BOOK REVIEW:

A REVIEW OF WHAT’S WRONG WITH CHILDREN’S RIGHTS:
STILL A “SLOGAN IN SEARCH OF A DEFINITION”

By Justine A. Dunlap

Government intervention into the lives of families has grown significantly in the last generation. Sometimes this is to the good, e.g., when needed to prevent imminent or continued physical violence within the family. But the intervention can go too far. Children can be removed from – or prevented from returning to – parents who, while imperfect, are not unfit. Too often removal occurs in poor families of color. Too often it occurs as a reflexive action without any real regard to whether it will aid the child being removed. And it occurs, again too often, under the label of children’s rights.

The negative side of government intervention on behalf of children is a primary focus of New York University Law Professor Martin Guggenheim’s book What’s Wrong with Children’s Rights. In this interesting book, Professor

* A slogan in search of a definition is how Hillary Rodham Clinton described the children’s rights movement 33 years ago. Hillary Rodham, Children Under the Law, HARVARD EDUCATIONAL REVIEW 43 (1973).
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1 For many years, such intervention was denied based on the notion that the family sphere was a private one. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
2 There is, of course, no such thing as a perfect parent, and what constitutes unfitness eludes clear definition. See infra at 189 for a discussion of unfitness.
5 Martin Guggenheim, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005).
Guggenheim is always instructive and often provocative. As a consequence, he has written a book worth reading.  

This book review essay will begin by offering an overall assessment of the book. It will then analyze two separate components of Guggenheim’s book. First, it will evaluate Guggenheim’s assertion that, absent a demonstration of parental unfitness, parental decision-making regarding their children is “virtually immune from state oversight.” Second, this review will explore Guggenheim’s critical view of children’s advocates and the role they play in securing rights for children.

The Book: What’s Wrong with Children’s Rights

Professor Guggenheim’s book addresses many of the issues relevant to the modern family. He juxtaposes parents’ rights, children’s rights, and the rights of third parties under a variety of different legal and factual circumstances. Woven throughout the book is a critique of the current children’s rights movement and the child advocates who populate it.

8 It is hard to imagine anyone better qualified to write this book than Guggenheim. He is currently the Fiorello LaGuardia Professor of Clinical Law at NYU, teaching and training students in clinical education. His work as a lawyer, which he describes in bits and pieces as is relevant, is inspiring to any lawyer who dreams of making a difference.


10 See, e.g., Guggenheim, supra note 5 at 205-06, 251.

11 Guggenheim, supra note 5 at 180.

12 Id. Many “parents’ advocates” may rightly view themselves as children’s advocates, if one believes that vigorous and effective advocacy for parents benefits children. For instance, as a parent’s attorney in the Washington, D.C., child abuse and neglect system many years ago, this author filed a motion for a court order for housing for a mother whose children were then in foster care only because they lacked adequate housing. The government opposed the motion, even though its social workers agreed that the children could be returned if there was adequate housing. See In the Matter of D.I., 113 DAILY WASH. L. RPTR. 1293 (May 6, 1985). As Guggenheim points out, the lack of available, adequate housing is responsible for a large percentage of children remaining in foster care. Guggenheim, supra note 5 at 193. This issue underscores the pernicious and often non-child-centered effects of unnecessary removal of children, a problem also addressed by Guggenheim. Id. at 192-96. Assuming that the parent and children had housing originally, once the children are removed, the parent may lose eligibility for staying in the housing and/or lose the income necessary to maintain it. Once lost, it can be a Herculean feat to recover, and thus the children remain in care—often at a cost equal to or exceeding what the government would pay in subsidized housing costs for a reunited family. But, as Guggenheim explains, the federal money to the states supporting out-of-home care far exceeds what the government is willing to pay to preserve and reunify families. Id. at 189-90. All too often this travesty occurs in the name of children’s rights.

13 Id. at Preface x and 180.
need of special rules — that is what makes them children.\textsuperscript{20} Unlike other “disadvantaged” groups to which they are sometimes compared, children need these rules, but they also grow out of the need for such rules, restrictions, and limitations when they become adults.\textsuperscript{21}

After dispensing with the largely discredited liberationists, Guggenheim argues that the movement “has less substantive content … than many would suppose.”\textsuperscript{22} He also states that the children’s movement lacks a coherent and workable voice. Notwithstanding internal incoherence, Guggenheim notes that the children’s movement has made its mark. This impact, he explains, was evidenced early on in the case of \textit{In re Gault}.\textsuperscript{23} This landmark U.S. Supreme Court case afforded minors involved in delinquency proceedings many of the constitutional procedural protections previously granted only to adult criminal defendants.

\textit{Gault} reflected the Supreme Court’s acknowledgement that the institution of the juvenile court, first established in 1899 to “help” minors who had run afoul of the law, no longer retained the helping qualities it had when it was created by the first children’s movement. The juvenile court could no longer be viewed as solely beneficent, hence the need to now afford rights to children in their interaction with the system.

Guggenheim offers a twist on \textit{Gault}’s impact. Among its legacies, he suggests, was a negative one: the creation of a lawyer-dominated children’s movement focused on rights rather than needs.\textsuperscript{24} This is a different perspective on \textit{Gault}, a case widely seen as benefiting children. Guggenheim’s view here is one of the book’s numerous strengths — an unusual perspective on some old “truths.”

