The Relational Rights of Children

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I. Introduction

Children, still a voiceless minority, are often tucked away as being dependent and only remembered by the law when things go very wrong and they need to be saved or punished. The rights and interests of children,\(^1\) whether based on case law, statutory law, or international human rights principles,\(^2\) have become decidedly more central in past decades.\(^3\) However, children still do not receive sufficient attention by legislatures, courts or in the legal academy.\(^4\) Although children’s issues are implicated in a variety of legal arenas such as criminal law and constitutional law they are primarily viewed as part and parcel of family law, not necessarily worthy of their own accounting.\(^5\) Discussing children’s rights at all is controversial for the way such rights are seen to oppose parental rights, and the methods for protecting children are highly

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\(^3\) *See* e.g., Atwood, supra note 2, at 382–86, 410-415.


\(^5\) Susan Appleton is working on a project to create an American Law Institute restatement of children’s rights, a project which would be the first of its kind. *See generally* Susan Appleton, *Restating Childhood*, 79 Brooklyn L. Rev. 526 (2014).
In this article, I tackle the compelling reasons why children’s rights are often ignored and devise core principles of a new legal framework for family law based on a system of relational rights as opposed to individualistic rights. I argue that legal rules intended to protect children should not merely rely on amorphous determinations of what is “best” for a given child or what individual rights such a child possesses. Rather, the state should be more proactive in supporting children within the context of their ongoing and varied relationships in a manner that is reflective of children’s ongoing needs and developing maturity. The relational perspective does not abandon children to their relationships with parents but it also does not pretend that children are isolated individuals reliant on state protection.

There are essentially three accepted models for how best to pursue children’s advocacy in the legal context – state centered, parent centered and child centered. While each of these models may allow for other interests or strategies to advance children’s needs, the primary focus is either on state intervention, parental care or children’s autonomy as the primary vehicle for asserting children’s rights and for protecting children’s interests. Focus is alternately on: (1) parental privacy as the primary method to pursue children’s interests based on a fundamental belief that parents should be given leeway to act on behalf of children either because they are best situated to determine what is good for their children, or because of competing interests and concerns; (2) state intervention in a manner similar to the state’s role in preserving and protecting the rights of adults or in protecting the state’s own interests in children; or (3) looking to children themselves, their desires and their capabilities, lived experiences and needs to determine what should be done for children in a manner that focuses on children’s actual will or autonomy or our potential to decipher and support that autonomy through progressive and creative means. The benefits and drawbacks of each of these visions are hotly debated. Persons in each of the three camps intend to protect children and claim to carry the mantle of children’s rights.

Division and inconsistency in discussing children’s rights are inevitable. While the International Convention on the Rights of the Child is arguably a document that includes

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6 For instance, the U.S. refused to ratify the CRC and generally prefers a parental privacy perspective on children’s interests that keeps children’s needs private. See Martha Alberston Fineman, What is Right for Children, Introduction, in What is Right for Children? (2009).

7 For a thorough discussion of the legal relevance of children’s increasing maturity, see Jonathan Todres, Maturity, 48 HOU. L. REV. 1107 (2012).

8 Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 647-50, 656 (2002) (“It is not my argument that family privacy is the only means of effectuating children’s rights; however, I do think it is an essential part of children’s interests… Parents are still the primary providers of childcare and their caregiving work is a central part of children’s interests.”); Emily Buss, Constitutional Fidelity through Children’s Rights, 2004 SUP. CT. REV. 355, 358-59; Parham v. J.R., 442 U.S. 584, 602 (1979).


elements of all three visions, different aspects of the accord have variously been criticized for being too state-centered, child-centered or parent-centered. When discussing the concept of “children’s rights” legal theorists often associate the use of “rights” language as referring to a child or state-centered vision because rights are associated with autonomy generally and in particular autonomy from parents. However, as children cannot always articulate their own liberty interests and their inmaturity compromises their ability to autonomously achieve that vision, rights can be a difficult fit for children. However, others have argued that a right need not be protected by children’s own agency. Rather, the state can protect children’s rights and parents and other adults can respect those rights even if children are not fully autonomous. Thus, the term “rights” need not necessitate reliance on full autonomy.

Similarly, those that rely on “best interests” analyses emphasize the need for third-parties, usually parents, to be anointed as stewards to make decisions that are best for children. Such analyses are often thought to provide a more paternalistic, parental rights friendly inquiry at the heart of children’s advocacy. However, the children’s best interests standard, impossibly hard to optimize, must also take into account all of children’s varied interests that are in need of protection: civil interests, children’s own expressed desires, children’s rights to be raised in the context of parental privacy as well as the potential need for state interference to protect children’s dependency and civil rights. In practice, the best interests standard is often used to interfere and supplant parental privacy for state interests and majoritarian values. Thus, catch

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12 See, e.g., Barbara Bennett Woodhouse & Kathryn A. Johnson, The United Nations Convention on the Rights of the Child: Empowering Parents to Protect their Children’s Rights, in WHAT IS RIGHT FOR CHILDREN? 7–19 (2009) (arguing that the treatise incorporates parental rights and best interests in a manner that makes it unthreatening to parental rights advocates); Shulamit Almog & Ariel Bender, supra note 50, at 277 (arguing that the CRC grants rights to children that frequently conflict with both parental rights and judicial discretion, focusing on the rights of the child detached from parent or state).

13 See e.g., Almog & Bender, supra note 12, at 277-279.


15 See Minow, supra note 56, at 1882-1892 (“Autonomy, then, is not a precondition for any individual’s exercise of rights. The only precondition is that the community is willing to make claims and to participate in the shifting boundaries.”); see also Anne Daily, supra note 14, at 8 (stressing the importance of “children’s rights rooted not in autonomy, but in their distinct place and future in the liberal polity.”)


phrases such as “children’s rights,” and “best interests” provide little guidance or overall vision of how to pursue children’s advocacy.

Even if a blend of such visions is ultimately necessarily, and there is certainly merit to each perspective, having access to a guiding principle underlying the implementation of children’s rights is sorely lacking given the tension between these three models. Indeed, instead of building on the merits of each perspective, the discussion surrounding children’s rights is fraught with dispute and inconsistency. These three perspectives are regularly portrayed as being in conflict with one another. Advocates of state involvement focus on the need to curtail parental rights; parental rights advocates look to prevent state interference; and children-centered advocates try to keep both parents and the state at bay, searching for new and creative ways to encourage and decipher children’s own voices. This triad of perspectives has largely played out as a grab for power among competing concerns. As I will demonstrate in this article, competing perspectives result in different legal implications on child-related issues such as custody, parental termination proceedings and children’s civil rights.

Yet, all three perspectives crystallize the nature of the inquiry and can be part of effectuating a jurisprudence that takes children’s rights seriously. Barbara Bennett Woodhouse’s child-centered approach in particular benefits from flexibility and progressive use of procedural innovations and the promise of narrative. However, while minor children need to have their voices heard to the extent possible, they cannot independently determine what is best for them and are so dependent on adult care that their own will in setting their course in life is limited no matter how hard we try to discern their own voices. Children are dependent on state or family to care for them and thus exertion of individualistic civil rights are naturally limited. Children are caught in the middle of agency and dependency. And, such child-centered inquiries require creativity and sensitivity in a manner that are difficult and costly for judicial systems. Reverting to rules, rights and presumptions is the norm. As between a parental rights perspective and a state rights perspective, context matters as does the nature of the claim, and choosing one perspective over the other as the dominant legal mantra seems a futile task. We are essentially stuck between these two procedural mechanisms -- between the power of parental rights and preferences, which continue to dominate family law, and the alternative argument in favor of state interference. There have been innovations to distill children’s voices but legal decisions have not significantly moved past this dichotomous perspective. I argue that children’s needs demand more than the dissonant crossfire between competing concerns – they demand support of the actual care relationships upon which they rely.

19 See Appleton, supra note 6, at 526 (“The ordinary word “child” denotes an extraordinary legal category, which in turn makes childhood an exceptional legal status. Yet, the contours, context and consequences of this category all reflect disarray.”)
21 See infra Part II.B.
22 See generally, Appleton, supra note 2.
24 See Woodhouse, supra note 1, at 1810-1811; Huntington, supra note 20, at 637; Appleton, supra note 6, at 540.
In this article, I will attempt to break this polarized and atomistic account of children’s advocacy and present reasoned guiding legal principles that can ease the tension by moving from an individualistic to a relational account of children’s rights. The accepted position in case law and scholarship is that children’s interests are a separate, individualistic inquiry and that they regularly compete and conflict with parental rights and state interests. However, children’s lives are not individualistic but rather relationship-based. Therefore, I argue that in contrast to the accepted norm of isolated, individualistic consideration of children’s rights and interests, children’s interests should be analyzed as relational interests. Children’s rights should not be viewed as liberty rights for the state to protect or rights to be free from the state or parents, or to be protected by the state or parents, but as rights to have the state support the relationships they need in order to grow and develop into adults. The child is in an inseparable interdependent relationship with custodians and the relational nature of children’s lives cannot be ignored. Either the state or parents as custodians must help children actuate and determine their interests and be involved in an ongoing, interdependent manner in children’s lives. These relationships support dependency, create capacity and lead children to independence and adulthood, to sufficient autonomy and wisdom to choose their own webs of complex relationships with employers, colleagues, family members and friends.

Ultimately, children’s rights cannot be completely subsumed to parental rights – children have needs that may conflict with parental needs and these rights should be taken seriously. And, children’s rights cannot be subsumed to state control either as it is usually parents who need to provide care. Although children gradually have stronger voices of their own as they mature that need to be heeded, they cannot be entirely relied upon themselves to effectuate their own needs as they are fundamentally dependent. Thus, any approach to children’s rights needs to take into account these multiple actors and, most importantly, the way they interact in relation to each other. I will demonstrate how such a focus on relationships, if applied, would create a seismic shift in modern conceptions of family law, a new dialectic in discussions of children rights and interests and more solid guiding principles to implement children’s advocacy in a variety of contexts.

25See Karen Czapanskiy, Interdependencies, Families, and Children, 39 SANTA CLARA L. REV. 957, 960 (1999) (proposing an interdependency theory in which a child’s best interest is considered alongside the care-giving unit rather than as an independent analysis); see also In re R.E.S., 19 A.3d 785, 789 (2011 D.C. Ct. App.) (finding that “parental rights ‘are not absolute, and must give way before the child’s best interests.’”).


29Minow, supra note 6, at 24.
This relationship-based theory of children’s rights follows from the relational theories of rights developed more than a decade ago by such influential theorists as Katherine Bartlett, Martha Minnow and Jennifer Nedelsky. This relational perspective developed with broad implications in response to a growing rights discourse focused on individualism, rights and autonomy. Yet, these relational perspectives have remained largely in the realm of theory and have not been applied or developed practically in the realm of family law despite their particular applicability to children’s rights. Recommendations flowing from relational rights theories are often contextual and based on case-by-case analysis, and a multitude of factors, which are difficult and costly to apply. It is difficult to determine what specific remedies might flow from legal support of relationships. This article moves the conversation forward, providing clear alternative principles to guide a relational perspective on children’s rights and interests. On the basis of these guiding principles, consistent and practical solutions can be provided in advocating for children in a manner that provides a clear alternative to the dichotomous and individualistic framework currently in place.

This article will proceed in three parts. In the first part, I will discuss the power struggle between the state, parents and child autonomy advocates at the heart of the children’s rights inquiry and demonstrate how these different perspectives have distinct and conflicting implications. I will then turn to psychological and empirical studies for guidance about what we know to be important for children: financial stability, low-tension environments and supportive relationships. I will argue that while the importance of financial resources and stability have been significantly incorporated in the law regarding children, the centrality of relationships has been undervalued. While short of emancipation proceedings, children’s

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30 Bartlett, supra note 27, at 315.
31 Minow, supra note 6, at 24 (1986); See also Martha Minnow & Mary Shanley, Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law, 11 HYPERATIA 20-26 (1996).
32 Nedelsky, supra note 26. Although Nedelsky things broadly of rights as relational, she specifically discusses her relational perspective’s applicability to children on pages 19-30, 39.
33 See e.g., Minnow & Shanley, supra note 31, at 5-6; Bartlett, supra note 27, at 298-299; Woodhouse, supra note 1, at 1841; Mary Ann Glendon, Rights Talk: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 9-15 (1991) (arguing that “rights talk” has stifled political discourse in the United States); Hendrik Hartog, The Constitution of Aspiration and “The Rights that Belong to Us All”, 74 J. AM. HIST. 1013 (1987) (arguing that rights do not include common beliefs about shared interests and collective rights); Mark Tushnet, An Essay on Rights, 62 TEX. L. REV. 1363 (1984) (critiquing rights as expressing the individualism of capitalism); Catharine MacKinnon, Feminism, Marxism, Method and the State, 8 SIGNS 635 (1983) (asserting that rights talk reflects a male, rationalistic view of the world); Schneider, supra note 27(defending rights talk as necessary for legal change); Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARP.C.R.-C.L.L.REV. 401 (1987) (defending the language of rights for people of color as significant and empowering).
34 See infra Part II.C & IV.
35 See e.g., Bartlett, 27, at 315 (“This dilemma suggests the need for broad rules with specific, individualized application. Such rules would create a responsibility-based standard that both assumes, and attempts to measure, responsible decision-making in individual, highly fact-dependent cases in which parents make competing claims to a newborn.”); Ruth Zafran, Children’s Rights as Relational Rights: The Case of Relocation, 18 AMERICAN UNIV. J. GENDER, SOC. POL’Y & L. 163, 204-212 (2010) (listing eight criteria to use in relocation cases based on relational perspective on children’s rights).
36 Herring, supra note 26, at 27.
37 See infra Part II. B.
fundamental legal identity is within these relationships, emphasis on supporting relationships is lacking.

In the second part, I will present the theoretical move from individual to relational rights. I will discuss the individualistic nature of parental rights despite the interdependent nature of the caregiving relationships in which they are involved. I will also discuss the relevance of state interests and their effects on decisions regarding children. I will describe how such individualist perspectives on state’s interests, as well as parental and children’s rights warp and obfuscate the real issues in promoting children’s rights – supporting interdependent relationships. Finally, I will discuss the nature of relational rights and how they are different from individualistic notions of rights.

In the third part, I will demonstrate how this altered perspective affects legislative policy and legal decision-making in the context of children. I will describe a number of non-exhaustive principled guidelines for applying this relational perspective in the context of children’s advocacy and begin applying these principles to highlight practical implications. These principles are broad but intended to make application of the relational theory more practical and less costly and unpredictable than case-by-case analyses.

First, in order to support a relationship as opposed to an individual, financial and welfare benefit support structures should refocus on support of the caregiving relationship and not detached individuals. Such measures should aim to support ongoing care relationships as opposed to merely providing a safety net when such relationships fail. Second, relational theory not only supports relationships but also provides emphasis on recognizing a variety of kinds of supportive relationships. From a relational perspective, degrees and types of relationships should all be supported but their differences also respected. Parental relationships should not be all or nothing, but care relationships should be supported in the many forms they come. Thus, I will point out the layers of relationships that support children and the ways the law can recognize these relationships differently so as to avoid tension, conflict and alienation. Third, room must be made for children to resist relationships and express their civil rights but within the relational framework. Both the effect of interference on the ongoing relationship as well as the extent of the threatened harm to the child must be taken into account. If the effect on the relationship is not significant, it is more justifiable to allow interference to protect the individual child. Indeed, I will argue that it is only through a relational perspective that children’s civil rights can be effectively protected.

II. Conflicting Claims Over What is “Best” for Children

A. Different Voices in Advocacy for Children

Children’s rights and interests are increasingly central to the law that affects them.38 Once treated more like property than persons,39 the development of legal standards that

38 See supra cites 2 to 4.
39 See, e.g., Nancy E. Dowd, Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers, 54 EMORY L.J. 1271, 1271, 1278 (2005); Stuart N. Hart, From Property to Person Status: Historical Perspective on Children's
centralize the rights and interests of children in areas such as custody, child support, parental terminations, and adoption law are significant advances in advocacy on behalf of children. However, figuring out how to pursue children’s interests has enjoyed much less consensus than the goal itself. As a result, developing advocacy on behalf of children becomes muddied, hampering progress.

