect the children from the dangers their parents are subjecting them to. The state, in other words, may be said to be acting to vindicate the rights of children, pushing back on the rights of the parents.

The archetype—that parents' rights come at the expense of children's rights, and vice versa—may be misapplied when argued in the typical case of parent and child, particularly because the model is based on assumptions of self-serving by all parties. It is not, however, the norm of human experience that parents pursue only their own selfish interests when it comes to child-rearing; parenting is in large part an altruistic enterprise. When parent and child butt heads, as the parent of any teenager knows, it is usually the case of the parent insisting on something the parent perceives to be *in the interest of the child*, which conflicts with what the child perceives to be in his own interest. Both parties—parent and child—are trying to act in the interest of the child, and they simply disagree about how best to go about it.

Because parents are responsible for, and typically committed to, the welfare of their children, it is only in the most exceptional case that a child would need protection *from* the parent. If the state presumed that parents' interests inherently conflict with children's interests, it would be natural for the state to assume the role of regulatory body, for the protection of the children. It is, perhaps, this mindset that has prompted the state to overreact to the parenting choices of free-range parents and

limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." (emphasis added)).

[173] This is apparently what happened in British law. *See* MCCALL SMITH, *supra* note 25.

to others who, for cultural, religious, socio-economic, or other reasons, choose a less intensive parenting style. But it follows from a very curious assumption that the state somehow cares about the welfare of those children more than their own parents do. Anyone making such assumptions can hardly have known any parents.

Rather, child welfare advocates, and state entities, should not assume that parental rights are somehow at cross-purposes with child welfare. For reasons that will be argued below, there are compelling reasons to believe that respecting parents' rights and discretion in their parenting decisions—rather than monitoring them, second-guessing them, and intervening whenever a parental lapse is perceived—is the best way to protect child welfare, serving both the rights and the interests of children far more effectively. Indeed, this may be the most compelling policy reason that parents should enjoy constitutional protection for their parenting decisions.

B. *Parents' Rights v. State Parens Patriae Rights*

When the state does seek to intervene, it brings the state's right into direct conflict with the parents' right. The line-drawing question then becomes one of how extensive the parent's right is, against the state's competing interest to act on behalf of the child, and on behalf of society.

Parens patriae is the state's power to protect vulnerable citizens incapable of protecting themselves.[174] There can be little question that the state has an important role to play here in cases of, for example, sexual abuse or severe physical abuse of children. If the parents cannot or do not protect the children from such abuse, and particularly if the parents are the ones inflicting the abuse, the state's *parens patriae* power is appropriately invoked to intervene in the family for the protection of the children.

The question arises, however, as to how far *parens patriae* power extends, especially as it applies to free-range parenting. What if there is no *actual* harm to the child, but only a *risk* of harm to the child? In such cases, when should the state be permitted, consistent with constitutional limits on state power, to second-guess the parents' judgment on what is best for the child, and intervene in the parent-child relationship? As already noted, the state cannot constitutionally intervene in the family if the parents are fit; as the Supreme Court held in *Stanley v. Illinois*, "The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father."[175]

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174 *Parens Patriae*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

175 Stanley v. Illinois, 405 U.S. 645, 657–58 (1972).

Those interventions dramatically undermine the family's stability and the child's sense of security, when the state takes children from their parents, or threatens to do so by launching an investigation.[176] Accordingly, as parents are already entrusted by nature, by moral duty, and by law, with the care and welfare of their children, the state's intervention can be justified only by the most extreme dereliction of that parental duty. Otherwise, because such disruptive interventions are inherently harmful to children, the state abuses its *parens patriae* power to protect children when it intervenes in the parent-child relationship. The intervention comes at expense of parents' constitutional rights, of course, as well: their fundamental liberty interests, as discussed above.

C. *One Parent v. the Other Parent*

We also see parental rights discussed in the context of cases pitting the rights of one parent against another parent, or against someone who would play a parenting role.[177] The typical parent v. parent case, however, addresses the simple matter of custody after the parents have parted ways.

These cases are less problematic, in terms of the state's overreaching and meddling in the family relationship, because the family itself is at a stalemate and needs, even invites, the state's intervention. In this situation, the parents do not agree on what is best for the child.[178] It is therefore entirely appropriate for the state to apply the "best interest of the child" standard to settle the matter.

It makes sense in this type of dispute to apply the "best interest of the child" standard because the parental stalemate makes it impossible for the state to defer to the parents' judgment. Indeed, it can be presumed that the parents are both trying to serve the child's best interest,[179] and because they disagree, the court needs to break the tie, applying the same standard that a parent would, i.e. what is best for the child. The disruption of the family and of the child's sense of security is a *fait accompli*, carried out by the parents themselves with the

176 *See* Coleman, *supra* note 127.

177 The battle may not be just between parents, but parent v. step-parent, *Quilloin v. Walcott*, 434 U.S. 246 (1978), or grandparent v. parent, *Troxel v. Granville*, 530 U.S. 57 (2000).

178 Of course, parents may not always be acting in the best interest of the child. They may want custody not because it would be good for the child, but because they vindictively wish to deprive the other parent of such custody, or any of a number of other selfish reasons. In such situations, it is the responsibility of the court to set aside such ignoble motives and act in a way that minimizes the harm the child is already suffering. In any case, the court is still basing its decision on what it perceives to be "the best interest of the child."

179 *Troxel*, 530 U.S. at 68 ("[T]here is a presumption that fit parents act in the best interests of their children.").

dissolution of that family, so the state's intervention is not causing the harm, just resolving the ongoing dispute.

