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CHILDREN'S ASSOCIATIONAL RIGHTS?: WHY LESS IS MORE

Emily Buss*

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.¹

Justice John Paul Stevens

I note that respondent is asserting only, on her own behalf, a substantive due process right to direct the upbringing of her own children, and is not asserting, on behalf of her children, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.²

Justice Antonin Scalia

In *Troxel v. Granville*, Justices Stevens and Scalia suggested that taking account of children's own associational rights might affect their analysis of a grandparent's visitation claim.³ This same accounting, however, appears to lead them in opposite directions. For Justice Stevens, a child's associational rights would bolster a grandparent's visitation claim.⁴ For Justice Scalia, these rights could undercut that claim.⁵ This divergence would be unremarkable if children's own views and actions drove the exercise of their associational rights. But both Justices assumed that a child would require some adult surrogate to press her claim. Stevens fixed on the grandparent as the child's rights-claiming surrogate,⁶ and Scalia fixed on the parent.⁷ The difference in outcomes they project from the exercise of children's associational rights runs no deeper than the difference in the adult they each chose to press the

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¹ *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

² *Id.* at 93 n.2 (Scalia, J., dissenting).

³ *See Troxel*, 530 U.S. at 90–91 (Stevens, J., dissenting); *id.* at 91–93 (Scalia, J., dissenting).

⁴ *See id.* at 91.

⁵ *See id.* at 93.

⁶ *Id.* at 90–91.

⁷ *Id.* at 91–93.

claim.

The Justices' early reach toward the recognition of children's associational rights has been greeted with enthusiasm by many concerned that the law affords inadequate protection to the important relationships children form with non-parental adults.⁸ But the Justices' words, when juxtaposed with one another's, should serve as a warning: Where the nature of the child's asserted rights is so contingent on the choices made by adults, we should be slow to assume that children gain anything of value in ascribing the rights to them.

In this Essay, I will consider the value of affording children associational rights. The Essay rests on two rights-favoring assumptions: First, it assumes that fostering and preserving children's relationships with nonparents will often be in the children's interest. Second, it assumes that our legal scheme should be structured to favor children's interests over others' when these interests conflict. Despite these assumptions, I conclude, however, that in most circumstances we should not attempt to protect children's relational interests by affording them associational rights. In my view, these rights are likely to do children more harm than good.

My opposition to children's associational rights is not conceptual, but pragmatic. As long as children depend upon adults to identify and assert their rights, we should have no confidence that affording children rights will translate into greater deference to children's needs. Indeed, rights or no rights, the quality of decision making for children will only be as good as the adults that control it. I see no reason to expect the group of adults that collect around children's rights claims to do a better job than parents of identifying and acting on children's interests. Moreover, the process of group decision making necessarily entailed in enforcing claims will surely do some harm. Finally, and most tentatively, I fear that calling things "rights," where the rights holder has so little command over their exercise may do a kind of harm of its own.

Many pieces of this argument repeat arguments I have made previously criticizing grandparent visitation laws and other legal provisions that establish the right of nonparents to seek custodial fragments from a court.⁹ The new point of these old arguments here is that vesting associational rights in the children themselves has no effect on the analysis whatsoever. The second point this Essay aims to make is that claiming to afford children rights, when they have so little control over their exercise, is problematic in its own right.

⁸ See, e.g., David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117 (2003).

⁹ Emily Buss, "Parental" Rights, 88 VA. L. REV. 635 (2002) [hereinafter Buss, "Parental Rights"]; Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279 [hereinafter Buss, *Adrift in the Middle*].

I. THE VISION FOR CHILDREN'S ASSOCIATIONAL RIGHTS

Before considering the implications of affording children associational rights, it is worth trying to flesh out precisely what such rights would look like.¹⁰ For adults, rights of association are classic autonomy rights. It is left up to adults to decide with whom they wish to associate and, for the most part, what the nature of those associations will be.¹¹ Associational freedom for adults means that the state cannot force them into relationships they do not desire and that the state cannot prevent them from forming relationships they wish to form. The value of the rights, for adults, is that they leave individuals free to chart their own course.

But for those pressing for associational rights for children, the focus is not, for the most part, on protecting children's autonomy, but rather on meeting their needs.¹² As a general matter, children's associations are heavily controlled by some combination of their parents and the state. This structure of authority is not, itself, challenged by advocates for children's associational rights, who share the general view that children benefit from the exercise of considerable control by responsible adults. What concerns associational rights advocates are two subsidiary issues. First, advocates are concerned about how parental identity is assigned, and second, they are concerned that children's additional, extra-parental relationships are afforded inadequate protection. On both of these issues, the contention is that affording children rights will help safeguard their interests at stake.

