

*A DELICATE BALANCE: THE ROLE OF GOVERNMENT
IN PROTECTING CHILDREN'S RIGHTS WITHIN THE FAMILY*

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Introduction: The Paradox of Children's Rights to Privacy and Protection

In theorizing about children's rights we encounter many paradoxes. Let me identify one such paradox which makes the role of government in insuring children's rights within the family extremely complex and delicate. Children grow and thrive in the intimacy of the family circle. Privacy is a necessary ingredient in family life, and parents must be free to raise their children without undue interference from government or other outsiders. In United States constitutional theory, we call this principle the principle of "family autonomy." Family autonomy empowers parents to act in the best interests of their children. Children need powerful parents in order to feel safe. They need to be cared for and sheltered by adults whom they know and love and in whom they can place their trust. Clearly, government must stay out of family matters in order to protect children's rights to privacy in family matters.

If we focus our gaze on family autonomy, we risk losing sight of the rights of the child as an individual. Family autonomy, however, has its dark side. The family is not an autonomous entity or an independent unit; it is a group of persons. The principle of family autonomy, in actuality, vests in some member or members of the group the power to make decisions for the others. Children are the least powerful of family members, just as they are the least powerful members of society. Sometimes parents use their powers to deprive children of their rights

rather than to nurture and vindicate children's rights. Sometimes they use their powers to damage other family members. A man or woman subjected to family violence can seek protection from government. Children, unlike adults, must rely on others to voice their needs. Young children especially lack the ability to act independently to invoke the intervention of government, even though they may sorely need it. Clearly, if children's rights are to have any meaning or effect, government must be ready to intrude on the privacy of the family—even when uninvited—to protect the rights of children. How can we strike a balance between the obligation to protect children's rights within the family and the value to children of family privacy?

Defining Children's Rights Within the Family

Before attempting to resolve this puzzle, let me address a threshold question. What do we mean by "children's rights within the family?" The United Nations Convention on the Rights of the Child provides some guidance. Children's rights within the family are a variation on the theme of children's basic rights under the Convention. Children have a right to have their basic needs met—including their needs for food, clothing, medical care and housing. They have a right to be educated and trained for independent citizenship. They have a right to a name and family identity and to preservation of family ties. They have a right to freedom of thought. They have a right to develop a religious life. They have a right to bodily integrity and to be protected from harsh treatment and exploitation. Government and the family share in the duty of assuring that these and other rights are respected and fulfilled.

Generally, government protects children's rights—both within and outside the family—by empowering parents. Parents function as children's agents in the great outside world. They also function as children's guides in the transition from infancy to adulthood. However, modern

theory makes clear that parental powers of agency and guidance are not “absolute and inalienable rights.” Rather, they are privileges that flow from parents’ duties and constitute the necessary authority for parents to carry out their special responsibilities. Rather than being conceptualized as the “owner” of the child, the parent is now seen as the “trustee” of the child’s welfare. The parent has a fiduciary duty to act in the best interest of the child, and to guide the child in actualizing his or her rights, consistent with the child’s evolving capacities. This does not mean that children command and parents obey. But it does mean that exercises of parental authority, in order to be perceived by adults and children alike as legitimate, should be grounded in a concern for the best interest of the child. Of course, the child’s “best interest” must be viewed in the context of family life. Often, parents must make decisions that balance the interests of one child against those of another or ask the child to sacrifice for the good of the family as a whole. Children’s right to family life includes these lessons in sharing and in sacrifice without which family life is empty and meaningless. The child’s welfare and the welfare of the family go hand in hand.