This scenario, therefore, is far different from those articulated above, where the state is insinuating itself into the family, trying to substitute its own child-rearing approach for what the parents have adopted and presumably agreed upon. The state's perception of what is in the best interest of the child should be invoked to settle a dispute between the parents, but never to disrupt an intact family, with fit parents, where no such disagreement exists.[180]

IV. Parental Powers and Duties

A. *The Legal "Power"*

Given that the parents' rights are not really about the interests of the parents, it may be helpful to consider more nuanced readings of "parental rights." Alexandra Popovici argues that the parental interest is not so much a "right" as a "power."[181] She draws upon the work of Madeleine Cantin Cumyn, who has derived the concept of "The Legal Power" from the Civil Code of Québec, as something "distinct from the right," rather a "prerogative granted in order to achieve a purpose."[182] Popovici suggests that "[r]econceptualising the parent as a power holder, and not a right bearer helps in truly understanding the dynamics at play and in shifting the discussion to what really matters: the protection and empowerment of children."[183]

Rather than a right, "which the holder can use in his or her own interest," Popovici argues that a parent has "a prerogative conferred in the interest of another."[184] This characterization of the issue invokes the

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180 *Quilloin*, 434 U.S. 246, poses an interesting example here. In that case, the absentee natural father, who had never taken steps to legitimate his child, objected to the proposed adoption of the child, now eleven years old, by the stepfather. The key precedent was *Stanley v. Illinois*, 405 U.S. 645, which had held that the state could not take custody of children over the objection of their unwed father, absent a finding that the father was unfit. But the Supreme Court distinguished *Stanley*, and allowed the adoption, even though it meant extinguishing the natural father's parenting rights, relying on the best interest of the child in making that determination. The controlling factor in this case, however, appeared to be the preservation of an intact family (the family consisting of the mother and stepfather, who had enjoyed sole custody of the child the whole time the child was growing up), and the mother of the child favored the adoption. *Quilloin*, 434 U.S. at 254–55.

181 Alexandra Popovici, Children at Play: Parenthood Contextualized, Paper Presentation at the Law & Society Association Annual Meeting (May 29, 2015) (abstract on file with the author).

182 Madeleine Cantin Cumyn, *The Legal Power*, 17 EUR. REV. OF PRIV. L. 345 (2009).

183 Popovici, *supra* note 181.

184 *Id.*

concept of duty. The parent's right over the rearing of her or his children cannot be considered without acknowledging, at the same time, the parent's duty to the child. Therefore, applying the civil law concepts, the "best interest of the child" should not be invoked as a limitation on the parents' rights, but rather as defining the duty of the parents in the exercise of the legal power over their children.

B. *The "Duty"*

1. Fiduciary Duty

Another way to look at the parental role is as a fiduciary, again defining the duty of the parent to act in the best interest of the child. Lionel Smith has explored this concept in the context of Canadian common law, applying established principles of fiduciary duty to the parenting role.[185]

Of course, fiduciary duties have been defined and conceptualized in a variety of ways, but if the fiduciary duty is defined as a duty of loyalty—a duty to act in the best interests of the beneficiary—Smith argues, it fits rather closely the legal expectations we have for parents.

It is easier to imagine how this is a fiduciary duty if one thinks of the duty of the state when a child becomes a ward of the state. Certainly, the state has a duty to provide for the child—food, shelter, clothing, education, etc.—and to make these provisions in order to serve the child's best interests. The state cannot be expected, however, to develop and maintain an affective bond with the child, even though parents almost universally do. As the Supreme Court explained in *Parham v. J.R.*,

> [O]ur constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that

185 The Canadian Supreme Court formally recognized a fiduciary duty on the part of parents in the case of *M.(K.) v. M.(H.)*, 3 S.C.R. 6 (1992). In that case, a woman who had been sexually molested by her father all the years she was growing up, sued him in tort, alleging, among other things, a breach of fiduciary duty. Lionel Smith, Parents as Fiduciaries, Paper Presentation at the Law & Society Association Annual Meeting (May 29, 2015) (Professor Smith's notes on file with author).

> *natural bonds of affection lead parents to act in the best interests of their children.*[186]

This may be one of the most instructive aspects of Smith's discussion of fiduciary duty, how parenting differs from the typical fiduciary relationship. The law may not be able to *require* a caregiver, parent or otherwise, to love a child, even though that may be what the child needs most. But parents typically *do* provide that, and a whole lot more than what they may be legally required to provide to their children. A fiduciary does not typically expend his own resources, depriving himself, for the benefit of the beneficiaries. And yet parents do that all the time. Indeed, parents typically provide far more to their children—(1) individual attention, (2) love (including manifestations of that love through quality time, hugs, etc.), (3) a sense of security, belonging, and self-esteem as a valued member of the household, etc.—than the law does, or could ever, require. And that is all the more reason to entrust children's welfare to the parents rather than to the state, in situations where the state might otherwise try to intervene.

2. The Business Judgment Rule

The other useful concept in the law of fiduciaries, as applied to the parent-child relationship, is the "business judgment rule." Corporate directors have a fiduciary relationship toward the corporation and its stockholders, but directors have to be protected from liability for their good faith actions. The business judgment rule creates a strong presumption in favor of the directors, insulating them from liability for decisions that ultimately harm the corporation. The presumption is that "in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest."[187] It ensures that a court "will not substitute its own notions of what is or is not sound business judgment,"[188] except in the absence of such informed good faith.[189]

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186 Parham v. J.R., 442 U.S. 584, 602 (1979) (emphasis added).

187 *Business-Judgment Rule*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

188 *Sinclair*, 280 A.2d at 720.

189 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *rev'd*, Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

3. Application to Parents

The application to parents is obvious and compelling. If we characterize parents as fiduciaries, we afford them a strong presumption in favor of their parenting decisions. We ensure that no court or other regulatory body will "substitute its own notions of what is or is not sound [parenting] judgment,"[190] as long as parents are reasonably "informed," acting in "good faith and in the honest belief" that their action was in the best interest of the child.[191] Indeed, the Supreme Court reaffirmed, in *Troxel v. Granville*, that "there is a presumption that fit parents act in the best interests of their children."[192]

Unfortunately, it appears that parents are not always being afforded this type of presumption, as CPS workers, police officers, prosecutors, and courts appear to have no qualms about substituting their own notions of what constitutes good parenting for that of the parents themselves, and make no particular effort to demonstrate parental bad faith in these cases. Certainly free-range parents like the Meitivs could never have been implicated for child neglect if they had enjoyed such a presumption under the law.