In a previous article, I considered the first question — the assignment of parental identity — at some length.¹³ In this Essay, I will focus on the second question. I will consider the extent to which we should recognize children's associational rights to develop or maintain important relationships with non-parental adults even when these relationships are opposed by their parents. While such rights claims could be cast in autonomy terms and limited to those children in a position to initiate litigation on their own behalves, the focus of the rights advocates is much broader. Children's associational rights, the advocates contend, should protect a child's interests in a

¹⁰ This involves a certain amount of conjecture, for those championing children's associational rights focus more on the justification for the rights than for the details of functioning.

¹¹ James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003) (demonstrating that "adults have a near absolute legal right to establish and maintain mutually voluntary relationships with other competent adults as they choose, as well as an absolute legal right unilaterally to terminate, or avoid, in the first instance, a relationship with any other person if they choose").

¹² *But see* Barbara Bennett Woodhouse, *Ain't I a Person?: Relational Rights of Children in Foster Care* (unpublished manuscript) (recounting the story of a foster child who asserted his own associational rights).

¹³ Buss, "Parental" Rights, *supra* note 9.

relationship, even where the child has neither the developmental nor the legal wherewithal to initiate suit.¹⁴ The call, then, is to involve courts in an assessment of the value to children of relationships parents threaten to deny them. Children's associational rights would protect relationships that courts concluded were good for children, not simply those a child is seeking to maintain.

II. WHICH SURROGATE?

While the law allows adults to identify and act on their own interests, it assumes that children need help identifying their own interests and therefore assigns various surrogates to do so. This is so whether children are afforded rights or not. Indeed, the primary surrogates assigned by the law are the child's parents, and this surrogacy arrangement is generally secured by affording rights to the parents rather than the child.

While these parental rights clearly have roots in a legal system less focused on children's interests than the one I advance,¹⁵ parents can generally be expected to do a particularly good job of identifying and protecting their children's own interests.¹⁶ Parents' extensive knowledge about their children and their strong emotional attachment put them in a particularly strong position to champion their children's interests. Moreover, parents afforded considerable freedom in their exercise of parental responsibilities are likely to enjoy their parenting responsibilities more and invest more time and energy in the job.

Of course, parents do not always act in their children's interest. They sometimes make well-meaning but bad judgments on their children's behalves, and sometimes allow their own self-interests to trump the clearly divergent interests of their children. It is these departures from good parenting that inspire some to call for children's associational rights.¹⁷ But because any such rights scheme will depend upon some other constellation of surrogates to identify and act on the child's associational interests, we should consider the qualifications of these various alternative surrogates before concluding that parental deficiencies justify shifting decision-making authority to them.

¹⁴ See, e.g., Dwyer, *supra* note 11 (suggesting that for children not yet capable of mature decision making, the law will best protect their associational rights by ensuring that associations serve their best interests).

¹⁵ Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

¹⁶ The value to children of affording their parents wide latitude in decision making regarding their upbringing has been discussed elsewhere at some length. See, e.g., Buss, *Adrift in the Middle*, *supra* note 9, at 287-96; Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

¹⁷ Dwyer, *supra* note 11; Meyer, *supra* note 8.

These qualifications cannot, however, be assessed in the abstract. Rather, we need to consider the relative qualifications of these alternative surrogates to assess children's associational interests in particular. These are not cases, like the education cases, for example, where the child's interests are entangled with those of the state. In such cases, we might conclude that state actors with educational expertise have a special surrogate role to play to ensure that children's education comports with the demands society will place on children when they grow up. Nor are these cases like the abuse and neglect cases, where there is a broad consensus in the community about the harm caused to children by certain parental conduct. In such cases, we might well conclude that the stakes are such that we must involve nonparental surrogates in assessing whether parents have, in fact, treated their children in a manner no parent is ever permitted to do. But in associational cases, there is no claim of high public stakes, nor is there a broad societal consensus about universally applicable standards of conduct. Rather, the cases call for the making of difficult individualized judgments about the relative value of relationships to children's long-term development. It is these sorts of soft judgments that the alternative surrogates will be ill-prepared to make.¹⁸

