

# PARENTS' SELF-DETERMINATION AND CHILDREN'S CUSTODY: A NEW ANALYTICAL FRAMEWORK FOR STATE STRUCTURING OF CHILDREN'S FAMILY LIFE

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*When adults exercise basic liberties, such as freedom of speech, association, or travel, their actions can adversely impact any child in their custody. In several topical areas of family and juvenile law, the prevailing view among courts and scholars is that the self-determination rights and interests of adults who happen to be parents trump or, at a minimum, must be balanced against the interests of their children, so that sometimes children's welfare must be sacrificed for the sake of parents' self-determination. This Article demonstrates that this view is mistaken, and that any deference to parents' self-determining interests or supposed rights is inappropriate in resolving custody disputes between parents or between a parent and the state. The constitutional and normative analysis that ordinarily applies when the state constrains individual liberty is inapt in situations where the state acts as a proxy decision-maker for private individuals, and this Article shows that this is how we must view the state's actions when courts and agencies decide with whom children will live. In such cases, it is inappropriate for state actors directly to consider the interests of anyone other than the children themselves.*

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### INTRODUCTION

Across a broad range of legal contexts in which parents' freedom clashes with the state's view of what is best for children, the predominant analytical approach of scholars, judges, legislators, and child-welfare agencies presupposes that a balancing of parents' liberty interests against children's interests is appropriate. This Article refutes that basic presupposition and thereby demonstrates the need for a fundamental revision in the way legal scholars and state actors analyze family and juvenile law issues.

This Article focuses on a subset of the contexts presenting conflicts between parents' demand for freedom and the state's view of children's welfare. It

is a category of custody disputes and child-protection interventions in which the parents' demand might appear morally strongest—those in which parents are not seeking directly to control the life of a child, but rather are engaged in self-determining conduct or speech. In these cases, parents are endeavoring to fulfill aims for their own lives, such as pursuing a new intimate partnership or expressing their convictions, and the clash arises from an incidental effect of those actions on the welfare of a child. Many scholars and some courts have argued as to these cases, in effect, that parents' self-determining choices should be costless vis-à-vis their relationship with their children.<sup>1</sup> They argue that courts should not make such choices a basis for denying or reducing custody; parents should not be “punished” in this way, they maintain, for exercising their basic liberties. In addition, they contend that courts should not order parents to refrain from particular self-determining acts or speech as a condition for receiving custody or visitation. Essentially, parents should not have to forfeit freedom to spend time with their children.

For example, in the long-raging debate over custodial-parent relocation following divorce, some scholars maintain that courts should not consider relocation plans at all as a factor in an initial custody decision or as a change of circumstances warranting later modification of an initial custody assignment.<sup>2</sup> They rest their view on the premise that custodial parents have a fundamental right to move and to pursue new career or relationship opportunities, a right that should not be constrained in any way through a court decision as to custody. Some judges have agreed. Within the family court setting, they believe the parents' choice to relocate should be costless.<sup>3</sup> With respect to parents' relationship choices, the U.S. Supreme Court held in *Palmore v. Sidoti* that, in custody determinations, trial courts may not consider that one parent has chosen to enter into an interracial marriage and that the choice might have negative consequences for the child, such as stigmatization, social isolation, and violence (e.g., getting beat up on the way home from school).<sup>4</sup> To impose a child custody cost on a parent because of such a choice would violate the parent's constitutional rights. Some scholars and courts maintain that the same principle should apply to parents who enter into same-sex relationships.<sup>5</sup> With respect to parents' religious practice or ideological expression, Eugene Volokh has argued that courts deciding child custody should almost never consider choices, beliefs, or behaviors of parents that come within the ambit of First Amendment protection.<sup>6</sup> Thus, that one parent openly professes females were put on earth to serve men and have no inherent worth, while the other believes in the full moral and social equality of girls and women, should have no influence on a court's decision in awarding custody of the couple's daughter.

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1. See *infra* Part III.A–B.
2. See *infra* Part II.E.
3. See *infra* notes 72–74 and accompanying text.
4. 466 U.S. 429, 433 (1984).
5. See *infra* Part II.D.
6. See Eugene Volokh, *Parent–Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

I show in this Article that the widely held view that parents' self-determining choices should be costless in connection with their relationships with their children is mistaken. Also mistaken is the more moderate position that courts should weigh parents' liberty interests against children's welfare in custody decisionmaking, so that state actors avoid inhibiting parents unless adverse effects on children rise above a substantial threshold. People have no more moral right in the parent-child context than in any other relationship context to be spared from negative consequences for their conduct and speech.

Part I below advances a view of state decisionmaking about children's custody as another instance of the general phenomenon of decisionmaking about personal relationships, something adults typically do for themselves without state involvement. This contrasts with the prevailing treatment of these decisions as *sui generis*. Situating child custody decisions within the broader context of relationship decisionmaking reveals a disparity in prevailing background moral assumptions as between two situations that are analogous and that arguably should be viewed in a similar way normatively—namely, adults' making relationship choices for themselves and state actors' making relationship choices for children. Part II then describes several specific contexts in which conflicts between parents' self-determining choices and children's welfare give rise to legal disputes and explains how state actors and legal scholars have responded to those conflicts. Part II focuses on allocation of custody and restrictions on parental conduct within already-existing legal parent-child relationships. The Article's analysis would also apply to the prior decision of who are to become legal parents to a child, when the adults at issue are potential legal parents rather than already in a legal parent-child relationship with a child, as in the adoption context, but I do not directly address that decision context here. Part III articulates and critiques various arguments that scholars and courts have made against imposing relationship costs on parents for self-determining choices in the custody and child-protection contexts. Part IV then presents the argument in favor of doing so, based on a new understanding of the state's role in child custody decisionmaking.

## I. RECHARACTERIZING CHILD CUSTODY DECISIONS

In nearly every realm of social existence, people understand that their choices about how they live can have costs, and that those costs include others' adverse reactions. Personal choices might injure or offend others, or they might simply make one less attractive to others as a business partner, friend, or spouse. That effect may lead others to change their disposition toward one. For example, others will eventually refuse to enter into contracts with business people who exercise their practical freedom to breach contracts when it is in their short-term interests (e.g., where the wronged party will not have sufficient incentive or resources to sue). Even when people engage in entirely legitimate—even admirable—behavior, they understand that others may react negatively and there is nothing they can do about it. For instance, a wealthy person might suddenly be moved by a moral epiphany to give away his wealth to charitable causes, leaving himself only the bare minimum to survive, all the while knowing and accepting that his country-club buddies might no longer want anything to do with him. Or, people who belong to certain religious faiths recognize that people of other faiths

do not want to socialize with them, and they accept that others are free to treat them in that way. They do not petition the government to compel friendly interaction on the grounds that others' dissociation makes them feel constrained in exercising their constitutional rights.

It is a universally recognized fact of life that other adults are free to disapprove of choices I make and for that reason to avoid me or refuse to give me something I want. I understand that if I want other people to associate with me as a friend, colleague, or family member, I have to constrain myself to some degree in the political views I express, the religious practices in which I engage, the type of job I hold, where I live, and what enjoyments I pursue. I cannot expect to do everything I might like to do without that decision having any adverse effect on my personal relationships with others. People vary in the degree to which they are willing to compromise their predilections and beliefs for the sake of getting along, being liked, and preserving relationships, but nearly everyone feels constrained to some degree. In any event, we all understand that we cannot order or force other people to accept every choice we make, never to count our choices against us, or not to alter their attitude or conduct toward us as a result of our choices. Indeed, we cannot require or expect them even to *consider* our self-determination interests in deciding whether and to what extent they are willing to associate with us; others are entitled to make decisions about their relationships with us based solely on their own interests.

This is especially true when one's choices negatively impact discernible interests of others, but it is true even when others cannot justify their reactions by reference to any injury incurred. I cannot reasonably expect everyone to view positively all that I do or say. This might not even be desirable, because it might forestall development of my capacities for self-regulation and thoughtful self-definition. It might obviate virtues such as courage, prudence, and personal responsibility, and make relationships—and others' regard for me—less meaningful.

This phenomenon of having to take into account the potential costs of one's choices arising from others' reactions is arguably more prevalent in intimate relationships than in any other domain of life. Choosing friends, and even more so, choosing sexual and marital partners, generally involves finely tuned judgments about others' lifestyles, beliefs, grooming, other relationships, neatness, habits, commitments, and daily activities. People constantly reject potential friends, girlfriends, boyfriends, husbands, and wives, not just because of how they treat others, but also because of choices they have made about themselves and their lives. It is very common to hear people say *I could never date someone who . . .* or *How can you be friends with someone who . . .*, and finish those sentences with phrases like: *is racist; believes women are inferior; doesn't believe in God; is liberal; doesn't like cats; watches baseball; doesn't exercise; sleeps around; has a negative view of the world; criticizes my family; is too cheerful; can't settle down; won't live in this city; hangs out with losers; smokes; drinks too much; never drinks; is obsessively neat*; and so on.

Moreover, within relationships that are already established and that will continue, people often criticize, disfavor, or avoid each other—in subtle or obvious

ways—because of choices the other person makes. One spouse’s religious conversion can alienate the other spouse, especially if the former repeatedly harangues the latter in an effort to convert her as well. A girlfriend’s decision to relocate to attend a distant college can lead to her partner’s decision to end the relationship. Suddenly expressing conservative views and vowing to vote Republican could make liberal friends less inclined thereafter to include one in social gatherings. Marrying someone of another religion or race could change family members’ attitudes, even to the point of shunning. Some reactions other people have might reflect poorly on them, rather than on the person to whom they are reacting, yet the law does nothing to prevent such reactions; it does not protect people from potential interpersonal costs of their choices and beliefs in any of these situations.

In short, nothing could be more familiar to us than the practical constraints that social existence imposes on our freedom, if we wish to develop and maintain personal relationships. We might be legally free to do X, but we have no control over others’ reactions to our doing X. Life is full of dilemmas in which a person wants very much to do X, but has to weigh the benefits of doing so against the possible costs in personal, business, and professional relationships—what we might call “relationship costs.” Young children have a hard time accepting that, but eventually they understand that the world does not revolve around or cater to them, that they cannot dictate how other people react to their choices, and that their choices can entail interpersonal costs. Indeed, as suggested above, some recognized virtues are inexplicable except in terms of such costs. We speak of people having the courage of their convictions, or the fortitude to follow their hearts, regardless of how their friends and family will react. On the other hand, when self-determining speech or conduct is psychologically damaging or even just offensive to others, we speak of having the maturity to hold one’s tongue, avoid hurting others, and preserve interpersonal harmony. And, we recognize the right of others to avoid such injurious conduct and speech.

Yet something peculiar happens when people think about parents’ making self-determining choices that adversely impact their children’s welfare. I speak here not of child-rearing decisions per se—for example, how parents discipline or educate their children. Those decisions are “other-determining” rather than self-determining. The “other,” relative to the parent, is the child; child rearing entails one person directing the life of another. In the realm of child rearing, everyone accepts that the state may constrain parental choices and behavior to some degree, and that if a parent treats a child in a certain way, this should generate costs for the parent. For example, if a parent chooses to suffocate a baby until she becomes unconscious in order to stop her crying, or to feed a child only lettuce because of divine command, we accept the state’s imposing the cost of lost custody, terminating parental rights, or charging the parent with a crime. In this context, too, many believe parents’ interest in being free to act or speak as they wish should receive some legal protection and should be controlling except in extreme cases.<sup>7</sup>

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7. See, e.g., Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 154 (1999); Colin M. Murphy, *Concerning Their Hearts and Minds: State of Oregon v. Beagley, Faith-Healing, and a Suggestion for Meaningful Free*

However, this Article focuses on parents' desire simply to live their own life as they choose, a desire that might appear more worthy of satisfaction than a desire to control another person's life however one chooses.<sup>8</sup>

When I speak of parents' self-determining choices, then, I mean choices made by adults who happen to be parents about their own lives as individuals, such as where they live, what intimate partnerships they have, what they consume, what religious practices they participate in, and what views they express. As described below in Part II, with respect to self-determining choices such as these, many legal scholars and some courts have taken the position that adults' choices should be costless for them vis-à-vis their relationship with their children even when the choices adversely affect their children. In other words, they maintain that the law should not inhibit parents' self-determination by threatening to deny them custody of their children.

The particular types of decisions I address are court resolutions of child custody disputes between parents and agency or court decisions in child-protective interventions. Many scholars maintain that parents or prospective parents, like other adults, have a moral and legal right—in some instances, even a constitutional right—to do X, and that it would unjustifiably infringe that right for the state to alter their relationship or rights with respect to children in adverse ways because they did X, or to order them not to do X as a condition for preserving the relationship. In effect, these scholars argue that, in connection with adults' self-determining choices, the law should tolerate the adults' imposing costs on children rather than forcing the adults to internalize consequences of their choices. They imply that adults' choices as individuals should be costless for them in connection with their relationships with children.

In asserting this position, scholars and legal actors treat decisionmaking about children as *sui generis* and so make no appeal to broader principles concerning relationship decisionmaking. Yet a judicial or agency decision about child custody is analogous to a relationship decision that competent adults routinely make for themselves, without state intervention. It is one instance of decisionmaking about with whom a person will share a home and family life. This is a sort of decision we expect individuals ordinarily to make privately based on their assessment of their own interests. As noted above, it is a decision people routinely make in reaction to the way others behave and express themselves.

Thus, state actors' decisions about children's family life are, at a higher descriptive level, of the same type as decisions private adult individuals routinely make for themselves, just carried out in a different way. This makes pertinent the question whether the moral and legal frameworks for analyzing state decisionmaking about children's family life should mirror those applied to adults'

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*Exercise Exemptions*, 46 GONZ. L. REV. 147, 182–83 (2011); Lauren D. Freeman, Note, *The Child's Best Interests vs. the Parent's Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 87 (1998) (“[T]he required threshold level of harm should be limited to the more extreme and clear-cut cases.”).

8. Cf. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1443 (1994) (contending that “other-determining rights” are, unlike self-determining rights, presumptively illegitimate).

autonomous relationship decisionmaking. Part IV below undertakes an analysis of that question. Before that, Part II describes current judicial treatment of some particular situations that raise the issue of whether and to what extent parents' self-determining behavior and speech should be insulated from "custody penalties" or, in other words, whether parents' interests or supposed rights should constrain child custody decisions. Part III presents and critiques arguments scholars and courts have offered for making parents' self-determining choices costless with respect to their relationships with children.

## II. PARENTS' SELF-DETERMINATION VS. CHILDREN'S WELFARE

Conflicts between parents' self-determining choices and what the state views as children's welfare can arise in many contexts. Some conflicts become the subject of court action in child-protection proceedings, some arise in custody disputes in domestic-relations court, and some are at issue in both types of proceedings. In theory, any type of parental choice that has what the state regards as an adverse effect on a child could be the subject of a child-protection action or a custody dispute between parents. In practice, though, there is not much overlap, because most types of self-determining choices parents make do not produce child-welfare consequences serious enough to trigger Child Protective Services ("CPS") involvement. In addition, some types of alleged harm are unique to the context of ex-partners squabbling over child custody—for example, that an ex-partner is introducing a new lover too quickly or is confusing a child by expressing contrary religious views. Below I organize pertinent parental choices by type of choice and, in each case, indicate whether it has been or could be at issue in either type of legal action.

### A. *Free Speech and Religious Expression*

Like any other adults, parents have personal views that they want to express about politics, religion, social practices, lifestyles, ideal character, art, the legal system, and any number of other things. Sometimes they just want to express the views to anyone, without having a specific audience in mind, and children might happen to hear what the parent says. Other times, parents want to express themselves to the children specifically, or to someone such as the other parent when the children are also present. Religious beliefs in particular are ideas that parents generally want to convey to their children. By intentionally expressing themselves in the children's presence, parents might want some validation or acceptance of their views by others and see their children as an easy audience, or they might want to induce their children to adopt the same views. There is no clear line between parents' self-expression and parents' child-rearing efforts in the realm of speech, but certainly expression of personal views is speech potentially protected from state interference by the First Amendment (regardless of the intended audience) under the Free Speech Clause, the Free Exercise Clause, or both.<sup>9</sup>

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9. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (giving First Amendment protection to expression of anti-gay, anti-military, and anti-American views at funerals for American soldiers).



Parental self-expression occurs routinely in everyday life and is generally unproblematic. Some parents consciously try to avoid imposing views on their children, believing that children are entitled to form their own opinions and will better develop into autonomous adults if allowed to think for themselves. But even so, they are likely to tell the children what they think about certain things, perhaps just making clear when their view is opinion rather than fact. Others aim directly to generate agreement, perhaps believing that their children will have better lives if they adopt certain views.

Whether parents present their views as opinion or as fact, and whether parents try to avoid imposing their views or aim to induce adoption of their views, parents' expressions can have a negative effect on children's welfare. Examples include making statements derogatory of another parent; ranting about particular groups of people, which instills hatred for or unwarranted fear of those people; expressing views that are not age-appropriate for a child; urging children to engage in criminal conduct; discussing things that will frighten a child; and directing insults at the child. In many custody disputes, one parent alleges detriment to a child from hearing the other parent express certain views and on that basis requests primary custody or restrictions on the other parent's speech when with the child. On rare occasion, a child-protection agency will charge a parent with psychological or emotional abuse for chronically demeaning a child.<sup>10</sup>

Courts have generally been willing to impose costs on parents for their speech when serious harm to a child is demonstrated. In the child-protection context, the law recognizes emotional harm from parental speech as a form of abuse that supports removal of a child from parental custody and imposition of conditions on parental custody (although it is rarely the sole basis for child-protection intervention in a particular family).<sup>11</sup> Nearly all states include emotional

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10. See, e.g., *In re Le.Z.*, No. B203834, 2008 WL 4482691, at \*1 (Cal. Ct. App. Oct. 7, 2008); *In re T.C.*, No. B166914, 2003 WL 22923579, at \*1 (Cal. Ct. App. Dec. 11, 2003); *In re Shane T.*, 453 N.Y.S.2d 590, 591–92 (N.Y. Fam. Ct. 1982). See generally Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children*, 26 J. LEGAL MED. 311, 321–23, 336–37 (2005).

