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The Pursuit of Intimacy and Parental Rights

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Abstract

This paper explores whether parents' rights to live with their children and to deny others access to those children are justified by the more basic right to form and maintain intimate relationships. Many theories treat parental rights as derivative – indirectly justified by children's interests. This paper asserts a nonderivative justification based on the value of intimacy to parents.

The paper initially explores the potential intimate relationship between a father and his newborn genetic child. It asks whether the interest in parental intimacy creates any reason to demand access to this particular child. Just as a right to intimacy provides no claim that a particular stranger become my friend, the right to become a parent seems to provide no justification for demanding access to a particular child. The paper argues that duties to care for genetic children – even controversial duties not widely accepted – provide a prima facie right to care for a genetic child. The right to establish an intimate relationship derives from a duty to do so.

The paper next considers rights to maintain ongoing intimate relationships with children. These are often challenged when grandparents or step-parents seek visitation over a parent's objection, or when a custodial parent seeks to relocate after divorce. I explore two common interpretations of these conflicts, which are pervasive in both legal and moral relationships: that people who knowingly make themselves vulnerable assume risks of loss, or that people who knowingly accept another's vulnerability owe duties not unreasonably to disappoint those who rely on them.

The paper concludes by considering whether broad parental authority – to exclude others and to direct the upbringing of children – can be justified by the parental right to intimacy. I do not believe intimacy can justify such rights. But I explore

briefly alternative parental interests that could ground this right – interests that compare parents with artist and other creative workers.

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Though not usually listed among our fundamental rights, we value the right to pursue intimacy – the right to form and sustain intimate relationships. Intimate relationships shape identity, life-plans, and happiness. Among the most important is the relationship between parents and children. The right to form and sustain the parent-child relationship is the subject of this chapter. In it, I explore whether parents' interests in forming and maintaining intimate relationships justify parental rights.

Before advancing an argument for parental rights based on a right to intimacy, I should clarify three preliminary issues. First, equating the parent-child relationship with forms of adult intimacy might seem unusual. Friendships begin with mutual consent, usually exhibit equality and symmetry, and most often include more than emotional components – we talk with our friends in addition to having strong feelings toward them. For parents of infants most of this is reversed. Relationships begin without the child's consent and lack equality or symmetry. Children are dependent and eventually subordinate. And relationships with infants rely on emotional bonds but not shared ideas. Despite these early differences, parent-child relationships have something in common with friendships – the value people find in them.

Second, the characteristics of intimacy might be thought obvious. Intimate relationships are particular. My connection to another person is intimate if we do not regard each other as fungible – another friend or lover would not be as good. Intimacy also includes trust, vulnerability, companionship, emotional connection, affection, and mutual support and concern. But intimacy is actually a contested ideal. Some people understand intimacy in mundane psychological terms; others embrace spiritual accounts equating

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intimacy with communion. This variation is understandable in a diverse society. Indeed it may be desirable; autonomous individuals come to understand for themselves the value of intimacy and then create that sort of intimacy as best they can. I remain agnostic about which characteristics are most important for intimacy.

Third, describing intimacy as a right might seem odd. Intimacy is a feature of voluntary relationships, an achievement that can no more be guaranteed than can being graceful or satisfied. I do not propose to assert a right to intimacy but a right to seek intimacy and to be provided with background institutions that make success reasonably likely.

A right of intimate association has been discussed extensively in American constitutional law, particularly after an influential article by Ken Karst.[1] And though many intimate relationships have since then been protected with rights, parental-rights claims have fallen into disfavor. Parental rights are acknowledged, if at all, as derivative – usually as legal entitlements created to protect children's interests (and therefore as limited by those interests) or as bribes necessary to induce parents to care for children.[2] Such derivative justifications, while certainly capturing facets of family life, also ignore important reasons to treat parental rights as independent: intimate relationships are a core part of a life well-lived. Autonomous individuals exercise some control over these relationships by, for example, selecting intimates and shaping relationships.[3]

A non-derivative right to establish and maintain intimate relationships raises more questions than it solves. Certainly it shows why shunning or isolating people is a prima facie

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[1] Ken Karst, The Freedom of Intimate Association, 89 **Yale L. J.** 642 (1980); David Fisher, Note, Parental Rights and Intimate Association, 48 **Hastings L.J.** 399 (1996).

