Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a Measure of Institutional Competence?

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abstract

This article explores the use of the best interest standard in the context of third-party interventions in ongoing parent-child relationships. I start by examining the history of the best interest standard and show that it has had different meanings in different eras. I then address the nature of the family and the question of whether interests beyond those addressed in the child's best interest standard are a legitimate part of family decision-making. I conclude that ongoing families are entitled to at least a measure of deference in their decisions about their children. Third-party interventions, such as those of doctors or judges, should require something more than simply a difference of opinion about where the child's interests lie. *Pediatrics* 2014;134: S111–S120

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The "best interest of the child" is the iconic standard courts use to resolve disputes about children. It took hold in the context of 2 proceedings in which judicial intervention is not at issue. The first involves disputes among parties with equal standing. If the father wants his son circumcised and the mother does not, the parents may appeal to the courts and the courts typically resolve the matter in accordance with their assessment of the child's best interest. The second involves cases in which there is no custodian with the authority or the will to make a decision. Consider an orphaned child who would like to participate in an experimental cancer treatment. No official may be willing to make a decision that might expose the official or the state to liability if things go badly. The agency might ask the courts to decide, and they would again do so in accordance with the child's best interest.

The harder cases involve the use of the standard either to determine when the courts should intervene in an intact parent-child relationship or what standard to use when they do. What if the parents, for religious reasons, refuse to vaccinate a 3-year-old in the midst of a pertussis outbreak? Can objecting doctors ask the courts to intervene on the basis of a best interest analysis? Opponents to such interventions frequently invoke the idea of "family privacy." Family privacy, in turn, is often conflated with the notion of parental rights and, indeed, in a number of cases, the Supreme Court has held that parents have a fundamental liberty interest in "the care, custody, and management" of their children.[1]

Yet, the idea of family privacy is not identical to the notion of parents' rights and parents' rights, where they do exist, are not absolute. Instead, the courts struggle with 2 ideas in deciding whether third parties should be allowed to intervene in existing family relationships. The first involves the intrusiveness of the intervention itself. Interventions into ongoing families may have negative consequences for children because of the form the intervention takes. Consider, for example, the state response to parents who refuse to vaccinate their 3-year-old. If the courts rule that the parents must facilitate the vaccination and the parents refuse to comply, the courts could authorize state officials to remove the child from the parents' custody and allow the doctors to give the child the shots. Involuntarily taking a 3-year-old, however, may inflict terror on the child and, even if the child takes the events in stride, the state officials carrying out the court orders may find them distasteful. Such an intervention may well infringe on notions of "personal dignity,"[2] including the dignity of the child and the enforcing officials, even in cases in which the parents' behavior is unreasonable.

The second consideration involves the parents' ability to balance concerns that courts and other third parties may not identify with the child's interests. In deciding to forego vaccinations for religious reasons, the parents may be concerned about their and their child's participation in a religious community. Suppose, for example, that the parents have older children who benefit from inclusion in the community and the parents risk ostracism if they vaccinate their children? The parents' decision, whether it advances the 3-year-old's narrow interests, may benefit the family as a whole.

This article will explore the question of the best interest standard in the context of third-party interventions in ongoing parent-child relationships. It will start by examining the history of the best interest standard, which has had different meanings in different eras. Second, the article will address the nature of the family as an ongoing unit and the question of whether interests beyond those addressed in the best interest standard are a legitimate part of family decision-making. The article concludes that ongoing families are entitled to a least a measure of deference in their decisions about their children and that third-party interventions should require something more than simply a difference of opinion about where the child's interests lie. Insisting on vaccination of a child in the midst of a pertussis epidemic may well be appropriate, but care should be taken to minimize disruption of ongoing families.

THE BEST INTEREST TEST

Historical Origins

The best interest of the child standard is centuries old.[3] It begins as a trump that supersedes parental authority. Nonetheless, invocation of the standard to substitute the views of a third party, such as the courts, over the views of otherwise fit parents remains limited. On the relatively few occasions when the US Supreme Court has addressed this issue, it has been more likely to limit than expand application of the standard.[4] Nonetheless, the distinctions between use of the standard to justify intervention and use of the standard to resolve a case once intervention has occurred have never been clearly delineated.

The standard clearly begins as a justification for intervention. The first reported cases come from the 18th century. English law permitted fathers to appoint guardians with decision-making power over their children, and the Chancery courts had authority to oversee the guardians "for the benefit of the infant."[5] Conflicts arose when testators conditioned inheritances on the father's appointment of a guardian for the child. If the father accepted the inheritance, he ceded his authority over the child; if he did not accept, the English courts concluded that he had waived his

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parental rights by failing to show "due attention to the interests of the child."[6]

These rulings articulated a potentially sweeping justification for intervention, allowing the courts to substitute their judgment for the fathers as to where the child's interests lay.[5] Yet, in other respects, they were limited. The conflicts over appointment of a guardian arose either when the father was no longer able to act or in the context of a probate decision in which the courts were already overseeing disposition of an estate. In addition, the father who refused to appoint a guardian in such contexts arguably had a conflict of interest, although one we would think strange today.[5] Nonetheless, these rulings gave rise to 2 subsequent lines of cases of greater import: custody cases that involved conflicts between fathers and mothers and abuse and neglect cases.

