2013

Misused Concepts and Misguided Questions: Fundamental Confusions in Family Law Debates

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Repository Citation
http://scholarship.law.wm.edu/facpubs/1788

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MISUSED CONCEPTS AND MISGUIDED QUESTIONS:
FUNDAMENTAL CONFUSIONS IN FAMILY LAW DEBATES
by James G. Dwyer

Autonomy and privacy are common terms in family law discourse. Many of the most popular family law scholarship topics are characterized as posing the question whether the state should regulate or intervene in family relationships, an action viewed as infringing on autonomy or privacy or both. Those who argue in favor of greater parental control over children’s lives, or greater freedom for parents in the way they treat their children, typically speak of regulation and intervention in a pejorative manner and ostensibly stand opposed to them and in favor of what they call “parental autonomy,” “family autonomy,” and “family privacy.” Even those who would like to see state agencies more aggressively protect weaker parties in family relationships against more powerful persons in those relationships use the terms regulation and intervention in a way implying that non-regulation and nonintervention are possible and, in fact, constitute the default state of affairs. They view state regulation of or intervention in the family as a departure from a natural—that is, state-free—situation. They differ from those who characterize themselves as anti-regulation by arguing in favor of such a departure.

Yet autonomy and privacy and their attendant concepts are almost always inappropriate in a family law context, and the question whether the state should regulate family relationships is a nonsensical one.

I. THE INEVITABILITY OF REGULATION AND INTERVENTION

The question of regulation or intervention most often arises today in discussing parent-state conflicts over child rearing—for example, what the content or manner of schooling will be or what medical treatment children will receive.

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1 Arthur B. Hanson Professor of Law, William & Mary School of Law, Williamsburg, Virginia.
3 I lump together intervention and regulation even though their precise meanings might not be co-extensive. In ordinary usage, we tend to think of regulation as a limit on freedom, a disruption of what people would otherwise do, whereas intervention we use more broadly to include not just limits or disruption but also bringing people together. Thus it makes sense
But the question whether the state should regulate family relationships can also arise in connection with legal rules, actual or proposed, that would direct adults’ behavior in intimate relationships with each other. At one time, arrest and prosecution for domestic violence constituted a new and striking intervention into the marital relationship. Further, some might even describe legal rules concerning the initial formation of family relationships—for example, parentage or marriage laws—as intervention in private life. In all these contexts, however, thinking about the legal or political questions as posing a choice between regulation or non-regulation, intervention or nonintervention, is the wrong way to think about them.

A. The Conceptual Impossibility of the Absence of State Intervention in the Formation of Legal Family Relationships

It is routinely overlooked, but obvious once stated, that there is no such thing as a legal relationship between adults or between an adult and a child without state intervention—that is, without an action by and involvement of the state that amounts to coming between the two persons to bind them in a certain way. The state is the source of laws, and it confers legal statuses and creates legal relationships.

This is true of business relationships as well, but it should be even clearer in the case of family relationships. A legal business partnership might exist by virtue of a contract even if the parties do not record it with a state agency, and yet at the same time it is a legal relationship only because the state stands ready to enforce that contract. Against the backdrop of state-generated laws about the significance of executing a business contract, entering into the contract creates a relationship entailing legal duties, rights, liabilities, and so forth. In the case to say, for example: “They didn’t know how to go about meeting, so I intervened.” Whereas saying “… so I regulated” seems inapt. Etymologically, intervene derives from the Latin words inter (between) and venire (to come), regulate from the Latin regulare (to control by rule, direct). In the family law context of primary significance in this paper—that is, state control over interactions and exercise of power within established legal family relationships—either term is fitting. It is equally consistent with common usage to characterize child maltreatment law and child protection agency operations, for example, either as state intervention in or as state regulation of the parent-child relationship.

4 See Shelley M. Santry, Penny Wise But Pound Foolish in the Heartland: A Case Study of Decriminalizing Domestic Violence in Topeka, Kansas, 14 J.L. & FAM. STUD. 223, 229 (2012). (“When English colonists settled in North America, they brought the principles and rationales of English common law with them. Under these principles, family autonomy and privacy were paramount, and the judiciary was loath to intervene unless the husband’s actions exceeded the bounds of ‘moderate chastisement.’”
of legal family relationships, state involvement in their formation is typically clearer, because the formation is usually memorialized in a state-issued document containing the names of the parties and providing proof of the state’s recognition: marriage certificates, birth certificates, adoption decrees, and guardianship orders.

