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A MINOR OF 'SUFFICIENT AGE AND UNDERSTANDING' SHOULD HAVE THE RIGHT TO PETITION FOR THE TERMINATION OF THE PARENTAL RELATIONSHIP

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A MINOR OF 'SUFFICIENT AGE AND UNDERSTANDING' SHOULD HAVE THE RIGHT TO PETITION FOR THE TERMINATION OF THE PARENTAL RELATIONSHIP

On the windowless facade of the New York County courthouse in Manhattan a frieze is carved, symbolizing family law. The artist[1] sculpted the following three figures on this wall. Justice, depicted as a robed woman, is sitting—without a blindfold—and holding the scales of justice in one of her hands. The other hand reaches down to the two other figures in the sculpture: a child looking up and a snake writhing alongside the child.

The depiction is ambiguous. Is Justice reaching for the snake or the child? Is she going to pick up the child to protect it from the snake—or is she going to pick up the snake along with the child? Symbolically, this sculpture presents the problems of children in family law. How can the justice system best address the problems facing today's children without making the situation worse for both the system and the child?[2] Is it possible to stop the snake from biting either the child or Justice, or both?

Justice Bracewell, an English judge who was much involved with the 1989 revision of United Kingdom law relating to children,[3] notes that family law is unusual in the framework of jurisprudence.[4] Instead of making findings only with regard to past events, family law is unique in that it must assess and plan for the future.[5] Family law must redress past wrongs by anticipating with whom a child will best develop.[6] According to Justice Bracewell, in the United Kingdom the ability of family law to deal with this unique problem was "straitjacketed" by laws passed years

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1. The artist is unknown.

2. Much has been written about the rights of children within the legal system. *See generally* DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD (1993); LAURENCE HOULGATE, FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW (1988); Wendy A. Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara B. Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

3. *See* discussion *infra* part V.

4. *See* The Honorable Justice Bracewell, Q.C., Lecture on the Practical Implications of The Children Act 1989 in Comparative Family Law 1-2, at the Notre Dame London Law Centre (July 11, 1994) (transcript on file with *New York Law School Law Review*) [hereinafter Justice Bracewell].

5. *Id.*

6. *Id.*

ago which were ill-adapted to the needs of children in a rapidly changing society.[7]

What changes have precipitated this need for a revamping of family law? As early as 1930, the writer Aldous Huxley described the forces he thought were rending the family.[8] On the one hand, Huxley thought, individualism, and, on the other, humanitarianism, have changed the way society thinks of children and our responsibilities for them.[9] Humanitarianism has made us, as a society, believe that "children have rights and that we are not justified in imposing on them too strict a discipline or constraint."[10] Individualism has made "parents feel that they too have rights. . . . They want to 'live their own lives,' [and] 'to express themselves'. . . . In a word, they resent the weight of family responsibilities."[11] Huxley concludes by stating that against this double assault the family cannot stand.[12] Perhaps the failure of the law to recognize how our ideals of individualism and humanitarianism have

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7. *Id.*

8. Aldous Huxley, *Babies—State Property*, EVENING STANDARD, May 21, 1930, at 7, *reprinted in* THE HIDDEN HUXLEY 47-59 (David Bradshaw ed., 1994).

9. *Id.* at 47.

10. *Id.*

11. *Id.* at 48.

12. *Id.* at 50. Huxley, of course, went on to write *Brave New World*, in which the word, "parent" was a dirty word and "everybody belonged to everybody else." ALDOUS HUXLEY, BRAVE NEW WORLD 66-78 (Perennial Library 1969) (1932). Neil Postman, a professor of Linguistics and Communications, believes that our world is becoming distinctly more "Huxleyian." *See* NEIL POSTMAN, AMUSING OURSELVES TO DEATH 155-63 (1985).

Note also New York City's reaction to the death of Eliza Izquierdo in November, 1995 at the hands of her abusive mother. *See* Lizette Alvarez, *With Anger and Shame, a Child is Buried*, N.Y. TIMES, Nov. 30, 1995, at B1. Although the press reports condemn the mother's actions, the real blame for Eliza's death seemed to be placed on the New York Child Welfare Agency's inaction. Joe Sexton, *Officials Fault City's Inaction In An Abuse Case*, N.Y. TIMES, Feb. 16, 1996, at B1; *see also* Raymond Hernandez, *State is Ruled Accountable Over Calls on Child Abuse*, N.Y. TIMES, Mar. 2, 1996, § 1, at 22; Kate S. Lombardi, *Child Abuse System Faulted*, N.Y. TIMES, Jan. 7, 1996, § 13, at 1 (Westchester Edition). Reaction to her abuse and death was so intense that New York Governor George Pataki sought and the New York legislature passed a law (signed by Pataki) allowing prosecutors access to records involving children who had been abused and were under the state's or a city's protective care. *See* Raymond Hernandez, *Albany Set to Relax Secrecy in Instances of Child Abuse*, N.Y. TIMES, Feb. 1, 1996, at A1; Raymond Hernandez, *Law to Ease Disclosures on Child Abuse*, N.Y. TIMES, Feb. 13, 1996, at B5; Joe Sexton, *Agency's Head Assails Abuse Case*, N.Y. TIMES, Feb. 17, 1996, § 1, at 26. For further proposed changes to the New York child welfare laws, see *infra* notes 231-41 and accompanying text.

changed the family has, as Justice Bracewell states, "straitjacketed" the courts into ineffectively dealing with children.[13]

The purpose of this Note, however, is not to discuss the philosophical underpinnings of the family or even the ability of family law to anticipate and plan for future events in a child's life. Instead, this Note explores the more narrow issue of whether a child, in his or her own capacity, should be able to petition to terminate the parental relationship. The changing structure of the family and the ability of the courts to predict what will be best for a child, though, lurks behind all issues involving children and their rights in our society and in our system of justice.[14]

The position of this Note is that a minor child, as defined by each state,[15] should be able to sue on her or his own behalf for termination of parental rights, provided she or he is of sufficient age and understanding as determined by the court.[16] This position finds support from several sources: first, in one Arizona case, *Appeal in Pima County Juvenile Severance Action No. S-113432,*[17] and in various state statutes[18] and their possible interpretations by the courts; second, in other areas of the law where children's traditional legal disabilities have been abrogated; third, in the sheer amount of child abuse and neglect cases and the long delays and inefficiencies perpetuated by state social service agencies; and fourth, in the recognition of a child's right to petition in the United Kingdom under The Children Act of 1989.[19] In fact, The Children Act takes this same position—minors determined by the courts to be of "sufficient age and understanding" are allowed to petition on their own behalf.[20]

The first part of this Note examines the common law rights of children and their constitutional rights as recognized by the United States Supreme Court. The second part discusses the removal of some of the traditional legal disabilities of children in areas of the law where they may

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13. *See* Justice Bracewell, *supra* note 4, at 1.

14. *See* ARCHARD, *supra* note 2, at 1-25 (analyzing children's rights from a historical perspective); Minow, *supra* note 2, at 1903-28 (discussing the defenders and critics of "rights" in American society and the role that rights play in family law matters).

15. The usual age of majority is 18. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-150 (West 1994).

16. *See* discussions *infra* parts IV, V.

17. 872 P.2d 1240 (Ariz. Ct. App. 1993)

18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533(A) (1994) (allowing "any person . . . with a legitimate interest" to sue for termination of parental rights).

19. *See* The Children Act (1989) (Eng.); discussion *infra* part V.

20. The Children Act § 10(2)(b).

petition a court directly. The process of termination of parental rights and an analysis of the case law and statutes involved comprises the third part. The fourth part recounts the current position of children in our society, the statistics on child abuse, and the ability of state agencies to deal with the problem. The fifth part analyzes The Children Act of 1989 in the United Kingdom with regard to the rights of children. The Note concludes with the proposition that a court should make a determination whether a child has sufficient age and understanding to bring a termination of parental rights suit, and upon such a finding allow a child to petition directly in his or her own name.

I. COMMON LAW BACKGROUND AND CONSTITUTIONAL RIGHTS

Traditionally, minor children have been under legal disabilities that flow from their dependent position on their parents.[21] In most jurisdictions such legal disabilities of children include the inability to establish their own domicile,[22] retain their own earnings,[23] enter into binding contracts,[24] consent to their own medical, surgical, dental, or psychiatric care without parents' consent,[25] sue or be sued in their own name,[26] sue their parents for injuries caused them by their parents,[27] make a will,[28] hire or be an agent,[29] enter into a partnership,[30] and

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21. U.S. DEP'T OF HEALTH AND HUMAN SERVICES & SCIENTIFIC ANALYSIS CORP., THE LEGAL STATUS OF ADOLESCENTS 11 (1981) [hereinafter THE LEGAL STATUS OF ADOLESCENTS]. *See generally* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *446-75.

22. *See* THE LEGAL STATUS OF ADOLESCENTS, *supra* note 21, at 11 (listing and discussing the traditional legal disabilities of children). *See generally* LAURENCE HOULGATE, THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS (1980) (discussing the philosophical and ethical norms that flow from a recognition of children's rights); ROBERT MNOOKIN, CHILD, FAMILY AND STATE 20-45 (1978) (examining federal and state cases which set the boundaries of authority between children, parents, and state); I. SLOAN, YOUTH AND THE LAW (1981) (giving an overview of children's procedural and substantive rights); Youth Law Center, *Legal Rights of Children in the United States*, 13 COLUM. HUM. RTS. L. REV. 675, 677-78 (1981-82) (discussing the trend toward greater recognition of children's rights).

