Washington and Lee University School of Law
Washington & Lee University School of Law Scholarly Commons

Faculty Scholarship

Summer 2014

The State, Parents, Schools, "Culture Wars", and Modern Technologies: Challenges under the U.N. Convention on the Rights of a Child

Nora V. Demleitner
Washington and Lee University School of Law, demleitnern@wlu.edu

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlufac

Part of the International Law Commons

Recommended Citation
Nora V. Demleitner, *The State, Parents, Schools, "Culture Wars", and Modern Technologies: Challenges under the U.N. Convention on the Rights of a Child*, 62 Am. J. Com. L. Supp. 491 (2014).

This Article is brought to you for free and open access by Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

NORA V. DEMLEITNER*

The State, Parents, Schools, "Culture Wars," and Modern Technologies: Challenges under the U.N. Convention on the Rights of the Child†

Topic IV. A

This paper focuses on some of the core principles of the U.N. Convention on the Rights of the Child and their application under U.S. state and federal law. While the United States has not ratified the Convention, it is a signatory. Many of the most intractable cultural issues in the United States involve children and their rights to participation, information, and decision-making. Frequently, primary and secondary education presents a fertile battle ground for "cultural clashes" between parents, schools, and state officials. In the private context, both U.S. law and the U.N. Convention have adopted the "best interests of the child" standard. Despite the usage of identically named or similarly sounding concepts, to what extent U.S. approaches may be aligned or conflict with the Convention remains subject to question. The United States would benefit from more active participation in a global dialogue about children's issues, especially as brain science and technological change challenge our traditional understanding of what it means to be a "child" and a "parent."

The United States has signed but not ratified the U.N. Convention on the Rights of the Child (CRC), which makes it one of only three countries that do not fully participate in this almost universally ratified human rights treaty.[1] With its signature the U.S. govern-

---

* Dean and Roy L. Steinheimer, Jr. Professor of Law, Washington and Lee University School of Law. I am grateful to Max Hyman, W&L '14L for his research assistance.

† DOI: http://dx.doi.org/10.5131/AJCL.2013.0034

1. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (listing signatories and ratifiers of CRC as of Oct.14, 2013). The other two countries are Somalia, which only in 2012 re-established a national government after decades of civil war, and South Sudan, which became a member of the United Nations in July 2011. The United States has ratified two of the three additional protocols to the CR. *See* http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en (listing signatories and ratifiers of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography as of Oct. 14, 2013) *and* http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11-b&chapter=4&

ment has indicated not only its general support for the principles of the CRC and the protection of the human rights of children, but also signaled U.S. compliance with these norms.[2] In recent decades, the U.S. Senate has generally been reluctant to ratify international treaties in the human rights area for domestic reasons, including preservation of states' rights, sovereignty concerns, questions of constitutionality, rejection of international accountability, and fears of foreign interference in the U.S. legal system.[3] Parental rights organizations have objected to ratification of the CRC, fearing it would empower children.[4]

This paper focuses on some of the core principles of the CRC and their application under U.S. law. As the laws of individual states rather than federal law govern many of these central issues, this can lead to distinct approaches, especially as new technologies impact family relations, including conception. Many of the most intractable cultural issues in the United States involve children or arise in the context of primary and secondary education, often pitting children against parents or against the state.

The curious role of children in the United States may be displayed nowhere better than in the criminal justice context. For the sake of children, U.S. sentencing has become ever harsher over the last thirty-five years. Enhancements have been applied to drug sellers who are offering illegal narcotics near schools;[5] child sexual offenders and those watching child pornography on the Internet have witnessed a dramatic lengthening of their sentences and at the same time have been exposed to life-long registration and community notification statutes. They have been barred from living near schools and daycare centers and even from frequenting playgrounds.[6]

On the other hand, children have also experienced the harshness of the criminal justice process. In the late 1980's, the fear of crime became amplified because of the image of the "superpredator," the

---

lang=en (listing signatories and ratifiers of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict as of Oct. 14, 2013).

2. UNICEF, *Introduction to the Convention on the Rights of Child: Definition of key terms*, *available at* http://www.unicef.org/crc/files/Definitions.pdf.

3. *See, e.g.*, Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988).

4. *See, e.g.*, parentalrights.org. For a full discussion of the arguments for and against ratification, see Congressional Research Service, Luisa Blanchfield, *The United Nations Convention on the Rights of the Child*, Apr. 1, 2013.

5. For criticism of these sentence enhancements, see, e.g., Aleks Kajstura, Peter Wagner & William Goldberg, *The Geography of Punishment: How Huge Sentencing Enhancement Zones Harm Communities, Fail to Protect Children* (July 2008), *available at* www.prisonpolicy.org/zones/.

6. For a critique of these developments, see Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100(3) AM. J. PUB. HEALTH 412 (2010).

adolescent, ruthless, violent offender.[7] In response, states allowed for or even mandated the transfer of juveniles into the adult criminal justice system.[8] Some states sentenced offenders as young as thirteen to life-without-parole. This trend has been reversed only in recent years through Supreme Court cases that barred the death penalty and mandatory life-without-parole for those who committed homicide while under age 18.[9] It also prohibited life-without-parole for juvenile non-homicide offenders, in recognition of the mental and emotional differences between adults and children.[10] The criminal justice system is indicative of the tension in which U.S. society and the U.S. legal system often find themselves with respect to the treatment and protection of children.

As the political culture in the United States values limited government and protections of the individual against the state, even the juvenile justice system extends extensive procedural protections to children. They have, however, been employed to justify harsher penalties. In general, U.S. law emphasizes rights rather than duties, an approach in which it varies, for example, dramatically from the African Charter on the Rights and Welfare of the Child.[11] Despite that political and legal belief structure, the common law has established duties based on special relationships, including those between husband and wife and a parental duty to reasonably protect a child. Explicit duties of children to parents appear limited to special situations. A child may owe a parent a duty of care, for example, when the child voluntary takes custody of an ailing parent in a way that prevents others from providing care to that parent.[12]

This paper will begin with definitions of "child" and "parent" and then turn to the core concept of "best interests of the child" and its application in select contexts. Next, it looks at three areas in which the rights of parents, children, and the state have come to clash—the right to speech, to information, and to freedom of religion—especially in the public school setting. All of these issues reflect ongoing changes in technology, society, and law, situating children at the center of crucial societal conflicts in the United States.

---

7. Shay Bilchik, Office of Juvenile Justice and Delinquency Prevention, *Challenging the Myths*, JUVENILE JUST. BULL. (Feb. 2000), *available at* www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf.