It would clearly be a mistake, then, for anyone to speak about formation of legal marriages or legal parent-child relationships in a way that suggests state nonintervention is a possibility. Some might be tempted to do so when the state makes or is urged to make a nontraditional choice, such as conferring the legal status of a parent on someone other than a biological parent or on more than two persons for a single child. The normality or seeming naturalness of two biological parents acquiring the status of a legal parent might fool people into thinking that it does not involve any legal action, whereas for the state to assign legal parenthood to surrogacy contractors or a birth mother’s husband who is not the biological father appears as a kind of social engineering that requires special justification. But that would be a mistake; traditional parentage laws are also state action coming between private persons in a rather dramatic fashion. That fact has impressed me each of the three times I have left a hospital with a newborn child in my custody. For the state to confer the status of parent on one adult rather than another has dramatic, life-determining consequences for a child. It is crucial to recognize that it is so, because only if we recognize the state’s central role in creating legal parent-child relationships can we ever hold the state accountable for how it carries out this function, which it arguably does quite poorly, insofar as it confers legal parent status on many people who are patently incapable of caring properly for a child.5

Indeed, with respect to parent-child relationships, the state also comes close to creating the social relationship as well as a legal one, because it attaches to the legal status that it confers on parents a presumptive entitlement to possess, or at least regularly associate with, a child. Most legal parents exploit that entitlement to create a social relationship with the child.6 Other adults who

6 See, e.g., 13 DEL. CODE § 701(a) (“The father and mother are the joint natural guardians of their minor child and are equally charged with the child’s support, care, nurture, welfare and education. Each has equal powers and duties with respect to such child ...”); FLA. STAT. § 744.301(1) (“The parents jointly are the natural guardians of their own children and of their adopted children, during minority”); 19-A ME. REV. STAT. § 1651 (“The father and mother are the joint natural guardians of their minor children and are jointly entitled to the care, custody, control, services and earnings of their children”). A nuance in the law of
might want to create a personal relationship with the child can be easily denied the opportunity if they do not have the legal status of parent; those to whom the state gives that status generally receive considerable power of control over the child’s social interactions. This is not to say that no social parent-child relationships arise without legal recognition and status; nonlegal-parent caregivers are common. But with respect to the great majority of children, adults assume the caregiver role after receiving state-conferred status and relying on it to claim possession of, or at least some time with, the child. In contrast, the social dimension of adult relationships initially arises without overt state action (for example, dating), and state conferral of legal status (such as registered partnership or marriage) is not the practical basis for continuing the social relationship; legal marriage today does not entail any right to the other spouse’s association nor, correspondingly, any duty on the part of spouses to live with or even spend time with each other.

Moreover, it is important to recognize that the state regulates or intervenes in individuals’ personal lives even when it refuses to create a legal family relationship between them, or refuses to give legal recognition to the social family relationship they have formed or would like to form. This is so because in that case the state still applies a set of rules to the interactions between those people, simply a set of rules that differs from that pertaining to the legal family relationship. This other set of rules influences the course of the individuals’ relationship with each other. For example, denying legal marriage status to same-sex couples amounts to insisting that legal rules governing non-spouses apply to them. That could be rules the state has created for a similar special relationship, in jurisdictions that recognize civil unions or domestic partner-

some states that drives this reality home is the disparate treatment of birth mother and biological father when they are not married to each other; whereas the mother is automatically a natural guardian with a right of custody, the biological father might have to pass a fitness or best-interest test before receiving custody. See, e.g., Ark. Code § 9-27-342(a) (“Absent orders of a circuit court or another court of competent jurisdiction to the contrary, the biological mother, whether adult or minor, of an illegitimate juvenile is deemed to be the natural guardian of that juvenile and is entitled to the care, custody, and control of that juvenile”); Fla. Stat. § 744.301(1) (“The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise”); Okla. Stat., Tit. 10, § 7800 (“Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction”); S.C. Code Ann. § 63-17-20(B) (“Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child”).

ships. Or it could be rules applicable to any two or more persons who cohabit, or the rules that pertain to complete strangers. Regardless of what the available alternative statuses are relative to legal marriage, some alternative set of legal rules will apply to members of social relationships and those rules might have practical (for example, pertaining to rights in property acquired during cohabitation) or symbolic significance that has a real impact on the relationships. In short, by refusing one form of regulation, the state incidentally imposes another.

B. The Impossibility of Non-Regulation or Nonintervention

Once the State Creates Legal Family Relationships

The most common context, though, in which scholars, judges, and others consider whether the state may or should regulate or intervene is parental control over child rearing. I have already suggested one false assumption: that the default situation for child rearing is nonintervention. When the state creates legal parent-child relationships, it confers various rights and powers on the persons to whom it gives the legal status of parent. I mentioned earlier the right of custody. In fact, one would think there is little point in conferring the legal status of parent or any other in a family relationship unless there are some rights, powers, and duties connected to it. The fundamental-rights case for state conferral of legal marriage status on any particular type of couple is continually becoming less clear precisely because there is increasingly less practical import to its doing so. Now it is largely a matter of only state-conferred financial benefits.