23. *See* THE LEGAL STATUS OF ADOLESCENTS, *supra* note 21, at 11.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

convey real property.[31] This comprehensive list of legal disabilities comports with the importance historically attached to family privacy in America.[32]

Over the last fifty years, the courts and legislatures in many jurisdictions have relaxed, at least in part, some of the traditional legal disabilities of childhood.[33] Other areas of law, like tax and criminal law, have recognized that children under the age of eighteen should sometimes be treated as adults. The reasoning behind the removal of these legal disabilities is a sometimes tacit, sometimes explicit, recognition that children have substantive rights under the Constitution;[34] thus, procedural rights in court are necessary to vindicate substantive rights.[35] This slow erosion of the barriers to the procedural capacity of children in other areas[36] of the law bolsters the decision to allow a child to sue on his or her own behalf for the termination of parental rights. The same reasoning for abridging traditional legal disabilities in other contexts is applicable to the decision of whether to allow a child to sue for termination of parental rights.

The common law concept of *parens patriae* gives courts the power to control matters of the family,[37] and, in general, gives the states the prerogative to control its citizens.[38] The source of the *parens patriae* authority remains unclear.[39] Historically, *parens patriae* originated from English common law, where the king had the royal prerogative to act as guardian to persons, such as lunatics, who had legal disabilities.[40] The fact that the *parens patriae* power, however, was ever applied to infants seems to be a historical accident.[41] Lord Coke's report of *Beverley's*

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31. *Id.*

32. MICHAEL DALE, REPRESENTING THE CHILD CLIENT, § 3.01 (1991 & Supp. Aug. 1994).

33. *See* discussion *infra* part II.

34. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 53, 74 (1976) (stating that "[m]inors as well as adults . . . possess constitutional rights.").

35. *See* DALE, *supra* note 32, § 3.02.

36. *See* discussion *infra* part II.

37. *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

38. JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT 1-15 (1991) (discussing the concept of *parens patriae* and the role of the state in children's rights from 1640 to 1800 in America).

39. *Id.*

40. *See* Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 196-97 (1978).

41. *Id.* at 202-03.

Case[42] in 1610 accidentally replaced the word "idiot" with "infant," and in 1658, the translation of the 1610 edition from French duplicated the error and exchanged yet another word "idiot" for "infant."[43] Subsequent cases then cited *Beverley's Case* to support the government's *parens patriae* power over infants.[44]

The unsure foundation of the doctrine in England did not become firm in crossing the Atlantic to this country. A sampling of United States Supreme Court decisions from this century shows the apparent contradictions in the strength of the *parens patriae* power. In the 1925 decision of *Pierce v. Society of Sisters*[45] the Court held: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[46] In *Pierce*, the Court invalidated an Oregon statue which required children to attend only public school.[47] Finding a substantive due process right in the liberty of parents and guardians to direct the upbringing and education of children under their control, the Court allowed the children to attend private school, instead of public school.[48]

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42. 4 Coke's Rep. 126b (London 1658).

43. *Id.* at 203. A phrase which originally read, "That if an idiot . . . " now read, "That if an infant who cannot defend, govern, or order his lands, tenements, goods, or chattels, the King of right ought to have him in his custody, and to protect him . . . . " *Id.* (quoting Beverley's Case, 4 Coke's Rep. at 126b). *Beverley's Case* was not a chancery court case, but was decided by the King's Bench. *Id.* at 205.

44. *See id.* at 204-05 (giving Shaftsbury v. Shaftsbury, 25 Eng. Rep. 121, 122 (Ch. 1725) as an example of such a case).

45. 268 U.S. 510 (1925).

46. *Id.* at 535.

47. *Id.*

48. *Id.*; *see also* Ex Parte Livingston, 135 N.Y.S. 328 (App. Div. 1912) (holding that the child could not be placed in or adopted in another home where the natural mother was able to care for the child). The *Livingston* Court was skeptical of the *parens patriae* power:

> This phrase [*parens patriae*] is very illusory in its meaning and has meant different things at different times in world history. . . . It has been used frequently to justify the acts of absolute power when the ruler and the legal state were one and the same. . . . But under our political system the state is not "omnipotent," and if it be "*parens patriae*," it is only so in a very restricted sense, and with due restraint as to the rights of individuals resting upon natural justice, and surrounded by the bulwarks of constitutional safeguards.

Id. at 331-28.

Nineteen years later, however, in *Prince v. Massachusetts* the Supreme Court bolstered the *parens patriae* power of the states,[49] holding that a state's authority over the conduct of children exceeds its authority to control the conduct of adults.[50] "[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."[51] As a result, the state was able to prohibit the sale of obscene materials to minors regardless of whether those same materials would be considered obscene to adults.[52]

With economic substantive due process of the *Lochner* era discredited[53] and thus, unavailable to check the growing expansion of the government, the Supreme Court in *In re Gault*[54] again examined the concept of *parens patriae*:

> The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles form the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* [in the place

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49. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

50. *Id.*

51. *Id.* at 166.

52. *Id.*

53. The shift away from striking down statutes on substantive due process grounds started in West Coast Hotel v. Parrish, 300 U.S. 379 (1937). I do not mean to imply that all pre-1937 substantive due process cases have been relegated to the history books. *Pierce* and *Meyer v. Nebraska*, 262 U.S. 390 (1923), remain viable modern precedents. *See* Moore v. East Cleveland, 431 U.S. 494, 499-506 (1977) (relying on *Pierce* and *Meyer* to strike down a law that forbade members of one's family, outside of the immediate family, from living together). The Court explained that "*Meyer* and *Pierce* have enjoyed frequent reaffirmance while other substantive due process cases of the same era have been repudiated." *Id.* at 501 n.8.

The Court's reasoning in *Prince* was reaffirmed in 1982. *See* New York v. Ferber, 458 U.S. 747 (1982) (upholding a New York statute that prohibited distribution of material depicting a sexual performance by a child under the age of sixteen regardless of whether or not the material is obscene). The Court did not make specific mention of the *parens patriae* power, however.

54. 387 U.S. 1 (1967).

> of the parent] for the purposes of protecting the property interests and the person of the child.[55]

In re Gault seems to cast a pall of suspicion over the doctrine of *parens patriae*. Instead of allowing the state to be the "parent" of the child, the Court began to recognize that children are human beings with constitutional rights separate from their parents.[56] This recognition began in *In re Gault*,[57] where the Supreme Court held that children in juvenile proceedings are entitled to many of the same constitutional procedural rights as adults.[58] Yet, while minors under the threat of criminal penalties may be entitled to some procedural rights under a constitutional analysis, the question of their substantive constitutional rights is problematic.

The source of this problem is that giving children constitutional rights has a tendency to displace the authority and constitutional rights of parents. The Supreme Court has held, for example, that "[t]here is a presumption, strong but rebuttable, that parents are the appropriate decision maker for their infants."[59] While the state has the authority in some areas of law to circumscribe parental authority, the issue of exactly what rights children have under the Constitution remains unclear. On one hand, the Supreme Court stated: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults . . . possess constitutional rights."[60] On the other hand, in *Santosky v. Kramer*,[61] the Supreme Court recognized that parents have a liberty interest in the parent-child relationship.[62]

In *Santosky*, the Court dealt with the issue of what burden of proof must be employed to substantiate a showing of parental unfitness to terminate parental rights.[63] In order to protect a parent's liberty interest in parenthood, due process requires a showing of the basis for terminating

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55. *Id.* at 16.

56. *See* DALE, *supra* note 32, § 3.01.

57. 387 U.S. 1 (1967).

58. *Id. But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that minor has no right to jury trial in juvenile delinquency proceedings).

59. Bowen v. American Hosp. Ass'n, 476 U.S. 610, 627 n.13 (1986) (plurality opinion).

60. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

61. 455 U.S. 745 (1982).

62. *Id.* at 753.

63. *Id.* at 747-48.

parental rights by clear and convincing evidence.[64] The *Santosky* Court also recognized that children have liberty interests that require protection,[65] however, the liberty interests are secondary to first establishing parental unfitness.[66]

In several areas of law, however, a state's authority trumps parental authority: child labor,[67] access to pornography,[68] marriage of infants,[69] and physical and emotional deprivation or violence.[70] But the decision whether to commit a child to a state mental institution is largely left to the parents.[71]

The areas of education and abortion are much more muddled. In the field of education, the Supreme Court has held that the state can require children below a certain age to attend some school,[72] however, as we have seen, the school need not be a public school.[73] States cannot prohibit teaching of foreign languages.[74] Yet, when schooling interferes with the parents' religious beliefs, mandatory schooling cannot be required.[75] With regard to abortion, the state has assumed the role of alternative parent.[76] In *Bellotti v. Baird*,[77] the Supreme Court invalidated a Massachusetts law requiring parental consent for abortions

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64. *Id.*

65. *Id.* at 754 n.7.

