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Whose custody is it, anyway?[1]: 'Homeschooling' from a *parens patriae* perspective

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Abstract

Proponents of 'homeschooling' routinely claim it is legal for parents to rear their children as they see fit. This view ignores the *parens patriae* doctrine – the primary legal basis for the judicial regulation of custody and the legislative enactment of compulsory schooling laws for the benefit of all children. This article challenges claims that 'homeschooling' is legal (without qualification) with evidence of the continuing vitality of the *parens patriae* doctrine in two North American jurisdictions. In New York and Ontario, where 'homeschooling' is not statutorily prohibited, the state through its legislative and judicial organs continues to limit the custodial authority of 'homeschooling' parents on the ground that children's independent welfare and developmental interests include exposure to public formative influences.

Keywords

common law, custody, homeschooling, *parens patriae*

Soon after the US Supreme Court exempted a group of Old Order Amish parents from compulsory schooling laws in the 1972 *Yoder* decision, conservative Christians began withdrawing their children from public schools on a massive scale. The modern 'homeschooling' movement was born. In this article, 'homeschooling' refers to this movement, orchestrated and dominated by conservative Christians seeking to rear the children born to them in exclusive conformity with what they believe God's will to be. Some subordinate state authority to divine authority in childrearing matters. Others deny or repudiate *any* public role in the upbringing of the children they regard as gifts of God. Citing *Yoder*, many claim a 'parental right' to rear their children as they see fit. Such claims, like the *Yoder* decision itself, are inconsistent with both the *parens patriae* doctrine and its underlying moral principles. The legal authority of a parent to make decisions on behalf of a child derives from the state.

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In this article, I begin by describing the common law concept of *custody*, the mechanism by which legal authority to make childrearing decisions is provisionally vested in biological and adoptive parents. As *parens patriae*, the state requires all custodians to subordinate their own interests to the independent welfare and developmental interests of their children when these interests conflict. I then discuss the *Yoder* decision, extraordinary in that the constitutional claims of Old Order Amish parents were given priority over the competing interests of their children safeguarded by the state as *parens patriae*. I then challenge the claim commonly made by 'homeschooling' proponents that 'homeschooling' is legal (without qualification) by citing judicial opinions in custody disputes involving 'homeschooling' parents in New York and Ontario. While 'homeschooling' may be legal from a statutory perspective, judges exercising *parens patriae* authority in both jurisdictions continue to limit the custodial authority of 'homeschooling' parents on the ground that children's independent welfare and developmental interests include exposure to public formative influences. I conclude with some brief observations about *parens patriae* authority and liberal educational philosophy.

The concept of custody

At common law, all persons are either *competent* or *incompetent*. Legally competent persons are those presumed capable of recognizing and advancing their own interests, intending the foreseeable consequences of their choices, and governing themselves and their affairs in accordance with reasonable laws. Legally incompetent persons are those presumed incapable of such things. Accordingly, adults are normally subject to *law*, a form of governance appropriate to competent persons, while children are normally subject to *custody*, a form of governance appropriate to persons incapable of governance by law.

At common law, incompetent persons are deemed to have an interest in becoming legally competent. Accordingly, persons exercising custodial authority must facilitate the prospective autonomy of the persons for whom they act as substitute decision makers.[2] As trustees, custodians must put the welfare and developmental interests of their dependents *ahead* of their personal interests. Because individuals cannot be expected to recognize, much less prioritize, the *independent* interests of vulnerable and dependent others without assistance and oversight, the state supervises all trusts and fiduciary relationships. Under the doctrine of *parens patriae*, the state exercises plenary custodial authority.[3]

Promoting and protecting the welfare and developmental interests of children have long been matters of sovereign concern at common law. 'Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him, for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt,' wrote Lord Redesdale in *Wellesley* v. *Wellesley*, All ER Rep. 189 (1828), a case in which the *parens patriae* jurisdiction of the Chancery Court was challenged by a philandering father claiming an absolute right to the custody of the children he had sired. 'Is it to be said, then, that there is no jurisdiction whatsoever in this country that can control the conduct of the father in the education of his children?' queried his Lordship. 'If a stranger was to enter into this House and hear what was argued on that subject, would it not strike him with astonishment that the law of this country should not have

provided for such a case?' Leaving the fate of children born in England to the unfettered discretion of their parents was unthinkable: 'We find that for a hundred and fifty years the Court of Chancery has assumed an authority with respect to the care of infants, and it has assumed that authority, to the extent in which it was assumed, for this reason.' A century later, in *In re Gould*, 174 Mich. 663 (1913), Judge Steele of the Supreme Court of Michigan declared that 'Every child born in the United States has from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges entitling it to governmental protection, and such government is obligated by its duty of protection to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority.'

There is an important conceptual distinction at law between *parentage*, legal recognition of two persons as the progenitors of a particular child, and *parenting*, legal authority to make childrearing decisions on behalf of a particular child. This authority is normally vested in biological parents through birth certification and in adoptive parents through judicial adoption orders (Goldstein et al., 1996: 24). No initial assignment or subsequent reassignment of custodial authority is ever exclusive or absolute. When domestic partnerships break down, judges are often called upon to reassign to one parent or the other the custodial authority previously exercised jointly. As *parens patriae*, the state routinely supervenes when individual custodians act unreasonably, where unreasonableness (or 'unfitness') is defined in terms of unwillingness or manifest inability to prioritize the independent welfare and developmental interests of a child.

Public wardship of children abused or neglected by their parents is a highly visible and relatively uncontroversial expression of the sovereign duty to protect society's most vulnerable members. But state authority to circumscribe the custodial authority of individual parents is *not* limited to exigent situations. The *parens patriae* duty to protect and promote the interests of every child within its territorial jurisdiction is an inherent sovereign prerogative; it does not arise upon parental failure, nor is its exercise limited to members of the judiciary. The state through its legislative organs prohibits all adults, *including* custodial parents, from furnishing drugs or alcohol to minors, from hiring or otherwise contracting with minors, from engaging in sexual relationships with minors, and so forth. Because such laws apply to competent adults, they are an expression of the police powers of the state. Because such laws protect and promote the interests of children, they are a reflection of the state's *parens patriae* obligations. Such laws impose limits on the custodial authority of parents, to be sure, but they have rarely been challenged on this basis.[4]

In addition to juvenile justice systems, child welfare programs and public assistance for families with dependent children, the expansive scope of *parens patriae* authority in the Progressive Era provided a legal basis for the establishment of state-maintained public school systems and publicly regulated private schools. Compulsory schooling laws required all parents to share custodial authority with 'public teachers' for limited periods of time (Alexander and Alexander, 2005: 258). These statutes imposed limits on the custodial authority of parents, to be sure, but none were successfully challenged on this basis until 1972.

Indeed, until *Wisconsin* v. *Yoder*, 406 US 205 (1972), the state was not seen as an interloper in the upbringing of children. Compulsory schooling laws had been consistently

upheld as a legitimate emanation of *parens patriae* authority exercised in the welfare and developmental interests of all future citizens. Indeed, the US Supreme Court had long recognized that neither parents nor the state could exercise *exclusive* custodial authority. 'The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers *only*,' wrote McReynolds J. in *Pierce* v. *Society of Sisters*, 268 US 510 (1925). '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' (p. 535; emphasis added). Note the language of non-exclusivity: McReynolds J. did not refer to 'schoolteachers' and 'parents' but to 'public teachers' and 'those who nurture' – to *public* and *private* formative influences. Indeed, while 'those who nurture' might be understood to include *anyone* exercising custodial authority,[5] the Court clearly recognized that parents could legitimately prepare children for obligations *in addition to* those associated with citizenship. Just as children are born into a family of some sort, they are born into a state of some sort. While the child is not the *mere* creature of the state into which she happened to be born, she is not the *mere* creature of the individuals to whom she happened to be born.