The state actually attaches to the status of legal parent not only a presumptive right of custody, but also presumptive rights to control many important aspects of children’s lives, such as their education and medical care, and permission to act toward a child in various ways that otherwise would be

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prohibited, such as physically carrying a child into one’s home, using physical restraint or corporal punishment to alter a child’s behavior, removing a child’s clothing, and other common aspects of parenting.\textsuperscript{10}

Because these are all powers, rights, and permissions (or liberties) that the state confers along with the legal status of parent, the default situation for parents as a matter of positive law is actually one of quite robust state intervention. It resembles the state’s creation of legal guardianships over incompetent adults, a case in which people more readily recognize the state’s heavy involvement even when it amounts to guardians’ being free to act as they wish. For example, if a guardian places a ward in a particular living situation, authorizes or refuses medical care, or enrolls the ward in some training program, we appreciate that the guardian does these things by virtue of extraordinary powers conferred on him or her by the state, powers that private persons ordinarily do not have over other private persons, and to that extent the state is intervening quite profoundly in the life of the person who is under guardianship. We see this too with guardianship over children, commonly conferred on substitute parent figures; a grandmother or aunt might be able legally to make educational choices for a child because the state has overtly placed her in a guardianship role and attached that power to the role.

Perhaps what makes us more cognizant of the state’s substantial intervention in the lives of dependent persons in the case of guardianship is (a) that it is less common and (b) that it involves individualized judicial or administrative state decision making. But the fact that legal parents typically derive their powers, rights, and privileges from statutory provisions covering thousands of cases all at once and without individualized scrutiny, rather than from a court order pertaining just to each one of them, does not at all change the fact that the state is giving parents those powers, rights, and privileges, and so the state is intervening in the life of a private, dependent person (in this case, a child) in a profound way. Both with guardianship and with legal parenthood, the resulting legal power of one private party over another rests entirely upon an action of the state. This becomes even clearer when we recognize the absence of such powers and permissions for other adults who might wish to have a say in how a child is raised. Neighbors who think they might do better raising a certain child would commit a crime by taking possession of the child. And they would have no ability to change the child’s enrollment to a different school; school officials would simply ignore them.

Thus, it is a common misconception, when parents and the state battle in court over some law or state action that separates parents from children or

\textsuperscript{10} See supra, note 6.
restricts parental power over some aspect of children’s lives (for example, education, medical care, or discipline), that what parents want is for the state to leave them alone and that state nonintervention is a possible outcome. In fact, what parents want is for the state to confer more complete power on them. They ask the state to invest the legal status of parent with plenary, rather than limited, legal power over children’s lives. At the extreme, they seek a state-conferring monopoly over the child’s intellectual formation and physical development. Speaking of this parent-state conflict as a battle over intervention is therefore a gross mischaracterization that creates an entirely false impression.

In fact, it would be equally plausible (or, better, equally implausible) to characterize some laws by which the state directs certain aspects of a child’s life, such as laws mandating vaccinations, as state inaction. One could say that the state is refraining from extending to parents a particular legal power—namely, the power to decide whether a child receives vaccinations.\(^1\) Obviously, vaccination laws are not actually an instance of state inaction; the state acted to pass those laws. But at the same time the state did not do something else—that is, include the decision whether to vaccinate in the power it confers on legal parents. The point here is that with child rearing the state must always do one thing or another, dictate certain things itself or assign legal power over those things to parents or other private parties, and it makes no sense to characterize the state’s choice between those two options as posing the question whether to intervene or regulate. The appropriate question, rather, is how the state will intervene or regulate child rearing—by specifying itself what must happen, by delegating that power to a private party, or by some combination of those two things (for example, by conferring power but establishing a range of permissible choices).

Similarly, although eliminating coverture was at the time likely regarded as a dramatic state intervention into the marital relationship, today we see it as the ending of an especially insidious and heavy-handed form of state involvement in the marital relationship—namely, conferring on one person in a family relationship extraordinary power over the life of the other person in that relationship.\(^2\) The normality of husbands’ power over wives and over all family wealth undoubtedly made it seem to most people (including wives) a natural state of affairs, and the state’s posture one of simply recognizing and declining

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\(^1\) In fact, nearly all states do gratuitously grant this power to parents who have a religious objection to vaccinations, and some grant it to a broader class of parents. See Children’s Healthcare Is a Legal Duty, Religious Exemptions from Healthcare for Children, http://childrenshc.org/?page_id=24#Exemptions

to disturb the natural order. But in hindsight we see that coverture actually constituted a severe state incursion into women’s lives, removing from them rights and immunities they possessed before the state conferred the legal status of marriage on them. Nevertheless, ending coverture was not a matter of the state’s ending its intervention into and regulation of the lives of married people; it was, rather, substitution of a different form of intervention and regulation.

Mischaracterizing as state intervention the state’s refusal to give parents greater power over children is rhetorically effective, because we generally regard state intervention as unwelcome interference requiring special justification. The mischaracterization creates the impression that the burden of persuasion belongs to those who believe the state should give parents less power. “State intervention,” like “surgical operation,” sounds like a disruption of normal life that is at best unfortunate. In the ordinary course of their lives, autonomous adults do not need overt state action to carry on as they wish in their interactions with each other, and so we assume the state has to justify any restrictions it imposes on adults’ freedoms. Further, we tend as a general matter to extend our manner of thinking about interactions among autonomous adults to our interactions with all other creatures. Perhaps we do this because it is epistemologically economical not to have to retool normatively and conceptually when shifting our gaze from adult interactions—historically the focus of our normative reasoning—to interactions with non-autonomous persons. Perhaps we do so also or instead simply because autonomous adults have always been able to do so. They have always been in a position of power relative to the non-autonomous and so have felt no practical compulsion to develop an additional way of thinking or set of principles that is sensitive to any differences in the characteristics of different groups of people, or to any differences in interactions with non-autonomous persons.