66. *See id.*

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

68. *See* Ginsberg v. New York, 390 U.S. 629, 639-43 (1968).

69. *See* People v. Benu, 385 N.Y.S.2d 222 (Crim. Ct. 1976).

70. *See* People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984); Padgett v. Department of Health and Rehabilitative Serv., 577 So. 2d 565, 570 (Fla. 1991).

71. *See* Parham v. J.R., 442 U.S. 584, 602-03 (1979). This list of rights is not meant to be exhaustive. For a full discussion of which rights children have, see generally THOMAS A. JACOBS, 1-3 CHILDREN AND THE LAW: RIGHTS & OBLIGATIONS (1995); DONALD T. KRAMER, 1-3 LEGAL RIGHTS OF CHILDREN (2d ed. 1994). For an international perspective on children's rights, see generally AMERICAN BAR ASS'N CTR. ON CHILDREN AND THE LAW, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia P. Cohen & Howard A. Davidson eds., 1990).

72. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

73. *Id.*

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

75. Wisconsin v. Yoder, 406 U.S. 205 (1972).

76. *See* Bellotti v. Baird, 443 U.S. 622 (1979).

77. *Id.*

sought by unmarried minors.[78] The Court held that the parental consent provision was acceptable only if a complementary provision in the statute allowed the minor to receive the consent of the court instead of her parents.[79]

In sum, while the Supreme Court has recognized that children have some constitutional rights,[80] the Court has also recognized that children's constitutional rights are not the same as adults and are sometimes subordinate to those of their parents.[81] The reasons the Court has posited for this constitutional difference are "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[82]

The states, however, retain the power under our federal system to legislate for the health, safety, and welfare of their citizens.[83] And every state has adopted procedures to protect children from abuse.[84] While the Supreme Court is skeptical of the *parens patriae* power, it continues to reaffirm the power of the states to legislate for its citizens health, safety and welfare.[85] In examining child welfare laws, it is difficult to distinguish between the ability of a state to legislate for its citizens' health, safety, and welfare and what could be called the state's ability to act as *parens patriae*.

Is the *parens patriae* power now subsumed within the states' police powers? After the Supreme Court's disavowal of *parens patriae*, it would seem that there would be fewer appeals to *parens patriae* as a source of

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78. *Id.* at 642-44.

79. *Id.* at 650-51 (holding that the law in question was unconstitutional, in part because it permitted "judicial authorization for an abortion to be withheld from a minor who is found by the Superior Court to be mature and fully competent to make this decision independently"). For the constitutionality of parental notification before an abortion by a minor, see Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) and Hodgson v. Minnesota, 497 U.S. 417 (1990).

80. *See supra* notes 57-77 and accompanying text.

81. Bellotti v. Baird, 443 U.S. 622, 634-37 (1979); *see also* New Jersey v. TLO, 469 U.S. 325 (1985) (holding that the standard for searches of students in public school is not probable cause, but the lower standard of reasonable suspicion).

82. *Id.* at 634.

83. This is often referred to as the states' police power. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); City of Newport, Ky. v. Iacobucci, 479 U.S. 92, 95-96 (1986); Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33 (1975); California v. LaRue, 409 U.S. 109, 114 (1972).

84. *See* THOMAS A. JACOBS, 2-4 LEGAL DIRECTORY OF CHILDREN'S RIGHTS (1985) [hereinafter DIRECTORY OF CHILDREN'S RIGHTS] (listing all state statutes dealing with child welfare).

85. *See, e.g., DeBenedictis*, 480 U.S. at 473-74; *Iacobucci*, 479 U.S. at 95-96.

authority. Such is not the case. For example, the New York state constitution and statutes contain no explicit reference to the *parens patriae* power. Yet, the advisory notes and practice commentaries to sixty-one New York statutory provisions contain some reference or explanation of *parens patriae*.[86] From 1967 (the year in which *In re Gault* cast doubt on the *parens patriae* power) to present the term *parens patriae* appears in over 300 New York state cases.[87] All this suggests that state courts are not necessarily skeptical of the *parens patriae* power.

This appraisal of family law issues raises two areas of tension in the law. The first is a conflict between the competing liberty interests of the parent and the child;[88] the second is the conflict between judicial recognition of children's constitutional rights and their procedural incapacity to vindicate these rights based on common law and statute.[89] In other words, there is a question as to *when or if* a child has a right; and there is also a question of *how* a child can protect those rights in court.

The courts seem to apply one of two types of analysis to determine *when or if* a child has a "right": (1) the state-as-*parens patriae* analysis, or (2) the constitutional rights analysis. Under either of these two analytical frameworks a child has a "right" to be free from abuse and neglect. Under a *parens patriae* analysis, this right flows from the obligation that the state has imposed upon itself; that is, it has the duty to protect the health, safety, and welfare of minors.[90] Under the constitutional rights analysis, a child has this right as a liberty interest. The Supreme Court seems to have recognized this right in *Santosky v.*

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86. "Family court, in its role as *parens patriae*, has the obligation to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being." N.Y. FAM. CT. ACT § 1011 annot. (McKinney 1994) (Article 10-Child Protective Proceedings) (quoting Matter of Adrian J., 464 N.Y.S.2d 631 (Fam. Ct. 1983)).

87. Westlaw search in the NY-CS database for cases using the term "*parens patriae*" after 1967.

88. *See id.*

89. *See, e.g.*, N.Y. CIV. PRAC. L. & R. 1201-02 (McKinney 1976 & Supp. 1996).

90. *See* Boland v. State of New York, No. 73398, 1996 WL 86321 (N.Y. App. Div. Feb. 29, 1996) (holding that claimant parent could sue the state for negligence where the abuse had been reported to the appropriate child welfare agency and the agency failed to act within the state's required 24-hour period). *Compare* DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989) (holding that a state's failure to protect a child against private violence generally does not constitute a violation of the Due Process Clause because the Clause does not impose a duty on the state to provide adequate protective services).

Kramer.[91] Indeed, no matter what the scope of the child's liberty interest in his or her own welfare, it would be illogical to consider it to include being forced to stay in a physically or emotionally abusive family situation. Thus, under either analytical framework, the right to be free from abuse exists for minors, and the question becomes *how* a minor can vindicate this right.[92]

II. RIGHTS CURRENTLY AFFORDED CHILDREN DESPITE THEIR TRADITIONAL LEGAL DISABILITIES

Traditionally, in order to overcome the procedural handicaps of infancy, a minor had to sue through a person who had reached the age of majority.[93] This adult is called the "next friend"[94] or "guardian ad litem,"[95] and, although he or she speaks for the minor, the minor remains the real party in interest.[96] Parents usually perform this function, and in many states they can represent their children without any formal court appointment.[97] In most cases, where the child's interest does not conflict

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91. 455 U.S. 745, 754 n.7 (1982) (noting the "liberty interests of the child"); *see also* Padgett v. Department of Health and Rehab. Serv., 577 So. 2d 565, 570 (Fla. 1991) (recognizing the fundamental liberty interest of a child to be free from physical and emotional violence).

92. The issue of the child protecting his or her right to be free from abuse at the expense of the parent's liberty interest in parenting is addressed again *infra* part IV. Logically, if a child is being abused by a parent, proof of abuse (by clear and convincing evidence) should also be proof of parental unfitness. *Cf. Santosky*, 455 U.S. at 754 n.7 (noting that just because there may be liberty interests of the child at stake, does not mean that the parents can be denied procedural due process).

93. *See* Kingsley v. Kingsley, 623 So. 2d 780, 783-84 (Fla. Dist. Ct. App. 1993) (discussing the traditional rationales for having a minor sue through a next friend or guardian ad litem). *See generally* 43 C.J.S. *Infants* §§ 7, 199 (1978 & Supp. 1994).

94. *See* 43 C.J.S. *Infants*, *supra* note 93, § 199.

95. *Id.* While the terms "next friend" and "guardian ad litem" at one time had different meanings, in most jurisdictions they mean the same thing. *See* 1 KRAMER, *supra* note 71, at 530-33.

96. *Id.*; *see* Kingsley, 623 So. 2d at 784; *see also* FED. R. CIV. PROC. 17(c):

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary the representative may sue or defend on behalf of the infant. . . . If an infant . . . does not have a duly appointed representative he may sue by his next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant . . . not otherwise represented in the action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

97. *See generally* KRAMER, *supra* note 71, at 532-46 (discussing the requirements and appointment of guardians ad litem and compiling cases).

does not conflict with that of his or her parents, a parent usually serves as the next friend for the child.[98] Yet, in domestic relations cases, especially those dealing with the termination of parental rights, the interests of child and parent diverge, and a parent cannot serve as a next friend.[99] As a result of this conflict of interest, the courts will usually appoint a guardian ad litem who is not a family member.[100] The exact responsibilities and duties of a guardian ad litem vary from state to state.[101] But generally speaking, the guardian ad litem must protect the interest of the child, but that does not necessarily mean that the guardian must present the child's wishes to the court.[102] In many states, however, if the guardian ad litem believes the child's interests are not what the child wishes, the guardian ad litem must present to the court both the wishes of the child and what the guardian ad litem considers to be in the child's interest.[103]

Even though the traditional view—that a minor must sue through a next friend—is the rule in the vast majority of United States jurisdictions,[104] courts and legislatures have begun to whittle away at the

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98. *See* JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 65-66 (1973) (arguing that children require better representation in the courts) [hereinafter BEYOND THE BEST INTERESTS]; James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 570-83 (1976) (arguing for individual representation of children at any juvenile and at many family law proceedings); *see also* Monroe L. Inker & Charlotte A. Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108, 113 (1971) (discussing child custody cases and the need for individual representation of the child, at least where custody is contested); Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177 (1974).