4. Issues of Risk

One of the key rationales for the business judgment rule is that if corporate directors faced liability for losses of the corporation, they would never dare take any risks, and that *shareholders would suffer* from the overly conservative approach directors would be compelled to adopt.[193] But that is precisely what parents are forced to do now, to take an absurdly conservative approach to parenting—where virtually *no* risk to the child is considered acceptable[194]—and *the children suffer.*

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190 *Sinclair*, 280 A.2d at 720.

191 *See Aronson*, 473 A.2d at 812.

192 Troxel v. Granville, 530 U.S. 57, 68 (2000).

193 Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).

194 Compelling examples of this are easy to find, as parents are charged with crimes for letting children play in the park, or for leaving their children in the car for a few minutes while they dash into a store to pay for gas, etc. Childhood injuries and deaths from being left in cars have attracted a lot of attention, and the advice to parents is never to leave a child in a car "not even for a minute!" Jan Null, *Heatstroke Deaths of Children in Vehicles*, NOHEATSTROKE.ORG (Sept. 9, 2016), http://noheatstroke.org. This is even though the risk of harm for leaving a child in a car for such a short time—especially when the climate control system of the car is left running—is essentially zero. *See* John N. Booth III et al., *Hyperthermia Deaths Among Children in Parked Vehicles: An Analysis of 231 Fatalities in the United States, 1999–2007*, 6 FORENSIC SCI., MED., & PATHOLOGY 99 (2010) (documenting that the harm to children typically comes in situations where the children are left in the car for hours). The "not even for a minute" advice undoubtedly comes from the fact that over half of the deaths come from situations where the

Surely parenting is as difficult, and as fraught with risk, as the business world, and the overprotection of children has been widely documented as harmful to them, just as overly cautious business strategy is bad for shareholders.[195] Parents, unlike corporate directors, are already hard-wired to be protective of their children, so the threat of legal liability seems unnecessary to provide parental incentives to take care. But fear of legal liability may impair parental judgment—it undoubtedly does, now that cases like the Meitivs' are getting publicity—to the detriment of the families themselves.

Our legal system recognizes that directing a corporation is an exercise in risk management, and that the health and profitability of the American corporation requires that directors be free to make such risk management decisions without fear of liability. Parenting too is an exercise in risk management, as protecting a child from one risk, almost inevitably subjects him or her to another risk.[196] It is a curious thing indeed if the law is more solicitous of the health and interests of the corporation, and of its shareholders, than it is of the health and interests of the American family, and its youngest and most vulnerable members.

One might quibble with the analogy, as children and corporations are hardly equivalent.[197] Nonetheless, it is neither wise nor rational to let remote risks dominate decision-making, particularly when the price of precaution outweighs its expected value. Tort law requires persons to

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child was forgotten in the vehicle; if you don't leave your child in a car for even a minute, the child cannot be forgotten there. *Id.* The prosecutions of parents, however, have often involved parents who have *not* forgotten about the children, and who have left the car's climate control system engaged, and in which the child did not come to harm. Erring on the side of caution may be good safety advice, but our society has begun to treat a parent's failure to exercise such an abundance of caution as a criminal offense.

195 Pimentel, *Criminal Child Neglect*, *supra* note 9, at 958–59.

196 *Id.* at 961–62.

197 Of course, the well-being of children is not perfectly analogous to the health of a corporation. Failure of a commercial enterprise, unlike the loss of a child, might be deemed a necessary loss, even a good thing, for the health of the industry and the economy overall. Investors, unlike children, have voluntarily chosen to assume such risks. Moreover, investors can diversify their portfolios to hedge against the failure of a corporate strategy, a risk taken that turns out badly. While some investments fail, others may more than compensate, resulting in positive portfolio growth overall, arguably greater than if every company were managed conservatively. It is hard to look at children this way, and no one would argue that the success of one child could compensate for the loss of another. In earlier eras, when infant mortality was commonplace and childhood diseases routinely claimed the lives of their victims, things may have been different. But even if having a larger family mitigated the tragedy somewhat in those days—so the "portfolio" would be doing well, despite the loss of one of the children—it can never be easy to rationalize that loss. And to the extent that was ever true, it is not so today, as families are smaller, and the few children born into modern families are perceived to be all the more precious. HONORÉ, *supra* note 41, at 243 ("The fewer kids you have, the more precious they become and the more risk-averse you get." (quoting DAVID ANDEREGG, WORRIED ALL THE TIME: REDISCOVERING THE JOY IN PARENTHOOD IN AN AGE OF ANXIETY (2001))); *see also* MARGARET K. NELSON, PARENTING OUT OF CONTROL: ANXIOUS PARENTS IN UNCERTAIN TIMES 17, 23 (2010) (referencing the "preciousness" effect).

behave reasonably in the taking of precautions, and will not find negligence unless the likelihood times the gravity of the harm is greater than the cost of avoiding it.[198] Once we acknowledge that parenting is inherently an exercise in risk management, we *need* to offer some protection for the parents who make those judgment calls. Arguing that the standards for risk avoidance should be high does not change the fact that almost every parenting decision is an exercise in risk-management, a decision where reasonable minds may differ. And unlike corporate directors, it appears that parents—who, after all, are doing their best without the benefit of professional training or expertise—are not getting the benefit of the doubt, or the deference they need and deserve, in the tough risk management decisions that they make on a daily, even hourly, basis.[199]

V. The Importance of Parents' Procedural Rights

Given that the Supreme Court has already opined on the rights of parents for the care and custody of their children, and recognized the fundamental liberty interest at stake, the problem for parents caught up in these cases may lie not so much in their substantive rights as in the procedures that are failing to protect those substantive rights. "On numerous occasions, the Court has described the deprivation in child protective cases as a 'unique kind of deprivation,' implicated by even a temporary dislocation of a child from his or her parent's custody. This deprivation warrants heightened procedural protections not typically applicable in civil proceedings."[200] Protecting these procedural rights poses legal and logistical challenges, however.

