

THE CASE AGAINST SEPARATING THE CARE FROM THE CAREGIVER: REUNITING CAREGIVERS' RIGHTS AND CHILDREN'S RIGHTS

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INTRODUCTION

There has been a gradual but clearly identifiable legal revolution in favor of supporting children's rights and promoting children's best interests.¹ Children, who were once treated more like property than humanity, and used as a means to punish parents and channel social norms through penalties on illegitimacy,² are now the focus of family law judicial determinations,³ the subject of international conventions,⁴ and the focus of much legislative and societal concern.⁵ Every jurisdiction of the United States focuses on the best interests of the child in determining custody as between formal parents and beyond.⁶ It is the

¹ See, e.g., Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 6–17 (2013) (providing a historical analysis of the development of children's rights); Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 270 (1995); Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 Hous. L. Rev. 817, 836 (2009). See also *infra* Part I.A for a discussion of the progress in the law towards respecting children's interests.

² See, e.g., Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1271, 1278 (2005); Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children's Rights*, 46 AM. PSYCHOLOGIST 53, 53 (1991); Andrew Schepard, *Kvell[ing] for Family Court Review on Its Fiftieth Birthday*, 51 FAM. CT. REV. 1, 1 (2013); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1807–09 (1993).

³ See Annette Ruth Appell, *The Pre-political Child of Child-Centered Jurisprudence*, 46 Hous. L. Rev. 703, 708 (2009); 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); Daniel W. Shuman, *Troxel v. Granville and the Boundaries of Therapeutic Jurisprudence*, 41 FAM. CT. REV. 67, 68 (2003); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY, 313, 315 (1998).

⁴ See, e.g., U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC].

⁵ Atwood, *supra* note 3, at 382–85, 410–15.

⁶ CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 2–4 (Nov. 2012), available at <https://www.childwelfare.gov/pubPDFs>

governing principle with regard to child support guidelines and litigation, adoption, placement after abuse, neglect proceedings, and emancipation.⁷ Internationally, many countries have ratified the U.N. Convention on the Rights of the Child (“CRC”), which creates, or at least reflects, a worldwide normative insistence on the use of the best interests of the child for determining custody and in allowing international adoptions, as well as for other legal determinations regarding children.⁸ The CRC delineates numerous children’s rights and focuses on child support and the right to know one’s biological heritage and be raised by one’s parents.⁹ International adoption, the use of assisted reproductive technologies (“ART”), and many other fields of law involving children, have all been influenced by best interests inquiries and discussions of children’s rights.¹⁰ There are inevitable shortcomings in the application of this standard where it may be argued that children’s interests are being ignored and are not as influential as they appear,¹¹ but the conceptual movement is clear and progress has been made.

However, the question remains, how far can this emphasis on children be extended, and, if one wants to take children’s rights and interests seriously as a valid cause for advocacy, are there any relevant considerations in advocating for children beyond what is determined to be best for an individual child?¹² In

/best_interest.pdf (discussing that all states have statutes requiring that the child’s best interests be considered whenever a court makes decisions regarding a child).

⁷ See *Bernstein v. Bernstein*, 498 So. 2d 1270, 1273 (1986 Fla. Dist. Ct. App.) (stating that the best interest of the child is predominant in establishing the amount of child support); 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”); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 69 (2014).

⁸ CRC, *supra* note 4, art. 3, ¶ 1.

⁹ *Id.* arts. 6–9, 12–16, 23–28, 30–32, 40.

¹⁰ See 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 children, the Hague Treaty struck a balance between hard-and-fast rules and flexible implementation options left to individual governments’ discretion.”); 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); Molly S. Marx, Comment, *Whose Best Interests Does it Really Serve? A Critical Examination of Romania’s Recent Self-Serving International Adoption Policies*, 21 EMORY INT’L L. REV. 373, 390 (2007) (recommending the European Union suspend Romania’s admission because Romania clearly fails to consider the best interest of the child as required by the United Nations).

¹¹ See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 849–54 (2004).

¹² See *Quiner v. Quiner*, 59 Cal. Rptr. 503, 518–22 (Cal. Ct. App. 1967) (Herndon, J., dissenting) (arguing that a parent’s religious affiliation is only relevant in a custody determination to the extent that it affects the best interests of the child, and here the mother’s religious affiliation would require her to isolate her son from his father, which would not be in the

particular, I have written a number of articles advancing the interests of caregivers and arguing for the revaluing of the caregiver role in family law.¹³ In these articles, I argue for revaluing caregiving work in order to provide more compensation and legal rights to those who care for dependents. These arguments have been critiqued for their focus on caregivers in isolation of children.¹⁴ Is giving rights to caregivers, or credence to the care work they provide, a potential threat to children's rights?

At first blush, it would seem that caregivers' interests would be part of any child-centered inquiry. Indeed, any best interests inquiry in determining custody will take into account children's relationships with their caregivers. On the other hand, caregiver interests may seem completely irrelevant as the children's rights inquiry may seem most pressing when relationships between parent and child break down, as in neglect and abuse proceedings. However, there are many more inquires that fall between those poles, where the issue of the severability of caregivers' and children's interests is central. This occurs particularly in custody law, which is the focus of this article. I will discuss a number of examples of these hard cases in this article. One common issue of contention is whether children should have a right to relationships with third parties other than parents, such as grandparents, when parents object.¹⁵ In these types of custody determinations, the extent to which the court should defer to the preferences of parents in primary caregiving relationships with children, as opposed to the many other factors involved in a best interests inquiry, is regularly dis-

child's best interests); JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 11–12 (2006) [hereinafter DWYER, RELATIONSHIP RIGHTS]. See generally 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 (2012) [hereinafter Dwyer, *Parents' Self-Determination*] (arguing that consideration of fairness to caregivers undermines the focus on children in custody disputes); Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 518–20 (1996); 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 1161–64 (arguing for a best interests standard in deciding when to deport citizen children with parents and a weakening of parental rights in this context); Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran v. Bosze*, 24 CONN. L. REV. 211, 237 (1991) (arguing that the best interests standards suffers from the flaw of not allowing for altruistic choices); Lauren C. Miele, Note, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody*, 43 NEW ENG. L. REV. 105 (2008) (arguing that because polygamy remains illegal and because it has a general negative impact upon the children involved, it will almost always remain a factor courts can consider when awarding custody).

¹³ See generally Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1 (2008) [hereinafter Laufer-Ukeles, *Selective Recognition*]; Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25 (2009); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419 (2013).

¹⁴ Dwyer, *Parents' Self-Determination*, *supra* note 12, at 92–93.

¹⁵ See *infra* Part IV.A.

puted. Indeed, that the primary caregiver presumption is not the law in any state, but rather it is the best interests standard which dominates custody proceedings, demonstrates the potential separation inherent in custody disputes. Relocation and modification proceedings in particular are often fraught with confusion on how much to take into account the ongoing relationship or to focus on a renewed vision of what might be best for children.¹⁶ Finally, in the context of education, health, and religious rights, as well as other types of parental choices, the relevance and strength of caregiver rights and the extent to which the state should interfere, overrule, or punish parental prerogatives is often at issue.¹⁷

The pitting of children's rights against caregiver rights is a great contemporary dilemma about the clash of rights. The clash of caregiver and children's rights joins a range of other dichotomies in family law that seem to create unending tension: father's rights versus mother's rights, parents' rights versus children's rights, state interests versus family privacy, and cultural identity versus the determinations of best available care. Moreover, if a focus on caregivers harms children's interests and a focus on children harms caregivers then the feminist movement for protecting the value of care seems to be potentially in opposition to children's rights.¹⁸ The power of this critique is that it uses the methods of feminist theory, seeking to protect the vulnerable and to uncover and uproot hidden power structures, to undermine the rights of the traditionally and still predominately female caregivers who feminists have sought to protect. To clarify, the question of caregiver rights is distinguishable from parental rights because not all caregivers are parents and not all parents are caregivers.¹⁹ Moreover, caregiver rights refer specifically to actions of caring for children

¹⁶ See *infra* Part IV.C.

¹⁷ See Dwyer, *Parents' Self-Determination*, *supra* note 12, at 82–86.

¹⁸ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 70–89 (1995) (arguing for valuing the caregiving “mothering” relationships that provide needed care for children); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 13–39, 124 (2000) (arguing that society should reconsider the role of care by breaking down the ideal worker paradigm that does not integrate the need to care for children); see also BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* 198–208 (1989) (discussing the advent of paid childcare fostered by women entering the workplace).

¹⁹ I largely put aside questions of parental rights versus children's rights in this article and instead focus on the need to include caregiver interests within the discussion of children's rights themselves. However, descriptions of the tension between parents' rights and children's are numerous. See, e.g., Annette Ruth Appell, *Accommodating Childhood*, 19 *CARDOZO J.L. & GENDER* 715, 726 (2013); Susan Frelich Appleton, *Restating Childhood*, 79 *BROOK. L. REV.* 525 (2014); Clare Huntington, *Rights Myopia in Child Welfare*, 53 *UCLA L. REV.* 637, 638–40 (2006); Jonathan Todres, *Maturity*, 48 *HOUS. L. REV.* 1107, 1111 (2012); Woodhouse, *supra* note 1, at 825.

and not to parental rights to treat children at their own discretion short of a finding of unfitness.²⁰

Some have argued, including James G. Dwyer, that to account for children's rights, children's interests should be the only consideration in custody hearings; thus, parental rights, prerogatives, and liberty interests would be completely irrelevant.²¹ Because of the focus on the need to protect children, it is argued that the state should step in and enforce children's rights in a manner analogous to the state's protection of adult rights.²² Therefore, to take children's rights seriously, it is necessary to curtail parental rights by allowing the state to intervene and protect children's rights based solely on objective "best interests" criteria, as determined by the state in judicial hearings.

In this article, I explain how the separation of the interests of children from the interests of caregivers through the use of the best interests standard is problematic and ineffectually furthers children's interests. Rather, support for children needs to focus on supporting relationships between children and caregivers. I will argue that the use of the best interests standard to isolate children's interests from caregiver interests has three primary interlinking aspects that make the standard weak and ineffectual as the primary means for advocating on behalf of children. First, the best interests analysis protects a variety of children's interests, such as: quasi-civil rights; liberty interests similar to, but more limited than, adult liberties; interests in being cared for by parents or other caregivers; and interests in protection from the state. These interests often mandate conflicting treatments and are hard to resolve by merely asking the state to determine what is "best." Second, due to these conflicting interests and the difficulties of predicting what is "best," the state is nevertheless called on to decide what is best without meaningful guidance from the standard; thus, courts rely on majoritarian values, preferring simplistic findings, such as nuclear families that are financially stable and well-educated, as opposed to the complex realities. Third, ultimately, because judicial determinations are made in a manner that gives state perspectives and interests special weight, the needs of caregivers and the children for whom they care are too often treated as separate inquiries as courts aim to provide an individualistic and isolated perspective of best interests in the liberal tradition.

I make this argument against the use of the best interests standard and the separation between caregivers and children it entails, not in deference to parental rights and prerogatives because parents are better situated than the state to

²⁰ See *infra* notes 31–39 and accompanying text for a discussion of some of the problems that have occurred in the legal treatment of children under a parental rights doctrine.

²¹ Dwyer, *Parents' Self-Determination*, *supra* note 12, at 82–86.

²² DWYER, RELATIONSHIP RIGHTS, *supra* note 12, at 131–36 ("As a matter of rational moral consistency, therefore, we should conclude on utilitarian grounds that in all cases in which the state structures children's relational lives, and in which children are not themselves in the best position to judge where their interests lie, the state should act as proxy for the children In short, it is simply unavoidable that the state will play a decisive role in the lives of nonautonomous persons, and it does so quite clearly today.").

know what is best for their children as others have argued,²³ or because we need to heed children's own isolated interests and voices more emphatically and in more creative ways,²⁴ but because an individualized account of best interests that focuses on children alone fundamentally misses the nature of children's needs and vulnerabilities, and the nature of the relationships upon which they depend. Children are caught between dependency and agency; thus, neither pursuing children's rights through reliance on parents, nor through reliance on a child's own voice sufficiently captures the nature of the children's inquiry. Rather, to promote children's interests the focus should be on supporting the relationships children need to thrive.

I will argue for a conceptual rejoining of care and the caregiver and then translate this union into applicable legal doctrine to fight the tide of separation, the liberal emphasis on individualism, and the focus on the clash of rights in modern family law. Instead of a focus on an individualistic best interests standard to support children, which is fraught with uncertainty and ambiguity and subject to bias, I argue that in pursuing children's rights, judges and legislators should focus on supporting these caregiver-child relationships. The child and his or her custodians have an inseparable interdependent relationship and this relational nature of children's lives cannot be ignored; the caregiver and the care that a child needs cannot be completely separated.²⁵ Moreover, these relationships that are necessitated by children's dependency are fundamental to children's needs.²⁶ Granted, when there is evidence of abuse and neglect, the relationship between children and caregivers must be questioned and their rights potentially terminated. However, short of abuse and neglect, the rights of children and caregivers need to be considered in parallel, viewed as inextricably intertwined, and in a manner that protects both children and caregivers. That does not mean that caregiver rights will always overwhelm what is deemed best for children or vice versa; rather, the importance of the relation-

²³ See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979); Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 358-59; Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 647-49, 656 (2002). Cf. Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001) (arguing for parental rights doctrine to maintain diverse family forms and cultural identities).

²⁴ See, e.g., Woodhouse, *supra* note 2, at 1810-41.

²⁵ See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 14-21, 24 (1986) [hereinafter Minow, *Rights for the Next Generation*]; see also Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297-98, 315 (1988); Martha Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894; Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 20-26 (1996); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 617-22 (1986).

²⁶ Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2166-67 (2011); Anne C. Dailey, *Children's Transitional Rights*, LAW, CULTURE & HUMAN. (forthcoming 2015) (manuscript at 21-30), available at <http://ssrn.com/abstract=2392570>.

ship demands consideration of how to best support children and their caregivers in a relational and inseparable context. Sometimes caregivers will have to be restricted or have their prerogatives overridden, but any such decision must keep the ongoing relationship between child and potentially multiple caregivers front and center.

This shift in focus away from an individualized account of children's rights versus caregiver rights, and towards a relational, relationship-based perspective on children's rights will significantly impact how we consider children's rights and the legal doctrines affecting children. In particular, I will present a relationship-centered series of legal rules for adjudicating custody decisions. I argue for recognition and preservation of a variety of types of relationships, including recognition of functional parenthood and third-party care, the use of presumptions to preserve relationships and to replace best interest inquires, and relocation and modification rules that reflect an emphasis on relationship preservation and stability.

This article will proceed in four main parts. Beginning in Part I, I will dissect the nature of children's rights and the relationship between children's rights and the best interests standard. This background is essential given the confusion and conflation of the concepts of children's rights, interests, and best interests.

Then, in Part II, I will critique the use of the best interests standard as the primary vehicle in modern law in advancing children's interests. I argue that the indeterminacy and ambiguity of the best interests analysis reflects internal conflicts based on the different types of children's rights comprising this standard, such as dependency rights, parental privacy, or civil liberties. Lumping these different types of interests together creates ambiguity and uncertainty in applying best interests that cannot be readily resolved. Thus, despite the standard's persistence, I add to the scholarly critique that the best interests standard is not a rich and meaningful basis for legal decision-making.²⁷

I will then provide some examples of how best interests analyses are often made unintelligible by differing interpretations of the meaning of children's rights and interests in complex legal determinations. I argue that the use of best

²⁷ See Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 426–27 (2000); Pamela Laufer-Ukeles, *Custody Through the Eyes of the Child*, 36 U. DAYTON L. REV. 299, 300 (2011) (“[D]ue to the malleability and ambiguity of the standard, determining best interests has proved to be dependent on factors other than a child’s needs [including] biases of judges [and] preconceptions regarding socio-economic class, gender and race While the best interests standard is intended to achieve that which is best for the child concerned, it is also a broad and ambiguous concept subject to manipulation and an unlimited number of interpretations.” (footnotes omitted)); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975) (“[D]etermination of what is ‘best’ or ‘least detrimental’ for a particular child is usually indeterminate and speculative. . . . [O]ur society today lacks any clear-cut consensus about the values to be used in determining what is ‘best’ or ‘least detrimental.’”).

interests is not an objective measure, but instead relies on majoritarian visions of optimal care imposed by the state in an attempt to isolate what is best for children; the state's analysis uses simple proxies for complex analyses and undermines family privacy rights and children's attachment to caregivers. These examples demonstrate how current law, which attempts to isolate what is best for children, in fact separates children's interests from caregiver interests in a manner that may be harmful to children and only accentuates the tension between children's right to be raised by their parents and their right for protection from the state.

Next, in Part III, I will consider the nature of caregiver rights and interests and how they are indelibly intertwined with children's rights and interests. I will describe how such individualist perspectives on parental and children's rights warp and obfuscate the real issues in promoting children's rights: supporting interdependent relationships. I will use Martha Albertson Fineman's vulnerability theory²⁸ and Jennifer Nedelsky's relational rights theory²⁹ to argue for a theoretical framework for considering caregiver rights in tandem with children's rights. This relational perspective is different from a state interventionist or parental rights perspective as it focuses on the need to support relationships as opposed to giving individuals or the state power to make decisions regarding children.

Finally, in Part IV, I will demonstrate how this altered perspective affects legislative policy and legal decision making in the context of custody law. First, I will argue for an approach to custody that focuses on supporting a variety of care relationships, such as primary, secondary, formal, and functional. Children have a right to have their supportive relationships maintained, even if primary parents object, and differentiation and hierarchy can ease the tension and allow different kinds of relationships to coexist. Second, I will argue from a relational children's rights perspective for the use of presumptions when possible to avoid using the best interests standard. Lastly, I will consider the law of relocation and modification, and provide principles derived from the interdependency of children and caregivers, while focusing on supporting multiple care relationships.

I. DISSECTING CHILDREN'S RIGHTS AND INTERESTS

In this part, I will address the nature of modern advocacy for children and its development. I will first provide a brief background on the fluctuations in the law regarding children's advocacy. I will then describe the nature of children's rights, and the nature of the best interests standard.

²⁸ See generally VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds., 2013).

²⁹ See generally JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2011).