11. See, e.g., *In re Paulina D.*, No. G038886, 2008 WL 727051, at \*2 (Cal. Ct. App. Mar. 19, 2008) (vesting children's custody with county social services agency after mother repeatedly called her daughter derogatory names including "prostitute," accused her of "belonging to a satanic cult," and told her "that she no longer wanted the child in the home"; and called her son derogatory names, including "gay" and her "enemy," causing him significant emotional distress); *In re Anastacia L.*, Nos. A115329, A118343, 2007 WL 2800132, at \*1–2 (Cal. Ct. App. Sept. 27, 2007) (adjudging daughter a dependent child based on father's repeatedly telling daughter they were being stalked by an unknown assailant, resulting in her being too afraid to attend school or spend time with friends); *In re Halley M.*, No. A111370, 2006 WL 1793619, at \*1 (Cal. Ct. App. June 30, 2006) (suspending telephone calls between mother and daughter in foster care because mother threatened suicide, spoke negatively about child's caregivers, made intimidating statements to child and her caregivers, inappropriately discussed case with daughter, and exhibited angry behavior in front of daughter); *In re Allen K.*, No. B176723, 2005 WL 1283307, at \*1–2 (Cal. Ct. App. June 1, 2005) (affirming order removing child from mother's custody because she called him "stupid," "idiot," and "fat" and said she would leave him alone in the street).

or psychological abuse within their definition of child maltreatment, and a typical definition of emotional abuse is “injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition,” or as evidenced by “anxiety, depression, withdrawal, or aggressive behavior.”<sup>12</sup>

In the context of custody disputes between parents after their relationship dissolves, courts have sometimes favored one parent over the other after finding the other’s speech harmful to children, and they have ordered parents not to express themselves in certain ways to children as a condition for spending time with them. The most common type of speech that courts “penalize” in one of these ways is non-ideological speech that is explicitly derogatory of the other parent.<sup>13</sup> On occasion, courts have even targeted a parent’s non-ideological speech to third parties out of concern that the speech would generate conflict between the parents or emotionally upset the other parent and thereby indirectly harm a child.<sup>14</sup> In fact, courts sometimes order a parent to speak positively about the other parent as a condition of custody.<sup>15</sup>

However, courts generally require a greater showing of harm to a child when parental speech is religiously grounded, and so they rarely impose restrictions on religious expression.<sup>16</sup> For example, in *Shepp v. Shepp*, the

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12. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2011), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/define.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf). States borrow this language from federal law providing funding for child-protection efforts. See 42 U.S.C. § 5106g(2) (2006).

13. See, e.g., *Smith v. Smith*, No. 7:07CV00117, 2007 WL 3025097, at \*6 (W.D. Va. Oct. 12, 2007) (rejecting First Amendment challenge to order prohibiting father from communicating denigrating statements about ex-wife or allegations that she abused their son); *Lamb v. Pierce*, No. S-11943, 2006 WL 3114380, at \*4 (Alaska Nov. 1, 2006) (upholding best-interest statutes even though they allow a court to consider one parent’s expressed disapproval of co-parent’s activities); *In re Marriage of Jeffrey*, 695 N.W.2d 504 (Iowa Ct. App. 2005) (unpublished table decision) (approving modification of custody based on mother’s false accusations against the father); *In re Marriage of Olson*, 850 P.2d 527, 532 (Wash. Ct. App. 1993) (finding no First Amendment violation when trial court prohibited father from making “disparaging remarks” about mother).

14. See, e.g., *In re Eric Y.*, No. A118628, 2008 WL 1736058, at \*12 (Cal. Ct. App. Apr. 16, 2008) (affirming custody award to father after mother made baseless accusations that father was physically and emotionally abusing child during overnight visits, which caused child severe emotional injury); *Borra v. Borra*, 756 A.2d 647, 650 (N.J. Super. Ct. Ch. Div. 2000) (enjoining father from contesting mother’s application for country club membership because it might generate conflict and thereby harm child); *Dickson v. Dickson*, 529 P.2d 476, 480 (Wash. Ct. App. 1974) (enjoining father from making defamatory comments about mother that “threatened her emotional health,” which would “have a harmful effect upon [the minor children] and on Mrs. Dickson’s ability to raise them”).

15. See, e.g., *Schutz v. Schutz*, 581 So. 2d 1290, 1292 (Fla. 1991) (upholding order that mother “do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father” (alteration in original)); see also Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 196 (2008) (citing other cases).

16. See Shulman, *supra* note 15, at 175.

Pennsylvania Supreme Court overturned a lower court order instructing a non-custodial father not to impress his fundamentalist Mormon belief in polygamy on his daughter.<sup>17</sup> The father had previously instructed his stepdaughter “that she would go to hell if she did not believe in polygamy.”<sup>18</sup> The court subjected the custody and visitation order to strict scrutiny, and concluded that “[w]here . . . there is no finding that discussing such matters constitutes a grave threat of harm to the child, there is insufficient basis for the court to infringe on a parent’s constitutionally protected right to speak to a child about religion as he or she sees fit.”<sup>19</sup> Significantly, the mother stated that the father’s belief in polygamy was the reason for their divorce.<sup>20</sup> Yet, of course, the Pennsylvania high court nowhere suggested that the mother’s choice to leave the father because of his beliefs violated his rights, unjustifiably imposing a “penalty” on him for engaging in protected speech, nor that the lower court’s granting of the divorce might be unconstitutional absent showing of “grave threat of harm” to the wife. Courts are even less likely to react to parental religious expression when it does not recommend conduct (such as polygamy) that is criminal, but rather is simply frightening for a child or derogatory of the other parent.<sup>21</sup>

### ***B. Religious Practices***

In addition to expressing views about religion, most parents belong to a religion and participate in religious practices. The parents’ participation alone rarely impacts a child. Concerns on the part of state child-welfare agencies most often arise when parents’ religious beliefs lead them to make child-rearing choices that the state deems harmful, such as denying medical care or subjecting a child to an unhealthy diet, but this is within the category of other-determining child-rearing choices that I am not addressing in this Article. Parents’ own religious practice might impact a child, though, if observing it frightens a child (e.g., if parents are speaking in tongues or worshipping the devil); if it incidentally inculcates beliefs that could be detrimental (from a secular perspective) for the child to adopt (e.g., if the child observed extremely sexist or racist practices); or if the parents put their lives at risk, given that the child likely would suffer as a result of a parent’s premature death or incapacitation. The 2008 case in Texas of CPS removing children from a polygamist community exemplifies a situation in which some people believe mere exposure to a religiously infused lifestyle is harmful to a

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17. 906 A.2d 1165, 1174 (Pa. 2006).

18. *Id.* at 1173.

19. *Id.* at 1174; *see also* Brooke Adams, *Order Bars Dad from Discussing Polygamy*, SALT LAKE TRIB. (Apr. 26, 2010, 12:11 AM), [http://www.sltrib.com/ci\\_14938288](http://www.sltrib.com/ci_14938288) (discussing a similar case in Utah).

20. *Shepp*, 906 A.2d at 1167.

21. *See, e.g., In re Marriage of McSoud*, 131 P.3d 1208, 1216 (Colo. App. 2006) (overturning restriction on mother’s taking child to her church, which was based on her resistance to supporting custodial father’s choice of Catholicism for the child, as a violation of mother’s free exercise right); *Harrison v. Tauheed*, 235 P.3d 547, 558–60 (Kan. Ct. App. 2010) (holding that trial court, in a custody decision, should not consider a Jehovah’s Witness mother’s expression of religious views that imply father will suffer annihilation for false beliefs).

child.<sup>22</sup> Intervention was ostensibly predicated on reports of community leaders' forcing minors into marriage and sex, but many people within and outside of child-protection agencies would like to see children removed from polygamist communities even if there is no forced marriage or underage sex.<sup>23</sup> They believe it detrimental to children just to absorb the ideology that infuses community life.

Child-maltreatment definitions are generally worded broadly enough to encompass any parental conduct that poses a substantial risk of harm to a child, and so could cover even parents' own participation in religious exercises.<sup>24</sup> However, one rarely sees reported court decisions involving child-protective intervention because of parents' own participation in religious practices or exposure of a child to their religious practices.<sup>25</sup> Religious practice comes up more often in custody disputes between parents. In that context, courts have generally taken the approach of counting religiously motivated conduct against a parent in an initial custody award, or of imposing restrictions on a parent's behavior when with the child, if—but only if—the other parent clearly shows the practices have already caused harm to the child.<sup>26</sup> Out of solicitude for parents' liberty, courts will not base decisions on a prediction of harm from religious practices, even though they do so with respect to harm from nonreligious parental conduct such as smoking and alcohol or drug abuse.<sup>27</sup>

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22. See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014 (Tex. App. May 22, 2008) (holding that child-protection agency had not adequately documented the need for removal).

23. See, e.g., Jessica Dixon Weaver, *The Texas Mis-Step: Why the Largest Child Removal in Modern U.S. History Failed*, 16 WM. & MARY J. WOMEN & L. 449, 492–95 (2010); Brian West, *Majority of Utahns Say Removal of FLDS Children Was Justified*, DESERET NEWS, Apr. 10, 2008, at A6 (citing poll revealing that 41% of Utahns believed officials should prosecute polygamy even without evidence of child abuse).

24. See, e.g., VA. CODE ANN. § 63.2-100 (2011) (defining as abused or neglected a child “[w]hose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, or impairment of bodily or mental functions”).

25. For a recent example, however, see *In re A.C.*, 2011 WL 2304147 (N.J. Super. Ct. App. Div. May 27, 2011) (upholding abuse finding against mother who brought her child to a ceremony in which, among other things, a goat and some chickens were beheaded, but suggesting the outcome might be different if mother had asserted a religious reason for doing so).

26. See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 927–28, 939 (2003).

27. See *id.* at 928; see also Shulman, *supra* note 15, at 200–01; Mireille O. Butler, Note, *Parental Autonomy Versus Children's Health Rights: Should Parents Be Prohibited from Smoking in the Presence of Their Children?*, 74 WASH. U. L.Q. 223, 237–38 (1996) (discussing custody orders restricting parental smoking). For a recent example, see Janice Morse, *Court Bans Mom from Smoking Near Child*, CINCINNATI ENQUIRER (Nov. 8, 2009, 6:46 PM), <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/AB/20091108/NEWS010702/911090327>. There are objections to restrictions on parents' smoking in children's presence, as a violation of parents' constitutional rights to liberty or privacy. See, e.g., Lila E. Slovak, *Smoke Screens: Why State Laws Making It a Crime to Smoke in Cars*

For example, in *Quiner v. Quiner*, a California appellate court overturned a trial court award of custody to the father, even though that award was likely in the best interests of the child.<sup>28</sup> An important factor in the trial court's decision was the fact that the mother brought the child to religious meetings at which women were not permitted to speak,<sup>29</sup> and the California appellate court held that that the lower court's reliance on this factor violated the free exercise rights of the mother.<sup>30</sup> Many scholars have advocated a stringent test for basing custody decisions on parents' religious practices. The American Law Institute ("ALI"), for example, has urged courts not to consider such practices at all "except to the minimum degree necessary to protect the child from severe and almost certain harm."<sup>31</sup> Such a stringent test reflects an aim of serving parents' liberty interests and is a substantial departure from the best-interests test that otherwise governs custody decisions.

### *C. Dissolution of Relationship with Other Parent*

Custody disputes between parents arise only after they have chosen to dissolve their relationship, which they (or at least one party to the relationship) generally do based on their assessment of what they want for their own lives. But that self-determining choice can have a great impact on their children. There is usually little chance that the end of cohabitation with the other parent will have no effect on a parent's relationship with a child; one or both parents will inevitably have less time with the child after separation than they had before. However, some scholars have argued that the post-separation division of a child's time between parents should match as closely as possible the proportion of time each devoted to

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*Containing Children Are a Bad Idea*, 41 FAM. L.Q. 601 (2007); Merril Sobie, *Second Hand Smoke and Child Custody Determinations—A Relevant Factor or a Smoke Screen?*, 18 PACE L. REV. 41 (1997).

28. 59 Cal. Rptr. 503 (Cal. Ct. App. 1967); see also *In re Marriage of McSoud*, 131 P.3d 1208, 1215 (Colo. App. 2006) ("[C]ourts in most other states have also recognized that, absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion."); *id.* at 1216 (finding that any state restriction on a parent's religious child rearing is subject to strict scrutiny); *In re Interest of E.L.M.C.*, 100 P.3d 546, 549, 563–64 (Colo. App. 2004) (overturning trial court order that custodial parent not expose child to "homophobic religious teachings," because of absence of evidence that such teachings endangered the child's health or development); *Harrison v. Tauheed*, 235 P.3d 547, 557 (Kan. Ct. App. 2010) (holding that trial court should not have considered that mother's religious beliefs would cause her to refuse medical care for the child and had motivated her to bring the child along on five-hour, door-to-door proselytizing outings); *Garrett v. Garrett*, 527 N.W.2d 213, 220–21 (Neb. Ct. App. 1995).

29. *Quiner*, 59 Cal. Rptr. at 506–07 & n.1.

30. *Id.* at 517–18.

31. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 (2002) [hereinafter ALI PRINCIPLES]; see also Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609 (1998).

direct child care before the separation,<sup>32</sup> effectively arguing that a parent's decision to end the relationship with the other parent should itself have as little effect on the parent's relationships with the children as possible.

The primary caretaker presumption, by which the parent who devoted the most time to direct care of the child during marriage should receive primary custody after divorce, has long been advocated by scholars and applied by many courts.<sup>33</sup> Some scholars have recommended an "approximation rule," which dictates awarding to primary caretakers not just primary custody but the same proportion of time with the child that they devoted to direct child care during the marriage.<sup>34</sup> This idea found its way into an ALI proposal for custody determinations<sup>35</sup> and has been adopted by one state.<sup>36</sup> Arguments in favor of the primary caretaker presumption or the approximation principle might rest on a child-centered argument that it is more conducive to children's welfare, for one reason or another, than is the currently predominant approach of open-ended best-interests determinations of custody arrangements. But some scholars have rested a defense of the principle on grounds of fairness to the parent who has been the primary caretaker for a child during a marriage, viewing post-dissolution custody almost as compensation or a way to minimize the emotional impact on her of the dissolution. For example, Pamela Laufer-Ukeles asserts that

the primary caretaker presumption recognizes the gender role of primary caretaking by providing a clear and significant benefit to the primary caretaker. . . . [T]he primary caretaker can bargain away this reward in consideration for the caretaking she has performed if she would prefer a more shared custodial arrangement; however, in recognition of the role she has played in the past, she will not have to bargain to continue her nurturing role in her children's lives.<sup>37</sup>

She further asserts that basing child custody decisions on the past actions of the parents shows "a fair regard to the desires and rights of parents."<sup>38</sup> Some judges

32. See, e.g., Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 849–53 (1998); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615 (1992).

33. See Dwyer, *supra* note 26, at 917–24.

34. See Bartlett, *supra* note 32, at 849–53; Scott, *supra* note 32, at 617.

35. See ALI PRINCIPLES, *supra* note 31, § 2.08 (stating that courts should "allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions").

36. See W. VA. CODE § 48-9-206 (2011).

37. Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 47 (2008).

38. *Id.* at 48; see also MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 180–85 (1994); Bartlett, *supra* note 32, at 853; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 501 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16–21 (1987); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 771–73 (1988) [hereinafter Fineman, *Dominant Discourse*]; Laura Sack, *Women and Children First: A Feminist Analysis of the Primary*

have also hinted at a fairness-between-the-adults rationale for applying a primary caretaker presumption.<sup>39</sup>

Of course, a primary caretaker who is getting divorced might be doing so against her wishes because the other parent initiated the divorce. As applied to such an unwilling parent, the primary caretaker preference or approximation principle is not equivalent to making that parent's choice to divorce (more or less) costless (because they made no choice). But the parent-focused, normative arguments scholars have advanced for this principle make no distinction based on who is seeking the divorce, or on what reason an initiator of divorce has for doing so. They thus do implicitly suppose an entitlement to costless choices as to parents who do initiate divorce proceedings or who engage in voluntary conduct—for example, infidelity—that destroys the marital relationship, and who wish to retain the primary role they had prior to divorce. The reality is that wives petition for divorce more often than husbands do,<sup>40</sup> a significant percentage of wives commit adultery,<sup>41</sup> and wives generally provide more direct care of children than husbands do—that is, they are primary caretakers.<sup>42</sup> Thus, some defenders of the primary caretaker presumption or approximation principle for determining post-divorce custody arrangements in effect argue that primary caretakers who choose to divorce their spouses or who act in ways destructive of the marital relationship should not incur any cost for doing so in terms of their relationship with their children.<sup>43</sup> In other words, an implication of their position is that primary caretakers are entitled, for their own sake, to continue enjoying the same relationship with their children after divorce even when the divorce is primarily the result of their own choices and even when ensuring them the same relationship is not what is optimal for the children. Of course, sometimes a primary caretaker's decision to seek divorce is compelled by the other parent's behavior, such as

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*Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 302 (1992) (“The primary caretaker standard promotes gender equality in practice, as well as in theory, insofar as it recognizes that in most American families, the mother takes primary responsibility for her child’s daily needs. . . . The primary caretaker standard appears to alleviate much of the post-divorce suffering of women . . .”).

39. See, e.g., *Burchard v. Garay*, 724 P.2d 486, 492 (Cal. 1986) (“[A]n assumption . . . that a working mother cannot provide such care [is] particularly unfair when, as here, the mother has in fact been the primary caregiver.”); *id.* at 494 (Bird, C.J., concurring) (“Typically, it is the mother who provides most day-to-day care, whether or not she works outside the home. A presumption which ignores this fact is likely to lead to erroneous and unfair decisions.” (citation omitted)).

40. See Margaret F. Brinig & Douglas W. Allen, *These Boots Are Made for Walking: Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 126–29 (2000).

41. See Anita L. Vangelisti & Mandi Gerstenberger, *Communication and Marital Infidelity*, in THE STATE OF AFFAIRS: EXPLORATIONS IN INFIDELITY AND COMMITMENT 53, 53 (Jean Duncombe et al. eds., 2008) (citing research for the proposition that as many as “20% to 50% of American women will have sex with someone other than their spouse while they are married”).

42. See W. Keith Bryant & Cathleen D. Zick, *An Examination of Parent–Child Shared Time*, 58 J. MARRIAGE & FAM. 227, 228 (1996) (“Mothers spend considerably more time in direct physical and nonphysical care of children than fathers.”).

43. See, e.g., Elster, *supra* note 38, at 16–19.

domestic violence or abandonment. Nevertheless, in a substantial percentage of dissolution cases, the dissolution can properly be characterized as the result of the primary caretaker's voluntary choice.

#### *D. New Relationships*

At any time, a parent might form new friendships or intimate relationships. This could adversely impact a child because of the type of person with whom the new relationship is formed; because the new partner engages in inappropriate behavior in front of or with the child; because the relationship interferes with other relationships the parent has that are important to the child (e.g., parents are married to each other and one has an extramarital affair); or because it is troubling to the child that the parent has a particular kind of relationship with anyone at a particular time (e.g., a recently divorced parent prematurely introduces a new partner into the child's life).