From \textit{Gault}, then, flowed the armies of children’s lawyers and their more amorphous counterpart, the children’s advocate. Guggenheim is critical of the lawyers who, in

\begin{itemize}
\item \textsuperscript{14} Id. at 286, fn 4.
\item \textsuperscript{15} Id. at 181-185.
\item \textsuperscript{16} Id. at 1-13.
\item \textsuperscript{17} Guggenheim, supra note 5 at 6.
\item \textsuperscript{18} Id. at 4.
\item \textsuperscript{19} Id. at 5.
\item \textsuperscript{20} Id. at 8-12.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at Preface xii.
\item \textsuperscript{23} \textit{In re Gault}, 387 U.S. 1 (1967).
\item \textsuperscript{24} Guggenheim, supra note 5 at 7-8.
\end{itemize}
addition to "winning" rights for children, made courts the forum of first resort to resolve disputes over children's rights. Making children into litigious beings has been largely to their detriment, Guggenheim asserts, not a positive step in creating and securing supposed rights.  

Among those who claim the title "child advocate," Guggenheim reserves much of his ire for those who seek to "protect children" from the constraints imposed by their parents. A pernicious effect of the current children's movement, Guggenheim argues, is to allow children's interests to be considered apart from their parents' rights and interests. Thus emerges the conundrum created by focusing too intently on children's rights - as opposed to their needs and interests. As children, they are not and, most would agree, ought not be, fully autonomous human beings. Yet the emphasis on rights has resulted in dividing children from their parents, thereby creating a vacuum. As Guggenheim puts it, "[t]he immutable truth of childrearing is that someone has to be in charge."  

Who takes care of children if they can't take care of themselves and if their parents are, in some legal fashion, removed from the picture? Although this question is in part rhetorical, its practical answer highlights the problem. The new caregivers are the lawyers, judges, and the state at large, whose enhanced role has become a prominent byproduct of the children's rights movement. So, Guggenheim points out, children's rights and welfare are still controlled by adults, just not the adults who are their parents.

Taking on those who purport to advocate on behalf of children requires a thick skin and some moxie. But take them on Guggenheim does. He argues that the children's rights movement is at best an empty shibboleth - e.g., "child-centeredness," at worst, is a falsely trumped-up banner waved at the expense of children and their families used, _inter alia_, as a "subterfuge for the adult's actual motives."  

After Guggenheim explains the two distinct children's rights movements, he sets out the "parental rights doctrine." So intertwined are children's rights and parents' rights, he asserts, that the former cannot be understood without a grounding in the latter. Guggenheim frames his discussion of parents' rights by asking the reader to envision for a moment that parents are not the natural guardians of their children. Imagine a society, he says, in which rules must be established to determine who raises any given child. One possibility would be to make biology irrelevant. Rather, a state agency matches available children with those who want to be parents. As Guggenheim spins out the Orwellian possibilities inherent in such a scheme, he underscores the "deeply embedded  

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25 Id. at 13, 245-48.
26 Id. at 187.
27 Id. at 13, 245.
28 Some would argue that the legal attribution of a need implicitly finds a right. See James G. Dwyer, _A Taxonomy of Children's Existing Rights in State Decision-Making About Their Relationships_, 11 WM & MARY BILL RTS J. 845, 848-49 (2003). Dwyer's taxonomy of no fewer than nine different kinds of rights for children (e.g., non-determinative right or imperfectly-tailored right) suggests that Guggenheim is correct in his assessment that, 33 years after Hillary Rodham Clinton first said it, children's rights is still a slogan in search of a definition. See Dwyer at 8-853, Guggenheim, supra note 5 at 12.
29 Guggenheim, supra note 5 at 42.
30 Id. at 246.
31 Guggenheim himself acknowledges the delicacy of this undertaking. _Id._ at xii.
32 See, e.g. _id._ at xii and 246.
33 _Id._ at 18. This discussion assumes, of course, that there is a common understanding of what a parent is. As with the term "family," the word "parent" has multiple meanings; any former common understanding is currently open to discussion and debate. There is the biological parent, the legal parent, and the step-parent. There may be a de facto or psychological parent. For each of these categories, there may be one person, a pair, or even more. Then there are persons with parent-like roles, such as legal guardians or family members, who find themselves temporarily or permanently in a caregiving role.
34 See, e.g., D.C. Code § 21-101(a) (2001). "The father and mother are the natural guardians of the person of their minor children." However, § 21-101(b) provides that another person may be appointed guardian "when it appears to the court that the welfare of the children requires it."
35 Guggenheim, supra note 5 at 18-22.
understanding” that parents naturally come by rights to their children.  

Guggenheim then demonstrates that the parental rights doctrine has, over the past century, become entrenched in the United States constitutional firmament. He highlights the U.S. Supreme Court cases that have assiduously protected the privacy sphere of the family. But, as Guggenheim notes, the historical legal shrouding of the family in privacy has had its cost. It was, after all, the theory of family privacy that justified the state’s failure to intervene when husbands beat their wives. Guggenheim acknowledges that the legitimacy of parents’ dominion over children must rest on a better foundation than that which for years sanctioned spousal abuse.

Guggenheim again expresses his concern that parents’ rights are too often seen as antithetical to children’s interests and needs. In so doing, he emphasizes the symbiotic nature of the parent-child relationship. The parental rights doctrine benefits children as well as parents. Here Guggenheim relies on the Supreme Court case Parham v. J.R. for support.

In Parham, the Court upheld a rather extreme exercise of parental authority - the right of a parent to institutionalize her child in a psychiatric hospital. The Parham Court offered a vision of family that “rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.” Parham is often seen as a parents’ rights case, but can rightfully be viewed as standing for the proposition that there are inter-related rights and needs that inure to the parent-child relationship.

Guggenheim’s first chapters on parents’ rights and children’s rights lay the foundation for the rest of his book. He has discrete chapters on, inter alia, third-party challenges to parental custody or choices; a child’s right to abortion; divorce, custody, and visitation proceedings; how children’s rights really serve adults needs; and the child welfare or child protection system. Constant throughout these chapters is Guggenheim’s concern that the establishment of children’s rights has redounded to their detriment.

