Family Law and Human Rights: The United States Perspective

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Where, after all do universal human rights begin? In small places, close to home – so close and so small that they can't be seen on any map of the world. Yet they are the world of the individual person.

Eleanor Roosevelt, to the United Nations, March 27, 1958

I. Foundations

American law has developed within the ideological theme of America's founding – the Declaration of Independence's assertion of one's "inalienable right to life, liberty and the pursuit of happiness." The United States Constitution relies heavily on notions of natural rights. Lockean principles of autonomous individuality have played out in various ways because of our particular history: a dedication to states' rights because of the fear of central government; a quest for equality because of our history with slavery and women's suffrage; a dedication to freedom of speech and religion because of colonial period strife with Britain. "Human rights" in America rest on individual liberty. This focus on individual rights, however, makes it difficult to address an organic unit, such as the family; to serve groups defined by status, such as children; and to recognize the interconnected nature of rights.

Although Congress has ratified the International Covenant on Civil and Political Rights and various other treaties, conventions and agreements, it has not ratified the United Nations Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, nor is there a document comparable to the European Convention on Human Rights (ECHR). The United States Constitution does not mention families or children, nor does it bestow any positive rights, such as a government obligation to provide health, food, education or an adequate standard of living. Human rights law then must be found in other places: the amendments to the United States Constitution, federal laws, the jurisprudence of the United States Supreme Court, other federal courts *and* in the constitutions, laws and court decisions of the fifty states.

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The Bill of Rights (the first ten amendments to the Constitution) protects the states and their citizens from the federal government through negative rights.[1] The Fourteenth Amendment which says "No state shall ... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" made the Bill of Rights applicable to protect citizens from the states also.

The Tenth Amendment allows the states to legislate over those items not reserved to the federal government. For the first 150 years, the states exercised the primary responsibility for family law jurisprudence – the creation and dissolution of family relationships as well as the rights and responsibilities of family members. Since 1859, federal courts have used a "domestic relations exception" to avoid hearing cases involving divorce, alimony, child custody or support, effectively leaving substantive family law issues in state courts. Even when Congress passes a law in the family area, federal courts have refused jurisdiction absent a specific mandate.[2]

Congress acts within its enumerated powers, mainly commerce and national defense, and until the1930s it regulated only immigration and Indian issues in the family law area. The Aid to Families with Dependent Children program and other parts of the New Deal legislation pushed the federal government into administering welfare programs based on the power to spend to promote the general welfare. Since then, Congress has increasingly federalized family law in areas where the states have been slow to respond, passing comprehensive laws covering child support enforcement, child abuse and protection, violence against women, and medicare health benefits. Federal courts have allowed tort and property actions between family members, and federal courts were granted original jurisdiction along with state courts for actions under the Hague Convention on the Civil Aspects of International Child Abduction.

The United States Supreme Court interprets constitutional language to resolve individual cases. In the absence of specified positive rights, the Court has reviewed state legislation on "substantive due process" grounds, resulting in a constitutional

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[1] The seldom used Ninth Amendment comes as close as anything in the Constitution to a grant of rights: "The enumeration ... of certain rights, shall not be construed to deny or disparage others retained by the people." A positive right, such as the statutorily-created right to Medicaid, requires state action or protection while a negative right, such as the right of privacy, allows individuals to be free from state intervention.

[2] *See* Thompson v. Thompson, 484 U.S. 174 (1988)(finding Parental Kidnapping Prevention Act did not create a federal cause of action, but was a full faith and credit law); Suter v. Artist M., 503 U.S. 347 (1992)(finding no private right of action to enforce the federal "reasonable efforts" requirements for child in foster care).

jurisprudence of families and children.[3] Substantive due process empowers the Court to find substantive limitations implicit in the Due Process Clause of the Fourteenth Amendment based on rights to life, liberty, property and equality, rooted in our nation's history and tradition. A legislature must have a compelling state interest to impinge on these important "fundamental" rights, and even then, must narrowly tailor the law to use the least restrictive means to serve the state's legitimate interests. A fundamental-rights analysis tied to history and tradition, however, makes it difficult to accommodate new social values and nontraditional families.

II. Respect for Family Life

Even without a provision similar to Article 8 of the ECHR's right to respect for private and family life, the United States Supreme Court has found a right to family privacy, protecting a "private realm of family life which the state cannot enter."[4] The locus of privacy appears to lie, however, in the traditional, nuclear family which includes two opposite-gender parents with dependent adopted or biological children.