This issue arises in child-protection proceedings as well. When a parent chooses to share a household with someone who poses a danger to children (e.g., drug dealers, members of violent gangs, convicted child molesters, and partner abusers), the situation falls under the heading of "failure to protect," a type of child neglect.<sup>44</sup> CPS agencies sometimes remove or threaten to remove a child from parental custody in reaction to reports that a parent's new boyfriend or girlfriend is such a person, though typically only after the association has already resulted in harm to the child.<sup>45</sup> If CPS learns that a mother's boyfriend has molested a child or brings disabling drugs to the mother whenever he visits, CPS will either remove the child from the mother's custody or leave the child in the mother's custody on condition that she stop associating with the boyfriend. There is little dispute about the appropriateness of such intervention, except in one particular context—domestic violence. Some commentators have objected to CPS removal of children from maternal custody because of exposure to domestic violence, arguing that this wrongly punishes mothers for being victims.<sup>46</sup>

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44. See, e.g., *In re Heather A.*, 60 Cal. Rptr. 2d 315, 321 (Cal. Ct. App. 1996).

45. See, e.g., *In re K.L.F.*, 667 So. 2d 130 (Ala. Civ. App. 1995) (affirming custody award to father where mother's boyfriend committed domestic violence against her, including while mother was holding child); *In re Biggs*, 94 Cal. Rptr. 519 (Cal. Ct. App. 1971) (ordering that custody be placed with social services agency where mother's boyfriend regularly battered children); *In re Interest of L.B.*, 530 N.W.2d 465 (Iowa Ct. App. 1995) (giving guardianship and custody to father where mother's boyfriend abused child and mother failed to intervene or seek appropriate medical care); *In re Alena O.*, 633 N.Y.S.2d 127, 128 (N.Y. App. Div. 1995) (holding man liable for failure to protect in termination of parental rights case); *In re Rhonda "KK,"* 620 N.Y.S.2d 541, 542–43 (N.Y. App. Div. 1994) (affirming termination of parental rights due to failure to protect daughters from son's sexual abuse).

46. See, e.g., Justine A. Dunlap, *The "Pitiless Double Abuse" of Battered Mothers*, 11 AM. U. J. GENDER SOC. POL'Y & L. 523, 530–31 (2003); Sharon N. Clarke, Note, *Strictly Liable: Governmental Use of the Parent-Child Relationship as a Basis for Holding Victims Liable for Their Child's Witness to Domestic Violence*, 44 FAM. CT. REV. 149 (2006); Anique Drouin, Comment, *Who Turned Out the Lights?: How Maryland Laws Fail to Protect Victims of Domestic Violence from Third-Party Abuse*, 36 U. BAL. L. REV.



Here too, though, the more common context is a custody dispute after parents have been in a long-term relationship. Jealousy often mixes with genuine concern for the child's emotional and psychological well-being when an ex-partner co-parent brings a new partner into a child's life. Domestic-relations judges are often asked to order a parent not to have the new lover sleep over or even be introduced to the child until a certain period of time has passed, or are asked to take into account in awarding custody that living with one parent would involve this complication.<sup>47</sup> In a smaller number of cases, a parent forms a relationship that causes or risks causing hostile societal reactions, or that the other parent views as immoral, such as a same-sex relationship or an interracial marriage. The other parent argues that this should be an important consideration in the best-interests custody analysis.<sup>48</sup> There have also been instances in which non-custodial fathers have asked for a change of custody on the grounds that the children were witnessing a new partner abuse the custodial mother.<sup>49</sup>

Domestic-relations courts in most states have become reluctant to interfere with parents' relationship choices in awarding and conditioning custody. In part this reflects an increasing disinclination to base decisions on moral judgments—for example, that sex outside marriage or same-sex intimacy is sinful.<sup>50</sup> Following the Supreme Court's decision in *Lawrence v. Texas*,<sup>51</sup> they can

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105, 126–27 (2006); Heidi A. White, Note, *Refusing to Blame the Victim for the Aftermath of Domestic Violence: Nicholson v. Williams Is a Step in the Right Direction*, 41 FAM. CT. REV. 527 (2003). On this topic as well, there are others who argue plausibly that protecting the interests of the custodial parent also serves the best interests of children. See, e.g., Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 22–24 (2001).

47. See, e.g., *Gibson v. Pierce*, 335 S.E.2d 658, 659 (Ga. Ct. App. 1985) (changing custody to father after mother admitted she allowed her fiancé to sleep over while child was present in home); *Senciboy v. Thorpe*, 947 S.W.2d 116, 121 (Mo. Ct. App. 1997) (denying change in custody order where father argued mother demonstrated lack of moral fitness by allowing boyfriends to spend night while child was home and having another child out of wedlock); *Shioji v. Shioji*, 671 P.2d 135, 136–37 (Utah 1983) (denying father's petition for custody modification because mother had her boyfriend staying in home overnight).

48. See, e.g., *Boot v. Boot*, No. 227262, 2001 WL 766115, at \*3 (Mich. Ct. App. Jan. 20, 2001) (dismissing father's allegation that mother's involvement in same-sex relationship reflected poor mental health); *Weigand v. Houghton*, 730 So. 2d 581, 586–87 (Miss. 1999) (finding father morally unfit for custody because he was homosexual and living with male partner); cf. *In re Custody of Temos*, 450 A.2d 111, 116–20 (Pa. Super. Ct. 1982) (reviewing custody award to father based in part on mother's interracial relationship).

49. See, e.g., *In re Marriage of Jeffrey*, 695 N.W.2d 504 (Iowa Ct. App. 2005) (unpublished table decision).

50. See e.g., *Moses v. King*, 637 S.E.2d 97, 98 (Ga. Ct. App. 2006) (holding that mother's cohabitation with lesbian partner was not a change in circumstances justifying reconsideration of custody; father would have to show child was harmed or exposed to inappropriate conduct); *A.O.V. v. J.R.V.*, Nos. 0219-06-4, 0220-06-4, 2007 WL 581871, at \*11 (Va. Ct. App. Feb. 27, 2007) (holding that father's homosexual relationship did not preclude joint custody, but also upholding order prohibiting father's companion from staying overnight when the children were present and prohibiting displays of affection between father and companion).

no longer rest custody decisions on the premise that a parent is a lawbreaker because he or she engages in homosexual conduct or heterosexual fornication.<sup>52</sup> Equal protection concerns have also pushed courts to treat non-traditional relationships as they would treat a heterosexual marriage.<sup>53</sup> As noted in the Introduction, the Supreme Court went so far as to hold that the Equal Protection Clause precludes courts—in awarding custody—from even considering that a parent’s new relationship is with someone of another race, even if that is causing the child to suffer considerably because of societal reactions.<sup>54</sup> Some lower courts have extended that principle to same-sex relationships,<sup>55</sup> and many legal scholars support doing so.<sup>56</sup>

Apart from the interracial relationship context, though, most courts have adopted a “nexus test” that permits judicial consideration of a parent’s intimate relationship in awarding custody if, but only if, the other parent clearly shows that the relationship has already caused significant harm or poses an immediate danger to the child.<sup>57</sup> Likewise, most courts today will not constrain a parent’s activities

51. 539 U.S. 558 (2003) (holding unconstitutional Texas statute criminalizing consensual homosexual acts).

52. See *Martin v. Zihler*, 607 S.E.2d 367 (Va. 2005) (extending *Lawrence* to find Virginia anti-fornication statute unconstitutional); cf. David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 493–94 (stating that *Lawrence* might be so broad so as to undermine society’s ability to express preference for a normative family life, but that a narrower reading of *Lawrence* could afford greater protection to gay and lesbian families while still allowing family courts to express a preference for stable households); Matt Larsen, Note, *Lawrence v. Texas and Family Law: Gay Parents’ Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53 (2004) (describing pre-*Lawrence* cases in which courts held parents’ being in same-sex relationships per se against them in custody and visitation determinations).

53. See Dwyer, *supra* note 26, at 926–27.

54. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); see also *supra* text accompanying note 4.

55. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (“[I]t is impermissible to rely on any real or imagined social stigma attaching to Mother’s status as a lesbian.”); *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000).

56. See, e.g., Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child Custody Decisions*, 22 YALE J.L. & FEMINISM 53, 57 (2010) (criticizing courts for “penalizing LG [lesbian and gay] parents for conduct that would be considered indicative of successful heterosexual relationships” and arguing that “LG parents should have the opportunity to represent themselves honestly to their children,” in part to ensure “parity between LG and heterosexual parents in custody disputes, and combat residual bias against LG parenting”); Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 884–85 (1997); Michael Wald, *Child Custody and Sexual Orientation*, in *DEBATING CHILDREN’S LIVES: CURRENT CONTROVERSIES ON CHILDREN AND ADOLESCENTS* 46, 50 (Mary Ann Mason & Eileen D. Gambrill eds., 1994) (“[P]romoting children’s well-being is not the only interest at stake in custody disputes. There is at least one other principle that is of equal or greater importance. Courts should not legitimate societal prejudices that are based on a person’s race, religion, or sexual orientation.”).

57. Jennifer Naeger, Note, *And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN’S L. REV. 397, 415 (2004). For an exception, see *J.L.S. v.*

with a new partner, such as introducing him to the child, having sleepovers, etc., absent a showing that it is already harming or endangering the child.<sup>58</sup> Harm might be evidenced by a report from the child's therapist or a custody evaluator that the child is extremely upset about the new partner's presence or has witnessed sexual activity.<sup>59</sup> This might, in part, reflect a modern rejection of unsupported fears of "moral harm" to children from exposure to supposedly "sinful" conduct, and a recognition that it is best for children to minimize grounds for custody litigation. On the other hand, it likely reflects at least in part a belief that adults in general are constitutionally entitled to enter into intimate relationships, even outside marriage, without state interference or penalty.<sup>60</sup>

### ***E. Relocation***

One of the most debated and litigated family law issues over the past two decades has been judicial treatment of parent relocation in custody disputes. Although American society is in general highly mobile, with individuals and families relocating at a relatively high rate compared to other societies, relocation rates are especially high following divorce.<sup>61</sup> Often one source of tension in a marriage is precisely that one spouse favors the site of the marital home but the other spouse does not. For example, families sometimes move because one spouse has a job opportunity in a new location, even though the other spouse would otherwise prefer not to move there.<sup>62</sup> After a divorce, the other spouse will feel freer to leave that place, perhaps returning to where his or her parents and siblings live. In addition, often one or both spouses want to create substantial geographical distance between them following dissolution of a long-term relationship, out of

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*D.K.S.*, 943 S.W.2d 766, 775 (Mo. Ct. App. 1997) (upholding restriction on transgendered father's visitation that he not cohabit with any other transsexual, based on psychologists' testimony that father's transformation would be very disturbing to the children, and stating that "[c]onsideration of conduct is not limited to that which has in fact detrimentally affected the children"). Courts are most willing to deny custody based on a new relationship when the relationship would warrant even child-protection intervention, as when the parent's partner has previously abused children. *See, e.g., In re Marriage of B.M.J.*, 575 S.E.2d 272 (W. Va. 2002) (upholding award of custody to father, where mother disregarded danger posed by boyfriend with history of sexual deviancy).

58. *See Dwyer, supra* note 26, at 939–40.

59. *See, e.g., Bemis v. Bemis*, No. KNOFA064104633S, 2011 WL 3335202, at \*1–2 (Conn. Super. Ct. July 12, 2011) (considering testimony of child's therapist).

60. Doctrinal support for this belief dates back at least to *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which the Supreme Court struck down a state law prohibition on the sale of contraceptives to unmarried persons.

61. *See* Scott J. South et al., *Children's Residential Mobility and Neighborhood Environment Following Parental Divorce and Remarriage*, 77 SOC. FORCES 667, 668 (1998) (citing studies showing that "single-parent families move more frequently than two-parent families, and that this difference is especially pronounced immediately following the dissolution of marriage" (citations omitted)).

62. *See, e.g.,* William T. Bielby & Denise D. Bielby, *I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job*, 97 AM. J. SOC. 1241, 1247 (1992).

hostility or heartbreak. And many times, one divorced parent wants to relocate solely because of a new relationship or job opportunity elsewhere.<sup>63</sup>

Relocation per se never triggers child-protective intervention. Someone who relocates to a particular place that is obviously unsuitable for a child, such as a park bench or subway tunnel, might lose custody of his or her children.<sup>64</sup> But moving to a house or apartment anywhere else is never treated as abuse or neglect, no matter how often it occurs and no matter what effect it has on the child.<sup>65</sup> The effect is usually modest even if it is on the whole negative. It is also plausible to think that moving is usually beneficial on the whole for children, if one assumes that parents generally move to better the family's circumstances and that changing environments can foster positive development in children. But the effect can be pronounced and quite negative, if there is repeated disruption of school and peer relationships, disorientation, social isolation, etc.<sup>66</sup> Many offspring of military members have substantial difficulty forming lasting relationships as adults because their childhoods were so socially disjointed.<sup>67</sup> Yet no one would call the CPS hotline to report a couple's plan to relocate yet another time, regardless of how concerned they were for a child's well-being. If they did call, they would be told that what they are reporting does not fit recognized categories of child maltreatment. It would be a truly rare case when a child would be better off separated from both parents rather than incurring the costs of another move. However, such a case is conceivable—for example, with an older child who could remain with extended family members rather than suffer another disruption of schooling, relationships, etc.

Relocation often generates parental petitions for custody modification, however. A parent's plans to relocate could be an issue in an initial custody award, but usually an initial custody arrangement is in place when a couple first separates, and it is usually not until some time has passed that an ex-partner decides to relocate. In the typical case, a court initially gives primary or sole custody to the mother or awards joint custody to the two parents, and then the mother decides to move away from the town that was the site of the marriage—sufficiently far away

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63. See, e.g., *Ex parte Monroe*, 727 So. 2d 104, 104–05 (Ala. 1999) (mother had to move to continue employment with U.S. Army).

64. See, e.g., *E.A. v. Calhoun Cnty. Dep't of Human Res.*, 994 So. 2d 269, 277 (Ala. Civ. App. 2008) (affirming termination of parental rights where mother had been homeless for a year).

65. James G. Dwyer, *No Place for Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and "Adult-Only" Residential Zoning*, 62 ALA. L. REV. 887, 899–914 (2011). For an argument that moving to a neighborhood unfit for children should trigger child-protective intervention, see *id.* at 914–29.

66. See Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 321, 326 (2005).

67. See Thomas J. Berndt & Jennifer J. Thomas, *Effects of Relocation to a New School on Children and Adolescents in Military Families*, PURDUE U. DEPARTMENT PSYCHOL. SCI. (Mar. 2007), <http://www2.psych.purdue.edu/~berndt/SRCD%202007%20effect%20relocation%20poster.pdf> (finding that military children's social acceptance, popularity, and leadership were significantly more negative than those of other students).

that the existing custody arrangement would become impracticable. She might move for a new job, a new relationship, or emotional space from her former partner. The mother wants to retain or to now receive primary custody and to reduce the father's time with the child in light of the relocation. The father might seek modification to give him primary custody, so that the child will stay behind when the mother moves.

Courts in the United States have come to disparate conclusions about how to react to such relocations.<sup>68</sup> Some treat relocation as a sufficient change of circumstances to warrant consideration of a modification and then freely modify a custody arrangement to do what is in the child's best interests, including a change of primary custody so that the child can remain in the same community.<sup>69</sup> Contrary to the suggestion of some scholars,<sup>70</sup> though, such courts never order parents not to move, but rather sometimes deny a parent permission to relocate a child, ordering a change of custody if a current custodian chooses to relocate herself. However, others have held that relocation per se, even though it might factually be a major change in a family's circumstances, should not be a basis for modifying custody, so long as the custodial parent has a legitimate reason for moving, typically citing the custodial parent's constitutional right to travel or general constitutional right to liberty as justification for this approach.<sup>71</sup> For example, in *Dick v. Thompson*, the

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68. See Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1755–57 (2007).

69. See, e.g., *Daugherty v. Daugherty*, 993 So. 2d 8, 14 (Ala. Civ. App. 2008) (finding that mother must overcome presumption that it was not in child's best interest to relocate); *In re Marriage of LaMusga*, 88 P.3d 81, 90–91 (Cal. 2004) (stating best-interests test but placing burden of proof on non-custodial parent); *Rowland v. Kingman*, 629 A.2d 613, 615–17 (Me. 1993) (holding that mother's desire to move from Maine to Oregon constituted significant change in circumstances and awarding primary custody of children to father); *LaChapelle v. Mitten*, 607 N.W.2d 151, 162–63 (Minn. Ct. App. 2000); *In re Marriage of Guffin*, 232 P.3d 888, 895–96 (Mont. 2010).

70. See, e.g., Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 37–38 (2002) (“[S]tatutes place some limits or restrictions on the ability of a custodial parent to relocate out of the state or to a considerable geographical distance from the noncustodial parent. Even when a state has no statute or rule expressly dealing with relocation, the inherent *parens patriae* power of the court can embrace jurisdiction to resolve parental disputes over relocation, and courts sometimes use that power to prevent a custodial parent from relocating.”); Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 2–3 (1995–96) (“Many women, as they contemplate interstate relocation, find their former husbands seek to prevent such a move. Moreover, the former husbands are frequently successful . . .”); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303, 320 (2006) (“A court may even prevent a custodial parent from relocating out of state to allow the child’s relationship with both parents to continue after the divorce.”).

71. See, e.g., *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 657 (Ark. 2003) (holding that “relocation of a primary custodian and his or her children alone is not a material change in circumstance,” and that “[t]he custodial parent no longer has the responsibility to prove a real advantage to herself or himself and to the children in relocating”); *Giannaris v. Giannaris*, 960 So. 2d 462, 468 (Miss. 2007) (“This Court has repeatedly held that the mere moving of the custodial parent does not constitute a material

Alaska Supreme Court held that if a custodial parent has a legitimate reason for moving, “then the court must not hold the relocation against the parent who is intending to move.”<sup>72</sup> Some family law scholars support this approach, citing the constitutionally protected liberty interests of custodial parents, and advocating that the liberty of custodial parents be decisive or at least balanced against the interests of the child.<sup>73</sup> For example, the ALI principles stipulate that a custodial parent should be permitted to move with a child so long as the relocation “is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose,” even if the move is not in the child’s best interests.<sup>74</sup> In between are courts that attempt a case-by-case balancing of parents’ rights and interests against the interests of children. These courts treat relocation as a basis for reconsidering custody and decide whether to permit a custodial parent to move with a child based both on what is best for the child and on the interests of the parents, including the parents’ interest in spending time with a child and in pursuing self-determining objectives, such as a new relationship or job.<sup>75</sup> In some states, a special statutory rule for relocation dictates such a balancing.<sup>76</sup> Many states prioritize the custodial parent’s right to travel and apply a presumption in favor of relocation.<sup>77</sup> Many scholars favor this balancing approach, with some requiring a strong showing of harm to the child from relocating for a court to block it.<sup>78</sup> Arthur B. LaFrance, for

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change in circumstances for child custody modification purposes.”); *Jaramillo v. Jaramillo*, 823 P.2d 299, 305–06 (N.M. 1991); *Watt v. Watt*, 971 P.2d 608, 615–16 (Wyo. 1999) (holding that parents’ constitutional right to travel precludes treating relocation by itself as the change-in-circumstances predicate for a custody modification hearing); see also Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL’Y & L. 163, 174–76 (2010).