The four surrogate contenders likely to be arrayed in defense of a child's associational rights are the relational subject (that is, the adult who makes up the other half of the contested relationship), the child's legal representative (whether lawyer or guardian ad litem), the expert witness, and the judge. Because the judge represents the ultimate decision making alternative to the parent, she represents the focal point of comparison for surrogate quality. But because the information available to influence the judge's decision is largely determined by the other potential surrogates, and because these other surrogates claim to stand in for the child as the rights *asserter*, I will focus some attention on them. I will suggest, as a general matter, that those alternative surrogates that have the best information about the child in question, are also most likely to have their judgments distorted by self-interest, and those least likely to have distorting self-interests are most likely to have poor information about the child. I will conclude that none of these surrogates, either singly or in combination, is likely to make better associational choices for a child than the child's parents, and that any scheme that shifts authority to others is likely to impose special harms on children, regardless of the ultimate decisions reached.

¹⁸ For a lengthier consideration of the relative decisional competencies of parent and state in various contexts, see Buss, *Adrift in the Middle*, *supra* note 9, at 288–89 (arguing that parents' relative decisional competence will be greatest on issues with largely private developmental consequences, and the State's relative competence will be greatest when public development is at stake and in measuring parental conduct against absolute standards around which there is a strong societal consensus).

A. The Relational Subject as Surrogate

For the most part, children's associational claims will be initiated by the person with a direct interest in fostering or continuing a relationship with the child. This may be the grandmother whose son has died, or the prospective adoptive parent who has lost a child to a birth parent. Particularly where these relational subjects are fighting to maintain an already well-developed relationship with a child, they may have a level of child-specific knowledge and emotional attachment akin to that of a parent. But these relational subjects also suffer from two related weaknesses that suggest serious problems with their role as surrogates: First, their self-interest in maintaining the relationship is at least as likely to skew their judgment as the self-interest of parents, and second, even devoid of self-interest, their assessment of the child's interests is likely to be skewed by the singularity of their focus on the relationship in question.

No adult will go to court to assert a child's right to associate with her unless she has a strong self-interest in maintaining the relationship. In many instances, the child's interests will coincide with the adult relational claimant: the strength and intensity of the relationship will make it highly valuable to both. But this need not be so. Indeed, the very intensity of an adult's eagerness to maintain a relationship with the child may say something about the health of that relationship for the child. In some circumstances, a child will gain great value in maintaining a strong relationship with grandparents after a parent has died, in others, that relationship may in fact be destructive for the child. While distinguishing the healthy from the unhealthy among these relationships is an elusive task, it is clear that the grieving grandparent, desperate to maintain some contact with her lost child through her grandchildren, is likely to be in a particularly bad position to make these judgments.¹⁹

Moreover, even where that relational subject makes a good assessment of the value of the relationship to the child, the assessment is generally a narrow one, that gives little consideration to the losses to other relationships, and other uses of time, inevitably suffered if the contested relationship is favored. Most relationships have some value to children, so the assessment of whether any particular relationship should be fostered or maintained is necessarily a relative one. Every minute spent developing one relationship is a minute not spent developing another, or engaging in some other activity of potential value to a child. Moreover, because there is surely some limit to the total number of intimate relationships a child can develop, it is not simply a question of allocating minutes, but also of making some big choices *among* relationships. Finally, relationships that can be justified in the abstract, even in relative terms, may not be able to be successfully integrated into the rhythm of a

¹⁹ Consider, for example, the case of *Boardman v. Boardman*, 2001 WL 881793 (Ohio Ct. App. July 23, 2001), in which a grandmother who had not seen her grandchildren for several years sought extensive visitation after her son's death.

child's life.

If a child were in a position to assert her own rights, she would take all of these competing considerations into account in determining whether to press a particular associational claim. She would also take into account the considerable costs associated with the litigation itself. But for all the children who are too young or legally unsophisticated to assert relational claims on their own, these trade-offs will be assessed by others, whether or not we afford children their own rights. Faced with a choice among surrogates, however, it is hard to see why we would place more confidence in the relational subject, with her frequently intense self-interest and narrowness of focus, than in the parent, as the identifier of the child's relational interests. While the parent's judgment, too, is likely to be clouded by self-interest, one of the virtues of the parent-child relationship is that it encourages the parent to incorporate the child's self-interest into her own. Moreover, the parent, charged with administering the big picture of the child's upbringing, can be expected to take into account competing claims on the child's time and emotions in a way that a single-issue relational subject will not.

