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Children's Interests in a Family Context - A Cautionary Note

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CHILDREN'S INTERESTS IN A FAMILY CONTEXT—A CAUTIONARY NOTE

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I. INTRODUCTION

The symposium organizers have posed the question whether children's needs are better advanced in abuse and neglect cases by greater emphasis on children's interests standing on their own or children's interests seen in the context of the families in which they live. I have some difficulty grasping the meaning of the question—particularly what it means for children to have interests "standing on their own"—but I will respond to the question based on two possible interpretations. On one interpretation, it is a question about the scope of children's interests that judges should take into account in reaching a disposition in abuse or neglect cases. Specifically, it is a question of whether judges should consider a child's relationship interests; that is, what the effects on a child would be from altering or ending a relationship with parents, siblings, extended family members, or other persons in the child's life. On a second interpretation, it is a question about how judges should define the content of children's interests and specifically whether they should assume those children have the same interests regardless of their family situation. Instead, should judges recognize that each child's interests—even those interests that do not maintain certain relationships—are, at least in part, specific to and defined by the particular family of which the child is a member.

Under either interpretation, the second alternative in the question posed must be the correct one. That is, children's

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needs are best served by focusing on their interests within the context of their families. With respect to the scope of children's interests, it is indisputable that children have very important relationship interests and that those interests can be adversely affected by certain kinds of attempts to stop abusive behavior. It would therefore be foolish, in trying to promote a child's welfare, not to consider those interests. Ideally, courts should, *whenever possible*, end abuse by improving, not ending, parent-child relationships, while also preserving the child's relationships with other persons who are important in their lives. In addition, children have an interest simply in being part of a family, independent of the particular individual relationships this entails,[1] because being a member of a family creates a sense of belonging and human connectedness, best prepares a person to enter into relationships as an adult, and is "normal"—a characteristic of no little importance to children. Judges should also consider this important aspect of a child's relationship interests in rendering a disposition. Foster care is unlikely to satisfy these interests, and even when children are adopted, it may take considerable time before they come to see a new, adoptive family as "their" family.

With respect to how children's interests should be defined, it is indisputable that families are not generic, and there is no good reason to try to make them generic. Judges should take as a given that different sets of parents have different cultural practices, values, and personalities, and recognize that these differences may partly determine what the state should deem best for any particular child. Thus, for example, in a case in which the goal is to "rehabilitate" parents charged with abuse or neglect, the judge or child protective agency structuring the rehabilitation ideally should consider such things as the capacities of the parents involved, which strategies those parents are likely to perceive as most threatening to their role as parent or to their chosen way of life, and whether certain mandated changes in a child's life might, given the child's existing perception of the world through the lens of family and community life, be an unhealthy confusion or psychological conflict for the child. The child's situation calls for tailor-made solutions, not a one-

1. I am indebted to Brad Saxton for this point.

size-fits-all approach to intervention.

Having concluded that under either of two interpretations of the question posed the answer is straightforward and unlikely to generate disagreement, I offer a few cautionary observations about viewing children's interests in the context of their family relationships. These observations can be grouped into two sets. The first set reflects beliefs that jurisprudence relating to parent-child relationships is, for the most part, not child-centered; that entrenched attitudes about child-rearing present a great obstacle to moving the legal system toward a child-centered jurisprudence and away from the current, adult-centered jurisprudence; and that in light of those attitudes, loose talk about "children in the family" can easily lead to slippage from a focus on the interests of children to a focus on the interests of adults. The second set of observations arises from a perception that the assertions of judges and commentators about children's relationship interests are often overly simplistic, ignoring important differences across situations and over the course of a child's life. I will suggest certain distinctions that should be made in that context, but are frequently not made.

II. THE RHETORIC OF CHILD PROTECTION

The first set of observations relates to a concern that a certain danger inheres *in practice* with recommending to judges that they look at children's interests in the context of their family situation, or recommending that judges look at a family as a whole, with the aim of improving the functioning of "the family." The danger is that such an exhortation will exacerbate an existing tendency of judges in abuse and neglect proceedings, indeed, in any proceedings regarding parent-child relationships, to focus on the adults involved rather than the children. From my experience representing children and parents in family court proceedings, and from reading innumerable judicial opinions concerning the law governing child-rearing, I have formed the impression that in all kinds of cases posing a conflict between parents and the state, judges' primary concern is with the rights and preferences of parents rather than with the interests of

children.[2] The rights and preferences of parents may coincide to some degree with the interests of children, but rarely do so perfectly and often do so very little.