It is generally agreed that children have compromised autonomy and less capacity for rational decision-making and accountability, although the extent of such incapacity is debated. In the context of criminal law, this incapacity is often stressed while it is less critical in constitutional and human rights law. Social sciences give us a vague picture, but immaturity is a reality that lends itself to dependency on adults and the state. Because of such incapacity, children’s rights are therefore different than those of adults, although analogies can be made. Children do not have the same rights to marry, vote, drive, work, sign contracts, etc., although older children gradually obtain limited forms of these rights. Still that does not mean that children do not have civil rights at all or that they do not have other rights that the state must protect and parents respect. How precisely immaturity should be managed is subject to great dispute.

Children’s immaturity was once managed by treating dependent children, unable to support themselves, as property of the parent or state. This could be seen in case law that once allowed punishment of parental indiscretions through loss of custody and the way illegitimate children were treated as not entitled to support or inheritance. Children were subject to the fate

Rights, 46 AM. PSYCHOLOGIST 53 (1991); Andrew Schepard, Kvell[ing] for Family Court Review on its Fiftieth Birthday, 51 FAM. CT. REV. 1, 1 (2013); Woodhouse, supra note 1, at 1807–09.


See e.g., Appleton, supra note 6, at 527; Todres, supra note 7, at 1145; Annette Ruth Appell, The Pre-Political Child of Child-Centered Jurisprudence, 46 HOUS. L. REV. 703, 708 (2009).

See Appleton, supra note 6, at 528-530.

Id. at 529; Richard J. Bonnie & Elizabeth S. Scott, The Teenage Brain: Adolescent Brain Research and the Law, 22 CURRENT DIRECTIONS IN PSYCH SCIENCE 158-160 (2013).


See Appell, supra note 1, at 162-165.

See e.g., Laura A. Rosenbury, Between Home and School, 155 U. PA. L. REV. 833, 833-834 (2007); Barbara Bennett Woodhouse, "Who Own's the Child?" Meyer and Piercee and the Child as Property, 33 Wm. & Mary L. Rev. 995, 997 (1992).

Jayna Morse Cacioppo, Note, Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?, 38 IND. L. REV. 479, 483 (2005) (reviewing the history of illegitimacy and how a child born to unwed parents had no right to child support); see Browne Lewis, Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children, 39 U. TOL. L. REV. 1, 5 (2007) (illegitimate children were considered “bastards” and not entitled to inheritance rights).
parents determined for them, with little if any outside regulation. State treatment of children without legal parents was harsh and unprotected.48

But such a perspective has largely been abandoned by the legal establishment and instead children’s incapacity is sought to be managed in a manner more respectful of children. The dominant alternative is the stewardship model, in which children are not the property of parents, but rather parents have responsibility for children and an obligation to act as stewards acting in their children’s best interests.49 This perspective gives parents privacy rights over children not only because of constitutional claims to such rights, but also from a children’s rights perspective, advocates argue that parents are best positioned to make decisions on behalf of children and steer them toward adulthood.50 Arguing in favor of natural affections, biological connections, the importance of cultural diversity and civil rights for children, as well as the importance of attachment theory and situational perspective, children’s rights advocates argue that parental privacy rights are what is best for children.51

Parental privacy is still dominant in U.S. law both because of the strength of parents’ constitutional rights and because the stewardship model of protecting children’s interests is still the most influential. However, there have been compelling critiques of parental privacy. Critics argue that parents are given too much discretion over children and that parental privacy needs to be curtailed in favor of protecting children’s rights.52 They stress the potential for dissonance and opposition between children’s rights and parental rights, arguing that the state must step in to protect children and preserve their rights and interests in a manner analogous to protection of adult's rights.53 Incapacity still being a primary limiting factor for children, it is argued that the state can protect children from dominating parents that are not sufficiently solicitous of their children’s interests.54 State interference with parental privacy for the sake of children has been advocated in a range of situations: to protect children’s relationship rights with third-parties,55 to punish parental prerogatives that are deemed bad for children by the state,56 to favor children’s

48 See Viviana Zelizer, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 56-77 (1994) (discussing the way children were valued for their useful labor in the foster care and adoption system); BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 93–107 (2008) (demonstrating harsh conditions for children in the foster care system).
49 See e.g., Scott & Scott, supra note 16.
50 See generally Buss, supra note 8; Annette Ruth Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. MICH. J.L. REFORM 683, 683 (2001) (arguing for parental rights doctrine to maintain diverse family forms and cultural identities).
51 Id.
52 See James G. Dwyer, THE RELATIONSHIP RIGHTS OF CHILDREN (2006); Dwyer, supra note 10, at 82-86; Marcia Zug, Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should be Based on the Best Interests of the Child, 2011 B.Y.U. LAW. REV. 1139, 1161-1164 (2011) (arguing for a best interests standard in deciding when to deport citizen children with parents and a weakening of parental rights in this context).
53 Dwyer, RELATIONSHIP RIGHTS, supra note 1 at 131–36 (“As a matter of rational moral consistency, therefore, we should conclude on utilitarian grounds that in all cases in which the state structures children’s relational lives, and in which children are not themselves in the best position to judge where their interests lie, the state should act as proxy for the children . . . . In short, it is simply unavoidable that the state will play a decisive role in the lives of nonautonomous persons, and it does so quite clearly today.”).
54 Id.
55 Dwyer, Relationship Rights of Children, supra note 1.
56 Dwyer, Parent’s Self-Determination, supra note 10.
right to stay in the U.S. when parents are deported, to favor children’s right to not be raised by high-risk parents who have not yet committed neglect or abuse, to favor adoption and termination of parental rights, among others. The call is to limit natural parental rights through state interference in order to better protect children. According to this perspective the state is expected to interfere in determining the child’s best interests.

Finally, others focus beyond parents and the state to children themselves to effectuate their own rights, arguing for a more robust vision of children’s autonomy and focus on methodology that respects children’s own voices, experiences and interests treating them as subjects as opposed to objects. This emphasis is on all children, but often is particularly effective with regard to older children who come closer to autonomy and are aware of the decisions being made on their behalf. Most basically, we are asked to listen to children’s wishes when it comes to custody disputes or when there is an international kidnapping case under the Hague Convention. More expansively, we are asked to consider how children experience legal determinations, seek to involve children in mediation and focus on children’s attachments to caring adults. Child advocates often argue for legal representation of children in custody proceedings and parental terminations as opposed to guardians ad litem to ensure advocacy on behalf of children. Barbara Bennett Woodhouse is perhaps the most central figure in the child-centered movement. She considers how the “law might be pushed and challenged to better reflect children’s experiences needs and interests.” She asks that we not see children’s interests through the perspective of adults, but instead to look at children’s real concerns. She asks us look at children’s literature and seek out children’s narratives, to ask the child question and listen to children’s own voices and to tame rights talk in order to get at the needs of children in a “generist,” child-centered manner that puts the next generation of children at the center of family law.

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57 Zug, supra note 52.
58 Dwyer, RELATIONSHIP RIGHTS OF CHILDREN, supra note 1.
61 Woodhouse, supra note 1, at 1836-41.
64 Woodhouse, supra note 1; Annette Ruth Appell, Accommodating Childhood, 19 Cardozo J. L. & Gender 715 (2013) (proposing a "Children’s Constitutional Participation Amendment").
65 Woodhouse, supra note 1, at 1836-41 (“Asking the child question, listening to children’s authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide. They are strategies to insure that children’s authentic voices are heard and acknowledged by adults who make decisions. The hard choices…call for hard listening to children’s needs and experiences.”)
B. The Policy Implications of These Differences

These three perspectives are not merely shadows of one another, but have real and potentially opposing policy implications. The three models engender substantively different perspectives on the appropriate way to resolve controversies involving children.

One question that has caused much dispute in the courts and amongst scholars is whether grandparents should be entitled to continue relationships with children despite objections of legal parents. These situations usually arise after the death or absence of the parent related to the grandparents. In *Troxel v. Granville*, the Supreme Court held that a best interests analysis used in determining whether to allow grandparent visitation did not give sufficient respect to parental rights and that there must be a particular weight or presumption given to parental choices. 66 Emily Buss, an advocate of parental privacy to purse children’s interests, has argued that given the ongoing parental relationship with children, it is best to leave decisions concerning with whom children should visit to parental discretion. 67 Parents are best situated she argues to determine how such visitation is affecting children and most affected themselves by the visitation that any court would impose. Jim Dwyer on the other hand believes firmly in the relationship rights of children and believes the state must interfere with parental relationships in order to allow children to have sustained relationships with third-parties. 68 He argues that best interests should allow courts to overrule parental decisions regarding visitation with third-parties as long as parental opinions are taken into account in such a best interests analysis. Moreover, when it comes to parental prerogatives such as relocation, religious exposure, etc., Buss has more confidence in parental privacy of a custodial parent and parental presumptions while Dwyer would like to rely further on best interests and state control in order to assist children. 69 Interestingly, however, both Buss and Dwyer appear to be in favor of broad inclusion of functional parents that reach minimum levels of care requirements. 70 However, once functional parental care meets these minimum requirements, Buss would argue for presumptions of parental privacy in decisions about children, while Dwyer would lean on state intervention. 71

Another area of dispute between child advocates is how directly involved children should be in custody disputes. There are those who argue that guardians ad litem are best situated to help courts make custody decision in children’s best interests. 72 And, that the best interests standard can adequately take into account a child’s wishes if mature enough to provide for them. 73 Others, however, believe that guardians ad litem that have to assess what they believe is best for the child are not sufficient, and that child advocates who make the case for the child’s

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68 *Relationship Rights of Children*, *supra* note 1, at 286-287.
70 *Id.*
own position with regard to custody separately should be required by the court in a variety of circumstances. This disagreement also touches on how negative the effects of engaging in litigation can be for children. Advocates of state interference or parental privacy perspectives are more likely to believe that guardians are sufficient while child-voice advocates will look to have children included in the proceeding despite the potential negative effects on those children.

A third area of disagreement that is influenced by these different perspectives is how strongly to enforce children’s civil rights. Abortion rights, marriage rights, circumcision, cultural identity rights, are the subjects of considerable controversy. On the one hand, children may seek the right to marry at a young age, on the other hand there is a desire to protect children by arguing that underage marriages are coercive to children and arranged by parents. While these situations may be examined on a case-by-case basis, the inclination is instead to raise the minimum marriage age for all and allow less exceptional circumstances. Children may have the right to cultural identities, but yet may be too immature to substantively agree to bodily interference involved with circumcision. As a general matter, those focused on children’s autonomy and rights separate from parents may want to ensure that children’s civil rights will be ensured by the state in a manner as close as possible to those of adult civil rights. Therefore, they are likely to support children’s rights not to be circumcised and, under circumstances where children express a will to marry, to support the right to marry. On the other hand, those focused on the parental privacy model may want to give parent’s discretion regarding what is best for children – allowing circumcision and necessitating parental consent for marriage. From a child-centered perspective, one that focuses on children as subjects instead of objects, older children’s desires may be heeded and younger or infant children’s bodily integrity must be analyzed by considering how a child would experience one outcome or the other. A best interests inquiry, which is likely to be relied upon by state and child-centered perspectives may provide little if any guidance due to how amorphous and broad such an inquiry can be. Thus, we see how these three views rotate and revolve around each other sometimes corresponding and sometimes differing but providing three distinct perspectives.

These examples provide broad strokes. They demonstrate the constant and unresolvable tension that exists in the current legal discourse. And, to be sure, there are also areas of relative agreement. All three perspectives how to best promote child advocacy would appear to be in favor of preserving a child’s relationship with a long-term active caregiver in favor of a parent with parental rights but without a parent-child relationship. Thus, in case like in re Baby Jessica, all three perspectives on child advocacy are likely to agree that Jessica DeBoers at two years old

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74 See cites supra note 63.
76 See infra Part IV.C.2.
78 Appell, supra note 1, at 154-156.
79 See Ross Povenmire, Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States, 7 Am. U. J. Gender Soc. Pol’y 87, 102-103 (1999)
80 See infra notes 17-19 & 82 to 88 and accompanying text.
should not have been taken away from the adoptive family, the only family she had ever known in favor of her biological father who did not consent to the adoption.\textsuperscript{81} This is because all three perspectives are focused on how best to advance children’s advocacy as opposed to a parental rights perspective.

Choosing among these three avenues seems futile. They are all compelling and relevant in their own way. While often viewed as in tension with one another, all three perspectives are often part of any inquiry on behalf of children. Unable to choose, the state normally puts a lot of reliance on “best interests” to weigh a variety of factors.\textsuperscript{82} However, the best interests analysis is so broad and malleable it is open to bias and varying interpretations.\textsuperscript{83} Best interests has long been criticized as ambiguous and amorphous and extremely difficult for judges to apply, necessitating costly and difficult proceedings.\textsuperscript{84} Scholars and social science studies have continually claimed that there is no scientific “best” and that efforts to optimize are expensive and largely futile.\textsuperscript{85} Best interests provides authority to the state decision-makers even though optimization is not possible resulting in the application of majoritarian values and simplistic analyses, minimizing parental privacy and civil rights of children.\textsuperscript{86} Moreover, state determinations of what is best often reflect simplistic understandings of the benefits of a nuclear family with financial stability in contrast to complex needs of children from unstable homes.\textsuperscript{87} The dominant “best interests” standard has the benefit of being able to take into account the variety of children’s interests – interests in being raised by parents with privacy, interests in state protection and interests in civil rights.\textsuperscript{88} However, its broadness and contextual nature is also its downfall. Often manipulated and abused, it is largely deemed a goal and not a standard, and has resulted in expensive custody disputes and highly controversial decisions.

C. The Underlying Basics: What We Know Children Need

In light of these fundamental tensions between competing mechanisms for pursuing children’s advocacy in the face of children’s limited autonomy, and the ambiguity of best interests, it is helpful to take a step back and lean on social sciences and psychology for insight as to what basic provisions are most important for children.

\textsuperscript{81} DeBoer v. DeBoer, 114 S.Ct. 1 (1993) (more commonly known as "In re Baby Jessica"); See Woodhouse, supra note 2, at 336; Dwyer, supra note 1, at 277.
\textsuperscript{83} See supra notes 17-18 and accompanying text.
\textsuperscript{84} See e.g., Robert H. Mnookin & Eleanor Maccoby, Facing the Dilemmas of Child Custody, 10 VA. J. SOC. POL’Y & L. 54, 71-72 (2002); Robert Mnookin, & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 954–57 (1979) (discussing the effects of bargaining in the context of uncertainty and, in particularly, effects on the weaker more risk averse party).
\textsuperscript{85} See supra note 18.
\textsuperscript{86} See supra note 19.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
1. Money & Low Conflict

Studies have demonstrated two primary indicators for children’s success. The first is financial stability and the second is being raised in a low-conflict environment. Having sufficient funds for a healthy diet, a stable house, consistent education without constant moving, and parental figures who are not constantly in crisis to provide for children is essential to children’s well-being. The lack of financial stability leads to poor outcomes for children, and can also be an indicator for the likelihood of parental termination and abuse and neglect proceedings as well as social welfare inquiries. Indeed, children who face financial hardships do so because parents are struggling and such struggles often lead to indelible effects on children. As scholars such as Naomi Cahn and Martha Minnow point out, focusing on children’s financial needs necessitates focusing on the financial stability of the household.

Second, low conflict in the home and in children’s environment is an important indicator of child well-being. Scholars and social scientists have repeatedly taken note of the way high tension and exposure to conflict can negatively affect children, particularly in the context of divorce. Moreover, studies have shown that in the context of high-conflict marriages, children of divorce have been better off than children of parents who have remained in marriage.

In other words, while the tension and instability occasioned by divorce undoubtedly harm children, so does living inside an unloving, potentially abusive relationship mired by high levels of conflict.

