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The Relational Rights of Children

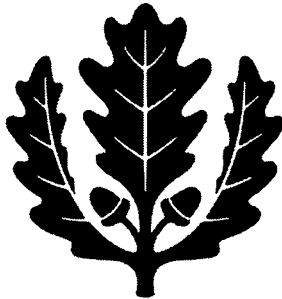
PAMELA LAUFER-UKELES

Although children have been considered central to family law for some time, the discussion of children's rights is still controversial and the methodology for advocating on behalf of children contested. Modern accounts of how to best uphold the interests of children are based on one of three models. Parents are either designated the fiduciaries best positioned to protect the interests of children, or the state is deemed responsible for intervening to protect the rights of children, or theorists and lawmakers look to decipher children's own voices and perspectives in order to develop child-centered advocacy. These three perspectives often stand in opposition to each other and result in children's rights being articulated in the midst of struggle and dissonance. The best interests standard most often relied upon to protect children's interests is amorphous and subject to internal conflict and manipulation. Moreover, it is based on competing interests and factors and subject to differing perspectives based on the three models for how to best protect children.

In this Article, I argue that none of the three models do enough to advance children's advocacy. Instead, I argue for a children's rights perspective that focuses on what children need most—relationships. Leaning on empirical and psychological studies, I argue that these relationships bring children to maturity, provide them with the care upon which they depend, and provide the context through which their rights should be viewed. In order to keep relationships central to the legal treatment of children, I advocate for the theoretical shift from an individualist account of rights to a relational account of rights and interests of children. In advancing this relational approach, I propose three guiding principles to reshape family law in a manner that focuses on supporting children's relationships. First, I argue that while family law currently serves children only upon the breakdown of care relationships, in reality, relationships need ongoing support much earlier. Social welfare programs as well as emotional, educational, and financial support should be directed at supporting relationships, particularly at-risk relationships, to prevent crises. Second, I describe how children have a variety of relationships upon which they depend. A variety of significant relationships should be recognized to coexist alongside each other in a differentiated manner that considers the relative harm and benefits from relationships and their disruption. Third, I argue that effectuating children's civil rights and the propriety of state interference with parental discretion needs to be examined within the context of ongoing relationships. When state interference with parents to protect the rights of children harms significant care relationships, the state must tread cautiously. However, when significant care relationships are not threatened, the civil rights of individual children can be more readily realized.

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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 important in recent

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¹ See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867–68 (1987) (listing some fundamental children's rights). Although "rights talk" is often criticized as creating unnecessary tension, see Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1841 (1993) [hereinafter Woodhouse, *Hatching the Egg*] ("Rights talk, when repeated often enough in connection with the power of parents over children, has the potential to undermine a generist perspective on adult authority."), most believe it is necessary to counteract strong notions of parental rights by arguing that children deserve the same level of protection, see Barbara Bennett Woodhouse, *"Are You My Mother?": Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 109 (1995) [hereinafter Woodhouse, *"Are You My Mother?"*] ("[I]n a rights-oriented legal culture, children need more than the weak reed of a claim to 'interests' if they are to make their needs and voices heard."). Using the term rights, as opposed to interests, is often viewed as a strategic choice rather than a factual distinction. See, e.g., JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 12 (2006) [hereinafter DWYER, *RELATIONSHIP RIGHTS*] ("Let me emphasize . . . that I am deploying an understanding of rights, consistent with common usage, whereby rights can be protections of persons' interests independently of any choices they make."); Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 152 (2004) (explaining that the phrase "children's rights" is used extraordinarily loosely and broadly"); Minow, *supra*, at 1886–87 (attempting to define rights). But see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986) (providing a firm definition of rights); Alon Harel, *Theories of Rights*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 191, 192–93 (Martin P. Golding & William A. Edmundson eds., 2005) (analyzing a logical framework for defining rights); Alon Harel, *Whose Home Is It? Reflections on the Palestinians' Interest in Return*, 5 THEORETICAL INQUIRIES L. 333, 339–40 (2004) (reasoning that "not each and every right derived from . . . [a] general right is conducive to the interests of the rightholders"). For our purposes I use the terms interchangeably, relying most on rights as they are stronger and more influential in modern discourse.

² See Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 Hous. L. REV. 703, 708 (2009) ("A legal regime governs dependency in all aspects of children's lives and agency, essentially assigning to their parents or other adult caregivers the power and authority to represent children's needs"); Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 382–83 (2011) (detailing the American Academy of Matrimonial Lawyers (AAML) standards for lawyers advocating

decades.³ Children, however, still do not receive sufficient attention by legislatures, courts, or in legal academia.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, having been deemed not necessarily worthy of their own accounting.⁵ Discussing children's rights at all is controversial because such rights are seen as opposing parental rights and the methods for protecting children advocated by jurists and scholars are highly disputed.⁶

In this Article, I tackle the compelling reasons why children's rights and interests are often minimized and, when recognized, highly disputed. I devise core principles of a new legal framework for family law that seeks to resolve some of this tension and lack of recognition, 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 individual child or what individual rights such a child possesses. Rather, the state should be more proactive in supporting children within their ongoing and varied relationships in a manner that is reflective of their ongoing needs and developing maturity.⁷ The relational perspective that I develop does not abandon children to the privacy and discretion of parental relationships, but it also does not pretend that children are isolated individuals reliant on the state's protection of their rights and privacy interests. Instead, the relational perspective looks to the state to support children's ongoing care relationships, usually with parents.

on behalf of children); Daniel W. Shuman, *Troxel v. Granville and the Boundaries of Therapeutic Jurisprudence*, 41 FAM. CT. REV. 67, 68 (2003) ("[T]he focus on the best interest of the child standard has prioritized the interests of the child and sought the insights of mental health professionals to assess these interests."); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 315 (1998) (tracing the development of children's rights in the United States). For international conventions, see the U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), www.un.org/documents/ga/res/44/a44r025.htm [<https://perma.cc/ZC73-UET8>] [hereinafter CRC].

³ See, e.g., Atwood, *supra* note 2, at 382–86, 410–15 (discussing the ways in which child-centered advocacy has become more central in recent decades).

⁴ See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 849–54 (2004) (reviewing various ways children are still treated unfairly by the legal system).

⁵ See Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525, 526–28 (2014) ("[A] welter of different laws, from different sources, governs children and childhood . . .").

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 Albertson Fineman, *What Is Right for Children?*, in WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 1, 1–4 (Martha Albertson Fineman & Karen Worthington eds., 2009) [hereinafter COMPETING PARADIGMS] (forming "an explanatory framework for considering the failure of the US to ratify the . . . CRC").

⁷ For a thorough discussion of the legal relevance of children's increasing maturity, see Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1109 (2012).

There are essentially three competing models for how best to pursue children's advocacy in the legal context: parent-centered, state-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 parental care, state intervention, or children's autonomy. The parent-centered model is 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 best for their own children,⁸ or because of the value in promoting diversity in child upbringing.⁹ The state-centered model is similar to the state's role in preserving and protecting the rights of adults, while also protecting the state's own interests in children.¹⁰ The child-centered model looks to children themselves, particularly their desires, capabilities, lived experiences, and needs, to determine what should be done in a manner that focuses on children's actual will and autonomy—or our potential to decipher and support that autonomy through progressive and creative means.¹¹ Advocates of each of the three perspectives intend to protect children and claim to carry the mantle of children's rights. Yet, the differences between the perspectives are significant, and opposing positions are hotly debated.

This tension translates into confusion and inconsistency in discussions of children's rights. While the International Convention on the Rights of the Child is a document that includes elements of all three visions, the

⁸ See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”); Emily Buss, *Constitutional Fidelity Through Children’s Rights*, 2004 SUP. CT. REV. 355, 391 [hereinafter Buss, *Constitutional Fidelity*] (“[P]arents . . . [have] authority to exercise control over children for their own good.”); Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 647–50 (2002) [hereinafter Buss, “Parental” Rights] (“Parents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances.”).

⁹ See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1, 19 (1986) (discussing how diversity of upbringing promotes children’s interests).

¹⁰ DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 17–23 (describing children’s rights to have the state protect their interests); see also James G. Dwyer, *Parents’ Self-Determination and Children’s Custody: A New Analytical Framework for State Structuring of Children’s Family Life*, 54 ARIZ. L. REV. 79, 120–24 (2012) [hereinafter Dwyer, *Parents’ Self-Determination*] (providing arguments in favor of state intervention to protect children’s interests).

¹¹ See Barbara Bennett Woodhouse, *Children’s Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497, 501–04 [hereinafter Woodhouse, *Destruction and Promise*] (reviewing new developments in American family courts); Woodhouse, *Hatching the Egg*, *supra* note 1, at 1827–44 (suggesting different ways the law can utilize a child-centered perspective); Barbara Bennett Woodhouse, “Out of Children’s Needs, Children’s Rights”: *The Child’s Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 323 (1994) [hereinafter Woodhouse, *The Child’s Voice*] (“By incorporating children’s perspectives and stories in our deliberations, we can move children’s rights towards a discourse that neither assumes a premature autonomy nor denies children the respect necessary for their growth toward autonomy.”).

accord has been variously criticized for being too state-centered, child-centered, or parent-centered.¹² Moreover, legal theorists often associate the use of “children’s rights” language as referring to a child- or state-centered (as opposed to a parent-centered) vision because rights are generally associated with individualistic autonomy,¹³ specifically autonomy from parents. However, because children cannot always articulate their own liberty interests and their immaturity compromises their ability to autonomously achieve their vision, individualistic rights can be a difficult fit for children.¹⁴ Others have argued that a right need not be protected by a child’s own agency. Rather, the state can protect children’s rights, and parents and other adults can respect and further those rights, even if children are not fully autonomous agents.¹⁵ Thus, the term “rights” need not necessitate reliance on full autonomy or “children’s rights” refer to a state- or child-centered vision of children’s advocacy.

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 reflect a more paternalistic, parental rights-friendly position in contrast to a children’s rights perspective that emphasizes children’s autonomy.¹⁶ The child’s best interests standard, however, must also take into account all of children’s varied interests that are in need of protection, including

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 COMPETING PARADIGMS, *supra* note 6, at 7, 8–9 (arguing that the CRC incorporates parental rights and best interests in a manner that makes it unthreatening to parental rights advocates); Shulamit Almog & Ariel L. Bender, *The UN Convention on the Rights of the Child Meets the American Constitution: Towards a Supreme Law of the World*, 11 INT’L J. CHILD. RTS. 273, 277 (2003) (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 Almog & Bender, *supra* note 12, at 278 (describing the autonomous nature of rights).

¹⁴ See Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights”*, 1976 BYU L. REV. 605, 647 (“The presumptions arising from the limited capacities of minors account in large part for the general limitation on their exercise of rights . . .”); Anne C. Dailey, *Children’s Transitional Rights*, LAW, CULTURE & HUMAN. 1, 4 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2392570 [https://perma.cc/RKJ2-BFHH] (“Because they are presumed to lack adult autonomous decision-making skills, children are not treated as full citizens entitled to lead lives of their own choosing.”).

¹⁵ See Minow, *supra* note 1, at 1885 (“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 . . . participate in the shifting of boundaries.”); see also Dailey, *supra* note 14, at 5 (stressing the importance of “children’s rights rooted not in autonomy, but in their distinct place and future in the liberal polity”).

¹⁶ See *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982); Leonard I. Rotman, *Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 942 (2011) (defining a fiduciary’s duties); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2402 (1995) (“[T]he parental relationship, once established, has intrinsic value for the child that extends beyond successful performance of caretaking tasks.”).

children's civil rights, and children's own expressed desires.¹⁷ In fact, in practice, the best interests standard is not frequently used to interfere and supplant parental privacy in favor of state interests and in furtherance of majoritarian values.¹⁸ The best interests standard should take into account all categories of children's rights and interests, and numerous factors, which are potentially conflicting and incongruous, somehow arriving at a determinative position as to what is "best" for children.¹⁹ In easy cases this analysis may not be difficult. When contentious issues arise, however, such as relocations, parental terminations, issues regarding the custody of children born to undocumented immigrants, and issues regarding incarcerated parents, which potentially create a conflict between children's interests in attachments with parents and state visions of normative family life, resolutions are nebulous. Thus, catch phrases such as "children's rights" and "best interests" provide little guidance or overall vision of how to specifically pursue children's advocacy in difficult cases where parent-centered, state-centered, and child-centered visions for children's advocacy clash.

Even if a blend of such visions is ultimately necessary, having access to a guiding principle underlying the implementation of children's rights is sorely lacking given the tension between these three models.²⁰ As I will demonstrate in this Article, competing perspectives result in significantly different legal implications on child-related issues such as custody, parental termination proceedings, and children's civil rights.²¹ Indeed, instead of building on the merits of each perspective, the discussion surrounding

¹⁷ See, e.g., Appell, *supra* note 1, at 153 (discussing different categories of children's rights, including children's civil rights, privacy rights, and dependency rights); Ariel Ayanna, *From Children's Interests to Parental Responsibility: Degendering Parenthood Through Custodial Obligation*, 19 UCLA WOMEN'S L.J. 1, 12–13 (2012) (listing the variety of factors of parental adequacy used in balancing tests performed in the legal sphere with regards to child custody); Minow, *supra* note 9, at 14–21, 24 (discussing different categories of children's rights).

¹⁸ Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregivers' Rights and Children's Rights*, 15 NEV. L.J. 236, 259 (2014).

¹⁹ See sources cited *supra* note 17; see also Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954–58 (1979) (discussing the uncertainty created by the best interests standard and the problematic nature of bargaining in the "shadow" of such uncertainty); Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 71–72 (2002) (discussing criticism of the best interest standard in that it gives judges too much discretion and injects uncertainty into out-of-court negotiations); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 74 (2014) (summarizing the difficulties courts face when trying to determine what is in a child's best interest).

²⁰ See Appleton, *supra* note 5, at 526 ("The ordinary word 'child' denotes an extraordinary legal category, which in turn makes childhood an exceptional legal status. Yet, the contours, content, and consequences of this category all reflect disarray.").

²¹ See *infra* Part II.B.

children's rights is fraught with dispute and inconsistency.²² 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 power grab among competing concerns. Despite the promise of a child-centered approach and the progressive use of narrative, child-centered inquiries require creativity and sensitivity in a manner that is difficult and costly for judicial systems.²³ 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 appears to be a futile undertaking. We are essentially stuck between these two procedural mechanisms—that is, between the power of parental rights and preferences, which continue to dominate family law, and the alternative argument in favor of state interference.²⁴ Children's interests demand more than the dissonant crossfire between competing concerns.

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. Further, children's rights cannot be subsumed to state control either, as it is usually parents who need to provide care. Although children cannot be entirely relied upon to effectuate their own needs, since they are caught between agency and dependency,²⁵ the stronger voices they develop as they mature and the transitional nature of childhood must be taken into account. 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

²² See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 638 (2006) (stating that "the debate between advocates of parents' rights and children's rights is charged and polarized").

²³ See, e.g., Harry Brighouse, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 707–08 (2003) (arguing that children's voices should be treated as "consultative rather than authoritative"); William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 IND. L.J. 635, 651–57 (1998) (explaining that attorneys have to be different advocates, investigators, and interpreters under a child-centered approach).

²⁴ See Appleton, *supra* note 5, at 540 (discussing the tension between parental rights and state authority); Huntington, *supra* note 22, at 643 (suggesting that parents' rights are a long-standing legal principle that "has driven federal and state legislation and shaped legal doctrine"); Woodhouse, *Hatching the Egg*, *supra* note 1, at 1811.

²⁵ See Appleton, *supra* note 5, at 549 (noting the tension between children's agency and their dependency).

compete and conflict with parental rights and state interests.²⁶ Children's lives, however, are not individualistic, but rather relationship-based, and sociological and psychological studies support the centrality of relationships to children's well-being and development.²⁷ The child is in an inseparable interdependent relationship with their custodians and the relational nature of children's lives cannot be ignored.²⁸ Children's rights should not be primarily viewed as individualistic rights for the state to protect or liberty rights to be free from state interference, but as rights to have the state support the relationships children need in order to grow and develop into adults.²⁹ Children's rights discussions should focus on supporting these interdependent relationships between children and caregivers as opposed to amorphous individualistic best interests analyses. Such relational support should also reflect the transitional maturity of children and their changing reliance on relationships. The state should not be viewed as a threat to children's right to privacy, but rather as a necessary partner in helping parents nurture children's development so that they can effectuate their own autonomy and capacities.³⁰ I will demonstrate how relational rights capture these realities for children better than

²⁶ See *In re R.E.S.*, 19 A.3d 785, 789 (D.C. 2011) (explaining that "[p]arental rights 'are not absolute, and must give way before the child's best interests'" (quoting *In re A.B.E.*, 564 A.2d 751, 755 (D.C. 1989))).

²⁷ See *infra* Part II.C.2.

²⁸ See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297–98, 304–06, 315 (1988) (characterizing parental rights as responsibilities and obligations to children due to parent-child interdependency); Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894 ("A body of family law that protects only the autonomous self fails to nurture the relationships between individuals that constitute families."); Minow, *supra* note 9, at 18 (observing the "critical role of relationships with adults in children's lives"); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 618–22 (1986) (explaining different concepts of interdependent rights, which "emphasize the ability of rights discourse to express human values and affirm the creative, expressive, and connective possibilities of rights").

²⁹ See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 31–34 (1973) (explaining that "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development"); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2155–61 (2011) (discussing children's psychological need for relationships). For a discussion of relational rights in the context of family law generally, see Shazia Choudhry et al., *Welfare, Rights, Care and Gender in Family Law*, in *RIGHTS, GENDER AND FAMILY LAW* 1, 12–18 (Julie Wallbank et al. eds., 2010). For a discussion of relational rights and its general applicability, see JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 3–5 (2011).

³⁰ See John E. Coons et al., *Puzzling over Children's Rights*, 1991 BYU L. REV. 307, 308, 343 ("Rarely does the state impose specific constraints which override the license of tolerant guardians."); Martha Minow, *Are Rights Right for Children?*, 1987 AM. B. FOUND. RES. J. 203, 211 ("The courts in a sense treat 'rights' as a kind of discourse, or vocabulary in ongoing communal efforts of understanding [between themselves and parents]."); Woodhouse, *supra* note 2, at 318 ("The notion that public and quasi-public entities must make the best interests of the child 'a primary consideration' is not meant to undermine parental authority . . .").

individualistic rights and how relational rights can be used to derive a new framework for advocating on behalf of children. 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's rights, and more solid guiding principles to implement children's advocacy in a variety of contexts.

This relationship-based theory of children's rights follows from relational theories developed more than a decade ago, by influential theorists such as Katharine Bartlett,³¹ Martha Minow³² and Jennifer Nedelsky.³³ These relational perspectives developed in response to a growing rights discourse focused on individualism, rights, and autonomy.³⁴ Yet, these perspectives have remained largely in the realm of theory despite their particular applicability to children's rights.³⁵ Recommendations flowing from relational rights theories are often contextual, based on a case-by-case analysis, and include a multitude of factors, which are difficult and costly to apply.³⁶ It is also difficult to determine what specific remedies might flow from general support for relational rights.³⁷

³¹ Bartlett, *supra* note 28, at 315.

³² Minow, *supra* note 9, at 24; *see also* Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 20-26 (1996) (analyzing three contemporary approaches to family law and arguing that none take an adequate account of family life and the family's relationship with the state).

