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PARENTAL RIGHTS AND DUE PROCESS

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ABSTRACT FOR "PARENTAL RIGHTS AND DUE PROCESS"

The U.S. Supreme Court regards parental rights as fundamental. Such a status should subject any legal procedure that directly and substantively interferes with the exercise of parental rights to strict scrutiny. On the contrary, though, despite their status as fundamental constitutional rights, parental rights are routinely suspended or revoked as a result of procedures that fail to meet even minimal standards of procedural and substantive due process. This routine and cavalier deprivation of parental rights takes place in the context of divorce where, during the pendency of litigation, one parent is routinely deprived of significant parental rights without any demonstration that a state interest exists—much less that there is a compelling state interest that cannot be achieved in any less restrictive way. In marked contrast to our current practice, treating parental rights as fundamental rights requires a presumption of joint legal and physical custody upon divorce and during the pendency of divorce litigation. The presumption may be overcome, but only by clear and convincing evidence that such an arrangement is harmful to the children.

Parental Rights and Due Process

DONALD C. HUBIN*

Forget, for a moment, the title of this paper. Imagine that it is titled, "Due Process and the Deprivation of Rights". Now, consider an unspecified right, *R*, which is "a fundamental right protected by First, Fifth, Ninth and Fourteenth Amendments".[1] Suppose that this right is regarded as "far more precious than property rights"[2] and that the Supreme Court characterizes *R* as an "essential" right[3] that protects a substantial interest that "undeniably warrants deference, and, absent a powerful countervailing interest, protection".[4] Imagine that "it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"[5] and that, because of this, "there must be some compelling justification for state interference"[6] with *R*.

These aspects of the nature of *R* stipulated, imagine further that our legal system actively functions to suspend or deny this right literally tens of thousands of times a year—that this is done openly and under color of state law. Suppose that the suspension, and sometimes even the denial, of *R* is done on the basis of little or no evidence of any state interest whatsoever. Imagine that, in these cases of suspension or denial, there is no demonstration, and often no allegation, that *R* has been, or is likely to be, abused or that the retention of *R* by the individual in question would be harmful to the legitimate interests of any other person. Suppose, further, that even the temporary suspension of this right shifted the burden of proof onto the former right-holder to demonstrate that the suspension should not become a permanent denial.

If there were such a right and it were treated in such a cavalier way, what should our reaction be? Outrage? Indeed!

But is there a right that can be substituted for *R* and make all of the above suppositions true? Absolutely. But it is neither the right to property (and not simply because it cannot be more precious than itself) nor the right to liberty. Though there are often legal threats to these rights, on the whole they receive

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[1] *Doe* v. *Irwin*, 441 F. Supp. 1247 1251 (D. Mich. 1977).

[2] *May* v. *Anderson*, 345 U.S. 528, 533 (1953).

[3] *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

[4] *Stanley* v. *Illinois*, 405 U.S. 645 (1971).

[5] Irwin 441 F. Supp. At 1251.

[6] *Id.* At 1249.

significant protection from the courts. There is only one right that has the importance described above and receives so little protection. It is the right of custody of our children—the cluster of rights labeled 'parental rights'.[7]

The above might strike one as flagrant hyperbole. Termination of parental rights is not done in the casual way I have described.[8] The state *is* required, a critic might point out, to show by "clear and convincing evidence" that a compelling state interest is at stake before termination of parental rights.[9]. And so it is, *sometimes*. But there is a context in which parental rights are suspended with little or absolutely no evidence of the involvement of any state interest whatsoever. That context is divorce. While this context apparently affects our reaction to the casual procedures by which we suspend or terminate parental rights (else one would expect a hue and cry over this practice), it does not weaken the argument against such procedures. Divorce proceedings routinely involve unconscionable violations of minimal due process protections of fundamental rights and liberties.[10]

I argue for this thesis below. I begin by discussing some features of parental rights and of the state interest in the custody of children. Next, I examine the sorts of due process considerations that have arisen in the context of termination of parental rights outside the divorce context. I then describe a procedure commonly used during divorce proceedings to determine custody during the period of the divorce litigation (*pendente lite*). The arrangements during the pendency of the litigation are extremely important because they establish a *status quo* which influences what it is reasonable to do with respect to parent/child arrangements in the final divorce decree and, even more importantly, because of the direct effect they appear to have on the long-term parent child relationship. (A full explanation of the reasons for focusing on the procedures for determining temporary custody, as opposed to permanent custody, will be offered later.) In the penultimate section, I argue directly for the thesis that this procedure involves the temporary denial of fundamental rights without due process of law. Finally, I turn from the abstract discussion of the nature and basis of legal rights to discuss the real interests protected by these rights.

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[7] Francis McCarthy (1988) has challenged the claim that parental rights are fundamental rights in the constitutional sense of the term. For present purposes, I shall accept the Supreme Court doctrine that they are. Were McCarthy's challenge successful, the state would need to show only that its procedures for denying parental rights had a rational basis, not that they were necessary to serve a compelling state interest. I do not believe that even the weaker test can be met, but I do not argue that here.

[8] At least, it is not *supposed* to be done in the casual way I have described. Despite the legal procedures that are supposed to protect against unwarranted state interference in the parent/child relationship, the actual practice seems to involve too much interference, too casually monitored (Wald, 1976; and Becharov, 1985).

[9] Santosky v. Kramer, 102 S. Ct. 1388 (1982).

[10] Lee Bombria *et al.* (1988) asserts this view. Ellen Canacakos (1981) and Holly L. Robinson (1985) argue for it extensively.

The issue of parental rights and due process is not sterile or pedantic; parental rights protect the vital interests of parents and children alike. Our cavalier legal treatment of them is inexcusable for the real human devastation it causes.

SOME ASPECTS OF PARENTAL RIGHTS AND THE STATE'S INTEREST IN THE CUSTODY OF CHILDREN

Parental Rights: 'Custody' is a misleading term, for it suggests a unitary thing when, in fact, it refers to a set of rights and responsibilities. In this respect, it is like 'property'.[11] Both are convenient labels for a cluster of rights that have traditionally been bundled together by social practice and in our thought. There is a great danger of committing "false dichotomy fallacies" when we employ such labels without sufficient care. With respect to property, for example, we often think that, absent some special arrangements, a person must either own an item in the strong sense that we own personal property, or the item must be one over which the person has no property rights. This is, of course, mistaken, but it is an understandable mistake given our tendency to think of owning property as an all-or-nothing situation. We must be wary of these conventional categories—especially when our task is to challenge the conventions themselves. We must ask ourselves whether the items in the set of rights in question are inseparable, whether the justification for each item is the same, and so forth. For the most part, I shall talk about parental rights, instead of custody, to emphasize this.

I know of no exhaustive listing of the set of parental rights we typically associate with having full custody of children. The following rights, only some of which are relevant to our present concern, are commonly assumed to be included in the set:

- the right to physical possession of the child;
- the right to inculcate in the child one's moral and ethical standards, including the right to discipline the child;
- the right to control and manage a minor child's earnings and property;
- the right to have the child bear the parent's name;
- the right to prevent adoption of the child without the parents' consent;[12]
- the right to make decisions concerning the medical treatment, education, religious training and other activities of the minor child; and,
- the right to information necessary to exercise the above rights responsibly.