Of course, the vision of the children's rights advocate is not to shift decision making authority from a parent to the relational subject, but rather to give the relational subject authority to start a process that would then involve other surrogate identifiers of a child's interests. Before considering the strengths and weaknesses of these additional surrogates, it is worth noting that one very important decision is, in fact, controlled by the relational subject.

Any system that gives the relational subject standing to assert the associational claim (whether on her own behalf, or on behalf of the child), gives this adult the final say in whether decisions about the child's associations, and all matters affected by those associations, will be the subject of litigation. Again, if the child could exercise her own associational rights, the cost of litigating the issue would loom large in her calculation. And, of course, if the parent has sole authority over the associational decision, she will protect the child from these costs altogether. In contrast, enforcing children's associational rights through interested third parties invites litigation by those unlikely to assess properly the cost of litigation to the child. Where relational subjects have the authority to bring the litigation, a parent can only protect her family from litigation by conceding on the ultimate question and granting the subject ongoing access to the child.²⁰

²⁰ Ross Thompson et al., *Grandparent Visitation Rights, A Psycholegal Analysis*, 29 FAM. CONCILIATION CTS. REV. 9, 20 (1991) (noting that the enactment of grandparent visitation statutes increased grandparents' leverage "because parents may submit to visitation demands to avoid the financial and emotional costs of a lawsuit").

B. *The Child's Legal Representative as Surrogate*

Although individuals with a vested interest in litigation could force the associational issue into court, a scheme of children's associational rights will ensure that these individuals cannot single-handedly determine the outcome of the case. Where the ultimate decision rests with the court, a rights scheme is likely to produce additional surrogates for the child along the way. Casting children's relational interests in rights terms increases the likelihood that children will be provided with some form of legal representative in the proceeding, whether that representative serves as a traditional lawyer or a guardian ad litem.²¹ Either way, we should not be optimistic that these legal representatives will serve as effective surrogates for the child.

In the past three decades, the number of individuals appointed to represent children in family law matters has grown substantially. This is in part due to the explosion of child protective services litigation, in which children's legal representation is required as a condition of federal funding.²² More generally, a growing awareness of children's independent legal interests in family matters, and the potential inadequacies of the named adult parties as representatives of these interests, has inspired legislatures and courts to provide for children's legal representation in a growing number of cases.²³ This expansion has, however, been accompanied by considerable confusion and disagreement about the proper role for these legal representatives, particularly where young children are concerned.²⁴

²¹ In the related context of third-party visitation litigation, there is some evidence of courts appointing lawyers to serve as guardians ad litem. *Cf.* *Nelson v. Edstrom*, 2001 WL 218643, at *2 (Minn. Ct. App. Mar. 6, 2001) (noting the court's authority to appoint guardian ad litem in visitation cases, but declining to do so in this case); *see, e.g., Boardman*, 2001 WL 881793, at *1 (noting the magistrate's appointment of guardian ad litem); *In re Visitation of Z.E.R.*, 593 N.W.2d 840, 846 (Wis. Ct. App. 1999) (approving of appointment of guardian ad litem in third-party visitation case).

²² 42 U.S.C. § 5106 (2000).

²³ Linda E. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53 (1992); *cf.* Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation, and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 307-08 (1998) (noting "proliferation" of court appointments of counsel for children in custody and visitation proceedings). It was once generally assumed that divorcing parents would, between the two of them, represent the interests of their children in custody disputes. *See* Frances Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 IND. L.J. 605, 613 (1998) (noting the traditional view that custody disputes are primarily private matters in which the parents safeguard the best interests of their children").

²⁴ *See, e.g.,* Guggenheim, *supra* note 23, at 328 ("Unquestionably, determining whether, and, if so, what, to advocate on a child's behalf, constitutes the most perplexing feature of representing children who are too young to be empowered to direct their representatives."); *see also* Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child*

Whether this legal representative should function as a lawyer (taking direction from his child client), or as a guardian ad litem (making his own assessment of the child's best interests) or as some combination of the two is a matter of considerable debate, and in any particular case, the role choice may be determined by statute, by court order, or by the individual choice of the legal representative.²⁵ Because children's associational rights are conceived in largely needs-based terms, we can expect this role uncertainty to follow children into cases pressing their own associational rights.