A. From Rights to Interests and Back Again

Children's interests were once completely subsumed under the rights and interests of parents. Parents were entitled to use their children for labor and collect their wages, and could punish their children harshly, even to the extent of death in several states.³⁰ Children were considered the property of fathers who would retain custody as a matter of right.³¹ Even when custody could be awarded to either parent, the dispute concerned only the rights of two competing adults, and children were used as a punishment or reward for parental behavior.³² Children were also used as a means to "punish" the sins of parents in laws surrounding illegitimacy.³³ Illegitimate children were historically severely discriminated against and the state justified this by the fact that the parents conceived the children out of wedlock. Illegitimate children did not have rights to child support or inheritance, nor did they have equal access to civil rights.³⁴ When children did not have parental care, they would be placed with foster families, but the goal was simply to find a family to care for them and there

³⁰ See Woodhouse, *supra* note 3, at 314.

³¹ Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497, 502.

³² Modern case law has since reversed the course of punishing parents by refusing to award custody. See, e.g., *Ashwell v. Ashwell*, 286 P.2d 983, 987 (Cal. Dist. Ct. App. 1955) ("[I]n determining where custody of children shall lie the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals"); *Hayes v. Gallacher*, 972 P.2d 1138, 1142 (Nev. 1999); *Sims v. Sims*, 865 P.2d 328, 330 (Nev. 1993) (holding custody determinations should be made in best interests of children, not to punish parents); see also *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (stating that purpose of custody decision is not to punish parent); Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293, 309 (2012); Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87, 97 (2006); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1187 (1999).

³³ See Taylor Gay, Comment, *All in the Family: Examining Louisiana's Faulty Birth Order-Based Discrimination*, 73 LA. L. REV. 295, 303-04 (2012) (discussing how illegitimate children, born to unmarried parents, were discriminated against by the government until 1968 when the United States Supreme Court held that denying children rights based on legitimacy is unconstitutional); see also *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding "it is invidious to discriminate" against illegitimate children by precluding them from recovering damages for the wrongful death of their mother); Cara C. Orr, Comment, *Married to a Myth: How Welfare Reform Violates the Constitutional Rights of Poor Single Mothers*, 34 CAP. U. L. REV. 211, 218 (2005) (reviewing discrimination based on illegitimacy and how the American legal system has historically discriminated against children born out of wedlock).

³⁴ Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 483 (2005) (reviewing the history of illegitimacy and how a child born to unwed parents had no right to child support); see Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1, 5 (2007) (illegitimate children were considered "bastards" and not entitled to inheritance rights).

was little oversight over the conditions of the homes or the suitability of placement.³⁵

The first revolution in advocacy for children was the switch from children as property to children as interest bearers.³⁶ Under the “fiduciary” model, children are treated as persons in need of protection. This is still consistent with a strong view of parental rights, as a “fiduciary exercises great authority and power.”³⁷ Accordingly, children’s interests have become the focus of legislation, case law, and international treaties.³⁸ Children went from being viewed as parental property to individuals with needs and interests that need “stewardship.”³⁹ Today, children’s interests have become relevant both in the context of child protection—such as in cases of abusive or neglectful parents—and in resolving disputes between parents. Laws that explicitly punished parents through custody awards are defunct,⁴⁰ and almost all discrimination based on illegitimacy unconstitutional.⁴¹

Although other constitutional factors may still be considered in determining custody,⁴² the best interests of the child standard is dominant in custody decisions.⁴³ Best interests analyses almost always include the relevance of children’s voices, particularly with regard to older children, but also take into account the fact that minor children need more than mere autonomy, they must also be taken care of. Ultimately, best interests analyses allow the state, judges, parents, and other surrogates to determine what is best for children.

The second revolution in advocacy for children is the growing prevalence of children’s rights. Children’s rights advocates are more focused on pitting children’s needs against parental rights or state interests, creating a cocoon of

³⁵ See BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 96–99 (2008) (demonstrating harsh conditions for children in the foster care system); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 169–71 (1994) (discussing the way children were valued for their useful labor in the foster care and adoption system).

³⁶ See Woodhouse, *supra* note 3, at 313–14.

³⁷ *Id.* at 314.

³⁸ See *supra* notes 1–10 and accompanying text.

³⁹ See Woodhouse, *supra* note 2, at 1755–56; Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2519–20 (1995); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401 (1995).

⁴⁰ See *supra* notes 30–33 and accompanying text for a discussion of laws that treated children as property.

⁴¹ See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding unconstitutional a state law that barred illegitimate children from bringing wrongful death suits); *but see Nguyen v. INS*, 533 U.S. 53, 58–59 (2001) (holding that children born out of wedlock must have paternity of U.S. citizen legally acknowledged by age eighteen or lose ability to gain U.S. citizenship).

⁴² See *supra* note 12 and accompanying text.

⁴³ See James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 911 (2003); *infra* Part II.A.

protection that belongs to children alone.⁴⁴ Stewardship, as a conceptual model in which parents make decisions on behalf of children, is called into question. Those who focus on promoting children's rights as human rights tend to be more focused on listening to children's voices than on allowing others to make decisions on their behalf.⁴⁵ However, because children cannot always articulate their own liberty interests and their immaturity compromises their autonomy, typical rights language, which usually focuses on individual autonomy and rationality, is a difficult fit for children.⁴⁶ Nonetheless, rights need not depend on full autonomy.⁴⁷ The state can protect children's rights, and parents and other adults can respect those rights, even if children are not fully autonomous.⁴⁸ Children's rights advocates focus on how children—without full liberty and constitutional rights—still maintain human, civil, and constitutional rights that deserve to be protected from interference.

The source of such rights may be based on ethical notions of human and civil rights, international conventions, or domestic constitutions.⁴⁹ Indeed, children's rights are canonized in the U.N. Convention on the Rights of the Child ("CRC"), which many countries have signed.⁵⁰ However, despite the name of the document, there are disagreements on how rights-oriented versus best-interests-oriented the CRC is in reality.⁵¹

"Rights talk" regarding children is quite widespread in child advocacy literature.⁵² Although it is often criticized as creating unnecessary tension,⁵³ most

⁴⁴ See, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867–71 (1987).

⁴⁵ See, e.g., Shulamit Almog & Ariel L. Bendor, *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, 277–79 (2004).

⁴⁶ See, e.g., Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 BYU L. REV. 605, 644–56.

⁴⁷ See Minow, *supra* note 44, at 1882–1891 ("Autonomy, then, is not a precondition for any individual's exercise of rights. The only precondition is that the community is willing to allow the individual to make claims and to participate in the shifting of boundaries.").

⁴⁸ *Id.*

⁴⁹ For different moral approaches to the source of rights, see *infra* notes 130–32 and accompanying text.

⁵⁰ See *supra* notes 3–4 and accompanying text.

⁵¹ See, e.g., Barbara Bennett Woodhouse & Kathryn A. Johnson, *The United Nations Convention on the Rights of the Child: Empowering Parents to Protect Their Children's Rights*, in *WHAT IS RIGHT FOR CHILDREN?* 7–18 (Martha Albertson Fineman & Karen Worthington, eds., 2009) (arguing that the treatise incorporates parental rights and best interests in a manner that makes it unthreatening to parental rights advocates); Almog & Bender, *supra* note 45, at 277 (arguing that the CRC grants rights to children that frequently conflict with both parental rights and judicial discretion, focusing on the rights of the child attached from parent or state).

⁵² See, e.g., Minow, *supra* note 44, at 1868–69 ("Advocates for children typically make claims about children's rights, despite prevailing rules of parental and judicial discretion, in an effort to challenge public complacency and to yield particular results in particular cases.").

believe it is necessary to counteract strong notions of parental rights by arguing that children deserve the same level of protection.⁵⁴ Largely due to this perceived tension between parental rights and children's rights, and the resulting threat to the former,⁵⁵ the United States has not signed the CRC.⁵⁶ Accordingly, children's rights talk in U.S. case law is relatively uncommon when compared to other countries. Although balancing rights is a common phenomenon, many believe a discussion of children's rights is inappropriate and an unjustifiable intrusion on parental rights.⁵⁷

The terms "best interests," "children's interests," and "children's rights" are thrown around with abandon. Using the term "rights" as opposed to "interests" is often viewed as a strategic choice in order to combat the strength of parental rights rather than a factual distinction.⁵⁸ Legal scholars and judges move swiftly from one to the other. However, there are real and important differences between the terms. Joseph Raz described the relationship between rights and interests: "'X has a right' if and only if . . . an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."⁵⁹ Interests reflect general advocacy on behalf of children's well-being. One can have a desire that is not really in one's interests (does not promote their well-being), although that may be a paternalistic perspective. A child has an interest in having his voice heard, but his voiced desires may not support his interests; thus, the state or a parent must step in to make decisions on the child's

⁵³ See, e.g., Woodhouse, *supra* note 2, at 1841–43 ("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. It keeps neighbors and even family at arm's length, excuses the community from accepting real responsibility for the plight of 'other people's children'" (quoting W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN* 78–85 (1982))).

⁵⁴ See, e.g., 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) ("Wary as I am of the destructive potential of 'rights talk,' I have chosen in other writings to consciously adopt a discourse of 'needs-based rights' to describe children's so-called interests. I do so because of my conclusion that, in 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.").

⁵⁵ See Woodhouse, *supra* note 3, at 315 ("The provision of human rights is not a zero sum game; acknowledging that children have human rights serves to strengthen, rather than to diminish, the human rights of their parents.").

⁵⁶ *Id.* at 313.

⁵⁷ *Id.*

⁵⁸ See, e.g., DWYER, *RELATIONSHIP RIGHTS*, *supra* note 12, at 12–13; Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 *NEV. L.J.* 141, 153 (2004); Minow, *supra* note 44, at 1867 (discussing various ways rights talk is used and pointing to an aspirational incentive to use "rights talk" even after rights claims have failed).

⁵⁹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986); accord Alon Harel, *Theories of Rights*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 191, 192 (Martin P. Golding & William A. Edmundson eds., 2005); Alon Harel, *Whose Home Is It? Reflections on the Palestinians' Interest in Return*, 5 *THEORETICAL INQUIRIES L.*, 333, 339–40 (2004).

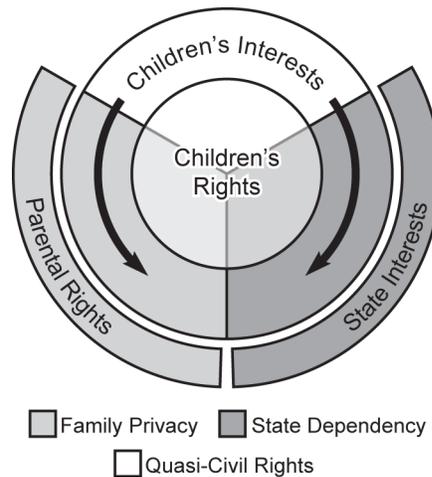
behalf. Although we allow adults to follow their own autonomous desires, we are more cautious when it comes to children due to their immaturity.

A right is a tool for achieving interests. When an interest is so weighty as to create a duty in others, it is a protected interest that becomes a right. Thus, the rights discourse should be preserved for actual rights that, by definition, require a strong interest and an interest holder. However, rights should not be used to protect all of children's potential interests; rather, rights should encompass a small core of interests that have clear sources—constitutional, ethical, or based on international treaties.

People disagree on what promotes children's interests, and some amount of experimentation may be necessary and justified. However, children's rights create a necessary protective zone that must be upheld unless a rare and compelling reason exists to outweigh such rights. Encompassing rights within the broader concept of interests weakens the power of children's rights and prevents advocates from pursuing interests in a variety of coherent ways according to the circumstances. Therefore, children would benefit from a more differentiated use of both rights and interests.

I will use both "interests" and "rights" in this article as tools to promote child advocacy; however, although I am stuck with the mixed and complex uses of these terms in the literature and case law, and thus I will continue to use them in flexible ways, ideally these terms connote different concepts and are not completely interchangeable.⁶⁰ However, the term "rights" can be used to refer both to the rights it denotes and to the related interests that support them.⁶¹ Therefore, in the following discussion of different categories of rights, one must understand that there is a broad range of interests to support each right. In the next part, I will analyze the different components of children's rights and interests and then discuss the use of the best interests standard.

FIG. 1: COMPONENTS OF CHILD ADVOCACY



⁶⁰ This conflation of rights and interests undoubtedly causes confusion, so I will do my best to be clear in the context of this article. But, as I am often dependent on others' use of the terms, and for the sake of simplicity, they will have to be understood somewhat fluidly and flexibly despite the different definitions I argue that we should attribute to these terms.

⁶¹ See Figure 1 for a pictorial depiction of the relationship between children's rights, children's interests, and state and parental interests.

B. The Three Categories of Children's Rights: Quasi-Civil Rights, the Right to Familial Privacy, and the Right to Adequate Care

The term “children’s rights” is used in a variety of ways, based on a variety of sources,⁶² and stands for substantively different kinds of rights. First, children have two kinds of rights that can be at odds with each other: civil rights and dependency rights.⁶³ What Annette Appell terms “quasi-civil rights” are freedoms from state or parental interference, such as rights of reproduction, marriage, citizenship, privacy, cultural identity, and so forth.⁶⁴ These rights are “quasi” because they mirror adult civil rights, but are much narrower and more limited.⁶⁵ Dependency rights are the rights to be cared for by the state or by parents, the right to be parented and cared for and to have one’s basic needs fulfilled.⁶⁶ These rights are specific to children, who are in need of care. These rights involve the freedom from abuse and neglect and the social welfare of children. However, they have little to do with freedoms and liberty.⁶⁷ Thus, there is tension in the notion of children’s rights when referring to their dependency and need for care and their limited liberty rights.⁶⁸

These so-called “dependency rights” can be further divided into two sub-categories: the right to be parented by one’s own legal parents in the form of familial privacy, and the right to state protection as a means of assuring adequate care for children.⁶⁹ These different dependency interests should not be lumped together as they can conflict. The first set of rights is based on the belief that children’s care is best provided by parents; thus, children have a right to such care without interference from the state. The second set of rights is based on the need for state interference with parental relationships to protect children or to care for children when parents are not willing or able to provide the necessary care.

All three categories of children’s rights assume different primary voices in any resulting conflict and different actors in assuring children’s rights. In the case of quasi-civil rights, the child is the primary actor seeking liberty rights from the state and parents are either not involved, involved only in supporting the child in achieving those rights,⁷⁰ or involved as antagonists from whom the

⁶² See *supra* notes 58–59 and accompanying text.

⁶³ Appell, *supra* note 58, at 150–61.

⁶⁴ *Id.* at 154–56.

⁶⁵ *Id.* at 154.

⁶⁶ *Id.* at 156–60.

⁶⁷ *Id.* at 156.

⁶⁸ *Id.* at 160–61.

⁶⁹ Minow, *Rights for the Next Generation*, *supra* note 25, at 18–19.

⁷⁰ For instance, parents might support children’s right to vote and right to citizenship, among other quasi-civil rights obtained from the state. Children’s rights vis-à-vis the state can also benefit parents’ rights. See Jonathan Todres, *Women’s Rights and Children’s Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN’S L.J. 603, 612–16 (2004).

child is seeking to effectuate his rights to freedom from parental control.⁷¹ For instance, quasi-civil rights that provide liberty from parents are emancipation through the courts,⁷² the right to abortion,⁷³ the right to marry,⁷⁴ and the right of children to have their voices heard in custody disputes.⁷⁵ Indeed, because parental consent may often vitiate the need to seek redress of civil rights from the state, parental opposition is not uncommon in these cases.⁷⁶ A child may also seek the right to vote, to drink alcohol, to receive legal representation or juvenile treatment in criminal matters, to forego parental consent laws, or to access medical or genetic birth parentage information in a matter that is either uncontested by or unknown to formal parents.⁷⁷ These are usually rights exercised by older children who have the capacity and autonomy to pursue the liberty interests that support them. The CRC specifies a number of these quasi-civil rights, including the right to identity,⁷⁸ the right to a nationality,⁷⁹ the freedom of expression, and the right to receive information.⁸⁰

Quasi-civil rights may implicate dependency rights as well, particularly when such rights may provide freedom from parental control. However, despite the potential for overlap, they can still be distinguished because quasi-civil

⁷¹ See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (holding that a minor seeking an abortion must have consent from either a parent or the state, but that a parent cannot have a veto on a child's right to an abortion without the potential for a state override); *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (holding a law that required parental consent for minor to marry constitutional).

⁷² See, e.g., CAL. FAM. CODE § 7120 (West 2013); CONN. GEN. STAT. ANN. § 46b-150b (West 2009); LA. CIV. CODE ANN. art. 371 (2014). See generally Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239 (1992).

⁷³ See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976).

⁷⁴ See, e.g., *Moe*, 669 F.2d at 68 (minor seeking the right to marry without parental consent but the court upholding the constitutionality of parental consent to marriage laws).

⁷⁵ See CRC, *supra* note 4, art. 12 (identifying the right of children who are capable of identifying their own views to express these views in matters affecting them, either directly or through a representative); Woodhouse, *supra* note 2, at 1753.

⁷⁶ J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 173-74 (2003) (discussing the traumatic experience of minors who have to face parental opposition to their abortion in court); Catherine Grevers Schmidt, Note, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 604 (1993) (discussing how parental opposition to abortion has contributed to late term abortions as some minors seek redress through the courts).

⁷⁷ *In re Gault*, 387 U.S. 1 (1967) (finding that where a child faces a loss of liberty he or she must be afforded appropriate due process protections, including the right to counsel); ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 2-3 (6th ed. 2009) (discussing provisions that preclude children's rights including the right "to vote, hold public office, work in various occupations, drive a car, buy liquor, or be sold certain kinds of reading material." (footnotes omitted)).

⁷⁸ CRC, *supra* note 4, art. 8.