[2] An excellent exploration of the limits to child-centered justifications for parental rights is Amy Gutman, Children, Paternalism, and Education: A Liberal Argument, 9 **Phil. & Pub. Aff.** 338 (1980).

[3] A non-derivative parental right based on intimacy is posited by Ferdinand Schoeman, Rights of Children, Rights of Parents, and the Moral Basis of the Family, 9 **Ethics** 6 (1980).

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wrong – extended isolation makes intimacy almost impossible. But a right to intimacy does not alone explain which relationships or potential relationships must be respected, what support such relationships are due (from laws or from specific individuals), or what other interests justify institutions that undermine intimacy.

The specific questions I consider include whether parents are morally entitled to live with their children and to deny others access to those children. I do not limit this inquiry to genetic parents; similar claims to association are raised by step-parents, grandparents, and intentional parents[4]. I inquire first about a right to establish relationships not-yet formed, in contexts such as a father seeking future access to an unborn or recently born child. Having considered a right to establish intimacy, I next consider disputes about the ability to maintain intimacy in established relationships, such as conflicts over relocation by one parent, or a parent's effort to deny continued contact to a step-parent, grandparent, or other caretaker.

I conclude that the pursuit of intimacy provides an important basis for some parental rights but that other elements traditionally associated with parental rights are justified, if at all, by other interests. I explore one alternative interest briefly at the end of this essay.

The Right to Establish Intimacy

Consider first potential relationships. A right to seek intimate relationships consists partly in not having the group of potential intimates unduly restricted. Being held in complete isolation deprives people of this right. So too does declaring off limits anyone in a large group of people, especially if the off-limits group includes all those with whom a

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[4] By "intentional parent" I mean both adoptive parents and individuals who contribute to the creation of a child by, for example, hiring a surrogate mother or securing sperm for artificial insemination.

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person seeks intimacy. Legal bans and social taboos against gay people engaging in public affection or private sex acts or marriage inhibit intimacy in this way.[5]

But unduly restricting the class of potential intimates is not the only (or even main) restriction on potential intimates that matters. Some rules or customs deny access to a specific person as a potential intimate without dramatically limiting the class of potential intimates.[6] For example, traditional rules (no longer universally enforced) prevent donors of sperm and ova, and parents placing children for adoption, from knowing where their genetic children are being raised – in part to prevent them from having relationships with these children.[7] These rules were designed to inhibit formation of specific relationships. Similar are rules declaring that a child's biological father has no parental rights if the child's mother was married to another man,[8] or rules permitting an unmarried mother to place a child for adoption without the father's consent if he has not come forward rapidly enough to establish a relationship with the child.[9]

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[5] I do not mean to suggest that identifying an interest in intimacy, without further argument, shows bans on same-sex marriage to be unjustified. Many other considerations are relevant to that claim – equality concerns primary among them. I mean only to illustrate substantial interference with intimacy as one reason to oppose such bans.

[6] Bans on polygamy raise another kind of limit to intimacy – limiting its form. Most people regard the ban on polygamy as justified because in practice polygamy is often accompanied by coercion and exploitation. But within polygamous communities, these bans are seen as a form of oppression – unjust both because they discriminate on religious grounds and because they forbid a specific form of intimacy.

[7] For a summary of cases on post-adoption visitation, see Post Adoption Visitation by Natural Parents, 78 A.L.R. 4th 218 (1990). A similar discussion on the rights of sperm and ova donors can be found in Rights and Obligations Resulting from Human Artificial Insemination, 83 A.L.R. 4th 295 (1991).