99. *See* BEYOND THE BEST INTERESTS, *supra* note 98, at 65-67; 1 KRAMER, *supra* note 71, at 540-42; Genden, *supra* note 98.

100. *See, e.g.*, N.Y. CIV. PRAC. L. & R. 1201-02 (McKinney 1976 & Supp. 1996). The guardian ad litem and attorney ad litem are not the same positions. The guardian ad litem stands in place of the child, cures the child's legal disability to sue in court, and seeks to ascertain what would be best for the child; the attorney ad litem represents those wishes in court and in other legal matters. While the same person can be both the guardian and the attorney, such is not always the case. *See* 1 KRAMER, *supra* note 71, at 536-42.

101. 1 KRAMER, *supra* note 71, at 542-44 (noting this variety of duties).

102. *See id.*

103. *See id.*

104. For a directory of all state statutes dealing with Children's Rights, see 2-4 DIRECTORY OF CHILDREN'S RIGHTS, *supra* note 84.

traditional disabilities of infancy.[105] Minors may be emancipated from their legal disabilities in one of three fashions.[106] First, children may be emancipated by operation of law—this includes statutes that define the age of majority,[107] statutes that make marriage or military service emancipating,[108] and statutes that allow for partial emancipation to contract for certain things, such as necessaries or insurance.[109]

Second, judicial recognition of particular unacceptable parent conduct or of important rights of children can free the child to some extent from the aegis of parental authority.[110] An example of this type of emancipation is *Bellotti v. Baird*,[111] where the courts became alternative parents for minors seeking consent to abortions.[112] In many jurisdictions, the judiciary has limited the traditional immunity for intrafamily torts.[113] Children can now sue their parents for certain torts committed by the parents.[114] Part of the reason for providing parents

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105. *See* THE LEGAL STATUS OF ADOLESCENTS, *supra* note 21, at 12-39.

106. *Id.*

107. *See, e.g.*, CAL. CIV. CODE §§ 60-70 (West 1982) (California Emancipation Statute).

108. *Id.*

109. *Id.*

110. *See* THE LEGAL STATUS OF ADOLESCENTS, *supra* note 21, at 20-22.

111. 443 U.S. 622 (1979).

112. *See supra* notes 76-79 and accompanying text.

113. *See, e.g.*, Winn v. Gilroy, 681 P.2d 776 (Or. 1984); Gibson v. Gibson, 479 P.2d 648 (Cal. 1971); Goller v. White, 122 N.W.2d 193 (Wis. 1963) (the first state to limit the traditional immunity for intrafamily torts).

Note, however, that the removal of immunity for intrafamily torts does not mean that the minor suing the family member can sue in his or her own name. The minor would still have to sue through a guardian ad litem. But allowing children to sue for intrafamily torts in some instances was a recognition of the rights of children.

114. *See Winn*, 681 P.2d 776; *Gibson*, 479 P.2d 648; *Goller*, 122 N.W.2d 193. A few states have been willing to completely abrogate parent-child immunity. *See, e.g.*, Dzenutis v. Dzenutis, 512 A.2d 130 (Conn. 1986). *But see* Richards v. Richards, 599 So. 2d 135 (Dist. Ct. App. 1992), *review dismissed by* 604 So. 2d 487 (Fla. 1992) (refusing to completely abrogate parent-child tort immunity and not allowing a child to sue her parent for alleged sexual abuse). In the majority of states that still have immunity in place, the general exceptions to the rule of family immunity are: (1) injuries sustained as a result of the parent's negligence while driving; see Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability and Spoil the Parent*, 25 NEW ENG. L. REV. 1161 (1991); (2) suits in which the parent or child dies; see Davis v. Smith, 253 F.2d 286 (3d Cir. 1958); Johnson v. Myers, 277 N.E.2d 778 (Ill. App. Ct. 1972); and, (3) where children are employed by their parents, see Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971). Children cannot sue their parents for

(and all immediate family members) immunity for intrafamily tort claims was the threat to family harmony that such a case would pose.[115] In removing the immunity, courts found this rationale unpersuasive in light of the fact that "'[a]n uncompensated tort is no more apt to promote or preserve peace in the family than is an action between [family members].'"[116] Similarly, those opposed to allowing minors to sue for the termination of parental rights on their own behalf because of the disruption of family life it would bring are on shaky ground. Is it more harmonious for the family to be allowed to continue to abuse or neglect a child, or is it more harmonious for the family to allow the child to extricate him or herself from the situation? The answer is the latter because an abusive family situation is, a fortiori, not harmonious.

The third and final way for minors to become released from their parents' control and to overcome their legal disabilities is by judicial declaration of emancipation authorized by statute.[117] Several states have a legal process whereby a court can declare a minor emancipated.[118] The conditions required for such a judicial declaration differ from state to state but typically require that it be in the best interest of the minor, that the minor be able to manage her or his financial affairs and that she or he lives apart from her or his parents.[119] Many of these states allow the minor to directly petition the court for a declaration of emancipation.[120]

Other areas of law have also recognized that eighteen as the age of majority is too old. For example, in tax law a minor's earned income is not the parent's income, but the minor's for tax purposes.[121] Also, a minor's unearned income is taxed at his or her parents' highest marginal tax rate, but only until the age of fourteen.[122] From fourteen to eighteen

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inadequate parenting. *See* Burnette v. Wahl, 588 P.2d 1105 (Or. 1978).

115. *See Gibson*, 479 P.2d at 651-52 (discussing the rationales for immunity, but finding them unsound).

116. *See, e.g., id.* at 651 (quoting Emery v. Emery, 289 P.2d 218, 224 (1955)).

117. *See* DALE, *supra* note 32, § 3.05.

118. *See id*; *see, e.g.*, ALASKA STAT. § 09.55.590 (1995); CAL. CIV. CODE §§ 60-69 (West 1982); CONN. GEN. STAT. ANN. §§ 46b-150-150e (West 1986); N.M. STAT. ANN. §§ 24-10-1, 28-6-2, 28-6-8 (Michie 1992).

119. *See* DALE, *supra* note 32, § 3.05[3].

120. *See, e.g.*, ALASKA STAT. § 09.55.590(a) (1995); CAL CIV. CODE § 64(a) (West 1982); CONN. GEN. STAT. ANN. § 46b-150 (West 1986); N.M. STAT. ANN. § 28-6-8A (Michie 1992).

121. 26 U.S.C. § 73 (1994).

122. *Id.* § 1(g). This is commonly referred to as the "kiddie tax." *See also* Estate of Butler v. United States, 798 F. Supp. 574 (E.D. Mo. 1992) (upholding against a due process attack the taxation of the unearned income of a minor (under the age of 14) at

years of age, a minor is not taxed at the parents' rate.[123] Perhaps in no other area of the law, however, has the dividing line between adult and child been blurred than in the criminal law. Routinely, minors fourteen years old are now tried as adults.[124] If a minor, fourteen or older, is suspected of committing one of host of violent crimes, this minor stands a good chance of being tried as an adult.[125]

Thus, in many areas of law, certain events "free" a minor from legal disabilities; the question is why should not abuse or neglect also be such an event? Bluntly stated, why is a minor treated as an adult when he or she assaults someone, but is not considered an adult when that same minor is assaulted, perhaps continually, by a family member?

III. TERMINATION OF PARENTAL RIGHTS—CASE ANALYSIS AND STATUTORY INTERPRETATION

At least one jurisdiction has allowed a child to petition directly for the severance of parental rights.[126] In *Appeal in Pima County Juvenile Severance Action No. S-113432*,[127] the court distinguished other legal disabilities of infancy[128] from the legal disability which prohibits a child from suing as the petitioner in a termination of parental rights case.[129] The court made no distinction between a child's capacity to be a party when the petition is brought by someone else and when the child has commenced it.[130]

The basis for the *Pima County No. S-113432* decision was an interpretation of the Arizona parental rights termination statute[131] and an analysis of the foundations of the traditional legal disabilities of

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the parents' highest marginal tax rate).

123. 26 U.S.C. § 1(g).

124. *See* Catherine R. Guttman, Note, *Listen To The Children: The Decision To Transfer Juveniles To Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 520-28 (1995) (describing the increase in trying minors as adults and discussing the various state systems for transferring minors to adult court).

125. *See id.*

126. Appeal in Pima County Juvenile Severance Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1993).

127. *Id.*

128. For example, those disabilities with regard to marriage, driving automobiles, military service, and consent to surgery. *See id.* at 1243.

