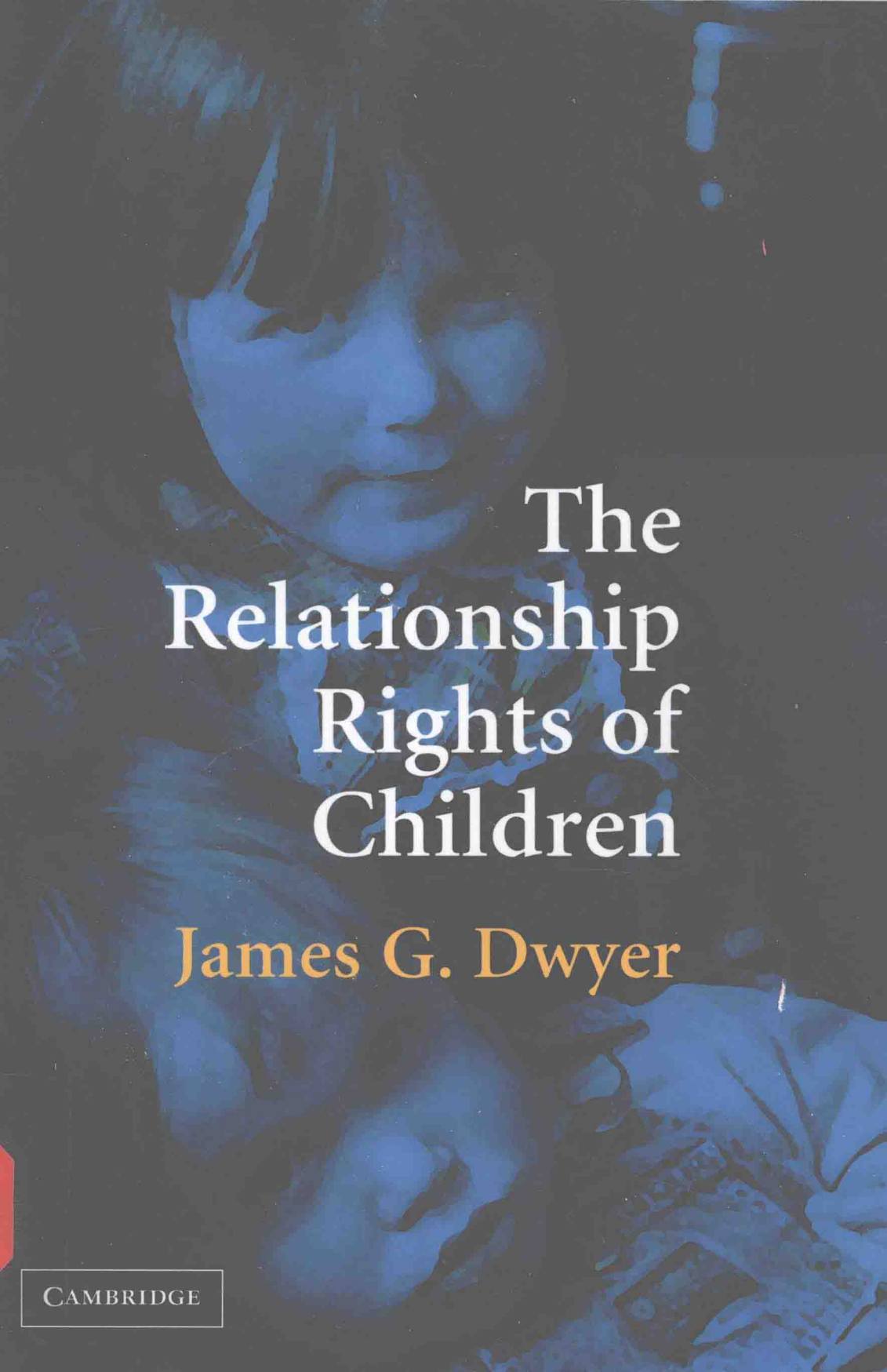

The Relationship Rights of Children

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THE RELATIONSHIP RIGHTS OF CHILDREN