72. 74 P.3d 886, 888 (Alaska 2003).

73. See, e.g., Warren D. Camp, *Child Custody Disputes in Families of Muslim Tradition*, 49 FAM. CT. REV. 582, 585 (2011); LaFrance, *supra* note 70, at 12.

74. See ALI PRINCIPLES, *supra* note 31, § 2.17 cmt. d (“The court is not permitted to prevent a relocation simply because it determines that such a relocation would not, on balance, be best for the child.”).

75. See, e.g., *In re Marriage of Ciesluk*, 113 P.3d 135, 147 (Colo. 2005) (holding that children’s well-being must be balanced against “the constitutional interests of the parents,” including the right to travel and the right to maintain a relationship); *Baxendale v. Raich*, 878 N.E.2d 1252, 1255–57, 1259–60 (Ind. 2008) (considering mother’s reasons for moving and father’s interest in remaining involved in child’s life, as well as impact of relocation on child’s welfare).

76. See, e.g., WASH. REV. CODE § 26.09.520 (2011) (“There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person . . .” (emphasis added)).

77. See, e.g., S.D. CODIFIED LAWS § 25-5-13 (2011); TENN. CODE ANN. § 36-6-108(d) (2011); WIS. STAT. § 767.481(3) (2011); *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 657 (Ark. 2003); see also David S. Kowalski, *Rush to Relocate: Are Presumptions in Favor of Relocating Parents Really in the Children’s Best Interests?*, 22 AM. J. FAM. L. 28, 29–30 (2008) (citing court decisions applying a presumption).

78. See Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 255–56, 268, 272 (1996); LaFrance, *supra* note 70, at 12.

example, argues: "Because relocation cases affect important constitutional rights [of the custodial parent] . . . custodial mothers, once custody is decided, should be free to move unless doing so endangers the child."<sup>79</sup>

A *non*-custodial parent's relocation can also generate a modification proceeding, because it might make the existing visitation arrangement more difficult or entirely impracticable to maintain. Either parent might then ask a court to rework the non-custodial parent's visitation schedule. Significantly, in this context, courts and scholars generally manifest no concern about "penalizing" a parent for exercising his right to relocate and pursue new opportunities. Courts decide whether and how to modify a visitation schedule based on what is best for the child (and sometimes also on what is most convenient for the custodial parent). They do not insist that a non-custodial parent have as much time with the child after the move as he did before and otherwise not experience any loss in terms of his relationship with a child.<sup>80</sup> They do not cite non-custodial parents' constitutional rights as checks on a best-interests-based modification. With non-custodial parents who relocate, everyone appears comfortable saying, in effect, "You chose to move, so you should accept the consequences."<sup>81</sup>

#### ***F. Job Commitments***

Another common change for parents following divorce is that one or both parents experience a change in employment. Sometimes one spouse's decision to take a new job precipitates the divorce, because the job is in a new location or will entail a much greater time commitment. More commonly, one spouse has been a homemaker, having left a career or scaled back to a part-time job in order to do so, but after divorce begins to work full-time to support or fulfill herself. In any scenario where a parent's job situation changes, the change could mean that the parent is not as available to the child. The other parent might then argue that he or she should receive primary custody or increased visitation because the other parent is less able to spend time with and otherwise care for the child.

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79. LaFrance, *supra* note 70, at 12; see also Chris Ford, *Untying the Relocation Knot: Recent Developments and a Model for Change*, 7 COLUM. J. GENDER & L. 1, 53 (1997) (endorsing a balancing of child's welfare and the rights of both parents).

80. See Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 246-54 (1999).

81. One seeming exception is overseas deployment of a military parent; legislatures and courts have been highly solicitous of such parents' concern that their complete absence for a period of several months to one or more years will result in a diminished role in their children's lives even after returning to the United States. Some states have adopted a custody rule requiring that a military parent enjoy the same share of parenting time after return that they had before deployment, even absent a finding that this would be in the best interests of the child. See, e.g., KAN. STAT. ANN. § 60-1630 (2011). Other states provide more modestly that any custody order entered in contemplation of deployment shall be modifiable upon return of the military parent. See, e.g., DEL. CODE ANN. tit. 13, § 727(d) (2011). In this situation, it is not a voluntary choice to relocate that the parent wishes to be costless with respect to the parent-child relationship, but rather the choice to enter and remain in the military.

With respect to employment, as with relocation, courts have had mixed reactions. Some take the position that a parent always has priority over a nonparent caretaker. Thus, if vesting or continuing custody in a parent with expanded job responsibilities means the child would spend a lot of time with a babysitter even when the other parent is available, then the court will shift the parenting schedule toward increased time with the other parent.<sup>82</sup> Other courts and some feminist scholars have insisted that a mother should not be “punished” for pursuing a career and should not lose any custodial status or time.<sup>83</sup> For example, in *Wellman v. Dutch*, a New York appellate court reversed an award of custody to a father who had a homemaker wife, even though the mother had the child in day care 9 to 13 hours per day while in her custody.<sup>84</sup> The court stated that the award would have “the impermissible effect of depriving . . . an unmarried working mother[] of her equal right to custody.”<sup>85</sup> What many courts and scholars have failed to recognize is that the primary caretaker factor, which plays a large role in custody decisions and which family law scholars almost uniformly embrace,<sup>86</sup> effectively “penalizes” primary breadwinners (typically fathers) for having devoted time to employment, even though acquiring income is an essential element of providing for children.

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These are some of the more common kinds of self-determining choices parents make that potentially impact their children’s welfare and that become the subject of child-protection interventions or custody disputes. As shown in this Part, judicial reaction to these conflicts of interest is not uniform; sometimes judges concern themselves only with the child’s welfare, but often judges ascribe to parents moral or constitutional rights that constrain decisionmaking. As discussed above and in the next Part, legal scholars’ positions on these conflicts are also mixed. Some at least ostensibly take the position that a child’s welfare should always trump parents’ desires, whereas others argue that parents should not have to choose between preserving their custodial relationship with a child and exercising their constitutionally protected freedoms.<sup>87</sup>

It is not difficult to imagine other possible situations of conflict between parents’ choices about their own lives or activities and their children’s best interests. Some parents engage in very risky behavior (e.g., extreme sports, unprotected sex, reckless driving, drug use) that could cause a child to experience

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82. See, e.g., *Ireland v. Smith*, 547 N.W.2d 686, 691 (Mich. 1996) (holding “child-care arrangements [to be] a proper consideration” in custody disputes and requiring a case-by-case analysis of such arrangements based on the child’s best interests).

83. See *Laufer-Ukeles*, *supra* note 37, at 20 (lamenting that “the best interest analysis has resulted in instances of bias against mothers who work outside the home”); Debra L. Swank, Comment, *Day Care and Parental Employment: What Weight Should They Be Given in Child Custody Disputes?*, 41 VILL. L. REV. 909, 936 n.151 (1996) (summarizing cases).

84. 604 N.Y.S.2d 381, 383 (N.Y. App. Div. 1993).

85. *Id.* at 383.

86. See *Dwyer*, *supra* note 26, at 919–20; *supra* notes 33–43 and accompanying text.

87. See *infra* Part III.B.



the trauma of losing a parent.<sup>88</sup> Some parents regularly embarrass their children by dressing strangely (e.g., bohemian, nerdy, funny hats), acting childishly in public (e.g., yelling at umpires, getting drunk and starting loud arguments), or being extremely pious. Some choose to give all their attention, even when they are with a child, to their work or hobbies, to television or the Internet, and so forth. All of these situations present the legal system with the same basic question: Should parents incur any cost in terms of how the law structures and supports their relationship with the child because they make choices about their own lives and pursuits that negatively affect some interests of the child or make them less desirable as a custodian of the child?

There can be reasonable disagreement about whether some particular choices do in fact adversely affect a child. My aim here is not to settle any such disagreement, and I do not take sides in any of the complex and often highly politicized debates over the relevant empirical research. My focus is rather the theoretical question whether parents are entitled to be insulated from consequences for their exercise of basic liberties when the state makes decisions about their relationships with their children, *if* their choices do in fact adversely impact the children, and relatedly whether state actors must be prepared to sacrifice children's welfare to some degree for the sake of protecting parents' self-determining freedom. A similar question arises when adults apply to adopt a child, because states consider a great number of factors in assessing the qualifications of such adults, including some that reflect self-determining choices of parents, such as lifestyle choices, smoking, and religious involvement.<sup>89</sup> State decisionmaking in the adoption context therefore presents a useful point of comparison.

### III. ARGUMENTS FOR MAKING PARENTS' SELF-DETERMINING CHOICES COSTLESS

This Part sets forth arguments scholars have made against "penalizing" parents for self-determining choices that fall within the ambit of constitutionally protected liberties or progressive political aims such as gender and race equality. Again, the penalty objected to could be making a parent's speech or conduct a *per se* bar to custody (with the state or another parent instead assuming full custody); making the effects of the speech or conduct one factor for courts to consider in deciding custody; or imposing a restriction on parental speech or conduct during custodial time or visits.

In any context, one might simply deny that children are adversely affected by particular parental speech or conduct. Or one might argue that any adverse effect is so small that it is outweighed by children's interest in the state not disrupting family life or undermining parents. A child-centered argument of either sort is important and often convincing. Scholarship that advocates replacing poor state decisionmaking with good child-centered decisionmaking by demonstrating what we do and do not know about the child-welfare effects of different parental

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88. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.04(A) (2011) (creating a rebuttable presumption against an award of custody to a parent who has been convicted of a drug offense within the prior year).

89. See Dwyer, *supra* note 26, at 886–95.

choices and of state interference with parenting is quite valuable. I am not responding to that scholarship. Nor am I concerned here with reasoning by state decision-makers that rests on faulty assumptions about what is best for children. Rather, this Article critiques reasoning based on interests and supposed rights of parents. It responds to the position that, because of parents' own desires and interests, state decision-makers should not restrict or reduce the custody of parents on account of parents' self-determining choices even if those choices adversely impact children.

#### *A. Parents Have Interests at Stake*

Some scholars assert simply that parents do have interests of their own at stake in child custody decisionmaking, as if that is sufficient to establish that parents' interests should constrain or influence state decisionmaking.<sup>90</sup> This minor premise, that parents have interests affected by custody decisions, is indisputable. Parents have an interest in having custody of their children, and they have an interest in being free to engage in self-determining speech and conduct. Family life is very important to most people, especially interacting with and caring for one's offspring. Freedom of expression in speech and action is central to personal development and fulfillment.

In many instances, of course, the personal interests parents have at stake might be minor or trivial, or a restriction might impact them to a minor or trivial degree. For example, a parent's interest in being free to watch slasher films while children are present rather than being restricted to watching slasher films when children are not present seems a trivial interest. Moreover, for some parents, the welfare difference between having primary or joint physical custody of a child versus having substantial visitation as a non-custodial parent might be small. However, the analysis to follow will take for granted that, for many parents, not receiving primary or joint custody would cause them much suffering and foregoing some self-determining speech or conduct would be a great sacrifice. This is often plainly true. For example, a mother who has been very much immersed in parenting for several years and who defines her identity principally in terms of her motherhood could be devastated by a court order making her a non-custodial parent, perhaps because of her cohabitation with a new partner. The alternative of foregoing that cohabitation in order to secure primary custody might be a great

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90. See, e.g., Chambers, *supra* note 38, at 499–503; Elster, *supra* note 38, at 16–18; Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. COLO. L. REV. 965, 980–81 (2005); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 390 (2006). Chambers purports to make a “case” for considering parents' interests, but ultimately the only thing resembling a rationale that he offers is “a desire to inflict the least total emotional harm on all the members of a family.” Chambers, *supra* note 38, at 502. This rationale simply presupposes, rather than proving, that the interests of parents should also factor into a court's consequentialist analysis of a case. Chambers offers no reason for preferring his desire over a desire to do the best thing for the child regardless of the effect on the parents, nor over a desire to maximize utility over a larger group of people such as the entire extended family.

personal sacrifice for her. In some situations, the interests parents have at stake will in fact be weightier than the interests children have at stake.

However, even taking for granted that parents might have great interests at stake in a particular instance, and possibly interests greater than those the children have at stake, it does not necessarily follow that the law should aim to protect those interests, that courts should ignore parents' self-determining choices when deciding custody, or that courts should balance parents' interests on a case-by-case basis. The mere fact that a person has interests that a court decision could affect is clearly not sufficient to make those interests relevant to the decision, let alone decisive. Other persons in a child's life might also have interests at stake in a custody decision, yet everyone accepts that those interests are irrelevant. For example, a custody decision often impacts a child's friends, but the friends' potential happiness or sadness will receive no mention in court proceedings. Even grandparents' interests in which of a child's parents becomes primary custodian are legally irrelevant, even though in some cases grandparents suffer more acutely than the parent from loss of time with the child. There must be something more than the mere existence of interests, therefore, to make them legally relevant. An argument beyond the bald assertion that parents have interests at stake is necessary, and unless the interests of all persons are to be let in, the argument must justify balancing children's interests against those of parents but not against those of other persons who might be affected. What is lacking is an argument that parents' interests are directly morally relevant to state decisionmaking about children's lives.

#### ***B. Parents Have Constitutional Rights Protecting Self-Determination***

Some scholars similarly assume that parents' constitutional rights of self-determination must play a role simply because they exist, so that in any of the contexts mentioned above in which the parents' behavior or speech comes within the scope of constitutionally protected self-determining liberties, courts must apply the usual constitutional test for restricting those liberties.<sup>91</sup> (I address separately in the next Subsection the right to have a parent-child relationship.) Parents are persons, persons have constitutional rights, and courts are state actors who must, one might suppose, respect everyone's constitutional rights in every context in which the state constrains persons' liberty. Scholars thus launch into an analysis of whether state decision-makers have sufficient justification in the child custody context for restricting the liberty of persons who happen to be parents by applying the same test they would apply in other contexts, without first asking whether adults' constitutional rights of self-determination are in fact relevant in this particular context.<sup>92</sup>

As with interests, however, it is not sufficient to point out that a court's decision regarding children's custody will impact a person's exercise of rights. Other adults who are also bearers of rights might have their freedom effectively

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91. See, e.g., *Camp*, *supra* note 73, at 585 (constitutional right to travel); David V. Chipman & Mindy M. Rush, *The Necessity of "Right to Travel" Analysis in Custodial Parent Relocation Cases*, 10 WYO. L. REV. 267, 270-71 (2010) (same).

92. See, e.g., Greenawalt, *supra* note 90, at 977-80.

restricted by a court order or might suffer from a court order that is in part a reaction to their exercise of protected liberties. It is not uncommon for a court to order a parent in a custody dispute to ensure that his or her family members—for example, a child’s stepparent, grandparents, or aunts and uncles—also do not say or do certain things around a child, such as denigrating the other parent.<sup>93</sup> Judges sometimes instruct parents that they are not to engage in any intimate conduct with a new partner in front of children.<sup>94</sup> Such an instruction effectively limits the freedom of the partner as well as the parent. A judge might condition a mother’s custody on her boyfriend not watching movies inappropriate for children when the children are present, which impacts the boyfriend’s exercise of his free speech right, or on her boyfriend’s not spending the night when the child is there. In *In re Marriage of Seffren*, an Illinois appellate court indicated that a trial court determining custody could, if it found sufficient evidence of endangerment, impose an even more severe restriction on a paramour—namely, one prohibiting a mother’s boyfriend from being within 100 yards of her children and even from being in her house when the children were not present.<sup>95</sup> Yet no scholar or court has suggested that the constitutional rights of persons other than parents might be a bar to such a court order, such that a mother’s boyfriend could appeal a custody decision or order against him as an infringement of his constitutional right of free speech or intimate association.

Likewise, even though denying a custodial parent’s request to relocate with a child in order to live with a new partner could effectively end the relationship between the parent and the new partner, no one would even mention the new partner’s constitutional right to freedom of intimate association. In such a case, grandparents might also plan to relocate, along with mother and child, yet no one would assert the grandparents’ constitutional right to travel as a relevant

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93. See, e.g., *DeFranco v. DeFranco*, No. DBDFA084009275S, 2010 WL 1612444, at \*5 (Conn. Super. Ct. Mar. 24, 2010) (providing that neither parent permit “any third person (including the child’s grandparents, aunts, uncles and cousins)” to “criticize or denigrate the other parent”); *Sichau v. Sichau*, No. FA94-0123180, 1995 WL 80114, at \*1 (Conn. Super. Ct. Feb. 16, 1995) (ordering that child’s mother and maternal grandfather “never again engage in negative words about [the child’s] father or his family”); *Armistead v. Sewell*, 75 Pa. D. & C.4th 241, 251 (Pa. Ct. Com. Pl. 2005) (providing that neither parent permit a third party to denigrate the other parent in the child’s presence).

94. See, e.g., *A.O.V. v. J.R.V.*, Nos. 0219-06-4, 0220-06-4, 2007 WL 581871, at \*6 (Va. Ct. App. Feb. 27, 2007) (upholding order prohibiting father’s companion from staying overnight when the children were present and prohibiting displays of affection between father and companion).