The Proper Substantive Standard to Sever Parental Rights – What Does the Supreme Court Require?

Unfitness – Is it the Requisite Standard?

Professor Guggenheim’s book is well-researched and, in this author’s view, supplies the correct analysis of applicable law and policy. However, in his parents’ rights chapter, he makes an assertion that is not directly supported by U.S. Supreme Court jurisprudence. Guggenheim states that “[i]nless parents ... are found to be ‘unfit’ in court proceedings ... parental childrearing decisions are virtually immune from state oversight.” Elsewhere he asserts that it is “well established” that fit, “legally recognized” parents can

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36 Guggenheim, supra note 5 at 20.
37 Id. at 25-34.
38 Guggenheim, supra note 5 at 22-23.
41 Guggenheim, supra note 5 at 35.
42 Parham, supra note 40 at 602.
forestall an adoption. While perhaps these statements should reflect the current state of the law, they do not. The Supreme Court has never held that parents must be found to be unfit prior to state intervention or, even more significantly, the permanent termination of parental rights.

Deciding whether unfitness is – or should be – the requisite standard first requires a look at the word itself. Unfitness is a term easily bandied about but less easily susceptible to a commonly shared definition. Indeed, one standard dictionary definition borders on the tautological: to be unfit is to be “below a required standard, unqualified, e.g. an unfit parent.”

Domestic relations scholar Homer Clark gives unfitness a definition that recognizes its seriousness. He suggests that “unfitness signifies active conduct by the parent which seriously and repeatedly harms the child either physically or psychologically.”

Others have suggested that unfitness is a proxy for parental fault. However, some of the saddest cases of parental unfitness involve cases of inability due to mental incapacity in which the parents would not commonly be considered “at fault.” Termination statutes and case law explicitly permit termination of parental rights on those grounds.

Given the imprecision of the word unfitness, my disagreement with Guggenheim and others who assert that the standard has been definitively decided may be mere semantics. In order for it to simply be a semantic difference, however, unfitness must be interpreted to be the equivalent of an initial judicial determination of parental neglect. Such a definition of neglect would be inconsistent with many state abuse and neglect laws.

Some states permit an immediate termination of parental rights simultaneously with the initial neglect finding. More commonly, however, a termination is predicated on two things: the actions originally giving rise to a neglect adjudication and a subsequent period of time in which the parent fails to remedy the situation. The original grounds, although sufficient for state intervention, are not tantamount to unfitness. Although this author rejects this conflating of the initial neglect stage with the termination requirements, there is language in Guggenheim’s book to suggest that he might not be similarly opposed. And he is, perhaps, in good company. The Supreme Court has said that a parent can lose a child to the state only after “proof of such unfitness as a parent as amounts to neglect.” Thus it appears that the court itself may have conflated two standards that are – at least in most states – substantively distinguished.

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44 Supra note 5 at 65.
50 But see In re J.H., 587 A.2d 1009 (Vt 1991). In that case, the Supreme Court of Vermont said that the “parental unfitness test must be met before [the state agency] can initially be awarded custody of a child.” Id. at 1012. The court declined to overrule that conclusion in In re C.H., 749 A.2d 22 (2000).
51 See Hershkowitz, supra note 48 at 290.
52 See Guggenheim, supra note 4 at 36.
The Role and Impact of Federal Law, the Constitution, and the U.S. Supreme Court

Family law and its sub-specialty, child abuse and neglect law, are largely a function of state law. Each state has its own divorce, child custody, child support, and adoption laws. Further, each state has distinct standards for civil child abuse and neglect cases, which are often in a court of special jurisdiction, apart from the more mainstream domestic relations matters. These standards define when a state may intervene into a family’s life, when it may take a child from her home, and when it may seek the permanent destruction of the parent-child relationship by terminating parental rights.

For a host of reasons, federal courts have traditionally declined to participate in the substantive area of domestic relations. Notwithstanding the heavy tilt toward state courts, however, federal law itself increasingly informs a state’s child abuse and neglect proceedings in two ways. First, Congress has passed considerable legislation in this area. Indeed, Guggenheim asserts that, for the past 30 years, federal law has been the “dominant influence in shaping child welfare practice.”

Second, the strong constitutional overlay on family issues has resulted in numerous U.S. Supreme Court cases, extending back in time almost a century. These cases present diverse fact scenarios and issues, but several subcategories emerge. The following section identifies and analyzes these categories.

Family Rights in the Supreme Court

Most of the U.S. Supreme Court cases concerning families have language that is solicitous of the rights of parents concerning their children, and the rights or best interests of children vis-à-vis their parents. Other cases make it plain that these rights are not without limits (e.g., the state or other third parties may, with just cause, interfere with families). Child advocacy groups and parents’ rights groups each employ language in the cases that contravenes their positions and positioning. It is worth considering whether an objectively discernable pattern exists.