8. For an example, see Human Rights Watch, *No Minor Matter: Children in Maryland's Jails* (1999), *available at* www.hrw.org/reports/1999/maryland/.

9. Roper v. Simmons, 543 U.S. 551 (2005) (juvenile death penalty unconstitutional); Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455 (2012) (mandatory life-without-parole sentence unconstitutional when applied to a juvenile convicted of a homicide offense).

10. Graham v. Florida, 560 U.S. 48 (2010).

11. Art. 31.

12. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

I. Who is a "Child"?

The authority to determine who is a child and what rights that person carries is divided between the federal and state governments. At common law, the age of majority was generally 21 years. Today the age of majority is regulated legislatively. While most people deem 18 the age of majority, the law appears more fluid.[13] With the exception of the right to vote—which the U.S. Constitution grants at 18 years due to a constitutional change in 1971[14]—most of the rights of children are age-dependent and may extend beyond 18 or end before that age. State legislatures regulate the specific numerical age at which individual rights arise.[15] Such regulation may accord with the CRC's approach that increasing rights (and responsibilities) be given to children as their age and maturity increase (up to the age of 18 unless otherwise determined under a country's law),[16] though U.S. law extends this concept of maturation beyond 18 in select areas. It appears that the CRC prefers individual assessment of a child's maturity, though in some contexts, it may accept at least a presumption of maturity or allow for a global age-based determination on efficiency grounds.

The specific age at which a child is legally considered an adult varies depending on the context. For example, the Alaska legislature set the default age of majority at 18 years. For select purposes, however, Alaska lowered that age. These include ownership of long guns (allowed at age 16, without parental consent) and consent to sexual contact (16 years, but elevated to 18 years if the child's sexual partner "has legal authority over the child").

On the other hand, Alaska has raised the age of majority above and beyond the general statutory age of majority for select purposes, such as possession of tobacco (19 years) and possession of alcoholic beverages (21 years). While many of these increases and decreases are specific to individual states and may be explained either by cultural differences between states or by specific incidents that have driven legislative change, others are based on federal mandates.

In all states, purchase and public possession of alcoholic beverages are allowed only at age 21, though many states permit exceptions to these general rules.[17] When the federal government

---

13. *See* Stanley v. Stanley, 112 Ariz. 282 (1975) ("majority or minority is a status rather than a fixed or vested right and [ ] the legislature has full power to fix and change the age of majority.").

14. U.S. Const. amend. XXVI, § 1.

15. *See* 43 C.J.S. *Infants* § 2 (Westlaw 2013).

16. CRC art. 1.

17. National Institute on Alcohol Abuse and Alcoholism, Alcohol Policy Information System, *Underage Drinking: Possession/Consumption/Internal Possession of Alcohol*, *available at* http://alcoholpolicy.niaaa.nih.gov/underage_possession_consumption_internal_possession_of_alcohol.html?tab=maps (listing exceptions to rule).

tied federal highway funds to the purchase or public possession of alcohol by those under 21, over time every state changed its law so as to guarantee its receipt of federal monies.[18] Even though Congress would have been barred from legislating a national drinking age, it achieved the same goal through its power of the purse.

In addition to the constitutionally based provision on voting age, other federal (and state) constitutional provisions may regulate certain aspects of the age of majority. The federal constitution's equal protection mandate, for example, bars state legislatures from declaring different ages of majority applicable to females and males, even in situations where biological and emotional maturity may differ.[19]

The Supreme Court has indicated increasing interest in child development concepts, especially in the sentencing area. It declared the execution of those who committed a capital offense while under the age of 18 unconstitutional, relying on child development literature, which finds children fundamentally different from adults as their judgment and emotional maturity are not yet fully developed.[20] The Court has recently applied this line of jurisprudence also to life-without-parole sentences.[21] Whether this approach will carry over into other areas of the law remains an open question. At this point, it presents a welcome reprieve for some young offenders, at least at the high end of sentencing.

As the CRC defines "child," a definition generally accepted in the United States, even though with respect to some rights and obligations the specific age cut-off may vary, it fails to provide a definition of "parent." In light of modern technological changes, that definition and the implicit rights and duties have become increasingly complicated. Recently, the U.S. Department of State ruled that U.S. citizenship will transmit to a child born to a U.S. citizen mother but conceived with the egg of a non-U.S. citizen. The definition of "parent" will likely cause further questions in the years ahead and present challenges in different areas of the law. For purposes of this paper, the term will be used in its commonly understood meaning.

---

18. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158.

19. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) (a state law allowing females who are 18 years old to purchase nonintoxicating beer, while barring purchase of such beer by males under the age of 21, constituted unconstitutional discrimination in violation of the equal protection clause); Stanton v. Stanton, 421 U.S. 7, 17 (1975) (in the context of child custody, no valid distinction regarding the age of majority can be made on the basis of gender).

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

21. Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455 (2012) (mandatory life-without-parole sentence unconstitutional when applied to a juvenile convicted of a homicide offense); Graham v. Florida, 560 U.S. 48 (2010) (life-without-parole unconstitutional for those who committed non-homicide offense before turning 18).

II. Parental Rights

Generally, the state grants parents broad leeway in educational and parenting choices for their children, including ways to punish children. Only in exceptional circumstances will parents be deprived of their rights because of abuse or neglect. Schools, however, are frequently held to a different and higher standard than parents. Societal norms, for example, have evolved with respect to corporal punishment in schools, and continue to undergo changes, though they have not yet impacted parental freedom in that area.

A. *Corporal Punishment*

The Supreme Court decided in 1977 that corporal punishment in schools does not violate the 8th Amendment prohibition on cruel and unusual punishments.[22] Currently, half of the states regulate corporal punishment statutorily, with some banning it, while others allow it expressly.[23] Within the family, physical punishment of children remains permitted,[24] apparently under a general belief that "some" corporal punishment benefits (or at least does not harm) a child. There is no debate in the United States about the international community's moving increasingly to a total prohibition on the physical punishment of children, including in families, under CRC Article 19.[25]

B. *Loss of Parental Rights*

Even in the United States physical punishment is limited by considerations of the child's best interest. Should parents violate such restrictions they may lose their parental rights. Physical harm is not the sole ground for such a decision. Under federal law, child abuse and neglect is defined as including sexual, emotional, and physical abuse, exploitation, and abandonment.[26] Many state statutes provide for the deprivation of parental responsibility upon a finding that a