What seems to happen in abuse and neglect cases, specifically, is that judges decide cases in large part on the basis of some, often unconscious, judgment about the overall moral worth, attractiveness, or deservingness of the parents

2. *See, e.g.,* Parham v. J.R., 442 U.S. 584 (1978) (upholding state statute allowing parents to commit children to psychiatric hospital without adversary hearing, emphasizing the historical tradition of "parental autonomy" and discounting the possibility of a conflict of interests between parent and child); New Life Baptist Church Academy v. Town of E. Longmeadow, 666 F. Supp. 293, 318-19 (D. Mass. 1987) (holding that requiring state approval of all private schools, and basing approval in part on qualifications of teachers, violated parents religious free exercise rights, because giving the state power to ensure that all children become intellectually autonomous would conflict with the fundamental interest of parents "'to guide the religious future and education of their children.'"); Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (reversing order of custody to father based in part on fact that father had remarried and the step-mother would be at home to provide constant care, because such a basis "suggests an insensitivity to the role of working parents" and would be "unfair" to the mother, who had previously been the primary caretaker); *In re* D.L.E., 614 P.2d 873, 874 (Colo. 1980) (holding that parent was entitled as a matter of free exercise of religion to refuse to provide treatment for child's seizures absent imminent danger to the child's life); State v. Kaimimoku, 841 P.2d 1076 (Haw. 1992) (reversing child abuse conviction of man who repeatedly slapped and punched his daughter, based on a conclusion that the father's purpose was to punish misconduct (the daughter's swearing at the father for verbally abusing his wife) and not to inflict serious physical injury, and giving no consideration to the well-being or rights of the daughter); *In re* John Doe and Jane Doe, 638 N.E.2d 181 (Ill.), *cert. denied* 115 S. Ct. 499 (1994) (holding that best interests of three year old adopted child are irrelevant to determination of his custody following nullification of adoption, in an opinion dominated by discussion of which set of adults—the adoptive parents or the biological parents—was more at fault for the biological father's non-involvement in the initial adoption proceeding); Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979) (upholding post-divorce transfer of custody to father solely because mother's cohabiting with a boyfriend was immoral); Dalli v. Board of Educ., 267 N.E.2d 219, 222-23 (Mass. 1971) (analyzing religious exemption to child immunization law entirely in terms of rights of parents who wanted their children not to be immunized but were not covered by the exemption, and urging these parents to petition the state legislature for a broader exemption); Painter v. Bannister, 140 N.W.2d 152 (Iowa), *cert. denied*, 385 U.S. 949 (1966) (awarding custody of child to maternal grandparents rather than father following death of mother "based upon his Bohemian approach to finances and life in general"); Ostermiller v. Spurr, 1998 WL 850267 (Wyo. Dec. 18, 1998) (upholding trial court order that four-year old child have normal visitation with, and adopt last name of, a father the child had never seen, based on evidence that the father now "wants to enjoy a relationship with the child, has a suitable residence, stable home and regular employment for that purpose").

involved,[3] rather than simply a judgment about the parents' capacity to fulfill specific needs of their children. They begin with a strong presumption of parental deservingness based on the constitutionally protected rights that parents are understood to hold.[4] A judge's ultimate conclusion about the

3. *See* Santosky v. Kramer, 455 U.S. 745, 763 (1982). ("Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. . . . Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias."). In custody cases, the backward-looking "primary caretaker" consideration, even though it may be a somewhat reliable predictor of which custodial arrangement is best for a child, *but see* David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (discussing empirical evidence as to connection between which parent was the primary caretaker in the past and which custodial arrangement would be best for a child in the future), in practice is frequently treated, and in scholarship is often discussed, as a reward for the parent who has sacrificed the most for the child in the past. *See, e.g.,* Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (stating that an assumption that a working mother cannot provide adequate care for a child, relative to a father's non-working new spouse, would be "unfair when, as here, the mother has in fact been the primary caretaker"); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (holding that the parent who was the primary caretaker in the past is to receive custody absent a showing that she is unfit, based in part on the perception that the primary caretaker will feel more intensely "the terrible prospect of losing the child"); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (arguing that a primary caretaker presumption should apply in all custody disputes between parents). *See also* Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325 (1997) (arguing that rules in several areas of the law governing children's lives compromise children's interests to some degree in order to achieve what is perceived as fairness to parents).

4. *See, e.g., In re* Jeffrey S., 1998 WL 879652, *13 (Ohio App.) ("[A] parent's right to due process as a result of his or her fundamental right to raise his or her children must be protected."); *In re* Henderson, 1997 WL 752633, *5 (Ohio App.) ("As a parent, appellant has a right to due process as a result of his fundamental right to raise his child."); *In re* Shane "OO", 664 N.Y.S.2d 113, 114 (N.Y. 1996) ("Due process requires that [a parent] at least be afforded an opportunity to put [the state child protective agency] to its proof, and to challenge its purported justification for refusing to relinquish custody before being deprived of his fundamental right to raise his son."); J.P. v. Marion County Office of Family and Children, 653 N.E.2d 1026, 1031 (Ind. 1995) ("[T]he courts of this state have long and consistently held that the right to raise one's children is essential, basic, more precious than property rights, and within the protection of the Fourteenth Amendment to the United States Constitution."); *In re* Howard, 382 So.2d 194, 198 (La. 1980) ("The right or interest at issue in an abuse/neglect proceeding is the right of a parent to custody and control of his or her child."); Brown v. Guy, 476 F. Supp. 771, 773 (D. Nev. 1979) ("A parent's right to the companionship, care, custody and control of their children is fundamental.").

parents' deservingness in a particular case, however, may not lead to the same outcomes as would a focus on the interests of the children whose needs are going unsatisfied, and a narrower examination of the parents in terms of their ability to satisfy the children's interests.