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89 See MELISSA LUDTKE, ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA 422-23 (1997) (arguing that limited financial resources and not single parenthood result in poorer outcomes for children).
90 Naomi Cahn, Placing Children in Context: Parents, Foster Care and Poverty, in WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 145, 145,150 (2009) (arguing that children are most often removed from their homes because of unstable parental income, citing strong correlation between poverty and child abuse and neglect. For example, children who live in families that make less than $15,000 per year are 45 times more likely to be abused or neglected).
91 Id.
92 See Paul R. Amato & Bruce Keith, Parental Divorce and the Well-Being of Children: A Meta-Analysis, 53 J. MARRIAGE & FAM. 43 (1991) (“Meta-analysis supports the notion that the impact of father absence appears to be mediated by family conflict…The family conflict perspective was strongly confirmed by the data. This perspective holds that children in intact families with high levels of conflict should have the same well-being problems as children of divorce, and the data supported this hypothesis.”); DANIEL G. SAUNDERS, NAT’L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, CHILD CUSTODY AND VISITATION DECISIONS IN DOMESTIC VIOLENCE CASES: LEGAL TRENDS, RISK FACTORS, AND SAFETY CONCERNS (Revised 2007) (“Enthusiasm for joint custody in the early 1980s was fueled by studies of couples who were highly motivated to ‘make it work.’ This enthusiasm has waned in recent years, in part because of social science findings. [For example,] Johnston concluded from her [most recent] review of research that ‘highly conflictual parents’ (not necessarily violent) had a poor prognosis for becoming cooperative parents,” and “[t]here is increasing evidence, however, that children of divorce have more problems because of the conflict between the parents before the divorce and not because of the divorce itself . . . .” (internal citations omitted) (emphasis in original)); E. Mavis Hetherington, Should We Stay Together for the Sake of the Children, in COPING WITH DIVORCE, SINGLE PARENTING AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE 93–116 (1999).
94See Paul R. Amato et al., Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood, 73 SOC. FORCES 985 (1995); Susan Jekielek, Parental Conflict, Marital Disruption and Children’s Emotional Well-Being, 76 SOC. FORCES 905 (1998); see also E. Mark Cummings & Patrick Davies, Children and Marital Conflict: The Impact of Family Dispute and Resolution 9 (1994) (finding that a high levels conflict affect childhood more than family structure).
conflict. The negative effects of exposure to violence and high levels of tension whether due to divorce or high conflict parental relationships have been well documented. The more children feel their parents are working in harmony for their well-being the better for children. While these studies have mostly been developed in the context of divorce, it is fair to apply them other co-parenting, caregiving context. When parents or by extension, grandparents and other caregivers have high levels of stress between them, such tension and conflict affect children whether after divorce or between caregivers who have never been married. The stress and conflict will also deeply affect caregivers, undermining their ability to care. Thus, in order to meet children’s needs, the value of low-tension environments must be part of the framework.

Neither the need for money or low-tension environments for good child development should be surprising or controversial and have been well developed elsewhere. While plenty of policy makers take these considerations into effect already, these well-settled studies should be kept in mind as we continue to evaluate and consider family law policies.

2. Children’s Need for Relationships

Social sciences also support children’s needs for relationships. The seminal study of Goldstein, Freud and Solnit attest to the importance of children’s bonds with parents. Following on such work, Anne Dailey provides a psychoanalytic, child-based perspective on children’s rights, relying on psychological sources to attach importance to children’s experiences, most central of which is the importance of their relationships and attachments with what she terms “good-enough caregivers.” She points to the importance of attachment fantasy and cognition as all being essentially dependent on this good-enough caregiver relationships. Pressing us to take into account that “the skills of adult autonomy derive from children’s earliest relationships with caregivers,” that children should have a right to good-enough caregiver relationship in order to best achieve liberal autonomy upon adulthood and thus best preserve the liberal state. She argues “a psychoanalytic perspective on children’s development gives us a new conceptual framework for thinking about the rights children should enjoy as members of a liberal polity. This framework focuses on children’s unique capacities, relational experiences,

95See Jane W. Ellis, Review Essay, Caught in the Middle: Protecting the Children of High-Conflict Divorce, 22 N.Y. Rev. L. & Soc. Change 253, 253 (1996) (“Keeping children away from violence, conflict and tension is a widely recognized goal of the legal system as a result of these studies.); Fieldstone and Coates, eds., Innovations in Interventions With High Conflict Families (Association of Family and Conciliation Courts, 2008) (information about high-conflict families, the effect on children, and the process of parenting coordination) (documenting the harm to children caused by unresolved and ongoing conflict between parents).

96Gregory Acs, Can We Promote Child Well-Being by Promoting Marriage? 69 J. MARRIAGE & FAM. 1326, 1327 (2007) (“[R]esearch shows that parental relationship quality affects parenting practices and that children whose parents have high-conflict marriages exhibit lower levels of well-being than those whose parents have low-conflict marriages.”); Marion Gindes, The Psychological Effects of Relocation for Childre of Divorce, 15 Journal of American Academy of Matrimonial Lawyers 119, 134-135 (1998) (“The research provides mixed results regarding the effect of contact with the nonresidential parent. For some children, contact with their noncustodial parent was associated with greater well-being, whereas, for others, it was associated with poorer adjustment. Frequency of contact alone is not associated with positive effects for the child. Where low conflict exists between the parents, contact with the noncustodial father appears to have a positive impact on children.”)


98See Dailey, supra note 26, at 2160; Dailey, supra note 14, at 3.

99Daily, supra note 26, at 2150; Daily, supra note 14, at 3, 7-9.

100Dailey, supra note 14, at 12.
Dailey focuses on children’s rights to maintain relationships, to be free of corporal punishment and to be free to have an abortion based on psychoanalytical forces at play in children.  

This psychological account attesting to the importance of children’s relationships for their development has practical ramifications. Dailey argues that based on her transitional view of children’s rights, not as unformed adult rights but as rights that are changing and adapting as children mature, the focus on bonds of attachment are central and that promoting such bonds should extend beyond genetic ties, recognizing children’s independent interests in ongoing relationships with non-parental figures with whom they have “primary caregiving relationships,” such as other relatives, foster parents, and stepparents.” These primary relationships with parents or others, from a children’s psychological perspective need to be maintained, she argues, even where children are at risk and relationships are flawed, and she argues for removal only as a last resort.

Other studies also support children’s need for relationships. Focusing on children born outside of marriage, Sara S. McLanahan and Irwin Garfinkel conducted empirical research on the well-being of children from birth until nine years old. The study was intended to consider how children born out of marriage are affected by the lack of a traditional nuclear family. The study found that indeed, children born outside of marriage fair worse than children of marriages in a number of different areas. They are less well-off physically in regards to obesity and asthma, with regard to mental health and in terms of academic achievement. The authors cite four phenomenon behind these differences: “(1) parental resources are much lower; (2) parental relationships are less stable; (3) parental investments in children are lower; (4) child outcomes are poorer.” McLanahan and Garfinkel’s hypothesis is that the nature of the parents’ relationship with children has a causal effect on the outcomes we care about. Instability in parental relationships, they argue, “reduces children’s life chances by increasing stress and uncertainty and undermining parental investments.” The study’s authors suggest that the normative implications of the study are to make direct investment in children in form of health and education services and by making parents and families more economically and socially secure. The authors recommend direct investments in children’s health and education, reducing mass incarceration, reducing prevalence of non-marital child-rearing and increasing the strength of father-child relationships through parenting programs and marriage support programs to educate and improve parents’ relationships with each other and with children.
It is clear that according to this study improving emotional and financial support for out of wedlock children is important. And, in addition to supporting the primary caregiver’s relationship with the child, buttressing father involvement in children’s lives can help achieve these goals, both because it increases rates of child support payment, and because it gives children the relationships such studies tell us they need. Clare Huntington takes this study’s results to argue for strengthening the relationship between father and child as a way to fix what is missing for children born out of wedlock as opposed to children born in wedlock. Therefore, she recommends that instead of granting single women custody automatically, causing fathers to have to negotiate custody with mothers or request visitation from courts, parents of children born out of wedlock should be deemed legal “co-parents,” which would have expressive and practical ramifications, and to reduce child support obligations on account of time spent with children. Thereby Huntington hopes to create better bonds between fathers and child, emphasizing the need for co-parenting between non-marital parents.

But these suggestions have the following additional potential ramifications: (1) they potentially reduce financial support to children; and (2) by removing automatic custody rules, make primary parent’s lives more difficult and less secure because they must navigate custody arrangements with the children’s fathers, go to court to get a custody order, and fight co-parenting presumptions when the secondary parent is not meeting his or her obligations. Supporting parental involvement should not threaten to complicate the burdens of care and support that are already and will likely continue to be placed on the primary caregiver’s shoulders by making them susceptible to tense and contestable co-parenting negotiations that do not provide clear, navigable rules. Indeed, the studies Huntington supports point to these out of wedlock fathers as having problems with violence, drug use and involvement in the criminal justice system. Such fathers may want to be involved with children but they also often lead unstable lives and are likely to have high-tension relationships with the mothers of their children. As mentioned above, low tension and greater support are both indicators of child well-being. McLanahan and Garfinkel’s study also supports the need to strengthen parenting relationships but there are other ways to do so that do not decrease child support obligations while increasing the likelihood for tension.

Focus on strengthening relationships is essential, but the need for financial support and low-tension environments to foster these relationships must be kept in mind as well. Both the primary and secondary relationships must be supported, but, as I will argue in this article, such relationships should be demarcated in a clear manner that does not necessitate too much


115 Id. at 173-176.

116 Id. at 225-231.

117 Id. at 192-193 (citing KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY 157, 169, 208, 214 (2013)).
negotiation, court involvement and potential disputes regarding money and care.\textsuperscript{118} Clear caregiving and financial roles should be defined and supported. As Huntington remarks, fathers in these families often have a different role in children’s lives: “fathers viewed their role in their children’s lives not as providing economic support or daily caregiving, but rather moral guidance and friendship to their children.”\textsuperscript{119} Different kinds of relationships can be valuable but they should not be thrown under the umbrella of “co-parents” and then left for the primary caregiver and financial supporter to fight for rights and needs. In Part III of this article I will argue for a clearly defined and hierarchical categories of parenting and care relationships that must work in tandem but need not be negotiated by the parties, as well as clear principles determining when the state should interfere. These categories provide clear rules and a balance of power that focus on the needs of the child to have relationships with multiple parents and caregivers. Moreover, I will argue for relationship-based support mechanisms for families that will do the most for supporting the financial needs of children and attachments in a non-punitive manner that indeed looks at complete separation as a last resort but distinguishes between primary, secondary and tertiary relationships.\textsuperscript{120}

D. Children’s Needs in Legal Context

Money, low conflict and maintenance of relationships should be seen as central tenets of supporting children’s well being. However, it is striking to note that while current family law has clearly been influenced by children’s need for money and low-tension environments and stability, the law has been less influenced by the need to maintain relationships. Focus on child support and its collection as well as welfare benefit programs focused on children demonstrate focus on financial stability. Emphasis on collaborative divorce and no-fault divorce, preference in many states for joint legal or physical custody when there is agreement between parents, and deference to parental rights and authority all may be said to demonstrate efforts to ensure stability and low tension environments.\textsuperscript{\textsuperscript{121}}

On the one hand, the strong preference for parental privacy ensures the parent-child relationship, which is often the most important relationship for children.\textsuperscript{122} Moreover, modification standards in custody decisions are usually more stringent than initial custody disputes, demonstrating a focus on relationship stability.\textsuperscript{123} However, legal principles are only beginning to recognize the ways in which multiple relationships can provide necessary emotional and physical support to children and the fact that not infrequently formal, biological parents are

\begin{itemize}
  \item \textsuperscript{118} See infra Part III.B.
  \item \textsuperscript{119} Huntington, supra note 114, at 194 (citing Kathryn Edin & Timothy J. Nelson, DOING THE BEST I CAN: FATHERHOOD AND THE INNER CITY 220-227(2013)).
  \item \textsuperscript{120} See infra Part III.
  \item \textsuperscript{121} See e.g., Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 CLINICAL L. REV. 427 (2000); Braiman v. Braiman, 44 N.Y.2d 584, 589–590 (1978).
  \item \textsuperscript{122} Troxel v. Granville, 530 U.S. 57, 60 (2000); See also Appell, supra note 50.
  \item \textsuperscript{123} See JUDITH AREEN ET AL., FAMILY LAW 948 (6th ed. 2012); ALASKA STAT. ANN. §25.20.110(a) (West 2012); WYO. STAT. ANN. § 20-2- 204(c) (West 2007 & Supp. 2014) ("A court having jurisdiction may modify an order concerning the care, custody and visitation of the children if there is a showing by either parent of a material change in circumstances since the entry of the order in question and that the modification would be in the best interests of the children . . . . ").
\end{itemize}
not the primary caregivers to whom children bond.\textsuperscript{124} From a child’s perspective, if the bond to a caregiver is strong, it can certainly warrant preservation above a parent’s objection.\textsuperscript{125} Moreover, if relationships are central to children’s well-being, the state fails to support those relationships in advance, providing instead de facto relief to children only after relationships break down.\textsuperscript{126} And, those relationships are terminated and receive no support post adoption with alternative families.\textsuperscript{127} Finally, even modification standards are gradually becoming more flexible and reverting back to the more amorphous and contestable best interests standard, and the need for ongoing relationships has been increasingly deemphasized in light of other interests within a broad “best” interests analysis, including children's and adult's civil rights.\textsuperscript{128} Each of these three issues are crucial in supporting relationships: (1) state involvement to support relationships in advance and not only upon the onset of turbulence; (2) support of multiple forms of relationships and (3) focus on ongoing relationships in considering conflicting or overlapping rights and interests. These principles will guide a relational perspective on children’s advocacy I outline in part IV.

Instead of focus on relationships, children’s rights advocacy has been focused on supporting the individual child. Such support comes from focus on children’s individual well being through a best interests standard and viewing relationships mainly through the lens of state or parents’ stewardship for achieving those individual interests.\textsuperscript{129} In the case of older children, autonomy and children’s voices also become involved to a greater extent. These individualistic guiding principles for children’s advocacy insufficiently weigh children’s attachment to and dependency on relationships.

III. From an Individualistic to a Relational Perspective on Children’s Rights & Interests: Mapping the Rights and Interests Involved

Given children’s need for relationships and the law’s tendency to focus on individuals, this part will develop a theory of rights that can better support relationships. In this part, I will map the distinctions between individual rights and interests, caregiver rights, group rights and finally


\textsuperscript{125} Daily, supra note 14, at 13-14.

\textsuperscript{126} See infra Part IV.A.

\textsuperscript{127} See Dailey, supra note 14, at 13-14.

\textsuperscript{128} See Ala. Code § 30-3-169.4 (2011) (rebuttable presumption that relocating is not in the best interest of the child); MINN. STAT. ANN. § 518.175 (2006) (necessitating a court order or consent from the other parent so that a custodial parent may relocate with their children); IDAHO CODE ANN. § 32-717(1) (2013) (not requiring a finding of changed circumstances if original custody decree was a matter of stipulation and not litigation as are most custody arrangements).

\textsuperscript{129} See infra notes 49 to 52 and accompanying text.
explain the meaning of relational rights, which focuses on the need for relationships. I will
develop the concept of relational rights and specify how the theory will inform the relational
principles for advocacy on behalf of children I develop in part IV.