[8] Many states presume that a husband is the father of any child born to a married woman, and sometimes make this presumption irrebuttable. The Supreme Court upheld a California statute on these facts in Michael H. v. Gerald D, 491 U.S. 110 (1989).

[9] The constitutional rights of unwed fathers have been extensively litigated. In Caban v. Mohammed, 441 U.S. 380 (1978) the Court overturned a decision that permitted adoption of a child over an unwed father's objection based on the father's longstanding relationship to the child. But in Lehr v. Robertson, 463 U.S. 248 (1983), the Court made clear that its decision did not create rights for unwed fathers without established relationships. In Lehr, the Court permitted a step-parent adoption without notice to the unwed father, who had not taken advantage of a putative-father registry. The child was two years old at time adoption proceedings began. The Court noted that "the biological connection…offers the natural father an opportunity… If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship…. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."

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Some of these rules make sense – both because they advance important goals and because any interest in forming a specific relationship is voluntarily waived (at least from the parent's perspective). Should we be concerned about the others? So long as a person can form other intimate relationships, why object to declaring off limits one specific (not-yet-formed) relationship? Surely my rights are not violated if Kobe Bryant refuses to be my friend or if Julia Roberts declines when I ask her on a date. Not only do their associational rights require this outcome, we rightly think that I can find friendship and love by looking among those who are willing. We could take a similar attitude toward children: I should not be able to insist on forming a relationship with any particular child so long as I have ample opportunity to become a parent to a different child.

Consider an example: Monsey and David conceive a child, perhaps through birth control failure, or after unprotected sex. Monsey has arranged for adoption, either by a couple seeking an infant or by her new life-partner. David does not learn about the pregnancy until after the child is born. He learns about the adoption shortly before (or shortly after) it is finalized and then seeks to be declared the child's father.

The legal question – should someone like David be able to rear the child or prevent its adoption by another – arises frequently, sometimes eliciting great controversy.[10] Outcomes vary depending on whether the mother was married when the child was conceived, how rapidly the father comes forward to seek the child, and whether he acts

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[10] Unwed father cases involving infants are particularly challenging. On one hand, the doctrine allocating right to fathers who "grasp the opportunity" to come forward quickly is hard to apply. On the other hand, if an unwed father does not come forward until after a child has been placed for adoption, protecting his opportunity can be painful for adoptive parents and for the child. One widely discussed case involved baby Jessica. The mother misled the father into thinking the child was dead and then placed the child for adoption. In re Baby Girl Clausen, 502 N.W. 2d 649 (Mich. 1993).

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responsibly toward the child from the start.[11] The moral question – on what basis should we evaluate his claim – is no less contested. Arguments for parental rights over infants usually rely on outdated interpretations of children as property (or property-like claims based on causation) or derive parental rights from children's needs.[12]

David's interest in intimacy cannot easily support his rights claim because David has so many alternatives. Just as my interest in forming a friendship with Kobe is reduced by the large pool of other potential friends, David's need to care for this infant is undermined by other actual or potential children. To succeed, the argument from intimacy to parental rights must show how infants differ from potential friends.

Infants differ from potential friends in at least one key respect: parents have duties toward infants. If I have a duty (or believe myself to have a duty) to form a close relationship with a specific child, my opportunities to care for other children would not undermine my reason for establishing this relationship.