Custody

The best interest of the child standard has had its greatest influence in custody cases, initially as a doctrine that allowed courts to recognize the importance of the mothers' role in the child's life and more recently as a way to mediate between mothers' and fathers' competing claims. Even in this context, however, the courts have remained wary of completely open-ended applications of a best interest standard.

Early English and American laws were said to treat children largely as their "father's property."[3] The earliest cases to recognize mothers' interests did so as an extension of the early English cases that justified intervention where the father had failed to act in the child's interests, such as cases in which the father was abusive, unfaithful, or failed to support the family.[7] Over time, however, the best interest standard became the more general test for custody disputes, curbing the primacy of the father to recognize mothers' interests.[3] Although the test gave courts greater ability to make individualized determinations, most courts apply mechanical rules to interpret children's interests.[8] First, by the beginning of the 20th century, the courts began to identify the best interest of a child of "tender years" with maternal custody.[8] Then, as divorce became more common, the courts identified children's interests with the continued involvement of both parents.[9] To be sure, courts retained the ability to depart from these expectations to protect children's interests, but such departures are the exception rather than the rule.[8]

The Constitutionalization of the Parental Preference Standard

The Supreme Court has been reluctant to grant children rights that could justify third-party intervention overriding parental preferences. Although the precise contours of the best interest standard have been left to the states,[10] the court's recent pronouncements reaffirm the propriety of restricting application of the best interest standard.

In *Michael v Gerald*,[11] for example, Justice Antonin Scalia's plurality opinion for the Court upheld the constitutionality of the marital presumption and, in doing so, ruled that unmarried biological fathers have no constitutionally protected rights to assert paternity over the wishes of the mother and her husband and the child had no separate, constitutionally protected interest in a relationship with the man she called "Daddy." The states were thus free to adopt statutes that limited the standing of third parties, including unmarried biological fathers, to assert any relationship to a child.

Justice Scalia similarly refused to use a best interest test to justify challenges to immigration procedures regarding children who might be deportable. In ruling on the case, he distinguished the role of the best interest test in custody cases from other potential applications:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.[12]

Scalia's opinion underscores the special circumstances of divorce proceedings and it rejects the idea of a best interest standard per se as justification either for intervention in an ongoing family or as the substantive standard by which such interventions are to be judged.

Although Scalia's musings in *Reno v Flores* may be mere dictum, the Supreme Court's subsequent decision in *Troxel v Granville*[4] is entitled to greater weight. In *Troxel*, the court considered the constitutionality of a Washington statute that permitted the courts to "order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."[13]

Justice O'Connor's plurality opinion emphasized the constitutional protection accorded to "the interest of parents in the care, custody, and control of their children."[4] In identifying the problems with the Washington statute, O'Connor underscored its breadth, noting that the statute allowed "*any person*" to petition "*at any time*" (italics in original)[4] and that the statute applied a best interest standard with no deference

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whatsoever to the parents' views. O'Connor wrote that this "places the best-interest determination solely in the hands of the judge."[4] Although the justices did not necessarily agree on the reasoning, a majority of the Supreme Court concluded that the statute violated the mother's constitutional rights in the case by imposing grandparent visitation without giving any presumption of validity to her views.

The decision in *Troxel* has reinforced state decisions that limit the standing of third parties to challenge family decisions and to restrict use of open-ended best interest determinations. The subsequent decisions require a presumption in favor of the views of a fit parent, with many states mandating a showing of detriment to the child to overcome the presumption.[10]

Abuse and Neglect

The cases to descend from the early English best interest decisions are abuse and neglect cases and these cases, although they continue to justify intervention in accordance with a broader conception of the child's interests, have a deservedly mixed reputation. The cases rest on the principle that outside parties should be able to prevent harm to a child and that a best interest analysis should govern that intervention.