Three categories readily emerge. The first category consists of the early cases that established the parental rights

55 In some states, parties other than the state may petition for termination of parental rights. See, e.g., FL Stat. 39.802. Domestic relations is an area “left to the States from time immemorial, and not without good reason.” See Santosky v. Kramer, 455 U.S. 745, 770 (Rehnquist, J. dissenting) (1982). Although this language appears in the dissent, it captures a majority view of where domestic relations cases should be heard. See also Susan B. Hershkowitz, Due Process and the Termination of Parental Rights, 19 FAM. L.Q. 245, 247-249 (1985-86).
56 The most recent, significant federal offering is the Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). ASFA, which accelerates the time frames for terminating parental rights, has prompted heated reactions, both pro and con. As a gross oversimplification, it could be suggested that so-called child advocates support it, while those labeled as parents’ advocates would generally be considered opposed. See Guggenheim, supra note 5 at 191-192.
58 Guggenheim, supra note 5 at 83.
59 Id. at 184-85, 188.
60 See infra for a discussion of U.S. Supreme Court jurisprudence in this area.
61 In “Parental” Rights, supra note 43 at 654, Buss suggests that while parental rights cases are generally analyzed as “single block,” they can be divided into two distinct blocks. The author largely agrees with Buss’s division but thinks it is useful to add a third, rather more amorphous category.
62 Looking for an objective pattern may be folly, as cases are written, read, and interpreted by persons who come to them with a view. Some persons may try harder than others to set aside that view and some circumstances urge neutrality, not advocacy. So it is that this author comes with a view, but will here endeavor to be as objective as possible in assessing what the Supreme Court has said.
63 There are some cases that best stand in a category unto themselves, and thus are not forced into any of these categories. See, e.g., Parham v. J.R., 442 U.S. 584 (1979), or Deshany v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
doctrine. The next category is a series of cases dealing with the rights of unwed fathers. The third category includes cases that deal with the termination of parental rights and foster care.

The first category, the early parental rights cases, sets the doctrinal foundation. These cases, which include Meyer v. Nebraska and Pierce v. Society of Sisters, involved intact, traditional families that were pushing back against state interference with family decision-making (e.g., parental choices for children). The court ruled in favor of these parents as against the state, framing constitutionally protected parents' rights that are “clearer in concept than in detail.” This handful of bedrock cases, spanning from the 1920s to the 1970s, produced inspiring language. That language is now widely quoted, even in cases where parents' rights are not upheld.

Society changed and so did the facts presented to the Supreme Court to decide issues of family law. No longer were intact families clashing with state laws and regulations that impinged upon parental choices for children living in the family unit. Once the facts moved beyond a nuclear family hunkering down against intrusion by the state, actual results — as opposed to honeyed dicta — for biological parents were harder to come by.

65 In Prince, it was not a parent but rather a custodial aunt who was disputing the power of the government to forbid her from directing her niece to distribute religious pamphlets. Prince at 59.
66 See, supra note 43 at 655.
67 Meyer and Pierce were decided in the 1920s, and the latest of the core quartet, Wisconsin v. Yoder, 406 U.S. 205 (1972), was handed down in the 1970s.
69 Justice O’Connor noted this societal difference in Troxel v. Granville, 530 U.S. 57, 63 (2000), suggesting that it is now “difficult to speak of an average American family.”

This societal change led to the second category of key family law cases on parents' rights. These case have involved unwed and, sometimes, “non-legal” fathers. Factualy, the fathers in these cases, who were seeking to have their parental rights protected, have presented the antithesis of intact families. Generally speaking, these were fathers who were unmarried to the mothers and whose rights were being terminated incident to an adoption by another man. And, as Guggenheim nicely explicates in his book, the law governing unwed fathers is different from the legal principles routinely applied to other parents.

Significantly, in each of these unwed father cases, the parental wishes of the two biological parents were diametrically opposed; thus, a “loss” for the unwed father was counterbalanced by a “win” for the biological mother who was supporting the legal efforts of her husband. Consequently, these cases can be seen as a logical extension of prior Supreme Court jurisprudence protecting intact families, albeit intact families that exclude the biological father.

Clearly these high court cases brought by unwed or putative fathers hoping to establish rights to their children have turned out poorly for those fathers. Moreover, the negative results for the fathers occurred notwithstanding the absence of proof of paternal unfitness and the presence of

70 See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979); Quillain v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 491 U.S. 110 (1989). As unwed or putative fathers, several of these biological fathers were challenging state statutes that declared them legally non-existent in imposing objections to their children's adoption by a stepfather.
71 In Michael H., supra note 70, the biological father and the child were seeking the father's rights to visit, notwithstanding that the child was born during the mother's marriage to another man and the husband was, by statute, the legal father. Id. at 115-16.
72 Guggenheim, supra note 5 at 63-69.
73 In the other categories of cases, the parents have aligned differently: together in the early cases, and separate but not adversarial in the last category.
74 In Caban, Quillain, and Lehr, supra note 70, the fathers were unsuccessful in stopping stepparent adoptions.
parental rights dicta. What is less clear is whether these cases are properly read as a retrenchment of parental rights.

The lone father’s victory here is *Stanley v. Illinois.* But *Stanley* contains an interesting mixture of facts, making it difficult to categorize. Like the other unwed father cases, Stanley challenged a statute that rendered his biological parenthood legally irrelevant. However, unlike the other unwed father cases, he was not seeking to interfere with legitimizing an intact family that included the biological mother. Rather, he was seeking to prevent his children, with whom he had lived for significant periods, from becoming wards of the state following their mother’s death.

Perhaps, then, *Stanley* is the case that bridges the first two categories of parental rights cases. It is certainly a chronological bridge, decided in 1972, the year of *Wisconsin v. Yoder* (the last of the original parental cases), and before any of the other unwed father cases. Further, it contains factual elements of each set of cases. *Stanley* suggests that even an unwed father can prevail if he: a) has a pre-existing relationship with his children; b) is fighting against the state, not the other, custodial parent; and c) is not attempting to exercise his parental rights at the cost of an already formed and functioning intact family unit.

The third category of Supreme Court cases dealing with parental rights is not as easily defined as the first two. This third category might best be described as including cases that arise from child abuse and neglect proceedings. These cases often challenged a decision to terminate parental rights (TPR). Usually these were TPR cases through an official

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75 See, e.g., *Lehr v. Robertson,* supra note 70 at 256, in which the court said: “The intangible fibers that connect parent and child have infinite variety ... It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.”