In *Prince* v. *Massachusetts*, 321 US 158 (1944), Rutledge J. affirmed that the state plays an educative role individual parents often *cannot* (i.e. exposing children to diverse conceptions of the good; promoting reason and critical thinking) while parents may teach what the state *must not* (i.e. inculcating religious beliefs). 'It is cardinal with us that the custody, care and nurture of the child reside *first* in the parents, whose *primary* function and freedom include preparation for obligations the state can neither supply nor hinder,' Rutledge J. wrote (p. 410; emphasis added). Yet again, the custodial authority of parents was described in ordinal, not *exclusive* terms. American parents have always been free to engage in *religious* instruction, but until *Yoder*, this liberty had never been judicially interpreted as an unfettered constitutional right to exercise *exclusive* childrearing authority. '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,' Rutledge J. observed (p. 166).

If the interests served by custody were not those of legally incompetent persons, there would be no reason for the state to regulate custody, and the concept of *parens patriae* would be unintelligible. 'No one should be entitled, as a matter of right, to control the life of another person, free from outside interference, no matter how intimate their relationship, and particularly not in ways inimical to the other person's temporal interests,' wrote James G. Dwyer (1994: 1373). At common law, no one has such a right. Indeed, until *Yoder*, parents claiming a 'right' to rear a child however they saw fit would have been viewed as unreasonable, just as the legal guardian of a comatose adult claiming a 'right' to do whatever she saw fit would be.[6]

Yoder and the homeschooling movement

In *Wisconsin* v. *Yoder* (1972), Chief Justice Burger took a position sharply at odds with the *parens patriae* doctrine. 'It is one thing to say that compulsory education for a year or two

beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live', he wrote, 'but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith' (at p. 222). The Chief Justice evidently believed that the children of Old Order Amish parents, unlike all other American-born children, fell outside the scope of sovereign concern. He consigned the Yoder children to an *Amish* way of life, denying their status as *legal incompetents* entitled to non-exclusive custodial arrangements. 'Our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents,' he cautioned (at p. 230). But the interests of the Yoder children were undeniably implicated insofar as Wisconsin's compulsory schooling laws were a mechanism by which the state sought to fulfill its *parens patriae* duties to *them*.[7] '[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,' the Chief Justice declared (at p. 232). 'However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children' (p. 233).[8] This has been widely interpreted to mean the state must yield to parents seeking an exemption from compulsory schooling laws on religious grounds.

And so began a *new* American tradition, particularly amongst conservative Christian parents: 'homeschooling' on a massive scale. This is no coincidence. William Bentley Ball, attorney for the *Yoder* respondents, was an outspoken opponent of compulsory schooling laws backed by conservative Catholic and evangelical interest groups (Peters, 2003; Saxon, 1999). Milton Gaither (2008) has confirmed that both Ball and Michael P. Farris, who subsequently founded the overtly fundamentalist Home School Legal Defense Association, worked for of Paul Lindstrom's Church of Christian Liberty. Gaither describes this organization, founded in 1965, as 'a self-consciously Reformed and Reconstructionist hotbed of Christian activism' and Lindstrom himself as a devoted follower of Rousas J. Rushdoony, a radical Calvinist theocrat who believed the US had been chosen by God to fulfill a divine plan and argued forcefully for a 'return' to biblical law. Rushdoony was heavily influenced by a Dutch Calvinist theologian, Cornelius van Til, who argued that the literal truth of the Bible was an essential 'first principle' or 'presupposition' that was to be assumed in any argument (Gaither, 2008: 135, 145–6).

Recent estimates from the US Department of Education's National Center for Education Statistics put the number of 'homeschooled' children at 1.5 million as of 2007 (Bielick, 2008; Reich, 2002: 145). The percentage of children whose parents chose 'homeschooling' for religious reasons increased from 72% in 2003 to 83% in 2007 (Bielick, 2008). Many such parents claim a right to rear their children as they see fit, in exclusive conformity with their religious beliefs. 'Homeschoolers' who repudiate any public role in childrearing and seek to isolate their children from public formative influences deny their children the non-exclusive custodial authority to which they are entitled at common law.

Under the *parens patriae* doctrine, the state bears a custodial responsibility to *all* children within its jurisdiction, and *all* children have a corresponding entitlement to *public* formative influences. The state may not accede to 'parental rights' claims without violating its duty to treat every child with equal respect and concern in its *parens patriae* capacity.[9] Yet such outcomes are precisely what the 'parental rights' doctrine enunciated

in *Yoder* has entailed – a constitutional basis for parents to claim *exclusive* custodial authority on the ground that childrearing is, among other things, a private liberty interest. The *Yoder* decision, ostensibly limited to the unique circumstances of the Old Order Amish respondents, is now routinely cited when *parens patriae* authority is challenged on First and Fourteenth Amendment grounds. An exemption from compulsory schooling laws had been granted for some, establishing a precedent for all. As of 8 April 2010, *Wisconsin* v. *Yoder* has been cited in 2,060 US federal and state cases, including 64 US Supreme Court decisions, and in ten Canadian cases, including four Supreme Court of Canada decisions.

Left to their own devices, Jonas Yoder, Wallace Miller and Adin Yutzy would almost certainly have paid their five-dollar fines and moved on with their lives.[10] Instead, their 'cause' was championed by Christian fundamentalists looking for an opportunity to establish the very precedent which Farris and the Home School Legal Defense Association (HSLDA) have since proved so remarkably adept at exploiting. *Yoder* opened the floodgates to the modern 'homeschooling' phenomenon.[11] Yet because custody – legal authority to make childrearing decisions – is a *parens patriae* matter, it usually falls within the purview of state courts.[12] There, in the absence of US constitutional claims, the judicial exercise of *parens patriae* continues to safeguard the interest of every child in *non-exclusive* custodial arrangements. Although 'homeschooling' is not statutorily prohibited in either jurisdiction, members of the judiciary in the US state of New York and the Canadian province of Ontario continue to view 'homeschooling' with suspicion, particularly when 'homeschooling' is undertaken with a view to isolating a child from diverse formative influences. Judges exercising *parens patriae* authority continue to regard parental attempts to isolate their children from diverse formative influences as unreasonable and have limited the custodial authority of 'homeschooling' parents on this basis.

Custodial decisions in New York: homeschooling from a *parens patriae* perspective

In the following custodial disputes in the courts of New York, US constitutional claims were either absent or unsuccessful, leaving judges free to regulate the custodial authority of homeschooling parents in a *parens patriae* capacity. These cases involved (a) 'homeschooling' by parents in violation of compulsory schooling laws; (b) 'homeschooling' by a former domestic partner; (c) 'homeschooling' by a parent exempted from compulsory schooling laws; and (d) 'homeschooling' by foster parents.