22. *See* Ingraham v. Wrights, 430 U.S. 651, 671 (1977).
23. *See* Corporal Punishment in Public Schools, 0040 SURVEYS 7 (2007) (Westlaw).
24. *See* 6 Am. Jur. 2d *Assault and Battery* § 28 n.1 ("A parent, or one acting in loco parentis, does not commit an assault and battery by inflicting corporal punishment on a person subject to the person's authority, if the parent remains within the legal limits of the exercise of that authority.").
25. *See, e.g.,* Elizabeth T. Gershoff, *More Harm Than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 Law & Contemp. Probs. 31, 54-56 (2010) (discussing social science research detailing negative effects of corporal punishment and adoption of bans on such punishment in dozens of countries around the globe).
26. Federal Child Victims' and Child Witnesses' Rights Act of 2009, 18 U.S.C. § 3509 (West, Westlaw through 2013) ("[T]he term 'child abuse' means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child."). *See also* 42 Am. Jur. 2d *Infants* § 18 (West, Westlaw through 2013).

parent is guilty of a federal or state crime against children.[27] The state may also terminate a parent's right to have a relationship with her child pursuant to a finding of abuse, or other event that shows that the parent is "unfit"—but the finding of unfitness must be made by at least clear and convincing evidence.[28] In addition, incarceration longer than 15 months may cause termination of a parent's legal responsibility for their child. Because of the negative impact of such a forced separation on parent and child, in recent years some criminal justice policies, such as drug courts, have been developed in part to keep the family unit together.[29]

Courts and state administrative agencies, such as child protective services, may deprive a parent of parental responsibility.[30] A state's choice in these tools is a matter of preference, and the federal constitution only requires that the parent's procedural due process rights be honored, which means notice and an opportunity to be heard. States vary in their provision of trial by jury for proceedings involving termination of parental rights.[31] Any of these procedural protections only apply to the permanent termination of parental rights but not to temporary removal of children from the home.

In most states, both the parent and the child have the right to an attorney, paid by the state if they cannot afford one, because of the gravity of the rights at stake in termination proceedings. In about a dozen states, however, children continue to remain unrepresented.[32]

When a child has been abused or neglected, she becomes a ward of the state, which means dependent on the court. It is the task of the court to preserve the child's relationship with her parents if at all possible. This mandate aligns with CRC Article 9, which asks that states keep parents and children together unless such a separation is necessary because the parents, for example, have dissolved their rela-

---

27. *See* 59 AM. JUR. 2d *Parent and Child* § 34 (West, Westlaw through 2013). For examples of how states define child abuse and neglect, *see generally* U.S. Department of Health and Human Services, Administration for Children & Families, *Child Welfare Information Gateway, What Is Child Abuse and Neglect?* (2008) *available at* https://www.childwelfare.gov/pubs/factsheets/whatiscan.cfm.

28. *See* 53 A.L.R.3d 605 (West, Westlaw through 2013); 59 AM. JUR. 2D *Parent and Child* § 34 (West, Westlaw through 2013).

29. *See, e.g.*, Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAMILY CT. REV. 23, 27 (2012); *A Jailhouse Lawyer's Manual,* Chapter 33: Rights of Incarcerated Parents, COLUMBIA HUM. RTS. REV. 896 (9th ed. 2011).

30. *See* Child Abuse, 0080 SURVEYS 18 (2007) ("The agency to whom suspected abuse is reported is often a state child protection office that is not hindered by the same constitutional restrictions to which traditional law enforcement agencies are subject. These agencies are sometimes allowed to take custody of children prior to actually proving that abuse has occurred.").

31. *See* 102 A.L.R.5th 227 (2002).

32. Erin Shea McCann & Casey Trupin, Kenny A. *Does Not Live Here: Efforts in Washington State to Improve Legal Representation of Children in Foster Care*, 36 NOVA L. REV. 363 (2012).

tionship and live separately or because of abuse or neglect of the child. Under U.S. law, if preserving this relationship would lead to the continuance of abuse, neglect, or instability in the child's life, a court may provide a new permanent and stable home for the child.

As the court explores the feasibility of preserving the child-parent relationship, the two parties will initially be separated only temporarily. The state can house children for a short period of time, upon the government's further evaluation of the fitness of the parents or the home for the children, with the assumption that the child will be returned home. If the parent is abusive, s/he can be removed from the home, and through a protective order be ordered to cease contact with the child. Children may also be put in the care of another family member, a situation that can be temporary but also evolve into long-term placement. Should no suitable family member be available, children can be placed in foster care. Within a year in foster care it should be determined whether children will eventually be put up for adoption. This process has been accelerated to avoid the long-term placement of children in foster care. As domestic adoptions can be fraught with difficulties and many individuals prefer to adopt young children, many children remain in foster care until they age out of the system at eighteen. This happens currently to 11% of all children in foster care.[33]

Even though the state can completely and irrevocably terminate the rights of a parent to a relationship with their child, it must prove the need for such a deprivation by clear and convincing evidence. This is a very high standard because natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child [that] does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[34] On the other hand, parents whose parental rights have been terminated do not appear to owe their former (legal) child any duties, though this may differ from state to state.

When a child's interest is at stake, including the termination of parental rights, the CRC, under Article 3, requires that state and private welfare agencies, the legislature, administrative agencies, and the judiciary make the "best interests of the child" standard their primary consideration. The next section will define the standard under U.S. law and apply it in a number of different settings. It will conclude with a critique of the application of the standard to individual situations in which the child is involved directly but a refusal to apply it when a child's welfare is at stake indirectly or when application of the standard would require societal changes.

33. Children's Rights, *Facts About Aging Out*, *available at* http://www.childrensrights.org/issues-resources/foster-care/facts-about-aging-out/.

34. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

III. THE BEST INTERESTS OF THE CHILD STANDARD

Many of the distinctions between those below and those above the age of majority seem to be driven by considerations of the best interests of the child, a standard that originated in the United States.[35] As a matter of both common and statutory law, best interests of the child have been the guiding principle in many U.S. jurisdictions for more than 125 years.[36]

A. Best Interests Defined

States may adopt the best interests standard either through legislation or through judicial decision-making. Today all fifty states have laws that require use of this standard in many areas of law, including child labor, education, adoption, custody, and placement of children.[37] Federal law also uses the concept when addressing child welfare issues under its jurisdiction. Legislative proposals to change the focus of the standard, in some cases to increase parental rights, have generally failed.[38]

All states of the union, the District of Columbia, and several U.S. territories have statutes that direct courts to consider the best interest of the child when making important life decisions.[39] With respect to custody decision, many state statutes specify a number of non-exclusive factors to consider. Common among these factors are (a) the health, safety, and welfare of the child, including the petitioning parents' capacity to provide medical care, clothing, sustenance, and emotional support; (b) the existence of domestic violence in the home, and whether the party seeking custody is the perpetrator; (c) the

35. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAMILY STUDIES 337 (2008).