Where the court appoints the child a lawyer, it will be that lawyer's responsibility to ascertain and advocate the expressed views of the child on the question of the child's associational rights. Note that if the rights are perceived purely as the child's, and the lawyer's position is taken at face value, the child's decision to oppose court-ordered contact might be the end of the question and require dismissal of the litigation. However, because most advocates of children's associational rights do not conceive them as simple "autonomy rights," the child's position would not necessarily be controlling. Thus, the lawyer would serve only as a child's view-presenting surrogate, leaving the final associational choice to the court.

We should have no confidence, however, that the lawyer will succeed in this view-presenting role. Many children will find it difficult to identify and then express their views on these associational issues to anyone, and lawyers may be particularly ill-suited to overcome these difficulties. Generally, the lawyer's contact with the child is extremely limited in both scope and duration. What little contact the lawyer has is relatively formal, and therefore likely uncomfortable, for the child. Establishing rapport with children is difficult for any adult stranger, and likely particularly so for lawyers, whose subject is full of unfamiliar concepts and arcane language, and who lack any special training in speaking with children. Moreover, the improbability, from the child's perspective, that this strange professional adult will, in fact, keep her confidences and advocate for her wishes may further impede the quality of the lawyer-client communication between them. In sum, we should be skeptical about the lawyer's ability to present the child's true views to the court.²⁶

If, on the other hand, the court appoints the child a guardian ad litem, that

Protection Proceedings Should Be Represented by Lawyers, 32 LOY. U. CHI. L.J. 1 (2000).

²⁵ See Guggenheim, *supra* note 23, at 307–08 (identifying a small number of states whose legislatures have defined the role of counsel for children, and noting the general lack of guidance provided by either legislatures or courts in most states on this role question).

²⁶ I have discussed children's developmentally-based resistance to participation in a traditional lawyer client relationship in previous articles. See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999) (discussing socio-cognitive barriers to children's understanding that they are in control of decision making in their relationship with their lawyers); Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996) (discussing children's difficulty understanding and believing that their lawyers will keep their confidences and take direction from them).

guardian will be charged with making his own assessment of the child's interests, and presenting this assessment to the court. For this role, as well, the child's own views are, of course, important, and we can be equally skeptical of the ability of the guardian ad litem — also generally trained as a lawyer — to ascertain the child's views. Moreover, the guardian ad litem will lack any special expertise to assess the child's interests. While this is a general problem with the guardian ad litem model of representation in all family law matters, the guardian's lack of special expertise seems particularly evident in the context of the sort of associational claims at issue here. How a legally-trained guardian will ascertain the relative benefits and harms to the child of maintaining an association the child's parents oppose is unclear. The guardian will have neither the depth of acquaintance with the relevant parties, nor any special expertise in assessing relationships, that would suggest he had something valuable to add to an assessment of the child's interests.

Although the relational subject will bear the responsibility for imposing litigation on the child, the legal representative will also impose some uninvited litigation costs on the child. Providing the child with a legal representative forces the child into yet another relationship, one that relies on a certain professional intimacy to succeed. Imposing this relationship is, in any event, a certain intrusion, and particularly so where, as I have argued, children are unlikely to understand the nature of the relationship thrust upon them. Where they lack this understanding, pressing them to engage in the relatively intimate communications contemplated by the lawyer-client relationship imposes a considerable cost of its own. When we couple these concerns with the low probability that these legal representatives will actually gauge their child clients' interests correctly (whether as identified by the client or by the representative), we might again question why we would prefer such representatives to representation by parents.

C. The Expert as Surrogate

In an attempt to get a better read on the child's best interests, parties and the court can be expected to call upon experts, particularly psychologists, to assess the associational claims at issue.²⁷ Indeed, in the parallel context of custody and

²⁷ It is difficult to ascertain the extent to which courts have relied upon experts in the closely related context of third-party visitation disputes. An article written in 1991 concluded that there was little evidence that courts were basing their decisions in these cases on the recommendations of experts. *See* Thompson et al., *supra* note 20, at 19. But recent cases reveal that at least some courts do rely on psychological assessments. *See, e.g.*, Boardman v. Boardman, 2001 WL 881793, at *4 (Ohio Ct. App. July 23, 2001) (reversing the trial court's order of third-party visitation, finding the order an abuse of discretion, in large part because it failed to take account of a psychologist's report recommending against significant visits); *In re* Visitation of Z.E.R., 593 N.W.2d 840, 846-47 (Wis. Ct. App. 1999) (approving of the trial court's reliance upon expert evaluations and recommendation in determining

visitation proceedings, these experts are offered as the antidote to the surrogacy failings of the relational subject, the legal representative, and the court.²⁸ But the experts, too, lack any real qualification as surrogates. They, too, have only limited exposure to the family members in question, and while they have considerably greater skill than the lawyers and relational subjects in assessing the current functioning of individuals and relationships, they lack any special ability to translate that current information into useful predictions for the future. Because calls for associational rights are based on a concern for the long-term interests of children, this lack of predictive ability is fatal to their expertise.²⁹