Government’s Role in Promoting Respect for Children’s Rights

How can government play its dual roles of protecting children’s rights as individuals and respecting and nurturing family autonomy and privacy? One way in which government can act to protect children’s rights within the family, is through the simple means of promoting a discourse that casts the parent not as “owner” but as “fiduciary.” The public rhetoric we use to describe family relationships has a powerful effect on how we act in the privacy of our homes. When government, through its laws, its schools, and its policies promotes the ideal of respect for children’s human rights, it creates a climate in which state intervention is less necessary. The

most important thing government can do to insure children's rights within the family is to teach parents of today and tomorrow about children's rights. But government must also practice what it preaches, and support parents in the hard but important work of raising children. A government with family-friendly policies (good schools, safe neighborhoods, quality childcare, a living wage for the working parent, and income supports for the needy parent) is a government that promotes children's rights within the family. There is an old-fashioned saying in English, "An ounce of prevention is worth a pound of cure." (We are so old fashioned in the U.S.A. that we still use pounds and ounces instead of kilos and grams). To paraphrase this popular saying, "an ounce of positive support by government is worth a pound of negative and coercive intervention."

Government Intervention to Protect Children's Rights to Bodily Integrity

But sometimes government intervention in the family, against the wishes of a parent or other family member, is necessary to protect children's rights. The most obvious arena in which state intervention plays a critical role is the protection of children from abuse or neglect. Perhaps the most basic role of government is to protect the weak from the brute force of the powerful. This role is so fundamental, we take it for granted. But imagine a world in which the strongest were free to beat, starve, exploit, imprison and terrorize their neighbors, while the police looked the other way and ignored their cries for help. Until quite recently, this was the world inhabited by children. The lucky children were surrounded by kind and gentle adults. The unlucky children had to endure whatever mistreatment their families meted out. In the new age of children's rights, we believe that children have a right to be safe and secure in their own homes and government has an obligation to assure their safety. Every government must establish a

system for receiving reports of child abuse and neglect and for intervening to stop it. But the systems for child protection must respect the child's need for family relationships and avoid destroying the family in order to save the child.

Here again, an ounce of prevention is worth a pound of cure. Government should focus its efforts on identifying children "at risk" of abuse and offering voluntary services and supports to their families, before coercive intervention becomes necessary. In the United States, I am sad to say, we have failed in our duty to assure children's rights to be safe and secure in their own homes. Each year, 1,000 American children die at the hands of their parents or other family members. Our primary means of dealing with this crime wave against children is removal of the child and placement in a foster home or state institution. Currently, 600,000 children are living in substitute care—my colleague Dean Ira Schwartz of the University of Pennsylvania School of Social Work has written a book about them titled "Kids Raised by the State." Poverty, drug abuse, and family violence have created this huge group of needy children, many of whom live most of their childhood in state care. While these children may be safe from bodily harm, their rights to be raised in a family are violated daily by government. Our newest policy initiative, called The Adoption and Safe Families Act of 1997, seeks to solve this problem by making it easier to terminate the "rights" of parents who have neglected or abused their children in order to free these children for adoption. But it is unclear whether enough adoptive families can be found, especially for children with special needs, and it is also unclear how well older children will adjust to the loss of those they know as their family, and to whom they are attached despite the neglect or harsh treatment they may have suffered.

When Children's Religious and Educational Rights Conflict with Parental Autonomy

Abuse and neglect are not the only reasons for state intervention in the family. Some parents deny children access to education in the name of family autonomy or religion. Children's rights to intellectual freedom are meaningless if they are prevented from obtaining the skills necessary to use their intellect. While the government should not dictate what values and beliefs parents teach their children, it must assure that all children have the basic tools with which to acquire knowledge and to make judgments about the world around them. When family autonomy clashes with children's educational rights, family autonomy must give way. A free compulsory public education may infringe on parental choices, but it also guarantees children a future right to make intelligent and informed choices of their own, for themselves and for their own children. Nevertheless, government must be sensitive to the child's need for a sense of family integrity, and avoid unnecessary confrontations with deeply held family values.