[11] See A. M. Honoré (1961).

[12] The rights enumerated to this point are cited in BLACK'S LAW DICTIONARY, (5th ed. 1979).

Parental rights are neither absolute nor unlimited. They are non-absolute in the sense that they may, in certain cases, be overridden by other considerations. For example, a parent's right to determine the education of his or her children may be overridden by the need to provide children with accurate information with which to make responsible choices of their own. Parental rights are limited in the sense that a full and accurate statement of them would contain limiting clauses. Thus, the parent has no right, not merely an overridden right, to discipline a child by physical torture.

Perhaps more importantly, parental rights are fiduciary rights.[13] Parents have the legal right to make certain decisions concerning their minor children *in the best interests of the children*. This feature of parental rights explains some of the limitations of the rights, and may also shed light on why and under what conditions these rights might be overridden. Furthermore, the fact that the parent is a trustee means that, even when the parent is acting within the scope of his or her rights and in a situation in which these rights are not overridden, the parents' choices are to be guided by considerations of the best interests of the children.

What has been said so far about the nature of parental rights doesn't begin to answer all the important questions about such rights. For a full understanding of these rights, much more needs to be said about the philosophical foundation, the content and the limitations of such rights. Fortunately, the argument presented here does not require that we present and defend anything like a full theory of the nature and grounds of parental rights. Rather, we will proceed on the basis of broadly shared, considered beliefs about the content of parental rights in the expectation that any plausible theory of the foundation of parental rights will succeed in capturing the content we are assuming. While we will return to the nature of parental rights after discussing the basis of the state interest in the care and nurturing of children, we will continue to address the issue of the implications of parental rights without defending a specific moral theory that grounds those rights.

The State Interest: Parens Patriæ is the doctrine under which the state alleges an interest in the care and custody of children (and others not competent to represent their own interests). This doctrine, literally asserting that the king is the parent of the state, was formulated in England in the thirteenth century to assert the state's role as guardian of those who were mentally incompetent. The notion that the king (or the government) is the parent of the entire state is quaint; the assertion that the state has a compelling interest in the care, nurturing, and

[13] I use this term in the rather non-technical sense that Locke thought the rights of government as being fiduciary rights. An excellent examination and development of the concept of parental rights as fiduciary rights is undertaken in Scott and Scott (1995).

rearing of children is anything but. How should we interpret the *parens patriæ* power so as to avoid what is quaint while retaining the valid insight?[14]

One interpretation, which I will call 'the classical interpretation', holds that the fundamental right to determine the care and custody of children resides with the state *and not with the parents*. On this interpretation, the state delegates the cluster of rights referred to as parental rights to the child's parents (typically), who act as trustees of the state interest. Being the fundamental right holder, the state is entitled to determine the goals and ends for which parental authority will be exercised and to remove parental rights when they are exercised in a manner contrary to the wishes of the state.

A second interpretation, which I call 'the contemporary interpretation', understands the doctrine merely to assert a state interest in the care and rearing of children. This interpretation does not derive the rights and authority of natural and adoptive parents from this state interest, though it holds that the state interest can be invoked to protect children from abusive parents.

Depending on the details of the interpretation, the practical implications of these two approaches can be identical.[15] Given this, can there any compelling grounds for preferring one interpretation to the other? The grounds for such preference cannot lie simply in the extensional implications of the interpretations, if I am right that with suitable embellishment the interpretations can have identical implications. But there may, nonetheless, be grounds for such a preference; there may be strong *theoretical* grounds for preferring one of these interpretations.

The classical interpretation, for example, might appear to receive support from the fact the rights of parents over their children are limited, potentially overrideable, fiduciary rights. For suppose that, *ab initio*, these rights reside in the state under the doctrine of *parens patriæ* and are entrusted by the state to the natural or adoptive parents. This seems to explain nicely the fiduciary aspect of the rights, why the rights are limited and why the state retains the right to judge when the parents have violated the trust. The state, on this account, is the trustor. As such, the state can set the terms and limits of the trust relationship, specify the ends for which it is constructed, and retain the right to determine when it has been violated.

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[14]For a more complete discussion of how the doctrine has been interpreted, and how that interpretation has changed over the centuries, see Venable (1966) and Hershkowitz (1985).

[15] Imagine, for example, that the trust invested in the natural or adoptive parents is one that is protected by significant safeguards. This would make the implications of the classical interpretation similar to those one would, *prima facie*, associate with the contemporary interpretation. Alternatively, the limitations on the rights and authority of natural and adoptive parents under the contemporary interpretation could be held to be so restrictive that the state begins to look more like the holder of parental rights.

But this is not a good reason to accept the classical interpretation. In the first place, if our sole reason for adopting this interpretation is the belief that it is necessary to explain the limited, non-absolute and fiduciary aspects of natural and adoptive parents' rights with respect to their children by appeal to a more fundamental right of the state to determine the care and custody of children, we would be left unable to explain satisfactorily the fact that the right of the state with respect to the care and custody is, itself, limited, non-absolute, and of a fiduciary nature. This alleged fact could be denied, of course, and I will not argue for it extensively here, but the implications of denial are unpalatable. Does not the state have, under the doctrine of *parens patriæ*, a responsibility to exercise parental rights for the benefit of the children? Can the state, unlike the parent, do no wrong in the exercise of its *parens patriæ* authority? Are there no limits on this authority? I believe that the state is at least as bound by considerations of the interest of the child as are the parents. The state's right over children is both limited and non-absolute, as is the parents'.

If this is correct, we gain nothing in seeking to explain these features of the rights of parents by appealing to the classical interpretation of the *parens patriæ* doctrine, for we shall have to find an explanation for the limitations and the fiduciary aspect of the state's right. When we have done so, we shall have found an explanation that the defender of the contemporary interpretation can employ to explain these features of the rights of natural and adoptive parents.

Second, if we believe that appeal to some sort of unlimited and unqualified right inhering in the state is necessary to explain the limitations in the rights of citizens or to explain why the state may have the authority to determine when those limits have been violated, we take a significant step toward an illiberal, totalitarian view. Our most sacred rights have limitations and are subject to state review. Surely we do not want to say that the rights of free speech and freedom of religion are grounded in absolute and unlimited rights inhering in the state—rights which the state chooses to entrust, in a limited and non-absolute fashion, to individuals.

So, the apparent explanatory power of the classical interpretation is apparent only, and the appearance is a dangerous one if we want to maintain the assumptions of liberal democracy. This removes a potential reason for favoring that interpretation and, furthermore, provides a good reason for rejecting it. If ever there was a relationship that is not grounded in social convention, political institution and law, the parent/child relationship is such a one.[16] This relationship

[16] Here, and throughout the paper, I am speaking of a parent/child relationship in a sense that neither presupposes, nor is ensured by, a biological relationship. A parent/child relationship is one that is typically manifested between biological parents and their children. It is also displayed in typical adoptive relationships. Sadly, it is sometimes not displayed between children and their biological parents; and, critically for the argument of this paper, it is sometimes the state itself that interferes with the maintenance of this relationship when both a biological parent and his children very much desire its continuance.

is paradigmatic of a natural relationship—far more so than the relationship one has to property, or to others in virtue of contractual acts.[17] This does not mean, of course that the parent/child relationship is uninfluenced by social conditions. The argument of this paper would be very much weakened if that were so. Rather, it means that the relationship is not a creation of the state; it is not the property of the state.