77 In the language of the later-decided *Lehr case,* the unwed father has grasped his opportunity interest. *Lehr,* supra note 70 at 262.

78 Although child abuse and neglect cases predate the second children’s movement described by Guggenheim, that movement placed these child welfare or child protection cases in their ascendancy.

79 See, e.g., Genty, supra note 45 at 759 for a discussion of the two ways in which parental rights termination proceedings can originate.


82 Id. at 747-48. See infra at 200 for a fuller discussion of *Santosky.*


84 Id. at 36-38. In many jurisdictions, counsel (for parent, child, or both) is statutorily mandated. See, e.g., D.C. Code § 16-2304 (b)(1) (2001).


86 This termination proceeding was part of a stepparent adoption proceeding, not a state-initiated child abuse proceedings. Admittedly, therefore, its placement in this category is a bit forced. But its similarities
The last case in this category, *Smith v. Organization of Foster Families*, did not involve a TPR proceeding, but did involve parental rights. In that case, foster parents challenged New York state law and procedure governing removal of a child from a particular foster home. They asserted that, after a year together, the foster parents and child became a psychological family with a liberty interest that warranted constitutional protection.

In *Smith*, the U.S. Supreme Court ruled, without dissent, that the procedures currently in place were adequate with the other cases seem greater than its differences, thus justifying the choice.

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[^87]: Smith v. Organization of Foster Families, 431 U.S. 816, 843-845 (1977). Guggenheim was involved in the *Smith* case, representing the foster parents. It is the case to which he refers when he writes that he was happy not to win. Guggenheim, supra note 5 at 236, fn 4.

[^88]: The biological parents opposed the foster families' argument, asserting that it came at the cost of state and federal constitutional law protecting families. *Id.* at 839-40. The class of children also imposed increased procedures, asserting that any additional procedures would be contrary to the children's interest. *Id.* at 839. This positioning of lawyers for children, coming in a significant case relatively early on in the second children's movement, illustrates well one of Guggenheim's core points in *What's Wrong with Children's Rights*. The position of the children - i.e., what they assert as their rights or, alternatively, what is in their best interests - is largely, if not exclusively, a function of the beliefs of the lawyers who are appointed to represent them. And a judge who appoints counsel in particular cases may be well aware of the lawyer's general world view regarding children's rights and interests. So it is easy to fathom that, given another set of lawyers, the lawyers for the children - either serendipitously or intentionally - could have come out on the "side" of the foster parents, not the biological parents. See Guggenheim, supra note 5 at 159-167 for a discussion of what he considers the unnecessary and sometimes pernicious input of lawyers appointed to represent children. *But see* Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 Loy. U. C. L. A. L. J. 1 (2000).

[^89]: *Smith* at 819-20.

[^90]: *Id.* at 839.

[^91]: Justices Stewart and Rehnquist and Chief Justice Burger concurred in the judgment but did not join Justice Brennan's opinion. *Id.* at 817. Justice Stewart wrote a concurrence, joined by Rehnquist and Burger, stating that, rather than "tiptoeing around the[es] central issue," he would declare that the foster parents had no interest protected by due process. *Id.* at 857-58.

[^92]: *Id.* at 847.

[^93]: *Id.* at 842.

[^94]: *Id.* at 846.

[^95]: See, e.g., Gentry, supra note 45; Vivek Sankaran, *But I Didn't Do Anything Wrong*, 85 MAR. MICH. B. J. 22, 24 (2006); Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 Fam. L. Q. 245, 247-249 (1985-86) (see supra note 48). Guggenheim makes this assertion but he does not particularly rely on Santosky or *Stanley*.


[^98]: To be sure, there are other cases containing dicta that could also be misconstrued. *See, e.g.*, M.L.B. v. S.L.I., 519 U.S. 102 (1996), a case in which the court mandated the right to proceed in *forma pauperis* in appealing a decision to terminate parental rights. There, the court referred to a parent resisting "the brand associated with a parental unfitness adjudication." However, a careful reading of that case demonstrates that this language is dicta.
unfit, thus enabling the state to wrest custody from that father without a hearing.99 Significantly, the statutory presumption the court struck down was irrebuttable.100 The U.S. Supreme Court concluded that the statute violated "the equal protection of the laws guaranteed by the Fourteenth Amendment."101 These unwed fathers, the court declared, were entitled to individual fitness hearings prior to having their children become wards of the state.

Stanley ratified the strong legacy of constitutional protection shrouding families by granting the unwed father a right to a hearing. It also yielded inspiring language about the relationship between parents and children.102 What Stanley did not yield, however, was a holding that parents must first be found unfit before the child can become a ward of the state.103 Although the Stanley opinion did refer to parental unfitness, it did so only in the context of describing the state statute being challenged.

Even more frequently cited for the "unfitness proposition" is Santosky v. Kramer, a case decided 10 years after Stanley. In Santosky, the parents challenged a New York state statute that permitted TPR upon a showing of "permanent neglect" by a fair preponderance of the evidence.104 The court found that level of proof constitutionally inadequate, holding that before "a State may sever completely and irrevocably the rights of parents in their natural child, due process requires

99 Stanley, 405 U.S. at 650, n. 4.
100 Id. at 650; Vlandis v. Kline, 412 U.S. 441, 447 (1973).
101 Stanley, 405 U.S. at 649.
102 Some of the language, it might be argued, was less than inspiring. For instance, the court stated that it "may be ... that most unmarried fathers are unsuitable and neglectful parents." Id. at 654.
103 The court itself has described Stanley as a case providing procedural, not substantive, protection to "family life." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 842, n. 47 and accompanying text. Some lower courts have read Stanley too broadly. See, e.g., In re J.P., 648 P. 2d 1364, 1374 (Utah 1982) ("[T]he conclusion is inescapable that the [Stanley] Court found a showing of unfitness to be a prerequisite to the severing of parental ties").
104 The parent petitioners were represented in the U.S. Supreme Court by Martin Guggenheim. Santosky, 455 U.S. at 747.

that the State support its allegations by at least clear and convincing evidence."105

Santosky, like Stanley before it, is a case about procedural requirements. It sets forth the constitutionally requisite level of evidentiary proof needed to prevail in a TPR proceeding. It does not decide what substantive allegations must be established.