But that is all quite unprincipled. The very point of jurisprudence and of moral reasoning is to think and act in a more rationally consistent and principled way. Today we feel a moral compulsion to do right by weaker persons even in the absence of a practical compulsion to do so. And that entails recognizing that normative assumptions underlying our attitude toward state involvement in relationships between autonomous adults might not carry over rationally to relationships between autonomous adults and non-autonomous persons. It entails a responsibility to accept that a quite different moral framework might be fitting for thinking about the state’s role in the lives and relationships of non-autonomous persons, including possibly a framework in which the state has presumptive decision-making power, pursuant to its parens patriae role, and justification is necessary for the state to confer any of this
power on private parties or to bestow special behavioral privileges on certain autonomous persons in their dealings with non-autonomous persons.¹³

Advocates for greater protection of children’s welfare against harmful parental choices or actions therefore make a strategic error in accepting intervention and regulation as the terms of debate. They should insist on framing parent-state conflicts over child rearing in terms of how the state will allocate power over children’s lives and whether the state will confer more or less control and freedom on legal parents. Or in terms of how the law can best serve children’s welfare or effectuate the rights of children in making relationship choices in their behalf and in imbuing authority into the roles any private parties play in children’s lives.

It is important also to be mindful that even in connection with relationships between autonomous persons, the state’s posture is not one of nonintervention. There are laws in place setting limits on interpersonal conduct (for example, prohibiting violence) and establishing consequences for particular interpersonal acts (for example, promises). Put simply, in a society governed by law, the state operates in all human interactions.

All this is easier to see if we contemplate what it would really mean for the state not to regulate or intervene at all in family relationships. I noted above that it is conceptually impossible for the state not to be involved in creation of legal family relationships. Is it conceptually possible for the state to leave such relationships unregulated after creating them? Or to leave social relationships that bear no special legal status unregulated? If so, is it practically possible?

One thing it might mean for the state not to regulate family relationships at all would be for the state not to create any special legal rules for such relationships. It is not conceptually impossible for a new state-conferred status to be purely nominal, having no practical significance. So the state might record marriages but not have any marriage laws, just as it might have no special laws for dating or friendships. Similarly, the state might record parental status but have no laws relating to parenting. Entrance into either relationship would then work no change in the legal powers, immunities, rights, and duties that anyone has.

Imagining this possibility illuminates the innumerable ways in which parents and intimate partners benefit from the particular form that state intervention in their family relationships currently takes. Were there no special legal rules for family relationships, biological parents would have no authoritative claim to possession of their offspring and no basis for invoking the state’s assistance in preventing their offspring from being carried off by others; their

legal position vis-à-vis the child would be no different from that of any other adults. Even if birth parents managed to hold on to their young, third parties could intrude to discipline, instruct, or give medicine to a child without the parents having any legal recourse; absent conferral by the state of substantial powers on the status of legal parent, parents would have no legal basis qua parents for complaint about these things and therefore no ability to call on the power of the state to protect their interest in custody and control.\textsuperscript{14} Clearly, then, absence of special rules for parent-child relationships is not something that parents or advocates for greater parental control over children’s lives want.

In reality, though, what I have just described—that is, a regime in which the state creates no special substantive rules for family relationships—is not actually a condition of non-regulation of those relationships. There would still be all the legal rules that today govern interactions among people who are not in a family relationship with each other. Especially relevant to parent-child interactions would be rules prohibiting kidnapping, physical restraint, and battery. Thus, in the absence of special regulations for parent-child relationships, not only would biological parents have no basis for claiming the state’s assistance in preventing others from taking possession of their offspring, but they also would not be legally free to assume custody and engage in common parenting behaviors themselves.

Given that mere elimination of special rules does not actually amount to non-regulation, we have to look for a more extreme departure from the status quo to get to a condition of non-regulation. Real non-regulation would appear to require a condition of lawlessness—that is, absence of any laws governing people who form or desire family-like relationships, in terms of their interactions with and control over each other. In that condition, parents would have no legal rights or powers vis-à-vis their children, but also no duties (positive or negative) or liabilities. Spouses likewise would not be constrained legally in their conduct toward each other if the state truly did not regulate family relationships. Quickly we see that nonintervention in this sense is utterly unattractive and unlike what any sane person seriously recommends.

And in fact, even that scenario does not go far enough to create a situation of true nonintervention. For it to be the case that only family relationships and no others exist in a legal vacuum, the state would have to pass laws that establish when people are in fact in a family, so as to remove from only those people and in connection with only those relationships the legal protections that those

\textsuperscript{14} Such actions by other adults might violate some right the state has given the child, but the biological parents would have no standing to act as agent for the child in enforcing those rights, and in any event the biological parents’ own wishes regarding the child’s upbringing would be legally irrelevant.
people enjoyed before the state applied that prescription to them. There would still, then, be a form of state intervention into the lives of persons because of their having social relationships that the state regards as family relationships. The state would intervene in their lives at some point in their interactions precisely to remove from them certain rights and duties they would otherwise have.