⁷⁹ *Id.*

⁸⁰ *Id.* art. 13.

rights do not concern the need for care from others, although they could involve procedural rights in the process of determining care, such as having a voice in custody disputes.⁸¹

Children also have the right to parental care and parents have a duty to provide this care.⁸² Parents have the corresponding right to privacy to raise their children free from state interference.⁸³ Thus, cases such as *Wisconsin v. Yoder*⁸⁴ and *Pierce v. Society of Sisters*,⁸⁵ which announce the doctrine of parental and family privacy, may also be used as examples of cases that promote children's right to parental care.⁸⁶ Parental privacy rights were not initially developed to oppose children's rights, though this is how they are commonly positioned in modern times.⁸⁷ Rather, they developed to oppose state interference with a child's right to be raised by his or her parents without the state interfering or claiming rights over children.⁸⁸ Children's rights also concern protection from state intrusion.⁸⁹ These privacy cases are part of the movement for children's rights because they allow a diversity of child upbringings.⁹⁰ This line of thinking about children's rights is also represented in the CRC. In Article 5, the CRC provides: "States Parties shall respect the responsibilities, rights and duties of parents . . . to provide . . . appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."⁹¹ Additionally, Article 7 continues by explaining that every child has "the right to know and be cared for by his or her parents."⁹² In Article 14, the CRC states that "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of

⁸¹ See, e.g., Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 FAM. L.Q. 53, 60–65 (1985) (arguing that, in custody disputes, independent legal counsel for minors ensures that their interests are protected); see also Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 827–30 (1999) (discussing the need to focus on children's voices in custody disputes based on a best interests analysis).

⁸² See Woodhouse, *supra* note 2, at 1818–27.

⁸³ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that "[t]he liberty interest . . . of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

⁸⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (allowing Amish children to avoid compulsory schooling requirements).

⁸⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (allowing children to be educated in a manner other than public schools).

⁸⁶ See Minow, *Rights for the Next Generation*, *supra* note 25, at 19.

⁸⁷ See discussion of relationship between parental rights and children's interests *infra* Part II.B.

⁸⁸ See, e.g., WOODHOUSE, *supra* note 35, at 63 (discussing the rights of children to parental care having been brought to the United States as indentured servants); Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 WM. MITCHELL. L. REV. 807, 814–15 (2007).

⁸⁹ See Minow, *Rights for the Next Generation*, *supra* note 25, at 19.

⁹⁰ *Cf. id.*

⁹¹ CRC, *supra* note 4, art. 5.

⁹² *Id.* art. 7.

his or her right.”⁹³ Thus, there is a broader understanding of children’s rights under both U.S. and international law that includes the notion that children have a right to be parented by their formal legal parents and that such parents should have freedom to act on their children’s behalf without governmental interference. This set of rights is quite distinct from children’s quasi-civil rights because although they are intended to advance children’s interests, the interests are completely subrogated to legal parents who hold such rights on behalf of their children. Thus, it is the parents who struggle for such rights against the state, and children are the beneficiaries.

Whether this category of children’s rights and interests legitimately reflects children’s interests at all is often contested and the case law is often used to critique parental privacy rights as in opposition to children’s rights.⁹⁴ Importantly, children’s own voices may not be heard as parents are in a battle with the state. However, children’s rights can be upheld even when they do not have autonomy or capacity to argue for themselves, and children’s own voices do not always need to be heard for their rights to be protected.⁹⁵ In many instances it is best for parents in loving families to make decisions for their children, and privacy rights support such decisions.⁹⁶ Indeed, Emily Buss makes a compelling case that parental privacy rights most effectively promote children’s best interests, arguing that too much state intrusion into a child’s upbringing, absent exceptional circumstances, will only complicate a child’s life.⁹⁷ She argues that state intervention comes at a cost and should therefore be “limited to those circumstances where the costs of failing to intervene are great enough to justify the costs of intervention.” She makes this argument not only because parents are best able to judge the best interests of children, but also because states must rely on parental implementation of state-imposed directives pertaining to children’s best interests.⁹⁸

It is not my argument that family privacy is the *only* means of effectuating children’s rights; however, I do think it is an essential part of children’s interests. As Barbara Bennett Woodhouse argues, “[children’s] growth to autonomy depends on the care and guidance provided by bonded care givers in the intimacy of the family, and children rely for their very survival on these supportive relationships.”⁹⁹ Family privacy rights are not the enemy of children’s rights. Quite the opposite, in most cases they are the best proxy for advancing chil-

⁹³ *Id.* art. 14.

⁹⁴ *See, e.g.*, Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 138–44 (2009); Zug, *supra* note 12.

⁹⁵ *See, e.g.*, Minow, *supra* note 44, at 1882–85.

⁹⁶ *See, e.g.*, Buss, “Parental” Rights, *supra* note 23, at 647; Woodhouse, *supra* note 3, at 316.

⁹⁷ Buss, “Parental” Rights, *supra* note 23, at 647–50.

⁹⁸ *Id.* at 649.

⁹⁹ Woodhouse, *supra* note 3, at 316.

dren's interests.¹⁰⁰ Parents are still the primary providers of childcare and their caregiving work is a central part of children's interests.

The third category of children's rights is the right to adequate care.¹⁰¹ This right exists even if parents do not or cannot provide the necessary care. This right extends beyond parental privacy and can be subdivided into two types: rights to care that are effectuated by the state, and rights to care that are effectuated by private parties other than parents. The state, through its *parens patriae* power, is the legal guardian of children who do not have legal parents that are adequately providing for their needs.¹⁰² The right to such state-provided care is exercised in abuse and neglect proceedings, parental terminations, foster placements, and so forth.¹⁰³ In the CRC, these kinds of rights run throughout, but are particularly highlighted in Article 19, which explicitly discusses the nation-states' responsibility to prevent the abuse and neglect of children,¹⁰⁴ and in Article 20, which gives the child the right to government protection and alternative placement if taken from legal parents.¹⁰⁵ In such cases, the government acts as protector of the child and is usually in conflict with legal parents, when acting to find suitable care in lieu of inadequate parental care.

Children's right to care may also refer to duties filled by caregivers other than formal parents. Quite a few commentators have promoted children's right

¹⁰⁰ Buss, "Parental" Rights, *supra* note 23, at 647–50.

¹⁰¹ See generally *Ex parte* L.E.O., 61 So. 3d 1042, 1047 (Ala. 2010); Michael Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 261–65 (1998); Woodhouse, *supra* note 3 (suggesting a new rights discourse that emphasizes children's rights to have their basic needs met by adults as opposed to parental rights to raise children); Marla Gottlieb Zwas, Note, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 348 (1993) (discussing foster care children's entitlement to a service plan including adequate care and services).

¹⁰² See Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 322 (2010) (discussing the fact that "[i]t is well accepted that, pursuant to the doctrine of *parens patriae*, states are obligated to care for vulnerable children"); Daniel L. Hatcher, *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N.M. L. REV. 159, 171–72 (2012) (highlighting the fact that "State agencies step in to protect [the] rights and interests [of children] when the parents can no longer appropriately care for their children").

¹⁰³ See, e.g., *In re* Morgan, Nos. 9-04-02, 9-04-03, 2004 WL 1717934 (Ohio Ct. App. Aug. 2, 2004) (terminating a mother's parental rights to her twin sons, and granting permanent custody to the child agency); *In re* Pittman, No. 20894, 2002 WL 987852 (Ohio Ct. App. May 8, 2002) (terminating mother's parental rights and granting custody to state agency); CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (Jan. 2013), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf (outlining the common statutory grounds for determining parental unfitness and citing neglect as first on the list); Mary E. Taylor, Annotation, *Parent's Use of Drugs as Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights*, 20 A.L.R. 5TH 534, 537–39 (1994) (finding that a mother and father addicted to heroin were unfit to maintain their parental rights).

¹⁰⁴ CRC, *supra* note 4, art. 19.

¹⁰⁵ *Id.* art. 20.

to care as delivered by third parties other than the state or parents, often called *de facto* or functional parents.¹⁰⁶ Such functional caregivers may provide necessary daily care in support, or in lieu, of formal legal parents when they are not able to fulfill their obligations.¹⁰⁷ Such caregivers create significant relationships with children who may acquire a right to state protection of those relationships. Accordingly, “functional parents” may be tagged with a duty of continued support as a consequence of care they provided in the past.¹⁰⁸ The CRC can be understood to support the rights of functional parents, although it does not discuss them as explicitly as it does other kinds of rights. In Article 5, the Convention refers to respect for rights and responsibilities of parents or “the members of the extended family or community as provided by local custom” to provide direction and guidance to children in their exercise of rights.¹⁰⁹ In addition, some argue that “functional parents” should be included under the term “parents.”¹¹⁰ In this category of rights the child and third-party caregivers seek protection of their relationship from the state, potentially, but not necessarily, over the objection of a legal parent.¹¹¹ In other cases, a legal parent may consent to such relationships but the state may not offer a framework to support them.¹¹²

¹⁰⁶ See, e.g., Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85–96 (2004); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47, 74 (2007); Laufer-Ukeles & Blecher-Prigat, *supra* note 13, at 439–41; Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 455 (2008).

¹⁰⁷ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2002) (defining “*de facto parent*”); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 20–21 (2008); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314–32 (2007); Kavanagh, *supra* note 106, at 85 (“[T]he rule of the ‘exclusive’ family . . . is a central problem in family law in the United States . . . [It] is harmful to children, families, and the public interest [because it is] an intentionally, but unnecessarily, limited vision of parenthood that distorts the narrative of too many people’s lives.”); Murray, *supra* note 106, at 394; see, e.g., *H. v. H.*, 676 N.Y.S.2d 677 (N.Y. App. Div. 1998); *In re Sleeper*, 929 P.2d 1028, 1029–30 (Or. Ct. App. 1996); *Bupp v. Bupp*, 718 A.2d 1278, 1281–82 (Pa. Super. Ct. 1998); *Rubano v. DiCenzo*, 759 A.2d 959, 961 (R.I. 2000); *Quinn v. Mouw-Quinn*, 552 N.W.2d 843, 845 (S.D. 1996).

¹⁰⁸ See DWYER, RELATIONSHIP RIGHTS, *supra* note 12, at 123–67; Laufer-Ukeles & Blecher-Prigat, *supra* note 13, at 464, 467.

¹⁰⁹ CRC, *supra* note 4, art. 5.

¹¹⁰ See Appleton, *supra* note 107, at 59; Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners’ Children*, 13 THEORETICAL INQUIRIES L. 127, 150–51 (2012) (arguing that functional parents should be treated like “parents” for purposes of the necessity to give particular weight to parental prerogatives discussed in *Troxel*); Buss, “*Parental*” Rights, *supra* note 23, at 650–52.

¹¹¹ See Laufer-Ukeles & Blecher-Prigat, *supra* note 13, at 421–23.

¹¹² Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 335 (discussing how functional parenting arrangements, such as same-sex partnerships, are extremely vulnerable to negative custody determinations when the legal parent dies); see Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CALIF. L. REV.

Each category of rights described above has different primary parties and processes through which children can effectuate their rights. Thus, both the nature of and the parties involved in these rights vary considerably, so different procedural methods for achieving different rights are appropriate. In the case of children's "quasi-civil rights," lawyers are best to advocate on behalf of children.¹¹³ Lawyers are also best when children are treated as adults or have adult-like proceedings against them—such as the termination of parental rights for teen parents¹¹⁴—and certainly when minors are involved in the criminal system.¹¹⁵ On the other hand, when evaluating the best care situation for dependent children, whether during divorce, parental termination cases, or foster and adoption placements, it may be reasonable to rely upon guardians ad litem who work for the courts and can examine the child's care situation in depth.¹¹⁶ Attorneys representing children are often faced with dilemmas of whether to advocate based on children's wishes or their beliefs regarding the child's best interests, particularly for children between the ages of six and fourteen.¹¹⁷ Thus, an attorney may be helpful, but should be used in addition to a guardian ad litem, not instead of one, given the other pressures facing attorneys and their more limited training in social and child protection.¹¹⁸ When dealing with the care of older children who have a right to express their own interests and wishes, some methods for including children's voices, like mediation¹¹⁹ or providing a guardian ad litem and an attorney, would be appropriate.¹²⁰ Although all

1177, 1200 (2010) (examining equitable doctrines for functional parents and noting that not all states apply these equitable doctrines).

¹¹³ 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, 1675 (1996); Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in Child Welfare Proceedings*, 36 *U. DAYTON L. REV.* 307, 314–17 (2011).

¹¹⁴ Fines, *supra* note 113, at 314.

¹¹⁵ See, e.g., *In re Gault*, 387 U.S. 1, 36, 41 (1967) (giving children right to council in juvenile delinquency and criminal proceedings); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 *NEV. L.J.* 836 (2006).

¹¹⁶ See Symposium, *Session 3: 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 CASA child advocate or guardian ad litem in representing children's voices in dependency proceedings).

¹¹⁷ *Id.* at 275.

¹¹⁸ *Id.*; cf. Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 *UMKC L. REV.* 965, 965–66 (2007) (arguing that all family law attorneys should be experienced in dealing with their clients' psychological demands).

¹¹⁹ Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* 745, 777–80 (2006); Melissa J. Schoffer, Note, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 *FAM. CT. REV.* 323, 323–24 (2005).

¹²⁰ Cf. Barbara Glesner Fines, *Pressures Toward Mediocrity in Representation of Children*, 37 *CAP. U. L. REV.* 411, 445–47 (2008) (evaluating attorney and guardian ad litem perceptions of their respective roles in the system).

these methods are used to get at the child's best interests and thereby pursue children's rights, an initial identification of the kind of children's rights to which we are referring may streamline the inquiry and reduce the need for a variety of methods.

In sum, "children's rights" can be pursued in many different ways, have many different aspects and parties, and delineate conceptually diverse and not infrequently opposing goals. Although all these rights are valid and appropriate depending on the context, the mere use of the term "children's rights" to define or prove anything can be confusing and amorphous due to these potentially conflicting meanings. Indeed, if we spend more time breaking down and considering the nature of the various rights at stake, we can do better in helping children effectuate those rights.

II. THE PROBLEM WITH BEST INTERESTS: INDIVIDUALISM, CONFLICT, AND THE CLASH OF RIGHTS

A. *Best Interests and the Problem of Optimization*

While "children's rights" can be divided and separated to delineate coherent goals and conflicting parties, the term "best interests" is often used to cover advocacy for all such rights and various potentially conflicting interests.¹²¹ Rights can guarantee a certain baseline of civil and care-based protections secured by caregivers and the state. Regardless of the approach, whether through a capabilities approach to basic rights,¹²² an egalitarian approach,¹²³ or a Rawlsian equilibrium view of rights,¹²⁴ agreeing on the basic rights of children is by far a more manageable and modest challenge than deciding upon what is optimal for children. Children's interests can be broad and include debatable goals regarding what is conducive to a child's well-being and are easier to articulate because there is no burden of optimization.

In the context of custody decisions, best interests analyses are based on a variety of factors. Such factors often include, among others, the suitability and quality of the care being offered, the levels of conflict surrounding custody disputes, the children's wishes, and past caretaking arrangements.¹²⁵ As part of

¹²¹ See McLaughlin, *supra* note 94, at 131.

¹²² See generally MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5–6 (2000) (explaining the focus of the "capabilities approach"); Amartya Sen, *Human Rights and Capabilities*, 6 J. HUM. DEV. 151 (2005).

¹²³ See generally T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998).

¹²⁴ See generally JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001); JOHN RAWLS, A THEORY OF JUSTICE (1971).

¹²⁵ See 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, 150 (2011) (discussing how, when making custody determinations, courts consider evidence regarding conflict between the parties each parties contribution to creating such conflict); Andrea G. Nadel, Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R. 4TH 1129 (1985) (discussing how several

this broad inquiry, religious¹²⁶ and financial factors are often taken into account,¹²⁷ as are marital and extended family situations,¹²⁸ family violence,¹²⁹ and cultural and racial considerations.¹³⁰ The inquiry is broad, flexible, and context specific. Children's own stated preferences are usually considered, although the weight given to such preferences varies by state and by the age of the child.¹³¹ The inquiry often entails competing and conflicting considerations between two fit parents. Still, the best interests standard is the dominant tool for determining custody in the United States,¹³² and the normative goal in international conventions.¹³³

courts have looked to who fulfilled the primary caretaker role in making custody arrangements); D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R. 3D 1396 (1965) (discussing how the child's wishes are also a factor in custody determinations).

¹²⁶ See *Bonjour v. Bonjour*, 592 P.2d 1233, 1236 (Alaska 1979) (holding that religious factors are part of the best interests inquiry, and that holding otherwise would render a court blind to important elements bearing on the child's best interest); see also Gary M. Miller, Note, *Balancing the Welfare of Children with the Rights of Parents: Peterson v. Rogers and the Role of Religion in Custody Disputes*, 73 N.C. L. REV. 1271, 1286 (1995) (considering how courts consider religion as a proper factor in the best interest test).

¹²⁷ See Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 217 (2000) (highlighting how many courts consider financial factors in custody hearings).

¹²⁸ See, e.g., David Carl Minneman, Annotation, *Significant Connection Jurisdiction of Court to Modify Foreign Child Custody Decree Under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA)*, 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R. 5TH 1 (1999) (listing cases considering the extended family of the child in making custody jurisdiction determinations).

¹²⁹ See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1070 (1991); Woodhouse, *supra* note 81, at 826; see also Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 157 (2000) (highlighting that "[c]hild custody and visitation decisions must be made with full knowledge of the previous family violence and potential for continued danger, whether or not the children have been physically harmed").

¹³⁰ See Kathryn Beer, Note, *An Unnecessary Gray Area: Why Courts Should Never Consider Race in Child Custody Determinations*, 25 J. C.R. & ECON. DEV. 271, 273 (2011) (finding that state courts across the country have decided custody cases based on race, and arguing that state court's should be precluded from considering race in child custody bases).

¹³¹ 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) (children's wishes usually relevant but not dispositive); see also *Tasker v. Tasker*, 395 N.W.2d 100, 103 (Minn. Ct. App. 1986) (concluding trial court properly denied interview because court had discretion to make determination); O'Neill, *supra* note 125, at 1402-09.

¹³² See *Wallin v. Wallin*, 187 N.W.2d 627, 629 (Minn. 1971) (reviewing the best-interest-of-the-child concept as key to determining custody disputes); *Dupré v. Dupré*, 857 A.2d 242, 248 (R.I. 2004) (highlighting that "[i]t long has been established that in awarding custody, placement, and visitation rights, the 'foremost consideration' is the best interests of the child"); D.E. Ytreberg, Annotation, *Award of Custody of Child Where Contest is Between Child's Mother and Grandparent*, 29 A.L.R. 3D 366, 379, 384 (1970) (defining a child's welfare as the primary consideration for courts, and how "courts have also implemented a

Much has been said in criticism of the ambiguity and discretionary nature of the best interests standard and the way it can negatively impact cases that depend on it.¹³⁴ Here, I add to that criticism by making the case that in most instances the use of the best interests standard is not helpful because it involves too many conflicting interests. Because the best interests standard mirrors and incorporates all the different children's rights discussed above, such factors can easily conflict. Thus, the inquiry is often not only broad and ambiguous but internally inconsistent.