A. Individualistic Accounts of Rights and Interests: Children, Parents and the State

1. Children’s Rights

Children’s rights are composed of a number of different kinds of rights and interests: quasi-
civil rights, dependency rights and parental privacy rights.\(^{130}\) Children have interests in parental
privacy, in dependent care and in a limited range of civil rights that are lesser versions of adults
civil rights as well. Because of the complexity of children’s interests, and children’s reliance and
need for care from others, it is problematic to examine these interests from an individualistic
perspective. Still, individualistically focused rights of children are the norm, as is separating out
parental rights and state interests from children’s rights. In the liberal western tradition, human
rights and liberty rights are considered personal individualistic rights.\(^{131}\) As Minow explains, the
dominant narrative of the relationship between individual and society in the U.S. is that
autonomous individuals have rights against the state, coupled with obligations on individuals for
their actions.\(^{132}\) Such an individualistic perspective is more appropriate when dealing with quasi-
civil rights that mirror adult-like civil, personal rights and less realistic when focusing on
children’s need for dependent care. In the egalitarian liberal tradition, this individualistic
perspective is true for all conceptual depictions of rights, including children’s rights.\(^{133}\) For the
most part, in our liberal tradition, rights belong to the individual person, not to a group of persons
or to a community.\(^{134}\)

Given the historical process that led to advocating for children’s rights as human rights,
and the way children were historically treated as parental property,\(^{135}\) it is not surprising that
when focusing on children’s rights and interests it is usually done in a manner that specifically
excludes considering parental rights.\(^{136}\) Indeed, children’s rights are held up as an alternative to
and in opposition with parental rights.\(^{137}\) Instead, it is argued that only children’s welfare is
relevant when children’s well-being is involved.\(^{138}\) Many children’s rights advocates see a clear

\(^{130}\)See supra Part II(B); Laufer-Ukeles, supra note 19; Appell, supra note 1, at 154-156.
\(^{131}\)See e.g., David Engle, Concepts of Rights: Introduction, 28 Law & Society Review (1994); Ronald K. Collins &
405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single,
to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision
whether to bear or beget a child.”)
\(^{132}\)Minow, supra note 9, at 16.
\(^{133}\)See Jennifer Nedelsky, supra note 26, at 5-9 (describing the individualistic nature of liberal rights); Minow, supra
note 9, at 15-16.
\(^{134}\)See e.g., Minow & Shanley, supra note 31, at 16-18; John Rawls, A THEORY OF JUSTICE (1971) (focusing on the
individual as the rights holder in moral discourse).
\(^{135}\)See supra note 39 and accompanying text.
\(^{136}\)See Minow, supra note 9, at 19.
\(^{137}\)See e.g., Zug, supra note 52, at 1161–64; Julia H. McLaughlin, The Fundamental Truth about Best Interests, 54
\(^{138}\)See Dwyer, passim, supra note 1.
binary tension assumed between children’s rights and parental rights as they have developed and as they are frequently conceived. They fear that talk of relationships will only lead to undermining the focus on children themselves.  

Barbara Bennet Woodhouse also expresses an individualist perspective on children in her “generist” formulation: “Generism would place children, not adults, firmly at the center and takes as its central values not adult individualism, possession, and autonomy, as embodied in parental rights, nor even the dyadic intimacy of parent/child relationships. It would value most highly concrete service to the next generation… as well as collective community responsibility for the well-being of children.”  

Although valuing children’s needs for relationships, Woodhouse is concerned that protecting children within their relationships will result in avoiding “adult guilt and enhance adult freedom, without necessarily meeting children’s needs for care.”  

Susan Appleton also argues that relationship based accounts of children’s rights may miss the developmentally changing needs of children forcing them to be stuck in static relationships. However, relationships are also essential in harboring this development, and looking at development in children outside of relationships misses too much. Relationships should not be viewed as static but as developing children’s autonomy and independence.  

As a whole children’s advocacy has developed to focus on children alone, not parents and not relationships. While the concerns that have led to this perspective are valid, I argue that the challenges must be met directly from a relationship-based perspective with guiding principles that ensure that children’s needs are central and evolving, and not by reverting back to individualism and de-emphasis on relationships.

The standard argument against a fully child-centered vision of custody is that parental and societal interests should be able to compete with children’s rights to well-being and that balancing these various rights should occur when determining custody. Thus, in Palmore v. Sidoti, the state’s distaste for considering third-party discrimination is taken into account. And, in Troxel v. Granville, parental rights are used to disqualify a completely child-centered best interest standard. My argument is not that there is a need to consider parental or societal interests or other third-party rights in determining custody as opposed to considering just children’s interests or a need not to consider them – I take no position on this issue. Rather, I argue that any conception of individualized rights of children that does not also consider the interests of parents and society in providing care for children does not appropriately reflect the nature of childhood, parent-child relationships and children as rights-holders. Looking at a child as an individual misses the fundamental interdependent context of a child’s life. Children’s rights must be considered in the complex context in which such care is provided. Thus, a contextual, relational perspective on children’s rights is appropriate. Only through a

139 Dwyer, supra note 1, at 128-130.
140 Woodhouse, supra note 1, at 1815.
141 Id.
142 Appleton, supra note 6, at 544.
143 See supra Part II.C.2
144 Dailey, supra note 14, at 13 (emphasizing the transition, non-static nature of children’s relational lives).
146 530 U.S. 57 (2000).
147 Such an argument is outside the scope of this article. For discussions of the parental rights doctrine, see Woodhouse, supra note 1, at 1810-1811; Appleton, supra note 6, at 540.
relationship-focused perspective can children’s rights be accurately calibrated and parent and state interests be appropriately limited.

3. Parental Rights

Parental rights over children are not what they once were, although they are still strong.\textsuperscript{148} And, parental privacy interests are still part of a children’s rights analysis, even in the context of a broad best interests inquiry.\textsuperscript{149} From the children’s advocacy perspective that this article takes, the question is not whether parents have a right to do as they wish with their children, but what power balance between state interference and parental privacy rights best serves children?\textsuperscript{150} While some argue that parental choices should almost always be assumed to be in a child’s best interests,\textsuperscript{151} others advocate for more interference by the state in judging and condemning poor choices and ensuring that there are consequences for parental prerogatives that negatively affect children.\textsuperscript{152}

There are a number of different kinds of decisions that parents make that can affect children. First, there are parental choices about how to best raise children.\textsuperscript{153} Given the subjective and indeterminate nature of optimizing between perspectives on how to best raise children, parental actions that are legitimately and credibly taken with their children’s interests in mind – even if the state or others disagree about their advisability – should usually be respected. This promotes the values of diversity and accepts that there are real differences of opinion about what kind of life is best for children.\textsuperscript{154} There are also parental choices that are not related to how to raise children but rather are more about parents’ “selfish” desires.\textsuperscript{155} This second variety of parental choices involve liberty rights to act in a way that may be partially about care for children but is also about parental preferences for their own sakes. Thus, one parent can relocate for a job which will bring more stability and security to the parent and child but is also a job that is preferable to the parent for career advancement and the like – even the residence of the parent’s new mate. Or, a parent can increase religious commitment both for his own benefit and for that of his children. This mixed motive scenario is the most common. In this case the parental prerogative is part parental discretion about what is best for the child and part about what is best for the parent.

The third kind of parental choices regarding children are those that are not made with any consideration of children or done in spite of what a parent himself thinks is best for his child. These kinds of liberty rights may or may not affect children negatively, but it is likely there will be some secondary effect upon them. Thus, for instance, a parent can trade a family car that helped in carpools and promoted children’s safety for a sports car. Alternately, a parent can

\textsuperscript{148} See supra notes 46 to 48 and accompanying text.
\textsuperscript{149} See supra notes 49 to 51 and accompanying text; Laufer-Ukeles, supra note 18.
\textsuperscript{150} See generally Dwyer, supra note 1.
\textsuperscript{151} See supra notes 49 to 51 and accompanying text.
\textsuperscript{152} See supra notes 52 to 60 and accompanying text.
\textsuperscript{153} See e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).
\textsuperscript{155} Dwyer, supra note 1, at 129-134.
move a child to Los Angeles in order to become an actor knowing that it would uproot the child completely and provide little security. Or, a parent can become part of a cult that does not permit him to see his child and thereby clearly harms the child. A parent can choose to smoke, go on a long vacation, eat fattening food, run a red light, have too many beers, etc. All such choices may not be in the interests of the child but would be short of abuse and neglect. Parental choices whether more selfish or more about children are usually on a spectrum. In other words, even when not making choices solely for the sake of children, their children’s needs may be factored in to some extent. In part IV. C. I will consider to what extent interference is warranted with parental prerogative from a relational perspective.

4. Caregiver Rights

Parents’ rights and interests are directly relevant to discussing children’s rights because they are often, if not usually, spending their time caring for children. As Woodhouse argues, “[a] truly child-centered perspective would also expose the fallacy that children can thrive while their care givers struggle, or that the care giver’s needs can be severed from the child’s, which has led to the attitude that violence, hostility and neglect toward the caregiver are somehow irrelevant in the best interests calculus.” But there are also caregivers who are not legal parents of children.156

Caregivers take responsibility for the care of children, but, caregivers are also individuals. The relationship between caregiver and child is particularly complex – there is persistent and constant interdependency between caregivers and children. The more care a parent provides, the harder it is to separate the caregiver from the child. A caregiver’s needs and rights become intertwined with the child’s life because of the direct effect of their life choices on children and the constraints in their choices that raising children places upon them. If a primary caregiver is overwhelmed and does not have necessary support – both financial and emotional – and therefore wants to relocate, the interests of the child are interconnected with that caregiver’s rights and interests because a caregiver cannot provide good care without feeling stable and secure herself.158 Caregivers, particularly primary caregivers, inhibit their own market work in order to provide necessary care and therefore their religious, geographical, personal needs as well as their physical safety cannot be completely separated from a child’s needs and interests. Such interdependency can be seen to compromise the individuality of the caregiver, and minimize the independent needs of the child.159 However, the interdependency is the reality and recognizing such interdependence is more important in supporting children’s rights than symbolic gestures.160

156Woodhouse, supra note 2, at 316.
157See cites, supra note 124.
158See Minow, supra note 9, at 2-20.
160Robin L. West, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 93-95(2003)("[W]hen we are acting as caregivers, we need not rights that falsely presuppose our autonomy, and independence, but rights that frankly acknowledge our relational reality: when infants, children, or aging parents are dependent upon us, we are dependent upon others for support and sustenance.")
Therefore as a matter of logic and sheer practicality, it is increasingly evident that children’s rights cannot be promoted without advancing caregiver rights: “Policy-makers increasingly recognize that a society cannot care for its children without addressing the needs of their caregivers, who must either be subsidized at home or given the support they need to participate in the labor market as breadwinners.” 161 If caregivers’ and children’s needs are indelibly intertwined then supporting children means supporting caregivers as well. Children cannot be assured care in isolation – the care has to be given by someone who has adequate financial, emotional and psychological means to do so. 162

It is not enough to pit parental rights against children’s rights and punish parents who do a less than an optimal job – who are not “best.” There are not enough parents for children in need; the foster care system is expensive and overwhelmed. 163 Parents who are trying to provide good care need financial and legal support for their efforts. Society should focus on providing the support necessary to these caregivers to provide good care. The United States has lagged behind other countries in recognizing rights that extend beyond individuals and relies on privacy and individuality to cover children’s needs. But, as Woodhouse suggests, “…Americans must face the fact that these concepts [community and caregiver rights] are considered foundational in most of our peer nations.” 164 The American focus on individual rights in family law and beyond impedes the U.S. ability to provide for dependents and ensure the care that is so based on interdependency. 165 We must move from oppositional, individualistic accounts of children and


162 See e.g., Mary Lyndon Shanley, The State of Marriage and the State in Marriage, in Marriage Proposals: Questioning a Legal Status 201 (2006) (“the kinds of measures that would foster autonomy for adults and enable them to provide for children in their care include health insurance, affordable and quality child care, child allowances of the kind common in Europe, flexible workplace hours, and paid parental leave for both men and women.”)

163 See Nolan RindFleisch, Gerald Bean & Ramona Denby, Why Foster Parents Continue and Cease to Foster, in 25 Journal of Sociology and Social Welfare 6 (1998) (citing Kamerman and Kahn (1990) & General Accounting Office reports (USGAO 1989, USGAO, 1993); Patricia Chamberlain & Sandra Moreland, Enhanced Services and Stipends for Foster Parents: Effects on Retention Rates and Outcomes for Children, 71 Child Welfare 387 (1992) (“Current national trends show that although the number of available foster homes is shrinking, the number of children and adolescents being cared for in the family foster care system is growing.”); Susan Rodger, et al., Who is Caring for our Most Vulnerable Children? The Motivation to Foster in Child Welfare, 30 Child Abuse & Neglect 1129, 1130 (2006) (“...there is concern that the foster system may not be growing at a pace that can provide the necessary capacity to meet this [growing] need.”).

164 Woodhouse, supra note 161, at 850

165 Woodhouse, supra note 161, at 833 (‘Our failure to see the child in the ecological context also leads to the conceptual (and, too often, actual) separation of the child from her caregivers. A child-centered jurisprudence cannot be truly child-centered if it excludes the concerns of caregivers. In ignoring the needs of caregivers, primarily women, we ignore the needs of children.’) See also Minnow, supra note XX, at 2 (“[W]e need to develop
parental rights – or children and state rights when it comes to dependency rights, and move to a mutually supportive framework that affirmatively supports caregivers and the children for whom they care.

5. State Interests

While states do not have rights, and may seem irrelevant to a discussion of children’s rights, they do have interests that justify state interference in private relationships. These interests can involve third-parties, parents, society or the state itself, but can also involve protecting children. Sometimes the state interferes or sets standards for reasons that are explicitly not related to a particular child’s circumstances.166 Other times, the state argues that it is acting in a child’s interest, but as others have pointed out a state’s certainty about what is best for children is often more complicated than it may appear and hidden state interests may be involved.167 In other circumstances, the state is fully responsible for the care of children as when parental rights have been terminated due to abuse and neglect or when children are in the foster or state welfare system. The state then becomes legally responsible for the child’s care although it must outsource that care to institutions or private families. In such circumstances, the state’s own deficiencies may affect children, as where there are insufficient social workers tracking children’s welfare, insufficient funds to support a “good-enough” child welfare system and then state needs become inextricably intertwined with children’s needs. Due to this reality, instead of focusing on the child’s rights in opposition to state interference, understanding how the state can best help children within its own constraints through studies and social welfare support becomes essential. Legal principles that support state provision of care for children in a manageable and clear manner is essential given the state’s limited resources and the sometimes overwhelming needs of children.

B. Group and Relational Rights and Interests

Because children are dependent on others for their care, whether the state, parents or third-parties, it is difficult to determine children’s best interests in an isolated manner. In this section, I will develop this perspective on relational rights by using theories of what relational rights are and clarifying what they are not.

1. Group Rights

Rights to individual autonomy cannot fully capture the nature of caregiving relationships.168 Private, individual, rights cannot be realized if they are highly dependent on the

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166 See e.g., Palmore v. Sidoti, 466 U.S. 429 (1984) (state interest in prohibiting the effects of unconstitutional discrimination to be a factor in custody decisions); Zug, supra note XX, at 1170 (arguing that state has interests in protecting its citizen children in deportation cases).
167 See e.g., Marsha Garrison, Parents’ Rights vs. Children’s Interests: The Case of the Foster Child, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 386-7 (1996) (discussing cost and attractiveness to adopting parents as reasons the state may prefer adoption over foster care).
168 Minnow, supra note 33, at 16-17.
cooperation and actions of the others. Thus, for instance, the right to coital reproductive privacy is different than the right to reproduce using surrogacy in which third-parties and their interests must be considered and upon whom the private right to reproduce is dependent.

Other cultures focus less on individualistic liberty and privacy rights in defining human rights and more on group and community rights. For children, such community rights may make more sense given their interdependency with other individuals. While scholars advocate for community rights in many other contexts as well, children’s rights provide an ideal focus of the need for an expanded view of rights: “Children, even more than adults, illustrate the dilemmas of freedom-within-community…For children, connection to others is a precondition to autonomy and individuality.” Woodhouse points to the expansion of functional parenthood, open adoptions, kin foster care and other modern developments as integrating notions of community rights in a manner that is good for children and has developed in tandem with understanding of children’s interests. Other scholars point to family rights as an ideal application of such group rights.

Promoting the rights of a community is not the same as promoting relationships. However, exploring the idea of expanding rights beyond the individual and pointing to community needs, rights and obligations is instructive. Rights imply freedom from state imposition or duties of support by the state or others, and there is no reason that a community or other group cannot be stakeholders in such rights.

2. Relational Rights and Interests

Different from group rights or individuals rights, relationship-based rights take seriously the nature of relationships and the state’s obligation to support relationships that provide valuable care to children. A system of relational rights to replace individualistic rights has been promoted by Jennifer Nedelsky, among others. The basic premise is that individual rights can only be

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172 Woodhouse, supra note 11, at 498; see also Minnow & Shanely, supra note 31; Jane Rutherford, Beyond Individual Privacy: A New Theory of Family Rights, 39 U. FLA. L. Rev. 627 (1987) (arguing for support for family rights alongside individual rights and when the rights of individuals in the family conflict – husband’s rights with a wife’s or children’s with their parents, the weaker and more vulnerable party’s rights should prevail).
173 Woodhouse, supra note 11, at 501-503.
174 Rutherford, supra note 172.
sufficiently protected by protecting relationships as opposed to protecting individual freedoms in isolation from others. The relational perspective is related to but different than a focus on caregiver rights because it focuses more broadly on evaluating and supporting the role of relationships in the law. And, although thinking about community is essential when evaluating interdependency, the relational perspective does not subvert individualism to community rights. Neither individual nor community based rights alone are sufficient to uphold caregiver’s or children’s interests.