The United States recognizes freedom of choice in marriage if the parties are an unmarried man and woman who are over age eighteen (younger with parental or judicial consent), not too closely related by blood, with sufficient mental capacity to consent without fraud or duress. The Supreme Court stated: "... Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival."[5] A marriage valid in one state will be recognized as valid in other states unless contrary to strong state public policy. Federal and state governments offer married persons numerous rights and benefits both during the marriage and upon death, and impose obligations, such as support. All fifty states allow parties to divorce using a no fault ground.

As a general rule, biological or legal parents, including unwed fathers,[6] have the fundamental right to the care, custody and control of their children free from state intervention. Parents are entitled to the physical possession of their children (and their earnings) and can make decisions about their residence, medical care,

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[3] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Troxel v. Granville, 530 U.S. 57 (2000); Washington v. Glucksberg, 521 U.S. 702 (1997)(Souter concurring).

[4] Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[5] Loving v. Virginia, 388 U.S. 12 (1967)(finding Virginia's miscegenation law unconstitutional). *See also* Zablocki v. Redhail, 434 U.S. 374 (1978).

[6] Stanley v. Illinois, 405 U.S. 645 (1972); Caban v. Mohammed, 441 U.S. 380 (1979).

education, religion, and with whom the child associates.[7] The state can intrude upon the parental relationship only with the parent's consent or through use of its *parens patriae* power to protect the child, as in the case of abuse and neglect. To terminate a parent's rights to the child, the state must prove unfitness by clear and convincing evidence.[8]

Nontraditional families, which comprise the majority of American families according to the census, lack protections at a national level and in most states. Although the Supreme Court has noted that "ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family,"[9] it has not extended the protections to foster families[10] or to other types of nontraditional families.

Same-sex couples cannot marry except in Massachusetts.[11] The federal Defense of Marriage Act (DOMA) recognizes only unions between a man and a woman and denies federal benefits to any same-sex couple granted the right to marry under state law. Forty states have enacted DOMA statutes. Congress has proposed a constitutional amendment to limit marriage to a man and a woman; eighteen states have already added such amendments to their constitutions. Transsexuals face difficulties because many states use the English rule that a person's sex is determined at birth and do not recognize the transsexual as the postoperative sex.

California, Connecticut and Vermont grant the same benefits and obligations of marriage to same-sex civil unions; Hawaii gives statewide benefits to domestic partners. Other states, however, ban civil unions or domestic partnerships. Several state courts will divide jointly acquired property of cohabitants, but other rights, such as medical decision-making, inheritance, rights to sue for loss of consortium, as well as obligations to support, are absent. Forty states allow a family member related by blood or marriage to make health care decisions in the absence of a living will or other directive. Only a few states include friends or unmarried partners.

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[7] Troxel v. Granville, 530 U.S. 57 (2000).

[8] Santosky v. Kramer, 455 U.S. 745, 762 (1982).

[9] Moore v. City of East Cleveland, 431 U.S. 494, 503, 504 (1977)(striking zoning which prevented a grandmother from living with two sets of grandchildren).

[10] Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977).

[11] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003) (drawing a parallel between the state's denying marriage to a couple based on skin color and on sexual orientation, the court noted "history must yield to a more fully developed understanding of the invidious quality of the discrimination"). Massachusetts voters will vote in 2006 on a constitutional amendment to ban same sex marriages.

Same-sex couples may not be able to create a family through adoption because statutes routinely require termination of parental rights except for a stepparent adoption. Although seven states, either by statute or court decision, ban same-sex couples from adopting a child, at least nine states have granted same-sex couples the right to adopt.[12]

A same-sex partner who lives with a biological parent of a child (even if the partner has a child through assisted reproductive technologies during the partnership) may not have the relationship with the child protected. Eight courts have found no basis for granting any rights to a same-sex co-parent if the biological or legal parent denies access when the relationship ends. Courts in ten states have used theories of equitable estoppel, de-facto or psychological parenthood, have upheld a contract between the parties to allow for continuation of contact, or have broadly construed existing statutes. Stepparents and heterosexual cohabitants also lack protections in most states.