This book presents the first sustained theoretical analysis of what rights children should possess in connection with state decision making about their personal relationships, including legislative and judicial decisions in the areas of paternity, adoption, custody and visitation, termination of parental rights, and grandparent visitation. It examines the nature and normative foundation of adults' rights in connection with relationships among themselves and then assesses the extent to which the moral principles underlying adults' rights apply also to children. It concludes that the law should ascribe to children rights equivalent (though not identical) to those adults enjoy, and this would require substantial changes in the way the legal system treats children, including a reformation of the rules for establishing legal parent–child relationships at birth and of the rules for deciding whether to end a parent–child relationship.

James G. Dwyer is Professor of Law at the William & Mary School of Law. He received his J.D. degree from the Yale Law School and a Ph.D. in Philosophy from Stanford University. He has worked as an attorney in law firms in Washington, DC, and as a law guardian representing children in family court in the Albany, New York, area. He has published numerous law journal articles and book chapters on children's rights. His two prior books are *Religious Schools v. Children's Rights* and *Vouchers Within Reason: A Child-Centered Approach to Education Reform.*

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The book reflects a massive research undertaking, principally because Chapters 2 and 3 present descriptions of the law in numerous countries on numerous issues affecting children, parents, and incompetent adults. That research was pulled together by a legion of extremely capable law students: Katherine Aidala, Emily Anderson, Andy Befumo, Elizabeth Bircher, Sarah Cane, Brendan Chandonet, Natalie Collins, Sarah Edmonson, Carolyn Fiddler, Peter Flanigan, Caroline Fleming, Katheryn Mckinlay Hamrick, Emily Jones, Kelly Kumpula, Sarah Lenet, Briordy Meyers, Pia Miller, Ruth Nadeau, Gina Pereira, Andrea Phelps, Emmy Salig, Chris Seacord, and Kelly Street. Research librarian Fred Dingledy provided crucial assistance both to those students and to me in obtaining the more difficult sources.

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THE RELATIONSHIP RIGHTS OF CHILDREN

Contents

Introduction

Childhood ordinarily entails numerous personal relationships. We do not often recognize it, but the fact is that the state determines, to a large extent, what those relationships are. In some ways, it does this directly, most crucially by deciding who each newborn child's legal parents will be. The state also influences children's relational lives indirectly by conferring on legal parents some measure of control over children's associations with third parties. This book aims to develop a general theory of what principles should guide the state in making decisions about children's personal relationships, whether the issue is paternity or custody after divorce or termination of parental rights or grandparent visitation.

This topic is of profound importance for the well-being of individual children and for the health of society. The state's decisions as to who will raise and associate with a child are largely determinative of whether the child's life proceeds positively or poorly, and the aggregate result of good or bad state decision making is a citizenry that is happy and flourishing, mired in dysfunction and conflict, or something in between. And there is good reason for examining rigorously the appropriateness of current practices, because on many occasions in many contexts, the state in western society and elsewhere today makes decisions about children's relationships that are injurious to the children involved.

There can be reasonable disagreement as to precisely which state decisions are bad for children and about how often they occur, but every scholar of family law could point to some legal rule or established practice that he or she believes contrary to the welfare of children. Some of these occasionally capture the public's attention – for example, the dramatic "botched adoption" stories of the 1990s in the United States, such as the Baby Richard case, in which courts removed children from the custody of long-term adoptive parents and handed them over to previously absent

biological fathers, solely because the adoption process did not comply with technical requirements for terminating the biological father's legal rights. Others receive less attention, even though, or perhaps because, they are more routine. For example, the prevailing rules for parentage create legal parent–child relationships for newborn children solely on the basis of biological connection, with no regard for the preparedness of particular biological parents to raise a child, and as a result cause a significant percentage of children to suffer abuse or neglect at the hands of parents who are manifestly unfit for child rearing. The state's response to abuse and neglect – that is, its child protective rules and agencies – has many critics, including both those who believe the state removes children from their homes too readily and returns them too late and those who believe the state is too deferential to parents. Increasingly, we hear about custody and visitation disputes between legal parents and persons who are not legal parents but who have helped to raise a child, such as a former same-sex partner or stepparent, and the law governing such disputes in many jurisdictions empowers legal parents completely to sever a child's bond with those "de facto" parents.