In the face of conflicts and ambiguity, it is not surprising that state perspectives and interests prevail. Children's rights to care from parents and to care from the state are conflated into a singular judgment by the state about the "best care." Ultimately, if children have a right to parental care, this means that parents need to be given discretion to care for children in a diversity of ways. However, when the state is involved in judging care, its interests in children and the majoritarian values often expressed by the state can be in direct conflict with parental privacy.¹³⁵ Using the term "best" to resolve this conflict is a futile strategy because it will depend on the opinions of judges and what is best is nearly impossible to prove. Moreover, as the examples below will demonstrate, leaving the state to determine what is best for children in an isolated manner will often result in an analysis that separates a child's interests from a caregiver's interests in the difficult custody battles that the state must resolve.

When courts attempt to locate children's best interests it is no surprise that such an attempt is expensive and includes a variety of opinions from judges, guardians, parents, the children themselves, third-party caregivers, mediators, psychologists, and social welfare professionals.¹³⁶ And even with all of this ex-

wide range of other procedural rules in order to effect the result which will best serve the child's interests").

¹³³ See CRC, *supra* note 4 *passim* ("Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."); Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L. 749, 756-57 (2003) (discussing how the "Hague Convention on Jurisdiction, Applicable Law, . . . and Measures to Protect Children states that recognition of a foreign custody order may be refused 'if such recognition is manifestly contrary to the public policy of the requested State, taking into account the best interests of the child'").

¹³⁴ See, e.g., 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); Mnookin, *supra* note 27, at 227.

¹³⁵ See *infra* Part II.B.

¹³⁶ See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 772 (1988) (discussing the need for experts); Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making—How Judges*

pensive input, it is perhaps impossibly difficult to “optimize” between suitable (non-harmful) caregivers or to accurately determine what is “best” for children.¹³⁷ Such expertise does not actually create the verifiability and certainty that it promises.¹³⁸ As others have argued, such indeterminacy simply throws the decision back to judges, creating contested and expensive litigation or bargaining in the context of uncertainty that usually favors the more powerful party.¹³⁹ Best interests is a goal, not a standard that can provide clear answers.¹⁴⁰ Therefore, what is important is to assign clear responsibility so that the parties can work it out themselves in a reasonable manner.¹⁴¹ For a standard upon which so much of the advancement of children relies, all we really get is very little guidance, high costs, and uncertainty.

In the next section, I will give some examples of how internal contradictions in the meaning of best interests render the standard ineffective. I will demonstrate how using the best interests standard creates reliance on majoritarian values, provides simplistic answers despite underlying complexity, overemphasizes the tension between caregiver and children’s interest, and uses state interests to inform what is best for children.

B. Examples of Indeterminacy and Separation Between Care and Caregiver

To demonstrate how the best interests standard and its individualistic focus on children’s rights does not do enough to support children and provide the care they need, I will give some practical examples that have divided scholars on the merits of best interests. In these examples, there is seeming conflict between caregivers and children, or state and parental rights, and in the face of such conflicts the best interests standard struggles to determine what is best for children. These are examples of the hard cases, the cases that fall between the

Use the Primary Caretaker Standard to Make a Custody Determination, 5 WM. & MARY J. WOMEN & L. 1, 10 (1998) (discussing how the courts in assessing the best interest of the child usually require an expert witness which increases the hardship for the parties); *Veazey v. Veazey*, 560 P.2d 382, 390 (Alaska 1977) (recognizing that although a guardian ad litem increases the costs, a mediator or disinterested expert is often useful in custody cases).

¹³⁷ See Ariel Ayanna, *From Children’s Interests to Parental Responsibility: Degendering Parenthood Through Custodial Obligation*, 19 UCLA WOMEN’S L.J. 1, 2–3 (2012) (arguing against trying to optimize under a best interests standard due to the difficulties involved).

¹³⁸ Scott & Emery, *supra* note 7, at 73–74.

¹³⁹ See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954–57 (1979) (discussing the effects of bargaining in the context of uncertainty and, in particular, effects on the weaker more risk-averse party); Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL’Y & L. 54, 71–72 (2002).

¹⁴⁰ Mnookin & Kornhauser, *supra* note 139, at 957; Katherine C. Sheehan, Note, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN’S L.J. 135, 138 (1986) (calling the best interest test “intrusive, unworkable, and indeterminate”).

¹⁴¹ See Mnookin & Maccoby, *supra* note 139, at 72 (“Instead, the more basic criticism is that the best interests standard provides an uncertain backdrop for out-of-court negotiations.”).

need for parental termination where caregiver relationships with children have completely broken down and instances where parental privacy is regularly accepted. It is in these kinds of cases that the need to protect children's interests and rights is most pressing and sensitive to manipulation. These examples of the clash of rights generally and caregiver and children's rights in particular demonstrate the futility of the individualized best interests standard. Best interests is at best inconclusive and is at worst biased in a manner that reinforces majoritarian cultural norms, allows state interests to override established caregiving relationships, and imposes an idealized notion of care on the caregiving relationship upon which the child is already dependent.

1. *Deportation of U.S. Citizen Children with Alien Parents*

What should be done with the U.S. citizen children of illegal aliens who are being deported back to their countries of citizenship? Not infrequently, the state determines the fate of children who have already been removed from their parental homes because of insufficient living conditions and problematic circumstances usually intertwined with their parents' illegal status.¹⁴² The recent trend is to determine the children's fate—whether to remain with parents and be deported with them or to remain in the United States under state care—based on a best interests analysis as opposed to a parental rights analysis in which children would only be removed from parental care upon a showing of unfitness.¹⁴³ In her two articles on the subject,¹⁴⁴ Marcia Zug advocates for the use of the best interests standard in situations where children have been removed from parental custody prior to deportation.¹⁴⁵ Others have argued against the use of the best interests standard and in favor of maintaining non-U.S. citizens' parental rights.¹⁴⁶ Those in favor of a best interests determination argue that because children have the right to stay in the United States and their

¹⁴² Zug, *supra* note 12, at 1174–75. *See generally* Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63 (2012) (analyzing the growing practice of separating deported immigrants from their children).

¹⁴³ *See, e.g., In re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (“[T]he termination of the father’s parental rights was based on the possibility that the father could someday be deported and, with her mother’s parental rights also severed, [the child] might be returned to [state] custody or sent to Mexico.”); *In re V.S.*, 548 S.E.2d 490, 493 (Ga. Ct. App. 2001) (holding that termination of father’s parental rights by the juvenile court was premature where there was less than clear and convincing evidence that he was an unfit parent despite the fact that the lower court found that it was in the child’s best interest to terminate the father’s rights); *In re B. & J.*, 756 N.W.2d 234, 241 (Mich. Ct. App. 2008) (the juvenile court wrongfully terminated the parents’ rights based on a finding of “environmental neglect, consisting of inadequate sleeping accommodations for the children in [the parents’] home”).

¹⁴⁴ Yablon-Zug, *supra* note 151; Zug, *supra* note 12;.

¹⁴⁵ Zug, *supra* note 12, at 1142.

¹⁴⁶ Stacy Byrd, Note, *Learning From the Past: Why Termination of a Non-Citizen Parent’s Rights Should Not Be Based on the Child’s Best Interest*, 68 U. MIAMI L. REV. 323, 327 (2013).

parents do not, children and parental interests may not align; therefore, to protect children, the best interests standard is preferred over parental rights.¹⁴⁷

In such cases, the state and parents will often disagree as to what is best for the child. How can the state determine that it is in a child's interests to stay in the United States and be raised by foster or adoptive parents rather than remain with their biological parents and be raised by them? Being raised by one's own parents is a child's right; so is receiving state-provided care when parental care is insufficient. Therefore, if fit parents are available, how can the state justify the termination of parental rights based on the child's rights and best interests?

On the other hand, if these children have already been removed from parental care due to suboptimal living conditions, one could argue that these cases no longer involve caregiver rights. However, these removals are not infrequently based on illegal status and poor living conditions, so this seems an unjust conclusion—punishing illegal residents with detachment from children.¹⁴⁸ Moreover, the time these children have been away from their parents may not have diminished the caregiving relationship previously established, depending on the circumstances. On the contrary, these children's lives are in great tumult as they are living with foster families and their parents are in danger of being deported. Studies demonstrate that relationships between parents and children are not easily broken during short-term separations even when there has been abuse and neglect—and in such cases there has not been sufficient evidence to sever parental rights or prove abuse and neglect definitively.¹⁴⁹

Thus, the use of best interests instead of a parental rights doctrine mitigates the importance of these parental caregiving relationships. Indeed, allowing the best interests standard to determine custody instead of the usual abuse and neglect standard allows a state's interest in its citizen children to override chil-

¹⁴⁷ See James G. Dwyer, *Parent's Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1373–79 (1994) (discussing the conflict between parental rights and children's rights in the context of religious schooling); David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 141–43 (1992); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 638–40 (2006) (“[T]he debate between advocates of parents' rights and children's rights is charged and polarized.”); Zug, *supra* note 12, at 1164–66.

¹⁴⁸ Zug, *supra* note 12, at 1174–75; cf. Naomi Cahn, *Placing Children in Context: Parents, Foster Care, and Poverty*, in WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 145, 145, 150 (Martha Albertson Fineman & Karen Worthington eds., 2009) (The author clarifies that, in reality, children are most often removed from their homes because of unstable parental income, and the author points to the strong correlation between poverty and child abuse and neglect. For example, children who live in families that make less than \$15,000 per year are forty-five times more likely to be abused or neglected).

¹⁴⁹ See Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 381 (1996); Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 129–34 (2013).

dren's interest to be raised by parents.¹⁵⁰ Zug does not specifically include the right to be raised by one's parents as part of a child's rights or best interests;¹⁵¹ however, Zug and the state decisions upon which she relies, support the validity of parental privacy rights to some extent.¹⁵² To justify abrogating parental rights without a finding of abuse or neglect, one must rely on the state's interests for removal. Zug argues that some state interests weigh in favor of keeping children in the United States, namely "the state's interest in teaching children fundamental values of a democratic society" and "the state's interest in keeping American children connected to America."¹⁵³ Therefore, the best interests analysis is used to make room for state interests and to limit children's interests in being raised by parents. In conjunction with the state's own interests, the state will also consider majoritarian values regarding what is best for children—living in a wealthier economy and perhaps what is perceived to be a more stable household than that of deported aliens. Thus, the state minimizes children's rights to be raised by their own parents in favor of state interests and majoritarian values, and justifies this exchange in the name of best interests.

In this way, citizen children's rights to be cared for by parents are limited in favor of state interests in a manner that discriminates between children of illegal aliens and children of citizens.¹⁵⁴ Just as one may argue that children of

¹⁵⁰ Zug admits that a best interest standard does not automatically require termination from parents and in fact argues that in most cases it will not. In addition, she points to the fact that best interests analyses also involve parental considerations because, "[o]ne cannot consider the rights of children without also considering the rights of the people on whom they are dependent, most often their parents." Zug, *supra* note 12, at 1170. However, she continues to refer to the scenario where children remain with parents as one under the umbrella of "parental rights" which stands in opposition to children's rights under a best interests standard. *Id.* at 1171 ("The strongest argument favoring parental rights is that parental rights do not just benefit parents, but they also benefit children. . . . As discussed above, the well-established criticisms of a parental rights standard cast significant doubt on these assumptions in general.").

¹⁵¹ *Id.* at 1171.

¹⁵² *Id.* at 1178 ("However, it is not obvious that children's interests outweigh the equally substantial interests of fit parents in the care and custody of their children."); *Id.* at 1182 ("However, parental rights and children's rights can and must coexist. As the long fight between children's rights and parental rights advocates has shown, both standards have their place but neither one is right for all circumstances.").

¹⁵³ *Id.* at 1147–51.

¹⁵⁴ Others who make a stronger child's rights argument and are against any parents rights considerations in custody decisions, such as James G. Dwyer, argue that custody should always be made in the best interests of children without consideration of parental rights. Indeed, for children born to at risk parents he has advocated that a children's rights approach requires the removal of children from parents to adoptive or foster homes without the state having to prove abuse and neglect. See generally Dwyer, *Parents' Self-Determination*, *supra* note 12. In this manner, Dwyer's position could justify ignoring parental claims of non-citizens in the same way it does its citizens. But, of course, this strong state interference position in determining children's best interests is nonetheless troubling for those who believe that parents generally have a right to raise their children as long as they have not been proven unfit to do so or the belief that children have a right to be raised by these parents. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected

aliens are better off with a U.S. family, so could it be argued that the children of poor and unstable U.S. citizen families are better off with wealthier and more secure U.S. families.¹⁵⁵ Children's rights to be raised by their own parents should be applied consistently as between children of citizen and non-citizen parents. And, if imposing state interests and value judgments on children of citizens is rejected it should be rejected for children of aliens as well.

As I will argue in the next parts, instead of trying in this artificial manner to make sense of the interests of children and caregivers individualistically, the state should focus on supporting the caregiving relationships that support its citizens. If a citizen has an alien parent, despite the parent's illegality, the reason to let the parent stay in the United States is the furtherance of children's interests. It is clearly controversial to provide such a benefit to an illegal alien merely because they have given birth to a U.S. citizen; but, that is a consequence of the naturalization process in the United States¹⁵⁶ Once a child is a citizen and if the state is truly interested in protecting the child's rights, the state should not punish the children by deporting their parents. If, however, parents of U.S. citizens are to be deported, then the test should remain one of parental fitness, just as it is for U.S. citizens. State interests cannot justify abrogating caregiver rights in the name of children's rights.

2. *Cultural Rights of Native American Children*

The Indian Child Welfare Act ("ICWA") was intended to empower Native Americans to determine the identity and placement of children with Native American parents.¹⁵⁷ Seeking to protect Native American civil rights and to maintain the cultural identity of Native American children, Congress enacted

Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights,' . . . and '[r]ights far more precious . . . than property rights.'" (internal citations omitted)); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding parental right to raise children without undue governmental interference is fundamental liberty interest); see also Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 490–98 (1982) (reviewing constitutional protections afforded to parents, children, and family privacy, and arguing "intrusion is only justified under extremely exigent circumstances").

¹⁵⁵ Zug, *supra* note 12, at 1177. Zug describes domestic violence and potential death due to cultural realities in Guatemala—but if a child is so threatened, then refugee status for both child and mother may be appropriate. Moreover, the description of the entire country of Guatemala as dangerous to children seems problematic and perhaps exaggerated. *Id.*

¹⁵⁶ See Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 494–95 (1995) (arguing against deportation of parents of children citizens in the name of children's rights).

¹⁵⁷ Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901, 1902, 1915 (2012) (creating barriers to removal of Native American Children from their parents and tribes, including the right of tribal intervention in removal proceedings and preference for placement with Native American families); 25 U.S.C. § 1901(2) ("Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . .").

the ICWA to assure that children are raised within their Native American heritage. Thus, the ICWA recognizes the civil rights of Native Americans and the quasi-civil rights of Native American children to their own cultural and racial identities.¹⁵⁸ This issue invokes the tension between children's civil rights to identity and children's right to receive care from the state.

Many have noted, however, that the implementation of the ICWA has not met its promise to preserve cultural identity because it too often devolves into a "best interests" analysis that state courts have used to keep Native American children with non-tribal foster parents instead of transferring them to tribal authorities.¹⁵⁹ Critics argue that the goal of the ICWA to protect children's civil rights has been essentially swallowed up by judicially created exceptions, such as the "existing Indian family" exception and "good cause" justifications not to transfer Indian child welfare cases to the tribe for resolution.¹⁶⁰ According to these exceptions, if a Native American child is not removed from an existing Native American family or there is other good cause, the case remains in state courts for determination of what is best for children. State application of "best interests" prefers psychological ties to biological ties, and nuclear families to single-parent and extended families.¹⁶¹ Thus, a state's enforcement of best interests in custody undermines the civil rights that the ICWA was supposed to grant these tribes.¹⁶² Because dependency rights conflict with quasi-civil rights in these cases, and both types of rights are part of a broader best interests analysis, the state's understanding of the best upbringing for Native American children gets wrapped up in the best interests label and usually defeats those quasi-civil rights. Placing these two kinds of rights against each other in the best in-

¹⁵⁸ 25 U.S.C. §§ 1901, 1902, 1915.

¹⁵⁹ See, e.g., BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 7–8 (2010); Appell, *supra* note 58, at 162–65; Cheyafina L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 753 (2006); B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 422–29 (1997); Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 124–39 (2003) (exploring how courts, using majoritarian, essentialist notions of "Indian-ness", determine whether a parent is sufficiently Indian to make the child an "Indian child" for purposes of the ICWA); Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 366–67 (2009); Alissa M. Wilson, Note, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act* in In re S.S. and R.S., 28 LOY. U. CHI. L.J. 839, 886 (1997); Kacy Wothe, Note, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 HAMLINE. L. REV. 729, 758–75 (2012).

¹⁶⁰ Appell, *supra* note 58, at 162.

¹⁶¹ *Id.* at 165.

¹⁶² *Id.*

terests framework creates confusion and, in these cases, abrogates the civil rights of children.

Despite the complex choices involved in determining whether children should grow up within their tribe or in third-party foster homes, the use of best interests creates the façade that courts are making rational, clear-minded judgments about a child's best interests.¹⁶³ Thus, because courts have nothing but their own subjective judgments on which to base decisions when thinking about best interests, "decisionmakers often underestimate the value of the poor parents of color, the child's ties to them and his or her cultural heritage."¹⁶⁴

In the ICWA cases, as in the case of aliens who are being deported, the state takes up the mantle of children's rights, arguing that children have rights to normative majoritarian visions of the "best" or "ideal" care. However, children's rights are more complicated because identity and cultural issues are also at stake—not only for the parents or the tribe but for the children as well. Indeed, it is problematic to identify children's rights with majoritarian thinking about suitability when other factors also play into children's rights, including parental privacy rights, quasi-civil rights, and cultural benefits in dependency rights, which may be in the interests of children as well. The dichotomy between parental rights to culture and children's rights to care ignores what is the multi-factored and self-contradictory nature of the best interests standard itself.