John Locke appreciated this aspect of the nature of the parent/child relationship, though he expresses his awareness of it a way that may not be fully acceptable to the modern reader. Locke sees parental power as a form of natural government (§170, *Second Treatise*) in which parental power is based on a duty which is incumbent on parents "to take care of their Off-spring, during the imperfect state of Childhood" (§57, *Second Treatise*). "[A]ll *Parents* . . . [are] by the Law of Nature, *under a natural obligation to preserve, nourish, and educate the Children*, they had begotten . . ." (§56 *Second Treatise,* emphasis in original). This duty and the resultant powers are in no way the creation of the state. And, as Locke says, "This shews the reason how it comes to pass, that *Parents in Societies*, where they themselves are Subjects, retain a *power over their Children*, and have as much right to their Subjection, as those who are in the state of Nature" (§71, *Second Treatise*, emphasis in original).

Bruce Hafen is perhaps more explicit:

> The common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental cultural assumption about the family as a basic social, economic, and political unit. For this reason, both English and American judges view the origins of parental rights as being even more fundamental than property rights. Parental rights to custody and control of minor children have been variously described as 'sacred' as a matter of 'natural law', and as 'inherent, natural right[s], for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed.' *These judicial word choices imply that the parent-child relationship antedates the state in much the same sense as natural individual rights are thought to antedate the state in American political philosophy.*"[18]

[17] I believe the parent/child *relationship* is a "natural" one, and that this feature (which I here leave largely unanalyzed) does provide reasons for limiting state interference in the relationship. I do not, though, rest my argument on a Lockean account of natural rights, at least if such an account is understood as entailing that natural rights are God-given, self-evident or morally foundational. It is the relationship, not the right, that is claimed to be natural.

[18] Hafen, (1976), pp. 615-616 (emphasis added, modification in the original, citations omitted).

Many accounts for the nature and basis of parental rights could be offered and, here, I neither defend nor endorse any specific account. This will seem unsatisfactory to those seeking foundational answers. It might also be objected that the present argument cannot proceed without a commitment to specific moral theory from which to derive parental rights. After all, the argument is not fully independent of the content of parental rights and, unless we understand the foundation of such rights, we cannot be confident about their content. But this is a naive "first-things-first"-ism. While it is certainly true that the content of parental rights will depend on what moral theory grounds them, it is also true that some of our settled convictions about the nature of parental rights are more certain than is any moral theory that might be offered to ground them. Thus, we typically test moral theories in part by examining their implications for more mundane moral judgments. That the slavery practiced in the antebellum South violates individual rights to liberty and self-determination, can plausibly be asserted and relied on before we answer the rather abstract philosophical questions of whether these rights are natural and fundamental, or grounded in some social contract, or based on social utility or respect for persons or whatever.

While there is much that may be controversial about the nature of parental rights, I am assuming that one aspect of any adequate theory of such rights is brought out by the accounts of Locke and Hafen. That is that parental rights are not to be viewed as rights of the state that are delegated to parents. Parental rights protect the interests of parents and children in a relationship that is natural and independent of the existence of a state; and one of the things it protects these interests from is undue state interference in this relationship. Critically for doctrinal purposes, this is the interpretation the Supreme Court appears to accept in holding that "[i]t 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."[19]

The "Best Interest Standard" v. the "Harm Standard": It is a given that the state has an interest in the well-being of minor children (and others not

[19] Prince v. Massachusetts, 321 U.S. 158, 166 [1944]. In this section I have considered just two views about only one aspect of the nature of parental rights and their relation to the doctrine of *parens patriæ*. I opt for a view of parental rights that does not see these rights as derived from the *parens patriæ* doctrine *via* delegation of a state power. But, many questions remain to be settled. Are parental rights natural rights in a Lockean sense, or are they to be derived from an appeal to social utility or a hypothetical contract among the members of society? Are parental rights fundamental rights? While I reject a derivation from state powers of *parens patriæ*, I have not argued against the intriguing view, suggested to me by Vittorio Hosle (conversation), that parental rights are derivative from children's rights—perhaps that they should be viewed as powers and responsibilities in the service of such rights. This is a very attractive view, but one that remains to be worked out. I would welcome such a development in the full expectation that the argument of this paper would be at least as forceful on such an interpretation of parental rights.

capable of fending for themselves). As noted above, it is also true that parents have fundamental and nonderivative rights and responsibilities with respect to the rearing of their children. With these competing interests in the balance, we ask: *what* must be shown, and *according to what standard of evidence*, to justify state interference with parental rights?

Concerning what the state must show to be justified in interfering with parental rights, it might appear that there is only one reasonable position: The state is justified in interceding whenever it can show that it is in the best interest of the child to do so.[20] The best interest standard has the virtue of apparently supporting our social self-image of putting children first.[21] 'The best interest of the child' fits in easily with 'motherhood' and 'apple pie'—with 'truth', 'justice' and 'the American way'. It is hard to oppose the best interest of the child; and we should not. The best interest of the child should be paramount. However, it does not follow that the best interest *standard* should be accepted.

Acceptance of the best interest of the child as the primary, or even *sole*, goal of our adoption of a governmental policy does not entail acceptance of a policy of governmental action based on a best interest standard. Let me illustrate this with a well-known example—one drawn from the philosophical literature of liberty. John Stuart Mill's defense of his famous principle of liberty finally turns on what I shall call 'the best policy argument':

> [T]he strongest of all the arguments against the interference of the public with purely personal conduct is that when it does interfere, the odds are that it interferes wrongly and in the wrong place.[22]

Mill is not denying here that there may be governmental actions violative of his liberty principle that would promote social utility, which he "regard[s] . . . as the ultimate appeal on all ethical questions."[23] There may well be such actions. But, we cannot trust government to interfere with liberty at the correct times and in the correct ways. So, we pursue social utility by placing restrictions on the government's power to pursue social utility.

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[20] Ellen Canacakos (1981) rejects the best interest standard in cases of deprivation of parental rights in the context of divorce. Her arguments are based on appeals to consistency with cases of removal of parental rights of parents in intact marriages. This is a sound argument provided sound arguments can be given for rejecting the best interest standard in the latter case. If there is no such argument, consistency can be satisfactorily achieved in either of two ways.

[21] This often seems more rhetoric than reality. Judges and politicians sit in air-conditioned, marble-floored offices and pronounce on the best interest of children who are sweltering in old, crumbling, poorly ventilated classrooms with too many other children in the classroom and all of them using outdated textbooks.

[22] See Mill (1968) p. 198.

[23] *Id.* at 130.