Of course, sometimes children suffer simply because the state has limited information and resources rather than because the legal rules are indifferent to their welfare. The proper response in that case might not be legal reform but rather greater commitment of resources and acceptance of the unavoidable imperfection of human institutions. However, in many situations, children appear to suffer because the legal rules governing particular decisions about their relational lives do not require state decision makers to act with a single-minded focus on the welfare of the affected children. Instead, the law encourages state actors to protect interests of other persons or to advance broad societal aims, and those interests and aims can conflict with the interests of the children.

In particular, the rules governing many state decisions about children's family relationships are designed to protect interests and perceived rights of biological parents. Less commonly, rules are explicitly crafted to serve progressive causes such as gender or racial equality. For example, with respect to postdivorce custody decision making, courts in many jurisdictions are resistant to treating even as a relevant consideration in postdivorce custody disputes a mother's decision to move with the children far from the site of the marriage to pursue a career, despite the substantial disruption this can cause in a child's life. Judges express concern for the freedom and social advancement of women and on that basis are willing to limit application of the general "best interest of the child" standard for custody

decision making. In the United States, the Supreme Court has ruled out consideration of any stigmatization that might befall a child as a result of being in the custody of a parent who has entered into an interracial intimate relationship, based on the premise that states should be counteracting rather than giving effect to racial bigotry. In contrast, most lower courts in the United States that have addressed custody disputes involving a parent in a same-sex relationship have been willing to consider the potential effect of stigmatization on a child. Arguably, the two situations should be treated the same, but whereas from the adult-centered perspective that most family law scholars take the correct approach is to exclude consideration of stigma in both types of cases, from a child-centered perspective the correct approach might be to consider it in both. Scholars and social workers also perceive a conflict between child welfare and the claims of racial minorities in the adoption context; many adoption agencies remain resistant to placing minority-race children with white adoptive parents, in part because of concerns that such placements weaken or undermine minority communities, even when this means that a child might not be adopted at all.

To say that the law compromises children's well-being to some degree in some situations, to serve interests of individual adults or broad societal aims, is not equivalent to saying that the law is bad and should be changed. Any detriment to children might be outweighed by benefits to the children immediately involved themselves, or to children generally, or to other persons, and it might be morally appropriate to sacrifice the welfare of some children to some degree for the sake of other individuals' welfare or for the betterment of society as a whole. The European Court of Human Rights has in fact consistently taken the position that, when interests of children and parents conflict in family law controversies, the interests of one should be balanced against the interests of the other, thus allowing for the sacrifice of children's welfare in some cases to serve interests of adults. I do not presuppose that that is improper but rather aim in the course of this book to analyze whether it is so. The starting factual assumption of this book is simply that the state sometimes does cause detriment to some children when it makes decisions about their relational lives and that it does so in many cases because its decisions are based at least in part on supposed rights and/or interests of people other than the children immediately involved. Knowing precisely when that is true as a factual matter is not necessary to the normative analysis of this book.

The overarching question that this book addresses, then, is whether and to what extent it is morally permissible for lawmakers to create any legal

rules for decision making about children's relationships that by design compromise the welfare of children to serve interests of other individuals or general societal aims. Conversely, it asks whether legislatures and courts should reform the laws governing children's relationships to ensure that all decisions are based exclusively, or simply to a greater degree than at present, on the welfare or rights of the affected children.