³³ NEDELSKY, *supra* note 29. Although Nedelsky thinks broadly that rights are relational, she specifically discusses her relational perspective's applicability to children. *Id.* at 19-30, 39.

³⁴ *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991) (asserting that "rights talk" has stifled political discourse in the United States); Bartlett, *supra* note 28, at 298-99 (arguing that responsibility "is grounded in relationship rather than autonomy"); Hendrik Hartog, *The Constitution of Aspiration and "The Rights that Belong to Us All"*, 74 J. AM. HIST. 1013, 1021 (1987) (arguing that rights do not include common beliefs about shared interests and collective rights); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 (1983) (asserting that rights talk reflects a male, rationalistic view of the world); Minow & Shanley, *supra* note 32, at 5-6 (criticizing recent works of political and legal theory about the family and arguing for a new approach centered around the concept of relational rights); Schneider, *supra* note 28, at 611 (defending rights talk as necessary for legal change because of its ability to "articulate new values" and "political vision"); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363 (1984) (critiquing rights as expressing the individualism of capitalism); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-05 (1987) (defending the language of rights for people of color as significant and empowering); Woodhouse, *supra* note 1, at 1841 (discussing the importance of using rhetoric that speaks more about competing rights instead of parents' rights in children).

³⁵ *See infra* Part II.D (discussing how the focus on relationships is not adequately reflected in the law); Part IV (describing how a conception of relational rights can be used to derive principles for a new framework for family law).

³⁶ *See, e.g.,* Bartlett, *supra* note 28, at 324 ("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 AM. U. J. GENDER SOC. POL'Y & L. 163, 206-12, 217

This Article moves the conversation forward, providing clear alternative principles to guide a relational perspective on children's rights and interests. I derive three principles from relational theory: (1) focus on proactive state involvement that supports relationships, particularly at-risk relationships, as opposed to instilling fear of state interference; (2) support for the multiplicity and variety of relationships through categorization and clear delineation of responsibilities and rights; and (3) balancing individual harms against the harm of state interference on relationships in the context of children's civil rights. I will then demonstrate how these relational guidelines provide more consistent and practical solutions to promote children's interests.

This Article proceeds in three parts. In Part II, I will discuss the power struggle between the state-centered, parent-centered, and child-centered perspectives competing to control the children's rights inquiry and demonstrate how these different perspectives have distinct and potentially conflicting implications. After explaining how such conflict results in little guidance and too much tension in applying case-by-case legal standards to promote children's "best" interests, 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.³⁸ I will argue that while the importance of financial resources and stability has been significantly incorporated in the law regarding children, the centrality of relationships has been undervalued.³⁹ Thus, I turn to developing a legal framework for advancing children's interests through supporting children's relationships, keeping in mind children's need for financial resources and low-tension environments, in developing these relational principles to guide family law.

In Part III, I will outline the theoretical move from individual to relational rights and explain why such a move is not only essential to support the relationships that have been determined, empirically, to be so important for children, but also better captures the reality of children's lives. I discuss the current legal framework's reliance on individualistic accounts of parental rights and state interests in children, in addition to individualistic accounts of children's rights. I describe how such individualist perspectives warp and obfuscate the realities of children's lives: children's interdependence on parents, caregivers, or the state; the transitional nature of children's maturity; and the way the state must act in concert with parents to support children. Finally, I will discuss the nature

(2010) (listing eight criteria to use in relocation cases based on a relational perspective of children's rights).

³⁷ JONATHAN HERRING, RELATIONAL AUTONOMY AND FAMILY LAW 27 (2014).

³⁸ See *infra* Part II.B.

³⁹ See *infra* Part II.D.

of relational rights, how they are different from individualistic notions of rights, and how relational rights can better capture the transitional and interdependent realities of childhood.

In Part IV, I will demonstrate how this altered perspective affects legislative policy and legal decision-making in the context of children. I will describe three essential non-exhaustive principles 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. The first principle seeks to move advocacy for children away from the focus on the threat of state interference to looking to the state to proactively support functioning, good-enough relationships—even at-risk relationships—up until the point of paternal termination. Social welfare support structures provided by the state should focus on supporting caregiving relationships and not detached individuals. Such measures should aim to actively support ongoing care relationships as opposed to merely providing a safety net when such relationships fail. State-provided social welfare benefits for child care relationships, direct subsidies, caretaker support payments, and support for at-risk parents will all be discussed as following from this principle.

Second, relational theory not only supports relationships, but also provides emphasis on recognizing a variety of supportive relationships.⁴⁰ 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. I will discuss the role of formal primary parents, secondary custodians, and functional parents, as well as tertiary kin caregivers. These different categories of relationships will be analyzed and degrees of legal recognition suggested.

Third, room must be made for children to resist relationships and express their civil rights, so long as they do so within the relational framework. Both the effect of interference on the ongoing relationship as well as the extent of the threatened harm to the individual child must be taken into account. Thus, I suggest the need to balance the way interference may harm relationships with the threat of harm to the individual child from lack of interference. I will apply this principle in the context of disputes of infant circumcision and underage marriage.

⁴⁰ See *infra* Part IV.B.

II. CONTRASTING CLAIMS REGARDING 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.⁴¹ Once treated more like property than persons,⁴² the development of legal standards that 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.⁴³ However, figuring out how to pursue children’s interests has enjoyed much less consensus than the goal itself.

It is generally agreed upon that children have compromised autonomy and less capacity for rational decision-making and accountability, although the extent of such incapacity is debated.⁴⁴ In the context of criminal law, this incapacity is often stressed, while it is less critical in constitutional and human rights law.⁴⁵ Social sciences give us a vague picture, but immaturity is a reality that lends itself to dependency on adult parents and, in their

⁴¹ See *supra* notes 2–4 and accompanying text.

⁴² See Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1327 (2005) (acknowledging the historic notion that children have been considered property); Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children’s 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) (recalling that children were often treated like the mother’s property); Woodhouse, *Hatching the Egg*, *supra* note 1, at 1807–09 (highlighting a case that reflects the legal tradition of possessive individualism, which treats the child as “an isolated human possession” (quoting STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 106 (1968))).

⁴³ See *Bernstein v. Bernstein*, 498 So. 2d 1270, 1273 (Fla. Dist. Ct. App. 1987) (stating that the best interest of the child is predominant in establishing the amount of child support); Lisa Myers, *Preserving the Best Interests of the World’s Children: Implementing the Hague Treaty on Intercountry Adoption Through Public-Private Partnerships*, 6 RUTGERS J.L. PUB. POL’Y 780, 782 (2009) (“Without compromising the best interests of the children, the Hague Treaty struck a balance between hard-and-fast rules and flexible implementation options left to individual governments’ discretion.”); Sue Nations, *Louisiana’s Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057, 1084 (1990) (arguing that “providing for the best interest of the child is always the ideal [goal] sought by child support judgments”); see also Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interest of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 343 (2004) (discussing that international adoption legislation and practice purports to consider the best interest of the child, specifically referring to the Hague Convention and United Nations); cf. Scott & Emery, *supra* note 19, at 70–71 (discussing how the best interests standard is still the dominant standard despite its deficiencies).

⁴⁴ See, e.g., Appell, *supra* note 2, at 708 (commenting on the U.S. legal regime that governs “dependency in all aspects of children’s lives and agency”); Appleton, *supra* note 5, at 527 (“[S]ome authorities assume that minors lack mature decisionmaking capacity[,] some treat minors as if they have such capacity; and[,] still others require an individualized assessment of maturity for each minor.”); Todres, *supra* note 7, at 1145 (noting the significant inconsistencies across the various maturity indicators).

⁴⁵ See Appleton, *supra* note 5, at 528–30 (discussing recent criminal cases where the Supreme Court invoked research to emphasize reduced culpability of juveniles because of their developmental immaturity).

absence, the state.⁴⁶ Due to such incapacity, children's rights are therefore different than those of adults, although analogies can be made.⁴⁷ 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.⁴⁸ Still, that does not mean that children do not have civil rights at all,⁴⁹ 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.⁵⁰ 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.⁵¹ Children were subject to the fate parents determined for them with little, if any, outside regulation. State treatment of children without legal parents was harsh and unprotected.⁵²

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 the humanity 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

⁴⁶ See *id.* at 529 (stating that new research on adolescent brain development is becoming important in juvenile cases); see also Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 158, 159 (2013) ("[A]symmetries in the timing of development of different brain regions contribute to risk taking and immature judgment in adolescence.").

⁴⁷ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 123 (extending adult relationship rights to children); Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 750 (2013) (stating that there are occasions when the law treats children like adults).

⁴⁸ DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 123.

⁴⁹ See Appell, *supra* note 1, at 161–65 (using the implementation of the Indian Child Welfare Act to illustrate the contradiction between civil and dependency rights).

⁵⁰ See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833–34 (2007) (noting that parents and the state exercise almost complete control over children in the realms of home and school, respectively); Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (discussing the historic and problematic view of the child as private property).

⁵¹ See Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1, 5 (2007) (noting that illegitimate children were considered "bastards" and not entitled to inheritance rights); 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).

⁵² See BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 93–107 (2008) (detailing the harsh conditions for children in the foster care system); 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).

obligation to act as stewards acting in their children's best interests.⁵³ This perspective gives parents privacy rights over children, not only because of constitutional claims to rights to parent children at their own discretion, but also because parents, it is argued, are best positioned to make decisions on behalf of children and steer them toward adulthood.⁵⁴ Relying on the importance of natural affections, biological connections, cultural diversity, and civil rights for children, as well as attachment theory and situational perspective, supporters of the stewardship model argue that parental privacy rights, and a high level of discretion for parents, are what is best for children.⁵⁵ According to this perspective, the best way to promote children's well-being is to limit state interference to times of crisis and allow parents to steward their children as they see fit.

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 basis for promoting children's own interests. 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 in opposition to parental discretion.⁵⁶ Critics 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 the protection of adults' rights.⁵⁷ Incapacity still being a primary limiting factor for children, it is argued that the state can protect children from parents that are not sufficiently solicitous of their children's

⁵³ See, e.g., Scott & Scott, *supra* note 16, at 2401–02 (arguing that framing a parent's legal relationship to a child in terms of fiduciary responsibilities could be beneficial for both parties).

⁵⁴ See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 683 (2001) (arguing for the parental rights doctrine to maintain diverse family forms and cultural identities); Buss, "Parental" Rights, *supra* note 8, at 647–50.

⁵⁵ Buss, "Parental" Rights, *supra* note 8, at 647–50; see also Appell, *supra* note 54, at 714 (providing reasons that the privacy of the parent-child unit is valuable, including the fact that "it serves the political function of rearing children to meet their basic needs and to be citizens").

⁵⁶ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 79–80 (stating that parents are empowered to restrict children's rights without being required to make decisions based on what is best for the child); Dwyer, *Parents' Self-Determination*, *supra* note 10, at 84–86 (arguing that when parents make choices in pursuit of their own ends, children are forced to bear the costs); Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1162–64, 1179–80 (exploring arguments that parental rights can have damaging effect on liberal democracy and arguing for a best interest standard in the determination of deportation of citizen children).

⁵⁷ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 132, 136 ("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.").

needs and interests.⁵⁸ 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,⁵⁹ to punish parental prerogatives that the state deems bad for children,⁶⁰ to favor children's right to stay in the United States when parents are deported,⁶¹ to favor children's right to not be raised by high-risk parents who have not yet committed neglect or abuse,⁶² and to favor adoption and termination of parental rights,⁶³ among others.⁶⁴ The call is to limit natural parental discretion through state interference in order to better protect children.

Finally, others focus beyond parents and the state, instead looking to children themselves to effectuate their own rights. They argue 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.⁶⁵ This approach applies to all children, but often is particularly effective with regard to older children who are better able to express their opinions and more capable of making such decisions on their own than younger children.⁶⁶ This perspective asks that we listen to children's wishes when it comes to custody disputes or when there is an international kidnapping case under the Hague Convention.⁶⁷ More expansively, this perspective emphasizes the importance of considering how children experience legal determinations, seeking to involve children in mediation, and focusing on children's attachments to

⁵⁸ *Id.* at 132.

⁵⁹ *Id.* at 136.

⁶⁰ See Dwyer, *Parents' Self-Determination*, *supra* note 10, at 82, 119–28 (arguing that parental choices that are bad for children should have legal consequences for parents).

⁶¹ See Zug, *supra* note 56, at 1179–80 (“The state has a significant interest in keeping American immigrant children in the United States. This interest, combined with the children’s best interest, weighs in favor of applying a children’s rights approach to immigrant family reunification decisions.”).

⁶² See DWYER, *RELATIONSHIP RIGHTS*, *supra* note 1, at 260–62 (suggesting that under certain conditions parental rights should be abnegated upon a child’s birth before abuse and neglect are proven).

⁶³ See generally ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (suggesting that biological family preservation is overvalued and arguing for policies that better support the adoption process).

⁶⁴ See, e.g., William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 337–38 (1984) (arguing that infant circumcision is a violation of children’s rights); James G. Dwyer, *The Liberal State’s Response to Religious Visions of Education*, 44 J. CATH. LEGAL STUD. 195, 197 (2005) (stating that religious schooling may harm children by discouraging critical-thinking and self-expression and imposing “gender-stereotyped” roles).

⁶⁵ See Woodhouse, *Hatching the Egg*, *supra* note 1, at 1836–41 (arguing that children’s voices ought to be represented in judicial decision-making in lieu of treating children as compliant, silent objects rather than real, willful individuals with authentic voices).

⁶⁶ See *id.* at 1756–57.

⁶⁷ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

caring adults.⁶⁸ Child advocates often argue for legal representation of children, as opposed to ad litem guardianship, in custody proceedings and parental terminations to ensure advocacy on behalf of children.⁶⁹ Barbara Bennett Woodhouse is perhaps the most central figure in the child-centered movement. Woodhouse considers how the “law might be pushed and challenged to better reflect children’s experiences, needs, and interests.”⁷⁰ She asks us to look to children’s concerns from a child-centered view, rather than an adult-centered one.⁷¹ She also encourages us to look at children’s literature and seek out children’s narratives, to ask children questions 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.⁷²

B. The Policy Implications of These Differences

The three perspectives described above—parent-centered, state-centered, and children’s voice-centered—are not merely shadows of one another, but have real and potentially opposing policy implications. The three models adopt substantively different perspectives on the appropriate way to resolve controversies involving children, although they all claim to be focusing on children’s interests and advocating on behalf of children. To fully understand these three different perspectives, the opposing policy and doctrinal implications must be discussed.

One question that has caused much dispute in the courts and among scholars is whether grandparents should be entitled to continue relationships with children despite the objections of legal parents. These situations usually arise after the death of the parent directly related to the

⁶⁸ See Woodhouse, *Hatching the Egg*, *supra* note 1, at 1836–41; see also Merrill Sobie, *The Child Client: Representing Children in Child Protective Environments*, 22 *TOURO L. REV.* 745, 776–80 (2006) (describing child-centered mediation as a way to include children in child custody and child protection determinations); Melissa J. Schoffer, Note, *Bringing Children to the Mediation Table: Defining a Child’s Best Interest in Divorce Mediation*, 43 *FAM. CT. REV.* 323, 326–27, 329–30 (2005) (detailing methods of including children in adversarial divorce hearings and mediation).

⁶⁹ See Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1671–93 (1996) (arguing for a focus on children’s autonomy and right to counsel in delinquency, abuse and neglect, and custody cases); Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in Child Welfare Proceedings*, 36 *U. DAYTON L. REV.* 307, 314–17 (2011) (explaining the appointment of a guardian ad litem for children in child welfare proceedings, and how such representation may not fully represent the child’s wishes).

⁷⁰ Woodhouse, *Hatching the Egg*, *supra* note 1, at 1827; see also Appell, *supra* note 47, at 721–22, 754–55 (proposing a constitutional “Children’s Participation Amendment”).

⁷¹ Woodhouse, *Hatching the Egg*, *supra* note 1, at 1827.

⁷² See *id.* at 1840–41 (“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.”).

grandparents. In *Troxel v. Granville*,⁷³ the Supreme Court held that a best interests analysis used in determining whether to allow grandparent visitation did not give sufficient respect to constitutional parental rights and that there must be a particular weight or presumption afforded to parental choice.⁷⁴ Emily Buss, an advocate of deference to parental privacy in pursuit of children's interests, has argued that given a parent's ongoing relationship with her own children, it is best to leave decisions concerning with whom children should visit to the parent's discretion.⁷⁵ She argues that parents, who are most affected by the visitation that a court could impose, are best situated to determine how such visitation affects children; therefore, she agrees with the decision in *Troxel*.⁷⁶ Jim Dwyer, on the other hand, believes firmly in the relationship rights of children and that the state must interfere with parental relationships to ensure children have sustained relationships with third parties.⁷⁷ Dwyer 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 a best interests analysis.⁷⁸ Moreover, when it comes to parental prerogatives such as relocation and religious exposure, Buss has more confidence in parental decision-making as compared to state decision-making, while Dwyer would like to rely further on best interests and state control in order to assist children.⁷⁹ Interestingly, however, both Buss and Dwyer appear to be in favor of inclusion of functional parents as legal parents when such parties can demonstrate minimum levels of care requirements.⁸⁰ 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 for protecting children's interests.⁸¹

⁷³ 530 U.S. 57 (2000).

⁷⁴ *Id.* at 67, 69.

⁷⁵ See Buss, "Parental" Rights, *supra* note 8, at 649, 683.

⁷⁶ *Id.*

⁷⁷ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 286–87 (asserting that the idea that it is in the best interest of a child for a parent to have the right to make decisions about the child's relationships is illogical and nonsensical).

⁷⁸ *Id.* at 49.

⁷⁹ Compare *id.* at 17–22, 285–87 (suggesting that the state be given more authority in determining what is best for children), with Buss, "Parental" Rights, *supra* note 8, at 648, 654 ("Once the state is called upon to make individualized judgments about whether a particular choice is appropriate for a particular child, we should have no confidence that the state can do a better job than the parent. . . . [W]e should be slow to allow state intervention if the child's welfare is our goal.").

⁸⁰ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 286 (suggesting that conferring the concept of parenthood more broadly will protect functional "nonparent" parents); Buss, "Parental" Rights, *supra* note 8, at 650–52 (suggesting that parental identity be assigned based on the centrality of the relationship with the child as opposed to other factors).

⁸¹ Compare DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 285–87 (discussing reform of the rules for relationships with functional "nonparent" parents with a focus on the state as the decision-

Another area of dispute between those who self-identify as 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 decisions in children's best interests⁸² and that the best interests standard can adequately take into account a child's wishes if children are mature enough to articulate them.⁸³ Others, however, believe that guardians ad litem who have to assess what they believe is best for the child are insufficiently positioned to advocate for the child and that, in a variety of situations, child advocates who promote the child's own position should be required, in addition to or instead of guardians ad litem.⁸⁴ This disagreement also touches on differing opinions about the negative effects that directly engaging in litigation can have on children.⁸⁵ 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, and cultural identity rights are all the subjects of considerable controversy. On one hand, children may seek the right to marry at a young age.⁸⁶ On the other hand, there is a desire to protect children by arguing that young marriages are coercively arranged by parents.⁸⁷ While these situations may be examined on a case-by-case

maker), with Buss, "Parental" Rights, *supra* note 8, at 647–50 (arguing that parties identified as parents should have constitutionally protected privacy to make decisions regarding their children).

⁸² See John E.B. Myers, *Children's Rights in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. DAVIS J. JUV. L. & POL'Y 267, 269–70 (2004) (discussing benefits of a court appointed special advocate (CASA), otherwise considered to be a child advocate or guardian ad litem, as representation of a child's voice in dependency proceedings).