36. *See* Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and Its Consistency with United States Law,* 5 GEO. J. ON FIGHTING POVERTY 185, 191 (1998). Not all child-related legislation necessarily serves a child's best interest. The United States, for example, still permits recruitment of 17-year-olds (with parental consent) into its military. *See Join the Military: Eligibility Rules*, *at* www.military.com/join-armed-forces/eligibility-requirements. Human rights law on this issue continues to evolve.
See JONATHAN TODRES, MARK E. WOJCIK & CRIS R. REVAS, THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY IMPLICATIONS AND OF U.S. RATIFICATION 123 (2006) [hereinafter TODRES, WOJCIK & REVAS].

37. For a discussion of the movement toward a different standard in custody cases, see Richard A. Warshak, *Parenting By The Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 BALTIMORE L. REV. 83 (2011).

38. High-profile adoption cases have questioned the rights of parents in contrast to the "best interests" of the child. *See* Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995).

39. *See* U.S. Department of Health and Human Services, Administration for Children & Families, *Child Welfare Information Gateway*, *Determining the Best Interests of the Child* 1 (2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

child's relationship to the parties seeking custody; (d) the mental and physical health of the parents seeking or defending custody; (e) the present or probable future stability of the child's social environment. The last factor compares the child's greater support system in the current environment, including relationships with friends and family, with the probable state of a future support system after a given custody ruling. The test, therefore, allows for great flexibility and adaptability, which also makes it subject to criticism especially on grounds of unequal application.

Since the best interest standard is prevalent in U.S. law, commentators on the CRC have generally argued that its implementation in the United States "would require little or no adjustment in [its] long-standing history of attempting to keep the 'best interests of the child' at the forefront of judicial and legislative activity."[40] This may, however, not be true for all individual requirements under the CRC, especially as many pose novel issues. This includes the right of children to preserve their identity under CRC Article 8, which includes "nationality, name and family relations . . . ."

B. The Right to Identity

In light of modern reproductive technology, DNA testing, and changing family relations, the definition of "family relations" has come under pressure. Under common law, the mother's husband was assumed to be the child's biological father. Today, a child may file a paternity suit to rebut the paternity of that person and any other person claiming to be a father, or bestowed with the title of a parent by a court. In such situations, the court is free to compel a putative parent, or a person whose parental status is challenged, to submit to DNA testing.[41]

Children born out of wedlock are permitted to sue to establish paternity. Whether they are able to establish their relationship with a putative parent through blood and/or genetic tests depends on the nature of the procedure,[42] as blood tests may generally be used only to exclude paternity, but not to confirm paternity status over the objection of a parent.[43]

Legal parenthood and questions of identity may, in some situations, also pose challenges for same-sex couples. The Department of State appears to have recognized just recently the child of a lesbian couple as "born in wedlock" if the child is conceived from the egg of one woman and carried by the other. For a woman, therefore, "mother" becomes defined as being the genetic or the gestational and

---

40. TODRES, WOJCIK & REVAS, *supra* note 36, at 126.
41. *See* 41 AM. JUR. 2D *Illegitimate Children* § 31 (Westlaw 2013).
42. *See* 14 C.J.S. *Children Out-of-Wedlock* § 97, § 76 (Westlaw 2013).
43. *See* 41 AM. JUR. 2D *Illegitimate Children* § 31 (Westlaw 2013).

legal mother of the child, at least under one set of legal rules. How this will impact other legal concepts of parenthood and issues of identity remain open questions.

The right to know one's identity looks different for adopted children. In most U.S. jurisdictions, adopted children do not have a right to find out who their biological parents are as most adoptions are "closed."[44] Some jurisdictions allow an adopted child to learn identifying data about his/her biological parents upon a showing of good cause, and federal courts of appeal have upheld such legislation as constitutional. In many states, an adopted child does not have the right to discover even non-identifying data about their biological parents, including medical information or religion. Only a few states now require the inclusion of non-identifying information (medical and social histories) that can be released on request of the adopted child.[45] There is no indication of a substantial trend away from closed or near-closed adoptions.

The courts of two states, Tennessee and Oregon, notably diverge from the majority approach.[46] In those states, a child may obtain access to identifying data relating to their biological parents if disclosure is in the best interest of the child. Courts in both states have subordinated the parents' constitutional claims to a privacy interest in personally identifying data to the state's interests in the disclosure of parental identity inherent in administering adoptions.[47]

Modern technological advances increase the relevance and the stakes of decisions surrounding the discoverability of one's biological parents. Perhaps not surprisingly, in cases of artificial insemination by donor (AID) disclosure of the donor's medical data as well as non-identifying data is held to a standard similar to the disclosure of the identity of the natural parent of an adopted child.[48] In most states, children conceived through AID are unable to gain access to information relating to their natural biological donor, though at least eighteen states have passed laws that allow such children to gain ac-

---

44. *See* U.S. Department of Health and Human Services, Administration for Children & Families, *Child Welfare Information Gateway*, *Access to Adoption Records* (June 2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessap.pdf.

45. *See* 1 LEG. RTS. CHILD. REV. 2D § 6:12 (2d ed.) (Westlaw 2012).

46. Janet Leach Richards, *Medical Confidentiality and Disclosure of Paternity*, 48 S.D. L. REV. 409, 427–28 (2002–03).

47. *See* Does 1, 2, 3, 4, 5, 6, & 7 v. State, 164 Or. App. 543, 565 (1999) ("Because a birth mother has no fundamental right to have her child adopted, she also can have no correlative fundamental right to have her child adopted under circumstances that guarantee that her identity will not be revealed to the child."); Doe v. Sundquist, 2 S.W.3d 919, 926 (Tenn. 1999) (denying birth mothers' claims that Tennessee statute allowing children put up for adoption to obtain identifying data about their birth parents after attaining the age of 21 violated mothers' constitutional rights).

48. *See* Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 217 (2001).

cess upon a showing of cause. The California Court of Appeals, for example, held that the constitutional interest in maintaining anonymity was limited and outweighed by the state's interest in preserving children's right to discover their identity.[49] Only a small number of state courts have held that biological donors have a lower constitutional privacy interest in non-identifying than in identifying data, causing the states' interest in disclosure to override the lowered privacy interest.