Much has been written, by lawyers and psychologists alike, about the problems of expert testimony in custody proceedings.³⁰ While psychologists can contribute valuable insights about the current functioning of the various family members and the quality of the various relationships among them, they will have little advantage over lay people in assessing which future familial arrangements will be best for a child.³¹ To the extent they have a predictive advantage, it is limited to identifying those custodial arrangements likely to be particularly problematic, for the focus of psychological research, and the most quantifiable results of this research, is on pathology.³² This is in part because the complexity and diversity of nonpathological

whether visits were in the child's best interests).

²⁸ Janet Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265 (2002) (noting that courts have increasingly turned to mental health professionals to assist them in applying the open-ended "best interest" standard).

²⁹ *See id.* at 268 (noting that best-interest decisions in the custody and visitation context are unusual among adjudications in their focus on predictions for the future).

³⁰ NAT'L INTERDISCIPLINARY COLLOQUIUM ON CUSTODY LAW, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 300 (Robert S. Levy ed., 1998) (discussing the controversy surrounding the increasing reliance on clinical experts in child custody cases); *see, e.g.*, Bowermaster, *supra* note 28; Daniel Krauss & Bruce Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCH. PUB. POL'Y & L. 843 (2000) (noting the lack of good science about the effectiveness of various custody arrangements and proposing a more limited role for psychologists in custody litigation).

³¹ PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 161 (Lois A. Weithorn ed., 1986) (citing literature "firmly underscoring the lack of any methodologically sound empirical evidence allowing psychological predictions as to the effects of various types of custodial placements on children"); Krauss, *supra* note 30, at 865-66 (citing literature suggesting that psychologists are bad predictors of future behavior).

³² Krauss, *supra* note 30 (noting that the empirical studies designed to assess various custodial arrangements have focused on pathology); *see also* Bowermaster, *supra* note 28, at 297-98 (noting that some of the tests used by psychologists in developing custody recommendations are screening devices for gross psychiatric disorders, and that newer tests being developed to focus on custody issues have been criticized for their lack of validity and reliability).

outcomes makes them difficult to assess against one another, and in part because any such assessment would hinge on value judgments our pluralistic society prefers to leave to private decision making.

While I have found no parallel scholarly discussion of the use of expert testimony in third-party visitation or association cases, there is every reason to think that the problems identified in the custody context would be even greater here. As in the traditional custody context, we can expect the psychologist to shed some light on the current state of the relationships at stake in the litigation and the child's current views about these relationships.³³ Indeed, in light of the considerable difficulties a child's lawyer may have in ascertaining those views, the expert may, in fact, be more qualified than the lawyer to get this information. But psychologists will likely be asked to reach much farther than this, to assess whether the relationship should be maintained against parental wishes into the future.

Here, perhaps even more than in the conventional custody context, there is no hard science indicating whether such court-compelled associations serve children's interests.³⁴ While we may know, in some very general sense, that maintaining important relationships has value for children, there is no empirical basis for the conclusion that curtailing such relationships will impose serious harm on children, let alone harm that will outweigh whatever harm might be caused by forcing visits where parents are so adamantly opposed. Absent any such showing of harm, the court is left to sort between various nonpathological alternatives to determine which is best. Where the claim is not that children should be removed from unfit parents, but only that acceptable parenting should be supplemented by other relationships the parent opposes, the experts will be asked to do precisely what they have been shown, in the custody context, least qualified to do: namely, opine about the relative future benefits, to children, of two nonpathological relational approaches. Where the issue at stake captures only a fraction of the issues related to the upbringing of the child, we might be particularly skeptical about the ability of any such expert to have any special insights for the court.

The involvement of psychological evaluators, like the involvement of lawyers and guardians, will also not be without cost to the child. The evaluator is yet another unknown adult entering the child's life to ask intrusive questions. While these

³³ Krauss, *supra* note 30, at 871–72 (suggesting that psychologists bring special expertise to the assessment of children's wishes, and the level of decision making sophistication underlying those wishes).