The tendency to decide by focusing on parents, rather than on the interests of children, can skew results in either direction. If a judge is repulsed by a particular parent for reasons unrelated to the parent's ability to provide for the welfare of the child, dispositions may be punitive rather than designed primarily to do what is best for the child.[5] A judge may be repulsed not only by what the state has accused the parent of doing, but also by the parents' appearance (including race), demeanor, social class, and general way of life (*e.g.*, whether they are employed or on welfare, whether they use drugs, whether they are sexually promiscuous). Others have remarked on this phenomenon in the specific contexts of racial and class prejudice; they have asserted that some judges consciously or unconsciously perceive parents who are poor or who are members of certain racial minorities as inherently less able parents, or simply less deserving human beings.[6] My perception is that the phenomenon is broader, and that there is some tendency of judges to make judgments about the overall moral worth or attractiveness of parents based on other characteristics or observed behaviors that may not be inherently related to the interests of children.

Peggy Cooper-Davis has demonstrated that certain psychological factors may skew results in favor of overly aggressive intervention in abuse and neglect cases—for example, a judge's fear of being responsible for harm to a child left unprotected, out of both a genuine moral concern for the welfare of children and a concern for public criticism of a

5. *Cf.* Lassiter v. Department of Social Services, 452 U.S. 18, 39 (1981) ("forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators.").

6. *See, e.g.*, Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785, 809-811 (1994) (regarding race, social class, and other bias factors); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHIC. L. REV. 209, 267-68 (1995) (regarding racial prejudice); Note, *The Other 'Neglected' Parties in Child Protective Proceedings: Parents in Poverty and the Role of Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285 (1998).

failure to intervene.[7] However, there are also very strong pulls in the direction of non-intervention. While judges are likely to come from a different social class than the parents they are judging, judges will have some tendency to identify with the parents simply because the judges are also adults and often parents. I suspect no judge would deny that he or she is influenced by sympathy for any parents who are in danger of losing their children. In addition, the impact of doctrine and public discourse about parental rights should not be underestimated, as they create a tremendous legal and attitudinal obstacle to termination of a parent-child relationship and indeed to any interference with parental freedom.[8] The impact is likely to vary from judge to judge, depending on his or her political and moral outlook. But it is fair to say that the belief that parents have a presumptive entitlement to be left alone, which is forfeited only when their conduct is truly egregious or their judgment in child-rearing is way outside the bounds of reasonableness (itself a very permissive (and amorphous) standard), generally has a strong hold on the judiciary, just as it does on the public.[9] Whether or not one endorses this belief in parental entitlement,[10] one must concede that the belief encourages a focus on parents and on whether the parents have forfeited their entitlement, in proceedings that are supposed to be *child* protective proceedings.

The fact that only parents, not children, have constitutionally protected rights in child protective proceedings encourages a focus on the parents for an

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7. *See* Peggy Cooper-Davis and Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995).

8. *See, e.g.*, Hendry v. Marion County Dept. of Pub. Welfare, 616 N.E.2d 388, 391 (Ind. 1993) ("'[A] parent has a fundamental right to raise her child without undue interference by the state, and the parent-child relationship includes a parent's right to have unrestrained custody of her child.'").

9. *See, e.g.*, Reed v. Dillard, 652 A.2d 18, 26 (Del. 1995) ("[The child's] interests [in termination proceedings] are circumscribed by the competing constitutional rights of her biological parents. While the State may intervene in that relationship, it may do so only on clear and convincing evidence that the parent has forfeited the parental entitlement.").

10. For arguments that such a belief is misguided, see JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998) [hereinafter DWYER, RELIGIOUS SCHOOLS] and James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Children's Rights*, 82 CALIF. L. REV. 1371 (1994).

additional reason, and that is simply that the natural starting point for a legally-trained mind is with the rights of parties to a dispute. The now rejected coverture law regime, which conferred rights principally on the husband in a marital relationship, had the same effect with respect to spousal abuse.[11] What a judge would ask, if such a problem ever found its way to the courthouse, was not what was best for the wife or what her preferences were or what resources she had for self-help, but rather whether the husband was so reprehensible that he should be deemed to have forfeited his right to the unfettered rule of the home.