Why would someone have a duty to establish a relationship with a specific child? Procreating causes a child to exist and to have predictable needs, including stable, loving relationships with adult caretakers. Society could arrange to provide children with such relationships in many ways, some no doubt better than others. But in most actual societies, even in those that assign caretaking duties to servants or that forego long-term cohabitation (kibbutzim or boarding schools), parents are expected be the focal point of, and to

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[11] On the status of children born to married mothers, see Michael H. v. Gerald D., supra. Although the California statute in that case has been amended to become more liberal toward unwed fathers in some cases, it remains impossible for some unwed fathers to seek access when their children are born to a married woman. See, e.g., Dawn v. Superior Court, 17 Cal. 4th 932 (1998). On failure to come forward quickly, see Robert O. v. Russell, 604 N.E.2nd 99 (1992) (not permitting father to prevent adoption of newborn whose existence he did not know about in case where the mother did not take any steps to deceive him about the child's existence); Baby Girl Clausen, 496 N.W. 2d 239 (Iowa 1992) (permitting an unwed father to set aside an adoption because he was not consulted after the mother knowingly misrepresented the child as not his).

[12] See Michael Austin, The Failure of Biological Parenthood, 38 **J. Value Inq.** 499 (2005); Elizabeth Scott & Robert Scott, Parents as Fiduciaries, 81 **Va. L.Rev.** 2401 (1995); Emily Buss, Adrift in the Middle: Troxel v. Granville, 2000 **S. Ct. Rev.** 279.

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reciprocate, a child's love. Given the widespread expectation that a parent will fulfill this basic need, and the parental role in creating this need, most parents reasonably regard meeting the need as a prima facie duty.

Not all duties, however, need to be fulfilled personally. Parents who place children in adoptive homes fulfill their duties indirectly by providing their children with loving parents. Why then should a genetic father whose child is adopted have any further duty to fulfill?

Perhaps the duty to provide children a loving home cannot be delegated so easily. Parents who believe they must personally rear their genetic children offer varied reasons – ranging from a desire to continue a family name or tradition (which they might understand as a religious duty, or as a duty to ancestors, or as a duty to provide the child with a connection to the past), to a recognition that a child placed for adoption may feel herself abandoned no matter how loving her eventual home, to a simple understanding of the caretaking duty as inalienable.

Not everyone believes the duty to rear their children is non-delegable. And even those who regard the duty as better fulfilled personally do not always think it wrong to place children for adoption. Disagreement concerns both moral and factual issues: not everyone feels a strong commitment to provide their genetic children a connection to family line, or believes that loss associated with abandonment is serious.

Such moral and factual disagreements do not necessarily preclude judgment or regulation. But delegating parental responsibility is a question about which reasonable people can disagree. More importantly, it is a question at the core of individual identity for many people: what are my obligations as a parent and how ought I best fulfill them? For

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this reason, states should hesitate about preventing people from fulfilling parental duties personally.

Three objections to this account are likely apparent. First, even if this explanation is correct, it makes parental rights derivative of children's interests because the duty relies on a child's interest in being cared for by a loving parent. Second, even if the right is not derivative, it relies not on intimacy but on duty. Third, even if people have a right to fulfill their duties, they do not have a right to fulfill alleged duties that they mistakenly believe they have.

According to the first objection, my argument makes parental rights derivative of children's interest. A parent's right to associate with an infant is based on his interest in forming an intimate association. His duty explains why his interest in intimacy cannot be adequately satisfied elsewhere. But the duty element seems to rely on children's needs. This objection, I think, misunderstands my argument. Children may indeed have interests in being reared by a genetic parent. But the argument from parental duty to parental rights does not rely on children's interests. Rather it is the parent's interest in fulfilling his duty by creating an intimate association, rather than the child's interest in the association, that justifies the right.

The suspicion that my argument relies on children's interests is understandable. I claim that a parent is entitled to fulfill duties owed to children -- duties that provide for children's basic needs. Surely this argument derives parental rights from children's interests. But I do not think this connection necessary. Consider some examples. You save a stranger's life, and he insists on showing you gratitude in ways he regards as morally obligatory. Even though you do not want to receive this expression of gratitude, he might have a prima facie right that you do so. In this case the right of the person rescued to repay

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the rescuer depends on a duty but does not derive from the rescuer's interests.[13] Or consider a father who seeks to care for his biological child. His duty, as he sees it, stems from an obligation to honor his ancestors. Here too, if one accepts a right to fulfill a duty, the basis for this right does not derive from the immediate beneficiary's interests. Or consider someone who accepts an honor-based code of conduct. She promises to repay a loan. The lender is so wealthy that he tells her not to bother; the money makes no difference to him. If she plausibly has a right to repay him nonetheless, her right does not depend on repayment advancing the lender's welfare.