129. *Id.*

130. *Id.*

131. ARIZ. REV. STAT. ANN. § 8-533(A) (1989).

infancy.[132] The Arizona statute provides that "[a]ny person or agency that has a legitimate interest in the welfare of a child . . . may file a petition for the termination of the parent-child relationship."[133] Even though the statute mentioned both a petitioner and a child,[134] the court did not find that this language precluded them from being the same person.[135] A child could be considered a "person with a legitimate interest" in his or her own welfare.[136] With regard to traditional legal disabilities, the court found that the reasons underlying them, such as age limitation on marriage, driving a car, or service in the military, which were based on the fact that these acts require a certain level of maturity and capacity.[137] The same could not be said of a severance proceeding.[138]

Pima County No. S-113432 dealt with four children who lived with their biological mother and her husband.[139] Their biological father, to whom the mother was never married, sought a custody and visitation determination, and custody was awarded to the mother, with visitation rights awarded to the father.[140] After several violent situations with their father, visitation became a problem.[141] The children sued for termination of the father's parental rights, and the court allowed them to petition directly, even though their mother was available to petition for termination (she subsequently joined the children's petition).[142]

Another case involving a child's right to sue is that of Gregory Kingsley, who sought to "divorce" his parents in Florida.[143] Kingsley initially sued as petitioner; and the trial court allowed Kingsley to sue on his own behalf, even though he was only eleven years old.[144] The basis for the trial court's decision was its interpretation of a statute similar to

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132. *Pima County No. S-113432*, 872 P.2d at 1243.

133. ARIZ. REV. STAT. ANN. § 8-533(A).

134. *Id.* § 8-534 (1986).

135. *Pima County No. S-113432*, 872 P.2d at 1243.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1242.

140. *Id.*

141. *Id.*

142. *Id.* at 1242-43.

143. *See* Kingsley v. Kingsley, 623 So. 2d 780, 782 (Fla. Dist. Ct. App. 1993).

144. Gregory K. v. Ralph K., No. C192-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992), *rev'd by* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

that in Arizona.[145] The Florida statute required that "any person who has knowledge of the facts alleged" may file a petition for the termination of parental rights.[146] The trial court found that Kingsley was a qualified person under this statute.[147]

Furthermore, the court did not analyze a child's right to sue from the perspective of traditional disabilities, but from the standpoint of constitutional rights.[148] The trial court examined the Florida constitution and the purposes of Florida's child welfare laws and found that under both Gregory should be allowed to petition on his own behalf in seeking to sever his natural parent's rights.[149] The court quoted with favor the passage from *Planned Parenthood v. Danforth*,[150] that "minors as well as adults . . . possess constitutional rights."[151]

The Florida Court of Appeals reversed the trial court on this issue.[152] It held that the disability of infancy prevents a minor from initiating or maintaining an action for the termination of parental rights.[153] The *Kingsley* court did not use the reasoning of the *Pima County No. S-113432* court, clinging to the traditional disabilities of infancy and refusing to stray from them.[154] In addition, the Florida court of appeals relied on a Florida Rule of Civil Procedure which states that "an infant . . . who does not have a duly appointed representative may sue by next friend or guardian ad litem. . . . The court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an action."[155] Note that the language of this statute is not mandatory; it uses the precatory construction of "may sue" by next friend or guardian ad litem.[156]

As a result of this precatory construction, the Florida appellate court was compelled to discuss the reasons for the traditional rule, as well as the issue of a child's constitutional rights.[157] The court employed the

145. *Id.* at *1.

146. FLA. STAT. ANN. § 39.461 (West 1988).

147. *Gregory K.*, 1992 WL 551488, at *1.

148. *Id.*

149. *Id.*

150. 428 U.S. 52 (1976).

151. *Gregory K.*, 1992 WL 551488, at *1 (quoting *Danforth*, 428 U.S. at 74).

152. *See Kingsley*, 623 So. 2d at 782-85.

153. *Id.*

154. *Id.*

155. FLA. STAT. ANN. § 1.120(b) (West 1995).

156. *Id.*

157. *See Kingsley*, 623 So. 2d at 783.

traditional rule because it provided for the "orderly administration of justice and the procedural protection of a minor's welfare and interest by the court."[158] *Kingsley* reasoned that the fact that the child may be represented by counsel is not enough. In order to ensure protection of the child's interest, an adult party must stand in the place of the child before the court, although the next friend or guardian ad litem does not become a party to the suit.[159] On the issue of a child's constitutional rights, the *Kingsley* court recognized that a child has constitutional rights,[160] but it also noted that a state may legislate and restrict the exercise of those rights, unless they unduly burden the minor's pursuit of a fundamental right.[161] The court couched the requirement of suit through a next friend or guardian ad litem as merely a procedural requirement, rather than a substantive one.[162] If a minor mistakenly brings an action in her or his own name, such defect can be cured by the subsequent appointment of a next friend or guardian ad litem.[163]

In an interesting coincidence, the same day that the Florida District Court of Appeal reversed the lower court's ruling on Gregory Kingsley's standing to sue, another lower court in Florida held that a minor had standing to challenge a stipulation which would have set forth the parties' rights, if enforced.[164] In *Twigg v. Mays*, a Florida court had to decide who were Kimberly May's parents in an unusual factual situation.[165] At birth, Kimberly was apparently switched with another child, and she was raised by Robert Mays, who was not her biological father.[166] The Twiggs sued to have Kimberly declared their child, but before the court determined whether the Twiggs had standing to assert their parental relationship, the parties entered into a stipulation agreeing to blood tests to confirm parentage.[167] The parties also stipulated that the Twiggs would not seek custody unless Robert Mays could be shown unfit and agreed to develop a visitation schedule.[168]

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158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.* at 784-85, (citing Bellotti v. Baird, 443 U.S. 622, 643 n.23 (1979)).

162. *Id.* at 784.

163. *Id.*

164. Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993).

165. *Id.* at *3-*4.

166. *See id.*

167. *Id.* at *1-*2.

168. *See id.*

When the relationship between the parties broke down, however, the Twiggs sued for custody, and Kimberly Mays counterclaimed, requesting that any parental rights in the Twiggs be terminated.[169] Relying on the same Florida state constitutional language relied upon by the lower court in the *Kingsley* case,[170] the court in *Twigg* determined that Kimberly had standing in her own right and could challenge the previous stipulation, seek to terminate the Twiggs' parental rights, and direct her own attorney.[171] The court also noted that Kimberly's "legal" father, Robert Mays, had joined the petition, and he unquestionably had standing.[172] The court went on to hold that it was in Kimberly's best interest to stay with Robert Mays and dismissed the Twiggs' petition.[173]

In light of the unusual factual situation in *Twigg*, its strength as precedent for the idea that children can sue on their own behalf is questionable. With an appellate court deciding in the *Kingsley* case on the same day that a minor must sue through a guardian ad litem, the timing of the *Twigg* decision also casts doubt on its viability. Nonetheless, *Twigg* stands, unreversed, and allowed a minor to sue for the termination of the parental relationship.

As these cases demonstrate, the right to terminate parental rights is a statutory right, but is informed by the common law notions of an infant's legal disabilities.[174] Legislation in other states, which sets forth who may file for the termination of parental rights, is open to interpretation similar to that in Arizona.[175] For example, both Alabama and South Carolina's statutes allow any interested party to petition for severance of parental rights.[176] Michigan explicitly allows a child in foster care to petition for termination of parental rights.[177] No state court decision in Michigan, however, has interpreted this statute to allow a minor to petition directly. Other states have foreclosed the possibility of children

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169. *See id.* at *3.

170. *See* Gregory K. v. Ralph K., No. CI92-5127, 1992 WL 551488 (Fla Cir. Ct. July 20, 1992).

171. *See Twigg*, 1993 WL 330624, at *3.

172. *Id.*

173. *Id.* at *4-*5.

174. *See Kingsley*, 623 So. 2d at 783-84. *See generally* 1 JACOBS, *supra* note 71, § 3:02.

175. *See, e.g.*, ALA. CODE § 26-18-5 (Michie 1992); S.C. CODE ANN. § 20-7-1564 (Law. Co-op. 1976).

176. ALA. CODE § 26-18-5 (Michie 1992); S.C. CODE ANN. § 20-7-1564 (Law. Co-op. 1976).

177. MICH. COMP. LAWS ANN. § 712A.19b(1) (West 1994) (MICH. STAT. ANN. § 27.3178 (598.19b) (1995).

petitioning by only allowing a state agency to petition for termination,[178] or by not using the broad language of "any interested party" in their statute.[179]

Taken together, *Pima County No. S-113432*, *Kingsley*, and *Twigg* highlight the issues behind a determination that a child has a right to sue for termination of parental rights. Each opinion, however, failed to explicitly state the policy issues behind their decisions.[180] In *Pima County No. S-113432*, the court did not address the issue of very young children.[181] Should they be able to petition for termination? And what age is too young? Does maturity really have nothing to do with the *Pima County No. S-113432* court's decision to allow a child to be a petitioner?[182] If a child is a petitioner, does that mean that she or he can independently direct her or his own counsel? At what age should that take place? In *Kingsley*, the court concluded that the right to be one's own petitioner is only a procedural right, rather than substantive one.[183] Yet, if a child has a liberty interest in her or his own safety and welfare, and this is a fundamental right, what does it avail a child that she or he has this substantive right but does not have a procedural right that will allow the child to protect it?