95. 852 N.E.2d 302 (Ill. App. Ct. 2006). The trial court had asked, rhetorically, “[w]hat could he possibly say in regard to his ability to have contact with somebody else’s children[?]” *Id.* at 308 (alterations in original). The appellate court remanded the case on procedural grounds, however, to give the boyfriend an opportunity to present opposing evidence. *Id.* at 311–12; see also *Kelley v. Cockerham*, Nos. 1 CA-CV 09-0093, 1 CA-CV 09-0333, 2010 WL 3211906, at \*4 (Ariz. Ct. App. Aug. 12, 2010) (“If the court reasonably found that it was in the children’s best interests not to have contact with Mr. Tasa-Bennett, the court could have ordered Mother to avoid affirmative contact with Mr. Tasa-Bennett during her parenting time.”); *Kyle v. Leeth*, 727 So. 2d 497, 502 (La. Ct. App. 1998) (affirming family court’s order barring mother’s new boyfriend from being “anywhere near, or in the vicinity of,” minor child).

consideration. Accepted practice and prevailing assumptions thus suggest that it is inadequate, in order to inject constitutional liberties of parents into the child custody analysis, simply to assert that parents are persons who possess constitutional rights. We accept that the constitutional rights of some people are simply not relevant to court decisions about child custody even when the decisions will effectively constrain their freedom. What argument is there for treating parents' constitutional liberties as relevant but not those of other persons?

One might point to societal values underlying the constitutional rights we confer on individuals in a liberal society, values that might be served in the custody context as in other contexts by siding in favor of individual freedom. The First Amendment, for example, is thought to rest in part on the utilitarian justification that a free marketplace of ideas fosters societal progress.<sup>96</sup> The United States is generally more protective of free speech and willing to tolerate more adverse effects of speech than are other Western nations,<sup>97</sup> but let us suppose that the United States has struck the optimal balance. We might further suppose that we simply do not need to ascribe rights to nonparents in custody decisions in order to serve these societal interests; it is enough that someone can assert a First Amendment objection to custody decisions that restrict self-determining freedoms, and parents will usually be motivated to do this.

As with individual interests and rights, though, the mere existence of societal interests does not mean they are morally relevant to any particular dispute over individual freedom. Child custody disputes might well be different from other kinds of disputes, because they entail the state's making a decision about an individual's family life rather than a decision about broad social regulations. In fact, it seems presumptively morally illicit to justify a parental entitlement to liberty, when that liberty entails sacrificing the perceived well-being of children, by appeal to broad societal interests. This amounts to treating children instrumentally, as means to serving collective ends, in a way that seems more objectionable than balancing competing individual moral entitlements. To be sure, the law routinely tolerates incidental costs for individuals arising from state efforts to serve broad societal purposes without offending anyone's personhood. We all accept this as part of the social contract because it is inevitable in any social organization. But making decisions about fundamental aspects of a vulnerable person's life on the basis of such collective aims is quite different and, as I argue in Part IV below, entails disrespect for the personhood of an individual. We adults do not accept such control over our intimate lives for the sake of broad societal aims; this we do not regard as part of our social contract. The Supreme Court's privacy decisions, from *Griswold v. Connecticut*<sup>98</sup> to *Lawrence v. Texas*,<sup>99</sup> reflect this position.

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96. See TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 13 (2009); Volokh, *supra* note 6, at 680–82.

97. See Adam Liptak, *Freedom to Offend Outside U.S., Hate Speech Can Be Costly*, N.Y. TIMES, June 12, 2008, at A1; see also *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (upholding free speech right of protestors at funerals).

98. 381 U.S. 479 (1965) (invalidating prohibition on use of contraceptives as applied to married persons).

Moreover, even if the mere existence of parental or societal interests underlying constitutional rights were sufficient to make those rights relevant to custody decisionmaking, the rights might not, under established individual rights doctrine, support the protection of parental choices that many scholars advocate. Importantly, within the realm of First Amendment jurisprudence, and of individual rights jurisprudence more generally, there is a presupposition outside the child-rearing context that other persons affected by an individual's exercise of rights are legally and practically free to avoid the speech or other self-determining actions.<sup>100</sup> This is reflected, for example, in the exception courts carve out from speech protection for cases involving "captive audiences."<sup>101</sup> Yet children are neither legally nor practically free to avoid parents' speech or actions; they are a captive audience in the extreme when in parental custody. Thus, even under existing doctrine, parents might have no basis for asserting a constitutional objection to court-imposed limitations on their speech or conduct.

The concern with captive audiences principally stems from respect for the captives' own autonomy interests, and that applies to children as well—to their present or future autonomy interests, depending on their stage of development. The individual interests protected by the First Amendment support a right to choose which speakers to listen to and to avoid speech that is noxious or overbearing. Thus, when Eugene Volokh defends parental despotism over children's minds, as the unavoidable cost of ensuring that public debate remains free from stifling government control,<sup>102</sup> he overlooks the long-term threat to the autonomy of today's children from parental despotism. He implicitly endorses protection of parents' autonomy at the expense of children's future autonomy and offers no explanation of how this will on the whole, and in the long run, have a net positive effect on the individual or collective interests that underlie First Amendment rights.

Captive-audience doctrine also reflects a respect for individuals' privacy and so applies with greatest force at the compelled listener's home; "courts and commentators uniformly agree that people should not be captive to unwanted speech in the privacy of their own home."<sup>103</sup> Of course, this privacy interest also counsels in favor of greater protection for speakers in their own homes, but a balancing of competing privacy interests in the home would tip in favor of persons who are less able to leave the home, to speak or to avoid speech. Children subjected to harmful parental speech have no recourse. Likewise, elderly, invalid parents in the custody of their offspring would have no recourse against offensive speech by their offspring, yet even Volokh might hesitate to assert that the offspring have a First Amendment right against any state-imposed restrictions on what they say to their parents.

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99. 539 U.S. 558 (2003) (invalidating criminal prohibition of sodomy).

100. See *Snyder*, 131 S. Ct. at 1220 ("[T]he burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975))).

101. See Volokh, *supra* note 6, at 676–77.

102. *Id.* at 696–97.

103. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 944 (2009).

Further, the doctrinal exception for captive audiences could rest not only on concern for the autonomy and privacy of listeners, but also on a supposition about societal interests—namely, that private coercion also skews the development of beliefs in the marketplace of ideas.<sup>104</sup> Both government control and private action can make a marketplace less free, and in the commercial world we accept that government intervention is appropriate to protect vulnerable parties from oppressive private behavior. The same is likely true with the marketplace of ideas; private monopoly power over a receiver of ideas might be as much a threat to market freedom as is excessive government regulation.

Volokh briefly responds to the proposition that parents' First Amendment rights should be viewed as inapposite or inapplicable in the child custody context.<sup>105</sup> He concludes to the contrary, for two reasons. First, he expresses distrust of government decisions about which speech is permissible; state actors might use the custody context to effect a "coercive homogenization of public opinion," or they might, even when aiming only to serve the child, simply make mistakes.<sup>106</sup> Second, Volokh notes that "in any event First Amendment law does privilege the societal interest in protecting the marketplace of ideas over the government's power to protect various private interests."<sup>107</sup> Of course, neither point serves to differentiate parents' self-expression from that of other persons in a child's world, but perhaps Volokh would also object to restrictions concerning extended family members and parents' friends and lovers.

Volokh is certainly correct that judges make mistakes about what is best for children. He is also correct that many judges are inclined to impose their ideology on families that come before them. This is especially evident in cases involving parents' new relationships post-divorce. Volokh is wrong, however, to imply that parents' constitutional rights are the only or best available means for responding to these concerns. Although Volokh is principally concerned with the societal effects of government speech control, the defects in decisionmaking he points to are ones likely to harm children. Any state interference in parenting could impose a cost on children simply by disturbing family harmony and undermining parents' emotional well-being. Moreover, poorly supported or ideologically driven decisions are more likely to be substantively wrong for a child. A legislature that recognizes the potential harm to children from these defects could respond for the sake of children's well-being, without needing to appeal to parents' constitutional rights, by codifying (1) clear direction that only the verifiable welfare interests of the child are relevant and (2) a requirement that the benefit to children from restricting parental liberty be sufficient to outweigh the costs *to children* of doing so. In this way, parents' interests might properly sometimes receive *indirect*

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104. *Cf. id.* at 980 (asserting that government-compelled listening distorts the marketplace of ideas).

105. *See* Volokh, *supra* note 6, at 694–97.

106. *Id.* at 696–97.

107. *Id.* at 697.

protection, not because parents themselves are entitled to such protection but because it is best for children.<sup>108</sup>

If the legislature does not constrain judges in this way, children's own constitutional rights could serve as a basis for objecting to court orders that harm them by unjustifiably disrupting or diminishing their relationship with a parent—specifically, their right of intimate association.<sup>109</sup> As discussed further in Part IV below, when court custody decisions are contrary to the interests of both child and parent, a reciprocal associational right of the parent might properly be recognized.<sup>110</sup> But in that case the parental right is redundant; the child's right can do the necessary work, and it is more likely to keep judicial attention focused on the child's well-being. And this justification for recognizing a right of the parent does not extend to cases in which the infringing court order *is* in the child's best interest, which are the cases that proponents of parental entitlement are concerned about.

Volokh's second justification for making parents' constitutional rights part of the custody decisionmaking equation—that is, that First Amendment law reflects a choice to prioritize the marketplace of ideas over individual interests—simply begs the question whether (in the custody context) the First Amendment should even apply.<sup>111</sup> As I explain below, the custody context is categorically different from the types of contexts Volokh cites as examples of when the law privileges “the societal interest in protecting the marketplace of ideas over the government's power to protect various private interests.”<sup>112</sup> The contexts he cites involve the state acting or being asked to act in a police power role to protect autonomous adults from public speech that wounds them.<sup>113</sup> Court decisions concluding that speakers' First Amendment rights preclude such state action<sup>114</sup> are justifiable in large part on the grounds that autonomous adults are less vulnerable than children and have the wherewithal to avoid or respond to the speech. Volokh does not squarely address the question whether there is something categorically different about state decisionmaking regarding children's private lives. He also offers no basis for allowing parents' First Amendment rights, but not the rights of other adults, to override children's well-being. And he fails to address the point made above that private coercion, by parents, also reduces the freeness of the marketplace of ideas.

### ***C. Parents Have Constitutional Rights Protecting Their Role as Parents***

What might make parents' own interests relevant to custody decisionmaking is the constitutional doctrine protecting parents' relationship

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108. I offer reasons below, however, against inviting inquiry into parents' interests even in this indirect way. *See infra* Part IV.D.1.

109. For an example of a state court decision recognizing this right of children, see *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 524 (Cal. Ct. App. 1996).

110. *See infra* Part IV.

111. Volokh, *supra* note 6, at 697.

112. *Id.*

113. *See id.* at 697 n.270.

114. *See id.*



interest vis-à-vis their children, rather than First Amendment law. The Supreme Court has issued a handful of decisions recognizing and delineating a Fourteenth Amendment right of biological parents (in some circumstances) to become legal parents.<sup>115</sup> It has also issued a few decisions establishing procedural protections for parents against termination of their legal relationship with a child, and these decisions assume that parents' interests in maintaining their legal relationship with a child are constitutionally protected.<sup>116</sup>

Even supposing this doctrine to be morally sound,<sup>117</sup> it is legally insufficient to establish that courts must balance children's interests against parents' interests or rights in deciding whether to restrict or reduce a parent's custody of a child. The doctrine speaks only to the conferral and continuation of a legal relationship and says nothing about what custodial time or what freedom during custodial time parents must have in that relationship. Further, in none of these cases did the Court hold that the state may or must sacrifice the welfare of children to some degree in order to serve the interests of parents. In fact, in some of these decisions, the Court insisted that parents' and children's interests were unified in the particular circumstances addressed.<sup>118</sup> These decisions therefore do not sanction, let alone prescribe, a balancing of interests. They also do not proscribe a balancing, but some justification for doing so must be found other than that parents have interests at stake and that there is some constitutional doctrine protecting parents against complete denial of a relationship with a child.

#### **D. Fairness**

Scholars have also advanced various fairness arguments in favor of protecting parents' freedom, typically in the divorce context. The fairness at issue is always between adults rather than between parent and child.

##### *1. Between Parents in Intact Families and Parents After Dissolution*

One argument, specific to the divorce context, demands equal treatment of parents whose relationship has ended relative to parents whose relationship with each other is intact. Some scholars and judges have suggested that the state should do nothing in the context of a custody dispute between legal parents, beyond what it absolutely must do (i.e., establish some custody schedule), that it would not do

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115. See James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 813–18 (2009).

116. See *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982) (holding that courts must apply at least a “clear and convincing” evidentiary standard to allegations of parental unfitness in termination of parental rights cases); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981) (holding that state courts must sometimes provide an attorney for parents in termination proceedings).

117. For an argument that it is not, see Dwyer, *supra* note 115, at 824–27.

118. See, e.g., *Santosky*, 455 U.S. at 760 (“[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”); *Stanley v. Illinois*, 405 U.S. 645, 652–53 (1972) (asserting that parents and children have same interest against state’s removing child from custody of a fit parent).

with an intact family.<sup>119</sup> The argument is essentially that if a parent's speech or conduct would not trigger child-protective intervention in an intact family, then it should not influence a custody decision after parents dissolve their relationship. In the relocation context, for example, some have pointed out that parents in intact families are legally permitted to relocate even if this is not best for the child.<sup>120</sup> In the context of speech and religious exercise, Volokh maintains that because the First Amendment bars state intervention into intact families to restrict parents' speech, it should also bar the state from using a custody dispute as an occasion to restrict parents' speech.<sup>121</sup>

This type of argument fails for several reasons. First, even if it were true that parents in intact families are currently constitutionally insulated from restrictions on their self-determining speech and conduct, a moral argument to the effect that divorced parents should receive the same treatment would not have much purchase if the protection of parents in intact families is morally wrong. A premise that the two groups should receive equal treatment could support a conclusion that the state should restrict parents in intact families more. In fact, there is a strong case for believing that deeming parents in intact families constitutionally entitled to harm their children is immoral.<sup>122</sup>

Second, it is incorrect to say that the state does not or constitutionally may not intervene in intact families to restrict parental self-determination on child-welfare grounds. Volokh is mistaken in supposing that there is an established First Amendment bar to child-protective intervention in intact families to stop self-determining conduct or expression by parents that harms children.<sup>123</sup> A significant minority of all child-protection interventions are principally for emotional abuse—that is, a reaction to parents' speech.<sup>124</sup> A First Amendment objection by parents

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119. See, e.g., *Quiner v. Quiner*, 59 Cal. Rptr. 503, 514 (Cal. Ct. App. 1967) (“We assume that if the parties had remained married, and the father refused to observe the principle of separation, or if each had continued in the identical faith and accepted as part of that faith the principle of separation as zealously espoused by appellant alone, there could be no doubt that intervention by the state in John Edward’s upbringing would not receive hospitable consideration in any court.”); Volokh, *supra* note 6, at 673–74, 685–87.

120. See, e.g., Brief of Herma Hill Kay et al. as Amici Curiae Supporting Affirmance of the Court of Appeal’s Decision at 47, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (No. S107355).

121. Volokh, *supra* note 6, at 683–99. The only exception Volokh would permit is a prohibition on non-ideologically-driven disparagement of the other parent, because that sort of speech has little First Amendment value. See *id.* at 716.

122. See Dwyer, *supra* note 8, at 1405–23.

123. Volokh repeatedly asserts that there is. See Volokh, *supra* note 6, at 645, 683, 685, 687, 689–90, 692, 696. But he cites no court holdings to support this assertion. In fact, he cites numerous contrary appellate decisions. *Id.* at 673–74.

124. See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at 23 (2010), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf> (reporting that psychological maltreatment accounted for 7.6% of child maltreatment in 2009); Celia Doyle, *Emotional Abuse of Children: Issues for Intervention*, 6 CHILD ABUSE REV. 330, 338 (1997) (“A profile of . . . professional intervention [revealed that in] 20% of instances the reason for referral was specifically emotional abuse . . .”).

might raise the threshold for state intervention in some jurisdictions. Nevertheless, courts uniformly treat protection of children's welfare as a compelling state interest justifying restrictions on parents in intact families,<sup>125</sup> so some might simply require stronger evidence of harm and the least intrusive remedy when harm is shown. Parents in intact families certainly get away with more harmful speech and conduct than do divorced parents, but that is largely because there is generally not another adult inclined to complain to any state authority about speech in intact families and children are not in a position to protect themselves.

Third, to the extent that state actors are more restrained in protecting children from harmful speech or self-determining conduct in intact families, even when they learn about it, it is undoubtedly in large part because of an intuition about the marginal cost of intervention for families.<sup>126</sup> The disruptive impact of restricting speech appears less when families are already in court because of a divorce than they are when a family is not otherwise involved in court or agency proceedings. Similarly, when adults are deciding whether to enter into or remain in an intimate partnership for other reasons, they are more likely to make the other person's objectionable self-determining choices an issue and act to avoid them than they are when they are immersed in and fully committed to an ongoing relationship with the person. Judges might believe that adding any additional factor to the custody analysis has little marginal impact on a family, at least relative to intruding into intact family life to control parents' speech or conduct.<sup>127</sup>

Volokh rightly points out that this belief might often be incorrect, because restrictions on speech are likely to be experienced as extremely invasive even when imposed along with other orders in a divorce case.<sup>128</sup> I would go further and say that judicial orders not to engage in particular self-determining speech or conduct might sometimes be even more detrimental to family life when imposed in

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125. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982))); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (noting that “the Court has emphasized the paramount interest in the welfare of children”); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (stating that “the state has an urgent interest in the welfare of the child”); *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Adoption of Daniele G.*, 105 Cal. Rptr. 2d 341, 348 (Cal. Ct. App. 2001) (“[T]he welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect . . . [C]hildren require secure, stable, long-term, continuous relationships with their parents or [other caretakers] . . .” (third alteration in original) (citations omitted)); *In re Sheneal W. Jr.*, 728 A.2d 544, 551–52 (Conn. Super. Ct. 1999) (“[I]t is beyond debate that the state has a compelling interest in protecting children.”); *G.B. v. Dearborn Cnty. Div. of Family & Children*, 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001) (“[T]he state has a compelling interest in protecting the welfare of children.”); *In re K.M.*, 653 N.W.2d 602, 609 (Iowa 2002).

126. See *Volokh*, *supra* note 6, at 691.

127. *Id.*

128. *Id.*

the midst of a divorce. At that time, the family bonds and parental stability are already fragile. An intact family can group together to support each other during any litigation with the state, but a parent going through the trauma of divorce might have much less ability to cope with such an insult to his privacy and autonomy that arises, for example, from a court order not to discuss his religion in front of the child or not to expose his child to a new partner. The intensified psychological impact on the parent might seriously undermine his ability to be an effective parent for a child at a time when the child needs both parents to be at their best, not their worst.