While modern family relations with their frequent distinctions between biological, social, and legal parent(s) may constitute the most challenging frontier of the law, wide variety exists between countries with respect to rules on children's names and name changes.[50]

C. *Changing One's Name*

When a child requests change of his first, or determination or change of his last name, courts apply the best interests standard.[51] When changes of the last name are considered, courts turn to the factors employed in custody cases: effect of the change on the preservation and development of the child's relationship with each parent; the identification of the child as part of the family unit; the length of time that the child has used the surname; the preference of the child if the child is of sufficient maturity to express a preference; whether the child's surname is different from the surname of the child's residential parent; the embarrassment, discomfort, or inconvenience that may result when a child bears a surname different from the residential parent; important ties to family heritage, ethnic identity, and cultural values; and parental misconduct or failure to maintain contact with and support of the child.[52]

At the birth of a child, parents generally choose a child's first name without state interference. Should a child petition for change of name, the court considers the following issues in light of the best interests of the child: the child's preference; the effect of the change of the child's name on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and proposed names; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; and the existence of any parental misconduct or neglect.[53]

---

49. *See* Johnson v. Superior Ct., 95 Cal. Rptr. 2d 864, 864 (Ct. App. 2000).
50. *See, e.g., Thanks, mum: Governments find reason to regulate the names of children*, THE ECONOMIST, Jan. 14, 2012.
51. *See* 65 C.J.S. *Names* § 24 (Westlaw 2013).
52. *See id.*
53. *See id.*

Even though parents are left largely free in their choice of a given name for their child, a child's name change will be subject to a searching test, presumably to ascertain the child's rationale and seriousness of purpose and to avoid negative repercussions from a name change. The court's goal is clearly to protect the child's interest in these rare cases.

D. *Critique*

Historically, the best interest test may have hidden gender bias and continues to be applied disparately to different socio-economic, racial, ethnic, and religious groups. In addition, use of the test in some areas of the law conceals the poor treatment to which other areas of the law, such as the criminal justice system, subject children. Only recently has the U.S. Supreme Court acknowledged that children's intellectual and emotional development differs dramatically from that of adults, leading to restrictions on the most arduous and punitive sanctions imposed, including the death penalty and life-without-parole.

When children are the object of the decision-making, as in the cases outlined above or in custody situations, the best interest standard will be applied, even though perhaps not always equally. It has not been expanded, however, to the situations in which the state's decision will have a dramatic impact on the child even though the law does not exert its force upon the child directly. Two such situations involve the criminal sentencing of a parent (in criminal prosecutions unrelated to the child) and the decision to deport the non-citizen parent. In both of these cases the existence of a child or the importance of the relationship between the parent and the child are rarely considered, barring extraordinary situations, despite an increasing array of literature indicating the negative consequences of parental, and especially maternal, incarceration or deportation.

Over the last two decades, the number of prisoners who have at least one minor child has increased substantially, so that in 2010 2.3% of all minor children living in the United States had at least one incarcerated parent. Almost half of all prisoners have a minor child. Black children were 7.5 times and Hispanic children 2.5 times more likely to have a parent in prison than white children.[54] A recent study has found a substantial impact of parental imprisonment on a child's educational attainment, later unemployment, and involvement with the criminal justice system, especially following maternal incarceration. Perhaps most surprisingly, the same study found that the impact of maternal incarceration extends beyond the child to the entire community by depressing college graduation rates of young

54. Bureau of Justice Statistics, Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children* (Aug. 8, 2008; rev. Mar. 30, 2010), NCJ 222984.

people educated in schools where between 10 and 20% of other children had an incarcerated parent.[55] The U.S. criminal justice system, as the legal system as a whole, is individually oriented and therefore only rarely allows for consideration of third-party interests at sentencing. The U.S. Sentencing Guidelines, for example, indicate that "family ties and responsibilities are not ordinarily relevant in determining whether a departure [from the otherwise applicable guidelines sentence, which is primarily based on the offense of conviction and the offender's criminal history] may be warranted."[56]

A similar situation involves the deportation of non-citizen parents. As the United States subscribes to the *ius soli* (and *ius sanguinis*) principle of citizenship, even the children of undocumented migrants born in the United States automatically obtain citizenship. With the parents remaining without a legal status, however, if a removal order issues, they (and their children) face the choice between returning to the parents' country of citizenship or separating the family, often with serious long-term emotional and financial consequences. Parental arrest and detention, in addition to ultimate removal and long-term bans on return, inflict serious psychological harm on children.[57] Only in recent months has the U.S. Immigration and Customs Enforcement issued a policy outlining enforcement priorities and prosecutorial discretion, with the goal of "not unnecessarily disrupt[ing] the parental rights of both alien parents or legal guardians of minor children."[58] How successfully that policy has been implemented and whether it has served children well, may be too early to assess.

Failure to consider children's interests and wellbeing when a state decision will impact them dramatically has negative effects societally and systemically. Even though the best interest standard permeates many areas of judicial and agency decision-making, it re-

---

55. John Hagan & Holly Foster, *Children of the American Prison Generation: Student and School Spillover Effect of Incarcerating Mothers*, 46 LAW & SOC'Y REV. 37 (2012).

56. U.S. Sentencing Commission Guidelines Manual, §5H1.6. *Family Ties and Responsibilities (Policy Statement)* (2013).

57. *See, e.g.*, Dorsey & Whitney LLP, Report to the Urban Institute, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy* (2009).

58. U.S. Immigration and Customs Enforcement, *11064.1: Facilitating Parental Interest in the Course of Civil Immigration Enforcement Activities* (Aug. 23, 2013). For a critique of the memorandum as failing to allow for individual consideration, see Mills Legal Clinic at Stanford Law School & Center for Justice and International Law, *Supplemental Report on Prosecutorial Discretion and Family Unity Addressing U.S. Government Policies Issued After Submission of Petitioners' Report in support of the Public Thematic Hearing on Human Rights of Migrants and Legislative Reform in the United States before the Inter-American Commission on Human Rights (149th Period of Sessions) pursuant to Article 66 of the Rules of Procedure of the Inter-American Commission on Human Rights*, *available at* www.law.stanford.edu/sites/default/files/project/443312/doc/slspublic/13-10-22%20FINAL%20Supplemental%20Report.pdf.

mains inapplicable when the child's fate is not directly at issue despite it being indirectly affected.

Application of the best interest standard or direct imposition of state measures on children imply their right to provide input, though not necessarily the right to make a decision.