In deportation cases, parental privacy is overshadowed when determining best interests, and in ICWA cases, the children's quasi civil-rights to their cultural identities, as well as the benefits of being cared for in their biological culture, are undervalued. Yet again, best interests is used to hide a more complex determination by looking at children's interests in isolation from their more complex needs. Although this example may seem tangential to the clash of caregivers' rights and children's rights examined in this article, as the tribe may not yet have had a chance to form such a relationship with the child, this example clearly demonstrates the indeterminacy of best interests in the face of conflict between children's civil rights and dependency rights. This is a primary example of difficult custody decisions regarding children, in which the best interests standard is supposed to be applied.¹⁶⁵ Moreover, when children have multiple potential claims to relationships—here to foster parents and relationships with biological kin—all of these relationships would have to be taken into account under a relational perspective to properly give credence to caregiver rights.¹⁶⁶

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 166.

¹⁶⁵ See, e.g., *Jones v. Jones*, 542 N.W.2d 119, 121–23 (S.D. 1996) (considering whether the benefits of retaining cultural identity can be considered as part of custody dispute).

¹⁶⁶ See *infra* text accompanying notes 278–80 for a discussion of how biological and cultural kin ties may also be a basis for forming an important and necessary caregiver relationship.

3. *Rights of Children to Relationships with Birth Parents*

The third example I bring relates to the rights of children to have relationships with biological parents even when parental privacy has been compromised by abuse and neglect. Children's rights advocates have pushed for early termination of biological parental rights culminating in the adoption of the Adoption and Safe Families Act ("ASFA").¹⁶⁷ Before or after the termination of parental rights, the question remains whether children should retain any legal or emotional relationship with biological parents who they had relationships with before being placed in the foster system.¹⁶⁸ This issue emphasizes the tension between children's right to relationships with biological parents as a matter of identity and past care, and their right to be provided adequate care by the state.

Of course, if having contact with biological parents will continue to impose significant harm on children, such contact cannot be tolerated. However, there are instances, particularly for older children who feel attached to biological kin, where some contact, perhaps under supervision, may be more beneficial than harmful. Scholars have argued that even if children cannot live with their parents and the state must step in to protect their rights by placing them in foster care, this is not the end of the inquiry into how to advocate on behalf of children.¹⁶⁹ From a child's perspective, it is argued, the continuing bond with a biological parent, as long as it is not harmful, can be important for providing continuity, identity, and security.¹⁷⁰ Despite the "bad" parenting that led to foster placement, children's attachment to such caregiving parents is often strong.¹⁷¹ Reviewing psychological studies, Marsha Garrison posits that a non-custodial parental figure that has provided significant amounts of care can also have a significant impact on a child's life.¹⁷² Such insights have had some influence on the law. For instance, there is a preference for kin foster care over stranger foster care in many states, even if kin only know the child and do not have direct biological ties with him or her.¹⁷³ These changes reflect complex notions of

¹⁶⁷ ASFA amends Title IV-B and IV-E of the Social Security Act, which governs states' federally funded child-protective efforts. 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, 1 (2001). For representative discussions of ASFA, see generally Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. & CONCILIATION CTS. REV. 25 (2001).

¹⁶⁸ See Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 120 (2010).

¹⁶⁹ Garrison, *supra* note 149, at 377–90; Woodhouse, *supra* note 31, at 498–99 ("For children, connection to others is a precondition to autonomy and individuality.").

¹⁷⁰ Garrison, *supra* note 149, at 382–83; Woodhouse, *supra* note 31, at 498.

¹⁷¹ Garrison, *supra* note 149, at 380–81.

¹⁷² *Id.* at 383.

¹⁷³ Woodhouse, *supra* note 31, at 502–03; see Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, in CHILD CARE & INEQUALITY: RETHINKING CAREWORK FOR CHILDREN & YOUTH 83, 85 (Francesca M. Cancian et al. eds.,

children's needs and interests beyond the majoritarian visions of biological nuclear families.¹⁷⁴ Children's identity and attachment to parents and former caregivers, even in problematic contexts, may make kin care and some contact with parents beneficial. Thus, protecting children's interests may require more than just foster care and adoption; children's best interests may also require a continued connection with biological parents through open adoption arrangements even after parental rights are terminated. Although majoritarian norms regarding what is best for children point to nuclear families that mirror intact biological families, such situations may not be appropriate for children of broken homes.

Once again, best interests seems to collapse into a majoritarian view of the benefits of the nuclear family without sufficient consideration given to the complexity of family life, particularly with regard to children who are being removed from parental care. I cannot comment on what is "best" for children in the abstract or even with regard to any particular case, and this is not my goal; rather, my aim is to underscore that the determination of what is best is far more complicated than legislation and courts usually acknowledge. An interdependency perspective on children's rights could support an ongoing relationship with biological birth parents in a manner different from that of formal legal adoptive parents, depending on the potential for harm caused by the biological parents.¹⁷⁵

Indeed, as we saw in the deportation cases with regard to state interests in promoting democracy and connections with its citizen children, Garrison explores interests beyond those of children, such as those of the state, which might be persuading decision makers to emphasize adoption over kin foster care, and closed adoption over open adoption, as the "best" situations for children despite research that indicates otherwise.¹⁷⁶ She argues that the lower cost of adoption compared to subsidized foster care and the novelty and uncertainty of foster guardianship and open adoption make change slow. In addition, she recognizes that adoptive parents prefer closed adoptions and seek children to adopt that do not have ties to kin of biological parents.¹⁷⁷ Thus, she says it is largely state and adoptive parental interests that influence policy and perhaps "creep" into best interests analyses that are supposed to focus only on children.

2002) ("Kinfolk and extended family have been recruited to serve as paid foster mothers, and by 1998 at least half of the states' placements of children was with relatives."); Sandra J. Altshuler, *Child Well-Being in Kinship Foster Care: Similar to, or Different from, Non-Related Foster Care?*, 20 CHILD. & YOUTH SERVICES REV. 369, 369 (1998) ("The most striking increases have been in the number of children placed in kinship foster care.").

¹⁷⁴ Woodhouse, *supra* note 31, at 503.

¹⁷⁵ See *infra* Part IV.A; see also Appell, *supra* note 168, at 74; Godsoe, *supra* note 158, at 160.

¹⁷⁶ Garrison, *supra* note 149, at 386–387 (discussing cost and attractiveness to adopting parents as reasons state may prefer adoption over foster care).

¹⁷⁷ *Id.*

4. *Removing Babies at Birth from At-Risk Caregivers*

Although the right to reproduce and become a parent is only very rarely limited,¹⁷⁸ James G. Dwyer and others¹⁷⁹ have suggested that a best interests analysis can justify removing babies from high-risk parents at the time of birth.¹⁸⁰ Dwyer argues that at birth children have the right to be placed with parents who will act in their best interests and that parents who have a history of abuse and neglect, are below eighteen years of age, imprisoned, have been convicted of a violent or sexual offense, have a mental illness or incapacity, or who already have multiple children on welfare, may not reach that standard. Therefore, their parenthood should be subject to judicial determination based on the welfare of the child and not determined by birth.¹⁸¹ In addition, Dwyer has argued that keeping babies with mothers who are jailed, as a number of states in the United States have allowed and others are considering,¹⁸² has been part of the prison system for more than a century, and that is even more common abroad,¹⁸³ violates children's constitutional rights and their best interests.¹⁸⁴ These programs allow mothers to parent a child in prison for a prede-

¹⁷⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *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." (emphasis omitted)); see, e.g., *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001) (allowing limit on reproductive freedom as terms of probation for deadbeat dad).

¹⁷⁹ See, e.g., Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 *BUFF. L. REV.* 1321, 1360 (2012).

¹⁸⁰ DWYER, *RELATIONSHIP RIGHTS*, *supra* note 12, at 254–56.

¹⁸¹ *Id.* at 255–62.

¹⁸² Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, Washington, West Virginia and Wyoming allow such programs. James G. Dwyer, *Jailing Black Babies*, 2014 *UTAH L. REV.* 465, 470–71; Connecticut is currently considering such a program. See DIAMOND RESEARCH CONSULTING, *PRISON NURSERY PROGRAMS: LITERATURE REVIEW AND FACT SHEET FOR CT* (2012), available at <http://www.cga.ct.gov/2013/JUDdata/Tmy/2013HB-06642-R000401-Sarah%20Diamond%20-%20Director,%20Diamond%20Research%20Consulting-TMY.pdf>.

¹⁸³ Mother-child prison programs are much more common in Europe and Asia than in the United States. Indeed very few countries are similar to the United States in routinely separating young children from mothers not detained in high security prisons. In prison programs worldwide it is not uncommon for children to attend daycare centers during the day. See, e.g., RAM SUBRAMANIAN & ALISON SHAMES, *VERA INSTITUTE OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES* 16 (2013), available at http://www.colorado.gov/cejdir/Resources/Resources/Handout/2014/2014-01-10_VERA-EuropeanCJPractices_2013-10.pdf; Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 *N.Y.U. REV. L. & SOC. CHANGE* 371, 394–96 (2013).

¹⁸⁴ The discussion of children's constitutional "liberty" rights is beyond the scope of this article. Dwyer also argues that jailhouses nurseries are against a child's best interests. See Dwyer, *supra* note 182, at 536–37.

terminated amount of time, which may be subject to extension, under specified circumstances and almost always have maximum age limitations for the children.¹⁸⁵ Dwyer argues that living in a jailhouse setting cannot be best for children regardless of age or emotional state in any circumstance.¹⁸⁶

There is no doubt that Dwyer's arguments are compelling. Both incarcerating children and leaving them with at-risk parents appear to be deeply problematic practices. Dwyer's article on jailhouse nurseries is incredibly thorough and well-documented.¹⁸⁷ Nonetheless, although I do not argue that all such jailhouse nursery programs should be continued under any circumstances, the blanket rejection of jailhouse nurseries seems not to account for the nuances of children's interests and the ways in which such programs may be good for particular children. Studies document benefits for children and mothers.¹⁸⁸ Dwyer's blanket assertions that all such programs should be prohibited and that the parental rights of all at-risk parents should be questioned can threaten children's relationships with caregivers.

The readiness with which scholars are willing to sever the relationship between children and parents at birth may imply that the parental caregiving relationship begins at birth. However, gestation creates a significant connection between fetus and mother before birth.¹⁸⁹ The physical, emotional, and functional care relationship based on interdependency, biological exchange, and physical nurturance is a real and lasting care relationship.¹⁹⁰ Studies demonstrate that

¹⁸⁵ All but one jailhouse nursery program limit participation to mothers whose expected release date is before the child will reach the maximum age of 18 months, and who have no history of violent crime or criminal child maltreatment; New York does not appear to have such limitations. *See id.* at 472.

¹⁸⁶ *Id.* at 535.

¹⁸⁷ I focus on Dwyer's arguments in *Jailing Black Babies*, *supra* note 182, as representative of the kind of best interests arguments Dwyer makes, but will make references to his arguments in his book, *THE RELATIONSHIP RIGHTS OF CHILDREN*, *supra* note 12, as well.

¹⁸⁸ For examples of studies that document the benefits of prison nurseries, see JULIE KOWITZ MARGOLIES & TAMAR KRAFT-STOLAR, CORR. ASS'N OF N.Y., *WOMEN IN PRISON PROJECT, WHEN "FREE" MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE* 9 (2006) (children who are not able to maintain contact with incarcerated mothers are at greater risk of abusing drugs and/or alcohol later on in life. They are also at a greater risk for committing crimes and for underachieving in school); Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 J. OFFENDER REHABILITATION 271 (prison nurseries help keep children and mothers together and decrease the likelihood of children entering foster care).

¹⁸⁹ *See* ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 64 (1976) (observing that in women's experience, the fetus challenges the inside-outside dualism in western philosophy by being at once introduced from without and nascent from within, so that "[t]he child that I carry for nine months can be defined *neither* as me or as not-me."); Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567, 588-90 (2011).

¹⁹⁰ Robert Martone, *Scientists Discover Children's Cells Living in Mothers' Brains*, SCI. AM. (Dec. 4, 2012), <http://www.scientificamerican.com/article/scientists-discover-childrens-cells-living-in-mothers-brain>; Nancy Shute, *Beyond Birth: A Child's Cells May Help*

gestating mothers often bond with their babies, creating deep attachments prior to birth.¹⁹¹ Therefore, there is already a caregiving relationship at birth and separating the mother from the newborn child is already separation of care and caregiver. Pointing to this pre-birth care relationship need not threaten the right to abort as personhood of the fetus can still begin at birth, viability, or whatever standard is preferred. Simply recognizing that gestation creates a care relationship that is different from the genetic connection created by fatherhood does not pose a threat to feminism or women's equality. Rather, such recognition supports women's unique work and physical connection to fetuses.¹⁹² Many Americans would not want at-risk mothers to abort their babies, nor would many states permit them to after viability.¹⁹³ Therefore, in essence, if their babies are removed from them at birth they are essentially made to be forced surrogates for others.

Dwyer complains that there are no studies to indicate that jailhouse nursery programs are in children's interests and therefore such programs should never have been established.¹⁹⁴ Although I agree that studies should be conducted, a dearth of studies cannot result in outlawing such programs. Admittedly, if such studies could definitively show harm to children, the programs would be hard to justify. But, as Dwyer admits, there are few studies to draw from and the existing ones were based on overly small samples and yielded inconclusive results.¹⁹⁵ On the contrary, precluding such programs simply because studies are not yet available to show benefits makes innovation impossible.

or *Harm the Mother Long After Delivery*, SCI. AM. (Apr. 30, 2010), <http://www.scientificamerican.com/article/fetal-cells-microchimerism> (describing a process of cellular exchange between gestating mother and fetus known as microchimerism); see also Catherine Arcabascio, *Chimeras: Double the DNA-Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435, 439 (2007) (citing J. Lee Nelson, *Microchimerism: Incidental Byproduct of Pregnancy or Active Participant in Human Health?*, 8 TRENDS IN MOLECULAR MED. 109, 109 (2002)).

¹⁹¹ See *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 26 (N.Y. App. Div. 2000) (acknowledging "that a bond may well develop between a gestational mother and the infant she carried, before, during and immediately after the birth"); MARSHALL H. KLAUS & JOHN H. KENNEL, PARENT-INFANT BONDING 262–63 (2d ed. 1982); see also ROBIN FOX, REPRODUCTION AND SUCCESSION: STUDIES IN ANTHROPOLOGY, LAW, AND SOCIETY 71–79 (1993) (discussing the mother-child "bonding" that occurs during gestation); MARSHALL H. KLAUS & JOHN H. KENNEL, MATERNAL-INFANT BONDING 46 (1976); John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 397 (1991) (stating that prenatal bonding between mother and child "is supported by a great deal of evidence, both scientific and anecdotal"); R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 424 (1993).

¹⁹² See Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 Vt. L. Rev. 407, 435–37.

¹⁹³ *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) (allowing states to prohibit abortion post-viability unless the mother's life or health is in danger); GUTTMACHER INST., STATE POLICIES IN BRIEF, AN OVERVIEW OF ABORTION LAWS (Dec. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

¹⁹⁴ Dwyer, *supra* note 182, at 480.

¹⁹⁵ *Id.*

As discussed at length above, a component of children's rights is the right to parental care. Studies demonstrate that jailhouse nursery programs result in greater rates of parental care.¹⁹⁶ Nurturing parental care certainly benefits children, particularly if such care is supervised and in an educational setting, as is made possible by being in prison. The benefit of receiving such care and the benefits of continued mother-child care in a long-term nurturing relationship have been demonstrated to improve children's well-being.¹⁹⁷ Although Dwyer argues that the jailhouse programs are justified primarily based on benefits flowing to the mother, the potential caregiver, such as decreased recidivism for mothers who participate in the program as well as the benefit of being able to parent their babies even if in jail,¹⁹⁸ studies demonstrate that there is a greater likelihood of future parental care based on these programs and the way in which such parental care is preferable for children, as compared to foster care.¹⁹⁹ When compared to foster care options these children are hardly likely to be worse off.²⁰⁰

In order to discredit prison nurseries, Dwyer compares outcomes for children who are adopted, as opposed to in foster care.²⁰¹ It is based on this comparison, he argues, that jailhouse nurseries cannot be justified in children's best interests as children of adoption are significantly better off.²⁰² But, this is not the current default system, as children removed from imprisoned mother are not freed immediately for adoption; rather they are sent to live with foster parents or kin.

The immediate forced relinquishment of parental rights belonging to non-violent low sentence offenders cannot be good policy. If mothers choose to relinquish their children, adoption may be the best option, but forced relinquishment is a very different proposition. Many children are born to less than ideal parents, such as parents who pose a high risk of maltreatment, have mental and emotional limitations, struggle with prior or current drug addictions, live in unstable housing situations, are indigent, are illegal immigrants, are single parents, and so forth. Indeed, Dwyer himself describes incarcerated mothers as a

¹⁹⁶ See Goshin & Byrne, *supra* note 188, at 276–79.

¹⁹⁷ Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228, 234–35 (2012) (citing Mary W. Byrne, Key Findings, Maternal and Child Outcomes of a Prison Nursery Program, http://nursing.columbia.edu/byrne/pdf/KeyFindings07_09.pdf) (“The goal of such programs is to foster bonding and attachment between mothers and their infants, which studies have shown to promote healthier infant development, in addition to reducing recidivism on the part of mothers—a factor that has led some to promote the programs as a cost-saving measure.” (footnote omitted)).

¹⁹⁸ Dwyer, *supra* note 182, at 480–81 (“The primary motivation for state actors to accede to advocates’ requests for more programs that bring children into prisons has been the law-and-order and fiscal aims of preventing criminals from reoffending after they are released from prison.”).

¹⁹⁹ See *supra* notes 196–98 and accompanying text.

²⁰⁰ See Dwyer, *supra* note 182, at 483 n.90.

²⁰¹ See *id.* at 480 n.78.

²⁰² See *id.* at 480.

population with high rates of women with mental problems, drug addictions, ties to criminal activity, histories of sexual abuse, and undeveloped or weak attachments to their own parents. Moreover many of these women were raised in foster care, have family members who have been incarcerated, are victims of domestic violence, and have limited education and work experience.²⁰³ Indeed, there is overlap between the conditions that Dwyer says make prison inmates at-risk parents and those Dwyer argues make parents high-risk and subject to potential termination in children's best interests even when not in prison.²⁰⁴ This threat to the range of American families and their right to raise their children is broad and would alter the way we view parenthood and child-raising, by giving the government the right to transfer children from poorer, more at-risk parents to wealthier, majoritarian families. Although proven abuse and neglect may justify terminating parental rights, questioning parental rights because of the fear of potential maltreatment based on predetermined risk factors gives enormous discretion and power to the state.