Reasons for concern begin with the first cases. The English judges, after all, thought that a wealthy and involved father who had an affair could not be a fit parent, even though the mother had died.[4] The most common cases involved poverty or bankruptcy. Marsha Garrison observed that "[d]uring the nineteenth century, poverty remained virtually synonymous with neglect and permanent separation of parent and child continued to serve as the preferred remedy for need."[14] Inadequate food, substandard housing, and insufficient supervision justified state intervention and removal of children from their parents.[14]

Today, courts have become more likely to intervene to prevent neglect and physical and sexual abuse.[15] Critics argue, however, that such interventions continue to reflect a "dual system" of family law that defers to the well-off and intervenes in the families of the poor, particularly single-parent families receiving state aid.[16]

Law professor Cynthia Godsoe observed that findings of child abuse or neglect often focus on "parental conduct that, while perhaps undesirable, does not cause proven harm to children."[17] A study in Washington, DC, found that 75% of children removed from their parents did not meet the necessary standard of risk.[17] Instead, children are routinely removed in part for "dirty houses" or parental marijuana use so minimal that the amounts do not merit a misdemeanor criminal charge.[17]

The courts have acknowledged these reservations. In 1982, the Supreme Court, in a 5 to 4 decision, ruled that New York's "fair preponderance of the evidence" standard was insufficient and that the due process clause required that the state support its allegations "by at least clear and convincing evidence" to terminate parental rights.[1] The court observed that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias."[1] There is no reason to believe that such determinations would be any different today.[18]

HEALTH CARE DECISIONS AND THE BEST INTEREST STANDARD: THE ROLE OF INSTITUTIONAL CONCERNS

Health care decision-making takes place in between the custody and the termination of parental status arenas. On the one hand, health care decisions, unlike custody hearings, do not typically take place within an ongoing judicial proceeding. Review occurs either when the parents do not agree with each other or when a third party questions the parents' wishes.

On the other hand, health care decisions do routinely involve health care professionals. Like the social workers who initiate abuse and neglect charges, these third parties may initiate actions when they disapprove of parents' decisions.

The application of a best interest standard in these cases is likely to parallel the same institutional concerns that occur in the context of custody and neglect decisions. First, the courts rarely apply an open-ended best interest standard that allows third parties to determine the child's interests independently of parents' preferences; instead, an open-ended best interest standard is most likely to be applied when the courts do not trust parental decision-making. Second, in applying a best interest test, courts can and do consider the impact on the child's caregivers. The deference given to parental authority is not just a matter of parental rights. It also reflects the court's consideration of the impact on the child of imposing an outcome on an unwilling caretaker. Finally, courts may define the child's interests in terms of a larger set of societal concerns.

The Exceptions: Intervention and the Detriment Standard

The treatment of children starts with deference toward parental preferences.[19] Yet, parental rights are not absolute. In *Prince v Massachusetts*, a member of the Jehovah's Witnesses had her 9-year-old niece selling newspapers in violation of state labor laws. In upholding the aunt's conviction, the Supreme Court observed that

> The right to practice religion freely does not include liberty to expose the community or the child to communicable

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> disease or the latter to ill health or death . . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[20]

Judicial intervention is most common when the courts do not trust parental decision-making. The clearest examples involve a risk of harm to the child, particularly when the parents indicate that they are willing to sacrifice the child's interests to vindicate the parents' beliefs or commitments. Common law courts have historically exercised a *parens patriae* power, that is, "a sovereign right and duty to care for a child and protect him from neglect, abuse and fraud during his minority."[21] Parents have been held to a similar duty "to provide reasonable care, protection, maintenance and education for their children." If the parents were unable or unwilling to discharge that duty, the common law courts could "act to protect the interests of the child, take custody from the parents and appoint a guardian."[21] Indeed, one of the earliest interventions justified by a best interest standard involved a father who failed to secure appropriate medical care for his children.[22]

The most straightforward application of these principles with respect to medical decisions has come in the cases involving Jehovah's Witnesses who refuse to consent to blood transfusions for their children on religious grounds. An empirical review found that in all but 2 cases, the courts ordered the transfusions over parental objections.[23] The 2 exceptions involved older teens, close to the age of majority, who shared the parents' religious beliefs and agreed with the parents' decision. Although a showing of detriment to the child is relatively easy to make in most of these cases, the courts varied in the standard they applied. A closer examination of one of the cases in which court applied a lower standard, however, illustrates just why the courts are particularly willing to intervene in these cases as a matter of institutional allocation of decision-making responsibility.

In *In re Sampson*, a 15-year-old suffered from a rare neurofibromatosis disease that caused extreme disfigurement of the face and neck.[24] The mother, a member of the Jehovah's Witnesses, had consented to surgery to correct the child's appearance but not to the blood transfusions likely to be necessary in surgery of this kind. The surgery was risky in any event; it was dramatically more likely to cause death if transfusions were ruled out. The case is unusual in a number of respects. First, the boy's condition was not life-threatening; the primary benefit of the surgery was likely to be its impact on the boy's appearance. Second, the surgery, although it could improve the boy's quality of life, would neither cure the disease nor eliminate the disfigurement. Third, the surgery could be postponed until the boy reached the age of majority and could make his own decisions. Indeed, the doctor testified not only that the surgery could be postponed without worsening the likelihood of its success, but that it was likely to be safer at an older age because the risk of bleeding would be reduced. In short, the testimony in the case indicated that reasonable people might disagree on the timing and the merits of the surgery altogether.