A possible explanation exists, however, for the courts' avoidance of these policy concerns. As Chief Justice John Marshall noted over 150 years ago, "[T]he duty of watching over their [minors'] interests devolves, in a considerable degree, upon the court."[184] Perhaps in the termination cases discussed above, the courts (except for the appellate court in *Kingsley*) tacitly recognized that the child's interests were adequately protected, either by their attorney or by court oversight, and thus, the need for the minor to sue through an adult was unnecessary.

In addition, to the ability of the court to protect the child's interest, the decision to allow a minor to be a petitioner must be placed in the societal context of the prevalence of child abuse and the systemic context

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178. *See, e.g.*, MO. ANN. STAT. § 211.447(2) (Vernon 1978).

179. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-715(a) (West 1993); IOWA CODE ANN. § 232.111(1) (West 1994); 23 PA. CONS. STAT. ANN. § 2512(a) (1994).

180. *See* Kingsley v. Kingsley, 623 So. 2d 780, 783-84 (Fla. Dist. Ct. App. 1993); Appeal in Pima County Juvenile Severance Action No. S-113432, 872 P.2d 1240, 1243-44 (Ariz. App. 1993).

181. *See Pima County No. S-113432*, 872 P.2d at 1243-44.

182. Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681 (1987) (arguing for a maturity inquiry of minors to determine their capacity to sue).

183. *See Kingsley*, 623 So. 2d at 784.

184. Bank of the United States v. Ritchie, 11 U.S. (8 Pet.) 46, 50 (1834) (footnote omitted).

of an overburdened child welfare system. These final two factors weigh heavily in favor of allowing a child to petition on her or his own behalf, and are the subject of the next part.

IV. THE PROBLEM OF CHILD ABUSE AND NEGLECT AND THE CHILD WELFARE SYSTEM'S ABILITY TO HANDLE THE PROBLEM

Though much publicized,[185] a recapitulation of the numerous statistics of child abuse and maltreatment illustrates the extent of the problem. Surveys by the Federal Department of Health and Human Services indicate that the number of abused or neglected children has more than doubled in the last decade, amounting to 2.9 million cases of child abuse and neglect.[186] The Statistical Abstract of the United States reports that in 1990, 801,143 substantiated child victims of maltreatment were reported.[187] The number of substantiated claims of child mistreatment rose in 1991 in the United States to 838,232.[188] In New York State alone there were 51,168 cases of suspected child abuse and maltreatment in 1985, of which 18,356 were substantiated.[189] Of the substantiated cases, eighty-four percent of the perpetrators of child abuse and maltreatment were the child's parents.[190] While these statistics show that child abuse is a wide-spread problem, they do not indicate how many cases go unreported, which may be substantial,[191] nor do they demonstrate the overall condition of children in society. According to the Children's Defense Fund, children are now the largest group living below

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185. *See, e.g.*, Associated Press, *Mistreatment of Kids Seems to be Getting Deadlier, Group Says,* Jan. 27, 1987, at 7A; Patricia Davis, *Cases of Child Abuse Growing More Severe,* WASH. POST, Sept. 12, 1988, at D1; *For Other Vulnerable Children,* WASH. POST, May 15, 1993, at A24; Jack Kresnak, *Increased Crack Abuse Takes Toll On User's Children,* DET. FREE PRESS, Feb. 23, 1987, at 1A; Spencer Rich, *1.9 Million Child Abuse, Neglect Cases Cited - 1985 Total Represents Steep Rise,* WASH. POST, Mar. 3, 1987, at A5; United Press International, *Child Abuse Cases Rise,* WASH. POST, July 19, 1986, at B7.

186. Robert Pear, *Many States Fail to Meet Mandates on Child Welfare,* N.Y. TIMES, Mar. 17, 1996, § 1, at 1.

187. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993 at 209 (113th ed. 1994).

188. *Id.*

189. NEW YORK STATE COUNCIL ON CHILDREN & FAMILIES, STATE OF THE CHILD IN NEW YORK STATE 140 (1988) [hereinafter STATE OF THE CHILD IN NEW YORK].

190. *Id.* at 213.

191. *Id.* at 137.

the poverty line nationally, many in overburdened single-parent families.[192] In New York State in 1985, approximately one in every four children was living in poverty.[193]

To address this problem, all states have developed child welfare and foster care programs[194] designed to remove children from unhealthy or dangerous living conditions.[195] The system in most states follows a similar pattern of state involvement in families where child abuse or maltreatment is suspected.[196] All state systems became more uniform after the entry of the federal government into this arena with the Adoption Assistance and Child Welfare Act of 1980.[197] The Child Welfare Act sets out several guidelines which the states must follow in order to receive federal funds.[198] The guidelines include providing services to parents prior to the removal of a child from a home in order to attempt to make the home safe,[199] providing reunification services to parents where the family maintenance services have been unsuccessful,[200] and ensuring that a permanent plan is established for a child in foster care within eighteen months of the child's entering into care.[201]

While federal law now sets certain guidelines for the states to follow, the overwhelming majority of dependency proceedings are held in state courts.[202] The usual process by which a child is removed from an abusive home environment is as follows.[203] Any and all professionals who come or are likely to come into contact with children must report suspected child abuse and neglect to the appropriate state agency.[204] After a report the state child welfare agency conducts an investigation to

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192. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 26-35 (1991).

193. *See* STATE OF THE CHILD IN NEW YORK, *supra* note 158, at 69.

194. *See* DALE, *supra* note 32, § 4.01; *see also* 2-4 DIRECTORY OF CHILDREN'S RIGHTS, *supra* note 84 (listing the child welfare laws for the fifty states).

195. *See* DALE, *supra* note 32, § 4.01.

196. *Id.*

197. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 516 (codified as amended at 42 U.S.C. §§ 620-28 & 670-87 (1994)).

198. *See* 42 U.S.C. §§ 625, 675 (1994).

199. *Id.* § 625(a)(1)(C).

200. *Id.* § 625(a)(1)(D).

201. *Id.* § 675(5)(C).

202. *See* DALE, *supra* note 32, § 4.01[1].

203. *See* DALE, *supra* note 32, §§ 4.01-4.14 (describing the procedures whereby a child is removed from threatening family situations, culminating in the termination of parental rights); 3 KRAMER, *supra* note 71, at 3-43 (same).

204. *See, e.g.*, N.Y. SOC. SERV. LAW § 413 (McKinney Supp. 1995).

determine if the report was warranted.[205] At this point the state social worker is under a heavy burden to make the "right" decision, but typically a statute requires the state agency to do all things necessary to avoid removal.[206] If removal is necessary then placement is first attempted with a relative,[207] and if that option is unavailable, then the child is placed in foster care.[208]

Within a certain time period after removal,[209] the family court must hold a hearing to determine if probable cause exists to believe that the child is in need of help.[210] The consequence of this hearing is an order of placement which will call for continued foster care placement or a return to the family home.[211] The agency then continues its investigation to determine whether there is appropriate evidence for the agency to petition to have the child declared, depending on the vocabulary of the state, a minor in need (MIN), a person in need of services (PINS) or a child in need of services (CHINS).[212] If filed, a hearing is held on this petition, and the court in this situation usually has broad powers to try to remedy the problem,[213] which can result in continued placement of the child in foster care, and some form of treatment for the parents, the child, or both.[214]

As mandated by federal law, the court must review this determination every six months.[215] If the state agency determines that the child's situation is not going to improve, then it can petition for termination of parental rights,[216] which will allow the child to be adopted. Provided

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205. *See* DALE, *supra* note 32, §§ 4.09-4.14.

206. *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b.1.(a)(ii) & 7.(f) (McKinney 1992).

207. *See, e.g., id.* §§ 384-b (delineating requirements for removal to foster care).

208. *See, e.g., id.* §§ 383-c, 385 (McKinney 1992 & Supp. 1996); N.Y. FAM. CT. ACT § 1055 (McKinney 1983 & Supp. 1996).

209. *See, e.g.*, N.Y. FAM. CT. ACT §§ 729 (McKinney 1983) (72 hours).

210. *See, e.g.*, N.Y. SOC. SERV. LAW §§ 383-c, 385; N.Y. FAM. CT. ACT § 1055.

211. *See* N.Y FAM. CT. ACT § 739 (McKinney 1983).

212. *See id.* §§ 711-83 (McKinney 1983 & Supp. 1996) (setting forth procedure whereby child is declared a PINS).

213. *See, e.g.*, CAL. WELF. & INST. CODE § 361 (West Supp. 1991) (stating that if court asserts jurisdiction over child, court may interfere in parent-child relationship to any degree it finds appropriate).

214. *See, e.g.*, N.Y. FAM. CT. ACT §§ 751, 771, 775, 1061-69, 1071 (McKinney 1983 & Supp. 1996).

215. 42 U.S.C. § 628(a)(1) (1994).

216. *See, e.g.*, MO. ANN. STAT. § 211.447(2) (Vernon 1978).

that the state statute allows it, the petition for termination could be filed by "any interested party," as discussed above.[217]

While these child welfare systems are in place to aid children and remove them from threatening situations, they often are ineffective in achieving this goal. Three problems areas with the current system will be examined seriatim: first, the competing interests between parent and child and how the courts deal with them; second, limited and overburdened state child welfare resources, which lead to long delays and failures to act; and third, inadequate representation for children in termination proceedings.