Santosky, however, contains dicta that hint at a mandate of parental fitness. But when assessing what process was due under the three Mathews v. Eldridge factors,106 the court declared that a state victory "entails a judicial determination that the parents are unfit to raise their own children."107 When that quoted language is read in context, it appears to be a recitation of what the court believed would occur under New York state law, not the pronouncement of a constitutional necessity. The footnote following that language further demonstrates that the court was not then deciding, nor had it previously decided, the fitness issue: "Nor is it clear that the State constitutionally could terminate a parent's rights without showing parental unfitness."108

The quoted footnote language can be traced back to the 1977 case of Quillioin v. Walcott.109 In Quillioin, an unwed father objected to the adoption of his child by the child's stepfather. The biological father contended "that he was entitled to recognition and preservation of his parental rights absent a showing of his 'unfitness.'"110 Justice Marshall, for the majority, rejected the biological father's argument. The father's "substantive rights," Marshall said, "were not violated by application of a 'best interests of the child' standard."111

Rather than referring to the Quillioin holding, the Santosky Court instead cited language from Quillioin that itself

105 Id. at 747-48.
106 Id. at 754-74.
107 Id. at 760.
108 Santosky, 455 U.S. at 760, n. 10.
110 Id. at 254.
111 Quillioin, 434 U.S. at 254.
quotes an earlier case: "We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without a showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." As hopeful as that language may be to those who endorse the unfitness standard, it is classic dicta that has never been elevated to more.

Thus, those who cite to Santosky's footnote 10 as indicative of a Supreme Court holding of an unfitness standard are stringing together a series of footnotes built upon quotations to declare a principle of substantive due process. This is a shaky foundation. To be sure, these statements could be elevated in future cases; this is how the common law evolves. Here, however, there is no evidence that, as a matter of federal constitutional edict, the law has, in fact, evolved to this point. Further, there is nothing in Santosky to suggest an overruling or even an erosion of Justice Marshall's conclusion in Quillen that an unwed father could permanently lose his rights to his child based on a best interest standard, not an unfitness standard.

In sum, neither Stanley nor Santosky nor any other case permits the clear and unqualified conclusion that the court has declared unfitness to be the substantive standard constitutionally required prior to divesting a parent of his or her parental rights. Rather, as Justice Souter said in his concurrence in Troxel v. Granville, it seems plain that the court has "not set out exact metes and bounds to the protected interest of a parent in the relationship with his child."  

112 Santosky, 455 U.S. at 760 (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (internal quotations omitted)).
113 Quillen involved an unwed father. Thus its sanctioning of a best interest standard does not resolve the issue for Santosky, which did not involve unwed fathers. But nothing in Santosky undercuts this decision.
114 Troxel v. Granville, 530 U.S. 57, 78 (2000). Given that children's rights advocates often assert that children were and in many ways still are considered to be the property of their parents (see, e.g., Barbara Bennett Woodhouse, Who Owns the Child?: Meyer and Fierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992)), Souter's choice of the property language to describe the parent's relationship to her child is either an unfortunate coincidence or a telling ratification, depending upon which side of the debate one falls.
115 See, e.g., Leduc and Buss, supra note 43.
116 Indeed, it has been suggested that Troxel represents "concerted restraint," not the broad vindication of "parental authority" that some were expecting. David D. Meyer, Lochner Redeemed: Family Privacy after Troxel and Carhart, 48 UCLA L. Rev. 1125, 1189 (2001). See infra at 207 for a more detailed discussion of Troxel and its unfitness dicta.
117 Guggenheim, supra note 5 at 130.
118 Smith, 431 U.S. at 862-63 (Stewart, J., concurring).
That scenario presents the easy case. Even the most ardent children’s rights advocates believe that intact families should, as a general proposition, be left alone.\(^{119}\) When the difficult cases occur, the Stewart language, which forms the basis for Santosky’s footnote 10, offers nothing of substance. This is because the most difficult cases are those where termination of parental rights – the complete and permanent severance of the parent/child relationship – is at stake. In nearly all of those cases, the family has already been separated. Thus, the Smith/Quillio/Santosky parental rights language is inapposite because the family is not intact.\(^ {120}\)

Elsewhere, Santosky does offer language that acknowledges the plight of the broken family. Justice Blackmun, writing for the majority, states that parents retain a fundamental liberty interest in their children even if they “have lost temporary custody of their child to the State.”\(^ {121}\) This is important language for parents, but later in the same paragraph Blackmun emphasizes that he is talking about procedural due process. “[P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections.”\(^ {122}\) This qualifying language is not surprising, as Santosky represented a victory for parents in the area of procedural, not substantive, protections.

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\(^ {119}\) See, e.g., Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 Va. L. Rev. 2493 (1995). Even Woodhouse, a scholar who laments that children are in Supreme Court jurisprudence and elsewhere, treated like property, agrees that “state intervention in the intact family is to be avoided.” *Id.* at 2493.

\(^ {120}\) The Santosky family was partially intact. It had five children, but the state was seeking to terminate parental rights to only three of the three who had been removed. The youngest two children resided with the Santoskys, without any allegation of unfitness. *Id.* at 752, fn 5. This illustrates well the factual point made by Guggenheim and others, and experienced by this author in her practice as well. Once children are removed, it is very hard to get them returned. Guggenheim, *supra* note 5 at 206-208. This, then, is the factual corollary to the Stewart dicta. We jealously guard and protect the intact family, but once it becomes separated, the principles and policies afforded to intact families no longer obtain.