To establish a situation of lawlessness within social family relationships while avoiding such singling out for withdrawal of legal rights, the state would have to eliminate all laws governing personal interactions. Only if all persons, regardless of relationship, operate in a condition of lawlessness can we truly say that the state is not regulating or intervening in family relationships. It should require no further elaboration to make plain that true state nonintervention in family-like relationships is not something any rational person could endorse. It would mean the collapse of civilization and possibly make family life in any recognizable form impossible. As such, arguably, it is conceptually impossible for the state not to regulate or intervene in ongoing family relationships, because true non-regulation and nonintervention would mean destruction of the social conditions that make social family relationships possible.

Thus, judges, scholars, politicians, and others err when they frame debates over the law of child rearing or the law of spousal relations as posing the question whether the state should intervene and regulate. The question actually before them is how the state should regulate family relationships, given the inevitability of the state’s regulating and intervening in one form or another in all human relationships.¹²

¹² Relatedly, participants in such debates and legal disputes likewise err when they characterize as embodiments of a negative-rights jurisprudence the constitutional doctrines in the United States and elsewhere relating to the parentage rights of birth parents and the power of existing legal parents to control particular details of children’s upbringing. The reality is that such court decisions confer positive rights on parents, including in some contexts (e.g., Troxel v. Granville, 530 U.S. 57 (2000), holding that parents’ substantive due process rights require the state presumptively to give effect to their wishes regarding a child’s contact with grandparents) just the sort of right to state protection against intrusion by other private parties that the U.S. Supreme Court has refused to confer on maltreated children (e.g., DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189 (1989), holding that children have no constitutional right to state protection against a parent whom the state knows to be abusive) and victims of domestic violence (Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005), holding that domestic violence victims have no constitutional right to the state’s assistance in avoiding contact with their abusers).
C. Does Inevitable Mean Unconstrained?

Even though the state must intervene in and regulate family relationships, we can still demand justification from the state for the particular form of intervention and regulation it chooses. In particular, its intervention into the lives of children to the extraordinary extent of making choices for them about the formation of family relationships and then bestowing on certain adults substantial decision-making powers over them and numerous privileges (including, in the United States, the privilege to hit them) requires special justification.

The only plausible justification for going so far beyond mere protection against harms is the state’s *parens patriae* authority and duty to protect the well-being of non-autonomous persons. Because this is the only justification, the state may go no further in conferring on other persons power over children’s lives than that *parens patriae* justification warrants. Correspondingly, the state may not aim to serve the interests of any other private parties, including parents, in carrying out this form of intervention, nor any collective societal aims, such as diversity or racial equality. This is the view taken for granted in connection with the state’s creating and regulating guardianships for incompetent adults. As with such guardianships, the state must be viewed as occupying a purely fiduciary role when it acts to create, regulate, or dissolve parent-child relationships. The state may not take advantage of an incompetent adult’s incapacity to use that adult’s life to serve the interests of other private parties or to serve collective aims—the state’s power over children should be similarly restricted.

Accordingly, to the extent that legislatures or courts making decisions concerning parentage or central aspects of children’s lives such as education have aimed even in part to protect adults’ interests—which they do whenever they speak of balancing parents’ interests or rights against the state aim of promoting children’s welfare—or have in effect sacrificed children’s welfare, they have breached a fiduciary duty owed to children and violated children’s fundamental (negative) rights. Many cases of disrupted adoption that reach the courts provide good illustrations of this breach of fiduciary duty, insofar as even in the most child-friendly decisions the courts endorse a balancing of the child’s interests against those of biological parents, and in the worst cases they effectively treat the children as non-human possessions.

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16 *See* Dwyer, *supra* note 7, at 195–99.
17 *See*, *e.g.*, Heidbreder v. Carton, 645 N.W.2d 355, 369, 374–77 (Minn. 2002).
18 *See*, *e.g.*, In re Doe, 638 N.E.2d 181, 182 (Ill. 1994) (Baby Richard case) (ordering that a four-year-old boy be extracted from his adoptive family of four years and conveyed to a biological father he had never met, reasoning: “the appellate court, wholly missing the
II. MISUSE OF NICE-SOUNDING TERMS AND CONCEPTS

In modern western, liberal societies, autonomy connotes an important value, for some the most important value. For scholars and others influenced by Kantian moral and political philosophy, above all else the state and individual moral agents must respect individuals’ autonomy.\textsuperscript{19} Claiming to be pro-autonomy therefore makes one presumptively correct in one’s views, and many participants in family law debates characterize their positions as resting on or respecting autonomy.\textsuperscript{20}

Privacy is also an important value in our culture. The term actually has several meanings, as reflected in the variety of doctrinal strains in constitutional law relating to the right of privacy.\textsuperscript{21} In the family law context, it is most often given the meaning of insulation from regulation. In that sense, it is more or less equivalent to the concept of non-regulation, which, as explained earlier, is practically and perhaps conceptually impossible in regard to human relationships. In this section, I will point out additional problems with its use in family law scholarship.