The right to protection of family life eludes some unwed fathers. A man who fathers a child with a woman married to someone else may find he has no rights, even if he has a relationship with the child, because of the presumption of legitimacy of a child born to a marriage.[13] Some courts reject biological evidence to safeguard the social interest of the "traditional" family. An unwed father may lose the right to object to the adoption of the child by another if he fails to assume parental responsibilities within a specified (often short) time period or fails to comply with state requirements for acknowledgment or adjudication of parentage,[14] unless the father has been thwarted in his attempts to establish a relationship.

Immigrants have additional problems. Polygamous, same-sex, unconsummated proxy marriages and some common law unions are not recognized; current policy denies applications for immigration benefits made if one of the applicants is a transsexual. The marriage fraud amendments place restrictions and residency requirements on immigrants who marry citizens. An illegal immigrant who marries an American citizen and has children born here may find him or herself deported and be separated from the family.

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[12] *In re* Adoption of Tammy, 619 N.E.2d 315, 320 (Mass. 1993)(recognizing a non-traditional family based on the need of the child not to be left a "legal limbo for years while their future is disputed in the courts").

[13] Michael H. v. Gerald D., 491 U.S. 110 (1989).

[14] Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 436 U.S. 248 (1983).

III. Equality or Nondiscrimination

The United States recognizes that there is a basic human right to equal treatment under the law. The Civil War and women's suffrage amendments as well as federal and state laws preclude discrimination on race, ethnicity, religion, and sex. No Constitutional amendment prohibits discrimination based on sex, but the Supreme Court has used the equality principle of the 14th amendment to end *de jure* sex discrimination in employment and family law.[15] Half the state constitutions contain an equal rights provision; all states have invalidated laws that treat men and women differently. With the exception of combat positions in the military, men and women have equal opportunity under the law for education and jobs. Gender bias still exists, however. Women earn 76 cents for every dollar a man makes; and the labor market remains highly segregated based on gender, with one third of women working in occupations in which the percentage of women exceeds 80%.

Within marriage, women are no longer seen as "property" of their husbands nor children as the property of their fathers. Husbands and wives do not have to have the same domicile or residence. Both can own and manage separate property, make contracts, sue and be sued, and equally control marital property. However, studies indicate that women, even when they earn more than their husbands, still do the bulk of the domestic work. Marital property is equitably divided up on divorce. Equal protection precludes the use of race or sex as a basis for awarding custody of a child to a parent, married or not; the judge must look to the "best interests of the child."

The Supreme Court first used the equal protection clause to protect children in a school desegregation case in 1954, finding that separate education was "inherently unequal."[16] In 1968, the Supreme Court stated that a child born out of wedlock is a "person" under the Constitution and began to uphold equal protection challenges to legal classifications based on birth, class or wealth.[17] Courts have found that laws that are intended to benefit children equally, such as the right to adequate child support, cannot discriminate on the basis of a marital vs. nonmarital birth. There are still a few areas of difference. The Supreme Court upheld limiting the time that

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[15] *See* Reed v. Reed, 404 U.S. 71 (1971)(invalidating preference for male executors); Orr v. Orr, 440 U.S. 268 (1982)(invalidating law awarding alimony only to wives); United States v. Virginia, 518 U.S. 515 (1996). Kirchberg v. Feenstra, 450 U.S. 455 (1981)(striking the Louisiana "lord and master"law giving the husband authority over community property).

[16] Brown v. Topeka Board of Education, 347 U.S. 483 (1954).

[17] *See* Levy v. Louisiana, 391 U.S. 68 (1968)(allowing illegitimate child to sue for wrongful death of the mother); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Trimble v. Gordon, 430 U.S. 762 (1977). *But see* Lalli v. Lalli, 439 U.S. 259 (1978).

an out-of-wedlock child born to a noncitizen mother and citizen father could prove citizenship even though, if it is the mother who is a citizen, the children are citizens from birth. The governmental interest in promoting early ties to the country and assuring evidence of paternity supports the distinction.[18]

IV. Privacy

Family privacy, originally hierarchical with the father or husband representing the family to the outside world, protected important values for individuals and society when the man was the sole wage earner and the family was the economic productive unit. Even today, the state cannot "arbitrarily" intrude into the family, and day-to-day family life, including parental decision-making, is left to the family to resolve. However, over the past three decades, in addition to recognizing the equality of women in the workplace and in marriage, the law has displaced traditional notions of family privacy with the privacy rights of autonomous individuals within the family.