IV. Abortion, Custody, Adoption: Children's Rights to Express Their Views

CRC Articles 12 and 13 guarantee that a child has meaningful opportunities to express her views freely in all matters affecting her, though this does not necessarily imply decision-making authority. The First Amendment's protection of freedom of speech extends to children though children seem to possess lesser rights to expression than adults under the same circumstances, especially if the state can show a compelling state interest in restricting a child's right to express an opinion.[59]

In criminal proceedings, juveniles accused of crimes are guaranteed due process during both the pretrial and trial stages under the 5th, 6th, and 14th amendments, which includes the right to be heard.[60] As victims of criminal offenses, children also have a right to participate in the criminal justice process, though the process may have to be accommodated, especially for younger children.

The weight of the child's opinion in family matters and health issues, the most frequent situations in which such right will be exercised, increases with the age and maturity of the child.[61] Three areas—abortion, custody, and adoption—may be of particular importance to children, and especially older children.

A. Abortion

With respect to one highly charged issue—abortion, it has been hotly debated where the power to make a final decision resides and how to weigh a child's opinion. States may not impose a blanket provision requiring the consent of a parent or person standing in the position of a parent to the abortion of an unmarried minor. The Supreme Court invalidated a state statute that required minors to secure written parental consent before having an abortion.[62] Instead

59. Congressional Research Service, Henry Cohen, *Freedom of Speech and Press: Restrictions to the First Amendment* (2009); 1 Children & the Law: Rights and Obligations § 1:7 (Westlaw 2012).

60. *See* Kent v. United States, 383 U.S. 541, 554 (1966); *see also* In re Gault, 387 U.S. 1, 12-18 (1967).

61. *See* Virginia Mixon Swindell, *Children's Participation in Custodial and Parental Right Determinations*, 31 Hous. L. Rev. 659, 674-76 (1994).

62. *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 72 (1976); Swindell, *supra* note 61, at 672-73.

the Court suggested alternative procedures if the state wishes to still restrict minors' abortions.

Pregnant minors are entitled to show that they are sufficiently mature and well informed to make the abortion decision themselves upon consultation of a doctor but without any parental consent. Should the minor be insufficiently mature to make such a decision, the court can determine independently that an abortion is (not) in the best interests of the child. The so-called judicial bypass has been established to protect minors and shield them from having to share their plans with their parents.

The decisions on a minor's right to consent to an abortion have influenced judicial guidance on other medical procedures. The Supreme Court suggested, for example, that a state's requiring a minor's written consent for other procedures besides abortion may be equally constitutional, as long as the surgery is sufficiently serious.[63] How the courts will react, for example, to the desire of a minor to have a sex change surgery that lacks parental support remains an open question.

The state or a third party may have less power to override a child's refusal to undergo surgery than it has regarding a child's wish to have surgery.[64] The weight given to a child's refusal is a function of the court's determination of the child's maturity and competence to make reasoned decisions. These two factors also play a determinative role in a court's assessment of a minor's views in custody situations.

B. *Custody*

The most common situation in which children are heard is custody cases. Many states allow a child to express a preference in custody hearings, and in most states, the District of Columbia, and Puerto Rico, the child's preferences are considered in custody rulings. In the great majority of American states, children do not need to attain a specific numerical age before being allowed to participate in custody proceedings affecting them, or before the child's stated pref-

---

63. *See Planned Parenthood*, 428 U.S. at 67 ("As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.").

64. Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87, 102 (1999). The United States, under federal law, prohibits female genital mutilation, sometime referred to also as female circumcision, unless health considerations counsel in favor of it. 18 U.S.C. §116 (2012). Male circumcision is permitted and remains widespread in the United States, though the national rate of newborn circumcision has been dropping over the last few years. The latter, of course, precludes participation of the child in the decisionmaking.

erences be given weight in the court's best interest analysis.[65] Instead, most courts look to the "maturity" of a child—specifically whether the child has, to the court, sufficiently developed the emotional and intellectual capacity necessary to make an informed decision regarding her preferences. The weight courts assign to the preferences of a child scales with the level of maturity the judge observes.[66] Some states, however, take a hybrid approach, specifying age minimums for some purposes in child custody hearings but directing the judge to determine maturity holistically for other purposes in the same hearing.

In California, for example, children age 14 and older are permitted to address the court regarding custody and visitation, unless, pursuant to a finding on the record, the judge determines that "doing so is not in the child's best interests."[67] Children under the age of 14 may participate in custody hearings affecting them, but do not, like children over 14 years, benefit from a presumption in favor of their participation.

Notably, state courts give varying degrees of weight to the preferences of a mature child in best interest custody determinations. The first states that gave *controlling and mandatory* weight to child preference in custody determinations were four southern states: Georgia, Mississippi, Tennessee, and Texas.[68] There is some speculation that the American South's traditional allocation of more responsibility to children motivated this approach. In more recent years, however, most states have moved away from a mandatory scheme to a best interest approach that preserves judicial discretion.

Some of the states require children be "informed" before they are allowed to state a preference or before the judge can determine the weight of this preference. In child custody proceedings, a guardian *ad litem* or special attorney has the power to move discovery and get information from either of the two parents to enable the child to make an informed decision about which of the parents s/he prefers to have primary custody.[69]

---

65. *See* CHILD CUSTODY PRAC. & PROC. § 4:11 (Westlaw through Mar. 2012).

66. *See* Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 634 (2003) (noting that 80% of Arizona judges surveyed considered the preferences of older teenagers to be "very significant" in their decisionmaking, while only 40% of judges interviewed would give similar weight to the preferences of children aged 11-13 years, and 70% of judges interviewed agreed that the preferences of very young children are given "no significance at all" in their best interest custody determinations).

67. CAL. FAM. CODE § 3042(c), (d) (West, Westlaw through 2013).

68. *See* Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 445 (1998).

69. CHILD CUSTODY PRAC. & PROC. § 12:13 at n. 5 (Westlaw 2012) (providing a diverse list of jurisdictions that require the appointment of an attorney who is granted the same powers of discovery as the other parties). *See* Andrea Khoury, *The True Voice of the Child: The Model Act Governing the Representation of Children in*

Child custody decisions may come at any point in a child's life, and the same holds true for adoptions, though the participation and decision-making role of children in the adoption process is more substantial.

C. Adoption

Adoptions generally require greater child involvement in the decision-making than custodial arrangements.

> In many states, if the child being adopted is over a certain age, he or she must consent to the adoption. The age of children who must give their consent to adoption generally ranges from 10 to 14. Absence of such consent is apparently an absolute bar to adoption. The preferences of younger children may also be considered by the court, but are not binding.[70]

While many adoptions occur within the United States, the United States is also involved in inter-country adoptions, as a net "importer" of children.[71] Congress ratified the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and made national legislation applicable to all adoptions "involving United States residents"—apparently as parents or children.[72] This legislation (and the Convention) requires that all groups that offer cross-border adoption services in connection with a United States person must satisfy certain accreditation requirements and be approved by United States accreditation entities.