The court nonetheless appointed a guardian for the purpose of ensuring consent to the surgery and, if needed, the blood transfusions. In doing so, the New York court rejected the proposition that the courts could intervene only in "'drastic situations' or . . . those which constitute a 'present emergency'."[24] Instead, the court held that it had "a 'wide discretion' to order medical or surgical care and treatment for an infant even over parental objection, if in the Court's judgment the health, safety or welfare of the child requires it."[24]

I suspect that the court at least implicitly applied the following calculus to the decision. The mother had approved the surgery but not the transfusions; therefore, the court could conclude that there was no objection to the surgery itself. The decision to permit the surgery without transfusions, however, was either irresponsible because of the greatly increased risk to the child or a failure to make a decision at all because the mother's position left it up to the doctors to determine whether the surgery without transfusions was too risky to undertake.

That made it relatively easy for the court to substitute its judgment for the mother's. The family and the doctors all wanted the surgery. The mother objected to the transfusions for religious reasons and her son concurred in her judgment. For either the parent or the child to authorize the transfusions meant a break with their church, and both believed that such a break imperiled their spiritual lives. The court could spare them the agony of a painful choice by making the decision for them. The judge was not endangering his soul by making such a decision and the mother gave no indication that she or her church would reject the son because of court-ordered blood transfusions.[25] The result, although it could be said to violate the family's autonomy, could be seen as a win-win scenario: the surgery could go ahead without the family having to confront a choice between their religious scruples and the quality of the son's life.

The Best Interest Standard and Parental Prerogatives

A second type of case, which produces far more deference to parental decision-making on institutional grounds, involves donation to siblings. In *Curran v Bosze*, the Illinois Supreme Court refused to approve a bone marrow donation because

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of the donor children's best interest.[26] The case, however, can also been seen as a classic interpretation of the children's interests in accordance with an allocation of decision-making power to the primary custodial parent.

In this 1990 case, the father, Tamas Bosze, had a 12-old-year son, Jean Pierre Bosze, diagnosed with leukemia. Bosze had also fathered 3.5-year-old twins in a different relationship. Bosze and the twins' mother, Nancy Curran, had never married and he had initially denied paternity. When the twins were 2 years old, the parents agreed to a parentage order that gave Curran sole custody. It also stated that "In all matters of importance relating to the health, welfare and education of the children, Mother shall consult and confer with Father, with a view toward adopting and following a harmonious policy."[26]

After Jean Pierre's doctors recommended a bone marrow transplant and Jean Pierre's other relatives turned out not to be compatible donors, the father asked the twins' mother to have a blood test performed to determine whether the children were compatible. The intrusiveness and discomfort of the blood test would be minimal, but the twins' mother refused to permit it because she objected to the bone marrow transplant. The father sought a court order compelling the tests.

In the hearing, the father asked the court to apply a "substituted judgment" test that would attempt to replicate the decision the twins would make if they had reached the age of majority. The mother asked the court to apply a "best interest" test that would determine whether the bone marrow transplant would be in the twins' best interests before compelling the test for compatibility.

The court rejected the application of a substituted judgment test on the grounds that it required finding something that did not exist: the children's likely preferences based on their "philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes toward sickness, medical procedures, suffering and death."[26] The twins simply had not had the opportunity to develop moral worldviews and any substituted judgment would therefore have to rely on the decision-maker's "speculation and conjecture."[26]

Instead, the court applied a best interest test.[26] It observed that the mother, as the twins' sole custodian, could under Illinois law "determine the child[ren]'s upbringing, including but not limited to, [the] education, health care and religious training, unless the court, after hearing, finds, upon motion by the noncustodial parent, that the absence of a specific limitation of the custodian's authority would clearly be contrary to the best interests of the child[ren]."[26] In defining the children's interests, the court noted that donation could be considered to be in a child's best interests when the donor had a close relationship with the recipient and the recipient's death would have a significant effect on the child's quality of the child's life.[26] In the *Curran* case, however, the twins had met their older half-brother only twice, for brief periods.[26]

The court effectively sealed the outcome once it decided to base the decision on the best interest of the twins. A bone marrow donation would be uncomfortable for the donor and pose significant risks because of the general anesthesia necessary for the procedure.[26] Moreover, although the medical testimony indicated that Jean Pierre would almost certainly die without the transplant, some testimony indicated that his prospects were poor in any event.[26] The court required a clear showing that the transplant would advance the donor child's interests without consideration of the benefit to the sick child, and no such case could be made. The Illinois courts refused to order the tests or the bone marrow donation and Jean Pierre died 2 months after the court ruling.[27]

Although this decision was a particularly painful one, the outcome resembles more prosaic custody decisions. In these decisions, the courts typically defer to the preferences of the primary custodian. Consider, for example, a dispute between 2 parents over whether a child should have elective surgery to correct an obstruction to the daughter's nose that occurred as a result of a bicycle accident.[28] The father objected that the surgery was unnecessary; the mother (and the treating physician) thought it would improve the child's quality of life. The New Jersey court applied the same test as the *Curran* court; it concluded that overruling the preferences of the custodial parent required a clear showing that the custodial parent's decision was not in the child's interest.