The legal standards for termination of parental rights, predicated on parental entitlement, also invite a focus on the parents. While states are beginning to add a "best interests of the child" requirement to termination provisions, historically the only standard has been whether parents' behavior was sufficiently egregious or whether a parent was minimally "fit."[12] And even in states where today a best interests finding is required, that determination is made only after the court makes a judgment about how reprehensible the parents are; it is an additional requirement for termination, not a substitute basis sufficient in itself to terminate.[13] In some states, child protective workers may not

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11. *See* Honorable Pamela M. Macktaz, *Domestic Violence: A View from the Bench*, 6 MD. J. CONTEMP. LEGAL ISSUES 37, 37-38 (discussing judicial treatment of domestic violence under the common law coverture regime and quoting State v. Black, 60 N.C. 162, 163 (Win. 1864):

> [T]he law permits [a man] to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, and there be an excessive use of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain.

Id.

12. *See, e.g.*, J.K.C. v. Fountain County Dept. of Pub. Welfare, 470 N.E.2d 88, 93 (Ind. 1984) ("Children are not removed from the custody of their parents because there is a better place for them, but because the situation while in the custody of their parents is wholly inadequate for their survival."); *In re* J.P., 648 P.2d 1364, 1366 (Utah 1982); Sheppard v. Sheppard, 630 P.2d 1121, 1128 (Kan. 1981), *cert. denied* 455 U.S. 919, 102 S. Ct. 1274, 71 L.Ed.2d 459 (1982) ("[T]he right of . . . a parent to custody of the child cannot be taken away in favor of a third person, absent a finding of unfitness on the part of the parent.").

13. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-112 (West 1998); FLA. STAT. ANN. §§ 39.802, 39.806 (West 1998); MICH. COMP. LAWS ANN. § 712A.19b; VERNON'S ANN. MO. STAT. § 211.447 (West 1998); NEB. REV. STAT. § 43-292; S. CAR. STAT. § 20-7-768 (West 1999); S. DAK. COD. LAWS § 26-8A-26 (West 1999);

even order services for parents and their child absent a showing of severe harm to the child.[14]

In practice, the focus on adults fostered by attributing rights only to them and by basing termination decisions primarily or solely on an assessment of the parents, is made easier by the fact that abused and neglected children are typically out of sight during court proceedings.[15] The children ordinarily do not attend the court proceedings or appear before the judge in any other setting. In addition, the children's attorneys typically play a far less active role than do attorneys of the parents and the state. The fact that the children are out of sight must make it more difficult for judges to keep them in mind. In contrast, the judge comes face to face with the parent in the courtroom, and it is the parent and his or her attorneys with whom the judge must

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TENN. CODE ANN. § 36-1-113 (West 1999); VA. STAT. § 16.1-283 (West 1999). *See also In re* G.D. Jr. & C.D., 894 P.2d 1278, 1284 (Utah Ct. App. 1995) ("[I]t is unconstitutional to terminate a parent's rights based upon a finding of the best interest of the child without first finding that the parent is below some minimum threshold of fitness."); *In re* Kristina L., 520 A.2d 574, 582 (R.I. 1987) ("Absent a finding of unfitness, the natural parents' right to bear and raise their child in a less than perfect way remains superior to the rights of foster parents who may be exemplary nurturers."); Santosky v. Kramer, 455 U.S. 745, 760 (1982).

> [T]he private interest affected—weighs heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them. The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. . . . Victory by the State . . . entails a judicial determination that the parents are unfit to raise their own children.

Santosky v. Kramer, 455 U.S. 745, 760 (1982).

14. *See, e.g.,* McHencry v. Bartholomew County Dept. of Public Welfare, 581 N.E.2d 948, 953 (Ind. 1991) (disapproving of child protective intervention to stop excessive punishment of teenage girl, and stating that "[I]ntervention is not justified unless the punishment seriously impairs or endangers the child's emotional or physical well-being.").

15. *See* Jessica Liebergott Hamblen and Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 LAW & PSYCHOL. REV. 139, 159-166, 172 (1997) (noting that few children testify in criminal child abuse proceedings and describing numerous studies that revealed only a small minority of abused children testify in court).

principally come to terms in rendering a decision. Children left unprotected do not complain, and they do not vote. And the public rarely becomes aware of children who continue to be abused because the courts failed to take appropriate steps to protect them. In contrast, every disgruntled parent is a disgruntled voter, as are the parent's relatives and friends, and public outcry against an inappropriate intervention is probably at least as loud and frequent as public outcry against inappropriate non-intervention.[16]

If this impression of how judges make decisions in abuse and neglect cases is accurate, then it would be a step in the right direction if judges began their evaluation by considering what is best for the child, rather than by looking first and foremost at the parents and the parents' interests and rights. Of course, in examining the interests of a child, the court ultimately must consider whether the child's current parent or parents can satisfy those interests, and that requires making *some* judgment about the parents. I am simply recommending that this judgment be *limited* to the parents' ability to satisfy certain interests of the children, rather than constituting an overall evaluation of the parents' moral worth, deservingness, or attractiveness as human beings, or an assessment of whether the parents have forfeited their entitlement to undisturbed governance of their children. In addition, sympathy for parents has no place in child protective proceedings, any more than sympathy for abusive husbands has a place in proceedings to protect abused wives. A truly child-centered jurisprudence would mean that the focus of legal and moral attention is entirely on the well-being of the abused or neglected child.