Just as Mill believed that the sum of individual utility could be promoted by imposing constraints on the power of government to do what, by its lights, promotes social utility, so, I believe, the goal of promoting the best interest of children is best achieved by placing constraints on the power of government to do what, by its lights, promotes the best interest of children. These constraints are individual rights—here, parental rights. So, we say, the government has an interest in promoting social utility, but, *in the interest of social utility*, we do not grant to government the right to act in whatever manner it believes will promote social utility. The government has an interest in promoting good speech, I think, but it would be unwise, *from the standpoint of promoting good speech*, to grant to government the right to interfere with speech it finds not to be good. The government has an interest promoting the well-being of children, but, I argue, *from the standpoint of promoting the well-being of children*, the government ought not to have the power to act in whatever way it deems in the best interest of children. The best strategy for promoting the interests of children is to place barriers on the state's powers to promote the best interest of children.

One, but only one, source of government error involves overlooking a phenomenon of which Mill was well aware. Interference, he reminds us,[24] has costs and risks of its own. Those advocating interference with liberty, as well as those advocating interference with parental rights, seem sometimes to forget this. While it is true that individuals will often make choices contrary to their best interests (or the best interests of their children), it does not follow from this that government interference to enforce the preferred course of action will be in the best interest of the individual (or the child). Freely choosing to pursue a career in medicine might be in the best interest of an individual who, imprudently, seeks instead a career in film making. By definition, the government cannot coercively interfere with this choice so as to bring about a *free choice* to pursue the career in medicine. Thus, the government's decision is always between, on the one hand, coercing a course of action which would, if uncoerced, be optimal and, on the other, allowing the individual to pursue a non-optimal course of action. Coercion is, plausibly, intrinsically bad;[25] furthermore, coerced action does not typically yield outcomes that are as good as those which would result from what is otherwise the same course of action, freely chosen. As a result, coercing what would be, if freely chosen, the best course of action is often unjustified once the costs of coercion are considered. This point is easily overlooked in the earnest pursuit of worthy goals. While parents may often make decisions that are not in the best interests of their children, it certainly doesn't follow that it is in the best

[24] *Id.* at 198-99.

[25] This does not entail, of course, that it is always wrong to coerce, only that the coercive aspect of an action is always a moral deficit.

interest of the children for the parents' decision to be coercively interfered with. The state must tread lightly and interfere reluctantly precisely because it is inherently clumsy and it carries a big stick; the use of this stick has consequences besides those of the behavior coercively brought about. Nowhere is this more true than in the intensely private realm of the parent-child relationship.[26].

Thus, it is not only consistent with, but plausibly suggested by liberal political theory, that parental rights (and the rights of children) serve as a barrier to governmental attempts to promote the best interests of children—and this role can be justified precisely because it serves the best interest of children. If our goal is the best interest of children, we might, quite rationally, pursue this by limiting governmental power to pursue the best interest of children. This is, I believe, why we do not accept a best interest standard in determination of involuntary termination of parental rights with respect to intact marriages; it is why we do not allow governmental interference with specific decisions of custodial parents on the basis of a "best interest of the child" standard. [27] It is why we should not (even setting aside a consistency argument) do so with respect to involuntary termination of parental rights in the context of divorce.

On the other hand, parents sometimes make choices with respect to their children that are so clearly and seriously harmful to the children that any meaningful interpretation of the *parens patriæ* doctrine must allow interference. The exact wording of the appropriate standard can be contested, as can the *interpretation* of whatever wording is justifiable. I would propose something along the lines of the harm standard invoked for justifying state interference with parental rights in intact families,[28] and will assume some such standard throughout the following discussion.

The Standard of Evidence: Conceding that parental rights could be removed by the state because of its interest in the well-being of children upon a showing that retention of those rights is harmful to the child, it remains to be determined by what standard of evidence this must be shown. While there is

[26] Goldstein, et al. (1973); and Scott & Scott (1995) pp. 2417, 2430

[27] Goldstein, Freud and Solnit (1973) stress the importance of a stable parental authority figure in children's lives. This entails that, even when the state could find a better custodial adult to care for a child, it may not be in the child's best interest to break the bonds with the current, sub-optimal custodial parent in order to be placed in the care of the better care-giver. Parents are not fungible commodities and there are enormous emotional costs imposed on the child when care-givers are changed. This reminds us that changes have costs and that what otherwise might seem like the best situation may not be the best one for us to bring about given the cost of "getting from here to there". Mill's treatment of liberty points to a different problem. Applied to the issue of the standard for state interference with the parent/child relationship, Mill's insights go beyond citing potentially overlooked costs. He provides the schema for an argument for preventing an agent (here, government) from directly pursuing a goal (the best interest of the child) because that goal can be better achieved if the agent is not allowed to pursue it directly.

[28] *See* Parham v. J.F., 442 U.S. 584, 604-05 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. at 652-53 (1972).

controversy concerning this, caution suggests that the currently accepted standard of "clear and convincing" evidence is prudent.[29] It should be difficult for the state to interfere with fundamental rights.

We will proceed on the following assumptions: parental rights are fundamental and not derivative from a state power or interest; while the state has in interest in the well-being of children, it has the power to interfere with parental rights directly and substantially only upon a showing by clear and convincing evidence that interference is necessary to prevent harm to the children, and that the interference with parental rights employed is the least restrictive means available to prevent this harm.

DUE PROCESS IN THE TERMINATION OF PARENTAL RIGHTS

The focus of this paper is on due process considerations in the denial of parental rights—especially *pendente lite*—in the context of divorce. However, discussion of due process considerations in this context is not as extensive as one might like. The paucity of writings on this topic is one reason for looking to other contexts. Perhaps the arguments developed in these contexts may shed some light on the issues of present interest. Furthermore, as has been suggested, there are reasons of consistency for looking to these other contexts: absent a justification for different standards and procedures being used in different contexts, it seem reasonable to assume that the denial of parental rights should be subject to the same protective procedures. We shall see in the next section that they are not. In this section, we will examine the due process considerations that arise with respect to termination of parental rights in non-divorce contexts. We should do so with an eye toward determining whether there is reason to think that the arguments for these procedures are sensitive to the differences between the context of divorce and other contexts.

While controversies surround the issue of procedures and standards of evidence for the complete and permanent termination of parental rights, a useful summary of the current reasoning of the Supreme Court as stated in *Santosky* v. *Kramer*, 455 U.S. 745 (1982) is provided by Josephine Fiore.

> In *Mathews* v. *Eldridge*, the United States Supreme Court developed a three factor test to determine whether due process has been satisfied. The first factor to be examined is the private interest that will be affected by the official action. Second, the risk of error existing within the current procedures is compared to the probable value of any additional safeguards. Finally, the state's interest is evaluated along

[29] *Santosky*, 102 S. Ct. 1388.

> with the possibility of any additional costs or administrative burdens incurred by changing the existing procedures.
>
> The right of parents to raise their children is fundamental and falls within the liberty interest defined by the fifth and fourteenth amendments. The parents' interests concerning the upbringing of their children are entitled to constitutional protection. Due process protections are invoked when governmental action threatens parents' rights to the custody of their children. Parents may not be deprived of the right to raise their children absent a strong governmental interest.
>
> The state, as *parens patriæ*, has an interest in the welfare of its children. The state's interest, however, is secondary to the parents' interest. The state may intervene only if the parents fail in their responsibility to care for their children.[30] (Fiore, 1982, pp. 141-42, citations omitted.)