The relational perspective shifts the focus of rights from preventing state interference with individual freedom to placing positive duties on the state for setting preconditions for healthy and beneficial relationships. The goal of the relational approach is to consider what kind of laws and norms help structure relationships that work. Nedelsky’s argument is that rights can’t be secured without the fostering of autonomy through the fostering of relationships: “dependence is no longer the antithesis of autonomy but a precondition in the relationships – between parent and child, student and teacher, state and citizen – which provide the security, education, nurturing, and support that make the development of autonomy possible.”

Thinking of rights not as the right to be left alone but as rights to state support for interdependent relationships is a dramatic shift. This positivist view of the state goes against the very nature of liberty and freedoms that set the basis for U.S. constitutional freedoms.

Nedelsky, asks us to rebuild these positivist state obligations from the starting point of interconnection and not isolation. She counters egalitarian liberal feminists, arguing that a relationship-based approach better achieves the aims of feminism than an individualistic liberal approach. Nedelsky argues that individualistic autonomy and rights fundamentally misses the extent to which it is our relationships to others that define us – selves “become who they are – their identities, their capacities, their desires – through the relationships in which they participate.” She sharply criticizes all individualistic accounts of rights and autonomy as identities and capacities, she argues, are not comprehensible in isolation for their relationships. Nedelsky urges that in any debate about rights that we consider: “(a) what conditions, including law, have structured the relations that generated the problem; (b) what values are at stake; (c)

176 Jennifer Nedelsky, Reconceiving Rights as Relationship, 1 Review of Constitutional Studies 1, 8 (1993).
177 Nedelsky, supra note 26, at 87-88.
178 Nedelsky, supra note 26, at 8 (“The human interactions to be governed are not seen primary in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy. The whole conception of the relation between the individual and the collective shifts: we recognize that the collective is a source of autonomy as well as a threat to it.”)
179 Id. at 22. See also Robin West, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 93-95 (2003) (“That circle of mutual need, caregiving, dependency, and assistance, is as much a part of our social contract, as is the individual’s relinquishment of rights to self-defense in exchange for a right to protection against violence. A rights tradition that forthrightly acknowledged the natural reality of our inescapable dependence on each other--to say nothing of our social nature--would give pride of place to “relational rights” that would protect the caregiver, and hence the care bestowed in dependency relationships.”)
180 Id.
181 Minow, supra note 9, at 23
182 Id. at 8.
183 Id. at 55.
184 Id. at 7.
185 Id. at 4.
what kinds of relationships would foster those values; and (d) how competing versions of a right would structure relations differently.”

Nedelsky argument for a grand shift in our perspective on legal, political and moral life goes well beyond the realm of children’s rights or family law. This article’s focus is specifically on children’s rights. Putting aside the benefits of a more relational perspective on family law and legal rights more broadly, children’s rights by their very nature are interdependent and complex as discussed above and call for a nuanced relational perspective that focuses on the questions and issues Nedelsky poses. For children, it is certainly not sufficient to be left alone, to pursue that freedom that goes against the very nature of children’s needs and dependence. But, thinking about children as having only interests instead of rights does not do enough to counter other parties firmly established rights – like parental rights – and fails to capture the sense in which children’s interests are human rights. Thinking of children’s rights as relational rights solves this dilemma and captures the nature of children’s rights in the context of dependency.

The relational perspective on children’s rights is distinct from the right to relationships as well as relationship rights. The right to relationships is still individualistic; it is the right of the individual to have a relationship with another person, such as a caregiver. The relational perspective on rights is also not about rights that belong to a relationship. Relational rights are not group rights that need to be asserted by both members of a relationship in unison. Relational rights are about the responsibility of the state to protect and support relationships in order to protect and support individual interdependent children and caregivers. The rights derive from the individual children’s rights but flow to support the relationships themselves not to either individual’s isolated interest in the relationships – child or caregiver.

This complex perspective of individual within the community allows individuals to be protected within the context of the relationships that sustain them. Thus, the issue is to consider how individualistic rights structure and affect relationships and whether in so structuring relationships the legal rights and laws that protect these rights achieve the aims intended. From this broad theory a number of important tenets can be derived. First, relationships that support children are varied in character, but may be nonetheless worthy of support: “A conception of relational rights and responsibilities…would not regard “rights” as belonging to individuals and arising from the imperative of self-preservation, but rather would view rights as claims grounded in and arising from human relationships of varying degrees of intimacy, what

186 Nedelsky, supra note 26, at 236.
187 Nedelsky, supra note 34.
188 I make no judgment as to whether relational rights are appropriate outside the context of children’s rights and family law dealing with children.
189 See cites supra note 1.
190 See e.g., Dailey, supra note 26, at 2166-67; See also Dwyer, supra note 1 (arguing for the rights of children to have relationships with third-parties).
191 See supra notes 14-15, 33 and accompanying text for a discussion of the way rights creates duties upon the state.
192 Nedelsky, supra note 26, at 236-237 (“What I propose that is this reality of rights structuring relationships become the central focus of the concept itself and, thus, of all discussion of what should be treated as a right, how rights should be enforced, and how they should be interpreted.”)
Kenneth Karst has called intimate associations." Second, the relational theory is not static but evaluative and developmental, trying to support relationships in a fluid manner. Autonomy, values and relationships are not judged to exist or not exist but rather under the relational approach laws are evaluated as to their effectiveness in supporting such developing values. Therefore, this perspective on rights turns talk of children’s rights from incongruous to logical, as the perspective matches fluidly with the way children’s experiences and needs develop. The theoretical description matches gracefully with the psychological perspective on children’s development presented by Anne Dailey. Third, a relational perspective does not automatically view rights as confrontational, although ultimately belong to the individual and not the community and thus must seek to protect the individual within the community. As Martha Minnow suggests, the question should not be do parents have liberty rights in opposition to children’s rights but, “…what legal rules governing child custody, education and child support would promote settings in which children thrive? [w]hat rules promote parents abilities to create these settings?”

However, aren’t only good relationships in need of support? Does this perspective focus on relationships in a manner that can keep children trapped in bad circumstances? The relational argument is that relationships are constitutive of who people are, but that not that all relationships are good. As Nedelsky explains, it is “[p]art of the point of a relational approach is to understand what kinds of relationships foster – and which undermine – core values, such as autonomy, dignity, or security.” A relational approach to children must keep the potential harm of relationships in mind. First, it is still the state’s obligation to terminate custodial relationships involving abuse and neglect and parental unfitness. Nothing in the relational approach would change that safety net. On the other hand, the argument is that, as Anne Daily explains, children are dependent on “good-enough” relationships – not “best” relationships which are impossible to evaluate, involve too much state interference and complicate and weigh on relationships that children need. At-risk relationships are the most sensitive and will be considered below. But, it is only through understanding the nature of relationships that bad relationships can be evaluated and ended, relationships can be restructured and good relationships can be supported.

Relational perspectives on family law have been advanced by a number of influential scholars who have attempted to capture the need to focus on supporting relationships and not

193 Minow & Shanley, supra note 31, at 23 (citing Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE LAW JOURNAL 624, 626 (1980); See also Bartlett, supra note 27, at 315 (“We may also want to take account of the different degrees of relationship that have been formed.”)).
194 See supra notes 97 to 104 and accompanying text.
195 Dailey, supra note 14.
196 Nedelsky, supra note 26, at 77 (citing Joseph Raz, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 33 (1994)).
197 Nedelsky, supra note 26, at 238 (“…the relational approach is not some sort of collective alternative to protecting and enforcing individual rights. It is rather a means of doing so.”)
198 Id.
199 Id.
200 Id.
201 Dailey, supra note 14, at 3.
202 See infra notes 251-254 and accompanying text.
203 Nedelsky, supra note 26, at 32.
individuals. However, these perspectives have not had a major influence on U.S. judgments, legislation or legal scholarship. Indeed, the liberal individualistic position holds firm – rights belong to individual stakeholders and flow to individuals as well. The same arguments regarding the centrality of children’s interests in isolation from caregivers and parental interests and the oppositional nature of such rights remains the dominant discourse. A number of explanations can be offered. First, liberal ideas of rights, liberty, autonomy and individualism hold particularly strong in the U.S. and despite discussion of how children and dependency are different from such ideals, there is little desire to change the dominant position on rights. Other explanations, however, can be more readily overcome. Relational perspectives have been introduced most often in the context of theoretical debates about the nature of rights and children’s rights have been used as a pertinent example. But in order to translate these theoretical discussions into practical changes in the law affecting children, the theory must be made more practical, giving specific guidelines to courts and legislators about what a relational perspective on rights entails, how it would translate in case law and how it would better support children. In addition, because relational perspectives are based on context, a number of theoretical perspectives have suggested case by case determinations of what is best for relationships. However, such case by case analysis without specified guidelines can be amorphous, subjective, and difficult to monitor and apply in a consistent manner. Principled guidelines that do more than ask judges and legislators to make case by case, fact specific analyses can do more to make this perspective relevant and influential in children’s advocacy. These principles still need to be developed and applied in context but provide overarching guidelines for a children’s rights discourse that takes the way individual concerns are affected by relationships seriously.

I use the relational questions that Nedelskey argues must be asked to parse how the law can best promote children’s rights and interests and the general relational values developed by Nedelsky, Minnow and others to develop a specific set of guidelines for children’s advocacy from a relational perspective. Relying on the relational theory as well as social science studies focusing on the need for financial support and low tension environments as well as ongoing relationships I will set out three guiding legal principles for resolving conflicts and questions regarding the best way to pursue children’s advocacy. In particular, I will take the values of financial support, low-tension environments and supportive relationships as the relevant goals in considering the legal protection of children’s rights, broadly considering how development of these rights affect the relationships within which children are nested.

IV. Reframing Children’s Rights as Relational Rights

204 See Minnow & Shanley, supra note 31; Wanda Wiegers, Fatherhood and Misattributed Genetic Paternity in Family Law, 36 QUEEN’S L.J. 623, 627–628 (stating that a relational perspective on rights and responsibilities is important in all areas of law, but particularly in family law).
205 See supra notes 34 to 36 and accompanying text.
206 See notes 53, 137 and accompanying text.
207 Id.
208 Id.
209 But see Herring, supra note 26, at 48 (suggesting that a relational approach would require a case by case analysis).
In order to appropriately advocate on behalf of children we must shift the discussion from an oppositional rights discourse that pits children against parents, to delineating legal principles that govern interactions between individuals in a manner that best supports relationships. Thus, the key is not to point to whose interests trump but to look for guiding principles that can balance between the potential conflicting and competing concerns.

I will provide some examples of how these principles would be applied, but the goal of this article is to derive guiding principles not concrete answers to specific cases. The three principles I derive are: (1) the need to support ongoing relationships in lieu of rules that focus on the breakdown of relationships; (2) the need to sustain a variety of supportive relationships; and (3) in the context of seemingly conflicting positions between children’s civil rights and parental interests, the effect of any parental interference on ongoing relationships must be kept in mind.

A. Providing Ongoing Support for Dependent Relationships as Opposed to Protecting Individualistic Rights Once Relationships Breakdown.

The first principle is the need for legal rules that support ongoing relationships as opposed to saving children and thereby protecting their rights when relationships fail. When abuse and neglect are demonstrated and parents are deemed unfit, there is no doubt that the state must step in and terminate relationships that are harming children. However, such interference comes at the time of crisis – it is traumatic for the children involved and expensive for the state as it must find alternative arrangements for physical custody of children. Foster care is preferred over institutional care, but is expensive and constrained by a shortage of good foster parents. Social workers are overwhelmed. Good enough care relationships are in demand and in short supply. Crisis management through the child welfare and foster system can be more costly financially and emotionally than preventative family support.  

210 See Richard Gelles, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES (1996) (children more likely to be abused in group homes than foster homes); J. William Spencer and Dean D. Kunsen, Out of Home Maltreatment: An Analysis of Risk in Various Settings for Children, 14 CHILDREN AND YOUTH SERVICES REVIEW 485-492 (1992) (in group homes there was more than ten times the rate of physical abuse and more than 28 times the rate of sexual abuse as in the general population, in part because so many children in the homes abused each other); Mary I. Benedict and Susan Zuravin, FACTORS ASSOCIATED WITH CHILD MALTREATMENT BY FAMILY FOSTER CARE PROVIDERS 28, 30 (1992) (A study of reported abuse in Baltimore, found the rate of "substantiated" cases of sexual abuse in foster care (whether in private homes or in institutions) more than four times higher than the rate in the general population).

211 Patricia Chamberlain & Sandra Moreland, Enhanced Services and Stipends for Foster Parents: Effects on Retention Rates and Outcomes for Children, 71 CHILD WELFARE 387 (1992) (“Current national trends show that although the number of available foster homes is shrinking, the number of children and adolescents being cared for in the family foster care system is growing.”); Susan Rodger, et al., Who is Caring for our Most Vulnerable Children? The Motivation to Foster in Child Welfare, 30 CHILD ABUSE & NEGLECT 1129, 1130 (2006) (“...there is concern that the foster system may not be growing at a pace that can provide the necessary capacity to meet this [growing] need.”)


should seek to support—not punish—at risk families earlier to prevent the breakdown of the family.\textsuperscript{214}

Since the current rubric of rights focuses on individual autonomy, parental privacy and liberty rights as weighing against state interference, constitutional law seems to direct states to stay out of relationships for as long as possible. Parents have the right to raise children without undue interference from the state.\textsuperscript{215} However, from a relational perspective, non-interference fails to promote the relationships children need in advance of breakdown. Before there is harm to a child that could justify state interference with parental relationships, the state should support these relationships in a positive, relational and non-judgmental manner to preserve and foster the relationships.\textsuperscript{216}

While it may be argued on the one hand that any regulation even if non-coercive and supportive amounts to interference in autonomy,\textsuperscript{217} and on the other hand that even regulation at the breakdown of relationships shapes relationships by providing punitive warnings,\textsuperscript{218} a more direct and effective path for regulation is possible. Regulation can be framed that takes into account privacy and still supports relationships. There are concrete steps that the law can take to promote relationships in advance and thereby avoid the need for interference later on. This is a call for a shift in focus when it comes to children’s rights. Support for caretakers whether in the form of subsidies, divorce awards, or education and health benefits for families may be much more effective and less expensive then support for children when families come apart.

1. State Support for Relationships

Thinking about how to support relationships before they breakdown entails a more involved and creative state.\textsuperscript{219} The Supreme Court has made clear that under modern law, the state owes no affirmative duties to children.\textsuperscript{220} Rather, the state functions to punish bad parents through the child welfare system or even through the tort system. The state does not get involved in supporting ongoing caregiving relationships in order to change behavior and the

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\item \textsuperscript{215} Wisconsin v. Yoder, 406 U.S. 205 (1972); Santosky v. Kramer, 455 U.S. 745 (1984); Custody of Smith v. Stillwell, 137 Wash. 2d 1, 23-24 (2001) (“[s]hort of preventing harm to the child, the standard of ‘best interest of the child’ is insufficient to serve as a compelling state interest [under the fourteenth amendment] overruling a parent's fundamental rights”); Williams v. Williams, 256 Va. 19, 501 S.E.2d 417, 418 (1998) (holding that for “compelling state interest” to exist under fourteenth amendment, justifying order of visitation over objection of child's parents, court must find actual harm to child's health or welfare without such visitation)
\item \textsuperscript{216} See Dailey, supra note 14, at 26.
\item \textsuperscript{219} See e.g., Joe Handler, The Conditions of Discretion: Autonomy, Community, Bureacracy 7-14, 92-94, 160-161, 188-90, 279-96 (1986).
\item \textsuperscript{220} Dailey, supra note 14, at 26.
\end{enumerate}
nature of relationships instead of ending them. Such bureaucracy can be hard for states and can feel paternalistic, leading to a bigger more threatening state.  