\(^ {121}\) Santosky, *supra* note 97 at 753.

\(^ {122}\) *Id.*
In some ways, the *Troxel* facts harken back to the first round of parental rights cases, such as *Meyer* and *Pierce*. In both instances, the choices made by parents in intact families were constitutionally protected from outsider interference. U.S. Supreme Court rhetoric and results alike have been more protective of parental rights in situations where parents and children are currently residing together.

In the process of striking down the Washington third-party visitation statute, Justice O'Connor's plurality opinion offers language supporting the parental rights doctrine. On the importance of letting fit parents be, O'Connor says: if "a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Elsewhere in the *Troxel* plurality opinion, O'Connor writes that there is a presumption that "fit parents act in the best interests of their children."

The first quotation's parenthetical equating fitness with adequate care is curious. Certainly it cannot be said that the filing of a child neglect case always amounts to an assertion that the parent or parents are unfit. As the court has said elsewhere, even parents who have temporarily lost custody of their children to the state do not lose their parental rights. And, as Guggenheim documents, many child abuse and neglect cases are brought even when the offense is relatively minor. So the state does intervene short of allegations of parental unfitness.

Although *Troxel* has been lamented by children's rights advocates, it may not have added much substance to the already existing parental rights doctrine. The proponents' rights language in *Troxel* has obvious limitations. The most obvious limitation of the case is that *Troxel* is a plurality decision. More substantively, however, even a presumption that fit parents act in the best interest of their children is not akin to declaring that an unfitness finding must precede a termination of parental rights. Therefore, like *Stanley* and *Santosky* before it, the *Troxel* dicta cannot be

133 See text supra at 189 for a discussion of unfitness.
134 *Santosky*, 455 U.S. at 753.
135 Guggenheim, supra note 5 at 194.
136 It is possible to make the argument that the allegations contained in an initial neglect finding are always akin to an assertion of unfitness. This may be the argument that Guggenheim implicitly advances and would, in some ways, justify his assertion that unfitness is constitutionally mandated. See, e.g., Guggenheim, supra note 5 at 77. Although reasonable minds can differ, the author believes that this view is not—and ought not be—legally accurate. However interesting a full exploration of this point might be, it is beyond the scope of this article.
137 Guggenheim, supra note 5 at 117.
138 Guggenheim posits that *Troxel* may, in the long run, advance the cause of third parties against parents. *Id.*
139 The plurality consisted of Justices O'Connor, Ginsburg, and Breyer, and Chief Justice Rehnquist. *Troxel*, 530 U.S. at 60. Without O'Connor, the *Troxel* plurality is now down to three. The court's other centrist at the time, Justice Kennedy, dissented. His dissenting opinion offers a valiant attempt to synthesize the court's various pronouncements in the area. He also expressed concern over a categorical holding that harm to the child must always be demonstrated before a custodial parent's decision can be countermanded. *Id.* at 98-101. This hesitation may suggest an unwillingness on Kennedy's part to endorse an unfitness standard. For an interesting analysis of the *Troxel* line-up, see *Meyer*, supra note 116 at 1135-1155.
fairly transformed into constitutional principle that a parent must be proven unfit prior to a termination of parental rights.

**Does the Standard Matter?**

The risk of error that results from reading piccemeal, selected quotes from the U.S. Supreme Court is obvious. But it is nonetheless worth asking: does it matter that the U.S. Supreme Court has not held that parents must be legally adjudged unfit before their children are terminated?

For court determinations involving children, two different substantive standards may be at play. The fitness of the parent is one standard, the best interest of the child the other. Fitness is the more exacting requirement. It is more difficult to satisfy a requirement that a child may be placed with someone other than the parent only upon a showing that the parent is unfit; thus unfitness may be conceived as more "pro-parent" than a standard that the child may reside wherever is in her best interests.

Courts may try to synthesize these two standards. One court has said that "a child’s best interests are presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit." Or, as O’Connor phrased it in *Troxel*, "fit parents act in the best interests of their children."

But in circumstances that resist finessing — again, the hard cases — does it matter which standard is applied? This author’s response is a qualified yes. First, as indicated above, it takes more evidence to prove a parent unfit than it does to show that a child’s best interest repose in a particular place. And as any plaintiff who has ever lost a case for failure to mount the requisite proof knows, standards — both procedural and substantive — matter.

Second, there are numerous cases that suggest that lower courts are making these distinctions. In the widely publicized Baby Jessica case, the Iowa Supreme Court said that "courts are not free to take children from parents simply by deciding another home offers more advantages." So, in the everyday world of judicial dispute resolution in families, the standards are being differentiated and applied.

The yes is qualified, however. Litigation is family law cases is notoriously slippery. Sometimes an “anything goes” atmosphere prevails, all in the name of serving the child. Evidentiary rules are often honored in the breach. Judges, who often describe child custody cases as the most difficult on their dockets, no doubt want to do right by the child. Given the vagueness inherent in both the unfitness and best interests standards, it is relatively easy for a smart judge to reach the decision she wants under either standard. Moreover, due to the abuse of discretion standard likely to be applied, a careful judge can craft an opinion that is virtually immune on the appellate level.

**Of Folk Tales and Family Law**

In contrast to Professor Guggenheim’s assertion that unfitness is the acknowledged legal standard, which he makes matter-of-factly and without much fanfare, he is more insistent and vocal in his position on children’s rights advocates. Throughout *What’s Wrong with Children’s Rights*, Guggenheim is very critical of children’s rights advocates and their rhetoric. For instance, one of his milder critiques is that the rhetoric is a “useful subterfuge” to disguise adult motives. He also accuses the child advocacy legal professional of “unnecessarily contribut[ing] to th[e] pain” in

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140 Guggenheim, supra note 5 at 36-41.