A. *Right to Counsel*

1. Right to Counsel Under the Fourteenth Amendment

First, parents do not enjoy a constitutional guarantee of counsel in these cases. In a 5-4 decision in *Lassiter v. Department of Social Services*,

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198 This was the holding, of course, of the venerable Learned Hand decision in *United States v. Carroll Towing Co*., 159 F.2d 169, 173 (2d Cir. 1947).

199 See the discussion of parenting as risk management in Pimentel, *Criminal Child Neglect*, *supra* note 9, at 961–63; *see also* Brooks, *supra* note 55 ("I've been doing every minute of every day since having children, a constant, never-ending risk-benefit analysis.").

200 Sankaran, *supra* note 93, at 68 (citing M.L.B. v. S.L.J., 519 U.S. 102, 127–28 (1996)). "In *M.L.B. v. S.L.J.*, the Court concluded that due process required courts to furnish indigent litigants trial court transcripts, free of cost, when appealing termination of parental rights decisions." *Id.* (citations omitted).

the Supreme Court found no such right under the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment (unless they are also charged with a crime, in which case the Sixth Amendment right to counsel applies), or, apparently, any other provision of the Constitution.[201]

Of particular interest, however, are the dissents in *Lassiter*. Justice Blackmun, joined by Justices Brennan and Marshall, felt it was fundamentally unfair to not afford an indigent defendant the right to an attorney in a termination preceding, given that "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."[202] To illustrate this disparity, Justice Blackmun quoted trial excerpts that painfully depicted the pro se parent's inability to represent herself.[203] "The court gave petitioner an opportunity to cross-examine [a] social worker, but she apparently did not understand that cross-examination required questioning rather than declarative statements. At this point, the judge became noticeably impatient . . . ."[204] The state then introduced prejudicial hearsay evidence, to which the "[p]etitioner made no objection."[205] When the judge asked the petitioner if she had any closing arguments, she responded merely: "Yes. I don't think it's right."[206] Thereafter the trial court ordered the termination of her parental rights.[207] The fundamental unfairness of such proceedings, coupled with the unique importance of parental rights, persuaded the

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201 Lassiter v. Dep't of Social Servs., 452 U.S. 18, 33 (1981). Outside the criminal context, the Supreme Court has used the Due Process clause of the Fourteenth Amendment to make the determination if appointed counsel is constitutionally required. Specifically, the court will use the *Mathews v. Eldridge* test balancing (1) the nature of the private interest, (2) the risk of erroneous deprivation of the private interest without the requested procedure, and (3) the government's interest. 424 U.S. 319, 335 (1976).

202 Santosky v. Kramer, 455 U.S. 745, 763 (1982). In this case, the Supreme Court went detailed listing the advantages the state has in parental termination proceedings. Specifically, the Court stated that there are:

> [n]o predetermined limits restrict[ing] the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

Id.

203 *Lassiter*, 452 U.S. at 54–55, n.22 (Blackmun, J., dissenting).

204 *Id.* at 54.

205 *Id.* at 53.

206 *Id.* at 56. In addition, when the petitioner's mother, an important witness, took the stand, "[p]etitioner was not told that she could question her mother, and did not do so." *Id.* at 55.

207 *Id.* at 19 (majority opinion).

four dissenting justices that parental rights could not be constitutionally extinguished without right to counsel.[208]

In his separate dissent, Justice Stevens agreed with the other dissenters, but stated he would take his reasoning "one further step," to equate the parents' rights in these cases to those of criminal defendants.[209]

> The state may incarcerate [a person] for a fixed term and also may permanently deprive [that person] of her freedom to associate with her child. . . . Although both deprivations are serious, often *the deprivation of parental rights will be the more grievous of the two*. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law.[210]

Justice Stevens' suggestion that parental rights deprivations are more serious than criminal incarcerations had been articulated a few years earlier in the House of Representatives in the context of the Indian Child Welfare Act, as the House committee report observed: "The removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty."[211] Consistent with this, Justice Stevens concluded that, *for the same reasons criminal defendants* have a right to appointed counsel, parents facing termination should have the same right:

> In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel *apply with equal force to a case of this kind*. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.[212]

The history of the application of the Sixth Amendment right to counsel in criminal cases is instructive. In 1938, the Supreme Court held the Sixth Amendment required the federal government to afford indigent federal defendants appointed counsel.[213] Twenty-five years later, in *Gideon v. Wainwright*, this Sixth Amendment requirement was

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208 *Id.* at 35–60 (Blackmun, J., dissenting); (Stevens, J., dissenting).

209 *Id.* at 59–60 (Stevens, J., dissenting).

210 *Id.* at 59 (emphasis added).

211 H.R. REP. NO. 95-1386, at 22 (1978), cited in *Lassiter*, 452 U.S. at 39 (Blackmun, J., dissenting).

212 *Lassiter*, 452 U.S. at 59–60 (Stevens, J., dissenting) (emphasis added).

213 *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

applied to the states through the Fourteenth Amendment.[214] The Supreme Court reasoned that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," citing specifically the typical defendant's lack of knowledge of the law and the vast sums of money and resources the government has at its disposal to convict him.[215] These are precisely the concerns motivating the dissenters in *Lassiter*, and if being deprived of one's children is "more grievous" than a criminal penalty, the right to counsel in such cases is every bit as compelling as it is for criminal defendants.[216]

2. Right to Counsel Under State Constitutions and Statutes

Nevertheless, many, but not all, states have statutes or case law affording a right to counsel in state-initiated termination-of-parental-rights proceedings. Some of the states appear to have been inspired directly by the dissents in *Lassiter*.