However, an involved state may not necessarily lead to a more powerful and large state, rather to a “change in the way existing state power is exercised.” Many applications of such ongoing support to existing relationships are possible. Social welfare programs tend to focus on how to support children in need instead of taking a broader look at the relationships itself and how caregiver poverty clearly affect children’s poverty. For instance, welfare programs that focus on children’s health care need to keep in mind that children’s health is directly affected by caregiver health and that unhealthy parents are not likely to be able to support children. Indeed, as a general principle welfare programs that support families with affordable health insurance are more likely to succeed in fostering health relationships children need then do welfare programs focusing exclusively on children. Similarly social welfare that takes pressure off of families by providing high quality day care and pre-school public education focuses on children and simultaneously takes financial pressure off family members who are otherwise saddled with the need to fund such care. These services of a more “involved” state than the United States has traditional been do not necessarily interfere with parental discretion because they are not coercive. They merely foster healthy families and thereby address children's needs and hopefully help avoid later crisis management.

The Family Medical Leave Act (“FMLA”) is an example of a law that directly supports care relationships. FMLA allows twelve weeks of unpaid leave to caregivers who want to care for children or other dependent family members. However, the United States has lagged behind other countries in recognizing rights that extend beyond the individual, relying solely on privacy and individuality to cover children’s needs. Such support is unpaid and limited – other countries provided paid leave for as much as a year and use it or lose it paternity leave as well


222 See Nedelsky, supra note 26, at 223.


that incentivizes fathers’ relationships with children. Such measures allow parents to care for children and foster relationships while still allowing participation in the work force. Such European-style financial support endeavors are viewed as being too involved and “socialist” for the more individualist and private focus of U.S. regulations. However, a focus on children’s rights and interests demands such measures in lieu of privacy and crisis management. Such supportive measures need not interfere as they still leave options to parents as to whether to use such benefits.

Such measures may also be criticized as enabling and even incentivizing absence from the workplace. The focus on private responsibility and gender neutrality makes policy makers look askance at measures that may keep women at home. Families are intended to figure out how to support their children on their own without government assistance. Such a privacy perspective overlooks child development studies that clearly demonstrate that one-on-one contact during the first year of life is best for children’s development. The private sphere can accommodate such subsidies if one parent can support the caregiving parent during this time, but with increasing rates of children born out of wedlock and the need for two income families, such a perspective is not realistic or comprehensive. Children need for parents to maintain their jobs and be able to raise them in a flexible and nurturing manner. Children’s rights legislation should at a minimum support such care relationships.

Direct subsidies to families, particularly those in need, can support care relationships. Direct caretaker support payments by the state have been recommended by Martha Fineman, among others. Although direct subsidies may appear to be radical, a variety of methods for getting support to families are possible. From the state, caretaker support payments could be in the form of tax rebates, or stipends in a manner that is not only compensation for the use of daycare but also for home care. Particularly for single mothers or full-time or part-time stay at home mothers, such subsidies can do the hard work of keeping families functioning and value

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230 See e.g., Gillian Lester, A Defense of Paid Family Leave, 28 HARV. J.L. & GENDER 1, 2, 41, 46–50 (2005);


232 See e.g., Woodhouse, supra note 161, at 830–31.

233 See supra notes 105-112 and accompanying text.


235 See e.g., Ross & Cahn, supra note 224, at 69-71 (describing Fineman’s proposals for subsidizing private care as radical and citing disagreement over the modest family leave provided by FMLA as evidence.)

the work that caregivers do. Such care work consists of the very basics of child well-being and could help save the family from breakdown as poverty is a significant indicator for failed families.  

Any such subsidies are subject to criticism on two related grounds. First, why should the state fund reproductive choices that are based in privacy? And, second, how can we prevent people from having too many children in order to gain access to such benefits? Clearly, the relational approach sees room for limiting privacy in favor of support. Individualistic privacy is a value, but is not sufficient to advance children's needs. Although reproductive choices are grounded in privacy, a basis that is subject to criticism but persist nonetheless, the children born of such privacy are no longer considered wholly private concerns, but also societal concerns. Whether on the heels of the breakdown of relationships or during the ongoing good-enough care relationships, the state has some part to play – the question is whether that interference comes earlier to support or later to rescue.

Economists critique caregiver/child subsidies claim that subsidies incentivize “laziness” and parents will reproduce in order to get access to such subsidies – U.S. society does not react well to parents who perform caregiving in order to be paid. Furthermore, society has an interest in limiting the number of children born to any one family, especially poor families who are dependent on subsidies, who are likely to be the only families who receive state support. Of course, once a child is born his need for support is real and cannot be avoided, particularly when based on need. Such support is already being provided when child support cannot be collected and to foster parents once parental relationships breakdown. Systems that streamline such payments may save money. Moreover, the state can limit the amount of subsidy per family as larger families benefit from economies of scale. And, such subsidies can be need based and depend on a showing of good enough care by the family.

2. Caretaker Support Between Parents

Financial support in the form of child support is crucial for children. This is well accepted and focus is on enforcement. Calls that could lead to reduced child support should be viewed cautiously given children's need for financial support.

A number of scholars have argued that child support alone is not sufficient for providing the necessary support for care. Rather, caregiving activities also should be supported by

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237 See Cahn, supra note 90, at 145-150.
238 See e.g., West, supra note 231.
241 See supra Part II.C.(1).
242 See Timothy S. Grall, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009 1. 10 (2011) (collection of child support is a constant struggle. According to the 2011 United States census, in 2009 only 61% of the $35.1 billion due in child support was reported as received, averaging $3,630 per custodial parent entitled to support) (available at http://www.census.gov/prod/2011pubs/p60-240.pdf).
primary earning parents. Such calls for support between parents are based on the reality that caregivers cannot provide care and a child cannot be properly cared for without the caregiver also having financial stability. Caregivers compromise their own ability to earn in the market in order to provide the care that children need.\textsuperscript{244} It takes money to provide care and the care provided is valuable and deserves recognition and compensation.\textsuperscript{245} Primary caretakers depend on financial support from partners, just as primary earners depend on caregiving support from partners.\textsuperscript{246} Just as primary earners are able to maintain their higher earning potential when a relationship ends, reliance and equity as well as children’s interests justify allowing the primary caretaker to sustain an arrangement that allows her to continue care for children.\textsuperscript{247}

 Particularly when a relationship demonstrates a commitment to co-parenting and a certain balance of market work versus care work between parents, such support seems justified.\textsuperscript{248} Such caretaker support payments work best when there is a clear primary earner and a clear primary caregiver and a prior relationship on which to base such a division between care and market work. Marriage in particular creates a presumption of a commitment to a shared life and mutual reliance.\textsuperscript{249} But even without marriage, if a primary earner and primary caregiver can be identified when a couple acted together to raise children such joint parenting could justify continuing caretaker support so as to support the relationships that provide the physical day to day care for children. However, without a basis on which to determine who is the primary caregiver that needs support and how much market work should be compromised for the sake of care, such financial transfers between parents can be contentious and unjustified even if supportive. Since stability and low tension as well as relationships with both parents are all important for children, such support from co-parents are likely to be best when awarded to couples with a history of joint care.


\textsuperscript{245}See Laufer-Ukeles, \textit{supra} note 243, at 2, 64-65.

\textsuperscript{246}See Laufer-Ukeles, \textit{supra} note 243, at 75-76; Ann Laquer Estin, \textit{Maintenance, Alimony and the Rehabilitation of Family Care}, 71 N.C. L. REV. 721, 787–802 (1993); Laura T. Kessler, \textit{The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory}, 34 U. MICH. J.L. REFORM 371 (2001) (arguing that the importance of caregiving should be considered in shaping and interpreting the law of employment discrimination); Mary Becker, \textit{Care and Feminists}, 17 WIS. WOMEN’S L. J. 57, 61 (2002) (“We need to elevate care to this level of importance [a core value] for the basic reason that it is essential to human health and balanced development.”); Lucinda M. Findley, \textit{Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate}, 86 COLUM. L. REV. 1118, 1176 (1986) (“Employers should bear the costs of [childbearing] responsibilities because childbearing and rearing are crucially important social functions that are connected to and have major impacts on the work world.”); Martha Albertson Fineman, \textit{Contract and Care}, 76 CHI. KENT. L. REV. 1403, 1410-11 (“Caretaking labor preserves and perpetuates society and, therefore, collective response and responsibility is warranted.”); Ayelet Blecher-Prigat, \textit{The Cost of Raising Children: Toward a Theory of Financial Obligations}, 13 \textit{THEORETICAL INQUIRIES IN LAW} 197-207 (2012); Starnes, \textit{supra} note 243.

\textsuperscript{247}Laufer-Ukeles, \textit{supra} note 243, at 61-62.

\textsuperscript{248}Id. at 6.

\textsuperscript{249}See Laufer-Ukeles, \textit{supra} note 243, at 64-65; Starnes, \textit{supra} note 243, at 230-236.
3. State Support for At-Risk Parents

While the previous two recommendations for relationship support are proactive and focus on continuing support to functional relationships, there is also room for special focus on at-risk caregiver relationships. These are relationships may still be “good enough” – or at least cannot be proven yet to not be good enough -- but might also make the state leery about their likelihood of success. There is room to have the state step in for the sake of children when harm is feared, even before the harm is inflicted. Again this is a more involved state than the liberal tradition may describe but such creative and earlier interference may benefit children and relationships.

Jim Dwyer has argued that at-risk parents should not be automatically given parenthood rights upon a child's birth, but should have to prove suitability based on a number of factors that are intended to evaluate his or her suitability for parenthood, including living situation, parenting abilities, mental and physical health, etc.250 Dwyer categorizes at-risk parents based on empirical studies that such factors lead to for bad outcomes for children: parents who have mental, intellectual, and emotional limitations, struggle with prior or current drug addictions, have a history of abuse and neglect allegations, have violent criminal records, is imprisoned or is sentenced to a prison term, are indigent and have multiple children, are illegal immigrants, are teen parents, etc. 251 These parents, he argues are a potential danger to their children and the state has a responsibility to step in before damage is inflicted.

Getting involved earlier in parent-child relationships for the sake of children makes sense. From a relational perspective, however, the state should try to promote good-enough relationships. Instead of threatening these at-risk parents with termination, creating insecurity and further fear of the state, which could incentivize hiding and lying to state authorities, the state should try to positively influence relationships before actual harm can be demonstrated. Such fragile relationships could use access to parenting classes, psychological and social service counseling. While use of such services cannot be coerced, they can be offered and recommended for at-risk parents in order to help avoid parental terminations in the future. Such a supportive state could affirmatively help parents avoid falling into risky behaviors. And, in the particular case of jailhouse nurseries, where new mothers are confined with their babies, parenting and counseling guidance can be made mandatory for remaining in such nurseries together with babies, which mothers incarcerated for limited amounts of time often desire.

Of course, at-risk relationships garner more scrutiny from the state and upon a finding of significant harm, unfitness and a lack of effort in combatting at-risk factors termination and interference to remove children may be necessary.252 Providing support will either help curb the breakdown and will also allow the state access to children within this supportive framework, facilitating findings of harm when they exist. Privacy is sufficient for functional caregiving relationships, but community efforts to help at-risk parents benefit children born into less than ideal situations. The benefits of promoting such relationships outweigh the costs of threatening

250 Dwyer, supra note 1, at 259-261.
251 Id.; Jim Dwyer, Jailing Black Babies, 2014 Utah L. Rev. 465 (describing jail house nurseries in detail and arguing that any such programs violate the best interests of the child).
252 See infra Part IIC for a discussion of conditions for state interference.
those relationships, creating fear and insecurity, and ultimately having to rely on foster care and adoption to support children even before harm is inflicted by legal parents.

B. Differentiating Different Kinds of Parenthood and Care: An Inclusive Vision of Parenthood and Kinship Families

The second principle I provide is the need to assign categories of caregivers to allow children to benefit from different kinds of relationships. The central premise of children’s rights as relational rights is that children’s rights create a duty on the state to support ongoing care providing relationships. “[V]arying degrees of intimacy” should be recognized and supported because care is provided in a variety of ways and forms.253 Instead of looking at individual rights and benefits, which causes us to focus on parental rights versus children’s rights, and different caregiver’s rights in opposition to each other, a relational perspective can support various degrees of relationships simultaneously.

The categories of relationships I will outline delineate formal, functional, secondary and tertiary caregivers in a manner that necessitates support of each kind of relationship while simultaneously easing tensions between them. Conflicts can be minimized by giving primary parents greater physical custody and decision-making authority while still limiting such authority to ensure space for functional and secondary relationships. This principle has both a proactive and reactive element as the categories can create and support relationships that function but also give answers to the parties about background rules when there are conflicts.

1. Formal Primary Parental Care

Formal, primary, parents are caregivers who live with children and are registered as a child's parents with the state. There can be a single formal primary caregiver or there can be two. Formal primary parents have a legal and biological connection or adoptive relationship with children. Such relationships are identified ex-ante and depending on state law may also be defined through intent.254 As I would define them, formal primary caregivers either provide at least approximately 50% of children’s needed care outside of daycare, in home child care or school or are in a legally defined relationship with another legal parent who provides such care.255

Formal primary parents do not exist for every child. However, when they exist, they have clear responsibility for children at birth, and, it is hoped can provide security and continuous care in low-tension environments.256 Ideally there will be two formal primary parents. Two primary formal parents exist either because a child’s parents are married or in a committed cohabiting relationship with each other or because formal legal parents will be co-parenting in a cooperative manner within close to an equal partnership. They jointly and in

253 See Minow & Shanley, supra note 31, at 22-23.
256 Laufer-Ukeles & Blecher-Prigat, supra note 124, at 463-466.
unison provide care to children. However, one primary parent is increasingly standard for children and provides sufficient (if not ideal) care and stability over time.\(^{257}\)

Formal primary parental care is traditional parenthood. As such, it benefits from being well accepted, understood and automatically granted. Formal, primary parents receive the bulk of responsibility for children, providing the majority of care and their interests are most tied up with those of the children for whom they care. Thus, imposing upon them unwanted interactions with third-parties or interference from the state generally can create stress and tension which harms caregivers, children and their relationships. Thus, with regard to formal, primary caregivers the presumption in favor of parental discretion makes the most sense.\(^{258}\) While interference is sometimes warranted as will be discussed below, most care must be taken when imposing third-party obligations or interfering with formal parental parenting decisions due to the ongoing, interlinked nature of their care and children's well-being.

2. Functional Parents & Secondary Custodians

(a) Functional parents

Caregiving relationships other than with formal parents should be differentiated and recognized through a relational perspective, particularly if the relationship is significant and providing necessary care.\(^{259}\) Third parties, such as grandparents, step-parents, same-sex partners and others who are not formal parents increasingly seek custodial rights or visitation with children based on their caregiving activities.\(^{260}\) I have argued for providing parental status and rights to functional third-party caregivers because such status makes sense for children, caregivers and parents.\(^{261}\) These functional caregivers provide significant care over a long period of time sufficient to meet threshold requirements for becoming a functional parent.\(^{262}\) Children benefit from third-party care and formal, primary parents do as well.\(^{263}\) Status and rights benefit functional parents by providing recognition and valuing the care or financial support that they provide.\(^{264}\)

To become functional parents, functional caregivers must meet minimal levels of care provided – usually mirroring the approximately 50% care provided by formal, primary parents.\(^{265}\) This level of care is significant and demonstrates an encompassing care relationship. Moreover such care should be long-term and will often, though not necessarily, include a cohabiting relationship with the child.\(^{266}\) A formal, primary caregiver may also be involved in

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\(^{257}\) See supra notes 105-112 and accompanying text.

\(^{258}\) Troxel v. Granville, 530 U.S. 57, 60 (2000).

\(^{259}\) Minnow & Shanley, supra note 31, at 22-23

\(^{260}\) See cites supra note 124.

\(^{261}\) See generally Laufer-Ukeles & Blecher-Prigat, supra note 124.

\(^{262}\) Id. at 442-443.

\(^{263}\) Id. at 439-441.

\(^{264}\) Id. at 440-441.

\(^{265}\) ALI Principles §2.18 (describing the need functional caregivers to provide the majority of care in order to be determined a de facto parent).

\(^{266}\) ALI principles § 2.03(1)(c). (describing the need for cohabitation for two years in order to be determined a de facto parent); Laufer-Ukeles & Blecher-Prigat, supra note 124, at 469.
the relationship, but not necessarily. There can be two functional parental figures if each
provides roughly equal care.