In other states, the trial courts are required to make independent findings as to where the child's interests lie.[29] Even then, the courts often consider the role of the custodial parent in implementing a court's decision. In the *Curran* case, for example, experts indicated that the twins' response to the donation would depend to a large degree on their mother's reaction. A psychologist asked specifically what factors would determine the potential psychological effects on a 3.5-year-old child from being a bone marrow donor responded that "first and foremost" is support from the important adults in the child's life.[29] The psychologist observed that

> The mother's inability for whatever reason to concur and to support this process probably puts the—not probably, almost certainly puts the children at very serious risks for having adverse psychological consequences or results of this procedure.[29]

He added further that even if the mother pretended to support the twins during the procedure, the twins might sense

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her ambivalence and the twins "would not know if they can rely on the mother's emotional expression as a guide for things that would be safe or dangerous for them or good or bad for them." The psychologist concluded that the result could "compromise her relationship with the children and leave them floating in a nether land in this matter."[29]

In the *Curran* case, it is of course hard to know whether the mother acted out of genuine concern that the twins be subjected to a risky procedure with only a small chance of helping their half-sibling or whether she acted to spite the father. Either way, the *Curran* court's conclusion, both in terms of the way it structured the legal test and in terms of its analysis of the children's interests, identified their well-being with the preferences of the custodial parent. The court might well reach a different result had the custodial parent approved.

State Wariness and the Judicial Role

A third category of cases involves state concern about the nature of the procedure even when the parent's decision may arguably be in the child's interest.

Vaccinations, for example, present a free-rider problem.[30] Because vaccinations typically involve some risks, the ideal for every individual child would be if the others around the child were vaccinated but not the child herself. Yet, the courts routinely override parental objections to mandatory vaccinations.[31] In this context, the parents' preferences for the child and, indeed, the individual child's interests are largely irrelevant.

Sterilization has been associated with theories of eugenics that justified compulsory sterilization of those thought of as "defective" in an effort to improve the gene pool.[32] A total of 60 000 Americans were sterilized at the height of the movement, and Hitler, using language from the American efforts, sterilized millions more.[32] In addition, fears of promiscuity have sometimes led to sterilization, particularly in women with disabilities. In 1927, the US Supreme Court upheld the constitutionality of a Virginia statute authorizing sterilization of institutionalized mental patients without their consent.[33] The court famously declared that "[t]hree generations of imbeciles are enough."[33] Yet, Carrie Buck had been institutionalized after a rape and later writers would show that neither she nor her honor student daughter were either promiscuous or "imbeciles."[32]

Given this history, the courts are understandably wary of authorizing sterilizations, whatever the parents' wishes. The Colorado Supreme Court held in 1981 that

> Simply allowing the parents or guardians of the mentally retarded person to substitute their decision and consent to sterilization for that of the incompetent person is not an adequate solution to the problem. Consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.[34]

The Colorado court accordingly adopted a particularly strong statement of the best interest test, holding that sterilization could only be justified when a court found by clear and convincing evidence that "the sterilization is medically essential" and medically essential was defined to mean "clearly necessary, in the opinion of experts, to preserve the life or physical or mental health of the mentally retarded person."[34]

The result, however, does not necessarily lead to more searching inquiries into an individual's particular interests. A recent study found that of 8 cases addressing the proposed sterilization of mentally disabled children, the courts permitted the sterilization in 2 cases, did not permit the sterilization in 4 cases despite similar facts, and deferred decision in the other 2.[23] The author concluded that invocation of the best interest standard often obscured rather than illuminated the basis for the decisions.[23]

THE BEST INTEREST REDEFINED: ADDING THE FAMILY BACK IN

The best interest standard, both when it is strictly applied and when it isn't, reflects institutional concerns. These concerns involve the family as a unit. It is not just that parents can ordinarily be expected to take children's interests into account to a greater degree than other decision-makers; it is also that parents' attitudes and behavior affect the children even when the parents are not necessarily acting in the children's interests. Moreover, however easy it is to posit cases in which the courts and other third parties should intervene to protect children's interests, it is equally possible to point to other cases in which such interventions reflect judicial bias.