⁸³ See Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 640–41 (2003) (discussing the relevance, to varying degrees, of children's voices in custody disputes); see also D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R.3d 1396, 1402 (1965) (discussing the "prevailing view" that children's wishes are a factor in custody cases nationally).

⁸⁴ See Federle, *supra* note 69, at 1679–80 (discussing contrasting views on whether a child's representative should be a lawyer or a guardian ad litem); Fines, *supra* note 69 (advocating for child-centered and child-directed advocacy on behalf of teen parents in child welfare proceedings).

⁸⁵ See Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 980 (2006) ("The adversarial nature of divorce litigation negatively affects children, couples, and disillusioned practitioners.").

⁸⁶ See *infra* Part IV.C.2. (discussing mature children's civil rights as relational rights within the context of marriage).

⁸⁷ See Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1857 (2012) (describing how an adolescent may face various sources of pressure to marry that include older adult partners, parents, or authority figures, such as religious leaders).

basis, the legislative tendency is instead to raise the minimum marriage age for all and to allow less exceptional circumstances to override the age limitation. Similarly, children may have the right to cultural identities,⁸⁸ but may be too immature to substantively agree to bodily interference involved with circumcision.⁸⁹ Those focused on children's autonomy and rights separate from parents may want to ensure that children's civil rights are guaranteed by the state in a manner as close as possible to adult civil rights. Therefore, they are likely to support children's rights not to be circumcised when they are too young to consent and, under circumstances where older children express a will to marry, to support their right to marry against their parents' wishes if parental consent is required. On the other hand, those focused on the parental privacy model may want to give parents 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 would be analyzed by considering how a child would experience one outcome or the other.⁹⁰ Thus, we see how these three models rotate and revolve around each other—sometimes corresponding and sometimes differing—but providing three distinct perspectives.

These examples provide broad strokes. They demonstrate the tension that exists in the current legal discourse. However, there are also areas of agreement among these three perspectives. All three perspectives, on the best way to promote child advocacy, appear to be in favor of preserving a child's relationship with a long-term active caregiver rather than a parent who had parental rights but no parent-child relationship. Thus, in the *Baby Jessica* case, all three perspectives on child advocacy are likely to agree that two-year-old Jessica DeBoers 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.⁹¹ This is because all three perspectives are focused on how best to advance children's advocacy, as opposed to a parental rights perspective.

⁸⁸ See Appell, *supra* note 1, at 154–56 (identifying some of the constitutionally recognized civil rights of children).

⁸⁹ 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 & L. 87, 101–03 (1999) (arguing that the absence of consent in infants should, as it does with adults, preserve bodily integrity unless a showing is made that the medical treatment is necessary to preserve the infant's life).

⁹⁰ Cf. Woodhouse, *Hatching the Egg*, *supra* note 1, at 1812–14 (arguing for a child-as-subject, rather than child-as-object, viewpoint).

⁹¹ *DeBoer v. DeBoer (Baby Jessica)*, 509 U.S. 1301, 1301–03 (1993); cf. Woodhouse, *supra* note 2, at 315–16, 318–19 (explaining the characterization of the child-parent relationship as an emotional relationship rather than ownership and describing the forcible separation of a child from her parents as one of a child's "greatest losses").

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 relies on a “best interests” analysis to weigh a variety of factors considered relevant to children’s well-being.⁹² However, the best interests analysis is so broad and malleable it is open to bias and varying interpretations.⁹³ The best interests standard can be used as the mantle of those advocating any of the three contrasting child advocacy positions discussed above, without providing any resolution. Indeed, the Hague Convention on the Rights of Children, which uses “best interests” as its guiding principle, has elements of all three positions throughout the Convention, and even within a given article.⁹⁴ Thereby, the best interests standard embraces without resolving the dilemma of finding resolution between these three perspectives.

This results in many issues being left up to decision-makers without clear guidelines and acting on a case-by-case basis. The dominant best interests standard has the benefit of being able to take into account the range and variety of children’s interests—interests in being raised by parents with privacy, interests in state protection, and interests in adult-like civil rights.⁹⁵ Indeed, best interests analysis must take into account many factors and interests. But such differing interests often come into tension with one another in difficult and complex cases reflecting lack of certainty and contested resolutions. Best interests analysis has long been criticized as ambiguous and extremely difficult for judges to apply, necessitating costly and difficult proceedings.⁹⁶ It has long been argued, that, despite the evidence provided by psychologists and social workers, there is no scientific “best” that can be determined in individual cases governed by the standard and that efforts to optimize are expensive and largely futile.⁹⁷

⁹² Andrea G. Nadel, Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R.4th 1129, 1134 (1985); O’Neill, *supra* note 83, at 1399; see also Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute’s “Approximation Rule”*, 41 U. BALT. L. REV. 83, 89 (2011) (“The best-interest standard is preferable”).

⁹³ See *supra* notes 17–18 and accompanying text.

⁹⁴ CRC, *supra* note 2, art. 3 (“In all actions concerning children, . . . the best interests of the child shall be a primary consideration.”). In the context of articulating children’s freedom of religion and thought, the CRC considers in each of three subsections of Article 14, children’s own right to freedom of thought, the rights of parents to decide on behalf of children, and then the state’s obligation to step in to limit such freedoms for public policy reasons.

⁹⁵ See *supra* notes 17–18 and accompanying text.

⁹⁶ See, e.g., Mnookin & Maccoby, *supra* note 19, at 71–72 (describing the vast discretion given to trial judges utilizing the “best interests” standard in custody determinations); Mnookin & Kornhauser, *supra* note 19, at 954–57 (discussing the uncertainty involved in best interests analysis).

⁹⁷ E.g., Laufer-Ukeles, *supra* note 18, at 257–61; Scott & Emery, *supra* note 19 (describing the multiple problems of relying on a case-by-case basis); see Appléton, *supra* note 5, at 528–29 (discussing the lack of a “coherent” scheme in legal disputes regarding children that takes into account

State determinations of what is best often reflect simplistic understandings of the benefits of a nuclear family with financial stability rather than the complex needs of children from unstable homes.⁹⁸ Ultimately, the broadness and contextual nature of the best interests standard, while appealing, is also its downfall. Often manipulated and abused, it is more of a goal rather than a legally relevant standard, and has resulted in overly 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 as a standard which is unable to resolve such tension, it is helpful to take a step back and consider studies from the social sciences and psychology for insight as to what basic provisions are most important for children.⁹⁹

1. *Money and 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 and can provide for children is essential to children's well-being. A lack of financial stability leads to poor outcomes for children,¹⁰⁰ and can also be an indicator for the likelihood of parental termination and abuse and neglect proceedings, as well as social welfare inquiries.¹⁰¹ 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 Minow

important topics, values, and policies); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478 (1984); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 267 (1987); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 4 (1987); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1525 (1994).

⁹⁸ Laufer-Ukeles, *supra* note 18, at 257–61.

⁹⁹ Such studies are empirically researched and statistically significant considering the large populations of children they examine, unlike individualistic determinations made by judges, social workers, and psychologists financed by the parties, which scholars argue cannot make scientific determinations on a case-by-case basis. See Scott & Emery, *supra* note 19, at 91–92 (critiquing courts' reliance on mental health professionals to determine children's best interests).

¹⁰⁰ See MELISSA LUDTKE, ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA 422–23 (1997) (arguing that limited financial resources, not single parenthood, result in poorer outcomes for children).

¹⁰¹ See Naomi Cahn, *Placing Children in Context: Parents, Foster Care, and Poverty*, in COMPETING PARADIGMS, *supra* note 6, at 145, 150 (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).

point out, focusing on children's financial needs necessitates focusing on the financial stability of the household.¹⁰²

Second, low conflict within a child's home and within a child's overall environment is an important indicator of child well-being.¹⁰³ 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.¹⁰⁴ Moreover, studies have shown that in the context of high-conflict marriages, children of divorced parents have been better off than children of parents who have remained married.¹⁰⁵ 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. 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.¹⁰⁶ The

¹⁰² See *id.* at 145 ("Unstable sources of parental income are the major determinant of children's removal from their parent's custody, while the severity of child maltreatment is not as strong an indicator.").

¹⁰³ See 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, 101 (E. Mavis Hetherington ed., 1999) (concluding children of low-conflict families are more adjusted than those of high-conflict families); Paul. R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 *PSYCHOL. BULL.* 26, 38 (1991) (comparing children in intact, high-conflict families with children in divorced families and concluding those in intact, high-conflict families exhibited lower levels of well-being); Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1134 [https://perma.cc/9543-KY58] (last updated 2007) (stating that "[e]nthusiasm 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 that "[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" (citations omitted)).

¹⁰⁴ See, e.g., David Finkelhor, *The Victimization of Children: A Developmental Perspective*, 65 *AM. J. ORTHOPSYCHIATRY* 177, 188–89 (1995) (discussing the field of childhood victimization); Janet R. Johnston, *High-Conflict Divorce*, 4 *FUTURE CHILD.* 165, 171–76 (1994) (studying the effects of parental conflict on children); Daniel Siegel & Jennifer McIntosh, *Family Law and the Neuroscience of Attachment, Part II*, 49 *FAM. CT. REV.* 513, 514–17 (2011) (describing the effect of high-conflict relationships between parents on children).

¹⁰⁵ See Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 *SOC. FORCES* 895, 909 (1995) (indicating there are more adverse outcomes for children of high-conflict marriages that do not dissolve); Susan M. Jekielek, *Parental Conflict, Marital Disruption and Children's Emotional Well-Being*, 76 *SOC. FORCES* 905, 931 (1998) (highlighting findings that suggest parental divorce following high-conflict marriages can benefit a child's well-being); see also E. MARK CUMMINGS & PATRICK DAVIES, *CHILDREN AND MARITAL CONFLICT: THE IMPACT OF FAMILY DISPUTE AND RESOLUTION* 9 (1994) (finding that high levels of conflict affect childhood more than family structure).

¹⁰⁶ See, e.g., *INNOVATIONS IN INTERVENTIONS WITH HIGH CONFLICT FAMILIES* 41–45, 192 (Linda B. Fieldstone & Christine A. Coates eds., 2008) (documenting the harm to children caused by

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 to other co-parenting and caregiving contexts. 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.¹⁰⁷ 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 policymakers 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, particularly the primary caretaking parent with whom the child enjoys the most important bonds and attachment.¹⁰⁸ Building 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 caregiving."¹⁰⁹ She points to the importance of attachment, fantasy, and cognition as all being essentially dependent on these good-enough caregiver relationships.¹¹⁰ Dailey stresses the need to take into account that "the skills of adult autonomy derive from children's earliest

unresolved and ongoing conflict between parents, as well as providing information about high-conflict families, the effect on children, and the process of parenting coordination).

¹⁰⁷ Gregory 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." (emphasis added) (citation omitted)); Mar'ou Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIMONIAL LAW. 119, 134 (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." (footnotes omitted)).

¹⁰⁸ See GOLDSTEIN ET AL., *supra* note 29, at 9–16, 31–35.

¹⁰⁹ See Dailey, *supra* note 14, at 3; Dailey, *supra* note 29, at 2160 (indicating the "good-enough standard" is characterized by ordinary successes and failures of human relationships).

¹¹⁰ Dailey, *supra* note 14, at 3, 7–9; Dailey, *supra* note 29, at 2150.

relationships with caregivers,” and that children should have a right to a good-enough caregiver relationship, in order to best achieve liberal autonomy upon reaching adulthood, thus best preserving the liberal principles of the state.¹¹¹ 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 new framework focuses on children’s unique capacities, relational experiences, and future autonomy interests.”¹¹² Dailey focuses on children’s rights to maintain relationships, to be free of corporal punishment, and to have an abortion, based on psychoanalytical forces at work within children.¹¹³

This psychological account attesting to the importance of children’s interpersonal relationships for their development has practical implications. 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.¹¹⁴ Promoting these bonds should extend beyond those based purely on genetics, recognizing children’s independent interests in ongoing relationships with non-parental figures with whom they have “primary caregiving relationships,” including those with other relatives, foster parents, and stepparents.¹¹⁵ She argues these primary relationships with caregivers, from a children’s psychological perspective, need to be maintained even where children are at risk and relationships are flawed, with removal being the last resort.¹¹⁶

Other influential studies also support children’s need for relationships. Sara S. McLanahan and Irwin Garfinkel, focusing on children born outside of marriage, conducted empirical research on the well-being of children from birth until nine years old.¹¹⁷ The study was intended to consider how children born out of marriage are affected by the lack of a traditional nuclear family.¹¹⁸ The study found that indeed, children born outside of marriage fare worse than children of intact marriages in a number of different areas.¹¹⁹ They are less well-off physically, in regard to obesity and asthma, and mentally, in terms of academic achievement.¹²⁰ The authors

¹¹¹ Dailey, *supra* note 14, at 12.

¹¹² *Id.*

¹¹³ *Id.* at 13–17.

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.* at 13.

¹¹⁶ *Id.* at 14.

¹¹⁷ Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS 142, 144 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 149.

¹²⁰ *Id.*

cite four phenomena behind these differences: “(1) [lower] parental resources . . . ; (2) [less stable] parental relationships . . . ; (3) [lower] parental investments in children . . . ; [and] (4) [poorer] child outcomes.”¹²¹ 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.¹²² Instability in parental relationships, they argue, “reduces children’s life chances by increasing stress and uncertainty and undermining parental investments.”¹²³ The authors suggest that the normative implications of their study are to make direct investments in children, in the form of health and educational services, and by making parents and families more economically and socially secure.¹²⁴ 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 designed to educate and improve parents’ relationships with each other and with children.

D. *Children’s Needs in Legal Context*

Based on such studies, money, low conflict, and maintenance of relationships should be viewed as central tenets of supporting children’s well-being. However, while current family law has clearly been influenced by children’s need for money, 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 a focus on financial stability. Emphasis on collaborative divorce and no-fault divorce, with a 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.¹²⁵

On the one hand, the strong preference for parental privacy rights ensures the parent-child relationship, which is often the most important relationship for children.¹²⁶ Moreover, modification standards in custody

¹²¹ *Id.* at 149–50.

¹²² *Id.* at 150–51.

¹²³ *Id.* at 151.

¹²⁴ *Id.*

¹²⁵ See, e.g., *Braiman v. Braiman*, 378 N.E.2d 1019, 1020–21 (N.Y. 1978) (discussing the positives that come with joint custody for a divided family); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000) (discussing the benefits of collaborative lawyering for reducing litigation and conflict in family disputes).

¹²⁶ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (implicating the existence of a constitutional right of a custodial parent to make decisions regarding the care of their children); see also Appell, *supra* note 54, at 703–04 (discussing a parent’s constitutional right to primary control over child rearing).

decisions are usually more stringent than initial custody disputes, demonstrating a focus on relationship stability.¹²⁷ On the other hand, however, legal principles are only beginning to recognize the ways that numerous simultaneous relationships can provide necessary emotional and physical support to children and that there are situations when biological parents are not the primary caregivers with whom children bond.¹²⁸ From a child's perspective, if the bond to a caregiver is strong, it can certainly warrant preservation above a parent's objection.¹²⁹ Moreover, if relationships are central to children's well-being, the state largely fails to support those relationships in a proactive manner while they are ongoing, providing instead parental privacy rights and then de facto relief to children only after relationships break down.¹³⁰ Further, for the most part, parental relationships that have been terminated due to incapacity or voluntary termination become completely irrelevant post-termination despite ongoing attachments.¹³¹ Even modification standards are gradually becoming more flexible and reverting back to the more amorphous and

¹²⁷ See ALASKA STAT. ANN. § 25.20.110(a) (West 2015) (declaring an award of child custody or visitation can be modified, if in a child's best interest, due to a change in circumstances); WYO. STAT. ANN. § 20-2-204(c) (West 2015) ("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 . . ."); JUDITH AREEN ET AL., *FAMILY LAW* 948 (6th ed. 2012).

¹²⁸ See, e.g., Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 19–20 (2008) (examining the advantage of extending parental status recognition to those currently called third parties or legal strangers); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314–17 (2007) (comparing the legal rights of parents with those of third parties and arguing for the broadening of the category of those who qualify for parental recognition); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85–94 (2004) (addressing the American legal system's current view of a family and arguing for an expansion from the exclusive family system, which relies solely on the nuclear family for complete childcare); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 74 (2007) (discussing the recognition of community parenting); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 421–23 (2013) (advocating for the rights of functional parents, those who function in parental roles despite having no legally recognized parental status, in a manner differentiated with formal parenting rights); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 455 (2008) (discussing a conscious attempt by scholars to address the changing composition of the American family in light of the current legal construction of caregiving, which treats nonparents as strangers).

¹²⁹ Dailey, *supra* note 14, at 13–14.

¹³⁰ See *infra* Part IV.A (arguing for the development of legal rules supporting ongoing child relationships).

¹³¹ See Dailey, *supra* note 14, at 14 (indicating children have an existing interest in maintaining their relationship with a parent even when parents have previously forfeited this right); see also Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 130–36 (2010) (suggesting that relationships with biological parents post-adoption are worthy of legal protection).

contestable best interests standard.¹³² Also, the need for ongoing relationships has been increasingly deemphasized in light of other interests within a broad “best” interests analysis, including a focus on children’s and adults’ civil rights, as well as state interests.¹³³

Instead of focusing on supporting children’s care relationships, children’s rights advocacy has been mainly focused on supporting the individual child. Such interests are served by focusing on a child’s individual well-being through a best interests standard and viewing relationships mainly through the lens of state or parents’ stewardship.¹³⁴ 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. In the next Part, I will discuss, in greater depth, the law’s treatment of those individualistic rights and interests, and thereby expose the shortcomings in advocacy on behalf of children. I will then introduce the relational rights theory and explain how it can better support children’s relationships.

III. FROM AN INDIVIDUALISTIC TO A RELATIONAL PERSPECTIVE ON CHILDREN’S RIGHTS AND INTERESTS

In this Part, I will develop a theory of relational rights that can better support the relationships children need as compared to an individual account of children’s rights. I will first explore the nature of the individual rights and interests at stake—children’s rights, parental rights, caregiver rights, and state interests. Through the exploration of the individual rights and interests at stake, I will expose the shortcomings of modern law’s focus on individual rights and interests in the context of children’s advocacy by describing how such individualism fails to heed the importance of supportive relationships. In particular, I will analyze the limitations of focusing on individual rights as opposed to relational rights by: (i) demonstrating how relationship-based rights better support the transitional nature of childhood than individualistic rights; (ii) describing the intertwined nature of children and their parents and caregivers, which cannot be properly accounted for through individualism; and (iii) showing how viewing state interference as a threat to parental privacy misses the

¹³² See, e.g., ALA. CODE § 30-3-169.4 (2015) (declaring a rebuttable presumption that relocating is not in the best interest of the child); MINN. STAT. ANN. § 518.175 (West 2015) (necessitating a court order or consent from the other parent in order for a custodial parent to relocate with their children); IDAHO CODE ANN. § 32-717(1) (West 2015) (providing that a finding of changed circumstances is not required for custody if an original custody decree was a matter of stipulation and not litigation, as are most custody arrangements).

¹³³ See Laufer-Ukeles, *supra* note 18, at 22–33 (discussing the ways that implementation of the children’s best interests standard results in undervaluation of children’s relational attachments).