³⁴ Pat Keith & Robbyn Wacker, *Grandparent Visitation Rights: An Inappropriate Intrusion or Appropriate Protection?*, 54 INT'L J. AGING & HUMAN DEVELOPMENT 191, 198 (2002) (noting the lack of empirical evidence on the effect of court-ordered visitation for children, and the difficulties associated with developing such evidence); Thompson et al., *supra* note 20, at 20 (noting that neither judges nor psychologists have any special expertise in ascertaining whether maintaining a relationship between a child and a grandparent that is opposed by the parents is in a child's best interests).

psychologists are likely more skilled than the lawyers at doing so, the greater skill will not eliminate the invasion of privacy inherent in any probing discourse on family conflict. Where children are savvy enough to appreciate the level of influence the psychologist is likely to have on the court, they may find these conversations particularly stressful. Moreover, the very role of the expert prevents him from assuring the child that he will keep the child's statements in confidence. The job of these psychologists is not to provide treatment to the child, but rather to provide information to the court.³⁵

D. The Judge as Surrogate

Those who advocate for children's associational rights want judges to decide whether the relationship in question should be protected. Person for person, the judge's competence in assessing the child's interests will be predictably weaker than that of the parent.³⁶ The judge, like the legal representative, will have very little child-specific knowledge and a much smaller emotional investment in securing good outcomes for the child. But perhaps the comparative strength of the judge is her ability to listen, impartially, to the range of surrogates already discussed, and to have the benefit of a full presentation of conflicting views through an adversarial hearing. In my view, however, we should not be optimistic about the value of this synthesis — certainly not optimistic enough to justify the costs associated with the procedure required to produce it.

As noted, a scheme of children's associational rights might put before a judge the following combination of surrogates, all who will take a position about what result is in the child's interest: the parent (appearing as a party and also, perhaps, as an official legal representative of her child), the relational subject (appearing, perhaps, as a party or, perhaps as the (or a) representative of the child), the child's lawyer or guardian, and the experts who have conducted a professional assessment of the child's relational needs. This combination of surrogates will surely present the court with *more* information than is generally available to the parent, but it is hardly clear that it will be *better* information, and least clear of all is how a judge is to sort out the good information from the bad. The responsibility we place on judges to make these

³⁵ See David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 BEHAV. SCI. & L. 197, 208 (1989) ("Neither confidentiality nor privilege is typically attached to communications of the participants in child custody evaluations.").

³⁶ Taken together, these findings underscore what other commentators have noted about the judicial determination of the child's "best interests" in custody and visitation cases: such determinations are exceedingly difficult (and potentially indeterminate), exceeding the expertise of the court and its personnel and thus susceptible to reliance on parochial values and viewpoints that may be misleading.

Thompson et al., *supra* note 20, at 19.

important choices for children, and the lack of guidance we give them in how these decisions should be made, are likely to leave judges grasping at the straws offered by the experts and legal representatives. Even where these other surrogates have nothing much to offer (and even when they might admit as much), the imprimatur of their credentialed endorsements, particularly in combination, will offer comforting cover to the concerned but uncertain judge.³⁷

Of course, these same objections to judicial fact-finding can be made about a great deal of litigation, certainly other family law litigation focusing on children's interests, such as custody disputes.³⁸ We tolerate this form of flawed decision making in the custody context, however, only because we think some official resolution of intra-parental disputes is essential after divorce to facilitate successful parenting in these circumstances. Indeed, any resolution is preferable to the lack of legal resolution that would come if the courts were kept out of the decision making process. To allow two parents, each possessed of full parental rights, to continue to battle one another for custodial control year after year would predictably do considerably more harm to a child than reaching some ill-reasoned resolution.

The same cannot be said in the associational rights context. In our context, absent court involvement, there is no ongoing legal conflict, but rather clear parental control. In our context, rights advocates do not contend that any resolution, regardless of the quality of the decision making, is preferable to keeping the issue out of court altogether. Rather, the rights advocates press for a court process because they believe judges will make better choices than parents, a belief that in my view is difficult to support.

Even assuming that judges are better able than parents to assess the value of certain relationships to children, the judges' superior judgments may not translate into superior results, for the implementation of those judgments will fall back to the parent who opposed them.³⁹ This is the nature of these associational claims that assert the child's right not to be raised by other parents, but only to have some sort of ongoing relationship with others, while their parents retain responsibility for their upbringing. Relying on resistant parents to implement even the best of child-rearing decisions is likely to be problematic, and these problems are likely only to increase where our concern about parents' judgment or motives is greatest.