141 That fitness is generally considered "pro-parent" is not a view uniformly held but is an example of what Guggenheim calls a "pernicious shift" in the debate: "pro-parent" has been co-opted to mean "anti-child." Guggenheim, supra note 5 at 212.


143 *Troxel*, 530 U.S. at 68.


145 Guggenheim, supra note 5 at 96.


147 Guggenheim, supra note 5 at 154-157.

148 Guggenheim, supra note 5 at xi-xii.
difficult cases. Guggenheim makes a good case that the criticism is often warranted. But is all children’s rights rhetoric and are all children’s advocates equally deserving of the same level of fire?

As a vehicle to criticize children’s rights proponents, Guggenheim uses an unorthodox version of an old folk tale. Shortened, it goes like this: a person comes upon a stream filled with babies and, along the stream’s banks, she sees people laboring non-stop to remove the babies. The person is asked to help but declines, saying that she prefers to use her energies to travel upstream, find out how the babies are ending up in stream, and put a stop to it at its source.

At a typical child welfare conference, the ending of the story differs dramatically. The person who comes across those working in the stream says to them: “What you’re doing here won’t stop the problem, you must go upstream. Your work here downstream doesn’t matter.” The stream worker who has picked up a baby and put it safely out of the reach of the flowing water then replies: “It matters to that one,” and upon picking up another baby, “and to this one.”

The purpose of telling this story is to inspire and motivate those toiling in the trenches trying to help individual children. But what does the stream represent? Does its meaning vary? The first time I heard the story at a training conference for lawyers handling child abuse and neglect cases there was little doubt that the speaker, a child abuse investigator, meant the stream to be the endless source of abusive parents, from which children must be saved. In other contexts, one might imagine that the stream could be the foster care system, from which children and parents both need to be saved.

152 Guggenheim, supra note 5 at 181.
154 Guggenheim and the child advocates he criticizes are likely to view the source differently. For child advocates, the source is likely to be malevolent or incompetent parents. On the other hand, Guggenheim may see the system as malevolent or incompetent for failing to aid poor families. In both versions of the story, however, the parents are conspicuously absent.
155 See In re D.I., 113 DAIL Y WASH. L. RPTR. at 1299 (D.C. Superior Court).

Both the original and the alternative ending of the folk tale may be, at different times and to different people, true. The Guggenheim ending is at least partially true. Babies will keep turning up downstream until the source of their entry into the water is found and shut off. Until the flow is stanched, the efforts of the workers downstream will be ineffectual at best.

Guggenheim condemns child advocates as those toiling downstream. He argues that they have “no interest” in going upstream to discover and stop the source. But child advocates have at least two responses to make in their defense. First, there will always be some children who are abused and in need of protection. Therefore, the stream represents the unfortunate but necessary flow of children through the child welfare/child protection system. Those picking up and tending to the children can help those children ease their way through the system.

Second, child advocates might suggest that Guggenheim, if not being entirely hyperbolic, is at least being short-sighted. Surely it is important to go to the head of the stream and stop the problem at its source. But until that is done, and done completely and effectively, there must also be people stationed downstream. As one court has declared, the inability to save all does not excuse the effort to save none.

The available responses of the child advocate notwithstanding, many of Guggenheim’s criticisms seem accurate. Like Guggenheim, this author has long rued that those who seek to protect the rights of parents are deemed to
be against children.\textsuperscript{137} Like Guggenheim, this author has viewed her work on behalf of parents to be work that advances children’s interests as well. Moreover, this author has always been suspect of the “true believer” posturing of some child advocates.\textsuperscript{138}

However, having trained hundreds of lawyers for children and parents, I know there are many lawyers for children who are deeply committed to their clients and who are not — at least not always — anti-parent. And, as the system currently exists, a child’s representative, be it a lawyer or lay advocate, who is interested in keeping the child and parent together is the most powerful advocate a parent could have.

\textbf{Conclusion}

Professor Guggenheim’s book, \textit{What’s Wrong with Children’s Rights}, is a welcome, thoughtful, and most provocative addition to the family law literature. Over the past 35 years, Guggenheim has worn many hats: law professor and founder of the NYU juvenile rights clinic, lawyer for hundreds of parents in the child abuse system, and Supreme Court lawyer, to name a few. In each of those roles, he has acquired significant wisdom to share. Those who care about families and children would do well to read his book and take heed.

A note of caution is necessary for those who come to the book wearing the label of child advocate. Be of stout heart. Guggenheim does not go easy on you. But if children are your concern and the rhetoric of children’s rights is not merely a balm for a guilty conscience,\textsuperscript{139} this is a book well worth your time. Also be prepared to share your title with Guggenheim. Although he is best known as a parent’s advocate, he has made his case that he, as much as and perhaps more than any other, has children’s interests firmly in mind.

\textsuperscript{137} Guggenheim, supra note 5 at 176, 192, 212.
\textsuperscript{138} It was to counteract this potential that the Washington D.C. Superior Court Office of Counsel for Child Abuse & Neglect, in which I served as both staff attorney and director in the 1990s, required attorneys to represent both parents and children in child abuse and neglect proceedings. We believed that representing each side (in different cases, of course) brought balance to the endeavor and helped underscore that good representation of parents inured to the benefit of children. Unfortunately this policy was later changed, after complaints from those who wanted to represent only children. Some political forces are too powerful to resist forever.

\textsuperscript{139} Guggenheim, supra note 5 at xiii.