The first problem was introduced earlier in this Note: how can the law accommodate parents' traditional rights to custody and care of their children, while at the same time protect the liberty interests of children?[218] The trend is toward a greater recognition of what will be in the "best interests of the child" rather than a more parent-focused analysis.[219] Just what are the "best interests of the child" is nebulous and has been interpreted without much consistency by the courts.[220] In one California case even the fact that the father had murdered his children's mother was not enough to satisfy a statutory requirement for termination of the father's parental rights based on a best interests analysis.[221]

Some states have an explicit statutory mandate that judicial proceedings dealing with children must consider the child's best interests.[222] Only a few statutes provide that the child's best interests are the sole consideration in termination decisions.[223] The statutes which

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217. *See supra* notes 174-79 and accompanying text.

218. *See* Michael Dale, *Children Before The Supreme Court: In Whose Best Interest?*, 53 ALB. L. REV. 513 (1989) (giving a detailed analysis of the Supreme Court cases dealing with children's rights and the resulting tension with parental liberty interests in child-rearing).

219. *See* Christian R. Van Deusen, *The Best Interests of the Child and The Law*, 18 PEPP. L. REV. 417 (1991) (reviewing and criticizing recent statutes and cases, especially those from California, dealing with the best interests of the child).

220. *Id.*; *see also* Gloria Christopherson, *Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings:* In Re J.J.B., 71 MINN. L. REV. 1263 (1987); Michael Fine, *Where Have All the Children Gone? Due Process and Judicial Criteria for Removing Children From Their Parents' Homes in California*, 21 SW. U. L. REV. 125 (1992).

221. *In re* James M., 135 Cal. Rptr. 222 (Cal. Ct. App. 1976).

222. *See* GA. CODE ANN. § 15-11-8(a) (West Supp. 1986); IDAHO CODE § 16-2005(e) (1979); ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1986); WIS. STAT. ANN. § 48.426(3) (1986).

223. *See, e.g.*, ALASKA STAT. § 25.23.180(c)(2) (1983); D.C. CODE ANN. § 16-304(e) (1981); IDAHO CODE § 16-2005(e) (1979).

seem to require only examination of the child's best interests, however, cannot withstand constitutional scrutiny, unless there is a showing of parental unfitness.[224] Some states, without the statutory mandate to analyze the child's best interest in a termination proceeding, have incorporated this test by judicial decree.[225] Other states only allow an inquiry into the child's best interest after a showing of parental unfitness.[226] Even though the state must prove parental unfitness in a termination proceeding, such a showing seems to flow logically from a proof of abuse. Thus, what appears to be a two-tiered analysis (of first proving parents unfit and second determining the best interests of the child) collapses into one tier of analysis: did or has the parent abused or neglected the child?[227] Answering this question demonstrates whether or not parents are unfit, and often can determine what is in the best interest of the child, that is, whether or not the child should be removed from the family.

Further complicating the issue, however, is the congressional mandate that state agencies should try to prevent the breakup of the family.[228] This mandate is evident in state statutes requiring removal only where necessary, after many efforts are made to reconcile the family.[229] This requirement has been criticized because it allows abused children to

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224. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (holding that due process rights of parents may be infringed if state were to terminate without a finding that parent's are unfit); Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) (requiring a showing of unfitness before the state may break up a natural family if that family objects); *In re* J.P., 648 P.2d 1364, 1377 (Utah 1982) (basing a termination of parental rights solely on the child's best interest violates U.S. and state constitutions).

225. *In re* J.J.B., 390 N.W.2d 274, 276 (Minn. 1986); *see also* Finlay v. Finlay 148 N.E. 624 (N.Y. 1925); Wilson v. Mitchell, 111 P. 21, 25 (Colo. 1910).

226. *In re* Clausen, 508 N.W.2d 649 (Mich. 1993) (holding that a child has a constitutionally protected interest in family life, but that the child's interest is not independent of the parents' interest without a showing of parental unfitness); *In re* Moseley, 660 P.2d 315 (Wash. 1983) (holding that the trial court erred in failing to examine fitness of parents).

227. The specific parental behavior that can support a termination of parental rights case varies somewhat from state to state. *See* 3 KRAMER, *supra* note 71, at 3-43. Generally there are four types of behavior that give rise to a termination proceeding: abuse, neglect, endangerment, or abandonment. *Id.*.

228. *See supra* notes 195-200 and accompanying text.

229. *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b.1. & 7. (McKinney 1988).

remain in dangerous or unhealthy situations when they should have been removed.[230]

Using every effort to maintain the family unit is often unworkable because the child welfare system is ill-equipped to fulfill this goal as it is suffering under a tremendous caseload.[231] Recent newspaper articles have reported the problem, many saying that the system is overwhelmed.[232] Speaker of the House Newt Gingrich has even suggested a return to an orphanage system because the foster care system is failing.[233] With the system overburdened, children are failing to receive the attention they need and are required to have by statute.[234] For example, in the *Kingsley* case,[235] the court-appointed guardian for Gregory, who was supposed to help him resolve his case after eighteen months in foster care, never spoke to him during the entire thirty months the boy was in the system.[236]

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230. *See* David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 139 (1992) (criticizing the family reunification requirements because they keep children in difficult and dangerous situations); *see also* Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223 (1990); Georgia Kovanis, *Man Charged in Death Had Been Accused 7 Times of Abuse*, DET. FREE PRESS, Apr. 11, 1988, at 3A.

231. *See* Herring, *supra* note 230, at 179-90.

232. *See, e.g.*, Jim Brady, *Grand Jury Hits Backlog of Child Abuse Reports*, WASH. POST, Mar. 6, 1984, at B3; Georgia Kovanis, *Fatal Assumptions - The Failure of Michigan's Child Protection System: Children Die Despite Early Signs of Abuse*, DET. FREE PRESS, Nov. 19, 1989, at 1B; Jack Kresnak, *Numbers Raise Fears DSS is Missing More Kids in Danger*, DET. FREE PRESS, Apr. 17, 1994, at 1F; Nancy Lewis, *Child Neglect Cases Break Daily Record In D.C. Court - Reflects a System Overwhelmed*, WASH. POST, May 10, 1994, at A1; *Maryland Child Services Called Understaffed*, WASH. POST, Oct. 11, 1987, at B3.

233. *See* Celia W. Dugger, *Teen-Agers in the Orphanage Storm Have Lost Families but Found Voices*, N.Y. TIMES, Mar. 26, 1995, § 1, at 40; *see also* Milt Fruedenheim, *Charities Aiding Poor Fear Loss of Government Subsidies*, N.Y. TIMES, Feb. 5, 1996, at B8; Edward Walsh, *As At Risk Children Overwhelm Foster Care, Illinois Considers Orphanages*, WASH. POST, Mar. 1, 1994, at A9. Gingrich's suggestion has been countered with a great deal of criticism. *See, e.g.*, Robert Pear, *White House Says Young Will Suffer Under G.O.P. Plan*, N.Y. TIMES, Dec. 30, 1994, at A1; Richard Wexler, *A Warehouse is Not a Home*, N.Y. TIMES, Mar. 18, 1995, § 1, at 23 (editorial).

234. *See* Pear, *supra* note 186, at 1.

235. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

236. Lynn Smith, *Giving Kids a Say on Their Legal Rights*, L.A. TIMES, Nov. 5, 1992, at 7D.

Many states are also failing to meet the legal mandates of their child welfare programs.[237] As many as twenty-one states' child welfare programs are under court supervision because they are not fulfilling their legal obligations.[238] Child social workers often handle fifty to seventy cases each; whereas the Child Welfare League of America suggests no more than fifteen cases per social worker is inappropriate.[239] In response to this crisis, New York has appointed a Commission on Child Abuse and Neglect to review the problem.[240] An interim report of the Commission recommended several changes to New York law, including: (1) elevating some misdemeanors involving the endangering of child welfare to felonies; (2) easing the requirements for terminating parental rights in cases of sexual abuse; and (3) that a positive drug test be enough to prove a pregnant mother's neglect.[241]

Aside from child welfare workers providing inadequate services to children, proper attorney representation is a problem in termination proceedings too. Although the constitution does not require that an attorney be provided to a parent in termination proceedings,[242] most states recognize a right to counsel for a child who is the subject of a dependency proceeding.[243] The requirement of representation of children is also buttressed by the fact that in order to receive funds under the federal Child Abuse Prevention and Treatment Act, a state must

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237. Pear, *supra* note 186, at 1.

238. *Id.*

239. *Id.*

240. *See* Gary Spencer, *New Law on Children Proposed*, N.Y. L.J., Mar. 20, 1996, at 1.

241. *See id.* at 1, 4; *see also* David Firestone, *Giuliani Seeks Tough Laws To Help Abused Children*, N.Y. TIMES, Feb. 2, 1996, at B6 (discussing Mayor Rudolph Guiliani's proposals to improve child welfare agencies in New York City).