One aspect of the liberty protected under the Due Process Clause of the Fourteenth Amendment is a "right of personal privacy, or a guarantee of certain areas or zones of privacy" so that sexual relations between consenting adults are within the zone.[19] Crimes against fornication, sodomy, and adultery have been repealed in most states. Women have reproductive freedom such that neither the state nor a husband can veto a woman's decision to abort in the early stages of pregnancy.[20]

While not as extensive as adults', children have gained some rights against unwarranted state intrusion into their physical and moral liberty. Older children can seek medical treatment without parental consent when the state has a compelling interest in protecting the child[21] or when the child's privacy interests in reproductive decisions outweigh the parents'.[22] State laws vary considerably, however, so that

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[18] Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. I.N.S. 121 S. Ct. 2053 (2001)(denying citizenship to child born out of wedlock abroad where American father did not establish blood relationship by clear and convincing evidence, did not acknowledge paternity in writing, and did not legitimate child before age 18).

[19] Eisenstadt v. Baird, 405 U.S. 438 (1972) (noting individual's right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child); Roe v. Wade, 410 U.S. 113, 152 (1973); Lawrence v. Texas, 539 U.S. 558 (2003).

[20] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[21] Parham v. J.R., 444 U.S. 584 (1979)(presuming parents act in child's interests in commitment decisions subject to physician's independent examination and medical judgment).

[22] Carey v. Population Srvs Int'l, 431 U.S. 678 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979).

it may be possible for a mature minor to obtain an abortion without parental consent, but not a tatoo.

VI. Protection of Family Members

Family privacy sometimes posed serious risks for women and children because abuse within the family was considered within the realm of family privacy. In the last twenty-five years, both federal and state governments have enacted a number of civil and criminal statutes designed to protect victims of domestic violence. Congress enacted the Violence Against Women Act (VAWA) and all states have enacted both civil and criminal procedures to protect victims and punish abusers. Despite increased legislation, domestic violence remains an immense problem in the United States. Unfortunately, the Supreme Court found that VAWA confers no private right of action.[23] In 2005, the Supreme Court refused to allow a woman to sue the police department for its refusal to enforce a restraining order against her husband which resulted in the death of her children, finding that the Due Process Clause does not require the state to protect its citizens against invasions by private actors.[24] Giving the police "discretion" to enforce valid protective orders seems to leave domestic violence victims with inadequate remedies.

Protection for children is more complicated. The Constitution does not grant children positive rights to education, health care, protection from abuse, income supports, or shelter. Statutory federal and state benefits exist, but they are inherently more mercurial than constitutional rights. In America, the private family, not the government, has the responsibility to meet the child's needs. If the parents fail to do so or if the state has created a right, the courts will enforce the right. Federal and state child labor laws control the hours and conditions under which children can work for pay outside the home. The state uses its *parens patriae* power to protect a child only appears if the parents do not provide for the child as they should. Inside the home, parents have the right to control children, including corporal punishment with "reasonable force when necessary to maintain proper control and training." Parents have the right to the child's earnings absent emancipation, guardianship or legislation in a state. A parent can decide to home school a child in many states without any license, accredition or even a high school degree.

Most allegations that parents are not meeting the child's needs come in complaints to the state welfare system that a child is being abused or neglected. Federal and state laws provide for agencies to provide protective, foster-care, and adoption services for children. Although thousands of children are reported to authorities as

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[23] U.S. v. Morrison, 529 U.S. 598 (2000).

[24] S. Ct. after Gonzales, 125 S.Ct. 2796 (2005).

being abused annually, the Supreme Court rejected the argument that government authorities, once they know of a child at risk, have an affirmative duty to protect the child.[25] But if the state ignores or dismisses the complaints, what remedy is left for the child?

Many children are often left unprotected in custody disputes when one parent is a batterer. Congress urged states to not award custody to batterers. All states list the presence of domestic violence as a factor. Evidence shows that one who batters a spouse is more likely to abuse the children and that children suffer emotionally from witnessing domestic violence. Many judges, however, discount abuse of a spouse and allow unsupervised visitation or shared custody.