In lieu of outlawing all such programs as Dwyer suggests, and forcing adoption to more "optimal" families, more can be done to improve conditions for these children and their caregivers in the jailhouse setting. For instance, the stressful and unhealthy environment that Dwyer describes in jailhouse nurseries might be alleviated by addressing the conditions of such nurseries or providing that children spend time in outside daycare centers. The conditions of jailhouse nurseries that Dwyer describes are subject to oversight and perhaps can be made less stressful than conditions for some children in their legal homes or in foster care settings. State involvement can be used to improve conditions as opposed to severing ties with parents because they are in jail for a short period of time and do not have relatives who can provide adequate care. Because these mothers are in custody, it is an opportunity to educate and improve their parenting skills as they are literally a captive audience who has nothing but time for such education, as opposed to other family settings where states are not involved or only involved in crisis management. The costs to the state are not likely to be more in the long run, given the costs of foster care for children and jailing repeat offenders, as jailhouse nursery programs may reduce recidivism rates.²⁰⁵ In Europe, such efforts have apparently been successful overall, are popular, and regularly considered in line with children's best interests.²⁰⁶ Al-

²⁰³ See *id.* at 493–94 (describing challenges of inmates upon reentry and inmates' characteristics).

²⁰⁴ DWYER, RELATIONSHIP RIGHTS, *supra* note 12, at 260 (discussing similar at-risk characteristics relevant to pregnant inmates as compared to those Dwyer would consider "high-risk parents" and thus subject to judicial oversight in maintaining parenthood rights).

²⁰⁵ See, e.g., Erin Jordan, *Prison Nurseries Cut Female Inmates' Risk of Reoffending*, GAZETTE (Mar. 31, 2011, 10:43 AM), <http://thegazette.com/2011/01/31/prison-nurseries-cut-female-inmates-risk-of-reoffending> (describing the creation of prison nursery programs in Nebraska, California, Indiana, and Illinois and discussing how jailhouse nursery programs will save the state money).

²⁰⁶ See *supra* note 183 and accompanying text.

though the jailhouse may never be an “ideal” setting for child care, it is not likely to be abusive or neglectful either, and more can be done by the state to improve conditions, which would reduce stress, violence, and hostility. Although this less stressful, healthier environment, which includes possible outsourcing to ordinary civilian daycare centers, may not be the reality in some or many of these programs, neither is the forced adoption system that Dwyer sets up as the alternative to jailhouse nurseries.

Moreover, a few specific inquiries need to be considered in assessing the appropriateness of jailhouse nursery programs under particular circumstances. First, the benefits of breastfeeding are considerable and doctors often recommend nursing for at least one year.²⁰⁷ The benefits of having a nursing mother are not specifically considered in Dwyer’s article and because we are considering the care of very young babies, such consideration seems appropriate. Second, it is necessary to consider the mother’s sentence. If the mother can leave the jail along with the baby at the end of her term and before the baby is too old, the possibility of a continuing relationship with an ongoing caregiver must be weighted more heavily against the unideal setting of the jailhouse. However, if the baby must ultimately be separated from the caregiver when the child is older and more aware, these negative effects would weigh against jailhouse nursery programs.²⁰⁸ Third, once a child is older than eighteen months, the problem of living in the jailhouse is more concrete and certain limitations seem prudent—although some programs allow children to stay for up to two or three years. However, there is still the question of whether the child could be raised by the mother’s kin or brought to daycare centers in order to keep the family together when the mother is released, so long as the mother’s release does not occur too long after the child reaches eighteen months. This depends on availability of kin caregivers, the term of the mother’s sentence, and other factors that are relevant in considering whether a program that keeps mothers and babies together in a jailhouse setting may be beneficial.

Being raised in a networked “kin” family may not meet ideal notions of the nuclear family, but it is not for the state to judge such care networks if they are not abusive or neglectful. Best interests is more complex than Dwyer’s article relates, and the three questions above need to be asked and weighed when determining a women’s suitability for a jailhouse nursery program rather than outlawing these programs altogether. Ongoing caregiver relationships and children’s cultural identity are also important to their well-being.

²⁰⁷ See OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., YOUR GUIDE TO BREASTFEEDING 15 (Jan. 2011), available at <http://www.womenshealth.gov/publications/our-publications/breastfeeding-guide/BreastfeedingGuide-General-English.pdf>; Cindy Harmon-Jones, *Duration, Intensity, and Exclusivity of Breastfeeding: Recent Research Confirms the Importance of These Variables*, LA LECHE LEAGUE INT’L (Oct. 14, 2007), <http://www.lalecheleague.org/ba/may06.html>.

²⁰⁸ Dwyer, *supra* note 182, at 492–93.

There is also a clear racial and socioeconomic impact to Dwyer's arguments. As Dwyer himself forcefully emphasizes, the issue of jailhouse nurseries largely, but not exclusively, concerns minority babies who are living in jails or who are born to high-risk parents who are under tighter state surveillance. There is something innocent and compelling about wanting to protect children by relying on foster care and adoption, rather than high-risk mothers and their families, to care for children. However, it also demonstrates how powerful the best interests standard can be when wielded by the state. The state should not be the arbiter of the composition of the perfect family; nor should it be the predictor of who will be good parents. Caregiving mothers, from pregnancy onward, should be supported to provide needed care for their children. Children should not be forcefully separated from mothers and then raised in a costly and overburdened foster system while waiting to be adopted. First and foremost, caregivers should be supported by programs that seek to make good parents of those who may not have had a good upbringing and to break the cycle of abuse and neglect. If abuse or neglect nonetheless results, or preliminary direct evidence can be demonstrated, and is based on more than just indirect statistical evidence that creates a credible threat of abuse, then the state is left with no choice but to step in to protect the child.

Best interests should not be used to make sweeping judgments about children of at-risk parents and jailhouse nurseries. Raising children is complicated, which is why best interests is such a complicated and ambiguous standard, and why it should not be used to hold caregivers to idealized majoritarian models of parenting and care by trying to optimize and disqualify at-risk caregivers. Caregiving attachments must be encouraged, promoted, and supported unless the state discovers abuse and neglect, and then alternate caregivers should be found and supported.

These examples are intended to (1) demonstrate the way conflicts between different categories of children's interests create tension and ambiguity in determining what is "best" for children; (2) critique state reliance on its own interests and simplistic majoritarian values as a means of avoiding the adequate consideration of the complex and conflicting interests involved in best interests analyses, and demonstrate that what usually get minimized are caregiving relationships that do not follow majoritarian idealized norms of the nuclear family; and (3) demonstrate how caregiver interests are regularly separated from children's interests, which are adjudicated in an individualized manner that focuses on the child's rights and interests independent of ongoing relationships.

This criticism is intended to stem the tide of the use of best interests as the primary means of promoting children's interests. In the remainder of the article I will move beyond analysis and criticism of the best interest standard for advocating on behalf of children and protected children's rights and begin the complex work of providing alternative legal standards for protected children's rights in the context of custody disputes.

III. INTEGRATING CAREGIVER RIGHTS WITH CHILDREN'S RIGHTS

Determining what is “best” for children is a complex endeavor that cannot be solved simply by giving power to the state or parents to decide what is best and calling it “best interests.” Determining what is best is not feasible because adjudicating children’s rights and interests involves conflicting components making such an inquiry endlessly complex and subject to bias and manipulation depending on who has the power to decide. In this part, I refocus the debate in order to make it more substantive and less binary and antagonistic. As opposed to isolating children’s interests in a vacuum, I argue that children’s interests must be examined within the context of the caregiving relationships that support them as an appropriate reflection of their dependency. Although quasi-civil rights are also relevant for children, what children mostly need are dependency rights fulfilled by relationships that support them; therefore, such relationships should be at the center of any inquiry into children’s rights and interests.²⁰⁹ By focusing on caregivers’ rights and children’s rights while the caregiver relationships are still ongoing, family law can do more to support these essential relationships.

First I will clarify the nature of caregiver rights, and then I will discuss how to account for caregiver and children’s rights in tandem. Finally, in Part IV, I will apply this framework in the custodial context.

A. *Caregiver Rights and Interests*

The previous sections have discussed at length the nature of children’s rights and interests, and have pointed to the reality that most of children’s interests involve dependency rights—the need for care and nurturing from parents, caregivers, and the state. I have also demonstrated how the law regularly separates caregiver interests from children’s interests in a variety of contexts and relies on the best interests standard to make impossible judgments about what is best for children. Thus, the law regularly sets up a tension between children’s rights and caregiver rights.

However, as Woodhouse notes, 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.”²¹⁰ Caregivers’ choices, needs, inter-

²⁰⁹ See NEDELSKY, *supra* note 29, at 19.

²¹⁰ Woodhouse, *supra* note 31, at 512; accord EVA FEDER KITTAY, LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 28 (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) (while individualistic 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

ests, and rights affect and are indelibly intertwined with those of their children, due to the constant care parents must provide. Thus, separating children's rights from caregiver rights, and punishing or benefiting one without the other, is infeasible because the other will always be affected. A caregiver's every choice will affect her child, particularly a young, dependent child, and any punishment inflicted upon a caregiver will also affect that child. That which advances or hinders the interests of a caregiving parent will necessarily affect the interests of that parent's child, and vice versa. Attempts to isolate child and caregiver are not reflective of the interdependent nature of care.²¹¹ Such interdependency compromises the individuality of the caregiver,²¹² and minimizes the independent needs of the child. However, interdependency is the reality, and recognizing it is more important when supporting children's rights than are symbolic gestures protecting the individual liberties of caregivers and children.²¹³

If the needs of caregivers and children are indelibly intertwined, then supporting children means supporting caregivers as well. Children cannot be assured care in isolation. Thus, care must be given by someone who has adequate financial, emotional, and psychological means to do so.²¹⁴ 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.” Why would we want to set these parents up for failure? There are not enough parents to go around for all the children in need. The foster care system is expensive and overwhelmed.²¹⁵

years”); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 16–23 (2000); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 779, 788 (1997); Woodhouse, *supra* note 1, at 830–31.

²¹¹ Sources cited *supra* note 190.

²¹² See FINEMAN, *supra* note 18, at 14; SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 139 (1989); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1–2 (2008) [hereinafter Fineman, *The Vulnerable Subject*]. See generally MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (discussing how autonomy is impossible for interdependent caregivers and for children in need of care).

²¹³ ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 94–95 (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.”).

²¹⁴ 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.”).

²¹⁵ See Patricia Chamberlain et al., *Enhanced Services and Stipends for Foster Parents: Effects on Retention Rates and Outcomes for Children*, 71 CHILD WELFARE 387, 387 (1992) (“Current national trends show that although the number of available foster homes is shrinking, the number of children and adolescents being cared for in the family foster care system is growing.”); Nolan Rindfleisch et al., *Why Foster Parents Continue and Cease to Foster*,

Accordingly, parents who are trying to provide good care need financial and legal support for their efforts. Society should focus on providing the necessary support so that caregivers may provide good care.

Progress has been made in supporting dependents and caregivers as a unit with such developments as the Family Medical Leave Act (“FMLA”), which allows a limited amount of unpaid leave to caregivers who want to care for children or other dependent family members.²¹⁶ However, such progress is quite limited and much more needs to be done.²¹⁷ The United States has lagged behind other countries in recognizing rights that extend beyond the individual, relying solely on privacy and individuality to cover children’s needs. As Woodhouse suggests, “Americans must face the fact that these concepts [of community and caregiver rights] are considered foundational in most of our peer nations.”²¹⁸ The American focus on individual rights in family law and beyond impedes our ability to provide for dependents and ensure the care that is so based on interdependency.²¹⁹ In short, an individualistic perspective impedes promoting children’s interests.

For instance, some feminists argue that women need to be incentivized to establish themselves in the marketplace and therefore long maternal leave policies become problematic.²²⁰ However, child development studies clearly demonstrate that one-on-one contact during the first year of life is best for children’s development.²²¹ Thus, from a purely children’s rights perspective, it is clear that caregivers need time off from work to provide that care, and that the three months unpaid leave provided by FMLA is not enough. Moreover, it is only to promote a parent’s interest that leave is limited to protect women’s standing in the workplace.²²² Although it might not make sense for a woman to

25 J. SOC. & SOC. WELFARE 5, 6 (1998) (citing documentation by Kamerman and Kahn, as well as General Accounting Office reports); 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 care system may not be growing at a pace that can provide the necessary capacity to meet this [growing] need.”).

²¹⁶ Family Medical Leave Act of 1993, 29 U.S.C. § 2601 (2012).

²¹⁷ 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); 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); 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).

²¹⁸ Woodhouse, *supra* note 1, at 850.

²¹⁹ *Id.*

²²⁰ Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 2, 41, 46–50 (2005).

²²¹ Woodhouse, *supra* note 1, at 830–31.

²²² See Lester, *supra* note 220, at 2 (arguing for paid family leave but arguing against generous, long leave because of its effects on women’s status in the workplace).

leave her place of employment for a year, it might be best for children.²²³ From family leave to economics, education, and health, children's rights require providing support for caregiver rights and interests—even if supporting caregivers does not support women's place in the job market.²²⁴

Accordingly, our failure to value care properly and to focus on individualistic rights leads too often to both a conceptual and actual separation of child and caregiver.²²⁵ As Martha Minow concludes, “we 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.”²²⁶ We must move from oppositional accounts of children's and parental rights and interests—or children's and state interests—when it comes to dependency rights and move to a mutually supportive framework that affirmatively supports caregivers and the children for whom they care in a mutually beneficial manner.

Primary caregivers are those parents who do most of the day-to-day care, such as preparing children for school in the morning and picking children up after school, arranging for afterschool activities and enrichment, taking children to doctor's appointments, and otherwise supervising health and educational needs.²²⁷ Primary caregivers often stay home with children temporarily or even long term during their “tender years” and often curtail employment opportunities to engage in caregiving work and provide for children's everyday needs.²²⁸

²²³ This example also distinguishes between woman's interests and caregiver interests. Caregiver interests refer to interests associated with those who are caring for children while woman's rights may not be associated with such care.

²²⁴ Woodhouse, *supra* note 1, at 830–31.

²²⁵ *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 the children.” (footnote omitted)).

²²⁶ Minow, *Rights for the Next Generation*, *supra* note 25, at 2.

²²⁷ See David M. v. Margaret M., 385 S.E.2d 912, 916–18 (W. Va. 1989); Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981); Richard Neely, Commentary, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180 (1984).

²²⁸ See Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 37; Joan Williams, Response Essay, “It's Snowing Down South”: *How to Help Mothers and Avoid Recycling the Same-ness/Difference Debate*, 102 COLUM. L. REV. 812, 828 (2002) (“Today, two out of three mothers are employed less than forty hours a week during the key years of career advancement—and eighty-five percent of women become mothers.”); see also CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 37 (1987) (“Most jobs in fact require that the person, gender neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child.”); DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 147 (1996) (indicating that only 28 percent of women with young children work full-time outside of the home, while an additional 40 percent work from home and/or part-time); Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 501–03 (1988) (noting that the “Human Capital” theory of alimony focuses on what caretakers have sacrificed by leaving the work force or moving to part-time

Although it is not always the case, primary caregivers are usually identifiable even when both parents are pitching in to some extent.²²⁹ The easiest way to identify a primary caregiver is to identify the parent whose work hours are shorter and who balances care with work on a daily basis.²³⁰

Regardless of which parent is the primary caregiver, or whether a parent can be identified as a primary caregiver at all, most parents are caregivers to some extent. Primary earners also support and care for children. Third parties may also be caregivers and may provide more care and support than formal parents.²³¹ The more care a parent or other caregiver provides, the harder it is to separate the caregiver from the child when it comes to rights and interests. However, all caregivers have interests that are intertwined with the rights and interests of their children reflecting the care they provide.

A caregiver's rights and interests become intertwined with the child's life because of the direct effect of their life choices on the child as well as the constraints that raising children places upon them. Almost anything they do has some effect on their children, particularly when the children are young and when they are most dependent. If a primary caregiver is overwhelmed and does not have necessary support—whether financial or emotional—and therefore wants to relocate, the interests of the child are interconnected with those of the caregiver because a caregiver cannot provide good care without feeling stable and secure herself.²³² Caregivers, particularly primary caregivers, often inhibit their own market work to provide necessary care. As a result, their religious, geographical, and personal needs, as well as their physical safety, are never completely separable from their child's needs and interests.

Critics of such a perspective argue that there is significant danger in seeing caregiver well-being as intertwined with children's well-being, as the latter will suffer when there is focus on the former.²³³ Children's needs will be skimmed over for the sake of parents' interests, and the focus will be on parental rights rather than children's interests. Lawyers and judges, it is argued, would be better off focusing on children than on mixing parental well-being into the inquiry.²³⁴ But, this perspective misses the fundamental nature of children's needs: to be cared for by parents or other caregivers who will provide support.²³⁵ A caregiver's well-being directly affects and influences his ability to

schedules and misses the feminine choice to engage in certain jobs or professions that have flexible hours but are not as highly compensated); Donald R. Williams, *Women's Part-Time Employment: A Gross Flows Analysis*, MONTHLY LAB. REV., Apr. 1995, at 36, 36 (most married mothers still work primarily part-time).

²²⁹ See Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 2–3; see also WILLIAMS, *supra* note 18, at 2.

²³⁰ See Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 2.

²³¹ See *infra* Part IV.

²³² See Minow, *Rights for the Next Generation*, *supra* note 25, at 3.

²³³ Dwyer, *Parents' Self-Determination*, *supra* note 12, at 128–29.

²³⁴ *Id.*

²³⁵ See *supra* Parts I.B., III.A.

provide adequate care, and the benefits of that care, to children. Attempting to separate these inquiries misses the very nature of care itself. There is no good way to isolate children from caregiving parents except where the relationship itself causes enough harm to justify the state interference, and where the interference would actually prevent more harm than it would cause.

Therefore, I argue that creating a system of law and state support that focuses on children's rights separate and apart from caregivers' rights is illogical and bad policy, unless we are in the narrow area of enforcing children's quasi-civil rights against the wishes of parents or when there is abuse and neglect. And, even when dealing with quasi-civil rights, the nature of the ongoing relationship must be taken into account. In most circumstances and as a matter of forward-looking state policy, these rights should be viewed as overlapping and co-supportive, and not as potentially conflicting.