However, this basis for objecting to restrictions on parents in divorce cases is a child-welfare objection, one that can be expressed in divorce cases within a best-interests framework. It is not one that supports attribution of a constitutional entitlement to parents or a balancing of interests. It does point to the psychological well-being of parents, but again only indirectly, because of its connection with children's well-being. Some other sort of argument needs to be made in order to establish that parents' interests are relevant directly and independent of their connection to children's well-being, or that the state must refrain out of fairness from constraining parental freedom through a custody order.

In addition, the standard empirical assumption about marginal costs of intervention is undoubtedly correct in many cases, perhaps most. Allowing a parent's self-determining practices to be one factor in a multi-factor determination of who gets custody is likely to have much less impact on the parent than would an order—in the divorce context or in an intact family—specifically prohibiting the practices. Moreover, the divorce context can exacerbate the harms to the child of some parental practices, providing a justification for treating the two groups of parents—intact family versus post-dissolution—differently. For example, when two parents married to each other decide to relocate the family, there is generally no adverse impact on the parent-child relationship. In contrast, after divorce, a parent's move usually does affect the parent-child relationship. When a parent in an intact family says something explicitly or implicitly critical of the other parent, the effect on a child is likely to be much less than if the parents were divorced. After divorce children connect such comments to a devastating hostility between the parents and to a loyalty conflict with which they might be struggling.

### *2. Between Custodial and Non-Custodial Parents*

Another type of fairness argument rests on a perceived disparate treatment of custodial and non-custodial parents. In the relocation context, the supposed unfairness is adverse to custodial parents. A common refrain is that it is unfair to constrain the freedom of a custodial parent when a non-custodial parent is not similarly constrained in choice of residential location.<sup>129</sup> Coupling this perception with the observation that over 80% of primary custodians are

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129. See, e.g., Bruch & Bowermaster, *supra* note 78, at 272; Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 106, 137 (2007); Weiner, *supra* note 68, at 1796–97.

women,<sup>130</sup> many scholars note with concern that denying requests for custodial-parent relocation has a disparate adverse impact on women.<sup>131</sup>

This argument is simply nonsensical. It is true that non-custodial parents are always free to relocate without agreement of the other parent or court permission. But this is also true of custodial parents; they are always free to relocate themselves without agreement of the other parent or a court. What neither non-custodial parents nor custodial parents are free to do is to relocate the children far from their current home without agreement of the other parent or the court. Courts never tell custodial parents that they themselves may not move; what courts sometimes tell custodial parents is that if they relocate they will lose primary custody, because the child will continue to live primarily in the current location.<sup>132</sup> It is the same with a non-custodial parent who moves far away; he likely will have to accept spending less time with a child. The difference in custodial time as a result of moving and leaving the child behind could be the same for any given set of parents; custodial parents might experience a reduction of time, but as little as is practical, and non-custodial parents might lose most of their visitation time.

The principal asymmetry between the situation of a custodial parent and a non-custodial parent in the relocation context is actually one that favors the custodial parent—namely, that a custodial parent has some chance of moving the child with her. A custodial parent can file a petition for court approval to relocate with a child and reduce or at least change the visitation schedule of the non-custodial parent. It might not succeed, but in most instances it will. In contrast, a petition by a non-custodial parent to take a child with him and become the primary custodian because he is moving far away would be a nonstarter, absent some extraordinary independent consideration, and therefore one does not see such petitions. If many non-custodial parents did file such petitions and were routinely rejected, then perhaps these scholars who make fairness complaints in the relocation context would see that, in fact, custodial parents are privileged when it comes to relocation.

Some defenders of primary custodian freedom to relocate point out, rightly, that it is not just the relocating parent who is making a choice. A non-

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130. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-240, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 2 (Dec. 2011), available at <http://www.census.gov/prod/2011pubs/p60-240.pdf>.

131. See, e.g., Bruch & Bowermaster, *supra* note 78, at 248 n.7; Glennon, *supra* note 129, at 138; Weiner, *supra* note 68, at 1798–1800.

132. See, e.g., Allbright v. Allbright, 215 P.3d 472, 476 (Idaho 2009) (reversing lower court's order requiring custodial mother to remain in a particular geographical location, while recognizing that it would be in the minor child's best interest to stay there); Levine v. Bacon, 705 A.2d 1204, 1207 (N.J. 1998) (denying custodial father's motion to take his daughter with him when relocating to a different state because it would negatively impact her relationship with her mother); Momb v. Ragone, 130 P.3d 406, 412 (Wash. Ct. App. 2006) (“[R]elocation statutes do not prevent [the custodial parent] from traveling or relocating. [They] . . . prevent[] [the minor child] from relocating.”). Courts have sometimes explicitly required that non-custodial parents, as a condition for objecting to a custodial parent's relocation, manifest a willingness to assume primary custody. See, e.g., Long v. Long, 381 N.W.2d 350, 357 (Wis. 1986).

custodial parent who opposes relocation is also making a choice: He could also move to wherever the custodial parent wishes to go with the child but simply chooses not to do so.<sup>133</sup> Why, one might ask, should that choice to remain in the same place be costless, in terms of spending time with a child? Several states do, in fact, direct courts deciding relocation disputes to take into account the ability of the non-custodial parent to move to the place where the custodial parent wants to relocate.<sup>134</sup> If, however, a court injects into its analysis supposed rights of the non-relocating parent—specifically, the right not to travel or the right to preserve a relationship—and allows the right to justify a departure from a pure best-interests-based decision, then it is in effect aiming to make the non-custodial parent's choice not to move costless. And if a court injected supposed rights of non-relocating parents into their custody analysis but not supposed rights of relocating parents, then one might plausibly view the practice as unfair as between the two sets of parents (although one might instead plausibly believe a right not to relocate should generally trump a right to relocate, given the relative strength of the interests typically underlying each right). But in practice, when courts do ascribe and give weight to supposed rights of a non-custodial parent, they also ascribe and give weight to supposed rights of the custodial parent.<sup>135</sup>

Scholars who make this point about non-custodial parents' choosing not to move are correct that we should not view relocation cases as ones in which just one parent is making a choice. We should view them instead as cases in which both parents have chosen where they want to live, and the two choices in combination create a problem for parenting. This is a valuable insight. But a rule directing courts to decide what custody arrangement is best in light of the two parents' choices, which will sometimes lead to granting permission to relocate a child and sometimes not, is not unfair to either parent. Almost inevitably one parent or the other must experience some loss of time with the children, and deciding who that will be by comparing alternative outcomes for the children is not unfair. It simply mirrors the situation adults sometimes face in their relationships with other adults, where a friend or lover is torn between two locations and decides between them based on his or her own interests.

Non-custodial parents also sometimes object on fairness grounds to restrictions on their freedom.<sup>136</sup> Their complaint is that courts more readily and more often restrict non-custodial parents' conduct and speech, which is true principally in cases where courts aim to avoid inconsistency between what the two parents are doing—for example, in religious teaching.<sup>137</sup> Assuming that this disparity does in fact exist, this fairness objection still has little purchase. Restrictions on custodial parents generally entail more hardship simply because

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133. See, e.g., Weiner, *supra* note 68, at 1798.

134. See, e.g., WASH. REV. CODE § 26.09.520(9) (2011) (asking “whether it is feasible and desirable for the other party to relocate also”); see also Weiner, *supra* note 68, at 1763–75.

135. See Chipman & Rush, *supra* note 91, at 277–78.

136. See, e.g., David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1480–84 (2006).

137. See, e.g., Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997); Pater v. Pater, 588 N.E.2d 794 (Ohio 1992).

they apply to a larger portion of a parent's time. And the remedy for disparate treatment could as easily be to impose restrictions more readily on custodial parents, if that is best for children, rather than to impose them less often on non-custodial parents.

### 3. *Fair Compensation for Past Parenting*

Another type of fairness argument rests on the principle that people should be rewarded for efforts they expend for the benefit of others. In the custody context, one sees an argument in support of a primary caretaker presumption or approximation rule. In exchange for their other-regarding sacrifice, it is said, past primary caretakers are entitled to remain the primary caretakers post-dissolution.<sup>138</sup> Those who make this argument typically also assert or hint at a related child-centered rationale for a primary caretaker rule—for example, that adjusting one's life during marriage to care for children signals greater nurturing capacity or that rewarding caretaking encourages it *ex ante*, to the benefit of children.<sup>139</sup>

Such child-centered reasoning is not strong enough on its own to support the rule they favor, however, and some who offer it concede that a claim of parental entitlement must do some work.<sup>140</sup> The child-centered reasoning is not independently sufficient, in part, because any signaling from past sacrifice might be outweighed by the harm to the child from the parent's self-determining choice that is at issue. In addition, the signaling is not so clear, given that leaving home to work can for a particular individual be more of a sacrifice for the sake of children than is staying home with children; it all depends on the ambitions and preferences of the individuals involved in a particular case. Those who advance the compensation argument typically ignore, without explanation, the work efforts and personal sacrifices of the primary income earner, implicitly treating those efforts as not a component of caretaking for children and not signaling anything positive about that parent.<sup>141</sup> Yet arguably one should view employment as a form of caretaking; it is often just as much a sacrifice for a parent as is staying home with children. If one does take this view, then it is likely to be very difficult to identify a primary caretaker.

The other child-centered angle, which reasons that children in general benefit from a rule rewarding past caretaking, begs the same question about what counts as caretaking, because presumably the state wants to incentivize parents to earn income for the family as well as to spend time supplying direct care for children. In addition, something more would need to be said about why a court in an individual case may and should sacrifice the welfare of the child involved in that case for the sake of serving children generally. Requiring individual sacrifice for the collective good is not necessarily illicit, especially if the individual being

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138. See, e.g., Fineman, *Dominant Discourse*, *supra* note 38, at 769.

139. See *id.* at 772–73.

140. See, e.g., Elster, *supra* note 38, at 17.

141. See, e.g., Fineman, *Dominant Discourse*, *supra* note 38, at 769 (stating that ordering joint custody after divorce when the mother primarily provided direct care during the marriage “amounts to furthering the interests of noncaretaking fathers over the objections and, in many instances, against the interests of caretaking mothers”).

asked to sacrifice has previously shared in that collective good. But sometimes it is illicit, and this context—in which a court is dictating the family life of a child at a very vulnerable time—might be one in which it is presumptively illicit. We might, at a minimum, demand evidence that custody rules do influence parenting choices in intact families, given that married people generally think divorce highly improbable for them until it actually happens.<sup>142</sup> And we might expect the state to attempt other methods of incentivizing optimal parental behavior and choices before using custody orders as rewards.

Thus, the child-centered arguments for rewarding past caretaking do not do much work. Proponents of such a reward system must appeal to parental entitlement to defend a rule insulating some parents from the relationship costs divorce would otherwise entail. They would need to support a moral right of the primary direct caregiver to compensation in the form of custody. Again, the difficulty arises in explaining why only direct child care is viewed as a sacrifice meriting reward. Indeed, many parents who fail in an effort to become a primary or joint custodian at the time of divorce, because they were the primary breadwinner during the marriage rather than the primary direct caretaker, might plausibly object on fairness grounds that now they are entitled to have “their turn” to stay home with the children, while the other works full-time to support them. There is reason to question the sincerity of primary breadwinners who claim at the time of divorce that they would now be happy to spend more time with the children, but there is also reason to doubt that many primary caretakers truly viewed past time with their children as a sacrifice, as something they would prefer not to have done. If parents in intact families generally assume roles that they prefer, all things considered (both parents foregoing the opportunity to do more of something else, both wanting to satisfy family and societal expectations), then neither should be viewed as having sacrificed, and so a compensation-based fairness argument is misplaced. In addition, there is the challenge of defending a moral principle that is facially unattractive—namely, that children in custody disputes must in a sense repay a debt to their “primary caretaker” by incurring a welfare cost for the sake of gratifying that parent. I am not aware that any proponent of the primary caretaker preference or approximation rule has constructed such a defense.

#### *4. Potential Impact on Historically Subordinated Groups*

A final type of fairness argument points to the disparate impact that a best-interest test can have on particular groups of people and raises a concern about social equality for such people. This argument is especially compelling where the group at issue is historically subordinated and is characterized by a trait or behavior that is not (from the state’s perspective) inherently bad or condemnable or relevant to parenting, and the child-welfare effect justifying a denial of custody is hostile societal reaction. In the relationship context, permitting courts to take into account adverse community reaction to a parent’s new relationship can, for example, reinforce racism or hostility toward persons who are

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142. See Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757–58 (2009).



homosexual.<sup>143</sup> A gay parent might think it unfair that a court orders him not to let the children see him give affection to his partner, if the same court would not order a heterosexual parent to refrain from giving affection to a partner in front of the children. In some communities, taking a parent's new relationship into account in a custody decision might even give effect to prejudice against some religious groups. In any such case, the court's action might create a perception that the state endorses the prejudice. This was a major concern underlying the Supreme Court's decision in *Palmore*.<sup>144</sup>

I reiterate that there are sound arguments for constraining courts from basing decisions in custody cases on factors likely to inject judicial bias into decisionmaking. Recognizing that some judges might be racist, homophobic, or morally reactionary, the law might best serve children by at least requiring a stronger evidentiary showing of harm to a child in such cases. But to go beyond what is needed to protect children from bias, and to adopt a rule like that of *Palmore*, sacrificing the welfare of children in order to bolster a historically mistreated group or to advance progressive values and social harmony, requires substantial justification. Again, custody decisionmaking might be a context in which treating individuals (here, the children) instrumentally and requiring them to sacrifice for the collective good is presumptively illicit. I am unaware of any scholarly or judicial defense of such instrumental treatment of children in custody cases—that is, any argument of the sort: “Yes, it is right that little Melanie Sidoti suffer for the cause of ending racism, because . . . .” The state would never attempt to force adults into personal relationships or to dictate the details of an existing relationship between adults for the sake of advancing such societal aims. It therefore cannot be morally sufficient simply to state that those aims exist. One needs a theory explaining why it is permissible to manipulate the family lives of certain private persons in order to serve those aims.

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Thus, none of the arguments that courts and scholars have offered for letting parents' self-determination interests and rights influence custody decisionmaking are successful. Most such arguments are not well developed, and usually people speak of parents' interests and constitutional rights as relevant without offering any justification for assuming that relevance. There are additional arguments one could make, though, and I consider them in the course of presenting the contrary case in Part IV.

#### IV. THE CASE AGAINST COSTLESS PARENTAL CHOICES

When a state agency or court makes a decision about the custody of a child, it is choosing which intimate relationships a private individual (the child)

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143. See, e.g., Wald, *supra* note 90, at 390–91, 417. Wald ultimately takes the position that courts should be able to consider stigma effects on children in making adoption decisions, noting that “children should not be made to bear the costs of remedying biases.” *Id.* at 417–18. He would not permit consideration of stigma in custody disputes, but his reason is the child-centered one that it would encourage parents to bring more custody modification actions, which are inherently damaging to family life. *Id.* at 431.

144. See *Palmore v. Sidoti*, 466 U.S. 429, 432–34 (1984).

will have and scheduling that individual's private life. That is an extraordinary thing for the state to do. Indeed, it is extraordinary for anyone to make such a choice for another. Consider the offense to our Western sensibilities today when we hear of parents choosing spouses for their offspring in some non-Western nations. Of course, arranged marriages were also once common in what is now called the first world, and they still occur in isolated subcultures within the United States.<sup>145</sup> But today in the Western world, the prevailing ethos values individual autonomy and self-ownership so highly that mainstream society frowns on anyone attempting even to influence a person's choice of a partner. Divorce law has evolved to a point that if any married person for any reason wishes to exit the marriage, he or she is free to do so without the other spouse's consent. And adults have complete self-determination in choosing friends and spending time with family. If the state attempted a greater role in arranging our adult intimate relationships, we would not only be incensed; we would allege a violation of our constitutional right of intimate association, our fundamental right against the state meddling in our personal lives.<sup>146</sup>

Yet we collectively entrust to social workers and judges, who are typically complete strangers to a child, the power to decide with whom a child will live and how much time a child will spend with different adult family members, in some cases scheduling a child's private life in great detail. This Part explains why we tolerate this strikingly anomalous practice, clarifies the state's role in arranging or conditioning custody, and demonstrates why the underlying justification and nature of the state's role precludes balancing children's welfare against parents' liberty interests in child custody decisionmaking.

#### *A. Why Do We Allow the State to Arrange Children's Family Lives?*

The answer to this question must go something like this: (1) Choices need to be made—children cannot live in isolation or in perpetual relationship limbo; (2) Children, at least very young ones, cannot or should not make these choices themselves; and (3) Among all possible alternative choosers in the situations under discussion—that is, whether a child should remain in the custody of an abusive or neglectful parent and how a child's family life should be structured after parents' dissolve the relationship between themselves—these state actors (child-protection agencies and courts) are the best, however imperfect they might be. Presumably based on reasoning of this sort, our society has developed a now-taken-for-granted institutional system for state actors to order the private lives of children and to make for children decisions of a sort that competent adults make—and have a fundamental right to make—for themselves.

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145. See, e.g., *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 613–15 (Tex. 2008) (addressing wholesale removal of children from the Yearning for Zion ranch, where evidence suggested religious leader decided who would marry whom).

146. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (“[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.”).

The third step in this reasoning, though, begs the question: “best” in what sense or by what measure? It would not seem to be in the sense of least expensive; child-protection agency and court proceedings and divorce litigation are generally expensive for the parents and the state. It might be much cheaper to have a rule conferring unconstrained decisionmaking power on some private parties—for example, giving legal effect to a majority vote among grandparents or giving complete control over children’s relationships to biological mothers.<sup>147</sup> We could also challenge the other two steps in the reasoning. Why does a decision need to be made; why not just leave children to whatever fate results from the efforts of various adults to assume possession of them? Or why not let children decide themselves, at least as soon as they are old enough to understand the question?

There might be a utilitarian response to all these questions, along the lines that having state actors make custody decisions, despite the expense this involves, minimizes overall social costs, perhaps because leaving children’s fate to their own decisions or to the decisions of other private individuals would lead to chaos and violence. But regardless of whether that sort of utilitarian justification is plausible, it is not one the state or legal scholars generally offer. Rather, the state’s role in child custody decisionmaking has consistently been justified in deontological terms, as fulfilling a duty the state owes to non-autonomous persons to act as their surrogate and protector.<sup>148</sup> The state’s exercise of *parens patriae* authority might be viewed as a form of social insurance we have adopted out of concern for the integrity and welfare of individuals who, for whatever reason—accident, old age, or infancy—are incapable of advancing or protecting their own welfare. We permit the state to exert this authority when, and only when, an individual’s condition creates a need for a surrogate decision-maker and no private proxy seems suitable.