242. Lassiter v. Department of Social Serv., 452 U.S. 18 (1981).

243. *See, e.g.*, CAL. WELF. & INST. CODE § 317(c) (West 1994) (stating that if a child is the alleged victim of abuse, an attorney must be appointed to represent the child in all judicial proceedings); ILL. ANN. STAT. ch. 37, para. 802-17(3) (West 1994) (allowing a court to appoint a guardian whenever it finds that there may be a conflict of interest between the minor and his parents); MASS. GEN. LAWS ANN. ch. 119, § 29 (West 1994) (stating that a child has a right to counsel at all dependency hearings); N.Y. FAM. CT. ACT § 249 (West 1994) (requiring that a legal guardian be appointed in all child protective proceedings); *see also* William W. Patton, *It Matters Not What Is, But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 WHITTIER L. REV. 537 (1991); Donald Duquette & Susan Ramsey, *Representation of Children and Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REF. 341 (1987).

appoint an attorney ad litem (who can be the guardian ad litem as well) for a child in a dependency proceeding.[244]

Even with an attorney, adequate representation of the child's interest remains a problem.[245] One commentator has argued that an attorney "speaking" for the child merely interjected a usually, white, middle-class viewpoint into the proceedings.[246] Decisions by the guardian ad litem also have a tendency to tip the balance toward one side or the other in proceedings, which places the attorney in a powerful position to decide the case.[247] In order to remedy this problem, another commentator has suggested that children seven years and older should have the right to direct their own proceedings in court.[248] Another has called for a modification of the Model Rules of Professional Responsibility to allow for a "maturity inquiry" to determine if the minor is capable of directing the client.[249]

After examining these three problems—parent's rights versus a child's best interests, the failures and inadequacies of the child welfare system, and the ability of a child to have a voice through counsel in judicial proceedings—the question is whether allowing a minor to petition on his or her own behalf will help ameliorate these problems. With regard to the first problem, allowing a child to petition should not effect the due process standard which a court applies to termination of parental rights proceeding.[250] Merely allowing a child to be a petitioner does not require the court to focus only on the best interests of the child to the exclusion of an examination of the fitness of the parents.[251] Allowing a child to be his or her own petitioner also should help provide a remedy to a child entwined in an overburdened child welfare system. If the child

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244. 42 U.S.C. §§ 5101-18e, 5110 (1994).

245. Martin Guggenheim, *The Right to Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984). *See generally* Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423 (1993); Tara L. Muhlhauser, *From 'Best' to 'Better': The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633 (1990); Comment, *Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 CAL. L. REV. 481 (1982).

246. *See* Guggenheim, *supra* note 245, at 125-29.

247. *Id.*

248. *Id.*

249. *See* Lyon, *supra* note 182, at 681-94 (defining maturity inquiry).

250. *See id.* (discussing the need for the child's voice to be heard at a dependency or severance proceeding and arguing for a maturity inquiry to determine if the child can direct counsel).

251. *See id.*; *see also supra* notes 53-82 and accompanying text.

welfare agency is overwhelmed and understaffed and it is the only party that can petition for the termination of parental rights, then permitting a minor to petition may provide an expedited remedy to an extended confinement in the foster care system.

The question of adequate representation of a minor, ensuring that his or her voice is heard in court, is more problematic. Eventually, the question becomes at what age can a child direct his or her attorney.[252] Although science supports the proposition that a child seven years old can reason concretely, and thus may be able to provide adequate guidance to their counsel,[253] given the variety of environments in which children are raised a case-by-case analysis of whether a child if of sufficient maturity and understanding is appropriate.[254] This is the position taken in the United Kingdom.

V. THE CHILDREN ACT OF 1989 IN THE UNITED KINGDOM

An international example of comprehensive legislation with respect to children's welfare is the United Kingdom's Children Act of 1989 (Children Act).[255] Drawing on previous case law,[256] the Children Act puts the welfare of the child as its paramount consideration.[257] In order to ensure that the welfare of the child is the paramount consideration, section one of the Children Act requires that delays be avoided[258] and that courts first consider "the ascertainable wishes and feelings of the child concerned."[259] Before the Children Act, case law in England had recognized that the hard and fast rule of legal disabilities for those below the age of majority was inappropriate, given the traditional power of the

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252. *See* Guggenheim, *supra* note 245, at 125-29 (arguing that children seven years old and above can direct counsel).

253. *See* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH? THE AGES OF RIGHTS AND RESPONSIBILITIES 19-38 (1989).

254. *See* Lyon, *supra* note 182, at 689-95.

255. The Children Act 1989 (Eng.). *See generally* R. WHITE, P. CARR, ET AL., A GUIDE TO THE CHILDREN ACT 1989 v-vii, 33-38 (1990) (discussing the changes the Children Act implemented and analyzing the specific language of the statute); L. FELDMAN & B. MITCHELS, CHILDREN ACT 1989—A PRACTICAL GUIDE 16-23 (1990) (same).

256. Hewer v. Bryant, [1970] 1 Q.B. 357, 369; Gillick v. West Norfolk and Wisbech Area Health Authority, [1986] AC 112 (H.L.).

257. *See* Children Act, § 1(1).

258. *Id.* § (1)(2).

259. *Id.* § (1)(3)(a).

state to act as guardian under its *parens patriae* power.[260] In *Hewer v. Bryant*,[261] Lord Denning set out the idea of a continuum of parental authority:

> The common law can, and should, keep pace with the times. It should declare . . . that the legal right of a parent to the custody of a child ends at the eighteenth birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advise.[262]

This standard was confirmed in the case of *Gillick v. West Norfolk and Wisbech Area Health Authority*,[263] which involved a challenge to a memorandum of the English Department of Health and Social Services.[264] The memorandum allowed doctors to prescribe contraceptives to children under the age of sixteen without parental consent.[265] The court upheld the memorandum against the mother's contention that, as parent, she had the right to custody and control of her children with regard to contraception.[266] The *Gillick* rule is "that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[267] The *Gillick* rule was included in the Children Act by allowing a minor child to petition the court directly with regard to matters of his or her welfare.[268] This provision is not an absolute right of the minor, but can be obtained with the leave of the court if the child is of sufficient age and understanding.[269]

One English commentator has noted that the Children Act does not couch access to the courts in terms of rights; instead it focuses on needs

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260. *Hewer*, [1970] 1 Q.B. at 369; *Gillick*, [1986] AC 112 (H.L.)

261. [1970] 1 Q.B. 357.

262. *Hewer*, 1 Q.B. at 369.

263. [1986] AC 112 (H.L.)

264. *Gillick*, [1986] AC at 113.

265. *Id.*

266. *Id.* at 186.

267. *Id.*. *See generally* H.K. BEVAN, CHILD LAW 3-19 (1989) (discussing general principles in the law of the United Kingdom relating to children before the Children Act).

268. *See* Children Act, § 10(2)(b).

269. *Id.*

of children.[270] This avoids the problem of logic in American law that surrounds the issue of granting fundamental rights while not allowing procedural rights to vindicate them.[271]

Even though the United Kingdom may have more of a focus on the state as *parens patriae* than the United States, which is more concerned with protecting rights, the Children Act provides a good example of flexibility in attempting to promote child welfare. Instead of set rules about when children can enter court, the Children Act allows children of 'sufficient age and understanding' to try and change their position for the better. The United States should follow the United Kingdom's example with regard to petitioning for termination of parental rights.

VI. CONCLUSION

This Note argues that a minor, provided he or she has sufficient age and understanding, should be able to petition on his or her own behalf for the termination of parental rights. Instead of determining who can serve as the minor's guardian ad litem, the courts should first determine whether the minor has sufficient age and understanding to direct his or her own counsel. Critics may contend that allowing children into court causes a host of problems: that children will try to "divorce" their parents for not increasing their allowance, and that foster parents will seduce a foster child into petitioning for termination. These concerns are valid, but they are in large part mitigated by the already existing ability of the courts to protect a child's interest. Also, having a guardian ad litem does not necessarily mean that the child's wishes are effectively presented to the court. At least for more mature minors, direct input of the child's interest, not filtered through the adult guardian ad litem's views, may allow the court to come to a better decision on what will be best for the child.

Several other areas of law and social policy also support the right of minors of sufficient age and understanding to sue directly for termination: first, courts have recognized a child's constitutionally protected liberty interest in his or her own welfare and the state's have imposed upon themselves statutory duties to protect children; second, judges may analogize to other areas of the law where a minor's traditional legal disabilities have been, partially or entirely, removed; third, in state statutes that allow "any interested person" to petition for termination of

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270. THEODORE J. STEIN, CHILD WELFARE AND THE LAW 65-75 (1991).

271. *See* Donald N. Duquette, *Child Protection Legal Process: Comparing The United States and Great Britain*, 54 U. PITT. L. REV. 239 (1992) (comparing many of the provisions of the Children Act to those in American jurisdictions and discussing the differences in perspective in respect of children's rights between the two countries).

parental rights; fourth, in the inability of an overwhelmed child welfare to deal with the tremendous problem of child abuse; and fifth, in the example of the United Kingdom's recent revision to its law to allow children to petition directly. These factors weigh in favor of granting minors the right to petition even in the face of parents' constitutionally protected right to custody and control of their children and the problem of adequate representation of children if they are allowed to be petitioners. Returning to the image presented by the sculpture described in the introduction, Justice must not only reach down toward the child, the child must be allowed to reach up toward the scales of justice in order to avoid being bitten by the snake.

Jay C. Laubscher