To point to the welfare or rights of children as a potential basis for state decision making raises numerous questions that have been the subjects of debate among legal scholars and philosophers, questions conceptual (e.g., what sort of rights, if any, can a child possess?), procedural (e.g., who should determine what is good for children and who should possess the power to assert any rights children have?), and substantive (e.g., does procreating give rise to rights or only to responsibilities?). The analysis of this book touches on many of those questions. I cannot, of course, attempt a resolution of all relevant debates. What I hope to accomplish in this book is to advance discussion of several broader philosophical issues and to present a fundamental challenge to existing assumptions about what aims are morally legitimate in the legal contexts addressed – in particular, the increasingly popular view that it is appropriate for state decision makers to balance children's interests against the interests and rights of others in crafting statutes and in rendering individualized decisions that determine certain aspects of children's relational lives. Doing so will leave unanswered many important empirical questions, and as I proceed I endeavor to identify the questions of law and policy whose ultimate answer must depend on having not only a better theoretical understanding of the topic but also better factual information than I can muster or than is currently available.

The central aim of the book, then, is to develop a general theory of what children are morally entitled to as against the state, and correlatively what moral duties the state owes to children, when the state takes it upon itself to make authoritative decisions about the legal family relationships children will have and about which of a child's social relationships will receive legal protection. Before embarking on the normative analysis, though, in Chapter 1 I clarify what I mean when I speak of children having rights and explain why I examine the topic through the lens of rights, and in Chapter 2 I describe the current state of the law in some detail to document just how far short of a children's rights model existing rules fall. The remainder of the book then analyzes whether the state's decisions about children's relational lives should be governed to a greater extent, and perhaps exclusively, by rights of the children.

In developing a theory of the relationship rights of children, I assume for the sake of analysis that in every case the other persons whose relationship with a child is in question do wish to have that relationship. As it happens, and as explained in Chapter 2, the law in western society currently does not force unwilling adults into social relationships with children, and the well-known reality is that some adults decline to associate even with their biological offspring. That adults are legally free not to associate with children is itself significant in considering what rights children should have. Whether the law should ever force any adults to associate with certain children is worth considering, but I do not do so here.[1] My aim is to construct a general theory of what legal rights children ought to have in connection with their personal relationships with willing others.

My approach to developing such a theory is applied moral and political philosophy. It is "coherentist" in style, meaning that it first looks for widely agreed on general moral principles relating to intimate human relationships and then considers whether those principles ought to apply in state decision making about children's relationships and, if so, whether existing rules and practices in this area are inconsistent with those general principles. A basic premise of coherentist reasoning is that insofar as moral persons strive for rational consistency or coherence in their moral beliefs, they should want to change any specific rules and practices that are inconsistent with their general principles, unless they are prepared to abandon the general principles. In the context of children's relationship rights, this approach entails the following three-step process.

The first step, in Chapter 3, is to describe the legal rights competent adults now possess in connection with their personal relationships, which I treat for the sake of analysis as paradigmatic of human relationship rights. It shows that competent adults have a nearly absolute legal right to establish and maintain mutually voluntary relationships of their choosing with other competent adults. They also possess an absolute legal right unilaterally to terminate, or to avoid in the first instance, a relationship with any other person if they so choose. Chapter 3 also considers the extent to which this model of relationship rights has been extended in the law to incompetent adults. Chapter 4 then plumbs moral and political theory to discern the normative foundation on which the existing rights of adults to freedom of intimate association rest. It principally examines strands of modern political philosophy and popular moral discourse that treat human welfare or autonomy as ultimate values. From this examination it is possible to develop a fairly robust account of why we adults have the relationship rights we do.