B. Vulnerability Analysis and Relational Rights: Reconceiving Children's Rights

In this part, I offer two theoretical frameworks for resolving the potential tension between caregivers' rights and children's rights. As the caregiver and child are different persons, and rights attach to the individual in the liberal U.S. tradition, a framework for thinking of these rights in tandem is helpful. First, I discuss Martha Fineman's vulnerability framework and then Jennifer Nedelsky's perspective on relational rights. Both of these frameworks provide clear conceptual guidelines for considering how rights can work together as opposed to in conflict with one another.

1. Vulnerability Analysis: The Vulnerability Inherent in Relationships

In the liberal, individualist tradition that underlies much of modern U.S. law, rights talk divides and separates rights holders into individual stakeholders that compete with one another. Here, we are discussing the right to protection of children, who, as dependents, were once treated as property of parents, and are in need of care. Separately, we are also discussing the rights of caregivers who sacrifice market work and personal pleasures to care for these children.

Feminists have fought to secure basic rights for caregivers and value for the work they do for their children and for society.²³⁶ The focus of this article is the clash of these potential rights. In trying to decipher the relationship between two competing sets of rights it is helpful to keep in mind that these rights are exercised against the state and are often exercised to protect each individual's vulnerability. However, the quest for state protection of such vulnerability need not create conflict and tension between stakeholders; rather, the quest univer-

²³⁶ See, e.g., sources cited *supra* note 25.

salizes the struggles we face in pursuit of justice.²³⁷ Martha Fineman argues that just as individualism and the separation of rights among persons is a universal theory, so should it be a universal theory that liberal individualism does not provide sufficient support to vulnerable parties.²³⁸ Both children and caregivers have been underprivileged and underrepresented groups and it seems unfortunate to have to pit their rights against each other and choose.²³⁹ As Fineman suggests, we should move away from differentiation and focus instead on “the relationship and complementary shared responsibilities of the individual, the state, and societal institutions in regard to responding to the realities of the human condition.”²⁴⁰

From this perspective, children and caregivers share the vulnerability of the human condition. Because children depend on caregivers who in turn are deeply intertwined with their children in facilitating their well-being, it makes sense to protect these vulnerabilities in a complementary, shared fashion that is focused on relationships. These relationships should not be viewed as deviant but as the focus of state support.²⁴¹ Unlike rights talk that pits the rights of one side against the rights of the other and emphasizes obligations and duties in response to rights and interests, a focus on vulnerability instead emphasizes the universality of the vulnerable condition that the state must support in a holistic—as opposed to a necessarily divisible—manner. Thereby, Martha Fineman’s vulnerability theory provides a framework for resolving the tension between the competing rights introduced in this article.²⁴²

2. *Relational Rights and Interests: Supporting Individuals Within Relationships*

Although the theory of universal vulnerability that Fineman introduces demands that we start with the premise of our universal need for state assistance, rights and rights talk are still a fundamental and compelling tool for delineating what the state must do for its citizenry and the ways in which the state must not interfere with its citizenry depending on whether we are dealing with a positive right under the law to state action or a right to freedom from state interference. Focus on rights is unlikely to be easily abandoned in favor of focus on vulnerability. Another way to resolve the tension between caregiver rights and children’s rights is to focus on relational rights as opposed to individualis-

²³⁷ See Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 619–20 (2013).

²³⁸ *Id.* at 620.

²³⁹ See Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 647–48 (1987). (arguing that when caregiver and children’s rights conflict, the more vulnerable party’s rights should prevail—usually children).

²⁴⁰ Fineman, *supra* note 237, at 636.

²⁴¹ Fineman, *The Vulnerable Subject*, *supra* note 212, at 1, 3–4, 8.

²⁴² *Id.*

tic rights.²⁴³ Using the theory of relational rights has the benefit of remaining in the rights talk conversation as opposed to beginning with the demand for social welfare from the state due to universal vulnerability. However, the outcome of the need to focus on dependence and relationships is similar.

The relational perspective on children's rights is distinct from the right to relationships and from relationship rights, which are more comparable to group rights. The right to relationships is still an individualistic right that can attach to both individual children and adults. It is the right of the individual to have a relationship with another person, such as a caregiver.²⁴⁴ The relational perspective on rights is also not about rights that belong to a relationship. Relational rights do not protect two individuals together. Rather, the rights attach to the individuals, but the duty to the individual comes in the form of support for the relationship. Relational rights are about the responsibility of the state to protect and support relationships in order to protect and support individual interdependent children and caregivers.²⁴⁵ That the rights attach to individuals and flow to relationships does not mean the individuals' rights are compromised. Due to their interdependency, in most circumstances, the only way to effectively support and protect these individuals is through their relationships.

The basic premise behind relational rights is that when it comes to children's rights, instead of trying to decipher some identifiable notion of best interests, the focus of children's advocacy and the corresponding duties placed on the state should be on setting preconditions for healthy and beneficial relationships that children need.²⁴⁶ As Martha Minow inquires, in suggesting relational rights as the premise for children's rights, "[w]hat legal rules governing child custody, education, and child support would promote settings where children thrive? . . . [W]hat rules would promote adults' abilities to create these settings?"²⁴⁷ Children's advocacy should be viewed through the lens of interdependent relationships because such interdependent relationships are at the heart of what it means to meet the needs of children and caregivers. It is this complex perspective on families—individuals within an interdependent community—that best describes the relational perspective on children's rights I am advancing: "A conception of relational rights and responsibilities . . . would not regard

²⁴³ Minow & Shanley, *supra* note 25, at 23; see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1825–39 (1998) (discussion of relational rights and duties in tort law); C. Harry Hui, *Measurement of Individualism-Collectivism*, 22 J. RES. PERSONALITY 17, 17–19 (1988); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230, 1278 (1998).

²⁴⁴ See, e.g., Dailey, *Children's Constitutional Rights*, *supra* note 26, 2168, 2172–73 (discussing the right of children to have caregiving relationships due to their developmental needs); see also DWYER, RELATIONSHIP RIGHTS, *supra* note 12, at 84 (arguing for the rights of children to have relationships with caregivers).

²⁴⁵ See *supra* notes 36–61 and accompanying text for a discussion of the way rights create duties upon the state.

²⁴⁶ Minow, *Rights for the Next Generation*, *supra* note 25, at 23.

²⁴⁷ *Id.*

'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.'²⁴⁸

This perspective on rights as relational has been advocated broadly by Jennifer Nedelsky, who argues for a relational approach to organizing our collective lives in a constitutive manner and to approach legal questions from the starting assumption that our human selves are in interaction with others.²⁴⁹ She sharply criticizes all individualistic accounts of rights and autonomy as identities and capacities, which, she argues, are not comprehensible in isolation from their relationships.²⁵⁰ Therefore, from a relational perspective it is logical and sensible to consider children's rights in conjunction with caregiver rights.

IV. DOCTRINAL REUNIFICATION OF CHILDREN'S RIGHTS WITH CAREGIVER RIGHTS IN THE LAW OF CUSTODY

The question is therefore how, in practice, to balance the different components of children's rights—parental privacy, quasi-civil rights, and dependency rights provided by the state—with caregiver rights, when the goal is to focus on the supportive relationships that children need. And, importantly, how to incorporate the state and legislature in regulating and shaping this need for care. Broadly, civil rights are more straightforward to enforce in the liberal, individualistic tradition, but even such rights should be enforced keeping in mind the relationship in which they will continue to be supported. Yet, the need for care and the tension between state and parental caregivers in providing such care is more complex when the law focuses on individuals and not relationships. The need for care and the existence within interdependent frameworks makes the dominant, individualistic, liberty-based perspective on rights an impossible fit for children.

The child, an individual with his own rights and interests, is also an indelible part of a relationship with his parents, and when parents fail, the child is dependent on the state. So too, the caregiver, an adult with rights and interests of her own, is also an indelible part of a dependency relationship when it comes to caring for a child. The interdependency, for both the caring parent and the child, is not only physical, but emotional. Physically, a caregiver must provide safety, shelter, and care for the dependent child. Emotionally, caregivers' own choices are often intertwined not only with their own needs, but also with the needs of their children. Choices that might appear to be selfish could result in more emotional stability for a parent, which would improve parenting. Separat-

²⁴⁸ Minow & Shanley, *supra* note 25, at 23 (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 626 (1980)); see Bartlett, *supra* note 25, at 315 ("We may also want to take account of the different degrees of relationship that have been formed.").

²⁴⁹ NEDELSKY, *supra* note 29, at 55.

²⁵⁰ *Id.* at 121.

ing out caregiver choices that are just for the caregiver's sake and those that are for children is complex and may be impossible. This symbiotic relationship is central to parenthood both from a normative and descriptive perspective.

The answer lies in shifting from an oppositional rights discourse to delineating legal principles that govern interactions between these individuals and their rights in a manner that best supports their interdependent relationships. Thus, the key is not to decide whose interests trump whose, but rather to look for guiding principles that can strike a balance between the potentially conflicting and competing concerns.²⁵¹ I will provide some concrete examples of how a reunited perspective on care and caregiver would affect and alter the law of child custody. Most essentially, the law should reject the use of the best interests standard to the greatest extent possible. Moreover, substantively, the law would look to support caregivers along with children. The law should focus on nurturing relationships as opposed to focusing on the division between them.

A. *Supporting a Variety of Care Relationships*

Caregivers are not always parents. Children receive their care from a variety of sources. Although parents are still the primary providers of care, care is multifaceted and this article's focus is on caregivers, not on parents alone. Moreover, the focus on care is not an absolute measure. There is a variety of levels of care, and these different levels can be recognized for what they are and supported in degrees as opposed to absolute rights. A relational perspective should support a variety of forms of relationships from a variety of care providers.²⁵²

Third parties, such as grandparents, step-parents, same-sex partners, and others who are not formal parents, increasingly seek custodial rights or visitation with children based on their caregiving activities.²⁵³ I have argued for providing parental status and rights to functional third-party caregivers because such status makes sense for children, caregivers, and parents.²⁵⁴ These functional caregivers provide significant care over a long period of time that is sufficient to meet threshold requirements for becoming a functional parent.²⁵⁵

²⁵¹ *Contra* Rutherford, *supra* note 239, at 647. Jane Rutherford has argued for support for family rights alongside individual rights, and when the rights of individuals in the family conflict—husband's rights with a wife's or children's with their parents—the weaker and more vulnerable party's rights should prevail. *Id.* The focus of such a "rule" is on the nature of the parties individually and not on the functioning of the relationship and thus does not comply with the framework of relational rights that I promote. The rule to favor weaker parties may work as between men and women but not as between parents and children; this theory does not sufficiently appreciate interdependency of parent and child, as the weaker party—the child—is not necessarily poised to express or to have his will carried out without support from a parent.

²⁵² See *supra* notes 246–48 and accompanying text.

²⁵³ See *supra* notes 106–12 and accompanying text.

²⁵⁴ See generally Laufer-Ukeles & Blecher-Prigat, *supra* note 13.

²⁵⁵ Laufer-Ukeles & Blecher-Prigat, *supra* note 13, at 442–43.

Children benefit from third-party care and parents do as well.²⁵⁶ Legal status and rights benefit functional parents by giving recognition and value to the care or financial support they provide.²⁵⁷ From a relational perspective, as opposed to an individualistic rights perspective, there is less of a focus on separating out rights and interests and pitting the rights of different caregivers against each other. The focus is on supporting these relationships, whether formal and biological or functional and care-based.

However, functional parenting is different in practice and in theory from formal parenting. There are significant benefits to the flexible and diverse manner in which such relationships develop and meet the needs of children.²⁵⁸ Moreover, there are many different kinds of people that might qualify as functional caregivers by providing for the needs of children. Functional relations are not as stable, predictable, identifiable, or easily assignable as formal parenting relationships.²⁵⁹ They also create a potential multiplicity of claims that can upset the stable, private lives of children through state and court intervention.²⁶⁰ Thus, for the sake of the children who are the primary beneficiaries of functional caregivers, but also in acknowledgement of the different potential concerns involved, we should heed the benefits of functional parenthood without equating it to formal parenthood.²⁶¹

Functional caregivers need status and recognition to best care for children, to maintain relationships despite conflicts with parents, and to facilitate child-care that is supported by formal parents.²⁶² For instance, functional parents need status in order to obtain authority for health care decisions and to act as legal guardians.²⁶³ Functional parents should not be disposed of when primary caregivers disagree with them if their attachments are supporting the children. On the other hand, it also makes sense to support these caregiving relationships in a way that not only facilitates their continuity and stability but also minimizes tension with formal parents.²⁶⁴ Power struggles between formal and functional caregivers can create conflict between parental figures that has been demonstrated to be a primary risk factor in undermining children's well-being.²⁶⁵ Differentiation and a clear demarcation of obligations and responsibility for final decisions can give primary caretakers the support they need without challenging their primary parental status.²⁶⁶ A differentiated functional parent

²⁵⁶ *Id.* at 439–41.

²⁵⁷ *Id.* at 441.

²⁵⁸ *Id.* at 455–61.

²⁵⁹ *Id.* at 455, 461–66.

²⁶⁰ *Id.* at 463.

²⁶¹ *Id.* at 454–55.

²⁶² *Id.* at 441.

²⁶³ *Id.* at 439–40.

²⁶⁴ *Id.* at 461–62.

²⁶⁵ *Id.* at 466; *see infra* note 297 and accompanying text for studies that demonstrate that familial conflict harms children.

²⁶⁶ Laufer-Ukeles & Blecher-Prigat, *supra* note 13, at 466.

status would not override an ongoing formal parenthood relationship, but could also support secondary relationships with functional caregivers by providing rights to visitation or other subsets of parental rights even if a parent objects.²⁶⁷

Grandparents and other biological kin, however, including biological birth parents post-adoption, do not necessarily meet the threshold minimum requirements for determining functional parenthood and thus would not be entitled to functional parent status.²⁶⁸ They may be functional parents, based on the level of functional care they provide, or they may simply be loving grandparents and not substitute parents.²⁶⁹ Still, biological kin may seek state assistance from courts in obtaining access to grandchildren, often due to death of their child.²⁷⁰ In *Troxel v. Granville*, the Court dealt squarely with the potential conflict between parent, child, and state.²⁷¹ Grandparents sought visitation with their grandchildren through state interference because the grandchildren's mother was not providing them with the access they desired after their son's death.²⁷² The trial court held that it was in the best interests of the children to continue the relationship with their grandparents, as provided by state statute, as the relationship appeared to have a positive impact on their lives.²⁷³ However, the Supreme Court held that any such "best interests" reasoning was a violation of parental privacy rights.²⁷⁴ Instead, greater weight should be given to the fact that parents can determine what is in their child's best interests.²⁷⁵ The case was sent back to the appellate court and the lower courts have had a dizzying time figuring out what the Supreme Court judgment meant and what standards might be considered constitutional.²⁷⁶

Interpreting *Troxel* from a relational rights perspective, there are two issues that need to be considered. First, best interests should already include such special considerations of parental prerogatives and liberties because low tension and parental privacy are part of what helps children thrive.²⁷⁷ It is usually not in the best interests of children for the state to force a relationship that parents object to and that creates tension in the home. If the Supreme Court is saying that

²⁶⁷ *Id.* at 467.

²⁶⁸ Cf. Dailey, *Children's Constitutional Rights*, *supra* note 26 (arguing for rights to caregiving relationships but only when caregivers are "primary").

²⁶⁹ Laufer-Ukeles & Blecher-Prigat, *supra* note 13, at 442–43.

²⁷⁰ See *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 61–63.

²⁷⁴ *Id.* at 72–73.

²⁷⁵ *Id.* at 72.

²⁷⁶ See, e.g., Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 396–401 (2002); Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 15 (2003).

²⁷⁷ See *supra* Parts I.B, II.A.

parental prerogatives merit extra weight due to parental rights, the question becomes how much weight?

Second, focus should be given to the *effect* of enforcing the relationship on the interaction between child and parent, child and grandparent, and parent and grandparent. As long as the primary caregiver is still acting as primary, if the care provided by the grandparent is important to the child's well-being, such visitation should be continued despite parental objections in recognition of the relational principle of supporting different forms and degrees of relationships. However, if the grandparent relationship has not been important in providing care, and there is deep-seated, unresolvable tension between grandparent and parent that will cause harm to the primary caregiving relationship, then grandparent interaction would not be worth supporting at the cost of harming the relationship with formal parents.

This same analysis could apply in providing birth parents with access to children post-adoption, if not already provided for by agreement, in order to support children's relationships with parents, even if adoption is the best option for the primary caregiving relationship.²⁷⁸ Particularly with regard to older children, birth parents' relationships with adopted children may be significant and should not be discarded to the detriment of the children. Attachment from past caregiving is the primary indicator of the need to support such ongoing, yet differentiated care relationships, such as in the case of post-adoption contact,²⁷⁹ relationships with long-term foster parents, or relationships with illegal immigrant parents. Other factors may be relevant as well; for instance, biological and cultural connections to a child can create a strong desire to care and provide for a child. Such cultural and biological affinities should be encouraged, as is the case for Native American children and children born to inmates, so as to foster these needed caregiving relations and cultural identities. If primary formal parents are given defined rights including primary physical custody, the vision is for other attached caregivers, whether due to past care, biological affinity, or cultural kin-ties, to also be given an opportunity to have a caregiving relationship with a child to that child's benefit. Such secondary caregivers may interfere with the exclusive, binary parental relationship envisioned in the nuclear family, but for many children such care networks can be extremely beneficial, and thus parental rights should be weakened for the sake of these relationships. From a relational perspective a child can benefit from a myriad of connections both biological and cultural as well as based on caregiving attachments.

In sum, opening up the network of care to other committed long-term caregivers makes sense from a child-focused, relational perspective when children benefit from such care.²⁸⁰ If, however, the secondary relationship cannot be

²⁷⁸ See *supra* Part II.B.3.

²⁷⁹ See generally Appell, *supra* note 168, at 102–36 (discussing the importance of relationships between children and biological kin post-adoption).

²⁸⁰ Murray, *supra* note 106, at 454–455.

sustained in parallel to the primary relationship, this reality would have to be taken into account and likely discontinued unless the care relationship is significant enough to rise to the level of functional parent, in which case, allowing such a relationship despite formal parental objections would be more imperative. However, I believe that a societal and legal embrace of the reality of networked care, along with clear delineations of power and control, can usually avoid power struggles and allow adults to provide for multiple care relationships that are beneficial to children.