Because I believe judges all too frequently focus on the adults involved rather than on the children, and base their dispositions, at least partly, on how much sympathy they have for the parents, I am wary of any recommendation that judges focus on "the family," even if the idea is supposed to be that they focus on the family only in relation to the child's interests. I am wary because of the meaning and effect of modern rhetoric regarding the family.[17] It is common for

16. The public that would cry out is, after all, the adult public, and adults are at least as likely to identify and sympathize with other adults, as they are to identify or sympathize with children.

17. *See* Twila L. Perry, *Transracial and International Adoption: Mothers,*

those who urge lesser state intervention into parent-child relationships to couch their arguments in terms of "protecting the family" or respecting "family autonomy" or "family rights."[18] This terminology is highly problematic.

Typically when people speak or write about protecting families or respecting "family autonomy" or "family rights," one or both of two things is going on. First, in the *speaker's* mind, though perhaps only subconsciously, the rhetoric is a thinly disguised call for stronger protection and freedom for *parents*, as against state efforts to protect children, motivated by sympathy for parents whose freedom in child-rearing the state has constrained.[19] Second, in *listeners'* minds, when they hear the term "family autonomy" or "family rights," they understandably think "*parental* freedom" and "*parents'* rights," just as when one hears the term "national sovereignty" applied to a country ruled by a despot, even a benevolent despot, one thinks of the despot's freedom to do what he wants rather than an exercise of collective will by the people of that country. For example, when one hears someone speak of "Iraq's national sovereignty," one thinks of Saddam Hussein doing whatever he wants. Similarly, when one hears "family autonomy," one thinks of parents doing what they want. This analogy is not intended to suggest that the average parent rules the family the way Hussein rules Iraq—though certainly some parents do. Rather, it is to identify a *conceptual problem* that arises when autonomy or rights are attributed to groups that do not operate on the basis of democratic decision-making among free and equal persons, and a *psychological phenomenon* that occurs when groups of that nature are discussed, namely, that reference to the group gets mentally translated into a reference to the

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Hierarchy, Race, and Feminist Legal Theory, 10 YALE J.L. & FEMINISM 101 (1998) ("The language that we use in the discussion of a social issue is not without significance. Language not only has the effect of conveying ideas, but the manner in which an issue is discussed can have an impact both on the relationship between the parties involved in the discussion and the incentive these parties have to reconceptualize the issue or approach it in new ways.").

18. *See, e.g.*, Joan C. Bohl, *Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in* Herndon v. Tuhey, 62 MO. L. REV. 755 (1997); Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 440 (1996); Note, Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse, 18 PACE L. REV. 135, 161 (1997).

19. These terms have also been used in an analogous fashion to advocate for greater protection of husbands against efforts to protect or empower wives.

rulers of the group.

To put it differently, notions of "family autonomy" and "family rights" are conceptually incoherent, and that incoherence generates confusion. Whatever sense the notions of group autonomy or group rights might make in other contexts, they make no sense in the context of the family, which is inherently non-democratic, at least while children are very young. Use of such terminology serves only to mask claims for greater individual rights for adults. Scholars of family law should, therefore, take a pledge to never use these terms. And while we are at it, we should also commit to never using the term "parental autonomy," which is not only conceptually incoherent, but in fact an oxymoron. "Autonomy" means self-rule, self-determination, and parenting is not self-determination; it is an "other-determining" activity. Joining the terms "autonomy" and "parental" is therefore nonsensical. People use that term, just as they use "family autonomy" and "family rights," because it has greater moral purchase than does an assertion of "parental right" or "parental freedom," even though they all amount to precisely the same thing.[20] So let us call things what they are. It is ironic that people so commonly get away with using such terms in discussing child-rearing when, if someone today were to assert "marital autonomy," "marital rights," or "husband autonomy" in opposition to intervention to protect battered wives, he would be torn to intellectual shreds. We need to take the same critical stance in relation to the discourse surrounding child-rearing. We need to develop a self-conscious "critical children's theory" approach to family law.[21]

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20. *See, e.g.*, Diane L. Abraham, *California's Stepparent Visitation Statute: For the Welfare of the Child, Or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where are the Constitutional Safeguards?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125 (1997); Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1004 (1996) ("[P]arents' decisions about which values to instill in their child involve 'choices central to personal dignity and autonomy.'") (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

21. There are probably more apt terms than "critical children's theory," but I cannot think of any that are also as suggestive of a comparison with other critical theories. I would include many works by contemporary scholars under the heading of critical children's theory—works that reveal illicit attitudes about children underlying legal doctrine pertaining to parent-child relationships, e.g., Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer*

The upshot of this discussion of terminology is that I fear that encouraging judges to focus on "the family" can, depending on how it is expressed, exacerbate an existing tendency to focus on parents rather than children in abuse and neglect cases, and that encouraging judges to protect families may lead them simply to give even greater protection to parents. Stronger protection for parents would produce better results for children in *some* cases—namely, those where termination or other highly interventionist disposition is in fact not the best thing for the child, but where judges are nevertheless inclined to terminate parental rights because they have formed an *adverse* overall moral judgment of the parents, and this judgment is sufficient to override the presumption of deservingness and entitlement. But it would be achieving that result in the wrong way in those cases—that is, by still focusing on the parents. And more importantly, in the majority of cases where courts are already over-protective of parents, a decision not to terminate parental rights out of sympathy for them, and respect for their legal and presumed moral rights, would lead to worse results for children.