¹³⁴ See *supra* text accompanying notes 49–52.

ways in which the state and parent are jointly responsible for a child's well-being. I will then introduce group rights and relational rights as alternatives to relational rights, contrasting the deficiencies of individualistic rights with the way relational rights can improve advocacy for children. I will demonstrate how relational rights support the relationships that children need and better capture the relational realities of children's lives.

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

1. *Children's Rights: Caught Between Individualistic and Relational Rights*

This Article does not advocate for relational rights as opposed to individualistic rights in order to strengthen parental rights.¹³⁵ Indeed, the standard argument against a fully child-centered vision of custody is that parental and societal interests should be balanced with children's individual rights when determining custody arrangements. Thus, for instance, in *Palmore v. Sidoti*, the state's distaste for considering third-party discrimination is taken into account;¹³⁶ and in *Troxel v. Granville*, parental rights are used to disqualify a completely child-centered best interest standard.¹³⁷ 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. Viewing a child as an individual misses the fundamental interdependent context of a child's life. Indeed, only through a relationship-focused perspective can children's rights be accurately calibrated, and parent and state interests be appropriately limited.

The current law protecting children is dominated by reliance on best interests of the child analyses, which are individualistic in that they attempt to focus on what is best for an individual child. Such individualistic inquiries separate parental rights and state interests from children's rights. Focusing on rights as individualistic is consistent with the Western liberal

¹³⁵ Discussion of the importance of parental rights is outside the scope of this Article. For discussions of the parental rights doctrine, see Appleton, *supra* note 5, at 540–41; Woodhouse, *Hatching the Egg*, *supra* note 1, at 1810–12 (critiquing conventional doctrine as being too “adult-centric,” perpetuating the notion that caregivers have a property right in children, and emphasizing personal autonomy over an interdependent, community-based approach to child welfare).

¹³⁶ See *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (holding racial classification alone cannot justify the state removing an infant from the custody of its otherwise fit mother).

¹³⁷ See *Troxel v. Granville*, 530 U.S. 57, 60–61, 66 (2000) (describing the right of parents to “make decisions concerning the care, custody, and control of their children” as fundamental even against third parties who have a longstanding relationship with the children).

tradition of considering human rights and liberty rights to be personal, individualistic rights.¹³⁸ As Martha Minow explains, the dominant narrative of the relationship between the individual and society in the United States is that autonomous individuals have rights against the state and also are responsible for their own actions.¹³⁹ In the egalitarian liberal tradition, this individualistic perspective is true for all conceptual depictions of rights, including children's rights.¹⁴⁰ For the most part, in our liberal tradition, rights belong to the individual person, not to a group of persons or to a community.¹⁴¹

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,¹⁴² 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.¹⁴³ Indeed, children's rights are held up as an alternative to and in opposition with parental rights.¹⁴⁴ Instead, it is argued that only children's welfare is relevant when children's well-being is involved.¹⁴⁵ Many children's rights advocates see a clear 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.¹⁴⁶

¹³⁸ See, e.g., *Eisenstadt v. Baird*, 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."); David Engel, *Concepts of Rights: Introduction*, 28 LAW & SOC'Y REV. 489, 489 (1994) (contrasting the Western liberal tradition of promoting individual rights with the concept of group rights prevalent in Southeast Asia). For a discussion describing the stratification amongst liberal scholars on fundamental rights, see Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 231 (1988).

¹³⁹ Minow, *supra* note 9, at 16.

¹⁴⁰ See NEDELSKY, *supra* note 29, at 5–9 (describing the individualistic nature of liberal rights); Minow, *supra* note 9, at 15–16 (tracking the origin of competing views of individual rights).

¹⁴¹ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 11 (1971) (focusing on the individual as the rights-holder in moral discourse); see also Minow & Shanley, *supra* note 32, at 16–18 (describing the issues that arise when applying individual rights concepts to family law).

¹⁴² See *supra* note 39 and accompanying text.

¹⁴³ Minow, *supra* note 9, at 19 (describing "instances of state action penetrat[ing] the traditionally private sphere of family and construct[ing] a direct relationship between the child and state," thereby excluding the parent).

¹⁴⁴ See, e.g., Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 138 (2009) (noting that, while the interests of the state, the child, and the parent may occasionally be aligned, more often they diverge); Zug, *supra* note 56, at 1161–64 (arguing that, though parental rights may have ancillary benefits for children, the doctrine is more concerned with ensuring "parents do what is best for parents").

¹⁴⁵ See, e.g., DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 130 (arguing that "[t]he correct thing to do is stay focused on the child").

¹⁴⁶ See *id.* at 128–30

Barbara Bennet Woodhouse expresses an individualist perspective on children in her “generist” formulation:

Generism would place children, not adults, firmly at the center and take 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.¹⁴⁷

Although Woodhouse values children’s needs for relationships, she is concerned that protecting children within their relationships will result in “avoid[ing] adult guilt and enhance adult freedom, without necessarily meeting children’s needs for care.”¹⁴⁸ Susan Appleton also argues that relationship-based accounts of children’s rights may miss the changing needs of children throughout their development, forcing them to be stuck in static relationships.¹⁴⁹

Indeed, fear of the way relationships may swallow the needs of children has prevented sufficient consideration of the centrality of those relationships and their need for support. I would argue, however, that in fact a relational perspective is more able than an individualistic account of children to reflect children’s development and increasing independence. From an individualistic perspective, a child either does or does not have certain rights, regardless of their age. Except for the right to be heard, which develops as a child matures, children’s civil rights, rights to relationships, and the right to care span from birth until majority. Relationships, however, are not static. While relationships are essential in harboring children’s development,¹⁵⁰ as a child matures and becomes less dependent on relationships, the harm to the relationship caused by state interference is lessened and individualism becomes stronger. Relationships should not be viewed as static, but as developing with children’s autonomy and independence.¹⁵¹ As autonomy and independence develop, less emphasis can be given to the need to respect that relationship and state interference can be more readily justified. As children transition to majority, a different balance between individualistic rights and relational rights can be justified. Adjusting children’s rights to account for a child’s increasing independence for relationships will be set out in the relational context in Part IV.C in which the civil rights of children are discussed, as

¹⁴⁷ Woodhouse, *Hatching the Egg*, *supra* note 1, at 1815.

¹⁴⁸ *Id.* at 1822.

¹⁴⁹ See Appleton, *supra* note 5, at 544.

¹⁵⁰ *Id.*

¹⁵¹ See Dailey, *supra* note 14, at 13–15 (emphasizing the transitional, non-static nature of children’s relational lives).

well as in the remainder of Part IV where older children's voices are given more weight in countering relational interests.

Despite the fact that it is logical that the historical development of children's rights are in opposition with parental rights, children's needs cannot be sufficiently accounted for without considering their parents' rights because their needs and interests are intertwined with adult care. Such care and development are the most important interests children have. The intertwined nature of parental and children's rights will be further developed in the forthcoming parts on parental and caregiver rights. First, I will describe the difficulty in evaluating parental privacy rights and parental choices apart from the impact of such choices on children, which complicates states' determinations of when to interfere and punish parental choices. Second, I will analyze the way caregivers' and children's well-being are essentially intertwined, making a state's desire to support children dependent on support for caregivers.

2. Parental Privacy Rights: Difficulty in Discerning Actions on Behalf of Children and Actions on Behalf of the Self

Parental rights are strong, although they are not as strong as they once were.¹⁵² The privacy interests involved in being raised by one's own parents are still part of a children's rights analysis, even in the context of a broad best interests inquiry.¹⁵³ From the children's advocacy perspective that this Article takes, the question is not whether parents have a right to do what they wish with their children, but what power balance between state interference and parental privacy rights best serves children.¹⁵⁴ While some argue that parental choices should almost always be assumed to be in a child's best interests,¹⁵⁵ 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.¹⁵⁶

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.¹⁵⁷ Given the subjective and indeterminate nature of

¹⁵² See *supra* text accompanying notes 46–48 (describing how children were once treated more like property than persons).

¹⁵³ See *supra* text accompanying notes 101–05; see also Laufer-Ukeles, *supra* note 18, at 257–60 (describing and criticizing the best interests standard).

¹⁵⁴ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 4 (describing the central thesis of “what children are morally entitled to as against the state”).

¹⁵⁵ See *supra* text accompanying notes 49–51 (describing the perspective that promotion of parental discretion is what is best for children).

¹⁵⁶ See *supra* text accompanying notes 52–60 (describing the perspective that the interests of caregivers and children are not always aligned and, thus, worthy of greater state intervention).

¹⁵⁷ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that “the First and Fourteenth Amendments prevent the State from compelling [parents] to cause their children to attend formal high school to age 16” when such a practice would burden the free exercise of religion).

optimization of the different perspectives on the best ways to 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.¹⁵⁸ There are also parental choices that are not related to how to raise children, but rather are more about parents' "selfish" desires.¹⁵⁹ This second variety of parental choice involves 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 that can bring more stability and security to the parent and child and can also be a job that is preferable to the parent for career advancement. A parent can increase religious commitment both for his own and his children's benefit. 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 partly about what is best for the parent.

The third kind of parental choice regarding children is one made without any consideration of children, or done in spite of what a parent 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 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, and so forth—all choices that may not be in the interests of the child but would be short of abuse and neglect.

Parental choices, whether selfish or instead about their children, are taken 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 how, under a relational theory of rights, parental decision-making can be judged in a contextual, relationship-sensitive manner. But, it is clear that under an individualistic framework, the art of judging parental choices, determining whether they are made with children's interests taken into account or not, and either punishing parents or interfering in such choices based upon a best interests analysis is complex, particularly without considering the effects of such interference

¹⁵⁸ *E.g.*, Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4 (1996) (discussing benefits of cultural and religious diversity).

¹⁵⁹ See DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 130–34.

on children and their relationships, and arguably too nuanced for a typical state arbiter of children's well-being.

3. *Caregiver Rights: The Intertwined Nature of Caregiver and Child Well-Being*

Parents' rights and interests are directly relevant to discussing children's rights because they are often, if not always, 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 care giver are somehow irrelevant in the best interests calculus.¹⁶⁰

But there are also caregivers who are not legal parents of children.¹⁶¹

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.¹⁶² 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.¹⁶³ Caregivers, particularly primary caregivers, inhibit their own market work in order to provide necessary care and therefore their religious, geographical, and personal needs, as well as their physical safety, cannot be completely separated from a child's needs and interests.¹⁶⁴ Such interdependency can be seen to compromise the individuality of the caregiver¹⁶⁵ and minimize

¹⁶⁰ Woodhouse, *Hatching the Egg*, *supra* note 1, at 1824.

¹⁶¹ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000).

¹⁶² See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 106 (2005) (discussing the interdependency of children and caregivers).

¹⁶³ See Minow, *supra* note 9, at 14 (noting that the concept of children's rights has been viewed as being intertwined with the rights of the caregiver).

¹⁶⁴ See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 2–10 (2002) (discussing how care for children compromises market work).

¹⁶⁵ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 25–26 (1995) (“The presence of children creates dependency not only because children are themselves dependent, but also because the person who assumes primary care for them becomes dependent on social and other institutions”); SUSAN MOLLER OKIN,

the independent needs of the child.¹⁶⁶ Interdependency, however, is a reality and recognizing such interdependence is more important in supporting children's rights than symbolic gestures.¹⁶⁷

Therefore as a matter of logic and sheer practicality, it is increasingly evident that children's rights cannot be promoted without advancing caregiver rights: "Policymakers 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."¹⁶⁸ 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.¹⁶⁹

It is not enough to pit parental rights against children's rights and punish parents who do a less than optimal job—those who are not "the best." There are not enough parents for children in need; the foster care system is expensive and overwhelmed.¹⁷⁰ Parents who are trying to provide

JUSTICE, GENDER, AND THE FAMILY 139 (1989) (discussing the vulnerability of women in primary caretaking roles both economically and socially).

¹⁶⁶ See generally FINEMAN, *supra* note 162 (discussing how autonomy is impossible for interdependent caregivers and for children in need of care).

¹⁶⁷ ROBIN 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.").

¹⁶⁸ Woodhouse, *Destruction and Promise*, *supra* note 11, at 512; see, e.g., EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY (1999); Martha C. Nussbaum, *The Future of Feminist Liberalism*, in THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 186, 188 (Eva Feder Kittay & Ellen K. Feder eds., 2002) (positing that while "atomist liberalism relies on the 'fiction of competent adulthood,' . . . [r]eal people begin their lives . . . in a state of extreme, asymmetrical dependency, both physical and mental, for anywhere from ten to twenty years"); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 16–21 (1999) (arguing that caretaking is a societal debt that faces inadequate economic and structural support); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 779, 788 (1997) (advocating that the state has a societal interest in ensuring that the family play a central role in proper child rearing and moral development for children); Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 Hous. L. REV. 817, 824 (2009) [hereinafter Woodhouse, *A World Fit for Children*] ("A paramount consideration is the bond between child and caregiver, without which children cannot learn to grow. The ability to grow and flourish depends on an environment that is fit for both children and their caregivers.").

¹⁶⁹ See, e.g., Mary Lyndon Shanley, *The State of Marriage and the State in Marriage: What Must Be Done*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 188, 200 (Anita Bernstein ed., 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.").

¹⁷⁰ See Patricia Chamberlain et al., *Enhanced Services and Stipends for Foster Parents: Effects on Retention Rates and Outcomes for Children*, 71 CHILD WELFARE 387, 388 (1992) ("Not only is

good care need financial and legal support for their efforts.¹⁷¹ The United States has lagged behind other countries in recognizing rights that extend beyond individuals and relies on privacy and individuality to protect children's needs.¹⁷² But, as Woodhouse suggests, "Americans must face the fact that these concepts are considered foundational in most of our peer nations."¹⁷³ The American focus on individual rights in family law and beyond impedes the United States' ability to ensure sufficient care for dependents, which is based on interdependency as opposed to individuality.¹⁷⁴ We must move from oppositional, individualistic accounts of children's rights and parental rights—or children's rights and state rights—to a mutually supportive framework that affirmatively protects caregivers and the children for whom they care. Support for caregivers is at the heart of support for children. Support for caregiver relationships is the core tenet of the relational theory and the guidelines I derive from that theory as discussed in Part IV.

4. *State Interests: State Interference vs. State Responsibility*

While states do not have rights, states do have interests that justify interference in parental relationships with children. These interests can involve a third party's desire to access children, parental behaviors, the state's interest in educating children, or society's interest in not allowing the state to condone discrimination, but also can involve the protection of children and the advancement of their interests.¹⁷⁵ Sometimes the state interferes with parental relationships for reasons that explicitly are not related to a particular child's circumstances.¹⁷⁶ For instance, the state has

recruiting good foster homes difficult, but the foster parents who currently provide care are dropping out at alarming rates."); Nolan Rindfleisch et al., *Why Foster Parents Continue and Cease to Foster*, 25 J. SOC. & SOC. WELFARE 5, 6 (1998) ("Nationally, there has been a crisis in child protection service prompted by a shortage of suitable foster family homes able to provide safe and supportive care when children must be placed away from their own homes."); 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) ("[T]here is concern that the foster system may not be growing at a pace that can provide the necessary capacity to meet this [growing] need.").

¹⁷¹ Shanley, *supra* note 169, at 200.

¹⁷² *See id.* ("In placing the costs of care on the family, the United States departs from the practice of other industrial democracies, in which the state assures some floor of social good in each citizen.").

¹⁷³ Woodhouse, *A World Fit for Children*, *supra* note 168, at 850.

¹⁷⁴ *See id.* at 832–33 ("Our failure to see the child in the ecological context also leads to the conceptual (and, too often, the 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* Minow, *supra* note 9, at 2 ("[W]e need to develop a perspective on children's rights that refrains from comparing the abilities of children and adults and instead addresses their mutual needs and connections.").

¹⁷⁵ Zug, *supra* note 56, at 1150–53.

¹⁷⁶ *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."); Zug, *supra* note 56, at 1172–

an interest in not deporting its citizen-children born to undocumented immigrants in order to educate its own citizens.¹⁷⁷ Other times, the state argues that it acts in a child's best interests, for example, when terminating the relationship between children and parents accused of abuse and neglect.¹⁷⁸ 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.¹⁷⁹ In the parental termination situation, the state may also take into account the need to simplify the adoption process and to make children more attractive to adoptive parents.¹⁸⁰

In other circumstances, the state is fully responsible for the care of children after parental termination or when children are in the foster system or welfare system. The state then becomes legally responsible for the child's care, although it must outsource that care to institutions or to other private families. In such circumstances, the state's own deficiencies may affect children—when there are insufficient social workers to track children's welfare, insufficient funds to support a “good-enough” child welfare system, and insufficient funds to monitor foster homes.¹⁸¹ The state's interests and resources thereby become inextricably intertwined with children's needs and parental well-being. The state is dependent on the functioning of good enough parents to take care of children or else the state becomes responsible for systems that are imperfect. The state needs parents to care for children and has an interest in ensuring that children develop into good and productive citizens. Upon the failure of parental care, the state must take full responsibility for children's well-being.¹⁸² Thus, when it comes to caring for children, the state, parent, and child have interests that are very much intertwined.

Due to this reality, instead of focusing on parental rights to be free of state interference or the responsibility of the state to interfere with or punish parental actions or children's rights to be raised by parents without state interference, focusing on how the state can best help children within their caregiving relationships is essential. The state is a reluctant, non-ideal

73 (arguing that the government has an interest in not deporting citizen children along with undocumented immigrant parents).

¹⁷⁷ Zug, *supra* note 56, at 1172.

¹⁷⁸ Dwyer, *Parents' Self-Determination*, *supra* note 10, at 120; see Zug, *supra* note 56, at 1172.

¹⁷⁹ 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, 386–87 (1996) (providing “comparative costs” and the “greater appeal” of traditional adoption to adoptive parents as two reasons why the state may prefer terminating parental rights to facilitate adoption over foster care).

¹⁸⁰ *Id.* at 387.

¹⁸¹ See *supra* note 156.

¹⁸² See Dwyer, *Parents' Self-Determination*, *supra* note 10, at 123–26 (explaining how states assume a role of “*parens patriae*” on behalf of the child in situations where parents are unable to properly care for the child).

child caregiver.¹⁸³ Thus, the state must work as a partner with parents to care for children—not simply wait for parents to fail and assume custody. The state and parents need to work in unison, without threat to the parents of state interference and judgment or parents fighting to keep the state at bay. For children in particular, the view of state interference as a violation of individualistic liberty and privacy misses the ways that children are partially and potentially fully dependent on the state and how parental rights, state interest, and children's rights are interrelated. Therefore, in Part IV, the relational theory and the principles I derive therefrom will discuss how short of demonstrated abuse and neglect, state interaction with parents should focus on direct or indirect support of parental care relationships as opposed to threats of termination, interference, punishment, or judgment of parental actions.¹⁸⁴

B. *Group and Relational Rights and Interests*

In the previous parts, I described the nature and shortcomings of an individualistic conception of children's rights and interests as opposed to an account of rights focused on relationships. In this Part, I will develop this perspective on relational rights by detailing what a relational framework of rights entails and clarifying what relational rights are not.

1. *Group Rights*

Rights to individual autonomy cannot fully capture the nature of children's lives: children's dependence on caregiving relationships, state and parent interdependency, and children as transitional beings, emerging from dependency on others.¹⁸⁵ Private, individual rights cannot be realized if they are highly dependent on the cooperation and actions of others. Thus, for instance, the right to coital reproductive privacy¹⁸⁶ is different than the right to reproduce using surrogacy in which third parties and their interests

¹⁸³ See *id.* at 122–23.