Considering the importance of the interest protected by parental rights and the risk of error, the Santosky Court reversed the trial court's decision that was based on a fair preponderance of the evidence and held that "clear and convincing evidence is the minimum constitutional standard for the termination of parental rights."[31]

Our argument concerning the procedures for the suspension or termination of parental rights in the context of divorce will parallel the above argument. I contend that the above argument applies as well to that context. The consequence is that procedures which suspend or deny parental rights in this context without requiring the demonstration by clear and convincing evidence that a state interest is being served by such action and that this interest cannot be served by any less restrictive action are unconstitutional and violate basic human rights.

DIVORCE PROCEEDINGS AND THE DENIAL OF PARENTAL RIGHTS

While the details of divorce proceedings will vary from one jurisdiction to another, what follows is not uncommon, I believe. When one party sues the other for divorce, requesting custody of the minor children, and the other party responds also requesting custody, there is an opportunity for the parties to agree to custody matters *pendente lite* (during the period of litigation). If the parties cannot agree concerning the custody of the children during the period of the legal proceedings, the court (a judge or referee), based on either a brief hearing or affidavits, awards temporary custody.

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[30] Fiore (1982) pp. 141-42 (citations omitted).

[31] *Id.* At 146 (citations omitted).

The phrase "award custody" constitutes a strange twisting of reality in the context of divorce, dissolution and most other conflicts over custody between natural and adoptive parents. Such parents typically appear before the court at the outset each with full parental rights.[32] No one is *awarded* rights; one parent is *deprived* of rights. The "award" of custody in such cases is neither the granting of rights, nor the transfer of rights; it is the denial of rights. And the temporary "awarding" of custody is really the suspension (temporary deprivation) of rights. It is important to remind ourselves of this, I think, so that we examine the procedures we employ in this process with an appropriately skeptical eye.

The procedures for "awarding" custody *pendente lite* do not require evidence, or even an assertion, that the person whose parental rights are abridged has abused, or is likely to abuse, his or her parental rights. They do not require evidence that the retention by both parties of their parental rights would be harmful to the children or even contrary to their best interest. They do not require evidence that the retention by both parties of their parental rights would adversely affect the interest of either parent. They do not require evidence that there is any state interest at all in suspending the parental rights of one of the parties. The procedures leads to the direct and substantial denial of parental rights without any requirement of evidence that a state interest is involved, without any requirement of evidence that there is no less restrictive means to achieving any legitimate state interest that might be involved, virtually without any of the standard due process protections.

It should be noted that the determination of exclusive custody to one parent, either temporary or permanent, does not involve the complete suspension or termination of all rights and responsibilities for the noncustodial parent. Obviously, many parental responsibilities typically remain, including, of course, the obligation of financial support. Similarly, some of the rights remain. The right to prevent adoption remains in effect, for example. Usually there is the right to the limited companionship of the children through "visitation", though mechanisms for enforcing this right are weak.

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[32] Canacakos (1981, pp. 790-91) argues persuasively that the rights in question attach to individuals *qua* individuals. In addition to the points she makes, the view that the rights in question do not attach to individuals in this way forces some intellectual contortions. For example, suppose one holds that parental right attach to the "marriage". Each individual parent acts as an agent of this corporate right-holder while the marriage is intact but, upon divorce, the state must determine where to invest new, individual parental rights. This view raises at least two problems: since the marriage is still intact until the divorce decree, it must be explained why the parental rights possessed by the marriage cease, *pendente lite*, when the marriage is still in existence; more troublingly, it must be explained why if either parent dies or abandons the other, the remaining parent retains all parental rights without any new judicial pronouncement. These problems are not insoluble for one dedicated to the thesis that parental rights are not the rights of individual parents. Legal fictions abound and new ones can be created at will. But there are blemishes to be covered if one takes this line and the resulting position looks as if it will be awkward and *ad hoc*.

The fact that not all parental rights and responsibilities cease with the temporary or permanent loss of custody should not obscure the fact that this is a taking of rights of the sort described in the opening paragraph. When rights are "bundled" in familiar packages (as parental rights are), it is not necessary for the entire bundle to be suspended or revoked in order for there to be serious infringements on one's rights. The retention of some parental rights does not contradict the assertion that parental rights are suspended or terminated in the divorce process.

Nor is the seriousness of the situation diminished significantly by the fact that we are concerned here, for the most part, with the temporary suspension of rights *pendente lite*—during the pendency of the legal action. (Indeed, as shall become clear, the timing of the temporary custody decision makes it of the utmost importance to preserving the parent/child relationship.) As those involved in the practice of domestic law know, '*pendente lite'* may refer to a period of many months, often years and sometimes many years. With the deprivation of rights with respect to children, even more so than with deprivation of other rights, "justice delayed is justice denied". The brief years of childhood are unrecoverable. To be denied the parenting relationship with one's children for any significant period of time is to be permanently and irrevocably denied parenting the children during that precious period of their lives.[33] And, it should be remembered, even when the litigation period does not seem especially long by adult standards, it will seem very long to a *child* deprived of meaningful contact and a parenting relationship with one of his or her parents. Furthermore, even in the absence of a legal supposition to this effect, temporary orders establish a *status quo* with respect to the custody of the children with which courts are (sometimes not unreasonably) loath to interfere unless there is positive evidence of adverse effect on the children.

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[33]Of course, to be temporarily incarcerated is to be permanently and irrevocably denied one's liberty *during that period of time*. (It is not as if that time can be given back to you.) And to be temporarily deprived of your property is to be permanently and irrevocably deprived of it for that period of time. There seem to me to be two salient points of distinction between the case of parenting a child and these other cases. First, unless the deprivation in these other cases is for a very significant period of time, one period of time is much like another. This is not true of parenting a child. Second, these other sorts of deprivations, again unless they are for a very long period of time, seem compensable in fairly standard ways. I don't know how you compensate a parent, wrongly deprived of the right to rear his or her child even for a relatively short period of time. I don't know how you compensate a child, wrongly denied the right to be parented by one of his or her parents, even for a short period of time.

The arrest and incarceration of a parent of minor children involves, as a secondary effect, exactly the same deprivation of time with the children. Of course, the law requires that there be probable cause of guilt to justify such deprivations, and, except in very unusual cases, defendants retain their liberty *pendente lite*. (I am grateful to Julia Carpenter-Hubin for bringing both the similarity and the difference to my attention.)

Finally, and very importantly, even the temporary suspension of parental rights appears likely to so disrupt the parenting relationship as to permanently impair it. Citing Judith Wallerstein and Joan Kelly (1980), Edward Kruk says:

> There is a critical period that strongly influences the nature of postdivorce father-child relationships: the transition period from the point of . . . [separation] to approximately six months to one year after, a time when multiple stresses and adjustments impinge on all members of the divorcing family, *legal processes have their greatest impact, and access patterns are established and consolidated*.[34]

Far from being a decision that courts can take lightly because it is "just temporary", the determination of custody *pendente lite* is one of the most serious decisions made in cases of divorce precisely because it determines the quality of the parent/child relationship during "this critical period". It deserves more care and attention than it receives.