Under the second alternative interpretation of the question posed, I concluded above that judges ideally should define the content of a particular child's interests by reference to the specific characteristics of the child's family and community.[22] But this conclusion, too, suggests a danger inherent in making a particular recommendation to judges, given the adult-centered nature of family law jurisprudence. The danger in this context is that judges will substitute the parents' judgment of the child's interests for their own judgment—guided by statutory criteria, empirical research, and case-specific evidence—of the child's interests. This

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and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992); works that challenge assumptions about the relationship between the state and families and the notion that the parent-child relationship is a "private" phenomenon, e.g., Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835 (1985); and works that urge recognition of new constitutional rights for children by challenging generally assumed justifications for treating children differently from adults, e.g., Susan A. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353 (1998).

22. This may be a very difficult thing to do in practice.

approach obviously would make the entire child protective proceeding pointless. To adopt the parents' judgment is to abdicate the state's role of protecting children's interests, and to abandon a child-centered jurisprudence. It is one thing for the state to say that, within certain limits *defined by the state* based on *the state's perception* of what is best for children, parents should be free to act on the basis of their judgments as to their child's interests, because this parental freedom is, *in the state's view*, a good thing for children. It is quite different to say that parents are entitled to have their judgment of their child's interests control the outcome of an abuse or neglect proceeding, or any other legal dispute over their child's welfare. The latter position is unacceptable from a perspective that takes seriously the morally and legally distinct personhood of a child.[23]

The danger, then, is that judges will understand a recommendation to take into account a particular parent's characteristics, including culture, in making a situation-specific determination of a child's interests, as a recommendation to effectuate the parent's judgment, by adopting the parent's beliefs as the court's basis for deciding the outcome. The danger would be greatest where parental judgments appear to arise out of minority cultural practices and beliefs, because misunderstandings of liberal notions of toleration and self-determination lead many people to believe that the freedom the state must accord to adults in directing *their own* lives must also be given to parents in directing the lives of children. That the United States Supreme Court enshrined this fundamental misunderstanding into a constitutional principle in *Wisconsin v. Yoder*[24] makes it all the more likely that judges will misconstrue a recommendation to define children's interests by reference to the particular families in which they live.

What is needed, if the goal is to get courts to consistently make decisions in abuse and neglect cases that are in the child's best interests, is a way to refocus judges' attention on children, while still encouraging them to take into account that a child's interests are affected by their particular family

23. *See* DWYER, RELIGIOUS SCHOOLS, *supra* note 10.

24. 406 U.S. 205 (1972) (holding that the free exercise rights of Amish parents entitle them to keep their children out of school beyond the eighth grade).

situation and typically include interests in maintaining family relationships. In terms of rhetoric, the language we use in exhorting decision-makers to make decisions in certain ways, perhaps the way to do that is to not talk about "focusing on the family" or "protecting families," but rather to talk simply about "children's relationship interests," to spell out concretely and specifically what those interests are,[25] and to make judges conscious of the danger of slippage, of shifting their focus from children's interests to parents' worth or attractiveness or deservingness.

In terms of legal changes, perhaps a "best interests of the child" requirement should be the *only* requirement for termination of the parent-child relationship,[26] just as it is, at least nominally, the only criterion for deciding the contours of children's relationships with divorcing parents. In the abstract, this might cause some alarm because it conjures up images of judges terminating parent-child relationships and shuffling children around based on the judges' subjective judgments about optimal parenting. But a "best interests" standard could be fleshed out in termination statutes, just as it is in custody provisions, to constrain judges' decisions in whatever ways are appropriate.

For example, a termination provision could spell out that judges must make an explicit finding regarding the strength of a child's interest in maintaining a relationship with the abusive or neglectful parent and in remaining part of his or her current family and community. Additionally, the provision could direct that judges order termination of the parent-child relationship only if they find, based on strong evidence, that the anticipated future harm to the child from remaining in a relationship with the parent, after less severe measures of preventing the abuse or neglect are considered and perhaps attempted, outweighs the child's interest in maintaining the relationship. Thus, a properly constrained

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25. *See infra* at Part III.A.

26. *See In re* J.P., 648 P.2d 1364, 1368 (Utah 1982) (holding unconstitutional a statute providing for termination of parental rights based solely on the best interests of the child, rejecting the State's argument that "'any distinction (between the best interest and unfitness standards) is a mere matter of semantics,'" and determining instead that replacing an unfitness standard with a best interest standard "deleted a statutory protection for the parental rights of fit parents" and did "not provide equivalent protection for parental rights.").