¹⁸⁴ See, e.g., Dwyer, *RELATIONSHIP RIGHTS*, *supra* note 1, at 258–62 (describing at-risk scenarios where parents without demonstrated abuse and neglect would have to demonstrate their rights to obtain custody of their children); James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 465–66 [hereinafter Dwyer, *Jailing Babies*] (arguing that the current prison nursery practices are unconstitutional and that states should discontinue their use); Dwyer, *Parents' Self-Determination*, *supra* note 10, at 82 (suggesting, to protect children from parental discretion, judgment and punishment of parents for their bad behavior).

¹⁸⁵ See Minow & Shanley, *supra* note 32, at 16–17.

¹⁸⁶ See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that the right to privacy includes the right to reproductive choices); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that forbidding the use of contraceptives is a violation of the right to privacy and, therefore, unconstitutional).

must be considered and upon whom the private right to reproduce is dependent.¹⁸⁷

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,¹⁸⁸ children's rights provide an ideal focus of the need for an expanded view of rights, since "[c]hildren, even more than adults, illustrate the dilemmas of freedom-within-community. . . . For children, connection to others is a precondition to autonomy and individuality."¹⁸⁹ 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 an understanding of children's interests.¹⁹⁰ Other scholars point to family rights as an ideal application of such group rights.¹⁹¹

¹⁸⁷ JANET L. DOLGIN & LOIS SHEPHERD, *BIOETHICS AND THE LAW* 193 (2005); Dena S. Davis, *The Puzzle of IVF*, 6 *HOUS. J. HEALTH L. & POL'Y* 275, 286 (2006); see also Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 *UCLA L. REV.* 1077, 1117 (1998) (discussing other rights interests besides the parents' rights to reproduce in the context of assisted reproductive technologies). But see JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 30 (1994) (including the right to use assisted reproductive technologies as part of the right to reproduce).

¹⁸⁸ See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 136 (1991) ("The lack of a well-developed discourse about civil society has made it easy for Americans to overlook the costs exacted by the modern state and the market on the family and its surrounding communities of memory and mutual aid."); JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2010); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 70 (1993) ("[P]ersonhood is involved for the members of each group primarily in the claim of freedom of association whether or not the group's claim involves property. . . . [G]roup cohesion may be important or even necessary to personhood."); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *CARDOZO ARTS & ENT. L.J.* 175, 178 (2000) ("[O]nly a group rights model of ownership of intangible property will adequately protect the works of indigenous peoples from an ever-encroaching dominant society.").

¹⁸⁹ Woodhouse, *Destruction and Promise*, *supra* note 11, at 498; see also Minow & Shanley, *supra* note 32, at 5–6 ("[P]olitical theory and family law alike must embrace these paradoxes in their entirety, regarding people simultaneously as individuals and as persons deeply involved in relationships of interdependency and mutual responsibility, and regarding families both as private associations and as entities shaped by social policy and state action."); Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 *U. FLA. L. REV.* 627, 630 (1987) (arguing for support for family rights alongside individual rights and, when the rights of individuals in the family conflict, for the weaker and more vulnerable party's rights to prevail).

¹⁹⁰ See Woodhouse, *Destruction and Promise*, *supra* note 11, at 501–03 (explaining that, with an increased amount of children who lack a traditional family structure, informal communities can help aid this crisis).

¹⁹¹ See Rutherford, *supra* note 189, at 630 (advocating for "a new theory of family rights suggesting that fundamental family rights belong both to the family as a group and to each family member individually").

Promoting the rights of a community is not the same as promoting relationships, as will be discussed in further detail below. 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, and there is no reason that a community or other groups cannot be stakeholders in such rights. For instance, Jane Rutherford argues that families should have rights as units and that only when caregiver and children's rights conflict should children's rights prevail because they are the more vulnerable parties.¹⁹²

2. *Relational Rights and Interests*

A system of relational rights to replace individualistic rights has been promoted by Jennifer Nedelsky,¹⁹³ among others.¹⁹⁴ Relationship-based rights take seriously the nature of relationships and the state's affirmative obligation to support relationships that provide valuable care to children. The relational perspective is different from a focus on individual caregiver rights because it focuses more broadly on evaluating and supporting the role of relationships in the law.¹⁹⁵ Likewise, the relational perspective on children's rights is distinct from the right to relationships and 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 grandparent, despite parental objections.¹⁹⁶ 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; they are about the responsibility of the state to

¹⁹² *Id.*

¹⁹³ See generally NEDELSKY, *supra* note 29.

¹⁹⁴ See, e.g., Minow & Shanley, *supra* note 32, at 23 ("Relational rights and responsibilities should draw attention to the claims that arise out of relationships of human interdependence."); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1229-32 (1998) ("Conceiving of marriage as a relational contract does not undermine the normative goals of mutual commitment and relational stability."); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1825-39 (1998) (discussing relational rights and duties in tort law); Herring, *supra* note 37 (applying the concept of relational autonomy to family law generally); C. Harry Hui, *Measurement of Individualism-Collectivism*, 22 J. RES. PERSONALITY 17, 17-19 (1988).

¹⁹⁵ See NEDELSKY, *supra* note 29, at 245 ("The human interactions to be governed are not seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationships 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.")

¹⁹⁶ See, e.g., Dailey, *supra* note 29, at 2166-67 (discussing different instances in which children's independent right to maintain caregiving relationships comes into play); see also DWYER, *RELATIONSHIP RIGHTS*, *supra* note 1, at 11-12 (arguing for the rights of children to have relationships with third parties).

protect and support relationships in order to protect and support individual interdependent children and caregivers.¹⁹⁷ The relational perspective does not subvert individualism to community or group rights.¹⁹⁸ The rights derive from the individual children's rights and flow to support the relationships themselves.¹⁹⁹ This complex perspective of individual rights within the community allows individuals to be protected within the context of the relationships that sustain them.

The overarching premise of relational rights is that individual rights can be sufficiently protected only by protecting relationships, as opposed to protecting individual freedoms in isolation from others.²⁰⁰ Moreover, the relational perspective is different from individualistic accounts of children's rights that factor in the importance of relationships because according to the relational perspective, relationships are not just one factor to be weighed into an individual account of children's best interests. Rather, a relational perspective prioritizes and centralizes the importance of relationships in a children's rights inquiry, reframing the nature of rights as one to have those relationships supported as opposed to rights to individual liberties. Nedelsky argues that rights cannot be secured without developing autonomy through the fostering of relationships: "If we ask ourselves what actually enables people to be autonomous it is not isolation but relationships—with parents, teachers, friends, loved ones—that provide the security, education, nurturing, and support that make the development of autonomy possible."²⁰¹

The relational perspective shifts the focus of rights from the prevention of state interference with individual freedoms to the placement of positive duties on the state to set preconditions for healthy, beneficial relationships.²⁰² The goal of the relational approach is to consider what kind of laws and norms help structure relationships that work.²⁰³ Viewing 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

¹⁹⁷ See Minow, *supra* note 1, at 1882 (discussing the way rights create duties upon the state).

¹⁹⁸ NEDELSKY, *supra* note 29, at 87–88 ("A relational approach to rights and to understanding human selves and values is desirable. Nevertheless . . . the idea of unique and immeasurable value of each individual remains helpful.").

¹⁹⁹ See *id.* at 22; see also WEST, *supra* note 167, at 93–95 ("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.").

²⁰⁰ Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 8 (1993).

²⁰¹ NEDELSKY, *supra* note 29, at 124.

²⁰² Minow, *supra* note 9, at 23 (arguing that the juvenile courts should have the ability to use resources and benefits for youth and their caretakers, including "public support benefits, homemaker assistance, day-care volunteers, and job training").

²⁰³ NEDELSKY, *supra* note 29, at 32.

state goes against the very nature of liberty and freedoms that set the basis for U.S. constitutional freedoms.

Nedelsky asks us to build these positivist state obligations from the starting point of interconnection in lieu of isolation.²⁰⁴ She argues that individualistic autonomy and rights fundamentally miss the extent to which it is one's relationships to others that allows us to "become who they are—their identities, their capacities, their desires—through the relationships in which they participate."²⁰⁵ She criticizes individualistic accounts of rights and autonomy; identities and capacities, she argues, are not comprehensible in isolation from their relationships.²⁰⁶ Nedelsky urges that in any debate about rights that we should consider: (i) what conditions, including law, have structured the relations that generated the problem; (ii) what values are at stake; (iii) what kinds of relationships would foster those values; and (iv) how competing versions of a right would structure relations differently.²⁰⁷

Nedelsky's argument for a grand shift in our perspective on legal, political, and moral life goes beyond the realm of children's rights or family law.²⁰⁸ 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,²⁰⁹ children's rights are naturally interdependent and complex, and call for a nuanced relational perspective that focuses on the question of how the state should support the relationships essential to children's development. For children, it is certainly not sufficient to be left alone to pursue that freedom which 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.²¹⁰ Thinking of children's rights as relational rights solves this dilemma and captures the nature of children's rights in the context of dependency.

From this broad theory emphasizing the imperative that the law functions to support relationships, there are a number of clear theoretical principles that can be derived. First, a relational perspective does not

²⁰⁴ *Id.* at 55.

²⁰⁵ *Id.* at 4.

²⁰⁶ *Id.* at 5.

²⁰⁷ *Id.* at 236.

²⁰⁸ *Id.* at 3–4.

²⁰⁹ I make no judgment as to whether relational rights are appropriate outside the context of children's rights and family law dealing with children.

²¹⁰ See sources cited *supra* note 1 (discussing the relationship between rights and interests and outlining specific children's rights that ought to be recognized).

automatically view rights as confrontational.²¹¹ Although ultimately belonging to the individual and not the community, the law must seek to protect the individual within a collaborating community.²¹² As Martha Minow suggests, the question should not be whether parents have liberty rights in opposition to children's rights but rather, "what legal rules governing child custody, education and child support would promote settings in which children thrive? What rules promote parents' abilities to create these settings?"²¹³

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.²¹⁴ Therefore, this perspective facilitates the children's rights conversation because the perspective matches fluidly with the way children's experiences and needs develop as they mature. The theoretical description gracefully matches with the psychological perspective on children's development presented by Anne Dailey.²¹⁵

Third, relationships that support children are varied in character, but may, nonetheless, be 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 Kenneth Karst has called intimate associations."²¹⁶

However, are 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 not that all relationships are good.²¹⁷

²¹¹ NEDELSKY, *supra* note 29, at 77 (citing JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 33 (1994)).

²¹² *Id.* at 238 ("[T]he relational approach is not some sort of collective *alternative* to protecting and enforcing individual rights. It is rather a means of doing so.").

²¹³ *Id.* (citing Minow, *supra* note 1, at 1876).

²¹⁴ *Id.* at 124; see also Wanda Wiegers, *Fatherhood and Misattributed Genetic Paternity in Family Law*, 36 QUEEN'S L.J. 623, 627–28 (2011) (explaining that while the law cannot force relationships into being, it is advantageous for the law to use a methodology that takes into account the fact that individuals exist in relationships that are essential to their well-being and autonomy).

²¹⁵ See Dailey, *supra* note 14, at 3 (explaining that it is important that the law privilege "affective relationships over individual freedoms" because adult autonomy skills are rooted in early caregiving relationships); see also *supra* notes 114–22 and accompanying text (describing Dailey's analysis of psychological studies emphasizing children's reliance on relationships for their development).

²¹⁶ Minow & Shanley, *supra* note 32, at 23 (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 (1980)); see also Bartlett, *supra* note 28, at 315 ("We may also want to take account of the different degrees of relationship that have been formed.").

²¹⁷ NEDELSKY, *supra* note 29, at 32.

As Nedelsky explains, “[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.”²¹⁸ A relational approach to children *must* keep the potential harm of relationships in mind. Indeed, it is still the state’s obligation to terminate custodial relationships involving abuse, neglect, and parental unfitness. Nothing in the relational approach would change that safety net.²¹⁹ As Anne Dailey emphasizes, however, the argument is that children are dependent on “good-enough” relationships, not relationships that are in a child’s best interests, which are impossible to evaluate, involve too much state interference, and complicate and weigh on relationships that children need.²²⁰ At-risk relationships, falling between functional and abusive relationships, are the most sensitive and will be considered below.²²¹ But, it is only through an understanding of the nature of relationships that bad relationships can be evaluated and extinguished.²²² It is also through an understanding of the nature of relationships that good relationships can be restructured and supported.²²³

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 individuals.²²⁴ These perspectives, however, have not had a major influence on U.S. judgments, legislation, or legal scholarship.²²⁵ Indeed, the liberal individualistic position holds firm—rights belong to individual stakeholders and flow to individuals as well. The dominant discourse still involves the same arguments regarding the centrality of children’s interests in isolation from caregivers and parental interests and the oppositional nature of such rights remain in place.²²⁶ A number of explanations can be offered. First, liberal ideas of rights, liberty, autonomy, and individualism hold particularly strong in the United States and despite discussion of how children and

²¹⁸ *Id.*

²¹⁹ See Minow, *supra* note 1, at 1886 (explaining that expanding children’s rights does not prevent the state from intervening and providing a safety net in cases of parental abuse).

²²⁰ See Dailey, *supra* note 14, at 3 (noting that “good-enough” caregiving supports children’s special transitional rights and promotes the law constituting rather than controlling citizens).

²²¹ See *infra* notes 256–58, 260 and accompanying text (describing at-risk relationships between children and caregivers).

²²² NEDELSKY, *supra* note 29, at 32.

²²³ *Id.*

²²⁴ See Minow & Shanley, *supra* note 32, at 4–5, 20 (discussing the importance of acknowledging peoples’ individual and relational identities); Wieggers, *supra* note 214, at 627–28 (stating that a relational perspective on rights and responsibilities is important in all areas of law, but particularly in family law).

²²⁵ See Jonathan Herring, *Relational Autonomy and Family Law*, in *RIGHTS, GENDER AND FAMILY LAW* 259 (Wallbank et al. eds., 2010) (stating that the emphasis on autonomy in family law results in a focus on self-sufficiency and self-determination).

²²⁶ See *supra* note 53 and accompanying text (discussing the oppositional nature of the rights of children and caregivers).

dependency are different from such ideals, there is little desire to change the dominant position on rights.²²⁷ 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.²²⁸ But 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.²²⁹ 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.

In the next Part, I use the relational questions that Nedelsky argues must be asked to parse how a relational framework can promote children's rights and interests, as well as the general relational values developed by Nedelsky, Minow, and others to develop a specific set of guidelines for children's advocacy from a relational perspective. In my analysis of these guidelines, I rely on the relational theory as well as social science studies focusing on the need for financial support and low-tension environments in conjunction with ongoing relationships. The three guidelines I provide are: (i) focus on state support for ongoing good-enough relationships as opposed to the state threatening interference with the breakdown of relationships, particularly for at-risk families; (ii) state recognition and support of a varied multiplicity of care relationships; and (iii) in the context of seemingly conflicting positions between children's civil rights and state or parental interests, the state should balance relational rights with individualistic civil rights, giving more room for children to express their individualism as they mature.

²²⁷ See *supra* notes 148–51 and accompanying text (discussing the individualistic nature of rights in the Western liberal tradition).

²²⁸ See sources cited *supra* notes 205–06.

²²⁹ See Herring, *supra* note 37, at 48 (suggesting that a relational approach would require a case-by-case analysis).

IV. REFRAMING CHILDREN'S RIGHTS AS RELATIONAL RIGHTS

A. *Providing Ongoing Support for Dependent Relationships, Particularly At-Risk Relationships, as Opposed to Emphasis on the Threat of Interference if Relationships Breakdown*

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.²³⁰ 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.²³¹ 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 a 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,²³² but it is expensive and constrained by a shortage of good foster parents.²³³ As a result, social workers are overwhelmed.²³⁴

²³⁰ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1984) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (holding that a law compelling parents to send their children to public school until the age of sixteen was unconstitutional because it impermissibly interfered with Amish religious beliefs); *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998) (“Short 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*, 401 S.E.2d 417, 418 (Va. 1998) (holding that for “compelling state interest” to exist under the Fourteenth Amendment, justifying an order of visitation over the objection of the child’s parents, a court must find actual harm to child’s health or welfare without such visitation).

²³¹ See Dailey, *supra* note 14, at 14 (stating that the law should work to preserve child-caregiver relationships, with removal of the child from the caregiver as the last resort).

²³² See RICHARD GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* 163 (1996) (stating that group homes are more expensive for the state and are generally not appropriate for infants and toddlers); J. William Spencer & Dean D. Kundsén, *Out of Home Maltreatment: An Analysis of Risk in Various Settings for Children*, 14 CHILD. & YOUTH SERVS. REV. 486–87 (1992) (relating that in group homes there was more than ten times the rate of physical abuse and more than twenty-eight times the rate of sexual abuse as in the general population, in part because so many children in the homes abused each other).

²³³ Chamberlain et al., *supra* note 170, at 387 (“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.”); Rodger et al., *supra* note 170, at 1130 (“[T]here is

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.²³⁵ Child welfare policy should seek to support—not punish—at-risk families earlier to prevent the breakdown of the family.²³⁶ Termination is a last resort, but the state must step in earlier to support relationships that are functioning.

While it may be argued on one hand that any regulation, even if non-coercive and supportive, amounts to interference in autonomy,²³⁷ and on the other hand that even regulation at the breakdown of relationships shapes relationships by providing punitive warnings,²³⁸ 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 than support for children when families come apart.

concern that the foster system may not be growing at a pace that can provide the necessary capacity to meet this [growing] need.”).

²³⁴ See Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 78 n.172 (2009) (stating that social workers and attorneys handling foster care cases are overwhelmed (citing ANNIE E. CASEY FOUND., THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICES WORKFORCE 9 tbl.1 (2003))); see also Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 3 (2001) (noting that there was a dramatic increase in caseloads in the 1980s).

²³⁵ See Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 611 n.171 (2011) (emphasizing that prior to the need for termination, the goal of the child welfare system should be to support families in a non-coercive manner).

²³⁶ See, e.g., Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 36 (2005) (emphasizing the need to support at-risk families in a non-coercive manner); Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 18 (2009) (stating that intervening in family matters through the coercive power of a court should be an option of last resort).

²³⁷ See, e.g., Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1062–63 (2012) (critiquing attempts to non-coercively influence citizens' behavior through default rules).

²³⁸ Cf. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1522 (1983) (discussing how legal rules regarding contract enforcement shape private relationships).

1. *State Support for Relationships*

Thinking about how to support relationships before they breakdown entails a more involved and creative state.²³⁹ The Supreme Court has made clear that under modern law, the state owes no affirmative duties to children prior to parental abuse or neglect.²⁴⁰ 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 nature of relationships instead of ending them. Such bureaucracy can be hard for states and can feel paternalistic, leading to a bigger and more threatening state that interferes to harm and threaten and not to help.²⁴¹

An involved state, however, may not necessarily lead to a more powerful and large state, but rather to a “change in the way *existing* state power is exercised.”²⁴² Many applications of such ongoing support to existing relationships are possible.²⁴³ Social welfare programs tend to focus on how to support children in need instead of taking a broader look at the relationships that are supporting children and how caregiver poverty clearly affects children’s poverty.²⁴⁴ For instance, welfare programs that focus on children’s healthcare 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. Similarly, undocumented immigrants

²³⁹ See, e.g., JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 7–14, 92–94, 188–90, 279–96 (1986) (providing instances from the Madison, Wisconsin school district as examples of how informed consent, personal autonomy, and local-level discretion can foster strong relationships and a sense of community).