Although the 5-4 *Lassiter* majority did not recognize a categorical Fourteenth Amendment right to counsel in these cases, the force of the dissents has had great impact in various states.[217] Many states have enacted statutes that provide counsel for parents in these proceedings.[218] A number of state courts have recognized it as a right notwithstanding the Supreme Court's holding in *Lassiter*.[219] The Alaska Supreme Court, for example, interpreting its own state constitution, stated explicitly: "[W]e reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent."[220] Other state courts have also pushed back against the *Lassiter* majority opinion, including Connecticut,[221] Louisiana,[222] North Carolina,[223] and Pennsylvania.[224]

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214 Gideon v. Wainwright, 372 U.S. 335 (1963).

215 *Id.* at 344.

216 *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting); *id.* at 40 ("Surely there can be few losses more grievous than the abrogation of parental rights.") (Blackmun, J., dissenting).

217 Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, July–Aug. 2006, at 186, http://civilrighttocounsel.org/uploaded_files/37/Life_after_Lassiter__Pastore_.pdf.

218 Laura K. Abel & Max Rettig, *State Statues Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, July–Aug. 2006, at 245, http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39169.pdf.

219 Pastore, *supra* note 217, at 188–89.

220 *In re* K.L.J., 813 P.2d 276, 282 n.6 (Alaska 1991); Pastore, *supra* note 217, at 188–89.

221 Lavertue v. Niman, 493 A.2d 213, 219 (Conn. 1985) (citing Corra v. Coll, 451 A.2d 480 (Pa. Super. Ct. 1982)); *see* Pastore, *supra* note 217, at 188–89.

222 Louisiana *ex rel.* Johnson, 465 So. 2d 134, 138–39 (La. Ct. App. 1985) (holding that constitutional due process mandated appointment of counsel for indigent parents in termination proceedings); *see* Pastore, *supra* note 217, at 188.

However, Justice Stevens' reasoning extends beyond the context of the parental termination proceedings themselves. In criminal cases, individuals are entitled to attorneys *before* their trial begins, before they are even charged, as soon as their first custodial interrogation begins.[225] *Miranda v. Arizona* highlighted and addressed the problem of criminal defendants' rights to counsel being denied to them at this early stage, and demanded both that defendants be informed of their rights to counsel, and that questioning cease the moment the individual demands an attorney.[226] Absent counsel at this stage in the proceedings, the defendant is likely to waive his rights unwittingly, including his Fifth Amendment right against self-incrimination.[227]

The abuse of parents' rights by CPS caseworkers cannot be nearly as widespread as the constitutional violations by law enforcement that underlay the *Miranda* decision. Nonetheless, the cases cited and discussed above suggest tremendous potential to trample the rights of parents in these cases, where parents' child-rearing decisions are being second-guessed. Mr. Meitiv's attempt to invoke a right to counsel prompted a threat to take his children away:

> [A] CPS worker required [Mr. Meitiv] to sign a safety plan pledging he would not leave his children unsupervised until the following Monday, when CPS would follow up. At first he refused, saying he needed to talk to a lawyer, his wife said, but changed his mind when he was told his children would be removed if he did not comply.[228]

Faced with such a threat, the waiver of the right to counsel, much less the right to the "care, custody, and control" of his children,[229] cannot be fairly deemed voluntary.[230]

No doubt *Miranda* changed the nature of police investigations, and fundamentally altered the way police approach their work.[231] A right to counsel for parents facing any investigation that could result in their being deprived of their children could play a powerful role in transforming the way CPS workers and other law enforcement approach

223 McBride v. McBride, 431 S.E.2d 14, 18 (N.C. 1993) (questioning the appropriateness of *Lassiter*'s framework for all right-to-counsel determinations); *see* Pastore, *supra* note 217, at 189.

224 *Coll*, 451 A.2d at 487 (finding a putative father entitled to counsel in a paternity action); *see* Pastore, *supra* note 217, at 188.

225 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

226 *Id.*

227 *Id.*

228 St. George, *supra* note 1.

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

230 See discussion of *Vaughn*, *supra* text accompanying notes 96–97.

231 Brooks Holland, Miranda v. Arizona*: 50 Years of Judges Regulating Police Interrogation*, 16 INSIGHTS ON L. & SOC'Y 1 (2015); *cf.* George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203 (2002).

such families and their investigation of them. If the authorities are required to advise parents of their rights, for example, they are far less likely to overlook or disregard those rights. Richard Leo, a critic of *Miranda* and a skeptic of its impact,[232] conceded: "Although they may have devised clever strategies for successfully negotiating *Miranda* waivers and thereafter eliciting statements, *American police . . . have, by necessity, become more solicitous of suspects' rights, more respectful of their dignity, and more concerned with their welfare inside the interrogation room*."[233]

Rights to counsel, and a requirement to advise parents of their right to counsel, are likely to have a similar salutary effect on the CPS caseworkers' respect for parental rights. At the same time, if they know that their investigative approach is likely to be questioned and challenged by an attorney—rather than just the clueless and intimidated parents—they may be more cautious in how they proceed, and be more respectful of parents' legitimate claims to the care and custody of their children.

Although it is unlikely the Supreme Court would issue another decision like *Miranda* in this area, particularly given the majority holding in *Lassiter*, states can create a similar right to counsel, and the right to be informed of these rights, at these initial stages. Indeed, a number of state courts have embraced the reasoning in the *Lassiter* dissents, and they have found in their state constitutions some protection of a parent's right to counsel.[234] And many states have afforded such right to counsel by statute, although only in the context of termination proceedings.[235] The state-level developments present a promising precedent, and suggest a platform for affording further protection and more meaningful enforcement of parental rights.

B. *Effective Representation*

Some parents caught up in this process are also charged with criminal child neglect or endangerment.[236] If so, they are entitled to an attorney under the Sixth Amendment who may help them navigate through the system. But whether they hire their own counsel, or get the

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232 *See* Leo & Thomas, *supra* note 231.