"best interests of the child" analysis could subsume some of the requirements now embedded in a "scope of parental rights" analysis. But changing the analysis from an assessment of whether parents have forfeited their right to a relationship, to an assessment of what is best for the child, should help to refocus judges' attention on the abused or neglected child.

III. A MORE REFINED UNDERSTANDING OF RELATIONSHIP INTERESTS

In this section, I want to unpack the idea of children's relationship interests a little, and also make a point about parents' relationship interests. I offer the observation about parents' interests not because I think judges *should* consider them in child protective proceedings, but because I think judges *do* consider them and I believe a better understanding of what is best for an abusive parent might lessen any tendency not to intervene in situations of abuse and neglect because of sympathy for parents or solicitude for parental rights.

A. *The Nature and Relative Weight of Children's Relationship Interests*

The observation is now a familiar one that children have *an* interest, along with other, possibly contrary interests, in maintaining their relationships with their parents and other family members, including extended family and anyone with whom there is an intimate connection, even when there has been abuse by parents.[27] Let us dissect this observation a bit. What interests, exactly, does a child have in maintaining a relationship with an abusive parent?

Even in the worst cases, a child has an interest in having a relationship with his biological parents. Whether socially constructed or innate, most people appear to have a desire for that connection. This is manifest in the great lengths to which many adopted children go to find their biological parents. It is important to recognize, though, that in many cases this is the *only* interest a child has in a relationship

27. The observation is often traced to the 1970s writings of Joseph Goldstein, Anna Freud, and Albert J. Solnit: Before the Best Interests of the Child (1979) and Beyond the Best Interests of the Child (1973).

with a parent. Such cases comprise at least two kinds. One situation where it might be true that a child's only interest in having a parent-child relationship is an interest in the biological connection is where there is no existing relationship. This may be the case where the child is a newborn or where the abusing parent has been absent from the family until just before the abuse occurred. The other situation is where there is an existing relationship with no positive aspects, that is, where the child receives no benefit from interaction with the parent. In both situations, where the only interest of the child that may count in favor of a relationship with a parent is the biological connection, there ought to be some basis for evaluating the importance of that interest, in order to determine whether it outweighs countervailing interests of the child. I do not know whether sufficient empirical work has been or could be done to inform that evaluation, but my perception is that courts do not look for such work. Instead, each judge operates on the basis of some amorphous and unarticulated personal intuition about the importance of the biological connection, and the parties are left guessing how much weight it received relative to other interests of the child.

This question about the importance of biology arose for me in practice not only in abuse cases, but also in some custody/visitation disputes, particularly those between never-married parents. In some cases where a parent had not abused the child but also had not yet formed a relationship, it was my judgment as guardian ad litem that the parent had so many problems that he was unlikely to provide anything good for the child in the foreseeable future and was, in fact, likely to do harm. Moreover, I could see that the process of trying to create a relationship in such situations had the potential to harm the child. For example, imposing on a custodial parent an eighteen year routine of delivering the child for visitation with a non-custodial parent whom the custodial parent does not trust could have a substantial negative effect on the child's life. When the custodial parent is upset, the child experiences stress and the custodial parent is a less effective care-giver. In some of these situations, I was forced to conclude that—biological connection aside—the child would be better off if he or she never developed a relationship with the non-custodial parent.

In other, more blunt terms, put in the position of having to recommend one way or the other about visitation with a non-custodial biological parent, I was sometimes forced to conclude that that the non-custodian was simply not qualified to be a parent. I then had to ask myself whether the child's interest just in having the connection with a biological parent trumped the conclusion that the *biological* parent was incapable of acting as a *caretaking* parent. I usually assumed that it did not, but I had no basis for that assumption other than my own intuitions.

If someone were to object that it is more than a little frightening that a lawyer, someone trained in law, not the social sciences, would make such a judgment based on just a few interviews with the parties, I would not disagree. Given the reality of representing children in these cases, however, I do not see any responsible alternative. To not make any judgment is simply to leave things in the hands of lawyers, none of whom is required to advocate exclusively for what is best for the child. What many attorneys representing children do in these situations is take a conservative approach and recommend modest visitation, perhaps in a supervised setting, for an indefinite period of time. They make this recommendation, in my view, not because they attach greater importance to the biological connection than I do, but because they either 1) do not wish judges or other attorneys to perceive them as radical, and in light of established law and practice a recommendation of "no relationship" is viewed as radical, even if it is the best outcome for the child, or 2) fail to take seriously their role as an independent advocate for the child and instead believe that they must defer to what they understand as the rights of the parent. Neither of these is an appropriate basis for a recommendation by a guardian ad litem or attorney representing a child.