²⁴⁰ Dailey, *supra* note 14, at 14.

²⁴¹ For instance, state attempts to impose curfews on teenagers have been attacked by parents as overstepping appropriate state action and encroaching on parental privacy. See, e.g., *Anonymous v. City of Rochester*, 915 N.E.2d 593, 596, 600–01 (N.Y. 2009) (holding that the juvenile curfew in question “impose[d] an unconstitutional burden on a parent’s substantive due process rights”); Danny R. Veilleux, Annotation, *Validity, Construct and Effect of Juvenile Curfew Regulation*, 83 A.L.R.4th 1056, 1094–97 (1991) (briefing several court decisions that examine juvenile curfews and their interference with parental rights).

²⁴² See NEDELSKY, *supra* note 29, at 223.

²⁴³ See, e.g., Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 288–294 (1995) (explaining the role government plays in protecting children); Minow & Shanley, *supra* note 32, at 22–23; Shanley, *supra* note 169, at 201.

²⁴⁴ See, e.g., 42 U.S.C. §§ 601–19 (2012) (instituting a program designed to, inter alia, “provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives”); 42 U.S.C. § 1397aa (2012) (stating that the purpose of the program is to “initiate and expand the provision[s] of child health assistance to uninsured, low-income children”); Legal Immigrant Children’s Health Improvement Act of 2001, H.R. 1143, 107th Cong. (2001) (stating that federal medical insurance coverage of legal immigrants applies only to pregnant women and children); see also Catherine J. Ross & Naomi Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER. SOC. POL’Y & L. 55, 70–71 (1999) (describing the Temporary Assistance for Needy Families program and child welfare policy as focused on the child and not the caregiving unit).

who cannot find housing or employment are not going to be able to care for their citizen children born in the United States. Communities that are in need and struggling are going to produce needy children. The state must support children by supporting those communities in need, not just by focusing on the individual children.

Social welfare programs that take pressure off of families by providing high quality day care, pre-school public education, and low cost after-school programs focus on children and simultaneously take financial pressure off of family members supporting those children who are otherwise saddled with the need to fund such care. Alternatively, state support for the relational needs of children entails funding care for children conducted by parents at home. Funding the needs of caregivers and financially supporting relationships between caregivers and children are measures that children need. Such measures are not just about supporting parents; by supporting parents, they support the children dependent on parental care. Such care is not a matter of privacy under a relational theory. Rather, state support for such care supports the rights of children to good-enough, supportive relationships. These services of a more “involved” state, which the United States has not traditionally been, do not necessarily interfere with parental discretion because they are not coercive.²⁴⁵ 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.²⁴⁶ The United States, however, has lagged behind other countries in recognizing rights that extend beyond the individual, in relying solely on privacy and individuality to cover children’s needs.²⁴⁷ Such support is unpaid and limited—other countries provide paid leave for as much as a year and “use it or lose it” paternity leave that incentivizes fathers’

²⁴⁵ See, e.g., *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980) (holding that there is no deprivation of liberty interest of parents if no compulsory requirements are imposed); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 585 (Mass. 1995) (stating that the type of interference necessary to support a violation of parental liberty is a coercive or compulsory regulation).

²⁴⁶ Family Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1) (2012).

²⁴⁷ See, e.g., Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY, L. & POL’Y 1, 10 (2012) (stating that the United States lacks robust family and medical leave protection); Marianne DelPo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J.L. & SOC. POL’Y 88, 93 (2012) (noting that the FMLA is a major step towards recognizing the needs of caregivers but still has a number of significant limitations); Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 697 (2008) (explaining that employment rights should focus not only on individual rights, but also on larger social objectives); Woodhouse, *A World Fit for Children*, *supra* note 168, at 850 (noting that the culture of individualism in the United States has influenced the laws and policies towards families).

relationships with children.²⁴⁸ 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.²⁴⁹ However, a focus on children’s rights and interests demands such measures in lieu of privacy and crisis management to support caregiver relationships that children depend upon as opposed to attempting to provide rights to individual children. Such supportive measures need not overly interfere with parental discretion as they still leave options to parents as to whether to use such benefits.

Measures such as these may also be criticized as enabling and even incentivizing absence from the workplace. The focus on private responsibility and gender neutrality makes policymakers look askance at measures that may keep women at home.²⁵⁰ Families are intended to figure out how to support their children on their own, without government assistance.²⁵¹ 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.²⁵² 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.²⁵³ Children need 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.

Moreover, direct subsidies to families, particularly those in need, can support care relationships. For example, Martha Fineman proposes a

²⁴⁸ For a review of European family leave policies, see Julie C. Suk, *Are Gender Stereotypes Bad for Women?: Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 24–38 (2010) and Sandra Simpson, *The Elusive Quest for Equality: Women, Work, and the Next Wave of Humanism*, 48 GONZ. L. REV. 279, 289, 293, 303 (2012).

²⁴⁹ See Nancy Shurtz, *Sweden, Singapore and the States: A Comparative Analysis of the Impact of Taxation on the Welfare of Working Mothers*, 55 ST. LOUIS L.J. 1087, 1112–13 (2011) (explaining that the lack of support for a progressive support system is a result of U.S. political philosophy of “personal responsibility”); see also Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 392–93 (1996); Mona L. Shuchmann, Note, *The Family Medical Leave Act of 1993: A Comparative Analysis with Germany*, 20 J. CORP. L. 331, 358 (1995) (noting that “if the FMLA were truly so efficient as Congress suggested, then it would not have to be mandated because profit-maximizing firms would have implemented it”).

²⁵⁰ See, e.g., Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 41–42, 46–50 (2005) (recognizing that paid family leave may reinforce gender inequality and stereotypes).

²⁵¹ See, e.g., Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1418 (2009) (discussing how abortion and the sanctity of family and marriage are located in the realm of the right to privacy).

²⁵² Woodhouse, *A World Fit for Children*, *supra* note 168, at 830–31.

²⁵³ See *supra* notes 105–12 and accompanying text (examining the social effects on children born out of wedlock).

system in which the state pays out direct caretaker support payments.²⁵⁴ Although direct subsidies may appear to be radical, a variety of methods for getting support to families is possible.²⁵⁵ 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 day care, but also for home care.²⁵⁶ 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 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.²⁵⁷

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 persists nonetheless²⁵⁸—the children born of such privacy are no longer entirely private concerns, but also societal concerns. Whether on the heels of the breakdown of relationships or during support for the ongoing good-enough care relationships, the state has a role to play. The question is whether that interference should come earlier to support the relationship or later to rescue the individual child. Supporting the relationships earlier is both less harmful to the child, who is then able to avoid crisis, and more cost-effective for the state.²⁵⁹

Economists critique caregiver/child subsidies by claiming that subsidies incentivize “laziness” and that parents will reproduce in order to obtain access to such subsidies—our society does not react well to parents who perform caregiving in order to be paid.²⁶⁰ Furthermore, society has an

²⁵⁴ For further elaboration on this proposal, see Fineman, *supra* note 168, at 26–27.

²⁵⁵ See, e.g., Ross & Cahn, *supra* note 244, at 68–70 (describing Fineman's proposals for subsidizing private care as radical, but stating that subsidized caring for children is an alternative that provides some precedent for these more radical views).

²⁵⁶ See I.R.C. § 24(a) (2012) (providing tax credit of \$1,000 for childcare expenses of qualifying children); see also Janet Halley & Kelly Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 768 (2010) (comparing the ways in which the United States and Israel provide government-funded support to needy family members).

²⁵⁷ See Cahn, *supra* note 101, at 145–50 (noting that “[u]nstable sources of parental income are the major determinant of children's removal from their parent's custody”).

²⁵⁸ See, e.g., West, *supra* note 251, at 1418–20.

²⁵⁹ See *supra* notes 208–09 and accompanying text.

²⁶⁰ Ross & Cahn, *supra* note 244, at 69; see also Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Able to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 54

interest in limiting the number of children born to any one family, especially poor families who are dependent on subsidies and likely to be the only families who receive state support.²⁶¹ Of course, once a child is born his need for support is real and cannot be avoided. Such support is already being provided when child support cannot be collected and to foster parents once parental relationships break down. 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. 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.²⁶² This notion is well accepted; the focus of reform is on enforcement.²⁶³ Reforms 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.²⁶⁴ Rather, caregiving activities should be supported by primary earning parents as well. 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

(2009) (discussing the ways in which the value of paid care is minimized in the context of foster care and de facto parental status).

²⁶¹ See Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1900–03 (1971) (discussing the effect of population control policies on different classes); see also Ross & Cahn, *supra* note 244, at 70 (“[E]ven where the state intends the subsidy solely for the protection of the innocent child, and not for the caretaker[,] . . . the United States has proved reluctant to provide any benefits for the children of parents who have the financial capacity to support them . . .”).

²⁶² See *supra* Part II.C.1 (discussing the effect financial instability has on children).

²⁶³ See TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 1, 10 (2011), <http://www.census.gov/prod/2011pubs/p60-240.pdf> [<https://perma.cc/U4R3-KBQ7>] (providing statistics demonstrating that the collection of child support is a constant struggle). According to the 2011 U.S. 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. *Id.*

²⁶⁴ See, e.g., Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179, 193–96 (2012) (arguing for caregiver support payments associated with joint responsibility of parents in childcare); Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 61–65 (2008) (justifying alimony payments based on the need for caretaker support); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 215–19 (2012) (arguing for support payment based on co-parenting responsibilities); Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135 (2014) (discussing the shortcomings of child support and arguing instead for caretaker support payments when one parent does an unequal amount of care work).

care that children need.²⁶⁵ It takes money to provide care and the care provided is valuable and deserving of recognition and compensation.²⁶⁶ Primary caretakers depend on financial support from partners, just as primary earners depend on caregiving support from partners.²⁶⁷ 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.²⁶⁸

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.²⁶⁹ 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.²⁷⁰ 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.

²⁶⁵ See Laufer-Ukeles, *supra* note 264, at 2, 64–65.

²⁶⁶ See Laufer-Ukeles, *supra* note 260, at 75 (stating that “[c]aretaking requires money, is hard work and is extremely important to society in general and, in particular, to children who are without care.”); see also Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 61 (2002) (“We need to elevate [child]care to this level of importance [a core value] for the basic reason that it is essential to human health and balanced development.”); Blecher-Prigat, *supra* note 264, at 199 (arguing that childrearing costs should be “defined not only in terms of out-of-pocket costs,” but also in terms of “parental costs”); Ann Laquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 787–802 (1993) (discussing the importance of a primary caretaker on a child's social development); Lucinda M. Findley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1175 (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, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403, 1410–11 (2001) (“Caretaking labor preserves and perpetuates society and, therefore, collective response and responsibility is warranted.”); Laura T. Kessler, *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, 417–29 (2001) (arguing that the importance of caregiving should be considered in shaping and interpreting the law of employment discrimination).

²⁶⁷ See Laufer-Ukeles, *supra* note 264, at 61–62 (arguing the importance of supporting the caretaking spouse's role even after the marriage terminates).

²⁶⁸ See *id.*

²⁶⁹ See *id.* at 64–65 (discussing the costs and benefits of being the primary caretaker or the primary earner in the divorce context); Starnes, *supra* note 264, at 231–33 (explaining that married couples with children also enter into a “co-parenting partnership” and “each parent [is] individually liable for the child's welfare”).

²⁷⁰ Starnes, *supra* note 264, at 230–31.

3. *State Support for At-Risk Parents*

Parental relationships are either: (i) abusive or neglectful of children and thus subject to termination; (ii) well-functioning and thus worthy of support; or (iii) at-risk due to certain conditions, but not yet subject to termination. While the previous two recommendations for relationship support are proactive and focus on continuing support to all functional relationships, there is also room for a special focus on at-risk caregiver relationships. These 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 recommend, 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.²⁷¹ Dwyer categorizes at-risk parents based on empirical studies of particular factors that lead to negative 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, are imprisoned or are sentenced to a prison term, are indigent and have multiple children, are undocumented immigrants, are teen parents, etc.²⁷² These parents, he argues, are a potential danger to their children, and the state has a responsibility to step in before damage is inflicted.²⁷³

I agree with Dwyer that 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, not threaten to terminate them. Instead of threatening 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 counseling, 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. In addition, they can perhaps be incentivized by tying them to state

²⁷¹ DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 259–63.

²⁷² *Id.*; Dwyer, *Jailing Babies*, *supra* note 184, at 470–76 (describing jailhouse nurseries in detail and arguing that any such programs violate the best interests of the child).

²⁷³ See Dwyer, *Jailing Babies*, *supra* note 184, at 470–76.

subsidies. Such incentives could apply to all parents, not just at-risk parents to avoid parents feeling judged.

Of course, at-risk relationships garner more scrutiny from the state, and, upon a finding of significant harm, unfitness, or abuse and neglect, termination and interference to remove children may be necessary.²⁷⁴ Providing support may 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 may often be 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 are likely to outweigh the costs of threatening 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*

Multiple studies have demonstrated the importance of relationships to children, starting with primary attachment caregivers.²⁷⁵ Recent influential studies have emphasized the significant advantages for children of two-parent homes.²⁷⁶ According to McLanahan and Garfinkel, improving emotional and financial support for out-of-wedlock children is important.²⁷⁷ 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.²⁷⁸ This has led to advocacy for supporting multiple relationships with both parents, an idea that is also supported by relational theory that

²⁷⁴ See *supra* Part III.C (discussing conditions justifying state interference with parental care).

²⁷⁵ See *supra* Part II.B.

²⁷⁶ ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 61–63 (2014); see McLanahan & Garfinkel, *supra* note 117, at 142, 151–54.

²⁷⁷ McLanahan & Garfinkel, *supra* note 117, at 155.

²⁷⁸ See Jed H. Abraham, "The Divorce Revolution" Revisited: A Counter-Revolutionary Critique, 9 N. ILL. U. L. REV. 251, 292–93, 293 n.149 (1989) (reviewing and citing several studies supporting the proposition that there is a statistically significant relationship between joint custody and child-support payment compliance); Karen Czapansky, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 643–44 (1989) (noting that parents who perceive that their desires have been met in custody decisions are likely to comply with such decisions); Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 85–86, 86 n.69 (1990) (discussing the debate over the validity of empirical work testing the hypothesis that increasing paternal contact increases compliance with child-support orders); Mnookin & Maccoby, *supra* note 19, at 75–76 (noting that studies provide "clear [evidence] . . . that there is better compliance with support obligations by fathers who maintain contact with their children").

recognizes the importance of multiple relationships for children. Still, there are a variety of ways to support multiple caregiving relationships that reflect different levels of intimacy.

Clare Huntington uses the McLanahan and Garfinkel 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.²⁷⁹ Huntington recommends that, instead of granting single women custody automatically, and thus causing fathers to have to negotiate custody with mothers or to request visitation from courts, parents of children born out of wedlock should be deemed legal "co-parents," which would have expressive and practical ramifications.²⁸⁰ Additionally, she argues that non-custodial fathers should be able to reduce their child support obligations by providing care, which would be given in-kind credit against financial obligations.²⁸¹ Huntington thereby hopes to incentivize more engaged unwed fathers by reducing the barriers to parenting and making it more attractive in order to provide children with two engaged parents in a manner that comes closer to the reality of children of married parents.²⁸²

But these suggestions have the following additional potential ramifications: (i) they potentially reduce financial support to children, and (ii) by removing automatic custody rules, they make primary parents' lives more difficult and less secure because they must navigate custody arrangements with children's fathers, go to court to get a custody order, and fight co-parenting presumptions when the secondary parent may not be 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. The co-parenting status is liable to create high-stress situations for the custodial parent due to contentious co-parenting negotiations that do not provide clear, navigable rules between parties that are often not on the best of terms. Indeed, the studies Huntington supports point to drug use and involvement in the criminal justice system as reasons out-of-wedlock fathers drift away from their children.²⁸³ 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.

²⁷⁹ Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 202–08 (2015).

²⁸⁰ *Id.* at 173–76.

²⁸¹ *Id.* at 173–77.

²⁸² *Id.* at 225–31.

²⁸³ *Id.* at 192–94, 93 n.136, 94 n.148 (citing KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 157, 169, 208 (2013)).

As discussed above,²⁸⁴ low tension and greater financial resources are both indicators of child well-being. McLanahan and Garfinkel's study also supports the proposition that there is a need to strengthen multiple parenting relationships;²⁸⁵ but, there are ways to do so that do not decrease child support obligations while increasing the likelihood for tension. Both the primary and secondary relationships should be supported; however, in order to ease tension between unmarried and potentially unfriendly co-parents, such relationships should be demarcated in a clear manner that does not necessitate too much negotiation, court involvement, and potential disputes regarding money and care.²⁸⁶ As Huntington remarks, fathers in these families often have a different role in children's lives: "fathers view their role in their children's lives not as providing economic support or daily caregiving, but rather moral guidance and friendship to their children."²⁸⁷ Different kinds of relationships can be valuable and should be legally supported, but they should not be thrown under the umbrella of "co-parents," leaving the primary and secondary caregivers to struggle over their rights and needs. Rather, clearly defined and hierarchical categories of parenting and care relationships should work in tandem and clear principles should determine when the state should interfere. These categories can provide clear rules and a balance of power that focuses on the need of the child to have relationships with multiple parents and caregivers in a manner that minimizes tension and gives the primary parent the control and certainty needed.

Therefore, the second guiding principle I derive from the relational theory is the need to assign categories of caregivers to allow children to benefit from different kinds of relationships. According to relational theorists, "varying degrees of intimacy" should be recognized and supported because care is provided in a variety of ways and forms.²⁸⁸ Instead of looking at individual rights and benefits, which causes us to focus on parental rights versus children's rights, and different caregivers' 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

²⁸⁴ *Supra* Part II.C.1.

²⁸⁵ McLanahan & Garfinkel, *supra* note 117, at 151–53.

²⁸⁶ *See supra* Part III.B.

²⁸⁷ Huntington, *supra* note 279, at 194 & n.147 (citing EDIN & NELSON, *supra* note 283, at 220–26).

²⁸⁸ Minow & Shanley, *supra* note 32, at 23.

greater physical custody and decision-making authority, while still limiting such authority to ensure space for functional and secondary relationships.

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, biological connection or adoptive relationship with children, or, depending on state law, they can be defined through intent.²⁸⁹ Regardless of the basis for the formal status, such relationships are identified *ex ante* and are defined and acknowledged by the state. As I would define them, formal primary caregivers not only have formal legal status as a parent to their child, but also either provide at least approximately fifty percent of children's needed care outside of day care, in home childcare, or school, or are in a legally defined relationship with another legal parent who provides such care.²⁹⁰

Formal primary parents have clear responsibility for children at birth or upon adoption, and it is hoped that they can provide security and continuous care in low-stress environments.²⁹¹ Ideally, there will be two formal primary parents. Two formal primary parents exist either because a child's parents are married, are in a state-registered cohabiting relationship with each other, or are unmarried formal legal parents who will be co-parenting in a cooperative manner with close to an equal partnership. Formal primary parents provide care to children jointly and in unison. However, one primary parent is increasingly standard for children and provides sufficient (if not ideal) care and stability over time.²⁹²

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 and provide 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 that harms caregivers, children, and their relationships. For this reason, with regard to formal primary caregivers, the

²⁸⁹ See Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 435–38, 463–66 (discussing the distinction between formal and functional legal parenthood).