Next, Chapter 5 examines whether the prevailing moral justifications for adults' relationship rights provide any support for attributing rights to children. On the surface it appears that they do not, at least not for younger children, because each invokes adults' capacity for rational self-determination. But a deeper examination of welfare-based and autonomy-based moral reasoning about rights in personal relationships reveals ample support for children's rights as well – not, for the most part, rights identical to those which we adults enjoy, but rather rights that are analogous and equally effective – "equivalent rights," one might say. Those minors who are capable of mature decision making as to their personal relationships should have the same right that competent adults have to effectuate their choices, but in the more common case of children not yet capable of mature decision making, the law should afford them in every context a right to effectuation of "imputed choices" – that is, to what it is most reasonable to assume they would choose if capable of mature decision making, which will generally mean what is in their best interests, all things considered. Doing this would require transforming much of family law in most western nations.

Importantly, attributing to children rights equivalent to those held by adults would not entail that adults have no rights as to relationships with children. It would entail, though, that adults' rights to form and maintain relationships with children are no greater than their rights to form and maintain relationships with other adults. Adults would still be entitled to be considered for relationships with children, just as they are entitled to make known their interest in having a relationship with other adults. But the law would fully satisfy this right by permitting adults to petition for a relationship with a child to whomever – a court, a child's legal parents, or a child himself or herself – the law properly treats as the decision maker for the child. If the child's actual or imputed choice, as appropriate, is not to have the relationship, then that should be the end of the matter, just as would be the case where an adult rebuffed the efforts of another adult to form a relationship between them. If, however, the child's actual or imputed choice is to have the relationship, then the adult would possess an additional right against the state's or other private party's interfering with the relationship.

My analysis of the theoretical underpinnings of adult relationship rights and of their applicability to the situation of children raises many subsidiary questions, and subsequent chapters endeavor to address the more salient ones. Chapter 6 responds to objections that giving children rights equivalent to those enjoyed by adults would result in a substantial welfare loss for biological and legal parents and/or would infringe on, or undermine the

basis of, parents' autonomy. It then addresses some novel and intriguing theoretical questions regarding constitutional and policy constraints on, or bases for, state decision making in this context. As revealed by the survey of existing rules in Chapter 2, there are situations in which a single-minded focus on the welfare of children could produce outcomes that conflict with legitimate and important societal aims, some of which are embodied in "constitutional" restrictions on state action. I treat "constitutional" in this context as encompassing non-U.S. analogues to the U.S. Constitution, such as the European Convention on Human Rights. On what basis, then, may or must the state make decisions in such situations? Is the state's role in these cases a purely *parens patriae* one – that is, one of acting as agent for, or protector of, a private, dependent individual? Or does the state also or instead act here in its more common "police power" role, as agent for society as a whole? And if the state is acting to some degree in a *parens patriae* role, is it as constrained by constitutional provisions as it is when it acts in a purely police power role? Even if not compelled to do so, may the state nevertheless use its power over children's relational lives to promote the progressive societal aims underlying certain constitutional provisions, or does this amount to illicit instrumental treatment of children?

Chapter 7 then tackles the several difficulties said to plague application of the best-interests standard, responding to family law scholars who have taken the position that this standard is unworkable or incoherent. Chapter 7 also considers some perplexing questions not addressed by others writing about this area of law but that arise when one understands a best interests inquiry in terms of imputing choices to children. For instance, should children be assumed to have only self-regarding interests? Or should they instead have imputed to them altruistic concern for the happiness and well-being of, or a debt of gratitude toward, certain other persons, such as their biological parents? If we ask, for example, whom a newborn child would, if able, choose to be his legal mother, between a biological mother who is addicted to drugs and an available adoptive mother, should any sympathy for the biological mother enter into our reflections, on the grounds that people who can feel sympathy generally do so with respect to their biological parents' sufferings, or given that the child might later in life actually feel sympathy for his biological mother? Should we impute to the newborn child a "choice" to show gratitude to the biological mother for giving the child life rather than having an abortion? Or should we think only about the child's developmental needs?

Last, Chapter 8 reassesses a few of the existing legal rules governing decisions about children's relationships, by reference to the general theoretical