In other situations, there will be both the benefit of the biological connection and a psychological or emotional benefit for the child from maintaining a relationship with an abusive parent. In many, perhaps most, situations, there is both a positive and a negative aspect to the parent-child relationship. In these situations, if measures other than termination of parental rights can succeed in ending abusive behavior and in assisting the parent to become a better

parent within a reasonable period of time, then clearly that should be done. It is less clear what should be done in the not uncommon situation where the parent cannot be rehabilitated, yet the child still has an interest in maintaining the relationship. In such cases, a balancing of interests would seem to be called for, one that takes into account the strength of the relationship and the severity of the abuse or neglect that is expected to continue. This weighing of interests should be based on the best possible evidence about the nature of the *particular* relationship at issue and the harm that ending it would cause the child, given the age, psychological and emotional state, and other characteristics of the *particular* child involved, rather than on generalized assumptions about the importance of continuity in children's lives. It is not inconceivable that that balancing might sometimes dictate that some harm to the child must be reluctantly accepted, or in other words, that some abuse must be tolerated (though certainly not condoned), as disquieting as that sounds. In addition, this interest of the child in maintaining a relationship despite abuse by a parent who cannot be rehabilitated may create a preference for certain kinds of placement if termination is necessary—for example, the increasingly common practice of foster care or adoption by relatives.

B. *The Flip-Side of the "Unity of Interests" Anthem*

Having said that courts should not focus on the adults involved in abuse and neglect cases, I want nevertheless to make a point about parents' interests that I think is generally overlooked. It is the obverse of the observation that parent and child share an interest in avoiding unwarranted intervention. Just as it once may have been common for judges and child welfare workers to think that all of an abused child's interests point in favor of intervention, and to overlook the fact that intervention can entail costs for the child, I believe it still common for judges and others to make the mistake of thinking that all of a *parent's* interests point in favor of *non*-intervention. The mistake derives from thinking that parents' typical expression of what they want—to be left alone, is actually what is best for them.

I am going to go out on a limb and suggest that parents do not benefit from being able to abuse their children. To the

contrary, all human beings benefit from having *healthy* relationships with others, and particularly from having healthy, loving relationships with family members. I doubt that anyone conceives of abusing one's children as an aspect of human flourishing. In addition, a parent who alienates his children by maltreating them is a parent who, after the children are grown, must live with the pain of a hostile or discontinued relationship with his children. Thus, where parents' impulses toward abusive conduct are destroying their relationship with their children, the parents themselves would benefit from intervention that can help them get on a different track, a track that leads to a mutually rewarding relationship with their offspring.

It is therefore a mistake, I think, to view state intervention in abuse situations as always "for" the child and "against" the parent. Parents share with children an interest in receiving appropriate state intervention. Even where termination is necessary to protect the child's interests, the parent might also be better off on the whole, because that outcome might create a possibility that would not otherwise exist for a relationship after the child is grown. The child might reinitiate contact with the parent later in life, harboring less hostility to the parent than he or she would have if the abuse had continued throughout childhood.

Believing this to be the case, when I represented parents in child protective proceedings, I would sometimes talk to them about what they wanted in the long-run in terms of a relationship with their children, about how what they were doing might prevent their achieving that objective, and about what they might do, in cooperation with child protective workers, to accomplish their aim. I would encourage them to see that accepting some services might actually be the best thing *for them,* in terms of their long-term goals for their relationship with their children. Of course, accepting services can also be a way to get the state to agree to suspend the legal proceedings, so encouraging parents to accept services was not inconsistent with helping them satisfy their desire simply to avoid an adjudication of abuse or neglect or to avoid termination proceedings. But it gives the attorney an additional and entirely legitimate reason to recommend to the client that he or she accept rehabilitative services, and perhaps a way for the parent to actually approach counseling

or parenting classes with a positive attitude, thereby increasing the likelihood of success. Ultimately, of course, a lawyer representing a competent adult must allow her client to decide what he wants his lawyer to do for him, but I found that many parents were capable of appreciating to some degree that intervention was consistent with their self-interests, not just in avoiding a finding or disposition, but also in improving their relationship with their child.

IV. CONCLUSION

Judges who decide abuse and neglect cases should view the child as a member of a family, not as an isolated member of society. They should take into account that the child will always have *some* interest in maintaining a relationship with the abusive parent, and they should be aware that children's interests, including interests other than interests in family relationships, may vary depending on the unique characteristics of their parents and their parents' community. However, judges should be very self-conscious in thinking about children as members of families. They should not allow their attention to stray from the welfare of the children, and should be made aware of the danger of slippage occasioned by the parent-centered nature of family law jurisprudence. In addition, judges should be more discriminating in thinking about children's relationship interests; rather than assuming that the relationship interest is of the same nature and strength for every child, they should examine what kind of relationship, if any, presently exists, and what the prospects are for a relationship in the future. Sometimes the child's interest in having a relationship will be quite strong, and other times it may be barely significant. Lastly, while judges should not make decisions in child-protective proceedings based on sympathy for parents, judges who do sympathize with the parents involved can receive comfort from knowing that ordering parents to comply with a service plan, or even ordering termination of the parent-child relationship, may actually be the best thing for the parents, in terms of *their* relationship interests, as well as for the child.