There is a further tragic irony in our current practice. Since it is typically (probably in excess of 90% of the time) mothers who receive temporary custody, fathers are generally denied parental rights and, depending on the decisions of the custodial mother, the parent/child relationship these rights serve to protect. Kruk's research shows, tragically, that it is those fathers who are most involved with their children and with the day-to-day running of the household who are especially likely to be forced out of the lives of their children by the "access patterns . . . established and consolidated" *pendente lite*.

> [F]athers describing themselves as having been relatively highly involved with and attached to their children and sharing in family work tasks during the marriage were more likely to lose contact with their children after divorce, whereas those previously on the periphery of their children's lives were more likely to remain in contact. . . . Now-disengaged fathers consistently scored highest on all measures of predivorce involvement, attachment, and influence.[35] ()

The period of divorce litigation is a time when it is *most* important not to disrupt the parent/child relationship more than necessary. It is period during which there should be, if anything, heightened scrutiny of the demand that one parent be deprived of parental rights. The fact that it is merely "temporary custody" may lead us to think too lightly of these decisions. But the research shows that this temporary period comes at a time when the maintenance of a real

[34] Kruk (1994) p. 21 (citation omitted, emphasis added).

[35] *Id.* at 20 (citation omitted).

parenting relationship between the child and both parents is absolutely crucial. "Temporary custody" is not a matter to be taken lightly in divorce proceedings. Much is at stake.

DUE PROCESS AND PARENTAL RIGHTS IN DIVORCE

The commonplace is often almost invisible—the most common injustices are hardest to see. The injustice of racial segregation, so apparent to one not reared in a racially segregated society, is frequently hidden from those ensconced in such a social setting. People raised in a segregated society, even those otherwise of good conscience, often struggle to see the injustice of the arrangement. Feminists have repeatedly urged retreat from familiar institutions and "consciousness raising" in order to look on sexually discriminatory institutions with a fresh eye—to see anew what was formerly invisible by virtue of being ubiquitous. If I am correct, we fail to see the gross injustice of current procedures for determining the custody of minor children of divorce only because we see it so much.

If so, a first step toward awareness is to look on the practice as an alien anthropologist might. We will then see a typical contested custody situation as one in which two persons, both of whom love, care for and provide for their minor children walk into a courtroom, each asking that the other be deprived of the most significant parental rights. During the period of the litigation over this disagreement, the court temporarily deprives one party of these important parental rights with little or no evidence, and often without even an allegation, that there is any state interest in doing so, that the interests of any other person (particularly the children, of course) would be harmed by such rights not being suspended. The temporary situation becomes the *status quo* and as a practical matter, with no legal presumption, shifts the burden of proof onto the person whose rights have been suspended to show why the deprivation of rights should not be made permanent.

The argument against this practice is remarkably simple. Parental rights are fundamental, constitutionally guaranteed rights.[36] The procedures for the determination of temporary custody in divorce proceedings typically result in the direct and substantial deprivation of such rights without any demonstration of the existence of a state interest in such deprivation. As I shall indicate shortly, the deprivation of rights in question imposes an undue burden on those whose rights are infringed. These procedures, then, deprive citizens of fundamental rights

[36] In addition to the citation in the opening paragraphs of this paper, see *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972), *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968), and *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974).

without due process of law. They are, therefore, unconstitutional deprivations of basic human rights.[37]

It is worth saying a word in passing about a different line of justification for awarding sole custody to one parent. There is interest in some quarters in returning to a "fault-based" system of divorce. Though most current proposals involve fault only in the instance where the divorce is not agreed to by both parties, one could imagine an extreme version of the system that allowed divorce (at least between parents of minor children) only upon the finding that one party to the divorce is at fault. Then, it could be argued that the party at fault has forfeited parental rights to the faultless party.[38] Whatever the merits of such an extreme fault-based system of divorce (and I think they are seriously overbalanced by the demerits), the problems arising from the employment of such a system for determining parental rights upon divorce are apparent and severe. First, conflict between divorcing parties will be magnified immensely—with each party fearing the loss of the parent/child relationship upon their being found at fault. Secondly, this system can hardly make any claim to be "child centered" since the party at fault may well be the party better able to care for the children and provide for their needs. In any event, barring a presumption of fault *pendente lite*, even the acceptance of a fault-based system would have no bearing on the matter of primary interest here—the procedures for determining temporary custody—because during the pendency of the divorce proceedings there has been no finding of fault. There could, of course, be a presumption of fault *pendente lite*, but the basis for such a presumption would have to be carefully thought out and cogently defended given the importance of maintaining parental contact during the period of litigation.

THE INTERESTS PROTECTED BY PARENTAL RIGHTS

The Interests of Parents: I began with various legal declarations concerning the importance of parental rights. I argued that certain common procedures for determining the custody of minor children *pendente lite* (and perhaps procedures used for determining custody permanently) in cases of divorce violate due process considerations. Some see the violation of due process as always a matter of real importance. Others may see it as of merely theoretical interest unless the legal right in question protects an important interest and the violations of due process result in real harm. I side with the first group but happily confront the challenge posed by those in the second camp.

[37] This is merely the skeletal version of the argument; a "fleshed out" variant would follow closely the Court's reasoning in *Santosky*.

[38] I am grateful to Vittorio Hosle for pointing out this possible line of argumentation.

Parental rights protect vital human interests and the suspension or termination of those parental rights which are lost when one loses custody in divorce proceedings causes real psychological and physical harm. The evidence for this claim is compelling.[39] It is important to recall, though, that traditional deprivation of custody comprises deprivation of many of the rights bundled under the cluster concept of *parental rights*. As a result, it is not possible at this time to determine which ill-effects of losing custody result from the deprivation of which parental rights. With the increase in the frequency of situations in which there is joint legal, but sole physical, custody, the possibility arises for separating the issue of time with the children from that of other legal rights and responsibilities. However, it is questionable whether joint legal custody means very much in the practical, day-to-day guidance and nurturing of one's children if one is denied meaningful physical custody of the children.[40] The rights of merely legal custody are often abstract, difficult to enforce and of little practical significance.

As a practical matter, the study of the effects of deprivation of parental rights must proceed by looking at the available populations which have traditionally been: those with extensive physical contact and the standard "bundle" of parental rights subsumed under the term 'custody' and those with relatively little (or no) physical contact and extremely limited parental rights. The increasing popularity of joint physical and legal custody (or 'shared parenting') has provided a new population for very recent and future studies to compare with the previous two.

To set the context, it is important to recognize that the mental and physical well-being of fathers (who, somewhere around 90% of the time, are the "noncustodial" parent) is far more dependent on their relation with their children than is commonly understood. "[A] man's life as a father is central, not peripheral, to his health."[41] Problems with men's physical health (including fatigue, sleeplessness, back problems and more) increase with worries about their children and their parenting relationship with their children. Their sense of self-esteem is similarly affected. And, perhaps surprisingly, worries about their children and their parenting relation with them proved a greater hindrance to job performance for men than for women.[42] Apparently, men demonstrated less

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[39] See, for example, Stewart (1984) and Greif (1988).