³⁷ Bowermaster, *supra* note 28 (arguing that the lack of guidance provided by the best interest standard leads courts to rely, inappropriately, on the views of experts).

³⁸ See J. Coons, et al., *Deciding What's Best for Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465 (1993) (arguing that the key determination in custody disputes is not what is best for the child, but rather who is best suited to make that decision); Robert Mnookin, *Child Custody Adjudication and Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (focusing on the dual function of the court as protector of the child and resolver of the parents' dispute).

³⁹ Keith & Wacker, *supra* note 35, at 199 (summarizing literature suggesting that compelling visits against parents' wishes may have negative effects on children).

III. THE COST OF RIGHTS

Against the questionable benefits of a judicial fact-finding process, we must weigh the harm caused to families by the creation of associational rights. I have already noted the sort of harms likely to be imposed on children forced to engage in the litigation process. Giving children rights obligates them to speak about intensely private matters to a number of professional strangers, including psychologists, lawyers, and judges. Some children, left anxious and confused by these intrusive interactions, might be surprised to learn that these intrusions came from giving them rights.

Also troubling are the likely harms to family functioning. Again, I am saying nothing new when I suggest that litigation over a child's upbringing, and over a child's relationships with various family members, comes at a serious emotional, financial, and temporal cost to children and their families. Litigation disrupts schedules, escalates tensions and publicizes the family's disputes. It undermines parental authority by calling into question the parent's judgments and, at least potentially, forcing the parent to tolerate relationships that she opposes.

There is one other potential sort of harm that seems worth considering, though its proof is likely to be particularly elusive. In framing the issue in terms of children's rights, we may be setting up children for a kind of legal exploitation. Speaking of "children's rights of association" casts the relational interest in positive terms that are likely to skew decisionmaking in favor of interested adults. Of even greater concern, describing the scheme as one of children's rights offers considerable cover to those who favor preserving the relationships for their selfish ends.⁴⁰

As noted at the outset, the classic rights conception for adults is one of autonomy rights. The rights holder has some opportunity, and the freedom to take or reject that opportunity. To the extent associational rights, for children, encompass this same autonomy-based conception, I support such rights for children. Children should be entitled to initiate proceedings on their own to safeguard their relationships with others, whether with children or adults. But limiting associational rights to those circumstances would dramatically shrink their scope. Only the oldest and most sophisticated children will be in a position to pursue litigation to serve these ends.

Associational rights advocates, however, have much greater rights ambitions for children. They seek to extend these rights to all children, maybe even particularly to young children because they will be least prepared to preserve the threatened relationships in the absence of court intervention. While this rights concept sees the

⁴⁰ In *Troxel*, the grandparent visitation case heard by the Supreme Court, many of the amicus briefs filed on behalf of grandparent organizations framed the issue as one of children's rights. See generally Briefs Amici Curiae in Support of Petitioner, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138), available at http://supreme.lp.findlaw.com/supreme_court/docket/jandocket.html#99-138.

protection of children's important associations as serving children's developmental needs, it affords adults a broader choice-making authority than is generally associated with the enforcement of needs-based rights. Classic needs-based rights are comfortably generic: They establish children's entitlement to a certain level of care, education, nutrition, and the like, that is believed to be required for the healthy development of all children. This generic element makes them appropriately enforced by a broad range of surrogates. A surrogate need not worry about precisely what sort of education is appropriate for a particular child. She can simply advocate for that level of education determined to be universally appropriate.

The problem with associational rights, however, is that they cannot be cast in such universal terms. While all children require some number of healthy relationships to develop appropriately, the issue in the associational rights context is which among the possible relationships are most appropriate for a child. Therefore, even conceived in terms of children's needs, the assertion of associational rights will require the exercise of choice. Once choice is introduced into the rights analysis, the fact that the child is not making the choice is problematic, and the suggestion that the adult choice maker has accurately assessed the child's interests a likely fiction. Calling such a procedural scheme for awarding associational control a children's rights scheme may do more for adults than it does for children.

CONCLUSION

While there is no question that the current legal regime has produced some bad relational outcomes for children, we should have no confidence that children would do better if they were afforded associational rights. Whether or not afforded rights, children will be at the mercy of some set of adults who will decide which relationships are worth preserving. While parents do not make perfect surrogates, they can be expected to do at least as well as the various alternatives called into action by the establishment of associational rights.