This section will reexamine the role of best interest considerations that involve the family as an institution, looking first at cases in which parents withhold lifesaving treatments; second, the tradeoffs among different family members in donation cases; and third, caretaker concerns in modern sterilization cases.

The Family as the Crucible That Determines the Child's "Best Interests"

When the Jehovah's Witness family approved surgery but not the blood transfusions, the court perceived win-win possibilities. Other scenarios pose lose-lose propositions. *Newmark v Williams*[35] presents such a case. The

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child, Colin Newmark, was a 3-year-old with a deadly, aggressive, and advanced form of pediatric cancer known as Burkitt lymphoma. The doctors prescribed chemotherapy; the parents, Christian Scientists, preferred to rely on spiritual aid and prayer.[35] The parents, who had consented to an earlier surgery, opposed the proposed treatments as a violation of their beliefs. The trial court, concluding that spiritual treatment was an inadequate alternative to chemotherapy, ruled that the failure to provide medically approved treatments constituted neglect under Delaware law.[35]

The Supreme Court of Delaware reversed the decision. The justices chided the family court for failing to consider "the special importance and primacy of the familial relationship," emphasizing that in "many circumstances the State simply is not an adequate surrogate for the judgment of a loving, nurturing parent. . . . As one commentator aptly recognized, the 'law does not have the capacity to supervise the delicately complex interpersonal bonds between parent and child.'"[35]

The court justified its conclusion that the decision to rely on prayer was in Colin's best interests because of the nature of the treatments involved. The doctors had advocated an extremely aggressive cancer regimen that could permanently damage the child's kidneys, cause neurologic side effects, and risk exposure to infection.[35] Even if successful, the treatment offered at best a 40% chance of survival and Colin would have to be placed with foster parents who could monitor and supervise the procedures. The court explained:

> The egregious facts of this case indicate that Colin's proposed medical treatment was highly invasive, painful, involved terrible temporary and potentially permanent side effects, posed an unacceptably low chance of success, and a high risk that the treatment itself would cause his death. The State's authority to intervene in this case, therefore, cannot outweigh the Newmarks' parental prerogative and Colin's inherent right to enjoy at least a modicum of human dignity in the short time that was left to him.[35]

Colin died shortly after the Delaware Supreme Court announced its decision. Court-ordered chemotherapy was unlikely to have saved him.[36]

Family Trade-offs and the Individual Child

Newmark involved family preferences as a factor in the individual child's best interests; family preferences present a more difficult issue when they involve trade-offs among family members. The *Curran* court nonetheless found that even when the parents consent, the procedure should only be performed when it is in the donor child's interests.[36] To make that determination, the courts look for a close relationship between the donor and the recipient. This psychological benefit "is not simply one of personal, individual altruism in an abstract theoretical sense, although that may be a factor"; instead, it comes from a continuing relationship between the siblings and the potential impact of the recipient sibling's death on the donor.[36] Practically, however, the courts often do not intervene when the case involves consenting parents and an intact family. They are more likely to do so if the hospital objects or if the donor is mentally disabled.

In *Strunk v Strunk*,[37] for example, the Kentucky Court of Appeals authorized a kidney transplant from a mentally disabled adult to his 28-year-old brother. The 27-year-old donor had the mental capacity of a 6-year-old. The court, after hearing testimony that the recipient's death would be extremely traumatic for the donor, concluded that "it would not only be beneficial to [the ward's brother] but also beneficial to [the ward] because [the ward] was greatly dependent upon [his brother], emotionally and psychologically, and that [the ward's] well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."[37]

Even though the parents and the Department of Mental Health agreed that the operation should take place, the court of appeals split 4 to 3 in authorizing the operation. Justice Steinfeld's dissent referred to his "indelible recollection of a government which, to the everlasting shame of its citizens, embarked on a program of genocide and experimentation" and described himself as torn between the desire "to aid an ailing young man and a duty to fully protect unfortunate members of society."[37] He doubted that the court had the power to authorize the donation at all.

This judicial disagreement about the legal status of organ donors with disabilities leads to a number of ironies. Adult siblings can reach their own decisions and doctors testified in the *Curran* case that they typically agree to donate.[26] With minor donors without disabilities, the courts often defer to the parents' decisions.[38] With the mentally disabled, third parties are almost inevitably involved and they may view the case through the lens of mental disability. As a result, the disabled donor is more vulnerable both to parental and third-party decisions. Justice Steinfeld, for example, dismissed the conclusions of the psychologists who supported the donation decision, observing that "[i]t is common knowledge beyond dispute that the loss of a close relative or a friend to a six-year-old child is not of major impact."[37]

The dissent's observations, even if they are true, give no weight to the donor's interest in the survival of his sibling or the impact of the court's decision on the family relationships. The donor in this case had a close relationship with his ill brother, his only sibling. Moreover, the brother's death would certainly have an impact on the parents that might affect their relationship with the donor. The dissent's failure to consider the family context in a case like this substitutes the court's distaste for authorizing the

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procedure for serious consideration of the donor child's interests as a member of an ongoing family.[39]

Determining When Best Interests Depend on the Capacity of the Caretaker

If broader family interests are grounds for deference in many cases to parental wishes, there are also circumstances in which they are cause for concern. The sterilization cases, for example, both present circumstances in which the parents' desire to sterilize a teenager may be misguided and circumstances in which the benefits to the teenager outweigh her interests in retaining the ability to procreate.