[40] Kelly (1991, p. 23) reports that "[j]oint *legal* custody . . . was not found to be significantly linked with higher levels of father involvement in decision-making or time with children, nor did it result in greater compliance with child support, after controlling for income" (emphasis in original).

[41] Rivers and Barnett (1993).

[42] Deater-Deckard, Scarr, McCartney and Eisenberg (1994) found that fathers reported similar levels of separation anxiety as mothers and slightly *higher* levels of concern for their children left in day care facilities. Fathers tended to overestimate their wives' concern and the authors of this study speculate that this might be the result of the fact that it is "socially more acceptable for mothers' anxieties to exceed fathers' than for fathers' to exceed mothers'. Fathers know how anxious they feel themselves, and they may adjust their

(cont'd.)

ability than women to "compartmentalize," leaving their worries about their children outside the office.[43]

Given all of this, it should come as no surprise that men deprived of a parenting relationship with their children—deprived of the parental rights of companionship and guardianship—are adversely affected by the deprivation. And this is precisely what we find. J. W. Jacobs reports that divorcing fathers' overriding concern is with their continuing contact with and relationship with their children.[44] Dr. Robert Fay, M.D. reports that the typical non-custodial "father is also buffeted with feelings of grief, loss, anger, and failure, he experiences increasing desperation as he now begins to appreciate the depth of the gulf (physical and psychologic) that now exists and is widening between him and his children."[45] Debra Umberson and Christine Williams point out that "divorced fathers exhibit higher rates of health-compromising behaviors than do other groups of parents"[46] and "exhibit high rates of psychological distress, alcohol abuse, and mortality."[47] They conclude that "strain associated with the parental role may be one of the most important factors contributing to the distress experienced by divorced fathers."[48] Hypothesizing from qualitative aspects of their study that one reason for this is the perceived loss of control of one's children associated with being consigned to the status of visitor with one's children, they note that "[a] substantial body of literature suggests that perceived loss of personal control contributes substantially to psychological distress."[49]

Geoffrey Greif and Mary Pabst conclude that:

> Apparently, many fathers, like mothers, give up custody reluctantly . . . and feel ambivalent about it. It is difficult for them to separate from their children, even though it is the norm. We may need to rethink many of the normative views that we have about men suffering less than women when they are separated from their children. Just because their noncustodial status puts them in a fairly large group with other fathers, this does not mean that it is a comfortable role for many of them.[50]

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perceptions of their wives' concerns to exceed their own, regardless of mothers' actual level of anxiety" (p. 345).

[43] There is a growing body of research that supports the conclusion that men's satisfaction with their parenting role is central to their physical and emotional well-being. See Barnett, Marshall and Pleck (1992), Rivers and Barnett (1993), and Barnett and Marshall (1993).

[44] Jacobs (1982).

[45] Fay (1989) p. 415.

[46] Umberson and Williams (1993) pp. 378-79.

[47] *Id*. at 378.

[48] *Id.* at 397.

[49] *Id*. at 398 (citation omitted).

[50] Grief and Pabst (1988) p. 203. [Footnote incorrect in original publication.]

Put more positively, Joan Kelly reports the results of numerous studies that show that "*Fathers* with joint physical custody have consistently reported more satisfaction than fathers with visiting status."[*] A father's parental rights—including importantly, but not exclusively—the right to the companionship of his children, protects a vital human interest. Denial of the right has a severe adverse impact on real human beings.

If anything, the toll on non-custodial mothers seems likely to be higher, at least in some respects. Since mothers are expected to get custody of their children absent being demonstrated to be unfit, non-custodial mothers are likely to be viewed with suspicion. Either the court has found them to be unfit or, perhaps worse yet, they have voluntarily given up custody. In either case, they are likely to be subject to some social stigma. While forced separation from one's children and the deprivation of a true parenting relationship is extremely difficult for most parents of either sex, non-custodial women tend to have greater problems with feelings of guilt, with negative reactions from others, and with financial problems.[51]

The damage done to parents, deprived of parental rights appears to be individually devastating in many cases and it is certainly widespread. Parental rights serve to protect the parent/child relationship and, by so doing, protect an important parental interest. It is worth noting in passing, though it serves no role in the argument presented here, that a more equitable division of parental rights and responsibilities than arises under the custodial-parent/visitor model is also beneficial to many who would otherwise be the sole custodial parent.[52]

Beyond Parental Rights and Interests—The Interests of the Children: The following worry probably has arisen in the reader's mind: much has been said about parental rights, about due process and about the interests of parents, but, while the issue of children's interests arose in discussing the standard to be employed for governmental interference, no attention has been paid to the issue of what *is* in the interest of children. The overwhelming consensus in the literature on this issue is that, in the vast majority of cases, it is in the best interest of the children of divorce and dissolution to continue to have a true parent/child relationship with both parents. While I will return to this issue offering some substantiation, here is not the place to give a sustained argument for this conclusion. If the court makes a correct determination based on clear and convincing evidence (and following appropriate procedural safeguards) that, in a particular case, it is harmful to the children to continue to have a true parent/child relationship with both parents, that finding in itself grounds, under

[*] Kelly (1991) p. 24 (citations omitted). [Footnote omitted in original publication.]

[51] Greif and Pabst (1988) pp. 205-6.

[52] See, for example, Susan Steinman (1983), Maccoby *et al.* (1988), Anne Mitchell (1992) and Karen DeCrow (1994).

the doctrine of *parens patriæ*, a state's right to intervene to deny parental rights to one or both parents. Rather than ignore the issue of the interests of the children, I assume that it is precisely those interests that can override parental rights. But, because parental rights are fundamental rights, the determination that it is harmful to the children for both parents to retain full parental rights has to be made—it has to be made in the individual case and it has to be made based on clear and convincing evidence, with adequate procedural safeguards. Absent this, there is no adequate basis for the state's denying a parent his or her parental rights (and, in the same stroke, denying children the right to a parenting relationship with both parents).

One might argue, parents in contested divorces are, *by this very fact*, at odds with one another. Surely it is reasonable to establish the presumption that it is in the best interest of the children to be shielded from the conflict as much as possible. The awarding of temporary custody, our opponent might claim, is a reasonable—perhaps even necessary—means to this worthy end. I think not.