²⁹⁰ Cf. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c) (Am. Law. Inst. 2002) [hereinafter ALI PRINCIPLES] (defining a child's *de facto* parent as a person who lives with that child and, for reasons other than financial compensation, "regularly performed a majority of the caretaking functions for the child" or performed a share of caretaking functions "as great as that of the parent with whom the child primarily lived").

²⁹¹ Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 465–66.

²⁹² See *supra* notes 122–29 (referring to the increase in single-parent homes).

presumption in favor of parental discretion makes the most sense.²⁹³ While interference is at times warranted, as will be discussed below, more care must be taken when imposing third-party obligations or interfering with formal parenting decisions due to the ongoing, interlinked nature of the care they provide and their children's well-being.

2. *Functional Parents and Secondary Custodians*

a. *Functional Parents*

From a relational perspective, caregiving relationships other than those with formal parents should be differentiated but recognized, particularly if the relationship is significant and providing necessary care.²⁹⁴ 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 "functional" caregiving activities.²⁹⁵ I have argued for providing parental status and rights to functional third-party caregivers because such status makes sense for children, caregivers, and parents.²⁹⁶ Children and formal primary parents alike benefit from third-party care.²⁹⁷ Status and rights benefit functional parents by providing recognition and valuing the care or financial support that they provide.²⁹⁸

These functional caregivers provide significant care over a long period of time sufficient to meet threshold requirements for becoming a functional parent as opposed to an occasional caregiver.²⁹⁹ To become functional parents, functional caregivers must meet minimal levels of care provided—usually mirroring the approximately fifty percent of care provided by formal, primary parents.³⁰⁰ Moreover, such care should be long-term, and will often, though not necessarily, include a cohabiting relationship with the child.³⁰¹ A formal, primary caregiver may also be involved in 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

²⁹³ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (holding that deference must be given to parental decision-making on behalf of children instead of using a general best interests test).

²⁹⁴ See Minow & Shanley, *supra* note 32, at 23–25 (discussing the perspective that an adequate theory of family law will recognize the various relationships and responsibilities surrounding the nuclear family in a "constellation of intimate relations").

²⁹⁵ See sources cited *supra* note 128 (presenting the arguments in favor of functional parenthood).

²⁹⁶ See Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 438–41.

²⁹⁷ *Id.* at 440–41.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 442–43.

³⁰⁰ See ALI PRINCIPLES, *supra* note 290, § 2.03(c).

³⁰¹ *Id.* § 2.03(1)(c)(i) (requiring that a caregiver, to be considered a *de facto* parent, must cohabit with the applicable child for a period not less than two years); Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 468–69 (advocating for a measure of flexibility regarding the cohabitation requirement).

them against each other. Instead of viewing formal parental rights in opposition to functional parental rights, the focus should be on supporting these relationships in a complementary manner that allows them to coexist. Thus, a functional caregiver deserves recognition despite the infringement on the formal primary parents' traditional exclusive parenthood rights.³⁰² It is important, however, to also recognize the way in which functional parents are different than formal primary parents in practice and in theory. There are significant benefits to the flexible and diverse manner in which functional relationships develop and meet the needs of children.³⁰³ Further, 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.³⁰⁴ They also create a potential multiplicity of claims that can upset the stable, private lives of children through state and court intervention.³⁰⁵ 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, it should be recognized that functional parenthood is not equivalent to formal parenthood.³⁰⁶

Functional parents need status and recognition to best care for children, to maintain relationships despite conflicts with formal primary parents, and to facilitate their care of children when it is supported by formal parents.³⁰⁷ For instance, functional parents need status in order to obtain authority for healthcare decisions and to act as a legal guardian.³⁰⁸ However, in order to minimize tension and allow formal parents to parent with discretion, formal primary parents should be considered to have priority in care and legal decisions as compared to functional parents, although legal authority and a lesser degree of custody can be awarded to functional parents as well.

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

³⁰² See *supra* notes 142–44 and accompanying text (describing the strong parental rights doctrine).

³⁰³ See Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 456–61.

³⁰⁴ See *id.* at 461–65.

³⁰⁵ See *id.* at 465–71.

³⁰⁶ See *id.* at 473 (acknowledging that functional parenthood has “drawbacks,” and that a process of differentiation is therefore necessary to “create the proper balance between benefits, concerns, and overall difference”).

³⁰⁷ *Id.* at 441.

³⁰⁸ *Id.* at 439.

caregiving relationship. Formal parents who do not live with their children are the most common caregivers in this category. Even if formal parents do not have a past relationship with the child to serve as the foundation for an ongoing care relationship, due to an ongoing commitment, or obligation to provide child support and visitation, they would still be secondary custodians from the time of the child's birth. Involved grandparents may also be in this category, as could a devoted aunt, uncle, or other kin relation that provides regular and continuous care, or regular financial support to a child. Other than legal parents, however, these secondary kin caregivers must demonstrate ongoing sustained care relationships, even if they are not functional parents, to be considered secondary custodians. Genetic relationships are important because they create an affinity to children beyond third parties.³⁰⁹ These secondary caregivers, or secondary custodians, are not mere babysitters or occasional visitors. They are essential parts of the network of care provided to children, and have deep attachments to them based on genetic ties and ongoing relationships. Nonetheless, if secondary caregivers do not meet certain threshold requirements, they will not be entitled to functional parental status.³¹⁰

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 fifty percent joint physical custody, which makes them formal primary parents). They may also sometimes be awarded joint legal custody as well. During visitation, fathers usually have full discretion with regard to their children, unless a court has limited their visitation rights due to a prior showing of harm.³¹¹ 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. Such fathers are better classified as secondary custodians, rather than mere "visitors" in a child's life. Maintaining secondary custodian relationships is incredibly important because children benefit greatly from having multiple committed caregivers,³¹² and also because committed parental secondary custodians are more likely to pay child support.³¹³

³⁰⁹ Cf. Appell, *supra* note 54, at 714 ("[N]either genetic connection nor nurturing in themselves are sufficient to establish parenthood, but must exist in combination in relation to the child or to the 'mother' (the parent who contains both biological and nurturing relationship to the child).").

³¹⁰ Cf. Dailey, *supra* note 29, at 2167–68 (arguing for rights to caregiving relationships with regard to caregivers other than parents).

³¹¹ See, e.g., *Moore v. Moore*, 547 N.Y.S.2d 794, 794 (App. Div. 1989) (holding that, 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, 200–01 (1996) (describing the high level of discretion possessed by parents with visitation rights).

³¹² See McLanahan & Garfinkel, *supra* note 117, at 149; *supra* text accompanying notes 105–12.

³¹³ See *supra* note 307.

c. Conflicts Between Formal Parents and Functional Parents or Secondary Custodians

There can, of course, be conflicts between 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, modify a custodial agreement, or is otherwise uncooperative with the secondary parent. With other kin and functional parents, conflict tends to occur when formal primary parents try to limit or terminate their child's interaction with kin caregivers. From a relational perspective, it makes sense to support all of these caregiving relationships.³¹⁴ Functional parents should not be disposed of when primary caregivers disagree with them, or would prefer that they be removed from a child's life, and neither should secondary custodians.

Still, conflict and tension between caregivers can also be harmful to children.³¹⁵ Some argue that to avoid conflict, tension, and undermining parental authority, parental discretion should prevail over that of other caregivers.³¹⁶ These arguments, however, are usually anchored in exclusive parenthood rights. On the other hand, proponents of the "best interests standard" argue that children's rights include the right to have relationships with third parties, and that this right should not be overcome by parental objections.³¹⁷

From a relational perspective, these care relationships should be supported in a way that not only facilitates their continuity and stability, but also minimizes tension with formal parents.³¹⁸ Differentiation and a clear demarcation of obligations and responsibility for final decisions can give functional parents, and secondary custodians, the recognition they need without challenging formal primary parents' primary status.³¹⁹ A differentiated functional and secondary custodial status would respect ongoing primary formal parenthood relationships, but would also recognize rights to legal decision-making, visitation, and other subsets of parental rights, even when a primary parent objects.³²⁰ 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

³¹⁴ See Dailey, *supra* note 29, at 2156–66; Minow & Shanely, *supra* note 32, at 23–24.

³¹⁵ For a discussion of the effects of conflict and tension between caregivers on children, see *supra* Part II.C.1.

³¹⁶ See, e.g., Buss, "Parental" Rights, *supra* note 8, at 647–50 (discussing when parental discretion should be afforded greater deference).

³¹⁷ DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 50–53, 285–89.

³¹⁸ See Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 460–65 (discussing differences between functional and formal parenthood and the importance of supporting both types of caregiving relationships).

³¹⁹ *Id.* at 462–63.

³²⁰ *Id.* at 460–61.

harm of suddenly terminating such a significant secondary relationship; and, this harm should not have to be proven on a case-by-case basis.³²¹ 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 formal primary parent that continuing the relationship will significantly harm the formal primary parent's ability to care for their child. This, however, should be very difficult to prove. The presumption should work to impose secondary custodian and functional parent relations on formal, primary legal parents despite their opposition in all but the most extreme circumstances.³²²

Moreover, an older child's desire not to be in a secondary relationship should also 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 be evidence that continued relations may cause significant harm to 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 formal primary parent or be based on immaturity. That child's objection, however, can influence the extent of the visitation and provide cause for serious review.

Ultimately, if grandparents qualify as functional parents or secondary custodians, their visitation rights should be protected despite the wishes of parents. However, such grandparents are not just occasional visitors in children's lives. Only when a grandparent has a significant care relationship with a child, and terminating such a relationship would cause harm to the child, would the relationship be subject to a presumption of protection despite a parent's wishes to terminate the relationship. Moreover, secondary custodians or functional parents would be eligible to gain primary physical custody, but only if formal primary parents were no longer available. If a child is lucky enough to have two secondary custodians and functional parents fighting over custodial time, some equitable division of custody can be ordered (visitation being a form of custody). When individual rights are not involved, thus creating tension

³²¹ *Id.* at 464–65; *see also, e.g.,* *Neal v. Lee*, 14 P.3d 547, 550 (Okla. 2000) (determining that harm must be shown by a grandparent in stopping relations in order to counterbalance parental discretion to terminate visitation).

³²² For a discussion of the application of the relational theory to the relocation context, *see* Laufer-Ukeles, *supra* note 18, at 295.

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 post-adoption biological parents, surrogate mothers, and genetic donors to children 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.

If parents consent to these tertiary relationships, from a relational perspective, these relationships can be supported more proactively by the state through the creation of avenues for legal recognition, including registration systems and default rules that give tertiary caregivers access to children as long as parents consent. For instance, states should be willing to enforce open-adoption contracts, or at least provide legislation that validates open-adoption arrangements.³²³ Such legislation legitimizes tertiary caregivers, even if communication between birth parents and children is quite limited. I have also suggested giving legal status to surrogate mothers so that there is an understanding that they may have limited rights of access to children post-birth.³²⁴ While such post-birth contact usually happens in any event due to intimate bonds that develop between intended parents and surrogate mothers,³²⁵ recognizing such status can normalize such relations by creating default expectations.

This recognition transforms caregivers from legal strangers into engaged components of children's lives. Many children seem to benefit from connections with birth parents, genetic donors, foster parents, close relatives, etc.³²⁶ The state should not ignore the attachments that children

³²³ See, e.g., Appell, *supra* note 131, at 92–93 (discussing various ways states handle open-adoption contracts); Cynthia R. Mabry, *The Psychological and Emotional Ties that Bind Biological and Adoptive Families: Whether Court-Ordered Postadoption Contact Is in an Adopted Child's Best Interest*, 42 CAP. U. L. REV. 285, 323–24 (2014) (arguing in favor of post-adoption contact).

³²⁴ See, e.g., Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1251–52 (2013) (discussing the appropriateness of providing for post-birth contact between a surrogate and the baby to whom she gave birth).

³²⁵ *Id.*

³²⁶ See, e.g., HAROLD GROTEVANT & RUTH MCROY, OPENNESS IN ADOPTION: NEW PRACTICES, NEW ISSUES 18 (1998) (comparing the results of various studies analyzing the effects of open-adoptions on children, adoptive parents, and birth parents); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 416 (2012) (discussing an adopted child's need to have connections with genetic donors and birth parents in order to "be able to 'claim her 'identity of origin,' defined as a right to know and explore . . . her identity as a member of the family and group into which she was born."); Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born from Gamete Donations in the*

may develop to these caregivers, and should 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 a clear division of power, the benefits of such complexity outweigh the difficulties. Multiplicity and complexity reflect reality and can benefit primary parents by providing needed support, and help children get the stable ongoing care they need from committed caregivers.³²⁷

However, when there is conflict between primary parents and tertiary caregivers, these tertiary relationships do not hold as much weight as functional or secondary custodians in relation to primary caregivers. Primary caregiving parents, along with functional 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/access to children should be accepted unless (i) 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;³²⁸ or (ii) 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. Instead, such a category denotes legal recognition of the existence of a connection, allowing visitation to be more sporadic, and the legal recognition more focused on maintaining contact. Such non-invasive contact should not cause conflict with primary parents. State rules that set up expectations for such minimum contacts can facilitate these relationships by recognizing the status of tertiary caregivers and making presumptions that set expectations that those who fall into these categories would be allowed such contact.

United States, 45 FAM. CT. REV. 116, 120–21 (2007) (noting the importance of allowing children to form relationships with their genetic donors).

³²⁷ See Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 435 (“The composition of families varies greatly from household to household.’ Ultimately, all these blended, step, extended, complex, and kin-like ways of raising children are increasingly utilized and provide necessary and needed support for children.” (quoting *Troxel v. Granville*, 530 U.S. 57, 63 (2000))).

³²⁸ 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 fewer problems of legal threats and the harms of litigation. For an expanded discussion, see Laufer-Ukeles & Blecher-Prigat, *supra* note 128, at 461–63.

C. Balancing Harm to Relationships with Harm to Individual Children

This Part squarely tackles the difficult question of when the state should interfere with parental or caregiver decision-making in ongoing, functional care relationships. In determining whether to permit state interference with ongoing important care relationships under a relational perspective, the harm caused to the relationship by such interference should be considered. 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 formal primary 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.

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 relationships from such interference.

In applying this standard, by balancing harms to the relationship with harms to the individual child, the first inquiry addresses 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 a parent has a particular world-view and wants to raise the child according to that view, the state stepping in and preventing or prohibiting it can strain those bonds, particularly when that world-view reflects deeply held beliefs, religious or otherwise. Moreover, the interference can create parental insecurity and uncertainty, and negatively affect parenting behaviors and parenting security.³²⁹ Forcing education on a child against a parent's will, forcing a blood transfusion on a child of Jehovah's Witnesses, preventing children from undergoing cultural rites, all may be necessary depending on the level of harm to the child involved, but the effect interference has on the relationship is also relevant to the decision. Moreover, forcing contact with grandparents, third parties, surrogates, or birth parents can negatively affect primary relationships when primary parents object because of the strain infused on the primary relationship from having to foster relationships to which they object. The simple act of interference affects the nature of the relationship by second-guessing a parent's judgment, undermining parental security in parenting relationships, and by putting space between parent and child. If

³²⁹ See, e.g., HAIM OMER ET AL., *THE ANCHORING FUNCTION: PARENTAL AUTHORITY AND THE PARENT-CHILD BOND* (2013).

interference is likely to cause significant harm to the relationship, the state must be more cautious about interference and balance such harms against the potential harm to the child of not interfering.

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 significant harm to the child, or an older child expresses a desire for such interference, interference in parental relationships is justifiable even if harm to the individual child is not significant. 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. However, even if significant harm to that relationship is likely to result from state interference, where the harm to the individual child is determined to be significant and irreversible by substantiated evidence, the state may have cause to interfere regardless of harm to the relationship. In such circumstances, as when a parent refuses to provide life-saving medical assistance,³³⁰ or when a parent threatens to sterilize her daughter,³³¹ the state can step in, at least temporarily, to ensure the well-being of the child, by taking temporary custody or overriding parental authority.

Current law regarding interfering with or punishing parental choices 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. For initial custody disputes, the dominant principle used by courts is best interests.³³² In regard to state interference to protect children's civil rights,

³³⁰ See James Bopp, Jr., *Protection of Disabled Newborns: Are There Constitutional Limitations?*, 1 ISSUES L. & MED. 173, 180 (1985) ("[M]ost courts have indicated a willingness to order treatment over parents' religious objections to improve the health of a child."); Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and Capacities Applied: The Question of Special Priority*, 97 CORNELL L. REV. 549, 566 (2012) ("[A]dults, in many cases, cannot refuse essential medical treatment for their children on religious grounds."); Jennifer L. Rosato, *Using Bioethics Discourse to Determine when Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 8 (2000) ("[T]he [Supreme] Court has recognized that parents do not possess an unrestricted right to make decisions on behalf of their children. The Court broadly proclaimed that parents are not permitted to make 'martyrs' of their children, which meant that the state could interfere when serious harm or death to the child was likely to result from the parents' acts of omissions.").

³³¹ See Hazel Glenn Beth & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 39–40 (2000) (stating that judicial authorization is required for the sterilization of a minor even when the minor's parents and doctor consent to the procedure).

³³² See Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 470 (1999) (discussing the use of best interests in custody decisions); Merle Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1783 (2007) ("[C]ourts adjudicating relocation disputes strive to arrive at decisions that are in the child's best interest.").

the dominant principle is respecting parental privacy.³³³ 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.³³⁴ In modification and relocation disputes, in the majority of states, the standard leans toward protecting the status quo or parental privacy, unless significant harm to the child or bad faith can be shown with regard to the custodial parents' actions.³³⁵ Thus, other than in initial custody proceedings, where best interests analyses are used, parental privacy is largely respected. Children's rights advocates argue that this status quo is problematic because it gives parents too much discretion, does not punish parents for their bad behavior, and fails to put children's best interests sufficiently at the center of the inquiry.³³⁶

The significant harm to relationships standard is intended to be more permissible in allowing state interference than legal standards derived from parental privacy that prefer parental discretion unless significant harm to the child is demonstrated.³³⁷ In particular, when important care relationships are not likely to be harmed or a mature child can

³³³ See *supra* notes 49–51 and accompanying text.

³³⁴ *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000).

³³⁵ See, e.g., S.D. CODIFIED LAWS § 25-5-13 (West 2015) (granting the custodial parent the right to change residence, unless it would negatively affect the rights or welfare of the child); TENN. CODE ANN. § 36-6-108(d) (West 2016) (establishing that, as long as a good faith reason is provided by the custodial parent, the opposing parent must demonstrate harm to prevent the move with the child); *Morgan v. Morgan*, 12 A.3d 192, 200 (N.J. 2011) (holding that a petitioner seeking relocation must show “a good faith reason for the move and that the child will not suffer from it” (quoting *Baures v. Lewis*, 770 A.2d 214, 230 (2001))); *Goldmeier v. Lepselter*, 598 A.2d 482, 486 (Md. Ct. Spec. App. 1991) (demonstrating the tendency of courts to protect parental privacy absent a showing of significant harm to the child); ALI PRINCIPLES, *supra* note 290, § 2.17(4)(a)(ii) (providing a list of good faith reasons for a parent's move).