Both autonomy and privacy are routinely misused by scholars, legal actors, and the general public in discussing family law topics. Those terms are in fact entirely inapt in most family law contexts. This is so principally because most family law issues do not involve a single person, nor do they involve conflicts in which there is, on one side, the state or some other entity outside the family and, on the other side, family members who are all autonomous or whose interests are perfectly unified. The family issues that produce litigation or threshold issue in this case, dwelt on the best interests of the child. Since, however, the father’s parental interest was improperly terminated, there was no occasion to reach the factor of the child’s best interests. That point should never have been reached and need never have been discussed”\textsuperscript{22}).

\textsuperscript{19} It is unclear that Kant thought anyone has an obligation to promote autonomy, rather than simply respecting it when it happens to exist. See Dwyer, supra note 7, at 142–45. But most Kantian moral and political theorists and most people in general who think autonomy is the greatest manifestation of humanity take the position that we have an obligation to promote development of autonomy. See, e.g., id. at 142–60; Meira Levinson, The Demands of Liberal Education (1999). An appropriate use of the term autonomy in connection with child rearing is to speak of the child’s interest in becoming autonomous and the obligation of parents, teachers, and the state to promote children’s development toward autonomy.

\textsuperscript{20} See infra note 23.

public controversy are mostly (though not all)\(^\text{22}\) ones in which there is a manifest or potential conflict of interests among family members and the state is called on to address that conflict. And as to those issues, using *autonomy* or *privacy* to gain the moral high ground is inappropriate.

One very common misuse of *autonomy* is to characterize parental control over children.\(^\text{23}\) Parental autonomy is not only suspect as an attempt to disguise abuse of power; it is, in fact, an oxymoron. It is conceptual nonsense, a linguistic error. *Autonomy* means self-rule—that is, ruling oneself and one’s own life. From the Greek *auto* (self) and *nomos* (rule or law), *autonomy* is equivalent to self-determination. The *auto* refers to both the source and the target of the *nomos*; I am autonomous insofar as I am the source of the rules that I apply to my governance of my own life—for example, what occupation I pursue, what views I express, whether and where I worship. The term does not extend to every choice I might wish to make or every action I might wish to take; it is not the same as liberty or freedom or power. That is why it has more moral purchase than those other terms. A claim to determine one’s own life carries much greater weight than a claim merely to be free to do what one wants or to have power to control what or whom one wants to control. A claim to respect for one’s autonomy presumptively conflicts with no one else’s autonomy or

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\(^{22}\) A prominent exception is the same-sex marriage debate, in connection with which there is an assumption that the members of the family—that is, the same-sex couple—both want the same thing and would benefit equally from legal recognition.

rights, because no one else’s autonomy could possibly include a say in my governance of my own life and no one else is entitled to have my life go a particular way. My autonomous choice to be non-religious is “my business,” we say. In contrast, a claim to freedom and power carries no such empirical presumption, because conceptually they can extend to conduct and choices that impinge quite substantially and directly on central aspects of others’ lives. I might wish to have the freedom to take my neighbor’s property or the power to fire a co-worker.

Parental, on the other hand, means pertaining to parenting, and parenting means child rearing—that is, acting upon and governing a child. Thus, if we accept as a starting assumption that any child is a person ontologically distinct from anyone else, including his or her biological or legal parents, then we must recognize that parenting is inherently an “other-determining” activity and role. It involves one person imposing rules on another person, and one person treating another person in particular ways. It is quite clearly not an aspect of self-determination for the parent, any more than is an employer’s control of an employee, a police officer’s control of a motorist, or a husband’s treatment of his wife. Parenting and child rearing therefore can in no wise be exercises in autonomy, and to speak of “parental autonomy” as something the state should respect, protect, or promote is nonsense talk, just as would be speaking of a husband’s physical chastisement of his wife as an exercise of his autonomy. As with non-regulation, use of this oxymoron is an obfuscation aimed at gaining rhetorical advantage for the cause of legally protecting the freedom of more powerful members of family relationships. Those who oppose the measure of parental power and freedom that is being sought using this term should not tolerate the obfuscation.

The term privacy is generally not combined with parental but rather with family. Conceptually, privacy is as fitting conjoined with parental as with family, but “family privacy” sounds wholesome, whereas “parental privacy”

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24 See Barbara Bennett Woodhouse, “Who Owns the Child?": Meyer and Pierce and the Child As Property, 33 WM. & MARY L. REV. 995, 1113 (1992) (arguing that parental autonomy “stand[s] for the power to own another human being and to cast social regulation of this power as an assault on freedom”).