Some parents refuse essential medical care not only for themselves but also for their children, in the name of freedom of religion. Children have the right to exercise their religion without government interference. But a child's rights to religious freedom are meaningless if the child's life is sacrificed before he or she is even old enough to form a deeply held religious conviction. Before intervening, however, the state must ask whether the intervention is necessary and how it can best be accomplished without disrespecting the parents' *and the child's* sincere religious and personal beliefs. Adults too easily discount the force of children's spiritual lives. As psychiatrist Robert Coles has shown, many young children are acutely aware of the moral dimensions of their actions and identify themselves with the religion in which they are raised. Forcing children to act in violation of their religious beliefs invades their rights as surely as it invades the rights of adults. Once a child has formed a deeply held religious belief,

government must proceed with caution in overruling the child's conscience, reserving coercive intervention only for life threatening situations.

Government as a Mediator of Intra-Family Disputes

A very different kind of state intervention is involved when government mediates disputes among family members. In such cases, the state does not act on its own behalf but on behalf of other family members seeking to vindicate their rights to family relationship. The most common scenario of government as mediator is found in laws and court processes that govern the dissolution of marriage. Government, via the courts and the legislatures, plays a crucial role in setting the ground rules for family dissolution and the restructuring of the post-divorce family. In some nations, religious traditions may also play a crucial role in setting the rules, and the civil authorities may look to religious law for their family law principles. Whether its laws on divorce are entirely civil or partially religiously based, government bears an obligation to protect children from the damaging economic and emotional effects of parents' divorce. Laws regarding divorce must place the child's interests first, assuring adequate support from and contact with both parents. However, children should not be treated as property of the marriage, to be split fifty/fifty between warring parents or divided according to who was at fault for the ending of the marriage, without regard to their welfare. Nor should we assume that the child's right to contact with both parents translates into a right on the part of both parents to maintain contact regardless of the harm such contact may inflict on the child. We are beginning to realize, for example, that a father who batters the child's mother may forfeit his claims to visitation, based on the psychological harm to children of witnessing family violence.

Divorce also presents a challenge to the concept of family autonomy. In many countries,

family courts wield expansive powers of intervention, as they decide disputed issues of custody and child rearing that would be resolved internally if the family had remained intact. Some feminist theorists, such as Martha Fineman, have recommended conferring absolute power on the custodial parent to decide how the child will be raised, where the child will live, and what relatives or care givers will maintain contact with the child. While such a theory protects the children and their care taker from intrusion, it also may rob children of associational rights connecting them to persons who love and care for them. The United States Supreme Court will be hearing a case in January, called *Troxel v. Granville*, which raises the question whether parents' constitutional autonomy rights are infringed when courts allow grandparents, extended family members, or persons standing "in loco parentis" to petition for court ordered visitation. A focus on the best interest of the child and children's rights to family life suggests that parents' autonomy claims must be balanced against the rights of children to maintain contact with family members. This is especially important after a divorce, the death of a parent, or other such traumatic disruptions. One young client in my clinical practice, whose father is deceased, yearns for visits with his paternal grandfather. His mother has refused permission, without reason. Should this child lack the right to forge a connection to his own roots? I think not.

One role of the courts and legislatures is the role of defining family membership. Families come in all sizes and shapes, and government cannot protect children's rights to relationship without engaging in the process of defining who is within the family circle. Children define family according not only to blood and marriage but also according to care giving and love. If the child views a stepparent, a grandparent, an aunt or a de facto parent as "mother" or "father," then why should the child's perspective be ignored? Once we concede that

children have rights in family relationships that are reciprocal with the rights of adults, we can see that laws which deal with intra-family disputes over contact with children do not threaten “family” autonomy—they are restraints on the power of one family member to exclude other family members from contact with the child. As long as families remain an important feature of social organization, government will be called upon to mediate and referee such intra-family disputes.

When Young People Make Mistakes: Adolescence as a Learner’s Permit

One stage which presents extremely tough question in striking the delicate balance between family autonomy and state intervention is the stage when children cross the bridge of adolescence into young adulthood. The metaphor of “the learner’s permit” is a helpful tool for understanding the roles of parent and state during the “teenage” years. In many parts of the United States, young people may take the test for their “junior driver’s license” when they reach age sixteen. At age eighteen they can convert this into an “adult license” if they have a good driving record. However, before they have passed their driver’s test, they are issued a “learners’ permit” that allows them to drive only under adult supervision and only in daylight hours. Parents approach this period when young people learn to drive with fear and trembling. Young people approach it with confidence and excitement. Both are correct. In the same way, we must give our children the opportunity to “road test” their emerging capacities for autonomous decision-making. How will young people grow into their adult roles unless they are provided with some measure of autonomy and given a relatively safe space in which to practice their skills?