Consider the Connecticut case of *Ruby v Massey*.[40] The case involved 3 girls in state facilities on the verge of adolescence with significant mental disabilities. The girl who had already begun to menstruate suffered from severe and painful cramping, could not care for her own hygienic needs, and experienced psychological stress during her periods. The court concluded further that the girls would be subject to grave risks if they became pregnant "because they are incapable of communicating with a physician about their own physical condition, i.e., whether they have had fainting spells, whether they are in pain, whether they can feel the fetus move, whether they are in labor."[40] The court also found that they could not reliably use standard means of contraception and that regular gynecologic checkups posed difficulties because of their lack of understanding and cooperation.[40] The court concluded that the girls' best interest justified sterilization. In many ways, however, the more immediate consequences occurred to the caretakers who would have to see to the girls' hygienic needs and supervise their behavior.

The courts have had greater difficulty with cases that raise supervisory concerns directly. In *Conservatorship of Valerie N*,[41] for example, the California Supreme Court denied a parental request to sterilize a mentally disabled adult daughter. The daughter, who had an IQ of 30, had been living at home, showed aggressive tendencies toward men, and required continual supervision to prevent pregnancy. The parents argued that the need to provide that supervision affected the parents' ability to provide continuing care. The state Supreme Court ruled that the parents had failed to present sufficient testimony about whether she could conceive and the alternatives to sterilization. Yet, the parents had offered testimony about contraceptive efforts that failed because of their daughter's lack of cooperation, more evidence than had been offered in *Ruby v Massey*.[41] As a practical matter, proving that she had the ability to conceive would be difficult and ruling out the possibility of other contraceptives was close to impossible because the court identified 49 different contraceptives that could be tried.[41] The effect of the decision diverted attention toward hard-to-prove medical issues instead of Valerie's interest in avoiding pregnancy, an interest that included the impact on her caregivers and the type of supervision that she would need.[42] Valerie's interests, to a greater degree than the institutionalized girls in *Ruby v Massey*, depended on her parents' ability to care for her and their confidence in their ability to do so.

These decisions have been more effective in indicating state opposition to sterilization than in providing individualized determinations of the children's needs. Nonetheless, the cases reflect an appropriate desire to avoid an automatic conclusion that mental disability justifies sterilization. The insistence on the medical evidence about fertility and contraception, however, seems pointless when the parents show that an adult daughter, for whom they are caring in their home, will never be able to consent to sex, marriage, or childbearing.

CONCLUSIONS

Although the best interest standard is centuries old, its meaning has never been fixed. Instead, courts often invoke the standard to justify a decision made for other reasons.

Acknowledging these reasons may make the decisions that affect children's interests more comprehensible. They start with recognition that notions of family privacy involve not just parent's rights but identification of the circumstances in which children's interests may depend on their relationship with their caregivers. The state ordinarily should defer to parents in an ongoing family in which the parents' decision-making capacity has not been called into question.

When the state does intervene, the children's interests still cannot be determined in isolation. A child has an interest in being part of a family, of continuing relationships with those who will provide support during medical treatments, and contributing in turn as a full member of the ongoing community that constitutes the family. Parents should be able to balance the interests of their multiple children, and the mere fact that their obligations to multiple children conflict should not in itself disqualify their judgment.

Finally, those circumstances in which family judgments are suspect should be identified. Courts should understandably be wary of religious convictions for which parents must risk their membership in a religious community to act in their children's interests or of cases in which parental convenience may outweigh children's needs. Even then, however, the potential harms of intervention must be balanced against the advantages.

Taking a terrified child from his parents' arms is never an inspiring image. The best interest of the child standard can only advance children's interests when it is sensitive to the importance of the family in creating the context in which children experience the world.