B. Caregiver Presumptions

When two fit parents both want custody of a child, the custody dispute is bound to be antagonistic and difficult.²⁸¹ The situation often involves two loving parents who are angry with each other and longing to maintain close relationships with their children. Thus, custody disputes can be fierce and the ensuing conflict is sure to be detrimental to the children involved.²⁸² Too often, children are used as pawns in custody disputes and do not have enough opportunity to speak their minds. Moreover, custody disputes can be incredibly expensive, involving complex and conflicting evidence and testimony.²⁸³ Ultimately, it is incredibly hard to optimize between two loving parents even if they have different parenting styles. The best interests standard, which is both broad and inherently at tension with itself due to incorporation of both the benefits of parental privacy and the benefits of state intervention, gives little if any guidance to making determinations between two fit parents.

Between two formal parents, the relational perspective I am describing argues for supporting a variety of degrees and types of caregiving relationships. Thus, well-defined, differentiated statuses that minimize tension and conflict between parental figures, which have been demonstrated to be a primary factor in undermining children's well-being,²⁸⁴ could also apply to primary and secondary caregivers in a fashion similar to that suggested for functional caregivers and secondary caregivers, like grandparents. As described above, a variety of intimate relationships can be recognized, but differences should also be taken into account in allocating rights and responsibilities. In the context of custody disputes between two formal fit parents, this means that, absent an agreement to parent jointly, primary and secondary custodians should be clearly

²⁸¹ See *supra* Part II.A for a discussion of the best interests standard used in custody disputes between fit parents.

²⁸² See, e.g., ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 1-4 (2d ed. 1999); Yongmin Sun, *Family Environment and Adolescents' Well-Being Before and After Parents' Marital Disruption: A Longitudinal Analysis*, 63 J. MARRIAGE & FAM. 697, 698 (2001).

²⁸³ See *supra* Part II.A.

²⁸⁴ See Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 47-52 (discussing different approaches to custody determinations and analyzing their effects on tension and conflict between parental figures).

delineated, with distinguishable rights and responsibilities, but that both relationships should be sustained and supported in a rigorous manner.

In a previous article, I advocated for the primary caretaker standard in custody decisions between two fit parents.²⁸⁵ This standard is only applicable when a primary caretaker can be identified. However, despite contentious litigation on the matter, and conflicting studies, many estimate that in most cases a primary caretaker can be identified.²⁸⁶ The primary caretaker can be ascertained by affirmative day-to-day activities as well as limited participation in the work place.²⁸⁷ When such a caretaker can be identified, he or she should have presumptive custody that can be rebutted by agreement to share custody or by demonstrating significant harm to the child. Primary custody should constitute anywhere from sixty to eighty percent of physical custody of a child, depending on agreement and living situations of the parents, and leaving substantial visitation for a secondary caregiver.²⁸⁸ Although this suggestion for a presumption remains unpopular, and states instead rely heavily on the best interests standard, I make this argument again from a child-centered relational perspective. If not for the sake of caregivers, then perhaps from the perspective of children such a presumption can gain more support.

I argue for this presumption for several reasons. First, I believe that it is best for children to live with primary caregivers because of the validity of the attachment theory developed by Goldstein, Solnit, and Freund.²⁸⁹ Children bond to primary caregivers and need continuation of these important relationships. Second, I believe that unless parents can work together in a consistent and low-conflict manner, it is best for children that there is a primary custodian

²⁸⁵ See *id.* at 47–56.

²⁸⁶ See *id.* at 2 & n.3; see also CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 4–5 (2010).

²⁸⁷ See *Price v. Price*, 611 N.W.2d 425, 430–36 (S.D. 2000) (“The primary caretaker can be identified by determining which parent invested predominant time, care and consistency in raising the child.” (internal quotation marks omitted)); Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 2.

²⁸⁸ Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. Ill. U. L. Rev. 347, 353 (2005).

²⁸⁹ JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD (1986); see Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 48; see also, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002) (discussing expert testimony on the attachment theory); *David M. v. Margaret M.*, 385 S.E.2d 912, 916–17 (W. Va. 1989) (“Substantial research has confirmed that young children, as a result of intimate interaction, form a unique bond with their primary caretaker. This unique attachment to a primary caretaker is an essential cornerstone of a child’s sense of security and healthy emotional development. . . . Thus, the young child’s welfare can be best served by preserving the child’s relationship with the primary caretaker parent.”); Chambers, *supra* note 134, at 530 (“The original bond of the child with the primary caretaker is believed to have an important continuing effect on the child’s ability to pass through each stage with success”); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 799 (1985) (“The principal attachment figure is that person who is most responsive to the child’s signals of biological needs and who initiates and maintains social interactions with the child.”).

and decision maker to resolve conflicts and make important decisions.²⁹⁰ Third, I believe that there is a tendency for one parent to do more of the work than the other in raising children, and despite agreements made in court, one parent—the primary caregiver prior to the divorce—will still do most of the caregiving, so that parent will need the child support that primary custody involves.²⁹¹ Finally, as between two fit parents, I believe that it is fair to give the presumption to the primary caregiver to properly value the caregiving work he or she has provided.²⁹² Just as the primary earner keeps the value of this earning potential for his or her life after divorce, so too would the primary caregiver retain a benefit for the value of the care work that he or she has provided.²⁹³ Although primary earner support is also essential and should continue to be essential in the parenting relationship, it is also different in kind than caregiving and should be treated as such.

All these rationales support children's rights and interests, both directly and indirectly. Giving a primary caregiver presumptive weight when it comes to custody does not give her rights at the detriment of her children. From a relational perspective, the act of giving care needs to be supported because of the relational nature of children's rights. Caregiving should be valued and supported because it is what children need and thus the parents who provide the support to children should be supported as well.²⁹⁴ This will both reward and incentivize caregivers who provide needed care. Attempts to isolate the interests of the child from caretakers fail to appreciate the interdependent nature of caregiver and child well-being.²⁹⁵ Supporting care supports the children who are dependent upon caregiving relationships. Primary earners also have relationships with children that should be supported but, as they are different in nature, their differences should be taken into account. Based more on financial support than physical support, the relationship must be continued but need not depend on the same amount of constant physical interaction.

In situations where parents are substantively splitting care work and a primary caregiver cannot be identified, the presumption does not help and efforts to find a primary caretaker should not be too rigorous. When the caregiving functions are equal or near equal, it is not worth fighting about in court as litigation will only increase tension and joint caregiving work should be incentiv-

²⁹⁰ Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 54–55.

²⁹¹ *Id.* at 53.

²⁹² *Id.* at 47–49.

²⁹³ *Id.* at 58–59.

²⁹⁴ See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 192 (1992); Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 450–51 (1990); discussion *supra* Parts IIIA–B.

²⁹⁵ See Dwyer, *Parents' Self-Determination*, *supra* note 12, at 117–18 (arguing that preferring a primary caretaker in custody disputes will harm the interests of children unless it can be found that it is in children's best interests to remain with primary caretakers).

ized and supported. If a joint caregiving arrangement can be continued after divorce or by non-married parents by agreement of cooperating adults, it should be fully supported. However, if there is significant conflict and caregivers cannot work cooperatively, one parent has to be chosen and these are clearly the hardest cases to decide. Studies demonstrate that the two variables most important to the well-being of children are: (1) low levels of conflict between parental figures, and (2) financial stability.²⁹⁶ Clearly, fighting, uncooperative parents cannot easily “share” the raising of children.²⁹⁷ In order to minimize tension and ongoing conflict to which a child may be exposed in a manner that can be harmful, one parent should be chosen as primary legal custodian, although it should be ensured that the secondary custodian maintains a relationship with the child. The choice should not be made by “best interests,” but by focus on the nature and strength of the relationship between the child and each parent. In addition, in such cases, particularly for older children, child’s preferences should weigh heavily in determining the strength of the relationship and who should be preferred for custody.

Once a primary custodian is chosen, liberal visitation should be provided, maximizing the relationship between the children and the secondary custodian. Additionally, once awards are made in the rare cases where such custody arrangements are not made by agreement, parties can then sit down and rework the arrangement, because bargaining will be made easier by the certainty of a legal decision. Both primary and secondary relationships should be stressed as crucial to the child’s well-being. The imposition of some hierarchy supports working relationships, as there is a clear and final decision maker and demar-

²⁹⁶ Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 238–39 (2010) (discussing and citing studies of how exposure to high levels of conflict and stress negatively impacts children); 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, 93–116 (E. Mavis Hetherington ed., 1999); Paul. R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26, 38 (1991) (“The [family conflict] perspective assumes that divorce affects children primarily because of the conflict that occurs between parents before and during the separation period. . . . [Meta-analysis] results strongly support a conflict perspective; not only were children in high-conflict intact families considerably worse off than children in low-conflict intact families, but they also exhibited lower levels of well-being than did children in divorced families.”); Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns (Revised 2007)*, NAT’L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1134 (last visited Dec. 19, 2014) (“Enthusiasm for joint custody in the early 1980s was fueled by studies of couples who were highly motivated to ‘make it work.’ This enthusiasm has waned in recent years, in part because of social science findings. . . . [For example,] Johnston concluded from her [most recent] review of research that ‘highly conflictual parents’ (not necessarily violent) had a poor prognosis for becoming cooperative parents,” and “[t]here is increasing evidence, however, that children of divorce have more problems because of the conflict between the parents *before* the divorce and not because of the divorce itself.” (internal citations omitted)).

²⁹⁷ Laufer-Ukeles, *Selective Recognition*, *supra* note 13, at 54–56.

cated rights and responsibilities. However, secondary caregivers are important and need to be given rights to significant visitation and consultation regarding legal decision making for major life decisions.

C. *Modification and Relocation*

Modification and relocation cases are different than initial custody cases because they are brought after an initial award, usually due to some change in circumstances. The petitioning parent is requesting that the court move a child from the primary custody of one fit parent to the primary custody of the other fit parent. Because a custody agreement will likely have already been made, modification and relocation decisions can cause great upheaval to a child if custody is transferred.²⁹⁸

The typical standard in modification cases is that there must be significant change of circumstances that justifies a change in custody in the child's best interests.²⁹⁹ In relocation cases, the issue is that the primary custodian wants to leave town and this change is usually presumed to be significant. Thus, the traditional inquiry is whether the relocation is done in bad faith and will cause significant harm to the child, and the courts will allow the custodial parent freedom of movement in most circumstances where a good faith reason for moving is proffered by the primary custodian.³⁰⁰

A relational perspective must consider two factors. First, it is important to cement the secondary custodian's relationship with a child. A secondary caregiver, if fit, should have a protected and significant relationship with the child. Although I support recognition of the primary caretaker, the secondary status should also be protected as well. The relational perspective I describe supports hierarchy and assignment of roles to limit conflict and tension caused by power struggles and uncertainty in a manner that still allows both caregivers to have a substantive relationship with a child.

²⁹⁸ See, e.g., Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 866 (1997); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123–24 (1997).

²⁹⁹ See ALASKA STAT. ANN. § 25.20.110(a) (West 2007); WYO. STAT. ANN. § 20-2-204(c) (West Supp. 2014) (“A court having jurisdiction may modify an order concerning the care, custody and visitation of the children if there is a showing by either parent of a material change in circumstances since the entry of the order in question and that the modification would be in the best interests of the children”); JUDITH AREEN ET AL., FAMILY LAW 948 (6th ed. 2012).

³⁰⁰ See, e.g., S.D. CODIFIED LAWS § 25-5-13 (2013) (granting the custodial parent the right to change residence, unless it would negatively affect the rights or welfare of the child); TENN. CODE ANN. § 36-6-108(d) (West Supp. 2014) (as long as a good faith reason is proffered by the custodial parent, the opposing parent must demonstrate harm to prevent the move with the child); *Goldmeier v. Lepselter*, 598 A.2d 482, 486 (Md. Ct. Spec. App. 1991); *Morgan v. Morgan*, 12 A.3d 192, 200 (N.J. 2011) (petitioner seeking relocation must prove “a good faith reason for the move and that the child will not suffer from it.”); AM. LAW INST., *supra* note 107 § 2.17(4)(a)(ii) (providing a list of good faith reasons for a parent's move).

Second, caregiver actions should not be modeled or judged on an ideal “best interests” optimization scale. Some parental choices are based solely on what parents think is best for their children, while others, of course, are more selfish.³⁰¹ Still, even when parents are not making choices solely for the sake of children, their children’s needs may be considered to some extent. Even parental liberty rights that seem directly at odds with a child’s interests must be judged in the context of a relationship. When parental choices seem suboptimal, if they do not cause significant harm to children they should not affect custody, because parental well-being is inseparably connected to the quality of care parents are able to provide and the stability of the parental home.³⁰² Judging and interfering with those choices can negatively affect the care provided. For instance, choosing a non-family-friendly car or going out late with friends instead of being home every night with children may seem like selfish choices to be held against a parent. However, parental well-being and freedom is an important contributor to the provision of adequate care, and such choices should not be examined too harshly. Parents need support for their care, not intense scrutiny and judgment. Punishing parents for suboptimal choices that do not cause significant harm isolates and separates the children from the caregiver and ultimately harms ongoing relationships. Indeed, trying to determine who is at fault or condemning certain parental choices as less than the “best” for a child’s well-being mirrors a fault system of divorce. In many ways, the parent who chooses to leave or abandon the marriage can be argued to have done the most harm to the child. Yet, we have abandoned fault in divorce because it impacts child custody in a contentious and potentially harmful manner.³⁰³ Policies can and should be put into place to educate, inform, and encourage parents in a way that advances children’s interests,³⁰⁴ but we should be cautious about judging, punishing, and interfering with parental choices that do not amount to abuse or neglect, because this impacts ongoing care relationships by creating hostility and tension.

Recent legislation and case law have moved the law in modification and relocation cases closer to a renewed best interests analysis by purportedly focusing on the rights of the child and thus necessitating such renewed child-centered inquiries.³⁰⁵ However, this move towards best interests is not good for

³⁰¹ Dwyer, *Parents’ Self-Determination*, *supra* note 12, at 129–34.

³⁰² *See supra* Part III.

³⁰³ *See, e.g.*, Laufer-Ukeles, *supra* note 296, at 231–32.

³⁰⁴ *See* Helen M. Alvaré, Response, *A Response to Professor I. Glenn Cohen’s Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. HEADNOTES 8, 11 (2012) (suggesting that states should act to exhort and influence to encourage good parenting, but not coerce); Shelley Kierstead, *Parent Education Programs in Family Courts: Balancing Autonomy & State Intervention*, 49 FAM. CT. REV. 140, 141–43 (2011).

³⁰⁵ *See* ALA. CODE § 30-3-169.4 (2011) (rebuttable presumption that relocating is not in the best interest of the child); IDAHO CODE ANN. § 32-717(1) (West 2013) (not requiring a finding of changed circumstances if original custody decree was a matter of stipulation and not litigation as are most custody arrangements); MINN. STAT. ANN. § 518.175 (West 2006) (ne-

children. There is not only indeterminacy in the original custody decision but indeterminacy that can potentially be multiplied each time the non-custodial parent wants to challenge the judgment.³⁰⁶ In modification cases, the relational rights theory and the two factors discussed above would argue for keeping the standard for modification high in cases of two fit parents, certainly only allowing for changes in primary custody where significant harm can be demonstrated by the petitioner and this harm stems from the primary caregiving relationship. To end the primary caregiving relationship altogether, abuse or neglect must be proven. As both relationships should be considered significant, a high threshold would have to be met to alter the balance of time between two fit caregivers.

The two factors described above from the relational perspective—promotion of secondary care relationships and avoidance of judging and punishing caregiver choices—would seem to contradict each other in the case of relocation. Moving away from a secondary custodian will harm and affect the nature of that important secondary caregiving relationship, particularly if the secondary caregiver is involved in the day-to-day care of the child. However, removing custody from a parent who wants to relocate seems to punish caregivers for their choices in a manner that isolates the caregiver from the care he or she provides. In such cases, it should first be determined by the court whether the secondary custodian can retain the same level and depth of caregiving on an alternative schedule that perhaps gives the secondary caregiver more time in the summer and vacations. If so, relocation should be allowed if significant change can be avoided, and caregiver choices should be respected to the extent possible. Second, the judge should examine whether the relocation would cause significant harm to the child. A typical relocation should not cause significant harm to the child, as many people move, but if there has been instability in the child's life due to many moves over the course of a child's lifetime, it would be necessary to modify the custody arrangement so as to allow the child to remain with the parent who is not relocating.

If neither of the two inquiries delineated above provides clear resolution of the issue, and the relocation will significantly diminish the relationship with the secondary custodian and the child, the primary custodian should be encouraged to refrain from relocation and perhaps financial adjustments can be ordered by the court to cure the need for relocation. The primary custodian should not be threatened with removal of the children, as in most cases she would rather retain custody than move. The court also cannot deny her the right to move; but, the court can refuse to alter the visitation schedule that sustains the secondary custodian's relationship with the child, leaving it to the parents to negotiate a different schedule in order to make the relocation possible for the custodial par-

cessitating a court order or consent from the other parent so that a custodial parent may relocate with their children).

³⁰⁶ See, e.g., Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2025 (2014).

ent. In caring for children, parents must be able to come to such arrangements and usually do.

CONCLUSION

Focusing on children's needs is of the utmost importance in modern family law. Nothing I have written in this article is intended to detract from its importance. All three kinds of children's rights and interests I have addressed need protection and consideration. However, the only way to make headway in advancing children's advocacy is to move away from opposition and individualism which have become inherent in best interest inquiries and focus instead on the actual interdependency and relationships that are so important for children. This change in focus will not weaken children's rights; it will only advance them more effectively and in a manner that is easier for society to embrace and which better reflects reality. This article provides a new relational framework for analyzing children's rights and interests in a manner that allows us to consider traditional family law doctrines, like the primary caregiver doctrine, through a new child-based relations lens. For the most part, children do not need the right to be left alone, nor do they need the state to interfere in relationships with family members. Indeed, it is the fear of such liberty rights that makes embracing children's rights so difficult. Rather, what children need from the state is more support of the relationships and care that best serves them as members of a life-sustaining relationship. Such support can create a seismic shift in policy initiatives and family law, and beyond that will ultimately increase support of relationships for the sake of children and in the name of children's rights.