In fact, a utilitarian approach to child custody decisionmaking would be morally and constitutionally problematic. If aggregate societal welfare were the proper measure of the merits of state decisionmaking about children’s relational lives, then we should also allow the state whatever role in *adults’* relational lives would maximize social welfare. If it is appropriate to treat children’s intimate lives

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147. For a well-developed argument along these lines, see Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1 (2004).

148. See, e.g., *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (“Section 1653(2)(D), governing court orders for parental rights and responsibilities, and section 1653(3), requiring the application of the best interest of the child standard, embody the court’s equitable jurisdiction to act as *parens patriae*.”); *Sheets v. Sheets*, 254 N.Y.S.2d 320, 323 (N.Y. App. Div. 1964); see also *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (referring to “the State’s long-recognized interests as *parens patriae* and, critically, the child’s own complimentary interest in preserving relationships that serve her welfare and protection” and citing several Court precedents); *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare . . .”); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 464 (2002) (“State courts have consistently relied on the state’s *parens patriae* power in terminating parental custody rights altogether or limiting visitation, where such action is needed to protect the child.”).

instrumentally in this way, as a means of advancing the interests of all, and if children and adults are owed equal moral respect,<sup>149</sup> then it should be appropriate to treat adults' intimate lives instrumentally in this way also. And then we might have to tolerate much greater state involvement in, for example, decisions about who marries whom and how couples conduct their lives together, because adults do not seem especially good at choosing intimate partners or at being in relationships, and the dissolution of adult relationships generates great social costs. Yet we would object vehemently to the state paternalistically presuming to arrange our private lives or constrain our relationship choices—for example, by making a certain score on a compatibility test prerequisite to marriage. We would be incensed even if we found the utilitarian rationale for such meddling plausible, because we view adults as sovereign over their private lives, entitled to choose what they want for themselves and not to be treated as instruments in this realm of life for increasing aggregate social welfare. Their personhood is inviolable in this respect.<sup>150</sup> Stated in constitutional terms, a state interest in reducing diffuse social costs is not a sufficient justification for infringing the fundamental right of intimate association.<sup>151</sup> Also insufficient is an aim to prevent inhibition of other persons' exercise of liberties or to promote progressive societal aims. Intimate association, as among competent adults, is a domain where the state simply has no business being, unless and until a threat of material harm to some person arises, as in the case of domestic violence.<sup>152</sup>

Assuming that children deserve at least the same respect for their personhood that we accord adults, we should demand strong justification for the state's inserting itself into their private lives, and we should expect the justification to reflect that respect. Children's relative lack of autonomy does not transform them from beings of the highest moral status into things at the disposal of state or private actors who would use them to serve their own ends. Likewise, children are persons under the Constitution, and their fundamental interest in freedom from state intrusion into their family lives should therefore receive protection under the

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149. I have argued elsewhere that children are owed *greater* moral respect than adults. See JAMES G. DWYER, MORAL STATUS AND HUMAN LIFE: THE CASE FOR CHILDREN'S SUPERIORITY 183 (2011). But it suffices here to assume they are owed moral respect equal to that of competent adults.

150. There are, of course, utilitarian arguments for individual autonomy and for limits on state power over private persons, most famously John Stuart Mill's *On Liberty*. Mill focused principally on free speech and offered several reasons why society as a whole benefits when individuals are left free to speak as they wish. See JOHN STUART MILL, ON LIBERTY (1859). Few people, though, would deem such social welfare-based arguments the best ones for personal liberty or concede that their freedom of intimate association should depend on the empirical contingency that it produces the best overall consequences for society as a whole. When it comes to their private lives, people generally take a more Kantian view, demanding forbearance from others on the basis of the respect owed them as persons, which entails treating them as ends in themselves and not mere means for the creation of social value.

151. *Cf. Roberts*, 468 U.S. at 623.

152. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

Fourteenth Amendment's Due Process Clause.<sup>153</sup> The state must have a truly compelling reason for presuming to dictate with whom they live.<sup>154</sup> Promoting the welfare of the children themselves can constitute such a reason.<sup>155</sup> As with adults, serving interests of other individuals or promoting progressive societal aims cannot constitute such a reason.

Comparison with the situation of incompetent adults bolsters the conclusions that emerge from a comparison between children and competent adults. Imagine yourself becoming incapable, as a result of accident or aging, of rationally choosing where you live, who takes care of you, and with whom you associate. Next, imagine the state stepping in to make such choices for you. Presumably you would think this justifiable, if at all, solely because your condition necessitates an alternative decision-maker and certain state actors are the best proxies for your own decisionmaking. The notion that the state could step in to dictate your private life instead for utilitarian purposes, seizing an opportunity to use incapacitated members of society to serve corporate welfare interests, is repulsive. So, too, would be the state's assuming control of your life in order to gratify other private individuals. The state would be exceeding the proper bounds of its power and authority, and treading without warrant on the constitutionally protected space of your private life, by assuming power over your home life in order to use you for its own purposes or the purposes of other private individuals.

Thus, we would demand that any state decision-maker who presumes to insert itself into our private life if we become mentally incompetent act solely as a surrogate or agent for us, aiming to replicate the choices we would make for ourselves. And, in fact, the law of guardianship for incompetent adults matches this expectation, requiring that the appointment rest solely on an advance selection by the ward or on the ward's best interests.<sup>156</sup> For the most part, the law governing

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153. Cf. *Reno v. Flores*, 507 U.S. 292, 301–09 (1993) (ascribing Fourteenth Amendment rights to juvenile aliens but finding that Immigration and Naturalization Service practice of holding in custody pending deportation hearings did not violate those rights); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (recognizing children's constitutionally protected "liberty interest in not being confined unnecessarily for medical treatment"); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (recognizing constitutional right of children with respect to corporal punishment by public school officials); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (upholding First Amendment speech rights of public high school students).

154. Cf. *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) ("[T]he Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest."); *Roberts*, 468 U.S. at 623 (requiring the State to present compelling state interest in support of antidiscrimination law that would force private organization to accept women as voting members, even after concluding that only the relatively weaker right of expressive association, and not the stronger right of intimate association, was implicated).

155. See, e.g., *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005); *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994).

156. See *In re Estate of Salley*, 742 So. 2d 268, 271 (Fla. Dist. Ct. App. 1997) ("Where a ward's preference as to the appointment of a guardian is capable of being known, that intent is the polestar to guide probate judges in the appointment of their guardians. A ward's nominee, of course, may be rejected when unfit or unsuitable . . ."); *In re*

custody disputes between parents has also been consistent with the notion that the state acts as a surrogate, aiming to replicate what a child would choose for himself or herself if able. The prevailing rule has been that state actors must attempt to identify and choose in accordance with the best interests of the child, and courts routinely describe their role as a *parens patriae* one.<sup>157</sup> The parent-protective decisions that occur in some specific decision contexts, as described in Part II, are a departure from this rule, and the thesis of this Article is that the departure is wrong.

The answer to the question “best in what sense?” must therefore be “best able to ensure an outcome for the child that is what he or she would choose for himself or herself if able.” In other words, these state actors are, among all possible alternative decision-makers, best able to act as a proxy and agent for the child and best able to replicate and effectuate the private choice.

### ***B. How Should We View the State’s Role in Arranging Children’s Family Lives?***

In light of the foregoing, we can clarify the nature of the state’s role in child custody decisionmaking, and in particular see why that role is quite different from the role the state ordinarily carries out. Most scholars and judges fail to recognize that legal decisionmaking in the child custody realm is different in kind from that which properly operates in most legal contests between adults, and therefore that the type of legal analysis they are accustomed to performing might be inapposite.

We can distinguish two types of decisions state actors are called on to make: (1) types of decisions that are inherently ones the state should make; and (2) types of decisions that are by their nature ones private individuals should make for themselves when able, but that the state may make on behalf of private individuals when they are not able, if the state is the best available surrogate. Type 1 decisions include: (a) defining what constitutes harm by one person against another and whether and how to sanction it legally; and (b) (what could be viewed as a subset of a) adjudication of disputes over which private party is to enjoy ownership of something (e.g., property). Type 2 decisions comprise the exercise of sovereignty over that which private parties own. What private parties own includes both various forms of property interests and themselves. Importantly, in our moral and

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Guardianship of Quindt, 396 So. 2d 1217, 1217–18 (Fla. Dist. Ct. App. 1981) (upholding the appointment of a neighbor rather than the daughter because it was in the ward’s best interest); *In re Estate of Doyle*, 838 N.E.2d 355, 364 (Ill. App. Ct. 2005) (“In determining who shall be a disabled person’s guardian, the disabled person’s personal preferences as to who should be his or her guardian is outweighed by what is in the disabled person’s best interest.”); *In re Crist*, 732 S.W.2d 587, 590 (Mo. Ct. App. 1987) (“Preference is given a particular petitioner, not because the petitioner wants the position, but because the ward would want the petitioner appointed.”); *In re Guardianship of Macak*, 871 A.2d 767, 772 (N.J. Super. Ct. App. Div. 2005) (stating that in appointing a guardian, “the court should consider . . . the wishes of the incapacitated person, if expressed” and that “[i]f there is a significant issue as to the appropriate choice of guardian . . . the court may appoint a guardian ad litem to advise the court as to the person’s best interests”).

157. See Dwyer, *supra* note 26, at 908–10.

constitutional universe, self-ownership pertains to every person, and therefore the state is never properly called on to decide who owns some person. Exercise of sovereignty over people's lives, when carried out by the state, including decisions as to their intimate relationships, is therefore a Type 2 decision.

When the state makes Type 1 decisions, it is said to carry out a "police power" function.<sup>158</sup> The quintessential fulfillment of the police power role is enactment and enforcement of the criminal law. It applies when persons' conduct goes beyond their personal boundaries and causes or threatens to cause others what the polity deems harm. When the state makes Type 2 decisions, inserting itself within individuals' personal boundaries and exerting power to dictate what individuals ordinarily control exclusively themselves, it instead occupies the *parens patriae* role described above. It should not be surprising that when the state acts in one role, moral and constitutional analysis of its performance and of the rules governing its performance might properly differ from the analysis appropriate when it acts in the other role. Yet scholars and judges implicitly presuppose, when decisionmaking about children's personal lives is at issue, that the appropriate form of analysis is that which pertains to the police power role. They automatically adopt the kind of analysis with which they are most familiar and comfortable—the kind of analysis that typically applies when only adults are involved in disputes, as is true of most legal matters. This is implicit in the practice, described in Part II, of balancing the rights and interests of different parties. They offer no argument for this presupposition; indeed, they appear not to recognize as a pertinent question whether a different sort of analysis is called for. They assimilate disputes about the course children's lives will take to disputes between adults over property ownership and injurious conduct.

But children are not property, and decisions about with whom one will share a family life and what sort of living conditions one will accept are not decisions of a sort that we believe can cause harm to others. Decisions adults make about with whom they will enter mutually voluntary relationships can disappoint third parties, but law and popular morality do not regard that as a harm that triggers state police power action. Nor does the mere fact that, in connection with any individual's relationship choices, there might be interests competing with that individual's preferences (e.g., interests of those who want to be in a relationship with that individual but are not chosen), justify state police power intervention to balance interests and impose a utility-maximizing outcome on the parties. These decisions are simply not appropriate subjects for the state's police power function.

Likewise, when a court chooses one among several applicants to serve as guardian for an incompetent adult, this might greatly disappoint, offend, and even traumatize the other applicants. But we do not deem this a harm and we do not believe courts should perform the police power function of balancing the interests

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158. See, e.g., *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."); see also N.C. GEN. STAT. § 160A-174 (2011) (conferring a general police power).

of all affected parties. Decisions about children's relational lives are clearly of the same type, and we should not view the disappointment one adult experiences as a result of another being chosen as custodian, based on what is best for a child, as a harm that could trigger the state's police power role. If the state presumes to assume authority over these decisions, it may do so only in a surrogate, *parens patriae* role, stepping into a child's shoes and deciding on behalf of the child, as a proxy or agent. A four-judge dissent in the Ninth Circuit Court of Appeals, addressing foster care placements of maltreated children, aptly characterized the state's proper role in making decisions about children's custody: "[W]hen the state exercises power over children as *parens patriae*, it 'exercises a discretion in the interest of the child.'"<sup>159</sup> In this role, the state

takes on a grave responsibility *to that child* . . . . The decisions it makes with respect to the child must . . . be guided by an overarching objective: maximizing the child's welfare. Each child is entitled to have key decisions as to its care made in light of his own best interests, rather than to serve some collateral purpose.<sup>160</sup>

This type of "individualized standard is uniformly accepted by states as the touchstone for exercises of their *parens patriae* power. . . . [T]he state's *parens patriae* power over children is limited to actions 'which conduce to an infant's welfare . . . .'"<sup>161</sup>

### ***C. Why Is It Inappropriate for Courts to Consider Parents' Liberty Interests?***

Because the state may only act in a *parens patriae* role when making decisions about children's custody, standing in the child's shoes, its decisionmaking should aim to replicate the decisionmaking of autonomous adults with respect to their relationships. It seems safe to assume that autonomous adults in Western society today generally make choices regarding their most intimate relationships exclusively on the basis of their self-interest, or at least give lexical priority to their own interests. Among the alternatives available to us for an intimate partnership, we choose the one we think will be best for us—that will make us happiest, most fulfilled, and so forth. Certainly, we are legally entitled to choose solely on the basis of what is best for ourselves. Thus, when I decide whether to associate with other adults, I am under no obligation to factor into my decision their interest in freely expressing themselves or in otherwise living out their values and preferences; if I do not like what they say, what religious practices they engage in, or what relationships they form with others, or if they move far away from me, I am absolutely entitled to lessen or end my relationship with them

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159. Lipscomb v. Simmons, 962 F.2d 1374, 1386 (9th Cir. 1992) (en banc) (Kozinski, J., dissenting) (quoting N.Y. Foundling Hosp. v. Gatti, 203 U.S. 429, 439 (1906)).

160. *Id.* at 1388–89 (footnote omitted).

161. *Id.* at 1388 n.8 (citations omitted); see also McDuffie v. Holland, 690 So. 2d 386, 390 (Ala. Civ. App. 1996) ("[R]egardless of the form or nature of the proceeding, once the trial court has obtained jurisdiction over the children of divorced parents, the court retains jurisdiction during their infancy, and it is the court's duty to protect the interest of the children with scrupulous care." (quoting Vaughn v. Vaughn, 473 So. 2d 1090, 1091 (Ala. Civ. App. 1985))).



for that reason. This imposes a relationship cost on them for exercising their basic liberties, but it is a cost they must expect to bear.

Replicating this approach to decisionmaking as surrogate for a child would therefore mean acting always to promote the child's self-interest and not allowing interests or supposed rights of others to constrain decisionmaking. If the state surrogate for a child concludes that a parent's self-determining choices are adversely affecting a child or are likely to do so, the surrogate should take that into account in making any relationship choice for the child and should treat it as a reason (though possibly outweighed by competing child-centered reasons) for denying or limiting a relationship between the child and that parent. In this way, the state effectuates for the child a right equivalent to that of adults to lessen or avoid relationships with people whose conduct or speech has adverse effects. Correspondingly, the liberties and relationship rights of others, including parents, are subject to the limits and risks inherent in relationships between adults. One has no more right to be insulated from others' reactions to one's choices when the other is one's offspring, or a proxy acting for the offspring, than when it is another adult. Whether the particular choices are of a sort ordinarily within the scope of constitutionally protected liberties is irrelevant, because that constitutional recognition is relevant only to state police power action.

The approach many courts and scholars have taken to the custody contexts described in Part II, ascribing to adults rights to self-determining freedom that their conclusions must respect, or undertaking a balancing of children's welfare against the liberty interests of adults, is therefore entirely inappropriate. It takes the state outside its proper *parens patriae* role, imposing a kind of analysis appropriate only to the police power role and to different types of decisions.<sup>162</sup> It makes children vulnerable to being treated instrumentally in a realm of life—formation and maintenance of family relationships—where we do not permit adults to be treated in this way, and it therefore insults children's equal personhood and violates their constitutional right of intimate association. It is presumptively immoral and unconstitutional, and it requires much stronger justification than any court or scholar has offered.

Absent such justification, courts and child-protection agencies deciding with whom a child primarily should live and what conditions, if any, will be placed on parental custody, should carry out their analysis in a manner resembling the way in which an adult would analyze a choice between potential partners or a choice to impose conditions on a partner for continuing the relationship. If a competent adult considering whether to form or continue a relationship with another would base the decision in part on the fact that the other expresses bothersome views, engages in disturbing religious practices, has another relationship that could generate problems, plans to relocate, or plans to take on much greater work responsibilities, then a surrogate decision-maker for a child

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162. Cf. *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149 (Me. 2004) (“When exercising its *parens patriae* power, the court puts itself in the position of a ‘wise, affectionate, and careful parent’ and makes determinations for the child’s welfare, focusing on ‘what is best for the interest of the child’ and not on the needs or desires of the parents.” (footnote omitted) (quoting *Roussel v. State*, 274 A.2d 909, 925–26 (Me. 1971))).

should also include such things in its consideration of costs and benefits for the child of being in the custody of one parent rather than the other. If an adult would condition continued cohabitation with another on the other's refraining from disturbing speech or conduct, even though that speech or conduct is constitutionally protected against state suppression, then a proxy for a child should likewise condition custody on forbearance from disturbing speech or conduct, without regard for the liberty interests of the parent or the constitutional status of the conduct or speech vis-à-vis the state in other contexts. In the child custody context, state actors occupy the special role of *parens patriae* in which they cannot be deemed constrained in the same way by constitutional rights of other persons. The state acts as an agent for a private individual rather than for society collectively, and that different role comes with different obligations.

#### *D. Counter-Arguments*

Part III refuted various arguments scholars and courts have advanced in favor of protecting parents' liberty interests in the course of deciding children's custody. The foregoing portions of Part IV presented the *prima facie* moral and constitutional case for excluding parents' interests and rights from custody decisionmaking. Here I address several possible additional arguments against my position and in favor of treating parents' liberty interests as a constraint on child custody decisionmaking.

##### *1. Children Benefit from Parents' Satisfaction*

First, as I suggested in Part III, one might plausibly maintain that children benefit indirectly when their parents enjoy self-determining freedom. A parent who feels restricted, harassed, or disrespected is likely to bring less energy, enthusiasm, and emotional well-being to interactions with a child. At the extreme, such a parent might even dissociate from the child, not willing to pay the price of restricted liberty in order to have a relationship with the child. In theory, what effect possible alternative custody orders might have on parental disposition should be a factor in the best-interests calculation. I do not dispute this. This is different, though, from saying that parents' liberty interests should be balanced against the welfare of the child; instead a court would be balancing one interest of children—that is, in their parents' having a positive disposition toward parenting—against other interests of the children that might be in tension with that interest. It is a somewhat subtle conceptual difference, but a meaningful one.