From a relational perspective as opposed to an individualistic rights perspective there is
less need to separate out rights and interests and to pit them against each other. The focus is on
supporting these relationships in a complementary, whether formal and biological or functional
and care-based. Thus, a functional caregiver deserves recognition despite the infringement on
the primary formal parents’ traditional exclusive parenthood rights. Such parenting rights are
not central from a relational children’s rights perspective where it is relationships and not
individuals that are the focus of protection.

However, it is important to also recognize the way in which functional parents are
different then formal primary parents. Functional parenting is different in practice and in theory
from formal parenthood. There are significant benefits to the flexible and diverse manner in
which such relationships develop and meet the needs of children. And, there are many
different kinds of people that might qualify as functional caregivers by providing for the needs of
children. However, functional relations are not as stable, predictable, identifiable, or as easily
assignable as formal parenting relationships. They also create a potential multiplicity of claims
that can upset the stable, private lives of children through state and court intervention. Thus,
for the sake of the children who are the primary beneficiaries of functional caregivers, but also in
acknowledgement of the different potential concerns involved, we should heed the benefits of
functional parenthood without equating it to formal parenthood.

Functional parents need status and recognition to best care for children and to maintain
relationships despite conflicts with parents and to facilitate their care of children which is
supported by formal parents. For instance, functional parents need status in order to obtain
authority for health care decisions and to act as a legal guardian. However, when primary
formal parents are providing ongoing care to children, functional caregivers in disputes with such
parents should be awarded visitation and not primary physical custody.

(b) Secondary Custodians

Parents, grandparents and other biological kin, may be neither primary formal parents nor
functional parents because they do not provide approximately half of children’s caregiving needs.
However, they have a biological relationship with the child as well as a regular and significant
caregiving relationship. Formal parents who do not live with their children are the most common
caregivers in this category. And, even if formal parents do not have a past relationship with the
child to base an ongoing care relationship, due to an ongoing commitment/obligation to child
support and visitation they would be secondary custodians from the time of a child’s birth.

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267 See cites, supra note 124.
268 Id. at 454-461.
269 Id. at 461-466.
270 Id. at 461-466.
271 Id. at 454-466.
272 Id. at 441.
273 Id. at 439-440.
Involved grandparents may also be in this category as could a devoted aunt, uncle or other kin relation that provides regular and continuous care and/or regular financial support to a child. Other than legal parents, however, these secondary kin caregivers must demonstrate ongoing sustained care relationships even if not functional parents to be considered secondary custodians. Genetic relationships are important because it creates an affinity to children beyond third-parties. These secondary caregivers or secondary custodians are not mere babysitters or occasional visitors. These caregivers are essential parts of the network of care provided to children and have deep attachments to children based on genetic ties as well as ongoing relationships. However, these caregivers are not necessarily functional parents based on threshold requirements and thus would not be entitled to functional parental status.

When fathers or mothers are secondary custodians, they have been granted parental rights to have this relationship maintained. The judge will award them visitation or, more accurately, partial physical custody (less than the approximately 50% joint physical custody which makes them primary formal parents). They may or may not be awarded joint legal custody as well. During visitation fathers usually have full discretion with regard to children unless the visitation is limited for a specific reason of a threat of harm. Thus, visitation can also be described as partial physical custody. Moreover, fathers are requesting and being awarded greater amounts of visitation time and joint legal custody justifying calling such relationships secondary custodians and not mere “visitors” in a child’s life. Maintaining these secondary custodian relationships is incredibly important because of the benefits to children from having multiple committed caregivers and because a committed parental secondary custodian will also be more likely to pay child support.

(c) Conflicts between Formal Parents and Functional Parents or Secondary Custodians

There can of course be conflicts among formal, primary parents, functional parents or those I have defined as “Secondary Custodians.” For legal secondary parents these conflicts tend to occur when a primary custodian wants to relocate or modify a custodial agreement. With other kin and functional parents it happens when formal primary parents want to limit or terminate children’s interaction with kin caregivers, whether due to relocation or other reasons. From a relational perspective it makes sense to support all these caregiving relationships. Functional parents should not be disposed of when primary caregivers disagree with them or would prefer they be removed for a child’s life and either should secondary custodians. However, conflict and tension between caregivers is also harmful to children. Some argue that to avoid conflict and tension, and undermining of parental authority, parental discretion should

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274 Cf. Appell, Virtual Mothers, supra note 50, at 714 (discussing the need for genetic and care relations in the doctrine of parental rights).
275 Cf. Dailey, supra note 26, at 2167-77 (arguing for rights to caregiving relationships with caregivers other than parents but only when caregivers are “primary”).
276 See e.g., Moore v. Moore, 547 N.Y.S.2d 794 (4th Dep't 1989) (absent a showing of harm, a court cannot restrict a non-custodial parent’s discretion and authority regarding appropriate child activities during visitation); Margaret Tortorella, When Supervised Visitation is in the Best Interests of the Child, 30 Fam. L. Q. 199, 200-201 (1996).
277 See infra notes 105-112 and accompanying text.
278 See cites supra note 113.
279 See Dailey, supra note 26, at 2165; Minow & Shanely, supra note 31, at 23-24.
280 See supra part II.C(1).
prevail. However, such arguments are usually, but not always, anchored in exclusive parenthood rights. On the other hand, others argue that children’s rights include the right to relationships with third parties, which should be continued despite parental objections according to a best interests standard.

These care relationships should be supported in a way that not only facilitates their continuity and stability but also minimizes tension with formal parents. Differentiation and a clear demarcation of obligations and responsibility for final decisions, as well as rights, can give functional parents and secondary custodians the recognition they need without challenging formal primary parents' primary status. A differentiated functional and secondary custodial status would be careful not to override an ongoing primary formal parenthood relationship, but would recognize rights to legal decision-making, visitation or other subsets of parental rights even if a primary parent objects. While forcing such relationships above a parent's objection can be harmful to the primary formal relationship, such potential harm is outweighed by the potential harm of sudden termination of such a significant relationship – and, this harm should not have to be proven on a case-by-case basis. Therefore, a rebuttable presumption for continuing relationships through visitation with functional parents and secondary custodial parents should be applied. The presumption can be overcome by a showing that there is so much tension between the functional and primary formal parent that continuing the relationship will significantly harm the formal primary parent's ability to parent. This, however, should be difficult to prove. The presumption should work to impose secondary custodian and functional parent relations on formal, primary legal parents.

In relocation disputes, the judge must consider how relocation would affect the relationship of the child with the primary and secondary custodian as well as how preventing relocation would affect the primary legal custodian’s ability to provide care. If relocation can be permitted while sustaining the nature of the secondary custodian relationship, it should be permitted so as to allow the primary custodian flexibility. If the relocation will significantly weaken the relationship with the secondary custodian then the question is how preventing relocation will affect the primary custodian’s ability to care for the child. If preventing relocation will significantly harm the care for the child due to financial necessity or the need for family support, the relocation should be permitted because that relationship is more central to the child. Thus, the primary parents' reasons for relocating are therefore particularly important insofar as they are intended to improve care as opposed to other reasons. But, even if relocation is done for more selfish reasons, if the secondary relationship can be sustained at a similar level then relocation can be permitted. However, all that is possible should be done to preserve the secondary relationship even under less than ideal conditions. The question should not concern

281 See cites supra note 8, 50.
282 Dwyer, supra note 1, at 50-53, 285-289.
283 Laufer-Ukeles & Blecher-Prigat, supra note 124, at 461-462.
284 Id.
285 Id.
286 See e.g., Neal v. Lee, 2000 Ok. 90 (determining that harm must be shown by a grandparent in stopping relations in order to counterbalance parental discretion to terminate visitation).
parental rights to relocate but how relocation affects first the primary and the secondary relationships.

Providing visitation or some subset of parental rights to functional parents maintains the primary physical and legal custody of formal legal parents but still limits parental discretion and protects the significant relations children have with functional parents. When focus is on children and parents individually, the instinct is for one of the two parties to prevail, but from a relational perspective the focus should be on preserving the relationships even if they exist in different forms and varying degrees of intimacy and recognizing those differences. There is a limit to how much interference into the primary formal relationship is permissible. The fundamental question from a relational perspective is what is the effect of enforcing the relationship or, in the case of relocation, preventing the relocation through state interference on the interactions between the child and caregivers. The more central the relationship is to the child, the more important is the potential for harm. If relocation or visitation can be shown to significantly harm the primary relationship it cannot be ordered.

This harm-focused relational standard arguably still complies with Troxel as there is special weight given to the primary parental relationship, even though emphasis is also on preserving the functional and secondary custodian relationships. Although there is a presumption that functional parents and secondary custodians will be able to continue relationships with children, this presumption can be overcome by a showing of significant harm to the primary parental relationship. And, as the focus is on relational as opposed to parental rights, there is no need to differentiate between parents and other secondary custodians or functional parents.

Moreover, an older child's desire not to be in any of these secondary relationships should be taken into account. If a child does not want to be in a relationship with a secondary custodian or functional parent and the primary parent also objects, this would evidence that continued relations would significantly harm the primary relationship. However, just as it is expected that a relationship with a secondary parent should be continued to some extent despite a child's objection, it should be expected that a child will have a continued relationship with a functional parent or secondary custodian other than a formal parent. If a caregiver has reached these high standards, it should be presumed that stopping the relationship will harm the child unless it is found otherwise. A child's objection could be influenced by a primary formal parent or be based on immaturity. A child's objection, however, can influence the extent of the visitation and provide cause for serious review.

Secondary custodians or functional parents would be eligible to gain primary physical custody, but only if primary formal parents were no longer available. If a child is lucky enough to have two secondary custodians and functional parents fighting over custodial time, some share of custody can be ordered (visitation being a form of custody). When individual rights are not

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288 See Laufer-Ukeles & Blecher-Prigat, supra note 124, at 440.
289 See Troxel v. Granville, 530 U.S. 57, 68-70 (2000). There are those that argue that functional parents should also receive a presumption under Troxel equivalent to those received by parents. I have argued against a discretionary presumption for functional parents elsewhere. See discussion, Laufer-Ukeles & Blecher-Prigat, supra note 124, at 470.
involved creating tension and opposition, a supportive relational environment that nurtures children can be created from multiple parental, functional and kin caregivers.

3. Tertiary Kin Relations

There is a fourth category of adult that may seek contact or visitation with a child. This person has a close genetic relationship or a care based relationship that is less than functional parent but not both. In this category are a range of adults from biological parents post-adoption, surrogate mothers or genetic donors to children who were created through ART, step-parents, cohabiting partners that developed relationships with children, temporary foster parents that do not rise to the level of functional parents, and other potential kin that want access to children. Biological parents post-adoption will not have a significant caregiving relationship with children going forward and surrogate mothers have disputed claims to formal parenthood and thus neither would be considered secondary custodians.

If parents consent, these relationships should be encouraged and can be supported more proactively by the state through avenues for legal recognition, such as registration systems, and default rules that support the recognition of these relationships. Indeed, even with consent, there is room for the state to facilitate these potentially important relationships by permitting recognition and enforcement of open adoption contracts, and giving standing to surrogate mothers so that there is an understanding that they may have limited rights of access to children post-birth. Such recognition turns caregivers from legal strangers to engaged components of children’s lives in a manner that can be important to children. Many children seem to benefit from connections with birth parents, genetic donors, fosters parents close relatives, etc. The state should not ignore attachments children may develop to these caregivers and help create a family law system that can accept and recognize the need for these ongoing relationships with kin. Multiplicity involves complexity, but with clear rules and legal limitations, including hierarchy and clear division of power, the benefits of such complexity outweigh the difficulties given the actual attachments and benefits children derive from these relationships. Multiplicity reflects reality, can benefit primary parents be providing needed support and helps children can the stable ongoing care they need by committed caregivers.

When there is conflict between primary parents and tertiary caregivers, however, these tertiary relationships do not hold as much weight as functional or secondary custodians in

291 See e.g., Pamela Laufer-Ukeles, Mothering for Money: Regulating Commercial Intimacy, 88 Ind. L.J. 1223, 1251 (2013) (discussing the appropriateness of providing for post-birth contact between a surrogate and the baby to whom she gave birth).
293 See supra cites note 124 (discussing the reality of multiple caregivers in modern family life); Laufer-Ukeles & Blecher-Prigat, supra note 124, at 428-435 & 438-440.
relation to primary caregivers. Primary caregiving parents and secondary custodians need to be able to raise their children without too many evolving obligations to third-parties and the threat of legal interference. Parental discretion regarding visitation should be accepted unless (1) there is a contractual or other formal legal obligation with a tertiary caregiver, such as an open adoption agreement or a status that is imposed by law – through registration if available or through legislation -- creating legal expectations ex ante and thus setting expectations from the outset; 294 (2) an older child expresses a desire to continue these relationships. In such cases, the parent would have to demonstrate harm to the child to prevent the child from visiting with these tertiary relations. The likelihood of conflict can be avoided, however, because these relationships need not come with regular visitation rights as they would for secondary custodians or functional parents, but rather such a category denotes legal recognition of the existence of a connection, a relationships and visitation can be more sporadic and the legal recognition focused on contact. Such non-invasive contact should not cause conflict with primary parents. State rules can facilitate contact by recognizing the status of tertiary caregivers and making presumptions that those who, register, contract or legally fall into these categories would be allowed such contact.

C. The Significant Harm Principle and Civil Rights of Children

This section will further develop the significant harm to relationships principle referred to above in regard to conflicts between custodians and apply it to the context of children’s civil rights. Specifically, this section squarely tackles the difficult question of when the state should interfere with parental and caregiver decision-making in ongoing, functional care relationships. According to the significant harm to the relationship principles I am using to reflect the relational perspective on children’s rights, any interference by the state into the relationships that are currently supporting children should be judged in relation to the harm such interference might inflict on the important ongoing relationships. Any such harm must be then balanced against the harm that a child may suffer if there is no state interference. The more central the relationship the more significant is the harm to the relationship. Thus, interference with a primary, formal custodian must be done more cautiously than interference with a tertiary kin relationship, which can be justified by the threat of a lesser degree of harm to the child.

This third principle is the most reactive, because despite the relational perspective’s attempt to avoid conflict and create good, functioning, relationships, conflicts will ensue. When there is conflict between caregivers or between children and caregivers, I argue for balancing their interests by keeping in mind that, absent abuse and neglect proceedings, the relationships will continue and provide the necessary support for children. There are two kinds of state interference at issue here. The first is state interference with the care relationship in order to improve care of the children. The second is interference with the care relationship in order to protect children’s civil rights. In either case, the potential benefits to children of state interference must be balanced against the potential harm to the ongoing relationship.

294 If there is a legal agreement or a legally recognized status given to the tertiary caregiver then the threat of state interference and the nature of the relationships would be clear from the outset causing less problems of legal threats and the harms of litigation. See Laufer-Ukeles & Blecher-Prigat, supra note 124, at 461-466.
In applying this standard, the first inquiry is how state interference is likely to affect the relationship that is supporting the child’s essential needs. It seems that in many, but not all instances, the state coming between parent and children and dictating behaviors will strain that relationship. If significant harm to that relationship is likely to result from state interference, then only in the dire circumstances where the harm is irreversible and essentially calls into question the fitness of the parents should the state interfere, particularly when the strain is on the primary care relationship. In such dire circumstances, as when a parent refuses to provide life-saving medical assistance, or when a parent threatens to sterilize their daughter, the state can step in at least temporarily to ensure the well-being of the child by taking temporary custody or overriding parental authority. If, on the other hand, interference is not likely to cause significant harm to the care relationship, and the state believes parental actions are likely to cause harm to the child, or an older child expresses a desire for such interference, interference becomes justifiable. Indeed, if the parental relationship is not likely to be harmed, this demonstrates a willingness to come to a compromise and such measures as education, mediation or negotiation should be encouraged to resolve the dispute and to protect the child’s interest. If the harm in not interfering is significant and the harm to relationship is not, the state should act cautiously to interfere to protect the children, keeping in mind the need to support the relationship as opposed to punishing parents and other caregivers. But, some level of interference and/or positive assistance is likely to be warranted.