Accreditation standards mandate that the agency provide the putative parents a copy of the medical records of the child in English. To protect the child, the agency must conduct a thorough background report, including a home study, of the prospective parents. The adoption service must bill on a fee-for-service basis, not a contingency fee basis. In addition, the adoption service must disclose fully its policies and practices, the disruption rates of its placements for intercountry

---

Abuse, Neglect, and Dependency Proceedings, 36 NOVA L. REV. 313, 317 (Spring 2012) ("There is also the same lack of uniformity within the states, regardless of statutory guidance. In one county there may be a 'lawyers for children' program, and lawyers are regularly appointed, and in another county in the same state, there is no such similar program, and courts will appoint nonlawyers or Court Appointed Special Advocates (CASAs).").

70. 1 LEG. RTS. CHILD. REV. 2D § 6:5 (2d ed.) (Westlaw 2012).

71. U.S. Department of State, Bureau of Consular Affairs, Office of Children's Issues, *FY2012 Annual Report on Intercountry Adoptions* (Jan. 2013), *available at* adoption.state.gov/content/pdf/fy2012_annual_report.pdf. Despite a high total number of foreign adoptees, per capita the United States ranks only in the middle of highly developed Western democracies with respect to the total number of children adopted from abroad. *See* Australian InterCountry Adoption Network, *International Adoption Statistics*, *available at* www.aican.org/statistics.php.

72. *See* 42 U.S.C. § 14901–54 (2000); 2 AM. JUR. 2d Adoption § 46 (Westlaw 2013).

adoption, and all fees charged for such adoptions. These rules have been developed to protect potential parents from exploitation and children from illicit transfer and trafficking. This is particularly important as children in intercountry adoptions tend to be younger and are often unable to participate in the adoption process. Despite the heightened protections for both sides implicit in these requirements, intercountry adoptions have created diplomatic tensions between the United States and some sender countries.[73]

Above section has focused on the relationship between children, their parents, and the state, largely in its judicial or legislative role. Many other legal areas involving children's rights heavily implicate (public) schools.

V. School and Work

Depending on state laws, schooling from an age range between 5 and 8 up to 16 to 18 is compulsory in the United States. That requirement can be fulfilled through school attendance or home schooling. Approximately three percent of American children are being home schooled. Ten percent attend private rather than public schools.

Children may take on paid work outside the home while still in school, as envisioned in CRC Article 32 para. 2 point a. Federal and state laws regulate child labor. Regulations include restrictions on the number of hours children can work, what times of day a child may work, what general occupations are fit for children, what specific tasks children can perform, and under what conditions they may perform those jobs.

Federal law mandates the minimum age for employment, without parental consent, at 16 years, except for agricultural work.[74] The federal minimum age for non-agricultural employment is 14 years, which means that even with parental consent, a child under 14 years may not work.[75] Under federal law, the hours a child can work during the week also depend on the age of the minor—14-year-olds are permitted to work significantly fewer hours than 16-year-olds. Under U.S. Department of Labor regulations, workers between the ages of 16 and 18 years are prevented from engaging in employment the department finds to be particularly hazardous or detrimental to their health or well-being.

Agricultural employment does not require a minimum age. While child labor laws do not apply to a child working on her parent's farm, they apply generally to a child working on a farm owned by someone

73. *See* Council of Europe Parliamentary Assembly, Written declaration 536: *Intercountry adoption: Children as hostages of international relations*, Doc. 13113 rev. (Jan. 29, 2013).
74. *See* 29 U.S.C. § 203(e)(4)(l) (2006).
75. *See* 29 C.F.R. § 570.2 (West, Westlaw through May 2013).

other than her parents. With parental consent children as young as 12 may work on such a farm, in some states for up to twelve hours and without being paid minimum wage. Children's farm work—and work in the entertainment industry—remains poorly regulated. For many American children in rural areas, therefore, agricultural work may be a regular part of their lives, leaving less time for school-related work. Rural schools and educational attainment during primary and secondary school do not seem to be measurably below those in more urban or suburban settings; college attendance rate, however, is lower.

Schools themselves have frequently been the flashpoint of children's rights, especially the right to expression and the concomitant right to information, to allow for the formation of an opinion, which can then be expressed. Both aspects are encapsulated in CRC article 13 subject to limited exceptions outlined there.

VI. Access to Information: Tensions Between Parents, Schools, and Children

The Convention explicitly guarantees the right to information while the First Amendment only implicitly protects the right of access to information as such access is a necessary condition for the meaningful exercise of the right to free expression. Even in the case of adults, the right to information remains insufficiently developed.[76]

In a case indirectly involving children, the Supreme Court struck down a federal law that had prevented the mailing of unsolicited advertisements relating to the availability of contraceptives, in part because the law denied parents information necessary to make informed decisions about birth control and discuss it with their children.[77] The law remains unsettled when the child's desire for information conflicts with her parents' wishes, however. In this case, the courts must (or should) determine the extent and nature of the child's autonomous liberty interest —as distinct from her freedom of speech—as it is closely connected to the right to information.

A child's autonomy interests inevitably conflict with constitutional principles protecting the parents' rights to control and raise their children free from (most) governmental interference.[78] Parents have a recognized liberty interest in raising their children by the methods they desire, and are given great latitude in making choices for their children—including, for example, a parent's decision to re-

---

76. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to receive . . . .'"); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. Pa. J. Const. L. 223, 227, 230-31 (1999).

77. *See* Bolger v. Young Drugs Prods. Corp., 463 U.S. 60, 74 (1983).

78. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

move her child from otherwise mandatory lower education for religious and social reasons—seemingly without consideration of the child's wishes.[79] Minor children do not have any constitutional rights in the home that can be enforced against their parents, including the right to speech or information unless their parents give them such rights.[80]

Outside the home, parents and governments may influence children's access to information. Both government regulations and parental preferences will be less certainly enforced outside the home against a child who is considered "mature" since the child's First Amendment rights and constitutional interest in autonomy increase with age and maturity. Courts do not employ numerical age to decide dispositively a child's (lack of) maturity. A "mature" child's right to information is said to be strongest when access to that information is necessary for meaningful exercise of another fundamental right, such as that of protecting a would-be mother's decision to obtain an abortion—even if the would-be mother is legally a minor. Healthcare providers, therefore, may provide information necessary for informed consent to a medical procedure, including abortion and contraception, to minors.[81]

Most states allow parents to have significant control over the public school education of their children.[82] However, they cannot prevent public schools from teaching topics that they find morally offensive.[83] Many of these disputes have centered on sexual education as well as the teaching of evolution in public schools. In those situations, the state must allow for parents to seek alternatives to public schooling, and cannot limit what parents teach their children.[84] On the other hand, school boards—with or without the consent of parents—have the authority, for example, to ban certain books from the curriculum and from school libraries, as long as they do not do so because they merely disagree with the content but rather because of the educational suitability of the content.[85]

---

79. *See* Wisconsin v. Yoder, 406 U.S. 205, 224–35 (1972).