³³⁶ Compare Buss, “Parental” Rights, *supra* note 8, at 649 (“[E]ven good state decisions about child-rearing practices are likely to produce bad results when the state relies on resistant parents to carry them out, and the self-interested or overstressed parent can be expected to do a particularly bad job of coping with these intrusions.”), with DWYER, RELATIONSHIP RIGHTS, *supra* note 1, at 123–67 (arguing for more state interference to protect children).

³³⁷ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972) (“[T]he 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. 158, 168–69 (1943) (“It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.”); *Jacobson v. Massachusetts*, 197 U.S. 11, 37–39 (1905) (upholding the state's mandatory vaccination law); *Spiering v. Heineman*, 448 F. Supp. 2d 1129, 1140–42 (D. Neb. 2006) (upholding a statute requiring parents to submit newborn infants for routine blood testing); 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, 240–41 (1975) (“Every state today has a statute allowing a court, typically a juvenile court, to assume jurisdiction over a neglected or abused child and to remove the child from parental custody”).

demonstrate they are not dependent on such care relationships, this standard can be a much more aggressive tool than a parental rights doctrine can be in allowing state interference with parental choices, and in facilitating actualization of mature children's own will and autonomy. On the other hand, this standard is more cautious than a best interests inquiry in avoiding interference with ongoing care relationships. Having the state as big brother, observing every parental choice, does not make sense for children or society, as these relationships need support, not judgment.³³⁸ Still, policies can, and should, be put into place to educate, inform, and encourage parents in a non-coercive manner that advances children's interests and would inflict less harm on ongoing relationships.³³⁹

Next, I will apply this principle in two specific contexts regarding both mature and infant children's civil rights: (i) rights to marriage and (ii) 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.³⁴⁰ States question the propriety of the practice, whether it is done for religious purposes, medical reasons, or due to mere custom.³⁴¹ Most recently, the

³³⁸ See Buss, "Parental" Rights, *supra* note 8, at 647–49 (arguing that a "legal system that shows strong deference to parents' child-rearing decisions serves children well" because of "[p]arents' strong . . . knowledge of their [children's] needs" and that, therefore, "we should be slow to allow state intervention if . . . child[] welfare is our goal").

³³⁹ See Helen M. Alvaré, *A Response to Professor I. Glenn Cohen's Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. HEADNOTES 8, 11–12 (2012) (suggesting that the state should act to exhort and influence in order to encourage, but not coerce, good parenting); Shelly Kierstead, *Parent Education Programs in Family Courts: Balancing Autonomy and State Intervention*, 49 FAM. CT. REV. 140, 141–47 (2011) (advocating for use of voluntary and "quasi-mandatory" parent education programs to resolve legal disputes where children are involved because they are consistent with "the state's role . . . [in] assess[ing] child-rearing practices as they relate to the needs of the child [rather than] . . . actively requir[ing] changing those practices").

³⁴⁰ See Dena S. Davis, *Male and Female Genital Alteration: A Collision Course with the Law?*, 11 HEALTH MATRIX 487, 555–60 (2001) (describing controversy surrounding circumcision within the Jewish community and the rationale for the procedure); Povenmire, *supra* note 89, at 105–06 (arguing that constitutional considerations with respect to "the [right] of [a] minor to bodily integrity" may outweigh parental consent for infant circumcision); Kimberly A. Greenfield, Note, *Cutting Away Religious Freedom: The Global and National Debate Surrounding Male Circumcision*, 15 RUTGERS J.L. & RELIGION 353, 359–70 (2014) (describing the contentious history of circumcision in Germany, Sweden, and the United States, and detailing proposed, and enacted, recent legislation related to the practice in the United States).

³⁴¹ See, e.g., Bijan Fatch-Moghadam, *Criminalizing Male Circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012—No. 151 NS 169/11*, 13 GERMAN L.J. 1131, 1133–36 (2012) (commenting on a 2012 decision of a German court, which grappled with the many issues surrounding infant circumcision).

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 it.³⁴² Indeed, there are studies that indicate lasting traumatic harm to children resulting from infant circumcision.³⁴³ On the other hand, there are many other studies that indicate benefits of male circumcision for health reasons.³⁴⁴ Indeed, no major medical association either bans or universally recommends the procedure due to conflicting studies and opinions on the effects of the practice.³⁴⁵ Given these conflicting studies, the European objections are based more on the mere act of physically "mutilating" a child's body when there is no medical urgency, commonly pointing to a child's right to bodily integrity as the justification, as opposed to clear evidence of harm.³⁴⁶ The child's best interests approach gives little help in resolving such issues because the benefit of bodily integrity must also be weighed against parental interests in religious freedom, children's right to parental privacy, and to religious identification.³⁴⁷

In comparison, the relational perspective can provide more guidance

³⁴² Resolution on Children's Right to Physical Integrity, EUR. PARL. DOC. 1952 (2013), <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20174&lang=EN> [<https://perma.cc/7VR2-CQP9>] (follow "Download" hyperlink).

³⁴³ See, e.g., William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 337–38 (1984) (describing neonatal circumcision as a "barbarous . . . practice[]" and analogizing it to other, more commonly acknowledged forms of child abuse); T. Hammond, *A Preliminary Poll of Men Circumcised in Infancy or Childhood*, 83 BRIT. J. UROLOGY INT'L, Supp. 1, at 85, 85–87 (1999) (presenting the findings of several studies to suggest that, among certain populations, circumcision may lead to various physical, sexual, or psychological consequences later in life); Anna Taddio et al., *Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 LANCET 599, 602 (1997) (indicating that infants may experience post-traumatic stress disorder from circumcision); *Circumcision Policy Statement*, 103 PEDIATRICS 686, 688 (1999) (describing pain and stress experienced by newborns who undergo circumcision without any pain relief); Christopher Maden et al., *History of Circumcision, Medical Conditions, and Sexual Activity and Risk of Penile Cancer*, 85 J. NAT'L CANCER INST. 19, 19–24 (1993) (presenting epidemiological findings to suggest that circumcision is a risk factor for penile cancer).

³⁴⁴ See, e.g., *Report of the Task Force on Circumcision*, 84 PEDIATRICS 388, 388 (1989) (suggesting that neonatal circumcision has medical benefits related to the "incidence of urinary tract infection[,] . . . sexually transmitted diseases and[] . . . cancer"); Edward C. Green, *The Circumcision and AIDS Debate*, 41 ANTHROPOLOGY NEWS 22, 22 (2000) (discussing debate surrounding benefits of male circumcision in preventing the spread of AIDS).

³⁴⁵ See, e.g., *Report of the Ad Hoc Task Force on Circumcision*, 56 PEDIATRICS 610, 610–11 (1975) (concluding that no valid medical reasons for routine circumcision exist but not banning the practice either as harmful to infants).

³⁴⁶ Resolution on Children's Right to Physical Integrity, *supra* note 342. Indeed, in its 2013 resolution entitled "Children's Right to Physical Integrity," PACE expressed "particular[] worr[y] about . . . violation of the physical integrity of children." *Id.*

³⁴⁷ See Rhona Schuz, *The Dangers of Children's Rights Discourse in the Political Arena: The Issue of Religious Male Circumcision as a Test Case*, 21 CARDOZO J.L. & GENDER 347, 370–72 (2015) (discussing certain rights of children, "which are highly relevant to the circumcision debate," including the rights to freedom of religion and culture, parental privacy, and self-identity).

by infusing considerations of balancing individual rights with consideration of harm to relationships. The question is: what effect would state prevention of male circumcision have upon the parental relationship with children? For example, if the parents are circumcising their children due to custom or convenience, then state intervention with this decision would likely not harm the parental relationship. And, if the state believed that circumcision would cause harm to children, even if significant harm cannot be proven, then it is likely that mere education and provision of information, even in a non-conflicting manner, would be sufficient interference to drastically reduce circumcision of convenience or custom. Likewise, if male circumcision were done for health concerns, the state could 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.³⁴⁸ Doctors who perform these health-related circumcisions could be asked to provide the state's perspective on this matter.

However, when circumcision is done for religious reasons, or deeply held cultural reasons, much more is at stake. Male circumcision is a basic tenet of both Jewish and Islamic law.³⁴⁹ For example, not circumcising a child within Judaism removes the child from the religious community, although, according to Jewish law, he is still considered Jewish.³⁵⁰ Indeed, circumcision is considered a religious obligation in Judaism,³⁵¹ and either a religious obligation or a basic tradition in Islam depending on different opinions.³⁵² Similarly, many Christians also believe in a religious basis of

³⁴⁸ See, e.g., Marie Fox & Michael Thompson, *Cutting It: Surgical Intervention and the Sexing of Children*, 12 CARDOZO J.L. & GENDER 81, 86, 96 (2005) (arguing for education about circumcision to reduce its occurrence); Elisabeth McDonald, *Circumcision and the Criminal Law: The Challenge for a Multicultural State*, 21 N.Z.U. L. REV. 233, 265 (2004) (recognizing several foreign countries that have seen a reduction in circumcision, which have resulted from "dissemination of . . . medical research" on the procedure).

³⁴⁹ See *Genesis* 17:10 (King James) ("This is My covenant . . . between me and you and thy seed after thee[.] Every man child among you shall be circumcised."). The commandment of circumcision of male newborns on the eighth day is repeated again in *Leviticus* 12:3 (King James).

³⁵⁰ See *ENCYCLOPEDIA JUDAICA* 570 (1971) ("It is a Jewish father's duty to have his son circumcised. . . . [However, circumcision] is not a sacrament, and any child born of a Jewish mother is a Jew, whether circumcised or not.").

³⁵¹ Indeed, the leading Rabbinical codex of Jewish law, the *Shulchan Aruch*, written by Rabbi Yosef Caro in the 16th century, states that the commandment to circumcise one's son is greater than the other positive commandments. *Shulchan Aruch*, *Yoreh De'ah* 260:1 (reciting commandment to circumcise). 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. *ENCYCLOPEDIA JUDAICA* 570 (1972). Upon such an occurrence, other members of the community, or the young man himself when he is mature must arrange for the circumcision. See *id.* at 567–71 (discussing history and traditional background of circumcision).

³⁵² *Circumcision of Boys*, BBC ONLINE, http://www.bbc.co.uk/religion/religions/islam/islam_ethics/malecircumcision.shtml [<https://perma.cc/QN62-LNF9>] (last updated Aug. 13, 2009); *Khitān*, *ENCYCLOPAEDIA ISLAM* (P. Bearman et al. eds., 2d ed., Brill Online 2015),

the practice.³⁵³ As a result, not circumcising a child is considered to have a negative religious effect on the child and on religious parents, thereby potentially harming the parental relationship. Parents would hopefully not punish children for state prohibitions, but nonetheless state interference and undermining of parental authority could harm parenting relationships and by extension the child. Parents are likely to leave the state or disobey the law, which can result in legal penalty, in furtherance of their religious beliefs. Certainly, both consequences are not good for a child's relationship with a parent or the community. As serious harm to the child has not been proven by medical studies, but a significant negative impact on relationships with parents seems apparent, a ban on the procedure 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 given cultural beliefs in the practice, would need to be weighed against the more undisputed and demonstrable negative effects on female children.³⁵⁴ Such clear negative health effects warrant state interference regardless of harm to relationships.

2. *Mature Children's Civil Rights*

Mature children's civil rights are more complex because they involve not only ongoing care relationships, but also the will of children. Children's frustration in having their will impeded further complicates relationships. Therefore, more mature children's own desires must be part of any relational framework. Issues of both autonomy and dependency are directly at play in these considerations.

The right to marriage is considered fundamental.³⁵⁵ However, even mature children have limited rights in this regard.³⁵⁶ Fear of immature

http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/khitan-SIM_4296 [<https://perma.cc/H36D-6GCX>] (discussing the various Islamic opinions on circumcision, called "Khitan" under Islamic law).

³⁵³ See, e.g., Sami A. Aldeeb Abu-Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision*, 13 MED. & L. 575, 608 (1994) ("Male circumcision is practiced by the adherents of the three monotheistic religions . . . [which include] Christianity.").

³⁵⁴ See, e.g., *Toure v. Ashcroft*, 400 F.3d 44, 49 n.4 (1st Cir. 2005) (noting that "FGM may constitute persecution under some circumstances"); *Mohammed v. Gonzales*, 400 F.3d 785, 789 n.2 (9th Cir. 2005) (discussing the substantial harms of FGM); *In re Kasinga*, Int. Dec. 3278, 1996 WL 379826, at *4-5 (B.I.A. June 13, 1996) (citing physical harm of female genital mutilation); WORLD HEALTH ORG., *ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT* 34-35 (2008) (outlining several complications other than effects of the original cut that result from FGM, including the need for later surgery, urinary and menstrual problems, painful sexual intercourse, and infertility).

³⁵⁵ See *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (reaffirming the well-established principle that the right to marriage is fundamental).

³⁵⁶ On one hand, it is true that a child, because of his minority age, is not beyond the protection of the Constitution. See, e.g., *In re Gault*, 387 U.S. 1, 55 (1967) ("The constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults"). On the other hand,

decision-making and arranged coercive marriages keeps many children's rights advocates in favor of strict guidelines preventing marriage until the age of majority.³⁵⁷ Indeed, the right to marry is restricted in most states to those who have reached the age of eighteen.³⁵⁸ In many states, however, parental consent will allow a teenager to marry younger.³⁵⁹ Notably, in a few states such as Maryland and North Carolina, exceptions are made if the minor is expecting or has given birth to a child.³⁶⁰

In the seminal case of *Moe v. Dinkins*,³⁶¹ a fifteen-year-old pregnant girl, Maria, wanted to marry her boyfriend, Raoul, who was eighteen years old.³⁶² After Maria became pregnant, the couple moved into an apartment together.³⁶³ Maria requested consent from her mother to marry Raoul, but her mother refused because her mother feared that she would lose the welfare benefits she was receiving for Maria.³⁶⁴ Another couple, Christina and Pedro, also plaintiffs in the case, lived together in Pedro's father and step-mother's home.³⁶⁵ Just as Maria's mother had refused to consent to their marriage, so too did Christina's mother when Christina became pregnant; she instead arranged for Christina to have an abortion.³⁶⁶ The couples wanted to marry "to express their commitment to and caring for

the Court has recognized the state's power to make adjustments in limiting the constitutional rights of minors. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 636–37 (1968) (holding that a criminal statute, which accorded minors under seventeen a more restricted right than that assured to similarly situated adults, did not infringe upon their freedom of expression); *Prince v. Massachusetts*, 321 U.S. 158, 170–71 (1944) (upholding child labor law prohibiting minors from selling merchandise on public streets, despite Jehovah Witness's challenge based on constitutional right to religious freedom).

³⁵⁷ See, e.g., *Hamilton*, *supra* note 87, at 1862–63 (arguing that states should impose age restrictions on marriage).

³⁵⁸ See *id.* at 1832 (recognizing that "[t]he presumptive age of marital consent is . . . eighteen in all states but two, [Nebraska and Mississippi]").

³⁵⁹ See *id.* ("Every state permits adolescents younger than eighteen to marry with either parental or judicial consent, with most setting the minimum marital age at sixteen."). For example, 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. ANN. § 25.05.171(b)(2)(A)–(D) (West 2015). Similarly, Delaware permits minors to marry with court order absent parental consent, even though parental consent is a factor in a court's determination. DEL. CODE ANN. tit. 13, § 123(b) (West 2016). In Georgia, a minor who is at least sixteen years old may marry upon obtaining parental consent. GA. CODE ANN. §§ 19-3-2, 19-3-37(b) (West 2015). Finally, Hawaii requires both parental consent and court order if a minor, under the age of eighteen, wishes to be married. HAW. REV. STAT. §§ 572-1(2), 572-2 (West 2015).

³⁶⁰ MD. CODE ANN., FAM. LAW § 2-301(a)(2), (b)(2) (West 2016); N.C. GEN. STAT. ANN. § 51-2.1(a) (West 2015).

³⁶¹ 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982).

³⁶² *Id.* at 625.

³⁶³ *Id.*

³⁶⁴ *Id.* at 626.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

each other, to legitimate their relationship, and to raise their child in accord with their beliefs in a traditional family setting sanctioned by law.”³⁶⁷ In justifying the parental consent restriction (on children’s constitutional rights), the court emphasized children’s impaired capacity for decision-making, parental rights to make decisions for children, and children’s vulnerability: “the 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.’”³⁶⁸ In addition, the court described the denial of the right to marriage as merely temporary, and therefore held that marriage could legally be denied to children.³⁶⁹

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 their constitutional rights because the state should be able to step in, weigh the circumstances, and make a determination in a child’s best interests, or out of respect for children’s autonomy. From a relational perspective, it is hard to see how preventing these couples from marrying, due to a lack of parental consent, supports ongoing care relationships. The parents who are withholding consent are not providing significant care to their children who are living independently. 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, whereas not interfering may cause such harm. Therefore, from the relational perspective, state intervention to override parents’ discretion and allow these marriages should be permitted in order to effectuate children’s civil rights. Furthermore, although the inability to marry is temporary, it poses more harm to the child than 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 makes more sense. In other words, underage marriage can be restricted by the state with parents allowed to give consent, but the state should be able to step in to override parental fiat in circumstances where the children are more independent, especially where there is no threat that such intervention will cause harm and where lack of intervention could cause significant harm. In some jurisdictions, the state can step in and allow marriage under the age of majority by judicial approval absent parental consent.³⁷⁰ This may have mitigated the problems

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 629 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

³⁶⁹ *Id.* at 630.

³⁷⁰ See, e.g., COLO. REV. STAT. ANN. § 14-2-106(1)(a)(I) (West 2015) (allowing judicially approved marriages, even absent parental consent, for children over the age of sixteen but less than eighteen); 750 ILL. COMP. STAT. ANN. 5/208(a)–(b) (West 2016) (allowing state to override parental consent for children who are sixteen or seventeen).

faced by the mature children in *Moe*.

In some circumstances, the effect of the harm to the individual child by the state not interfering is greater than the harm of interference to the relationship. When the threat and danger to the child—emotional or physical—is not temporary, but rather is 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 even if it is ongoing. 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's position in *Planned Parenthood of Central Missouri v. Danforth*.³⁷¹

V. CONCLUSION

Although best interests is the current standard mechanism used to protect children, it is more a goal than a practical legal standard. It can be manipulated to reflect differing perspectives on how best to protect children—a state-centered, parent-centered, or child's-own-voice-centered perspective. As applied, it is a standard that relies on individualistic rights and interests, which does not sufficiently consider or emphasize the ongoing 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 in order to provide more guidance and clearer support for relationships in a manner that will more concretely and effectively protect children. The principles I have derived from the theory of relational rights, which I have described in detail above, can help judges, mediators, and advocates make choices that truly advance the interests of children. Of course, it is not possible to cover all applications of these principles, but I have tried to set out guidelines that are practical and approachable to frame a relational approach to children's rights. It is important that all three guidelines be used in conjunction with each other, as each adds to the overall change I advance. 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 broad and particularly helpful in setting the stage for relational rights for children.

Children neither need the right to be fully left alone, nor the benefit of state interference as against caring, supportive family members. Further, it is the fear of giving children liberty rights vis-à-vis parents that makes embracing children's rights so difficult. However, children need protection.

³⁷¹ 428 U.S. 52, 75 (1975) (holding that a blanket parental consent requirement for abortions by unmarried minors was an unconstitutional violation of minors' Due Process rights).

Children's rights should come in the form of support for care relationships that serve them, not in support for them as individuals in separation from parental care. As they mature, however, their individualism can be increasingly expressed and interference over parental objects more easily justified. Such support for relational rights 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.