233 Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 670 (1996) (emphasis added).

234 Pastore, *supra* note 217, at 188–89.

235 Abel & Rettig, *supra* note 218.

236 Although the Meitivs were never charged with a crime, Shanesha Taylor and Debra Harrell were. *See* Friedersdorf, *supra* note 11; Grinberg, *supra* note 14 (citing also the arrest of Nicole Gainey "after police found her 7-year-old son alone in a park less than a mile from her home.").

benefit of court-appointed counsel, they are likely to end up with an attorney who has expertise in criminal law, but who may be poorly qualified to navigate the procedure of the child protection agency.[237] Indeed, the criminal lawyer is likely to advise her client *not* to cooperate with authorities, at least not at first—a generally accepted strategy for criminal defendants[238]—when, arguably, this is exactly the opposite of what should happen with the agency if the parent hopes to retain custody of his or her children.[239]

There are dangerous pitfalls to trusting the advice of a criminal lawyer when compelling rights are at stake in other areas of law. In *Padilla v. Kentucky*, a criminal lawyer advised an immigrant (a lawful forty-year resident of the United States) to plead guilty to a drug-distribution charge, assuring him, erroneously, that the resulting conviction would not provide a basis for the defendant's deportation.[240] The Court allowed withdrawal of the guilty plea, noting that although the deportation consequence was collateral, the client's interest in avoiding deportation was so great that the "affirmative misadvice" amounted to ineffective assistance of counsel under the Sixth Amendment: "[We] have previously recognized that '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'"[241] It is easy to imagine criminal defense lawyer's advice, notwithstanding its soundness in terms of criminal law strategy, leading to bad outcomes in the dependency or termination proceedings against the parents. *Padilla* suggests that such outcomes may amount to a Sixth Amendment violation.

Parents clearly need counsel, but not just any counsel. They need counsel who know what they are doing in child protection cases. Unfortunately, in states that provide counsel to parents under their various statutory schemes, the attorneys may lack the qualifications and experience to provide quality representation,[242] particularly in this

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237 Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 UMKC L. REV. 337, 340 (2003).

238 *See, e.g.*, James Duane, *Don't Talk to Police*, YOUTUBE (June 21, 2008), https://www.youtube.com/watch?v=6wXkI4t7nuc; James Kirk Piccione, *Top Ten Reasons Why You Should Not Talk to the Police*, LAW OFFICES JAMES KIRK PICCIONE, http://www.kirkpiccione.com/10-reasons-not-talk-police (last visited Mar. 1, 2016).

239 *See* RAUBER & GRANIK, *supra* note 92, at 4–5; *supra* text accompanying note 91 (describing how immediate and full cooperation with the authorities is recommended as the best strategy for keeping custody of one's children in these cases).

240 Padilla v. Kentucky, 559 U.S. 356 (2010). Given the Court has also stated parental rights are as serious as criminal incarceration, discussed *supra,* it would seem that the reasoning could be extended to parental rights, under similar circumstances of *Padilla*.

241 *Id.* at 368 (citing INS v. St. Cyr, 533 U.S. 289 (2001)).

242 Fines, *supra* note 237, at 345 (referring to panels of attorneys who take appointment to represent indigent clients in civil proceedings, "attorneys participating in these panels are often

specialized and sensitive area. Protection of parents' rights, which requires building the confidence of state authorities that the parents can be trusted with their own children, requires that attorneys play meaningful intermediary roles on behalf of parents: asserting the parents' rights without alienating the agency. It is a tall order, but attorneys who develop expertise in the area have an opportunity to build reputations and goodwill with the courts and with the agencies; such attorneys are critical to the protection of parents' rights in these proceedings.

Barbara Glesner Fines explores alternative methods for providing such counsel in her article *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, with particular emphasis on the method of the court's appointing counsel, but allowing the counsel to "buy out" of the obligation by hiring another attorney to take the case, thereby fulfilling their court-appointed representation obligation through delegation.[243] The "buy-out" option enables attorneys to specialize in this area, and allows large firms to retain and maintain well-qualified and well-resourced specialists in this area on their own staffs, for the purpose of taking the cases whenever one of the firm's other attorneys is appointed to represent indigent parents in a case involving alleged neglect or abuse.[244]

A variety of other approaches have been adopted in the various states, with varying degrees of success.[245] The important thing, in terms of protecting the rights of parents, is that such parents have counsel who are sufficiently experienced and knowledgeable to provide effective representation and, as discussed below, that they have such counsel at the critical stages of the proceedings.

C. *Appointment of Counsel at a Sufficiently Early Stage*

Indeed, it is critical that parents have this representation early enough in the investigation to be able to preserve and protect those rights. As demonstrated above, parents may feel the need to waive their rights in order to persuade the authorities not to take their children from them.[246] Introducing counsel into this scenario may do little to resolve the problems or defend the rights of parents if the parents have

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inexperienced, new attorneys seeking experience and opportunities to establish themselves . . . ." (citing Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 606 (2001))).

243 Fines, *supra* note 237, at 347–51.

244 *Id.* at 350–51.

245 *Id.* at 344–47.

246 *See supra* text accompanying notes 22, 91–93.

already waived their rights, just as a criminal defense attorney may be of limited assistance to the defendant who, misunderstanding his own rights, has already made self-incriminatory statements, or otherwise opted to confess to the charged crime.[247]

A related concern is when children have already been taken away, and placed in foster care. Once the children are settled in foster care, CPS and the courts may impose conditions for the return of the children, and those conditions may involve considerable micromanagement of the parents' parenting style.[248] Protection of parents' rights over the care and custody of the children, therefore, requires intervention by competent counsel *before* removal. Once the children are removed, it is too easy for the system to dictate terms in derogation of parents' discretion over their children's upbringing, to substitute the judgment of CPS or the judicial officer for the judgment of the parents on how best to parent the children.[249] Moreover, even a temporary removal is an enormous imposition on parents' constitutionally protected interests;[250] absent an emergency, even a temporary removal should not be effected until parents have counsel to protect their rights.