Current law does not focus on the effect of judicial interference on ongoing relationships but rather maneuvers between parental privacy standards and best interests analyses, where relationships may be tangentially related. Shifting to a relational focus will create a significant shift in legal guidelines, making decisions more predictable and protection for children more concrete. For initial custody disputes the dominant principle used by courts is best interests. And, with regard to state interference to protect children’s civil rights the dominant principle is respecting parental privacy. In light of the holding of Troxel v. Granville, parental privacy can also be understood to be the dominant principle in protecting children’s interests with third parties. And, in modification and relocation disputes, in the majority of states, the standard leans toward protecting the status quo and/or parental privacy unless significant harm to the child and/or bad faith can be shown with regard to the custodial parents’ actions. Thus, other than in


298 See infra notes 49 to 51 and accompanying text.


300 See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17(4)(a)(ii) (2002) (providing a list of good faith reasons for a parent’s move); TENN. CODE ANN. § 36-6-108(d) (West 2005 & Supp. 2014) (as long as a good faith reason is proffered by the custodial parent,
initial custody proceedings, where best interests analyses are used, parental privacy is largely respected. Children’s rights advocates frequently argue that this status quo is problematic because it gives parents too much discretion, does not punish parents for their bad behaviors or put children’s best interests sufficiently at the center of the inquiry. 301

The significant harm to relationships standard is intended to be more lenient in allowing state interference than legal standards derived from parental privacy that prefer parental discretion unless significant harm to the child is demonstrated. 302 On the other hand, this standard is more cautious than a best interests inquiry in avoiding interference with relationships. Neither the parental rights doctrine nor the best interests doctrine does the work required in conflicts between caregivers or between children and caregivers. Parental rights do not leave enough room for multiple care relationships, for children’s own voices or for the need for state interference in certain circumstances. Parental rights do not consider the relevance to the ongoing relationship, only the degree of harm to the child. Under the relational standard, when there is not harm to the care relationship, the state can be given more leeway to protect children. And, as described at length above, best interests is a goal and not a standard – so amorphous as to be subject to manipulation and allotting undue authority to state entities who make such decisions based on majoritarian values and simplistic formulations. 303 A new relational perspective on resolving such disputes is needed. Thus, the significant harm to relationship standard described above falls between a children’s rights best interest standard and a parental privacy unfit standard in the amount of state interference it envisions.

This significant harm to the relationship standard leaves room for state interference, although it would still prefer supportive over punitive measures. The relational perspective seeks to support ongoing relationships that are still “good enough” and not punish or end such relationships. Although this standard reacts to conflict, the relational perspective prefers policies that impose on the state the duty to create harmony ex ante and avoid conflict ex post. Policies can and should be put into place to educate, inform and encourage parents in a manner that advances children’s interests. 304 Having the state as big brother observing every parental choice

the opposing parent must demonstrate harm to prevent the move with the child); Goldmeier v. Lepselter, 598 A.2d 482, 486 (Md. Ct. Spec. App. 1991); S.D. CODIFIED LAWS § 25-5-13 (2013) (granting the custodial parent the right to change residence, unless it would negatively affect the rights or welfare of the child); Morgan v. Morgan, 205 N.J. 50, 63 192 (N.J. 2011) (petitioner seeking relocation must prove “a good faith reason for the move and that the child will not suffer from it.”).

301 Contra Buss, supra note 8, at 647-50, 656 with Dwyer, supra note 10, at 120-126 and Dwyer, supra note 1, at 123-167.

302 See e.g., Wisconsin v. Yoder, 406 U.S. at 233-34 (“the power of the parent, even when linked to a free exercise claim, may be subject to limitation ... if it appears that parental decisions will jeopardize the health or safety of the child.”); Prince v. Massachusetts, 321 U.S. at 168-69; Jacobson v. Massachusetts, 197 U.S. 11, 37 (1905) (upholding mandatory vaccination law); Spiering v. Heineman, 448 F. Supp. 2d 1129, 1140-41 (D. Neb. 2006) (upholding a statute requiring parents to submit newborn infants for routine blood testing); Combs v. Homer Ctr. Sch. Dist., 468 F. Supp. 2d 738, 778-79 (W.D. Pa. 2006) (upholding a state's power to regulate the content and manner of homeschool education); Steven G. Gey, Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools, 42 HOUS. L. REV. 1, 75-78 (2005) (discussing the state's role in ensuring that each home-schooled child receives an adequate education); Robert Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 265 (1975).

303 See supra notes 82-88 and accompanying text.

304 See Helen M. Alvare, A Response to Professor I. Glenn Cohen’s Regulating Reproduction: The Problem with Best Interests, 96 MINNESOTA L. REV. HEADNOTES 8, 11 (2012) (suggesting that state should act to exhort and influence
does not make sense for children or society as these relationships need support not judgment. However, when such care relationships are not at stake, this standard can be a much more aggressive tool than a parental rights doctrine in allowing state interference with parental choices and in facilitating actualization of mature children’s own will and autonomy.

I will now apply this principle in two specific contexts regarding both mature and infant children’s civil rights: (1) civil rights to marriage and (2) civil rights not to be circumcised. Only through such examples can the import of the new relational standard be recognized.

1. Immature children’s civil rights

The issue of whether male infant circumcision violates children’s rights to bodily integrity is increasingly an issue of public debate. States increasingly question the propriety of the practice, whether for religious purposes of for medical reasons or due to mere customs. Most recently the Parliamentary Assembly of the Council of Europe (PACE) passed a resolution entitled "Children's Right to Physical Integrity," which expressed concern over the practice and recommended that European states consider placing restrictions on the practice. There are studies that indicate lasting traumatic harm to children but others. But there are many other studies that indicate benefits of male circumcision for health reasons. Indeed, no major medical association either bans or universally recommends the procedure due to conflicting studies and opinions. Given conflicting studies, the European objections are based more on objection to the mere act of physically “mutilating” a child’s body without medical urgency, pointing to a child’s right to bodily integrity. Children’s best interests gives little help in

to encourage good parenting but not coerce); Shelly Kierstead, Parent Education Programs in Family Courts: Balancing Parental Autonomy & State Intervention, 49 FAM. CT. REV. 140, 141-149 (2011)

305 See generally Buss, supra note 8.


307 See e.g., Bigan Fateh-Moghadam, Case Note, LANDGERICHEN COLOGNE, JUDGEMENT OF 7 MAY 2012 – No. 151 NS 169111, 13 GERMAN L. J. 1131 (2012);


resolving such issues as the benefit of bodily integrity must also be weighed against parental
interests in religious freedom and privacy.312 And, as children have an interest in being raised by
their parents and to religious identification and belonging, children’s best interest does not
provide a ready solution to this dilemma.

The relational perspective provides more guidance. The question is what affect state
prevention of male circumcision would have for parents and upon the parental relationship with
children. If the parents are merely circumcising their children due to custom or convenience,
then state intervention with this decision would likely not harm the parental relationship. If the
state believes that circumcision causes significant harm to children, then it is likely that mere
education and provision of information would be sufficient interference to drastically reduce
circumcision of convenience or custom. If male circumcision is done for health concerns, the
state can provide information to put forward its own position on the matter. Indeed, circumcision
for health reasons has been reduced dramatically due to a change in medical opinions about its
utility and the potential effects.313 Doctors who perform these health related circumcisions could
be asked to provide the state’s perspective on this matter. If the parents nonetheless insist,
demonstrations of significant harm from male circumcision, if proven, could justify intervention.

However, when circumcision is done for religious reasons, much more is at stake. Male
circumcision is a basic tenet of both Jewish and Islamic law.314 Not circumcising a child within
these traditions removes the child from the religious community, although according to Jewish
law he is still considered Jewish.315 Circumcision is considered a religious obligation in Judaism
and either a religious obligation or basic tradition in Muslim law.316 Many Christians also believe
in the religious basis of the practice.317 Not circumcising a child is considered to have a negative
religious effect on children and will seriously affect religious parents and therefore the parental
relationship. Parents are likely to leave the state or disobey the law, which can result in penalty,
in furtherance of their religious beliefs. Both consequences are not good for a child’s care. State
prevention of male religious circumcision will hurt the child’s care relationships and as of yet
serious harm to the child has not been proven and thus a ban would not be supported by a
relational perspective. Female ritual circumcision, on the other hand, may warrant different
treatment because the effect on the relationship, which may be just as negative, would need to be

312 See Rhona Schuz, The Dangers of Children’s Rights Discourse in the Political Arena: The Issue of Religious Male
Circumcision as a Test Case (CARDozo JOURNAL OF LAW AND GENDER, Forthcoming) (on file with the author).
313 See e.g., Elisabeth McDonald, Circumcision and the Criminal Law: The Challenge for a Multicultural State, 21
NEW ZEALAND UNIV. L. REV. 2333, 265 (2004); Marie Fox & Michael Thompson, Cutting It: Surgical Intervention
314 Genesis 17, verses 9-14. The commandment of circumcision of male newborns on the eight day is repeated in Leviticus 12,
verse 3.
315 See Joel Roth, The Meaning for Today, MOMENT, Feb. 1992, at 41, 42-44 (describing the importance of male
circumcision for belonging in the Jewish community).
316 The leading Rabbinical codex of Jewish law, the Shulhan Aurch (written by Rabbi Yosef Karo in the 16th century) states that
the commandment to circumcise one’s son is greater than the other positive commandments (Yoreh Deah, Laws of Circumcision,
chapter 260, section 1). Circumcision is the obligation of a Jewish father, and he is in derogation of his religious duties to God,
the community, and to his son, if he fails to have it done. Failing that, other members of the community, or the young man
himself when he is mature must arrange for the circumcision. See also Circumcision, ENCYCLOPEDIA JUDAICA 567-77
(1972) (discussing history and traditional background of circumcision).
317 See Sami A. Aldeeb Abu-Sahlieh, To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female
Circumcision, 13 MED. & L. 575 (1994) (explaining the obligatory nature of male circumcision in Muslim law).
weighed against the more undisputed and demonstrable negative effects on girl children.\textsuperscript{318} Such clear negative health effects warrant greater interference.

2. Mature children’s civil rights

Mature children’s civil rights are the most complex because they involve ongoing care relationships but also the will of children. Children’s frustration in having their will impeded will also complicate relationships. And, therefore, older children’s own desires must be part of any relational framework. Issues of both autonomy and dependency are directly at issue in these considerations.

The right to marriage is considered fundamental.\textsuperscript{319} However, even mature children have limited rights in this regard.\textsuperscript{320} The right to marry is restricted in most states to those who have reached the age of majority. However in many states parental consent will allow a teenager to marry younger.\textsuperscript{321} In a few states, such as Maryland and North Carolina, exceptions are made by state law if the minor is expecting or has given birth to a child.\textsuperscript{322} In the seminal case of Moe v. Dinks, an underage pregnant girl, Maria, who was fifteen years old wanted to marry her boyfriend, Pedro, who was seventeen.\textsuperscript{323} The couple was living with his parents.\textsuperscript{324} Her mother refused to consent to the marriage and instead made her an appointment for an abortion. Christina refused to keep the appointment and her mother told her she wanted nothing to do with her.\textsuperscript{325} The couple wanted to marry “to express their commitment to and caring for each other, to legitimate their relationship, and to raise their child in accord with their beliefs in a traditional family setting sanctioned by law.”\textsuperscript{326} Another couple that were plaintiffs in the case, Ricardo and

\textsuperscript{318} See Mohammed v. Gonzales, No. 03-70803, slip op. 3063, 3068 n.2 (9th Cir. Mar. 10, 2005); Toure v. Ashcroft, No. 03-1706, 2005 WL 247942, at *6 n.4 (1st Cir. Feb. 3, 2005); In re Kasinga, 21 I. & N. Dec. 357, 368 (B.I.A. 1996) (citing physical harm of female genital mutilation); WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 34 (2008) (citing studies showing that demonstrate harm of FGM).


\textsuperscript{320} While it is true that a child, because of his minority, is not beyond the protection of the Constitution, In re Gault, 387 U.S. 1, 87 (1967), the Court has recognized the State's power to make adjustments in limiting the constitutional rights of minors. Ginsberg v. New York, 390 U.S. 629 (1968) (criminal statute prohibiting the sale of obscene material to minors whether or not obscene to adults upheld despite First Amendment challenge); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor law prohibiting minors from selling merchandise on the streets upheld despite Jehovah Witness' challenge based on religious freedom)

\textsuperscript{321} Alaska allows minors between the ages of fourteen and eighteen to receive a marriage license upon court order absent parental consent, but only if the parents are “(A) arbitrarily and capriciously withholding consent; (B) absent or otherwise unaccountable; (C) in disagreement among themselves on the question; or (D) unfit to decide the matter.” Alaska Stat. §25.05.171(b) (2) (2010); see also Del. Code Ann. tit. 13, §123(b) (1999) (allowing minors to marry with a court order, absent parental consent, though parental consent is a factor in the court's determination). In Georgia, a minor at least sixteen years old may marry upon obtaining parental consent. Ga. Code Ann. §§19-3-2, 19-3-37 (2010). Hawaii requires both parental consent and a court order if a minor under the age of eighteen wishes to be married. Haw. Rev. Stat. Ann. §§572-1(2), 572-2 (LexisNexis 2005).


\textsuperscript{323} 669 F.2d 67 (2d Cr. 1982).


\textsuperscript{325} Id.

\textsuperscript{326} Id.
Maria, lived together with their one year old son as a separate family unit. Maria’s mother refused to consent to their marriage because she would lose her welfare benefits for Maria.

The reasons given by the court justifying the parental consent provision restriction on children’s constitutional rights are children’s impaired capacity for decision making, parental rights to make decisions for children and children’s vulnerability: “[T]he law presumes that the parents “possess what the child lacks in maturity” and that “the natural bonds of affection lead parents to act in the best interest of their children.” The court describes the denial of the right to marry as merely temporary and therefore marriage can be denied to children.

The case was decided from a parental rights perspective, in conjunction with a limited view of children’s constitutional rights. Children’s rights advocates have argued that such measures deny children’s constitutional rights because the state should be able to step in and weigh the circumstances and make a determination in children’s best interests or respect children’s autonomy. From a relational perspective it is hard to see how preventing these couples from marrying because of lack of parental consent supports care relationships. The parents who are withholding consent are not doing so within ongoing care relationships. On the contrary, the refusal to give consent is preventing the solidification of the care relationships for their grandchildren. Thus, allowing state interference will not cause significant harm to the ongoing relationship and not interfering may cause such harm. Therefore from the relational perspective, state intervention to override parents and allow these marriages should be allowed to effectuate children’s civil rights. Although the inability to marry is temporary, it poses more harm to the child then harm to the ongoing relationship. In other cases where there is an ongoing care relationship and children who wish to marry are still dependent, deferring to parental decisions may make more sense. In other words underage marriage can be restricted by the state and parents allowed to give consent, but the state should be able to step in to override parental fiat where there is no threat that intervention will cause harm and that lack of intervention can cause significant harm to children.

When the threat and danger to the child, emotional and physical, is not temporary but grave and life-changing, as when parents refuse to allow a child to have a wanted abortion when parental consent is needed, the significant harm to the child is likely to outweigh any harm to the relationship. Therefore, as in marriage, the state should be able to override parental consent laws, or, preferably, a teenager should be allowed to abort without consent. This position is in alignment with the Supreme Court position in United States v. Danforth.

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327 Id. at 625.
328 Id.
329 Id. at 629-630.
330 428 U.S. 52, 75-76 (holding that a blanket parental consent requirement for abortions by unmarried minors to be an unconstitutional violation of minors due process rights).
V. Conclusion

Best interests is the current standard used to protect children but it is more a goal than a legal standard. It is a standard that relies on individual rights and interests and does not sufficiently consider and emphasize the relationships upon which children are most dependent and which most contribute to children’s welfare. Instead, I argue for a relational perspective on children’s rights to best protect children. The principles I have derived from the theory of relational autonomy, which I have described in detail, can help judges, mediators, and advocates make choices that are good for children. Of course, it is not possible to cover all applications of these principles, but I have tried to set out guidelines that make them practical and approachable. Moreover, the principles themselves may not be exclusive as other legal principles can support relational rights of children. However, I find these three principles to be incredibly helpful and broad in setting the stage for relational rights for children.

Children do not need the right to be left alone or to have the state interfere as against family members. And, it is the fear of giving children such liberty rights that makes embracing children’s rights so difficult. However, children have claims on the state and need protection. Children’s rights should come in the form of support of relationships and care that better serve them, not in support of them as individuals in separation from parental care. Such support can create a seismic shift in policy initiatives, family law and beyond that seeks to support relationships for the sake of children and in the name of children’s rights.