Homeschooling by parents in violation of compulsory schooling laws

In *New York* v. *Donner*, 199 Misc. 643 (1950), the fathers of a handful of school-aged boys studying Talmudic law in a small, uncertified Yeshiva were charged with violating compulsory schooling laws. They claimed Jewish law prohibited secular education. Noting that the US Supreme Court did *not* hold that sectarian education could be substituted for secular education in *Pierce* v. *Society of Sisters* (1925), Delany J. (at p. 652) provided a rigorous defense of compulsory schooling laws as an emanation of *parens*

patriae authority. 'Compulsory education laws constitute but one of many statutes of a government, dedicated to the democratic ideal, which are universally enacted for the benefit of all of the children within the realm of government,' he declared (at pp. 168–9). 'Religious convictions of parents cannot interfere with the responsibility of the State to protect the welfare of children.'

In re Adam D., 132 Misc. 2d 797 (1986), involved a ten-year-old boy subject to wardship proceedings because of his parents' admitted failure to provide him with a homeschooling program consistent with the requirements of the New York Education Law. '[W]hat does seem apparent is that the respondents did not have the faintest idea as to how to go about providing their son with a substantially equivalent education at home,' wrote Justice Lamont (at pp. 800–1). The court placed the parents under the supervision of the Department of Social Services.

Blackwelder v. *Safnauer*, 689 F. Supp. 106 (1988), involved 'homeschooled' children whose parents objected to the teaching of evolution and sex education programs in public schools.[13] Claiming the state did not have 'jurisdiction' over the education of their children, Randy and Alice Blackwelder refused to allow onsite inspections of their home. In Chief Justice Munson's view, the Blackwelders could not exempt their children from public oversight. Viewing the Blackwelder children as future New Yorkers and declining to consign them to the insular lifestyle their parents apparently preferred, Chief Justice Munson declared that 'the state's interest in the intellectual, social, and psychological well-being of the children involved in this action cannot be minimized, as it was in *Yoder*' (p. 134).[14]

Homeschooling by a former domestic partner

In *Auster* v. *Weberman*, 198 Misc. 1055 (1950), a mother sought custody on grounds that her former husband refused to enroll their child in a public school. Weberman claimed the court could not order him to provide his son with a secular education, as this would contravene his First Amendment rights. Noting that in *Pierce* v. *Society of Sisters* (1925), the US Supreme Court had stipulated that certain studies plainly essential to good citizenship *must* be taught, Justice Murphy warned Weberman that if he did not enroll the child in a public school within two weeks, he would grant the custody order sought by Auster.

Homeschooling by a parent exempted from compulsory schooling laws

In re Kevin Sampson, 65 Misc. 2d 658 (1970), involved a 15-year-old boy who suffered from neurofibromatosis, leaving his face and neck severely disfigured. Though not intellectually impaired, Kevin had not attended school for six years and was virtually illiterate. His mother, a Jehovah's Witness, refused to consent to the blood transfusions necessary for surgery that would mitigate his disfigurement and allow him to lead a 'normal' life. Quoting liberally from an Ohio opinion asserting a child's right 'to live and to grow up without disfigurement', Justice Elwyn authorized the surgery.[15] What is worthy of note in this case is that Kevin's educational shortcomings were not attributable to his neurofibromatosis but to his mother's (improper) exemption from compulsory schooling laws. His education had been left to his mother alone, and she did not teach him to read.

Homeschooling by foster parents

In re Kevin M., 187 Misc. 2d 820 (2001), involved a seven-year-old child whose foster parents sought an order terminating his biological mother's visitation rights. Upon investigation into whether this would be in Kevin's best interests, the Court discovered the foster parents had alienated the child from his biological mother and had been 'homeschooling' him. The foster mother testified that Kevin was 'doing wonderful' [*sic*] and that church-related activities provided adequate socialization. Justice Mix held that a foster parent did not have custodial authority and thus could not claim a right to exempt a child from compulsory schooling laws on religious grounds. Indeed, 'homeschooling' violated the contractual obligation of foster care providers to let foster children 'mingle freely' with children in the broader community. The foster parents were ordered to enroll Kevin in a public or private school immediately.

Homeschooling from a *parens patriae* perspective in New York

The sovereign obligation to safeguard the welfare and developmental interests of all children under the doctrine of *parens patriae* has been widely interpreted in the United States as a duty arising *only* upon parental default or failure, particularly in circumstances when the life or health of a specific child is endangered by unreasonable parental decisions. The *Yoder* decision further undermined the *parens patriae* doctrine. When the state accedes to parents seeking to exempt their children from compulsory schooling laws on religious grounds, the state violates its *parens patriae* duty to prioritize the welfare and developmental interests of *all* children. In *Yoder*, Chief Justice Burger expressly rejected the argument by the State of Wisconsin, citing *Prince* v. *Massachusetts* (1944), that 'a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as *parens patriae* to extend the benefit of secondary education to [all] children regardless of the wishes of their parents' (p. 229). The State's argument conspicuously adopted language employed by Joseph Chitty (1820: 156), who described the scope of *parens patriae* authority in the following terms: 'The care of infants is so peculiarly a prerogative of the Crown delegated to and exercised by the Court of Chancery, that it has also been laid down that the Court may interpose even against that authority and discretion which a father has in general in the education and management of his child.' Chief Justice Burger acknowledged the facial validity of the argument, but distinguished the exercise of *parens patriae* authority in *Prince* as necessary to prevent the 'evil' of child labor.[16]

Compulsory schooling laws, like other legislative emanations of *parens patriae* exercised in the interests of children, apply to *all* adults having care and control of minor children, including those in stable domestic relationships. To be sure, *Donner* and *Auster* were pre-*Yoder* cases involving non-intact families. The initial grant of custodial authority by the state in those cases had been severed by divorce and subsequent parental acrimony, necessitating judicial reassignment of custody in a *parens patriae* capacity. But *Blackwelder* and *Adam D*. were cases involving intact and apparently stable and loving parents whose only 'failure' was an unwillingness (*Blackwelder*) or inability

(*Adam D*.) to accommodate public custodial requirements. In both cases, the custodial authority of the parents was circumscribed by the courts, in the former case by upholding statutory home visits and in the latter case by ordering direct supervision by public officials. Where parents refuse to share custody of their children with the wider public, the *parens patriae* duties of the state would appear to necessitate home visits. The public cannot safeguard the welfare and developmental interests of children if it is unaware of their custodial circumstances. '[I]t is in the interest of the State and of the Sovereign that children should be properly brought up and educated', wrote Lord Cranworth in *Hope* v. *Hope*, 43 ER 534 (1854), 'and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects' (pp. 540–1). Home visits in the interests of children whose mothers received public assistance were found by the US Supreme Court to be constitutional on this basis in *Wyman* v. *James*, 400 US 309 (1971), one year before *Yoder* (Dembitz, 1971).

Kevin M. is a particularly interesting case because the child concerned was a full-time ward of the state. In exercising day-to-day custodial authority, the state as *parens patriae* is required to do what a reasonable parent would do. In contracting with foster caregivers, the state requires them to perform *its* custodial duties. Thus ensuring children intermingle freely with the wider community might be seen as a *parens patriae* duty giving rise to an entitlement to diverse formative influences for all children. Clearly, in cases in which constitutional claims are unavailable or unsuccessful, the courts of New York have continued to find 'homeschooling' contrary to the welfare and developmental interests of children and have continued to limit the custodial authority of parents engaging in homeschooling, notwithstanding the 'parental rights' doctrine enunciated in *Yoder*. Indeed, while homeschooling may be legal in New York from a *statutory* perspective, it is not always reasonable from a *parens patriae* perspective.