Paul Chill has written compellingly about "the tendency of emergency child removal decisions—by social workers, police officers, and judges—to become self-reinforcing and self-perpetuating in subsequent child protective proceedings. This snowball effect, as one court has referred to it, is widely acknowledged by lawyers who practice in juvenile court."[251] Once removed, it can be very difficult to obtain the return of the children to their parents. Chill observed in 2004:

> Twenty years ago, an American Bar Association study reported that "experienced litigators" in child protection cases found it difficult to get children returned home "once removed, whether the original removal was appropriate or not." More recently, one such litigator

247 *See supra* text accompanying notes 225–31(discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

248 Fines, *supra* note 123.

> Once a child is removed, a variety of factors converge to make it very difficult for parents to ever get the child back. One court has referred to this as the "snowball effect." The very focus of court proceedings changes—from whether the child should be removed to whether he or she should be returned. As a practical matter, the parents must now demonstrate their fitness to have the child reunited with them, rather than the state having to demonstrate the need for out-of-home placement.

Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 542 (2004) (citation omitted).

249 Chill, *supra* note 248; Fines, *supra* note 123.

250 *See supra* text accompanying notes 144–47 (discussing how investigations and temporary removals can do tremendous harm to the children too).

251 Chill, *supra* note 248, at 540.

> put it this way: "Possession is nine-tenths of the law. Children who are with their parents at the beginning of a child protective proceeding are likely to remain at home; children who have been removed are likely to remain in governmental custody for a long time, even years." One clinical law professor has labeled this phenomenon "tracking"—as in "a train getting on a track and continuing to move down that track no matter what." And one nationally known jurist has written that issuance of an ex parte removal order, "in so many cases, is indeed the ball game."[252]

The lesson here is that if parents' rights to the care, custody, and control of their children can be meaningfully protected only if the parents can keep custody of their kids from the outset. "By seizing physical control of the child, the state tilts the very playing field of the litigation. The burden of proof shifts, in effect if not in law, from the state to the parents."[253] If the parents do not get counsel until after the dislocation has occurred, their rights have already been seriously compromised. "[T]he 1997 federal Adoption and Safe Families Act (ASFA) . . . converts every day that a child spends in foster care into one more tick of the clock in a countdown toward termination of parental rights."[254]

In order to protect the parents' rights, therefore, the provision of counsel will be required at the time the first removal is attempted, long before it is known whether the state will ultimately seek termination. That suggests a lower threshold for the appointment of counsel than exists in many states and, possibly, in any state. If the right to counsel accrues only when the state files to terminate parental rights, the advice of counsel is likely to be far too late to ensure the protection of parents' rights. As noted above, it appears that many cases are resolved without any hearing at all, with parents merely capitulating to the demands of

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252 *Id.* at 543 (citing, inter alia, DIANE DODSON, AMERICAN BAR ASS'N, THE LEGAL FRAMEWORK FOR ENDING FOSTER CARE DRIFT: A GUIDE TO EVALUATING AND IMPROVING STATE LAWS, REGULATIONS, AND COURT RULES 3-1 (1983); David J. Lansner, *Representing Respondents in Child Protective Proceedings*, *in* CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM, 1998: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM 583 (Practising Law Inst. ed., 1998); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 115–16 (1997)).

253 Chill, *supra* note 248, at 542.

254 *Id.* at 540. The referenced legislation was designed to make it easier for foster parents to adopt the foster children entrusted to them.

> ASFA generally requires states, as a condition of receiving federal funds, to file for termination of parental rights with respect to any child who remains in foster care for 15 out of 22 consecutive months. . . . Under ASFA, parental rights can now be terminated, or at least gravely threatened, on the basis of the mere passage of time.

Id. at 546 (citations omitted).

CPS, whatever they are, in order to ensure they can keep custody of their children.[255]

D. *Rights to a Hearing When Children Are Removed*

As mentioned above, removals constitute not only a deprivation of liberty under the Fourteenth Amendment, but also a seizure under the Fourth Amendment.[256] Under *County of Riverside v. McLaughlin*, the hearing must be held within 48 hours of seizure.[257] In some respects, the short time frame for the hearing is an important protection of the parents' rights, because it ensures that they get judicial review of the removal promptly. On the other hand, that is very little time to prepare for a hearing where so much is at stake, even if the parents have counsel.[258] Chill explains how it works in practice:

> [T]he state ordinarily must provide notice and a hearing before forcibly separating a parent and child. Courts have held that only an imminent danger to a child's life or health can justify removal of the child without notice and a hearing first. Even then, a prompt postremoval hearing must be held.
>
> In practice, however, children are seldom removed on anything but an emergency basis—either unilaterally, without a court order, or on the basis of some form of ex parte judicial authorization. . . .
>
> [D]ue process requires a prompt postremoval hearing even when summary removal is justified. Yet these hearings are often shams. They may be extremely brief, lasting 1 hour or less. Lawyers for parents and children, moreover, if there even are any at this point, may have barely had a chance to meet their clients, much less to investigate the state's evidence of imminent danger and prepare a cogent response. Thus, the prospect of quickly undoing an unnecessary emergency removal is fanciful at best in most cases.[259]

The upshot is that it is extremely difficult to provide adequate protection for parents' rights in these proceedings. Without effective and timely representation for the parents at this stage, there can be little hope that the constitutional rights of parents, whose parenting has come into question, will get adequate consideration.

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255 *See supra* text accompanying notes 91–92.

256 GUGGENHEIM & SANKARAN, *supra* note 90, at 36.

257 Cty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

258 For the reasons set forth in the preceding sections, the parents typically will have no right to counsel at this stage in the proceedings, and may well be appearing pro se.