The second objection has more merit. My argument, that parents have a right to form relationships with children when they (believe themselves to) have a duty to do so, does not depend on a right to pursue intimacy. Even if a right to seek intimacy did not exist, or a parent did not want intimacy, the parent might still assert his right to fulfill a duty. In the example above, we might add that David has no desire to spend time with children. He wants only to be a scholar who studies religious texts, mostly in isolation from others. But he believes it his religious obligation to rear his genetic child in his faith, and to teach the child, personally, about its main texts. He thus plans to revise his life aims and to devote time each day to his child's education. Perhaps he will come to value the intimacy of this relationship. But establishing such intimacy holds no attraction to him now and is not the basis for his claim to access. If his perceived duty justifies access, then apparently intimacy plays no role in my core argument.

[13] At most, this duty is prima facie. When strong reasons counsel against accepting gratitude, we regularly refuse. For example, under current law, recipients of donated organs may express gratitude in writing, buy may not offer any other material expression of gratitude.

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I acknowledge that a right of access might be persuasive absent any claim to intimacy.[14] But this need not undermine my claim. Perhaps intimacy is not necessary to justify a right to form a relationship with an infant. But for people who do value intimacy as their reason for establishing a relationship with a child, the argument from duty becomes an interest in establishing a relationship with this child. The interest in intimacy is not derivative – it is an independent right – but its application in this context does depend on another right.

The third objection is serious. Perhaps people have a right to fulfill actual duties. Moral arguments usually presume that ought implies can; if I am obligated to X, then I must be permitted to X (or else released from my obligation). But it does not follow that if I think I am obligated to X, I must be permitted to X. After all, I might think I am obligated to become president of the university or king of California. My sincere belief does not create a right.

Liberalism might warrant recognizing a right to fulfill some alleged duties. In any society there will be individuals who sincerely claim duties (whether religious or based on non-religious conceptions of the good) that are neither broadly accepted as true nor appropriately discarded as mistaken. Conceptions of the good typically include fulfilling one's obligations; they differ in specifying what obligations people have. In these disputed cases, alleged duties should sometimes be accommodated with rights.[15]

This argument from liberal accommodation might seem overbroad. On most liberal accounts, I should be free to do anything I like (whether I believe I am obligated to do so or

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[14] Whether to concede that this example illustrates an interest unrelated to intimacy depends on one's conception of intimacy. The father wants to establish a relationship with a particular person – not any random person. Even though common components of intimacy – companionship and affection – do not motivate him, a more catholic account of intimacy might include his motive as well.

[15] Cf. Jeremy Waldron, A Right to Do Wrong, 92 **Ethics** 21 (1981).

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merely wish to do so) unless my actions harm another. Why should liberal accommodation for varied conceptions of the good owe more deference to actions based on an alleged duty than to actions strongly desired for other reasons?

Alleged duties often deserve special accommodation. Fulfilling duties can be central in people's life plans, and in their perceptions of themselves as aiming for good ends.[16] People act wrongfully in their own estimation if they cannot fulfill duties they embrace. So compelling people to act against such norms violates individual conscience (or personal integrity), much like coercing confessions, mandating religious oaths, or sending conscientious objectors to war. Alleged duties thus deserve special accommodation because mandated violations of conscience interfere more deeply with basic autonomy interests than do more mundane barriers to achieving goals.