Custodial decisions in a Canadian constitutional context

American constitutional jurisprudence has routinely been cited by the Supreme Court of Canada since the advent of the *Canadian Charter of Rights and Freedoms* in 1982. While US precedents are sometimes persuasive, they are never dispositive. Moreover, when a Canadian court issues custody and access orders in disputes between former spouses and domestic partners, it is not 'state action' subject to *Charter* scrutiny. This principle was affirmed in a Supreme Court of Canada case involving a father challenging the conditions imposed on his access privileges.[17] James Young, a Jehovah's Witness, was not allowed to discuss his faith with his children, to take them to religious services or to include them in his door-to-door canvassing activities. In *Young* v. *Young*, 4 SCR 3 (1993), counsel for James Young and the intervening Watchtower Bible and Tract Society claimed his freedom of religion, his freedom of expression, his freedom of association, and his equality rights under ss. 2(a), (b), (d) and s. 15 of the *Charter* had been infringed. Justice L'Heureux-Dubé denied these claims, characterizing custody as the right of a *child*: 'The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent', she wrote (at p. 6). 'Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure,

protect and promote the child's best interests.' The exercise of *parens patriae* authority in custodial disputes between former domestic partners did not transform their essentially private character. '[I]t must be remembered that courts are only called to adjudicate such issues when the differences between the parties themselves have become irreconcilable. At this point, courts have no choice but to resolve the matter according to the best interests of the child,' Justice L'Heureux-Dubé reasoned (at pp. 106, 121). '[I]n those rare cases where parents cross the line and engage in conduct which constitutes . . . "indoctrination, enlistment or harassment", courts have a duty to intervene in the best interests of children.'[18]

Homeschooling appears to 'cross the line' when custodial authority is disputed in Canadian courts. Fourteen years after *Yoder*, the Supreme Court of Canada denied the constitutional claims of a conservative religious parent charged with violating compulsory schooling laws in *R.* v. *Jones,* 2 SCR 284 (1986). Citing *Yoder*, Thomas Larry Jones sought to continue instructing his children (and others) in the basement of his church in exclusive conformity with his religious faith. He argued that seeking the approval of provincial authorities would contravene his belief that God was the highest authority in childrearing matters. The Supreme Court sternly disagreed. 'The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens,' declared Justice La Forest (p. 30), rejecting both Jones's 'free exercise' and 'parental rights' claims. 'I do not think it would be reasonable to permit the appellant to ignore the province's laws on a matter as important as the education of the young' (p. 30).

Ontario courts operate within a constitutional context unencumbered by the 'parental rights' doctrine enunciated in *Yoder*. Indeed, Canadian courts have sought to reconcile constitutional rights for children and the fundamental values underlying the *Charter* with the priority traditionally given to the welfare and developmental interests of children under the doctrine of *parens patriae*. In *Children's Aid Society of Hamilton-Wentworth* v. *K. (L.)*, 70 OR (2d) 466 (1989), Steinberg Unified Family Court Judge (UFCJ) (at para. 38) observed that the *parens patriae* authority exercised by superior courts was 'an inherent jurisdiction to protect the best interests of children, even to the extent of overriding federal and provincial legislation where appropriate'. The exercise of *parens patriae* authority clearly retains its equitable attributes, permitting particularized and discretionary remedies where strict application of legal rules would yield manifestly unjust results – including the subordination of children's interests to those of their parents.

Custodial decisions in Ontario: homeschooling from a *parens patriae* perspective

The following Ontario cases involve (a) homeschooling by former domestic partners and (b) homeschooling in violation of compulsory schooling and child welfare laws. In custody disputes between former domestic partners, Ontario courts have found 'homeschooling' contrary to the developmental interests of the children concerned and have assigned custodial authority on this basis. 'A custody award is a matter of *whose* decisions to prefer, as opposed to which decisions to prefer', wrote Justice L'Heureux-Dubé in

Young v. *Young* (1993). Given the rulings of the Supreme Court of Canada in both *Young* and its companion case, *P. (D.)* v. *S. (C.)* (1993), the developmental interests of Canadian children clearly include exposure to diverse formative influences.[19]

Homeschooling by former domestic partners

Heath v. *Zdep*, OJ No. 4601 (2000), involved a mother who had opted not to work in order to 'homeschool' her eight-year-old daughter. Sherry Zdep would not allow the child to participate in community activities and went to great lengths to frustrate the father's access. Brian Heath filed an application for sole custody. Zdep argued that her religious beliefs required her to isolate Nicole from her father and other community influences. 'Unfortunately,' wrote Justice Little (at para 30), 'it does not seem that Nicole is being taught tolerance for the religious beliefs and practices of other people, including those of her father'. Citing *Young*, she concluded (at para. 31) that 'a child's relationship with the other parent is more important than exclusive conformity with the religious practices of one parent'. Custodial authority was granted to Heath.

K.J.S. v. *J.S.*, OJ No. 3688 (2000), involved a mother who moved to an unfurnished basement in Jackson, Michigan, where she 'homeschooled' her nine- and eleven-year-old children. 'I have no reservations in concluding that home schooling the two children was academically damaging to them,' declared Justice Quinn (at para. 8). '[The mother's] decision to home school the two children when she was not qualified . . . was irresponsible.' Justice Quinn likewise castigated Mrs S. for living as an illegal alien in the US, depriving her children of access to publicly funded health care. Custodial authority was granted to the father.

In *Christie* v. *Edmundson*, OJ No. 5893 (2002), Christie sought an order compelling Edmundson to return their daughter to school after unilaterally withdrawing her for 'homeschooling'. Finding there had been serious deficiencies in the quantity and quality of schooling Edmundson had provided, Justice Rodgers ordered her to enroll the child in school immediately.

In *Schippers* v. *Abbott*, OJ No. 2235 (2002), both former spouses sought the custody of the three- and five-year-old children of their marriage. The father planned to 'homeschool' the children; the mother planned to enroll the children in public school. Deeming her educational plan 'more solid, and more likely to succeed' (para. 15), Justice Pardu granted custodial authority to Abbott.

In *Marrocco* v. *Marrocco*, OJ No. 4026 (2007), Heather Marrocco sought a court order permitting her to move to a wilderness area 600 km north of her home in Windsor, claiming ten-year-old Johnny suffered from debilitating asthma. She had abruptly withdrawn Johnny from school in order to 'homeschool' him, ostensibly to protect him from bullying. School records indicated Johnny had experienced neither health problems nor difficulties with his peers. Justice Aston found that the proposed move was not a medical necessity and ordered Marrocco to enroll Johnny in school.

In *Litzen* v. *Dorsey*, OJ No. 1736 (2008), the father of four children claimed their mother's unilateral decision to 'homeschool' them served only her own interest in control. Justice Lafrenière ordered that the children be re-enrolled in school immediately, finding Linzen unqualified to teach four children of different ages.

Homeschooling in violation of compulsory schooling and child welfare laws

In *Durham Children's Aid Society* v. *B.P.*, OJ No. 4183 (2007), child welfare officials initiated neglect proceedings against Mr and Mrs P. after discovering only two of their four school-aged children could read. The parents challenged the applicability of child welfare legislation to a 'homeschooling' situation. Accordingly, the issue before the Court was whether failure on the part of 'homeschooling' parents to provide a satisfactory education as defined under the Education Act[20]constituted a child protection matter under the Child and Family Services Act.[21] 'A decision on the issue requires the Court to balance the rights of parents to make critical decisions concerning their children against the children's best interests in life as well as the state's interest in the protection of children from harm,' observed Justice Shaughnessy (at para. 29). 'The common law has long recognized the power of the state . . . to protect children where [their] lives are in jeopardy *and to promote their well being*, basing such intervention on its *parens patriae* jurisdiction . . .' (para. 29; emphasis added). Describing the protection of children as 'a basic tenet of our legal system', Justice Shaughnessy found no substantive conflict between the Child and Family Services Act and the Education Act. In his view (at para. 44), there was 'no limit to the kind of responsibility that a parent may breach' for the purposes of supervening *parens patriae* authority, 'provided the breach gives rise to a protection concern under the provisions of the [Child and Family Services] Act.' Neglect proceedings would therefore continue.