Good parents understand this principle, and strive to help their children grow into

autonomy by giving them a chance to try their wings. As the child matures, they give him increasing freedom and autonomy to make his own choices. Sometimes parents refuse to acknowledge the emerging capacities of the child. In a famous case from the State of Texas, Dominique Mocineau, a seventeen year old Olympic gymnast, went to court to seek emancipation from her parents' authority. She showed the court that her parents had used their authority arbitrarily and capriciously, spending the money their daughter earned on building a gymnasium for themselves, without consulting her. They had pushed her to perform for money, fired her coach out of jealousy, and made decisions for her based on their own agendas. She was granted the right to control her own life and her own earnings. Her story made world news, but many young people who are not famous are equally frustrated by laws that force them to remain in their parents' power even though they are supporting themselves and making wiser choices than their parents. In each society, the ground rules for parental control are different. Old ways that allowed parents to choose their child's spouse or career are giving way to a greater respect for the autonomy of youth. The U.N. Convention does not dictate one single formula for parental guidance and control of youth crossing the bridge to adulthood. It does, however, promulgate a principle of respect for the young person's emerging capacities. Parents who give a sixteen-year-old no greater freedom than a three-year-old do so at their own (and their child's) peril.

There is another important aspect to the concept of the "learner's permit." We must expect learners to make mistakes. When they do, we must remember that, despite the fact that they are engaging in adult activities, they are still not adults. Government must not treat a sixteen year old who makes a mistake or commits a bad act as if he really were a fully mature

adult. If adolescence is a “learners’ permit” how can we justify punishing children for failing to act with a full measure of adult responsibility.

One alarming trend in the United States and elsewhere in the world is the trend toward treating children who commit criminal acts as if they were hardened adult criminals. No matter what bad acts they may commit, all children have a right to be treated by their governments as children. In the U.S.A., all states have enacted laws that allow prosecutors to “certify” children as adults based on the type of crime they have committed. Children as young as ten or eleven can be tried in criminal courts, confined in adult prisons and sentenced to the same harsh penalties as adults. These practices are a rejection of a hundred years of juvenile justice reform, which predicated treatment of youthful offenders on the notion that government, in its role as “*parens patriae*,” must take responsibility for protecting and rehabilitating troubled and wayward children . One of the reasons why politicians in the United States oppose ratification of the United Nations Convention on the Rights of the Child is the prohibition it places on inflicting the death penalty on youthful offenders who committed their crimes when under age eighteen. Government must avoid demonizing the delinquent child in order to placate a fearful public.

Conclusion

We have seen that the vindication of children’s rights depends on a delicate balance between government intervention and family autonomy. On one side of the balance is a simple fact: Human rights are meaningless unless government provides remedies when they are violated. On the other side of the balance is a different but equally obvious fact: Intrusion on the family can victimize children by shattering the privacy, tranquility, and intimacy of their family circle. At the fulcrum of this delicate balancing act are our children. If we are not wise and

careful, in both our public and our private actions, it is the children who will suffer. Our children must rely on a partnership between government and families to vindicate their rights. The family, however it may be defined by a particular culture, is the most effective champion of children's rights. But when families are too poor or too stressed by modern work force pressures to provide for children's welfare, supervision and safety without assistance, government must provide economic and social resources to redress the imbalance and restore children's welfare. When families violate children's rights to bodily integrity or damage their future potential for autonomous citizenship, government must come to their aid and provide appropriate protective interventions. If children's rights are to become a reality rather than a slogan, it will require a respectful partnership between government and the family built around a core commitment to the best interest of the child and to the principle that children cannot thrive without both family privacy and public protection.