80. Both 42 U.S.C. § 1983 and U.S. CONST. Amend. XIV only prevent deprivation of civil liberties by state actors.

81. Belloti v. Baird, 443 U.S. 622 (1979).

82. *See* Ross, *supra* note 76, at 247 n. 120 (providing a list of state statutes that allow parents to opt out or provide substitute education that they choose on controversial topics, and statutes that require the school to give notice to the parents of students if the school curriculum contains education on controversial topics).

83. *See* Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 533–34 (1995).

84. *See* Ross, *supra* note 76, at 247.

85. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

In public school settings, the right to freedom of expression, including the reception of information, has frequently collided with the right to religious freedom.[86]

VII. Religion in School: The "Culture Wars"

Among the core CRC articles is 14, which guarantees children the right to freedom of thought, conscience, and religion. Under the U.S. Constitution, freedom of religion is guaranteed though the United States perceives itself has having a religious (largely Judeo-Christian) citizenry. For that reason the U.S. Supreme Court has developed extensive jurisprudence on how to assure the separation of church and state without unduly burdening the exercise of religious practice.

Education about religion, though not religious instruction, is available in public schools, as both an obligatory and an optional subject. Instruction about world religions, for example, is perfectly acceptable though attempts to teach religion in public schools would likely lead to Establishment Clause[87] challenges because public schools are state actors. Those challenges can be overcome if the teaching activity satisfies a three-part test.[88] First, the law under scrutiny must "reflect a clearly secular legislative purpose," which has been interpreted to mean that the law's explicit *purpose* cannot be designed to advance or inhibit religion.[89] Second, the law must "have a primary *effect* that neither advances nor inhibits religion" (emphasis added). Third, the law must be religiously neutral to "avoid excessive entanglement with religion."[90] Public schools can therefore mandate that students study subject matters relating to religion, so long as the school curriculum, including religious studies, reflects a secular legislative purpose—such as to teach social studies or literature—and so long as the primary effect of the curriculum is not to inhibit or advance certain religious ideals.[91] Beyond these restrictions, states are given substantial leeway—substantively and procedurally—in creating public school curricula.[92]

---

86. Approximately 10% of children in the United States in pre-kindergarten through 12th grade are enrolled in private schools, with about 80% of all private schools being religiously affiliated. Council for American Private Education, *Facts and Figures*, at www.capenet.org/facts.html.

87. U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

88. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).

89. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

90. *See, e.g.*, Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (involving property tax exemptions to religious institutions).

91. *See* Hall v. Bd. of Sch. Comm'rs of Conecuh Cnty., 656 F.2d 999, 1001-03 (5th Cir. 1981).

92. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 300 (1963) ("To what extent, and at what points in the curriculum, religious materials should be cited

On numerous occasions, religiously motivated school boards have attempted to weave religious ideals into mandatory school courses, for example by requiring the study of "intelligent design" or "creation science" along with evolution theory, restricting the teaching of evolution theory, or requiring abstinence-only sexual education. Courts are accustomed to applying the judicially created Establishment Clause test in such situations. The Supreme Court struck down a Louisiana law requiring that god-creation viewpoints be presented whenever evolution science was discussed in the classroom because the law served no secular purpose.[93]

The courts also held policies in Dover, Pennsylvania, unconstitutional when a largely religiously conservative school had adopted a classroom disclaimer that specifically referenced "intelligent design" (a relabeling of "creation science") as an alternative theory to evolution science, and later voted to change the ninth-grade biology curriculum to "make ninth grade biology students 'aware of gaps/problems in Darwin's theory and of other theories of evolution, including, but not limited to, intelligent design.'"[94] Such efforts by local school boards continue in religiously conservative communities throughout the United States.

Ironically, religious activists have occasionally seized onto the requirement to avoid "religious entanglement" to justify their introduction of religious views into school curricula. Some have argued that evolution science promotes atheism or the absence of god, which is "a religion," and therefore sole presentation of this science "theory" itself violates the Establishment Clause.[95] Courts, however, have rarely permitted the presentation of religious views to balance "anti-religion."

With the Supreme Court having closed most other doors to the promotion of religious beliefs regarding the origins of humankind, religious activists have instead attempted to find a secular purpose for "Darwin disclaimers," which are notices provided to students that evolution science is "only a theory" to be considered among other explanations for the origins of humankind, including creation science, intelligent design, or other explanations involving a divine source. Religious activists in state legislatures have also sponsored laws that instruct local school districts to "promot[e] critical thinking skills" by listing scientific theories that are deemed by statute to be "rightly

---

are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools.").

93. *See* Edwards v. Aguillard, 482 U.S. 578, 581 (1987). *See generally* Edward J. Larson, *Teaching Creation, Evolution, and the New Atheism in 21st Century America: Window on an Evolving Establishment Clause*, 82 MISS. L.J. 997, 1020 (2013).

94. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp.2d 707 (M.D. Penn. 2005).

95. *See* Blog: Religion & American Law, *Evolution and Atheism: Is There a Connection?* (Oct, 6, 2013), *available at* http://religionandamericanlaw.blogspot.com/2013/10/evolution-and-atheism-is-there.html.

subject to critical analysis," including "evolution, the origin of life, global warming, and human cloning."[96] These disputes, as curious as they may appear to non-Americans, are an integral part of the American legal system where the tension between religious freedom and the avoidance of state-sponsored religions inherent in the First Amendment often plays out in the school setting.

VIII. Conclusion

The CRC covers broad territory. Whether U.S. law always conforms to its requirements remains questionable, especially in light of the diversity of approaches within the United States. The most difficult questions under both the CRC and the U.S. Constitution and its laws pertain undeniably to the clash of rights between parents, the state, and children, many of which occur in the public school setting.

The United States would benefit from participating in a global dialogue on these challenging issues. This is particularly true as modern technology may expand the concept and undermine the traditional notion of parent. U.S. scholars and practitioners may also gain perspective and insight from the different understanding or application of legal concepts, such as the best interest standard.

---

96. *See* Larson, *supra* note 93, at 1008-32.