Homeschooling from a *parens patriae* perspective in Ontario

Zdep, *K.J.S.*, *Christie*, *Schippers* and *Marrocco* involved non-intact families. Divorce or separation had severed the custodial authority of the parents. Their subsequent unwillingness or inability to make reasonable custodial arrangements prioritizing the interests of their children above their own interests brought their dispute before the courts. In their *parens patriae* capacity, judges then did what the parents themselves, acting reasonably, would have done.[22] In most instances, Ontario courts seem to take as given that public schooling serves the developmental interests of children better than 'homeschooling', consistent with the 'no proof is needed' approach to public educational authority enunciated by Justice La Forest in *R.* v. *Jones*. Where reasons are given, the courts have tended to emphasize the desirability of diverse formative influences or the undesirability of exclusive or potentially indoctrinative parental authority. The ruling in *Durham Children's Aid Society* affirms that the expansive *parens patriae* authority giving rise to compulsory schooling and child welfare legislation in the Progressive Era remains robust in Ontario, where 'education' continues to be defined in its most compendious and developmental sense. *Parens patriae* duties are not limited to protecting particular children from actual harm. The state has a duty to promote the well-being of *all* children within its territorial jurisdiction. Indeed, the Ontario legislature has codified *parens patriae* principles, imposing a *statutory* duty on all persons (including judges) exercising custodial authority to make decisions in the best interests of the child.[23] Thus, as many of the Ontario cases illustrate, parents who 'homeschool' their children in order to *isolate* them

from others, including non-custodial parents and other members of the wider community, have routinely been denied or deprived of custodial authority on this basis.

Homeschooling from a statutory perspective

From a statutory standpoint, 'homeschooling' is *legal* in New York (where it is specifically contemplated in existing legislative instruments) and perhaps best described as *not illegal* in Ontario (where it has not been specifically contemplated in existing legislative instruments). Farris and the HSLDA often make the sweeping claim that 'homeschooling' is legal in every state and province. But statutes are not the only source of law in common law jurisdictions, and even where 'homeschooling' is legal from a *statutory* perspective, it may not be reasonable from a *parens patriae* perspective.

In New York, parents must send any school-aged child in their care and control to a public school 'or elsewhere' under NY Education Law § 3204(1). Instruction given anywhere other than a public school must be 'at least substantially equivalent to the instruction given to minors of like age or attainments at the public schools' under NY Education Law § 3204(2). In 1988, the New York State Education Department enacted 'homeschooling' regulations under NY Comp. Codes R. & Regs., Title 8, § 100.10.

In Ontario, parents may be excused from sending a particular child to school if the child is receiving 'satisfactory instruction at home or elsewhere' under Education Act, RSO 1990, c. E.2, s. 21(2) (a). The legislation includes the phrase *at home*, to be sure, but the phrase appears to have been included to accommodate 'home instruction' traditionally afforded children unable to attend school due to poor health, remoteness, or disciplinary exclusion – as in *E.B.J.* v. *Upper Canada District School Board* (2001). 'Home instruction' is conceptually distinct from 'homeschooling' (Brown, 2004: 160). 'Homeschooling' is a contemporary movement dominated by conservative Christians who deny or repudiate any public role in the education or upbringing of their children (Kunzman, 2009). According to a 1994 study of 808 homeschooling families in Canada conducted by Brian Ray (2001) of the National Home Education Research Institute, an organization affiliated with the HSLDA, 89% of the fathers and 92% of the mothers surveyed identified themselves as 'born-again Christians'.

Parents seeking an exemption from compulsory schooling laws in Ontario must obtain an order from the Provincial School Attendance Counsellor directing that a particular child be excused from attendance at school under s. 24(2) of the Education Act. Under s. 30(1), 'A parent or guardian of a child of compulsory school age who neglects or refuses to cause the child to attend school is, unless the child is legally excused from attendance, guilty of an offence and on conviction is liable to a fine of not more than $200.' In 2002, the Ontario Ministry of Education issued a policy memorandum detailing the extensive administrative requirements for parents in Ontario seeking such an exemption for the purposes of 'homeschooling', but a policy memorandum is neither a *legislative* nor a *regulatory* instrument. Thus 'homeschooling,' a fringe phenomenon in Ontario,[24] takes place in something of a legislative vacuum. Parents are occasionally convicted for failing to comply with compulsory schooling laws. In *R.* v. *Thompson*, OJ No. 3140 (1995), a mother was charged under the Provincial Offences Act, RSO 1990,

c. P-33, s. 24, for refusing to send her child to school without a lawful excuse. Dissatisfied with the instructional services nine-year-old Michael had been receiving at school, she 'homeschooled' him despite multiple verbal and written warnings from school officials. 'The Board does not care about my son and his education, but I'm his mother, and I do. He's taught at home,' she argued. 'I am in control, and I know what's best for my child' (para. 9). Zuker Prov. Ct. J. held that failure to send a child to school was a strict liability offense for which the only defense was due diligence. Finding no evidence of due diligence on Thompson's part, the court found her guilty as charged.

Custody from a *parens patriae* perspective

Although some scholars have described compulsory attendance laws as infringing upon children's liberty rights, such claims are illogical from a *parens patriae* perspective. Children do not have *liberty rights* at common law. Compulsory schooling laws apply to adults with custodial authority, not to the children on whose behalf their substitute decision-making authority is exercised. If children have an interest in custodial arrangements that safeguard and promote their welfare and development, compulsory schooling laws *safeguard* this interest, particularly where schoolteachers provide minimally discontinuous formative influences.[25] Indeed, common law jurisprudence suggests developmentally appropriate custodial arrangements regulated by the state as *parens patriae* may be the *only* cognizable right of a child at common law (Blokhuis, 2009: 305–8). As legal incompetents, children lack *standing* to assert rights claims. Yet judges exercising *parens patriae* authority are *required* to recognize and prioritize the welfare and developmental interests of any child whose custodial interests are implicated in *any* dispute brought before them, including that child's interest in becoming legally competent. Accordingly, a child's custodial interests may reasonably be considered a matter of right, despite her lack of standing to raise rights claims, because *the custodial interests of a child need not be claimed*.[26]

'Given that children are viewed as not having the capacity adequately to judge their own interests, it would not make sense for the state to decide that children's interests lie in the development of a capacity for autonomy yet allow them to refuse to develop this capacity,' writes Meira Levinson. 'The state may value the exercise of autonomy yet respect those adults who choose not to be autonomous; it cannot treat children the same way' (Levinson, 1999: 39). Viewing custody from a *parens patriae* perspective, Levinson's claims might fruitfully be elaborated as follows: When custodial parents are required by the community (of which they are members) to comply with compulsory schooling laws, the developmental purposes of custody are better served. Because children lack the capacity adequately to judge their own long-term interests, it is reasonable for the liberal democratic state to safeguard all children's interests in developing their capacity for autonomy. The liberal democratic state may value autonomy while respecting the choice made by a competent adult not to live autonomously. But the community cannot treat children in the same way because the competence needed to make such a decision cannot be imputed to them. Children therefore have a right to custodial arrangements likely to *facilitate* the autonomy the state will later impute to them as adults. It would not be reasonable for the liberal democratic state to decide that children's interests lie in

the development of a capacity for autonomy yet deny children opportunities to develop this capacity (Brighouse, 2006; Curren, 2000; Strike, 1982).