VII. Empowerment, Dignity

Most adults have rights to vote and to participate in society freely. Rights for children are complicated because children are presumed incompetent for most purposes until age eighteen, the voting age after the 26th amendment to the Constitution. Equality for children raises different issues than race and gender because, while the dependency of young children requires protection, children outgrow their "disability." A child's capacity for judgment is "developing" and varies according to the child's age, health, intelligence, education, culture and life experiences. The age of majority, however, may differ for driving a car, purchasing alcohol or tobacco, for marriage without parental consent, for employment, and for "maturity" to decide whether to terminate a pregnancy.

Children do not possess the same rights and privileges as adults to choose religion, school, residence, and health care. Empowering parents to speak for children is presumed to protect the children's interests, i.e., children's rights are subsumed in the rights of the parents. However, children do have the capacity to make some decisions and should be allowed to do so.

In recognizing a minor's due process rights, the Supreme Court recognized stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[26] Children have been given several autonomy-based rights – the right to equal protection in education, protection against arbitrary state action, and First

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[25] DeShaney v. Winnebago Cty Dept' of Soc. Servs., 489 U.S. 189 (1989).

[26] *In re* Gault, 387 U.S. 1. 13 (1967)(disclaiming any effort to "consider the impact of ... constitutional [guarantees] upon the totality of the relationship of the minor and the state."); Breed v. Jones, 421 U.S. 519 (1975)(noting that commitment of a minor to an industrial school is a deprivation of liberty whether criminal or civil); *In re* Winship, 397 U.S. 358 (1970).

Amendment rights to political expression[27] and to receive information.[28] A student has a right to notice of charges as well as the opportunity to present his or her case before being dismissed from school.[29] Juvenile offenders have the same rights as adults to counsel, to confront witnesses, to not self-incriminate, but they do not have the right to trial by jury. The child's capacity should mandate a right to counsel before any police interrogation, although that issue is not settled. In March 2005, the Supreme Court finally found that children cannot be executed for crimes committed as a child.[30]

Courts, however, often deny children standing in custody, juvenile detention, foster care and adoption. Children are subject to legal control solely because of their status. The focus on parents' equality "rights" in custody proceedings and arguments for joint physical custody (dividing the child's time 50/50) without an individualized finding of the child's best interest and without input from the child, treats the child like a piece of property and ignores the child's interest in stability and continuity of care. There should be an assessment of the child's needs and views even if the child is unable to articulate a view. If the child is capable of articulating a perspective, the child should have a way to get that voice before the court and the court should seriously consider it. Several states have authorized a lawyer to represent a child in all cases in which the child's custody is in issue. At least one federal court has found that the right to counsel guaranteed to foster children means the right to effective counsel.

A child should have the right to know the identity of his or her parents. The presumption of legitimacy of the child born to a marriage may protect a marital family unit, but it does not give the child information about his or her heritage. Putative fathers in many states cannot challenge a child born during the marriage of the mother and another man. Assisted reproductive technologies, such as artificial insemination, surrogacy, and in vitro implantation techniques may create situations with "anonymous" biological parents. Few states have legislation covering assisted reproduction. Some states void surrogacy contracts as against public policy because of the potential for exploitation, commodification and the right to human dignity. Some uphold gratuitous arrangements. Courts are grappling with the question of who is a parent – the "intended," the "legal," or the biological parent.

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[27] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)(suspending children for wearing armbands infringed on their right to express their views).

[28] Erzonik v. City of Jacksonville, 422 U.S. 205 (1975).

[29] Goss v. Lopez, 419 U.S. 565 (1975).

[30] Roper v. Simmons, 125 S. Ct. 1183 (2005).

VIII. Conclusion

The law in the United States does protect against discrimination, allows for individual privacy rights, and has statutes to protect adults and children from abuse. The reality is that enforcement is not always present. Same sex couples, battered women and children still need protection.

There remains a tension between public recognition of children's rights and allocating parents' authority. Some argue that an increase in children's rights decreases parents' rights and have proposed a Parental Rights and Responsibilities Act. Others fear rights for children will invade family privacy and threaten women's autonomy. However, giving rights to parents subordinates children's voices and discounts a child's right to choose to attend public school, to stay in school or to continue association with adults with whom he or she has a substantial relationship. One suggestion is to make the parent/child relationship more like a fiduciary relationship and for parents and the law to accommodate the growing capacities of children to speak for themselves. The challenge is to protect individual autonomy, as well as the privacy of families, without undermining the personhood of children.