259 Chill, *supra* note 248, at 541, 544 (citations omitted).

E. *Conclusions on Procedural Rights*

The mechanics of attorney appointment, and what limits can or should be imposed on CPS's investigations in order to accord adequate respect for parental judgments regarding their children's activities and levels of supervision, will need to be worked out. This Article's purpose is neither to spell out the details of such a system, nor to suggest that implementation will be easy. However, the provision of counsel at a meaningful stage in the process may be critical to protecting the rights of parents.

Of course, Mr. Meitiv initially refused to sign anything until he could consult with an attorney, and the demand for an attorney availed him nothing. The CPS worker simply threatened to take his kids unless he signed away his right to follow his own parenting judgment,[260] and by so doing, effectively coerced him into waiving that right.[261] So in this case, at least, even someone who can afford an attorney, and who asks for one up front, was largely powerless to assert his constitutional rights. Hopefully, a broader recognition of procedural rights of parents will serve as a check on such bullying and intimidation of parents; otherwise, the substantive Fourteenth Amendment rights of Mr. Meitiv, and of every parent in America to control the care and custody of their children, have little force or meaning.

VI. THE CHILLING OF PARENTAL RIGHTS

It may appear that the anecdotal reports of state interventions in free-range families are exceptional. Indeed, the fact that several of these cases have received significant publicity is by no means evidence that such state interventions are common. There are no good statistics on how frequently these arrests and interventions occur for parents who are, for whatever reason—parenting philosophy, resource limitations, culture, etc.—engaged in some type of free-range parenting; the evidence comes anecdotally, mostly from news reports. But the publicity given to recent highly-publicized cases, where parental rights were given so little respect by state authorities, is certain to chill the exercise of parental rights across the nation. The nightmare scenario of uniformed officers appearing on one's doorstep and threatening to take the children away is like a scene from *Sophie's Choice*.[262]

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[260] St. George, *supra* note 1.

[261] See discussion of coercion and involuntary waiver, in the context of the *Vaughn* case, *supra* text accompanying notes 96–97.

[262] In the movie, Nazis confronted a mother of two children as she was being inducted into the concentration camp at Auschwitz, and asked her which child she wanted to keep, because

As noted above, parents are unlikely to challenge the authorities and assert their rights in these situations, opting instead to plead for mercy in the desperate hope of keeping custody of their own children. Thus, the rights are neither vindicated in the individual case, nor defined by case law for future guidance to parents and state actors.

But parents, reading the news stories, will learn the powerful lesson that they cannot trust their own judgment about what is best for their children. They must now parent in a manner that respects the popular paranoia about child safety. If any busybody in the neighborhood is likely to disapprove of one's free-range or long-leash parenting practices, the parent can no longer pursue those practices, or otherwise rely on his or her own instincts on how best to parent a child in a potentially dangerous world. The fear of state intervention will certainly chill the exercise of these parental rights, undermining constitutionally protected family autonomy and, in all likelihood, the children's own interest.

CONCLUSION

As the legal system is targeting parents and parenting, applying ever more demanding standards for child safety, it is vital that the constitutional rights of parents be better defined and safeguarded. The "best interest of the child" standard must never be applied to condemn a parenting choice, at least when the parents are not found to be unfit and where parents are in agreement with each other over the parenting decision. Courts should recognize those parents' constitutional rights and powers and give a large measure of deference to parents' prerogatives in deciding how to raise their children—akin to the business judgment of corporate directors. At the same time, states should take care to ensure that parents' procedural rights are protected, primarily through affording a right to counsel early in the proceedings. Second-guessing by the state will otherwise undermine the family, and ultimately harm the children.

Free-range parenting, like any theory of parenting, may or may not withstand the test of time or survive in the marketplace of ideas.[263] But unless parents are allowed to trust their own judgment on these issues, to make these decisions without fear of state intervention, the

they were going to take the other one away. If she refused to choose, they would take both children. SOPHIE'S CHOICE (Incorporated Television Company & Keith Barish Productions 1982).

263 Robert Putnam, in his article *Still Bowling Alone*, suggests that the sense of community may be making a comeback in the post-9/11 era. The rise of the free-range parenting movement also suggests the start of a backswing of the pendulum. Sander & Putnam, *supra* note 32.

marketplace of ideas, as applied to parenting, will be effectively shut down. Then only one type of parenting—state-approved overprotective parenting—will be permitted: parents can either conform to the state-approved approach or risk the heavy-handed retribution from state authorities. That situation is the natural consequence if the state undervalues parental rights and prerogatives and applies instead a de facto "best interest" standard to justify interventions in families.

The alternative, more consistent with American constitutional values, is to strengthen and safeguard the family from external second-guessing. The Fourteenth Amendment protections should be sufficient to do this, as any action by the state in derogation of a parent's rights should be subjected to strict scrutiny and struck down unless it is the "least restrictive means" of protecting that child from genuine harm. But it may also be helpful to think in terms of a "parental judgment rule" modeled on the law of fiduciaries or other protections for parental discretion. Finally, parents need representation, lest they waive their rights to parent as they see fit in a desperate but understandable effort to keep custody of their own children. States need to provide parents with counsel and to advise them of this right, at the outset, certainly in time for parents to be represented at the first removal hearing. Otherwise, the parents' constitutional rights will remain unasserted, unadjudicated, and unrecognized.

If the state authorities and the courts are going to get this right, they need to respect parents' constitutional liberty interests and approach any intervention in the family knowing that their actions are subject to strict scrutiny. State interventions in the family should be viewed with skepticism, as they violate the "sanctity of the family"[264] and threaten "the interest of parents in the care, custody, and control of their children . . . perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]."[265] Only if strict scrutiny is applied to such intervention can parents get the breathing space, i.e., the discretion, they need to parent as they see fit, and to do it without fear). By strengthening the family, the state's legitimate objectives to promote the welfare of children are better served; after all, the ultimate beneficiaries of these constitutional guarantees are not so much the parents but the children themselves.

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[264] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

[265] Troxel v. Granville, 530 U.S. 57, 65 (2000); *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to . . . direct the education and upbringing of one's children . . . .").