Parens patriae from a liberal perspective

'Liberalism is . . . keenly attuned to the ways in which individuals are socially formed,' writes Randall Curren. 'Indeed, the central debates concerning liberalism in the past decade have revolved around the balance that must be struck between "respecting the autonomy of parents (whose conception of the good may include raising their children a certain way), and protecting or nurturing the autonomy of children," autonomy being regarded as a limited and socially conditioned capacity to determine how to live one's life' (Curren, 2006: 454; citing Brighouse and Swift, 2003: 261).

What appears to have been missing from many of these debates is an awareness of the existence of a doctrine by which liberal democratic states within the common law tradition have long recognized and safeguarded the interests of children in non-exclusive custodial arrangements.[27] Compulsory schooling laws are an emanation of the plenary custodial authority of the state as *parens patriae* requiring all parents to share day-to-day custody with the wider community for limited periods of time and, in the process, exposing every child to formative influences beyond the persons to whom she happened to be born.

Notions of childrearing as a community responsibility long preceded the liberal democratic state (Demos, 1970; Grubb and Lazerson, 1982). In colonial America, families routinely placed children in other households as helpers and apprentices.[28] After the Industrial Revolution, as Grubb and Lazerson (1982: 45) observe, 'the emergence of family privacy rights made public surveillance of childrearing patterns more difficult and . . . growing class and ethnic heterogeneity make the "sharing" of childrearing responsibilities almost inconceivable'. This is the point at which the 'sharing' of childrearing responsibilities ceased to be voluntary; the state mandated that all custodians send the children in their care to common schools. It is not surprising that the terms 'education' and 'indoctrination' acquired distinct meanings at about the same time (Curren, 2008: 310–11). Both religious parents and proponents of common schools accused each other of the latter. Yet indoctrination is highly improbable when 'home' and 'school' are institutionally distinct. 'If we take the requirements of autonomy seriously,' writes Levinson, 'we see the need for a place separate from the environment in which children are raised' (Levinson, 1999: 58).

Epilogue

The United States and Somalia are the only two United Nations member states that have not yet ratified the UN Convention on the Rights of the Child [CRC], an international agreement by which all states have affirmed the principle that prioritizing the welfare and developmental interests of children is a *sovereign duty*. Somalia has not had a functioning government since 1991, so its failure to ratify the CRC is understandable. In the United States, the situation is quite different. Fundamentalist Christian lobby groups, including the HSLDA,[29] have effectively blocked the ratification of the CRC, arguing that its provisions conflict with 'parental rights' guarantees and religious liberties within

the US Constitution, citing *Meyer, Pierce* and *Yoder* (Smolin, 2006: 104). At a minimum, this suggests the 'parental rights' doctrine enunciated in *Yoder* may be inconsistent, not only with the *parens patriae* doctrine, but with moral principles to which the states of the world as proxies for humankind have expressed broad agreement. Arguments about the exceptionality of the US Constitution would seem much less persuasive than the much simpler claim that the US Supreme Court made a bad decision based on a flawed interpretation of Lochner Era cases of dubious precedential value. The Lochner Era was notorious for Supreme Court decisions interpreting the due process provisions of the Fourteenth Amendment in a manner favorable to private property interests. Many of the regulatory reforms of the Progressive Era were overturned, particularly after the Communist Revolution in Russia (Sunstein, 1987).

In the most recent custody dispute to reach the US Supreme Court, *Troxel* v. *Granville*, 530 US 57 (2000), Justice Scalia (dissenting at p. 92) noted that 'Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children,' citing *Meyer*, *Pierce* and *Yoder*. Describing the Lochner Era as a period 'rich in substantive due process holdings that have since been repudiated', Justice Scalia opined that 'the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection'.

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Notes

1. In an article entitled, 'Whose education is it, anyway?' Tamir (1990) distinguished between a 'right to educate' and a 'right to be educated'. She observed that a *right to educate* places the educator at the centre of concern while a *right to be educated* puts the focus where it belongs – on the child. Just as the interests served by education are those of the child, the interests served by *custody* are those of the child. Custody is the mechanism by which legal authority to educate is exercised. As Feinberg (1980) famously observed, the exercise of substituted decision-making authority on behalf of a child must safeguard and promote the child's prospective autonomy interests – the child's right-in-trust to 'an open future'. Dwyer (2006: 351, note 9) argues that 'most contemporary Kantians take the position that adults owe a duty to children and incompetent adults to assist them in becoming autonomous; they do not limit moral value to current autonomy but rather extend it also to the potential for autonomy'.

2. There are three classes of incompetent persons subject to custodial authority at common law. The largest class is that of *infants*, persons developmentally incapable of self-governance in accordance with law. The age at which the law recognizes such persons as competent for particular legal purposes varies by jurisdiction. Other classes of legal incompetents include *idiots* and *lunatics* – persons with permanent or temporary mental impairments, respectively. Fiduciaries for incompetent adults are sometimes referred to as *guardians* or *conservators*, depending on the nature and scope of their substituted decision-making authority.
3. According to Custer (1978: 202), the King was referred to as '*pater patriae*' for the first time in English jurisprudence in *Falkland* v. *Bertie*, 23 ER 814 (1696). Then, 26 years later, the Chancery Court employed the phrase '*parens patriae*' in *Eyre* v. *Shaftsbury*, 24 ER 659 (1722). Lord Shaftsbury had appointed Eyre by will to be the guardian of his son. When Eyre discovered the Countess of Shaftsbury had retained a governor [tutor] for his young ward whom he deemed incompetent, he sought to deprive the Countess of her custodial authority. The Chancery Court assumed jurisdiction, holding that 'the Crown, as *parens patriae*, was the supreme guardian and superintendant over all infants' based on the holding in *Beverley's Case,* 76 ER 1118 (1603), that *infants*, *idiots* and *lunatics* were entitled to Crown protection as persons unable to take care of themselves.

   In 1820, Joseph Chitty canonically described the *parens patriae* role of the King as follows: 'The King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled (or rather, it is his Majesty's duty, in return for the allegiance paid him), to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property' (Chitty, 1820: 155).

   In the United States, the people of each state have succeeded the English monarch as sovereign and thus as *parens patriae*. Historically exercised on behalf of the King by the Chancellor, keeper of the King's conscience, *parens patriae* authority is now exercised by the superior courts in each state and by state Attorneys-General, successors to the Chancellor. According to Chitty (1820: 156), 'The Chancellor may, generally speaking, cause the performance of anything essential to the welfare or benefit of infants and their properties*;* and will protect their rights.'