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REFERENCES

1. *Santosky v. Kramer*, 455 US 745 (1982)
2. *Lawrence v Texas*, 539 US 558, 574 (2003), quoting *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 851 (1992)
3. Mason MA. From Fathers' Property to Children's Rights: The History of Child Custody in the United States. New York, NY: Columbia University Press; 1994
4. *Troxel v Granville*, 530 US 57 (2000)
5. Abramowicz S. English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody. *Columbia Law Rev* 1999; 99:1344–1389
6. *deManneville v deManneville*, 32 Eng Rep 762, 767 (ch 1804); *Powel v Cleaver*, 29 Eng Rep 274 (ch 1789)
7. *Blissets Case*, 98 Eng Rep 899, 899 (KB); *Mason*, id at 59 (1774)
8. McLaughlin JH. *The Fundamental Truth About Best Interests*, 54 St Louis U L J. 2009;113:126–127
9. *In re Sheavlier v Melendrez*, 744 NYS 2d 264, 266 (NY App Div 2002); Mo Ann Stat §452.375 (West 2002)
10. Maldonado S, *When Father or Mother Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 Iowa L Rev 865 (2003)
11. *Michael v Gerald*, 491 US 110 (1989)
12. *Reno v Flores*, 507 US 292, 303–304 (1993)
13. Wash Rev Code §26.10.160(3) (1994)
14. Garrison M. Parents' Rights vs. Children's Interests: The Case of the Foster Child, 22 NYU Rev Law Soc Change 1996;371:374
15. Hasday JE. Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 Geol J 2002;299:312
16. tenBroek J, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (parts I–III), 16 Stan L Rev 257 (1964); 16 Stan L Rev 900 (1964); 17 Stan L Rev 614 (1965)
17. Godsoe C. Parsing Parenthood, 17 Lewis & Clark L Rev 2013;113:125
18. Kennedy DA. Children, Parents & the State: The Construction of a New Family Ideology, 26 Berkeley J Gender L & Just 2011;78:119–120
19. Ouellette A, *Shaping Parental Authority Over Children's Bodies*, 85 Ind L J 955, 966–967 (2010)
20. *Prince v Massachusetts*, 321 US 158, 166, 170 (1944)
21. *State v Perricone*, 181 A2d 751, 759 (NJ 1962), citing *Lippincott v Lippincott*, 97 NJ Eq 517, 519–520, 128 A 254 (E & A 1925); cf *Johnson v State*, 18 NJ 422, 430, 114 A2d 1 (1955)
22. *Heinemann's Appeal*, 96 Pa 112 (1880)
23. Shah S. *Does Research With Children Violate the Best Interests Standard? An Empirical and Conceptual Analysis*, 8 NW J L & Soc Pol'y 2013;121:156–157
24. *In re Sampson*, 317 NYS2d 641 (NY Fam Ct 1970), *aff'd* 323 NYS2d 253 (NY App Div 1971)
25. *In re Application of LI Jewish Med Ctr*, 147 Misc2d 724, 729, 557 NYS2d 239, 243 NY Super Ct (1990)
26. *Curran v Bosze*, 141 Ill2d 473, 566 NE2d 1319 (Ill 1990)
27. Secter B. Boy in transplant legal battle dies of leukemia: Law: Jean-Pierre Bosze's father lost a fight to test a half brother and half sister as bone marrow donors. *Los Angeles Times*, November 20, 1990. Available at: http://articles.latimes.com/1990-11-20/news/mn-5084_1_bone-marrow-transplants. Accessed July 31, 2014
28. *Brzozowski v Brzozowski*, 625 A2d 597 (NJ Super Ct, Ch Div 1993)
29. *Lomabardo v Lombardo*, 507 NW2d 788 (Mich App 1993)
30. Fox JP, Elveback L, Scott W, Gatewood L, Ackerman E. Herd immunity: basic concept and relevance to public health immunization practices. 1971. *Am J Epidemiol.* 1995;141(3):187–197; discussion 185–186
31. *Vernonia School District 47J v Acton*, 515 US 646, 656 (1995) *Zucht v King*, 260 US 174, 176–177 (1922)
32. Lombardo PA, *Three Generations, No Imbeciles: New Light on Buck v Bell*, 60 NYU L Rev 30, 32 (1985)
33. *Buck v Bell*, 274 US 200 (1927)
34. *In re AW*, 637 P2d 366, 370 (Colo 1981)
35. *Newmark v Williams*, 588 A2d 1108, 1115, 1116 (Del 1991), quoting Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L J 645, 649 & *n* 13 & 14 (1977)
36. May L. Challenging medical authority: The refusal of treatment by Christian Scientists. *Hastings Ctr Rep.* 1995;25:15–21
37. *Strunk v Strunk*, 445 SW2d at 146 (1969)
38. *Hart v Brown*, 29 Conn Supp 368, 289 A2d 386 (Super 1972)
39. *In re Richardson*, 284 So2d 185, 187 (La App 1973)
40. *Ruby v Massey*, 452 F Supp 361 (D Conn 1978)
41. *Conservatorship of Valerie N v Valerie N.* 707 P2d 760 (Cal 1985) (en banc)
42. *Elizabeth S. Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 Duke L J 806 (1986)

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