25 See, e.g., Pamela Laufer-Ukeles, Between Function and Form: Towards a Differentiated Model of Functional Parenthood, 20 GEO. MASON L. REV. 419, 461 (“In a robust model of family privacy, states are limited in their ability to carve into parental rights and obligations”); Weithorn, supra note 23, at 1491 (“Out of respect for family privacy and parental autonomy, the state avoids involvement in family affairs until or unless parents are viewed as having failed their children in some extreme manner …”).
sounds sinister. The term autonomy is also often combined with family.\(^{26}\) Those who argue for family privacy or family autonomy are not necessarily engaged in nonsense speak; those can be (depending on what precise meaning is intended) conceptually coherent terms even though a family is a group rather than an individual. We commonly speak of groups having an interest in privacy or exerting their autonomy as against outsiders. One sensible meaning of group privacy is that members of the group can carry on their life within the group free of interference or observation by outsiders. Group autonomy means the group is able to establish its own rules for its internal affairs and to chart its own collective course.\(^{27}\)

The problem with applying privacy and autonomy to the group we call family is therefore not inherently a conceptual one. It is rather that this application frequently disguises at least these two important facts about families: First, the decision-making process in families is generally not like that in other private intermediate institutions, such as a fraternal organization, or in a state. It is generally assumed that in their dealings with outsiders, social clubs or legitimate governments have processes for making decisions about their needs or wishes in which all constituents participate equally or are equally well represented. Whereas that might be true of a family that contains only competent adults, it is not true of families containing non-autonomous persons, such as young children. They typically do not participate in family decision making, and family privacy and family autonomy are typically invoked precisely in


\[^{27}\text{In this context of speaking about groups, though, we again see that autonomy is not equivalent to freedom or power, but rather is limited in its meaning to self-governance. No one would speak, for example, of Russia’s former control of Afghanistan as a component of its national autonomy.} \]
those situations when an outsider (usually the state) believes that the autonomous persons in the group (competent adults) cannot be viewed as representatives of the non-autonomous persons in the group (children or incompetent adults). Second, and related, there are within families many potential conflicts of interests, especially conflicts between parents and children, which is why parents often cannot be viewed as proxies for children in dealing with the state.\textsuperscript{28}

In most family law contexts, and especially parent-state conflicts over child rearing, these two features of family life are prominent. The state wants something different from what parents want precisely because state actors believe the children have interests contrary to what the parents want, and therefore the parents do not adequately represent the children and the children’s interests in making decisions for the family. In such contexts, it is at best misleading to use family autonomy as a rhetorical weapon against the state’s position, just as it would be misleading for a husband to assert family autonomy against state efforts to stop him from battering his wife or for a nation’s government to assert national autonomy against efforts by an international body to stop that government from committing human rights abuses against a vulnerable minority group. Most often, it seems, family autonomy serves to disguise the efforts of powerful persons in a family to dominate weaker persons, to use the weaker persons to serve the interests and aims of the more powerful.

It might even be conceptually flawed to use family autonomy in contexts of internal conflict of interests, if it is the case that it is proper to apply the concept of group autonomy only in situations when there is a unity of interests among all members of the group in relation to the particular decision at issue. For example, it might be linguistically appropriate for a church to assert its autonomy against the state’s proposing to dictate when the church will hold its services (for example, for the purpose of traffic control), but not against the state’s proposing to prosecute priests who sexually abuse children in the congregation, even if the church leaders condone the abuse.

Group privacy is different from group autonomy. Privacy in one sense is about insularity and secrecy, rather than about who decides things for the

\textsuperscript{28} Cf. ARIZ. REV. STAT. § 8-221(E) (providing for court appointment of a lawyer and guardian ad litem for a juvenile charged with delinquency when the court perceives a conflict of interests between the juvenile and his or her parents); FLA. STAT. § 61.401 (authorizing separate legal representation in divorce cases and requiring it when there is an allegation of parental maltreatment of a child); 750 ILL. COMP. STAT. 50/13(B)(a) (requiring appointment of a lawyer to act as guardian ad litem for the child in adoption proceedings); 42 U.S.C.A. § 5106a(b)(2)(A)(xiii) (federal law requiring state courts to appoint a guardian ad litem to represent children in all child protection proceedings).
group. The concepts of insularity and secrecy are not at all incompatible with a conflict of interests; their meaning does not entail or presuppose any unity of interests or any particular decision-making regime. It is common and apt to say that domestic violence and child abuse usually occur in private. In fact, state actors might justifiably come to a conclusion in some situations that they should forbear from acting to change people’s behavior within a particular family because of the value that privacy in this sense can have for families. No parent’s behavior is perfect and perfectly altruistic, and even when imperfection rises to the level of what some might consider abuse or neglect, the family as a whole might be better off if left undisturbed. Having police or child protection agents come into the home and order a change of behavior, and in that way intrude upon privacy, can have an adverse psychological and emotional impact on everyone, and all members of a family might be better off, on the whole, if the state actors did not do that.