   For a more detailed account of the history of the doctrine of *parens patriae*, see Blokhuis (2009: 1–28).
4. Three New York opinions since *Yoder* featuring the key terms '*parens patriae*' and 'education' clearly distinguish the police power of state agents from their *parens patriae* duties to children: *In re Shannon B*., 70 NY 2d 458 (1987); *In re Terrence G*., 109 AD 2d 440 (1985); and *Anonymous* v. *City of Rochester,* 2009 NY Slip Op 4697 (2009). The latest decision, issued by the New York Court of Appeal, provides further evidence that the 'parental rights' doctrine enunciated in *Yoder* trumps the interests of children safeguarded by the state as *parens patriae* in US constitutional cases. A father challenged the constitutionality of a curfew instituted by the City of Rochester. With limited exceptions, police were authorized to take into custody persons under the age of 17 found in public spaces between 11 p.m. and 5 a.m. The New York Court of Appeals recognized the legitimacy of the curfew ordinance as an emanation of *parens patriae* authority instituted to protect minors from harm and to encourage parental supervision. Police officers could legitimately detain minors in a *parens patriae* capacity. Nevertheless, the curfew ordinance was found to violate 'parental rights' because of the limits it placed on the custodial authority of parents: among other things, the

ordinance imposed an unconstitutional burden on parents by requiring them to keep their children at home or to accompany them outdoors during curfew hours.

5. Merry and Howell (2009) have attempted to justify homeschooling on the ground that enhanced intimacy between parents and homeschooled children has developmental benefits. By their account, all intimate relationships involve affection, mutual knowledge, shared experience, open communication and trust. But intimacy, so defined, is hardly limited to familial relationships. Any form of schooling in which teachers ('tutors') and students ('pupils') enjoy an intimate relationship might be justified on this basis. I prefer the terms 'tutor' and 'pupil' because their etymology reflects the custodial nature of the teacher–student relationship.
6. Dwyer (2006: 90) has correctly observed that the guardians of incompetent or incapacitated adults are required by law 'to assist the ward in regaining or developing for the first time the ability to manage each aspect of his or her life – in other words, to promote and preserve the ward's autonomy to the greatest extent possible'. In some jurisdictions, this common law duty has been statutorily codified. Dwyer cites New York Mental Hygiene Law §81.20(a) (7) (2005), which requires substitute decision-makers for incapacitated adults to 'afford the incapacitated person the greatest amount of independence and self-determination', and *Oregon Rev. Stat*. §125.300(1) (2005), which provides that 'guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person' (2006: 326, notes 75–6).
7. Curiously, Chief Justice Burger went on to provide what might reasonably serve as a rationale for compulsory schooling as an emanation of *parens patriae* authority (at p. 232): 'The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14–16 if they are placed in a church school of the parents' faith.' The problem here is that the Yoder respondents had *not* placed their children in a parochial school. Whether children attend public schools or even publicly-regulated private schools, they are far more likely to be exposed to comprehensive worldviews different from those of their parents than 'homeschooled' children are. The degree of discontinuity between home and school may be lower in parochial school settings, but there is at least *some* discontinuity when schools and homes are institutionally distinct. For a topical discussion on the importance of institutional discontinuity to the facilitation of autonomy, see Brighouse (2005).
8. Justice White (concurring at p. 240; emphasis added) affirmed the *parens patriae* duty of the State to safeguard the developmental interests of the Yoder children – *including* their interest in an open future: 'A State has a legitimate interest not only in seeking to develop the latent talents of *its* children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.' Justice Douglas (dissenting at pp. 245–6) opined, 'It is the future of the student, not the future of the parents that is imperiled by today's decision . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may

be stunted and deformed.' Justice Douglas disagreed with Chief Justice Burger, finding the upbringing of the Yoder children was *not* within the dispensation of parents alone (p. 241).

9. Dwyer (1996) argues that when the state accedes to parents who object to public health care or public education for their children on religious grounds – as in *Yoder* – it constitutes an infringement of their children's *equal protection rights*. This is a problem, in his view, because a constitutional infringement of this nature is unlikely to be heard in a court of law because (a) religious parents are unlikely to recognize the infringement; and (b) their children cannot, as a rule, raise legal claims independently. Dwyer casts about for a mechanism by which children's interests might be cognizable at law, proposing, among other things, that a litigation guardian might speak on behalf of such children. After all, as he puts it, '[t]he child alone has fundamental interests in her health and education, and that child is therefore whom the law should put first' (p. 1478), describing a longstanding common law principle as something that *ought to be*. Under the *parens patriae* doctrine, safeguarding the welfare and developmental interests of *all* children is a sovereign duty. While Dwyer finds the 'parental rights' doctrine enunciated in *Yoder* inconsistent with the *constitutional* right of children to equal respect and concern from the state vis-à-vis their parents, I would argue that when the state accedes to parents seeking to exempt their children from compulsory schooling laws on religious grounds, the state violates both its *parens patriae* duty to prioritize the interests of children above the interests of their parents and its *parens patriae* obligation to safeguard the welfare and developmental interests of *all* children. Yuracko (2008) has cleverly argued that because 'homeschooling' parents have arrogated unto themselves a state function, the federal *state action doctrine* provides a legal basis for public regulation of 'homeschooling' to ensure children receive the kind of education to which they are entitled under all state constitutions. On this view, public regulation of 'homeschooling' is a *constitutional* imperative.
10. According to Peters (2003: 1), truancy charges were filed against Yoder, Miller and Yutzy after they refused to cooperate in a scheme to maximize state aid:
    The discord began in the fall of 1968, when the New Glarus Amish broke away from the local public school system and established schools of their own. After he realized that the defection of several dozen children would cost the school district thousands of dollars in state aid, the local school superintendent . . . approached several Amish parents and asked them to keep their children in the public school for the first two weeks of the new school year – just long enough for the youngsters to be tallied in the annual public school census, which determined how much per-pupil state aid the district would receive. The Amish, however, were too scrupulous to participate in this bit of trickery. They balked, and the local public school system lost almost $20,000 in state funding.
11. *Wisconsin* v. *Yoder* was without a doubt the first 'homeschooling' case to reach the US Supreme Court. The respondents sought an exemption from compulsory schooling laws so that they could educate their children at home after the eighth grade *in exclusive conformity with their religious beliefs and practices*. Their constitutional claims were grounded in the free exercise clause of the First Amendment and the due process clause of the Fourteenth Amendment.
12. *Per* Justice Rehnquist in *Santosky* v. *Kramer*, 455 US 745 (1982); citing Justice Holmes in *New York Trust Co.* v. *Eisner*, 256 US 345 (1921): 'If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume

of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason' (p. 349).