The subtlety of the difference is partly what makes it worrisome to allow parents' interests into the custody decision in even this indirect way. The subtle distinction is likely in practice to elude lawyers, judges, and parents, with the result that the focus will in fact become parents' happiness for the parents' own sake, causing courts to protect parents' liberty to an extent exceeding what is necessary to serve children's interests and so to compromise what is actually the overall welfare of the child, out of solicitude for perceived parental entitlement. Judges typically face only parents and lawyers in the courtroom, not the children, and that creates the danger that sympathy for a parent will improperly skew judges' thinking about a case. What also makes consideration of parental satisfaction worrisome is the moral hazard it creates; parents could improve their chances of

getting or retaining custody by demonstrating that restrictions on them make them miserable and sour their attitude toward parenting. On the whole, the state might foster better parenting by conveying clearly to parents in these legal proceedings that the welfare of their children is the state's singular concern. For these reasons, although I do not on theoretical grounds rule out such indirect consideration of parents' liberty interests, through the lens of children's interests, I believe that in practice doing so is highly problematic and likely on the whole to disserve children. Much more could be said about such child-centered arguments, but they are not the target of this Article, and even if this one were successful, it likely would not support solicitude for parents' liberty interests to the extent desired by those who advance parent-centered arguments.

### *2. State Action Need Only Be Better for Children than State Inaction*

Second, one might argue that because the state is doing children a favor by stepping in to make decisions for them, it is enough that the state not harm them greatly in the process—that it spares them from terrible outcomes. Children's incompetence creates a problem for them. The state could ignore it and leave children to whatever fate results from the actions of other private parties. I have not argued that *parens patriae* intervention in children's lives is morally or constitutionally obligatory, but rather just that it is the only permissible basis for the state's assuming control of children's relational lives. Children are better off if the state does assume control, even if the state does not ensure them the best possible outcome, so long as it effects better outcomes than would be likely without state involvement.

This argument might serve as a defense of imperfections in state actors' assessment of children's best interests—their sometimes making mistakes despite a singular focus on children's welfare. It cannot, however, serve as a defense of using children's lives to serve the interests of other private parties, to knowingly compromise children's well-being in order to gratify other persons. No person should be required to forfeit basic moral respect as a condition for receiving state assistance, yet as explained above, treating children instrumentally in the course of arranging their family lives is an affront to their personhood and human dignity. This is generally understood with respect to state decisionmaking about the care and home life of incompetent adults; although we accept that this decisionmaking will be fallible, we believe the dignity and personhood of non-autonomous adults require that such decisionmaking be solely of a fiduciary or proxy nature, a substituted judgment in behalf of the ward, aiming exclusively to serve their best interests or previously expressed wishes and values. Imperfect performance of a proxy role is unavoidable, but instrumental treatment of children can and should be avoided.

### *3. Adults Are Not Solely Self-Serving in Their Relationship Decisions*

A third potential counter-argument might be that truly replicating the decisionmaking of a private individual should not, or at least need not, entail indifference to the interests and desires of other private individuals with whom they are intimately connected. Perhaps some competent adults think only of their self-interest when making choices about relationships, but many and perhaps most

care about the people to whom they are related by blood or preexisting social relationship. It is true that a person is legally free to decline to relocate with a spouse who wants to take a new job and is legally free to make that decision without including the spouse's happiness in the cost-benefit analysis, but that is not a morally attractive form of decisionmaking, and most people are not so selfish in their intimate partnerships. Especially if the spouse who wishes to relocate has previously sacrificed significantly in order to provide care for the other, the other is likely willing to act altruistically to some degree to reciprocate. Similarly, if a sibling, friend, or intimate partner voices opinions one finds offensive or forms a relationship one finds disturbing, one ordinarily would try to accept and deal with this, to suppress one's initial aversive reaction, out of caring for the other person. Should not state actors, even if acting exclusively as surrogates for a child, also let such altruistic or caring attitudes enter into the decision calculus?

There is much to say in response to this argument. First, whereas it is more or less universal for individuals to aim to further their own happiness and well-being in making relationship choices, inclination to self-sacrifice of the sort posited by this argument is highly variable across persons. Perhaps partly out of recognition of this variability, the law relating to decisionmaking for incompetent adults creates a presumption that fiduciaries will not act altruistically on behalf of their wards, but rather will aim solely to advance the self-interest of the wards.<sup>163</sup> This legal rule likely also reflects recognition that authorizing agents for incompetent persons to impute altruistic choices and so act for the benefit of third parties would create a substantial danger of abuse. The incompetent persons are unable to object if the fiduciary goes too far, out of ignorance, out of sympathy for the competent persons who are pleading their cases, or out of self-dealing.

Moreover, the inherent nature of relationships between competent adults includes an expectation of mutual self-sacrifice,<sup>164</sup> whereas the inherent nature of the relationship between a parent and a minor offspring might plausibly entail unidirectional self-sacrifice by the parent for the child. This is part of the reason why adult offspring are expected to take care of their elderly parents; that is the time when reciprocation is expected, not when the offspring are developing children. It might be clearer in the case of young children that reciprocation is not expected, but it is almost entirely young children who are the subjects of custody disputes; adolescents usually make their own decisions about post-divorce residential arrangements.<sup>165</sup>

In addition, even among those adults who are willing to sacrifice their own interests to some degree out of caring for the self-determining interests of spouses, siblings, and friends, the degree is typically not very great. With respect

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163. See, e.g., N.J. STAT. ANN. § 3B:12-50 (2011) (permitting gifts from a ward's estate only if it is demonstrated that this would be in the best interests of the ward).

164. See, e.g., James E. Lennertz, *Tocqueville's Models of Law, Religion and Democracy in America: Virtue, Interest, and the Duty to Rescue*, 2 J.L. & RELIGION 69, 69-80 (1984).

165. See, e.g., GA. CODE ANN. § 19-9-3(a)(5) (2011) ("In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live.").

to offensive speech, it might be that most adults would not terminate a relationship because of the offensive speech,<sup>166</sup> but would ask the other person to stop expressing such views in their presence, or would at least signal their displeasure in an effort to induce the other to desist. They do not blithely accept the offensive expression out of love. Likewise, someone disturbed by a sibling's choice of an intimate partner might not refuse to associate with the sibling, but might try to interact with the sibling only when the partner is not present.

With respect to relocation, one must ask whether a parent-child relationship is more like a spousal relationship or a relationship with a sibling or friend. A person is more likely to sacrifice self-interest and relocate for the sake of a spouse than for any other relationship, simply because daily cohabitation is for most people essential to the spousal relationship, whereas the essence of a sibling or friend relationship is not so threatened by geographical separation. The parent-child relationship falls somewhere in between; some cohabitation and frequent contact is a component of its essence, but it can be well maintained with cohabitation occurring even less than half of the time.<sup>167</sup> Dissolution of the parents' relationship makes some loss of cohabitation inevitable, and relocation simply increases that loss for one of the parents. Thus, a large geographical separation and substantially diminished contact is not such a threat to the parent-child relationship as it might be to a spousal relationship, making it less plausible to impute to a child a choice to sacrifice interests in stability for the sake of facilitating a parent's move. Indeed, if the separation occasioned by a parent's relocation were a great threat to a child's relationship with that parent, and that parent has been the primary parent figure in the child's life, a court would take this into account as an important aspect of the child's well-being.<sup>168</sup> The situations that raise the moral question under discussion here are ones in which any effect on the child's relationship with the relocating parent is outweighed by interests of the child served by remaining in his or her current location. That typically means that the child's relationship with the relocating parent will not be greatly affected, and that the actual hardship that the relocating parent seeks to avoid is one for herself and not for the child.

But perhaps there is a stronger argument for an "other-regarding" aspect to custody decisions. One might think that, at least in some contexts, adults' relationship decisions are, in fact, constrained by rights of others—not legal rights, but moral rights. For example, if my sister begins expressing views I find obnoxious, or if a new intimate relationship she forms is likely to trigger social hostility toward her and anyone linked to her in the public eye, I am legally free to minimize or end my interactions with her, but I might be wronging her by doing so. Perhaps I owe a moral duty to her to accept her and her choices and not to

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166. *But cf.* Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006) (custody dispute following divorce that wife initiated because of husband's advocating polygamy).

167. *Cf.* Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 312–13 (1996) (“[O]ur findings show no significant connection between frequency of visits and time spent in the [non-custodial parent’s] home during visits and the development of a nurturing [parent]–child relationship.”).

168. *See, e.g.*, ALA. CODE § 30-3-169.3(a)(1) (2011).

inflict a relationship cost on her because her choices adversely affect me. It seems rather unloving to distance myself just because her particular form of self-determination makes me uncomfortable or makes my life more difficult.

But even if such a moral duty exists for some people in some situations, it likely varies depending on what self-determining choices are at issue, and it actually arises from the social context rather than the personal relationship. Specifically, the duty appears stronger when there is some element of social injustice at play. For example, if the choice is to enter into an intimate relationship, and my reason for distancing myself from a friend or relative who makes such a choice is that I might suffer spillover hostility that arises from an attitude I believe to be morally pernicious, such as racism or antipathy toward people who are gay, I might have a moral duty to accept that hostility so that I do not effectively participate in an injustice. The source of that duty, though, would not be the relationship; it would be the more basic duty many of us feel to fight against injustice, or at least not to exacerbate it or participate in it.

This becomes clearer if we contrast this scenario with another in which self-protective dissociation does not exacerbate a societal injustice. Suppose that my sister decides to become a crusader for resegregation, and I fear this will trigger social hostility toward her and anyone associated with her. I would feel no moral duty to exclude that aspect of my self-interest from my calculus as to whether and to what degree I will continue my association with her. I might, in fact, feel a moral duty to impose an additional cost on her for her choice, by dissociating myself. And with respect to choices that do not necessarily have any justice component to them, I would feel no duty either way. If, for example, my sister adopted religious views that included denigration of all who do not share her faith (rather than targeting any specific religious group), I would feel morally free to lessen my interactions with her just to avoid her self-expression, perhaps because it implicitly denigrates others. I would feel no moral duty to endure unpleasant conversations so that she is not “penalized” for exercising her religious liberty.

Further, the premise of surrogate decisionmaking is not that the surrogate should choose for the incompetent person as if that person were a competent adult, but rather that surrogates should choose for incompetent persons what they might be expected to choose for themselves *as incompetent persons* if they were able to choose while competent (as by advance directive). A surrogate decision-maker for a child should not think in counter-factual terms of what children would choose for themselves as adults, but rather what children would choose for themselves as children—as developing young persons. And the sort of moral duty to sacrifice self-interests posited in this argument is one that, if we would attribute it to anyone, we would likely attribute it only to autonomous moral agents—that is, to competent adults, and perhaps to adolescents, but not to young children. Moral duties exist for persons who are capable of autonomous moral reasoning and decisionmaking, so the analogy to adult relationships does not work here; it does not make sense to impute similar moral duties to young children. The Supreme Court in *Palmore* effectively imposed on children the moral choice to sacrifice

their personal well-being for the sake of promoting racial equality and justice, and this imposition was improper.<sup>169</sup>

It might be illuminating to think of this in terms of how one would instruct one's own children. Suppose that I have a six-year-old child and another child invited my child over to his house. Suppose also that I know that if my child does go to the other's house, he would likely become the target of social hostility to homosexuals, because this other child's parents are a gay couple. I might arrange the play date anyway and do everything I can to protect my child, or I might not. But in either case, I would not instruct my child that he has a moral duty to risk getting beat up on the way home from school for the sake of supporting the other child's parents in their self-determining choices. I might do so if my child were sixteen, but not if he is six. A six-year-old does not have such a duty. Moreover, I do not think intuitions about this would change if the adults involved were family members—for example, if the other child were a cousin and one of his parents were my child's uncle—my brother. Six-year-olds might have some moral duties, but if so they are principally to avoid gratuitously injuring others and do not include self-sacrifice to support adults' self-determination.

Relatedly, it is simply odd for a surrogate to carry out moral duties of the principal unless the principal directed the surrogate to do so. Agents might act independently to fulfill *legal* duties of their principal, as part of their efforts to serve the principal's interests. But they do not decide on their own what the principal's moral duties are and then sacrifice the principal's interests to carry out the supposed moral duties.<sup>170</sup> Moral reasoning and action are personal. They are a component of living a virtuous life. This is not something that can be done by proxy.

A full discussion of moral duties should also address those of parents themselves. One might suppose that competent adults who enter into legal relationships and wish to carry on social relationships, with another adult or with a child, have a moral duty to restrain themselves so as not to adversely affect the other person. If I am in an intimate partnership and I know that my partner finds my political views disturbing or would find it very difficult to relocate with me, I should consider refraining from expressing my views or from relocating. I should consider this not only for the self-interested reason that I might lose my partner's affection, but also because I have a moral obligation not to upset or make life difficult for my partner. I have a moral obligation to sacrifice my freedom to some degree for the sake of the other person. That duty arguably is stronger for a parent in relation with a child than it is for an adult with respect to an intimate partner. Expecting to enjoy costless self-determining freedom as a parent, expecting one's child just to deal with whatever adverse effects one's exercise of liberty has, is a selfish attitude inconsistent with the virtues and moral obligations that the parental role entails.

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169. See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 44 (2006).

170. Cf. UNIF. PRUDENT INVESTOR ACT § 5 cmt., 7B U.L.A. 34 (1994) (“No form of so-called ‘social investing’ is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries . . .”).

4. *The Analogy to Adults' Relationship Decisionmaking Is Inapt*

Lastly, one might argue that the analogy between state surrogate decisionmaking for children and the reactions we adults have to others' speech and conduct is simply inapt, or that it breaks down at some point for some reason. One reason might be that the parent-child relationship is crucially different from an intimate partnership. If an intimate partner minimizes or ends our time together because of my self-determining speech or conduct, there is an enormous pool of alternative potential partners to which I can turn. In contrast, a parent will have at best a very small number of other children with whom to carry out a relationship, if a court makes an adverse custody decision.

This line of reasoning is not persuasive. Intimate partners are not so fungible as the reasoning suggests, and the number of willing other persons might be extremely small or nonexistent. Yet the possibility that one's partner will have no other prospects does not limit one's right to dissociate from that partner if his or her speech or conduct bothers us. And on the other side of the equation, concerning parent-child relationships, if one can find another intimate partner after dissolving a relationship with one co-parent, there might be an opportunity to create more children and to enjoy a full-time relationship with those children. The relative hardship from rejection in the two cases is therefore not clearly of a different magnitude.

Another reason the analogy might break down is that the experience of being criticized or condemned by the state, in the form of a child-protection agency or court, might be different from the experience of being criticized or condemned by another private party—that is, of an intimate partner's objection to our speech or conduct. In other words, one might maintain that there is something qualitatively different about *the state* imposing relationship choices and commands, relative to private individuals doing so, even if it is acting as an agent for a private individual.

What that difference is, though, would seem to depend very much on an individual's particular sensitivities. For many, it might be easier to remain detached from a judge's condemnation than from a friend's or spouse's condemnation. Most people do not need or expect the state to embrace them, share their worldview, or esteem them. Our emotional well-being is not normally dependent on approbation by government employees who do not really know us. In contrast, a lover's rejection is commonly very traumatic. Moreover, we are accustomed to legal constraints on our behavior. Indeed, there are legal constraints on our behavior toward intimate partners, and we accept that courts may impose orders constraining specific behaviors by specific individuals in their intimate partnerships when their past behavior has caused harm. In the parent-child context or in the intimate partner context, the state's entrance to constrain harmful behavior depersonalizes the complaint and the command, and this might diminish the emotional impact. In any case, it is not clear why a difference in how one experiences a constraint as between the two types of relationships would justify a different normative approach as between the two, and in particular would justify sacrificing children's welfare.

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In sum, though numerous counter-arguments might be raised against the position that state actors should exclude consideration of parents' liberty interests from child custody decisionmaking, none considered here is persuasive. Focusing exclusively on the interests of the children involved does not give parents' interests or rights any less consideration than they are due, is not unfair to any parents, does not improperly exclude altruism or moral duties from surrogate decisionmaking, and does not subject parents to an experience that differs in a morally relevant way from an intimate partner's reaction to their speech or behavior. That the state's taking on a *parens patriae* role might be gratuitous does not justify its compromising that role by treating children instrumentally. If the state undertakes to manage children's relationship lives, it may not do so in any way it pleases, but rather must do so subject to limits arising from children's equal personhood—limits requiring it to act solely as surrogate or agent and not to be solicitous of parents' liberty interests.

### CONCLUSION

Rigorous scholarly examination of the precise role state actors occupy when dictating children's family lives has been sorely lacking. Currently, much role confusion characterizes the state's child custody decisionmaking and scholarly analysis of it—specifically, whether the state is to serve only the interests of children or also the interests of parents. This Article endeavors to inject clarity into our understanding of the state's role by highlighting the distinction between the police power and the *parens patriae* roles, by demonstrating why the state should act solely in the *parens patriae* role when deciding child custody matters, and by refuting numerous counter-arguments to this position. The implications of the Article's conclusion are far-reaching. I have focused on child-protective intervention and post-dissolution custody allocation, and these two categories of state action encompass a great variety of conflicts between the welfare of children and parents' desires to speak and act freely in furtherance of beliefs, desires, and ambitions. The other principal categories of state decisionmaking about children's relational lives are parentage and relationships with nonparents. The analysis presented here would apply to those categories as well, but additional considerations and arguments might arise in those other sets of situations. I leave that extension of the argument to another person or another time, and I welcome responses that would deepen the analysis in any context. I note here simply that the law governing adoption is consistent with this Article's thesis; the basic rule for approving an adoption is that it must be in the best interests of the child, all things considered, and adoption agencies and courts readily count against adoption applicants any of their self-determining behaviors or speech that might, in the state's view, adversely affect a child.<sup>171</sup> Any opposition to this Article's thesis should therefore either distinguish adoption from custody disputes on morally relevant grounds or explain why adoption law and practice are flawed for not being more deferential to applicants' liberty interests.

Importantly, the analysis presented here does not support direct prohibition of any speech or conduct by persons who are parents. Rather, this

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171. See Dwyer, *supra* note 26, at 882–90.

Article demonstrates that parents simply cannot expect their self-determining choices to have no effect on their relationship with their children. As in adult friendships and intimate partnerships, adults must expect sometimes to balance their interests in liberty against their desire to maintain a relationship with a child and choose which is more important to them.