Even if there were evidence (and there is not) that, in the majority of cases of contested divorce, parents are so embroiled in conflict that it is in the best interest of the children to have parental rights suspended for one of the parents, that would not justify a legal presumption in favor of such suspension. Because the parental rights involved are constitutionally guaranteed, fundamental rights, such a state policy would have to survive strict judicial scrutiny. This means that it would have to be shown at least that there is no less restrictive method of protecting the children's interests. But there is a less restrictive means to the end of shielding children in contested divorces in those cases where the retention of parental rights by both parents would be harmful to the children. It would require a specific determination, based on evidence, that the particular situation is of this sort. No doubt, this would involve greater costs than a blanket assumption that the parental rights of one parent must be suspended in contested divorces. However, a legal presumption infringing on fundamental rights may not be made simply because it is administratively more efficient and less costly than making an individual determination[53] and the state may not adopt a statutory scheme that deprives individuals of rights "without reference to the very factor that the State itself deem[s] fundamental to its statutory scheme."[54]

Were it the case that in most contested divorces there is so much hostility between the parties that it would be harmful to the children for both parents to retain parental rights, we would have reason for expecting most of the hearings on such an issue to be decided in one way. We would not have, as yet, any reason

[53] See, for example, *Stanley* 405 U.S. 645 (1972), Carrington v. Rash, 380 U.S. 89 (1965), Bell v. Burson 402 U.S. 535 (1971), Reed v. Reed, 404 U.S. 71, 76 (1971).

[54] *Bell,* 402 U.S. 535 (1971).

for denying parental rights without a specific finding. In fact, though, we should *not* expect that most hearings would result in the deprivation of parental rights *pendente lite*. It appears clearly *false* that it is typically harmful to children for both parents to retain parental rights and, thereby, a full parenting relationship with them. Quite the contrary. To be sure, there may be a few who still agree that joint custody is an arrangement "to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child."[55] Some *contemporary* authors may agree in substance, even if not in the intemperate language. But, the bulk of contemporary research seems to be of another opinion.

Joan Kelly cites numerous studies showing that "children describe the loss of contact with a parent as the primary *negative* aspect of divorce."[56] "Joint physical custody appears to result more often in maintenance of the father child relationship. . . . Father 'dropout' . . . occurred significantly more often in sole custody arrangements compared to joint custody."[57]

Robert Fay, in summarizing the results of a variety of studies, says, "the prime issue, for postdivorce stability and mental health for children is continued close, frequent, and meaningful interaction with *both* parents."[58] He emphasizes that "children's psychologic needs for loving contact with both parents should *immediately*, not 3 months later, dictate frequent contact with dad right now, regardless of mother's anger, state of being upset, or vindictiveness."[59] Fay's emphasis on the need for *maintaining* the parent/child bonds with both parents (rather than breaking it during the pendency of the litigation and then trying to re-establish it when the litigation is over) is especially warranted in light of the research, cited earlier, by Wallerstein and Kelly and by Kruk showing that the period of litigation is a critical one in establishing and consolidating the access patterns between children and parents. Apparently, the access patterns we are establishing by the presumption of sole temporary custody are having the disastrous effect of driving away from their children the most involved, attached and influential fathers. What must a child make of this? What must it mean to a child to find that a parent who was uncommonly involved in his or her life suddenly is unavailable and no longer shares in the important decisions concerning his or her life?

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[55] McCann v. McCann, 173 A. 7 (1934).

[56] Kelly (1991) p. 16.

[57] *Id.* at 25. *See* Andritti (1992, p. 192): "The finding that joint-custody fathers appear to have more contact with their children than do noncustodial fathers is of particular interest. . . . The results of the multivariate analysis suggest that custody status per se seems to facilitate fathers' involvement. Even when variables related to the predivorce quality of the father-child relationship are controlled, joint-custody fathers still appear to be more involved with their children after the divorce."

[58] Fay (1989) p. 415 (citations omitted).

[59] *Id.* at 412 (citations omitted).

Susan Steinman cites three broad benefits co-parenting was found to have for the children of divorce:

> First, they received the clear message that they were loved and wanted by both parents. Second, they had a sense of importance in their family and the knowledge that their parents made great efforts to jointly care for them, both factors being important to their self-esteem. Third, they had physical access to both parents, and the psychological permission to love and be with both parents.[60]

Children are aware of these benefits. Kelly reports the result of various studies as follows:

> In general, children have expressed higher levels of satisfaction with joint physical custody than with sole custody arrangements, citing the benefit of remaining close to both parents. They did not struggle with the sense of loss and deprivation so characteristic of children in sole-custody families. Joint custody doesn't create uncertainty or confusion for the majority of youngsters about either the arrangements themselves or about the finality of the divorce, and doesn't increase loyalty conflict.[61]

I believe we are in the happy situation in which doing the right thing legally—respecting the rights of all parties to a legal controversy—is also, typically, doing the best thing morally. It is usually best for the parents and the children alike. Even were there no rights-based argument to be made, this would constitute an excellent policy-based argument for establishing a legal presumption in favor of joint legal and physical custody, both *pendente lite* and permanently.[62]

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[60] Steinman (1983) pp. 746-747.

[61] Kelly (1991) p. 24 (citations omitted).

[62] Another interesting policy consideration in favor of such a legal presumption concerns the legal shadow in which negotiations about custodial matters takes place. A clear presumption about custody leaves parties to a divorce less prone to litigation. The strong presumption, prior to the early part of this century, of *paternal* custody, presumably served as a deterrent to legal efforts to obtain maternal custody. The strong presumption, *de jure* or *de facto*, for *maternal* custody from the early part of this century to the present, deterred fathers from seeking custody. The new standard of the "best interest of the children" substitutes for a clear presumption one that involves a highly contestable concept, and one which each party has reasons for seeing differently. This seems a recipe for encouraging litigation. On the other hand, suppose the courts were to say to divorcing couples: absent a showing that it is harmful to the children to have each party retain full parental rights, you will both retain such rights—now work out a detailed plan for sharing parental rights and responsibilities that fosters a true parenting relationship between the children and both parents. Such a presumption casts the right shadow for divorcing parents to bargain in.

SUMMARY AND CONCLUSION

The argument presented here is simple, but powerful. Fundamental human rights, recognized by the Constitution, ought not, legally or morally, to be suspended or denied without just cause and due process of law. This is especially important when these rights protect important human interests. Parental rights are fundamental human rights recognized by the Constitution. Furthermore, they protect important human interests of both parents and children. These rights are typically and systematically suspended or denied in divorce proceedings. The state's interference with these rights during divorce proceedings requires strict judicial scrutiny because the procedures involve the direct and substantial deprivation of fundamental rights and impose an undue burden on one parent (and, I believe, often on the children). Our current procedures for determining custody of children during the pendency of a divorce case *fail* the strict scrutiny they demand—they deprive individuals of fundamental, constitutionally recognized, human rights without just cause or due process of law.

Fidelity to the Constitution and to the human rights it seeks to protect requires that we modify our practices. It requires a presumption in favor not only of joint legal custody, but of a fairly equal division of the children's time between the parents. Obviously, one of the most important of the parental rights is the right to companionship with one's children. Both parents have equal rights to this, and it should be the presumption of the court that this benefit and responsibility will be equally shared. Furthermore, the effective exercise of many of the other parental rights involves having reasonable physical custody of the children.

Assuredly, this presumption is rebuttable. But it must be rebutted by clear and convincing evidence that there is some important state interest (like the welfare of the children) at stake that cannot be achieved by any less restrictive means than suspending or denying the parental rights of one of the parties. Since the important state interest of protecting children can be achieved without a *systematic* policy of depriving one parent of fundamental rights *pendente lite*, this practice is unjustified.

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