13. *Blackwelder* was a federal case that began with neglect proceedings in the Family Court of New York; see *In re Sarah B*. 139 Misc. 2d 776 (1988). In New York, a 'neglected child' is a person under the age of 18 whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his or her parent or other person legally responsible for his or her care to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of New York Education Law art. 65, pt. 1, according to the New York Family Court Act §1012(f)(i)(A) (1983). *Blackwelder* is readily comparable to the Ontario case of *Durham Children's Aid Society* v. *B.P*., OJ No. 4183 (2007), *infra*. In New York State and the Province of Ontario, child welfare statutes and compulsory schooling laws *overlap*. In both jurisdictions, they are statutory emanations of the *parens patriae* duty to safeguard the interests of children in shared private and public custodial authority.
14. Chief Justice Munson distinguished *Yoder* on grounds that the Blackwelder children, unlike the Yoder children, would have to live in 'modern' society. The day after Chief Justice Munson issued his opinion, the New York legislature amended New York Education Law §3204 (1988). Among other things, the timing of the home visits to which the Blackwelders objected was no longer discretionary. The Blackwelders filed an appeal with the US Court of Appeals (Second Circuit), arguing that the lower court decision should be vacated for mootness. Justice Newman rejected this claim and upheld the lower court judgement; see *Blackwelder* v. *Hunsinger*, 866 F.2d 548 (1989).
15. *Per* Justice Elwyn in *In re Kevin Sampson*, 65 Misc. 2d 658 (1970); quoting Justice Alexander in *Matter of Clark*, 185 NE 2d 128 (1962): 'The child is a citizen of the State. While he "belongs" to his parents, he belongs also to his State. Their rights in him entail many duties. Likewise the fact the child belongs to the State imposes upon the State many duties. Chief among them is the duty to protect his right to live and to grow up with a sound mind in a sound body, and to brook no interference with that right by any person or organization. When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative.'
16. In *Prince* v. *Massachusetts*, 321 US 158 (1944), the legal guardian of a nine-year old girl was charged with violating child labor laws after she and the child were found distributing religious tracts in Brockton, Massachusetts. While the 'homeschooling' that the Yoder children would receive on their parents' farms would almost certainly include farm labor, such concerns were not raised in that case.
17. Canadian courts tend to prefer the term 'access privileges'; US courts tend to prefer the term 'visitation rights.'
18. In *Young* v. *Young*, 4 SCR 3 (1993), the conditions imposed on James Young's access privileges were ultimately dropped because a majority on the Court accepted his undertaking not to indoctrinate his children. In a companion case with similar facts decided the same day, similar conditions imposed on the father's access privileges were sustained by the Supreme Court because he refused to make any such undertaking. See *P. (D.)* v. *S. (C.)*, 4 SCR 141 (1993).
19. Indeed, even where home instruction is provided by a public school district, lack of interaction with other children has been deemed contrary to a child's developmental interests by an Ontario court. In *E.B.J. (Lit Guardian of)* v. *Upper Canada District School Board*,

OJ No. 4174 (2001), 16-year-old E.B.J. and his 14-year-old brother C.J. were suspended for uttering threats and bringing a knife to school for protection due to severe bullying. Although police charges were ultimately dropped, the brothers nonetheless spent over a month in protective custody and continued to receive home-based instruction from a local school board employee thereafter. A psychologist and an experienced teacher attested to the harm the boys would suffer if their home-based instructional program continued. E.B.J. himself testified that he wanted to go to a school where he could take regular courses and meet other people.

20. The Education Act, RSO 1990, c. E.2, s. 21(1) requires that all parents or guardians cause the children in their care to attend school, unless a child is 'at least 16 years old and has withdrawn from parental control'. Parents may be excused from this requirement if their child 'is receiving satisfactory instruction at home or elsewhere' under s. 21(2).
21. Consistent with its *parens patriae* roots, the preamble to the Child and Family Services Act, RSO 1990, c. C11, states that its paramount purpose is 'to promote the best interests, protection and well-being of children'.
22. If parents had acted *reasonably*, prioritizing the interests and needs of their children, there would be no need for recourse to the courts. In a sense, this is true of all legal disputes involving private parties. Judges merely substitute their reasoned views for those of persons unwilling or unable to resolve their differences in accordance with reason.
23. Section 20(2) of the Children's Law Reform Act, RSO 1990, c. 12, provides as follows: *'Rights and responsibilities* (2) A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child.'
24. The Ontario Federation of Teaching Parents (OFTP), a 'homeschooling' advocacy group, estimates that there are currently 20,000 'homeschooled' children in the province. It arrives at this estimate by assuming that, if 2% of children in the US are 'homeschooled', the same percentage of Ontario children must be. Wrongly assuming there are 1,000,000 school-aged children in Ontario, 2% = 20,000. This is pure fantasy. First, even if it were true that 2% of American children are 'homeschooled', this cannot be presumed true in Ontario. Moreover, according the Ontario Ministry of Education, there were 2,087,588 students in the province in 2007–2008, not 1,000,000. See http://www.edu.gov.on.ca/eng/educationFacts.html (accessed 8 April 2010). Before engaging in its dubious calculus, the OFTP makes a chilling prefatory claim that 'Many home educating parents do not register with local school officials so an exact number is not known.' If thousands of children are being 'homeschooled' without public knowledge, the unqualified claim that 'homeschooling is legal in Ontario' – a claim repeatedly made by the OFTP – would be false in practice. See the Ontario Federation of Teaching Parents, 'Homeschooling Frequently Asked Questions' at http://www.ontariohomeschool.org/FAQ.shtml (accessed 8 April 2010).
25. 'Autonomy-facilitation requires a modicum of discontinuity between the child's home experience and her school experience, so that the opportunities provided by the home (and the public culture) are supplemented, rather than replicated, in the school' (Brighouse, 2006: 22).
26. In *C.R.* v. *Children's Aid Society of Hamilton*, OJ No. 3301 (2004), Justice Czutrin of the Ontario Superior Court of Justice (Family Division) observed that attorneys, as officers of the court, had *parens patriae* obligations to children: '[R]egardless of what side you take, I count on your bringing the information before me, for the benefit of the children. It is not

only the Office of the Children's Lawyer who has that obligation, but each of you [has] that obligation. Courts cannot make decisions without relying on lawyers being professional and knowing their obligations to children, regardless of what legislative mandate they have, whatever the legislation might say.' The most iconic statement of the *parens patriae* duties of judges in American jurisprudence was made by Justice Cardozo of the New York Court of Appeals in *Finlay* v. *Finlay*, 240 NY 429 (1925): 'The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly. He may act at the intervention or on the motion of a kinsman, if so the petition comes before him, but equally he may act at the instance of anyone else. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. He interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae* . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.'

27. Legal scholars of philosophy of education who have explicitly addressed the duties of the state as *parens patriae* include Feinberg (1980) and Dwyer (2006).
28. Of course, in colonial American settlements, there would not have been much discontinuity from one household to the next.
29. The Home School Legal Defense Association and ParentalRights.org, organizations headed by Michael P. Farris, strenuously oppose US Senate ratification of the UN Convention on the Rights of the Child. 'Child-rights advocates . . . say we can ratify the treaty, which preempts parents' fundamental rights to direct the upbringing and education of their children, without incurring binding legal obligations,' writes Farris in 'UN Treaty on Child's Rights Legally Binding, and Absurd'; see http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC=%7BE999C697-52A6-40A8-BA0E-8CD5325BA25F%7D (accessed 8 April 2010). 'They argue that American legislators will choose how much, if any, of the treaty to implement. Jonathan Todres, a professor at Georgia State, told the Associated Press that American parental rights would be safe because UN treaties contain "no enforcement mechanisms or penalties".' Farris goes on to accuse Professor Todres, co-editor of *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification* (2006) and numerous scholarly articles on children's rights, of dishonesty: 'So when Professor Todres says that the UN has no enforcement mechanism, he is telling a half-truth. The UN treaty establishes the law; American courts and child welfare agencies can, will, and must enforce the UN standards by virtue of Article VI of our Constitution.'

    As an attorney, Farris surely knows that international conventions are formal statements of principle and that amongst sovereign states there are no enforcement mechanisms comparable to domestic courts. Provisions of the CRC would not become part of American law unless and until ratified by the US Senate. The Senate could ratify with reservations if it wished. Thus, to the extent that any provisions of the CRC are established in American law, the establishment would be done *not* by the UN but by the US Senate. International treaties do not, in and of themselves, create, limit or expand individual rights *within* the American legal system.

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