Nevertheless, invocation of family privacy in support of normative arguments in family law is usually mischievous. It usually appears in opposition to state measures aimed at protecting weaker family members from harmful behavior or choices of more powerful family members, and it has moral purchase not when it conveys the meanings of secrecy and hiddenness but rather when it conveys one or both of two other ideas—namely, family autonomy or separate spheres. When people invoke family privacy, they typically do not mean to give the impression that they think powerful family members should be able to do what they want in secret, behind a dark curtain. We do not usually attribute great independent value to the possibility of people being able to do things to each other without anyone else finding out about it. An exception is mutually voluntary intimate conduct between autonomous adults, as reflected in the U.S. Supreme Court’s early privacy decisions, such as *Griswold* and *Eisenstadt*. A demand for family privacy in the context of

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29 See Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 472 (2013) (“The notion that family privacy, and consequently its harmony, is threatened by interspousal torts has been widely used by courts since the beginning of the twentieth century as a way to push back against the elimination of interspousal immunities”).

30 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating on equal protection grounds state law prohibiting distribution of contraceptives to unmarried persons, and stating: “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”); *Griswold v. Connecticut*, 381 U.S. 479, 85 (1965) (invalidating law prohibiting use of contraceptives as applied to married couples, and stating that the marital relationship lies “within the zone of privacy created by several fundamental constitutional guarantees”).
children’s schooling is not much like a demand for privacy in the context of spouses using contraceptives. Concealment is a positive and inherent aspect of marital intimacy but not of educating children.

Instead, what people really mean when they assert family privacy in conflicts with the state over family life or children’s upbringing is leaving the family alone to do as it wishes. They mean to suggest that the family is in a separate sphere, jurisdictionally other, entitled to act autonomously, a necessary and healthy counterpart to the impersonal and heartless state and market, the site of true human flourishing so long as it remains untainted by the gaze and touch of the state and the market.

And most of that is bunk. There is something to this idea; family relationships are special in some sense, different from the relationships between co-workers and between citizens per se. There is an important kind of human flourishing that takes place only within family relationships, and for that to happen there needs to be space and time where only the family members are physically present and they have practical freedom to interact and express themselves as they wish. But I have already explained why it is wrong to think that there are any human relationships untouched by the law, unregulated by the state, occurring in a purely private realm. The parent-child relationship in particular is one that owes its existence to state action and state decisions, concerning who will be in the relationships and what power over children the parental role will entail. When the state opposes some parental choice or behavior, the contest is not really one between privacy, in the sense of the family being in a separate sphere, and public intrusion, for the same reason it is not a contest between regulation and non-regulation and is not really about family autonomy. The real question is generally what legal (that is, state-conferring) license and power do parents enjoy with respect to children, and any answer to that question entails the state’s involving itself in the parent-child relationship.

Thus, for example, to argue that the state should not prohibit corporal punishment because this would intrude on family privacy is nonsensical and deceptive. It actually amounts to arguing that the state should intrude into the private lives of children to the dramatic extent of withdrawing from them a right against violent incursions on their bodies that they otherwise would possess simply as persons, and which they do have against people who are not their parents. Similarly, opposition to state laws prohibiting nonconsensual harmful conduct by one spouse against another or dictating what decision-making power one spouse has with respect to the person or property of the other does not really present a contest between privacy and state intrusion. The state must license and empower or prohibit and disable. The state is present in either case; there is necessarily a legal framework to family life. As with
autonomy, participants in family debates invoke privacy to make one kind of state decision, one allocation of legal license and power, appear more attractive than another, for an entirely illusory reason. It is a mischaracterization that distorts moral and political discourse.\textsuperscript{31}

III. CONCLUSION

I recommend that we largely eliminate regulation, intervention, autonomy, and privacy from our family law vocabulary. As suggested above, there are family contexts, principally involving only autonomous adults whose wishes and interests are unified, in which the terms autonomy and privacy might be apt.\textsuperscript{32} But all these terms appear routinely in contexts where they are inapt, even incoherent. And they are certainly unnecessary to almost any family law discussion. For the sake of greater honesty and accuracy in our discourse, I suggest we use other terms. If one believes parents should have plenary legal power to decide what sort of schooling their children receive, then use the terms power or control rather than nonintervention or parental autonomy. If one believes the state should not periodically visit the homes of parents the state knows are religiously opposed to medical care, to make sure any young children in the home are in good health, one can use terms like unmonitored custody or right to seclusion instead of family privacy. Nothing is lost analytically in using the former terms in each example, so anyone who feels like they stand on weaker ground using those terms rather than the latter should think about why that is so, and whether they need misleading rhetoric to make their views appear plausible.

\textsuperscript{31} For further critique of the concept of family privacy and the supposed public-private dichotomy, see Clare Huntington, Staging the Family, 88 N.Y.U. L. REV. 589 (2013); Olsen, supra note 2; Barbara Bennett Woodhouse, The Dark Side of Family Privacy, 67 GEO. WASH. L. REV. 1247, 1261–62 (1999).

\textsuperscript{32} It is also coherent and useful to speak of any individual within a family having an interest in privacy, in the sense of concealment, as against another family member. See, e.g., Benjamin Shmueli & Ayelet Blecher-Prigat, Privacy for Children, 42 COLUM. HUM. RTS. L. REV. 759 (2011).