Arguing for the special importance of alleged duties may seem odd. But I do not think the argument strays far from common intuitions. Often we take more seriously the need to accommodate individual choices by people who understand their actions as duties. For example, in disputes over religious accommodations, added weight has sometimes been given to claims that a rule not only makes religious practice more difficult but also impedes fulfilling a religious duty.[17] Special accommodations are also sometimes made when charitable giving is regarded as a duty – such as tithing.[18] Or consider how the Family

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[16] It might be thought that some specific worthy activities can only be done if done based on perceived duty. Perhaps there are such things. But I do not think parenting is among them. Although many people regard parental actions as guided by duties, acting from a sense of duty (rather than for example from love) is not necessarily central to the good of parenting.

[17] The impulse to accommodate religious duties under constitutional law has never been given much space, partly because recent doctrine has reduced the need to accommodate any religious practice inhibited by neutral laws, and partly because trying to decide which religious practices are duties requires state adjudication of religious doctrine. Nevertheless, efforts to accommodate particularly important religious rites, sometimes described in the language of duty, persist. See Kent Greenwalt, **Religion and the Constitution** 202-214 (2006) (citing as an example Mack v. O'Leary, 80 F.3d 1175 (7th Cir, 1996), vacated and remanded 522 US 801 (1997).

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[18] In personal bankruptcy proceedings, tithing has been given special protection by statute. See Kang, Tithing: Fraudulent Transfer or Moral Obligation, 18 **Bank. Dev. J**. 399 (2002). An opposite approach has

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Medical Leave Act creates rights for employees who care for a sick family member but not for those who care for a sick friend.[19] Although all these examples might be interpreted in other ways – the state might simply be accommodating aims it favors or drawing simple lines – they plausibly illustrate deference to asserted duties.

Rights to Sustain Intimacy through Continued Association

Intimacy does not require proximity or daily contact. But distance and irregular communication hinder relationships, especially relationships with children. Rules separating intimates are sometimes obviously unjust, such as when families are separated by national borders and inflexible migration rules. But most impediments to intimacy raise hard moral and practical questions. Examples include grandparent visitation, step-parent visitation, and relocation after divorce. Grandparents can encounter difficulty visiting grandchildren if their own child is dead or in prison and the grandchildren's other parent has remarried.[20] Step-parents who do not adopt children often cannot visit after separation or divorce.[21] Relocation disputes arise when a couple separates and the custodial parent seeks to move, perhaps for a new relationship or a new job, or to be closer to her own family. This makes regular visitation difficult for the now-distant parent.[22]

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been taken in the family law context, where tithing has not been treated as a necessary personal expense when calculating payer's available resources. See Osborne v Osborne (1987, La App 2d Cir) 512 So. 2d 645.

[19] 29 U.S. Code 28 Section 2612(A) (1).

[20] Many states authorize judges to order parents to allow grandparent visitation. These statutes have been questioned since the Supreme Court struck down a grandparent visitation order in Troxel v. Granville, 530 U.S. 57 (2000). The statute in that case was quite broad – allowing courts to order visitation for almost anyone based on the child's best interests. After Troxel, some states narrowed their laws so that only grandparents, and sometimes step-parents, had standing to seek visitation. For cases, see Grandparents' Visitation Rights Where Child's Parents are Deceased, or Where Status of Parents is Unspecified, 69 A.L.R. 5th 1 (1999); Grandparents' visitation rights where child's parents are living, 71 A.L.R. 5th 99 (1999).

[21] See Visitation Rights of Persons Other than Natural Parents or Grandparents, 1 A.L.R. 4th 1270 (1980).

[22] Case law is varies on a custodial parent's right to relocate with children against the wishes of a noncustodial parent seeking to continue regular visitation. Some cases have imposed a heavy burden on the moving parent to show a compelling reason for the move. See Daghir v. Daghir, 439 N.E.2d 324 (N.Y. 1982). Most courts adopt more lenient standards, often with a presumption favoring the move. See, e.g., Ireland v.

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In all these cases, parents opposing continued contact have their own interests in non-association or travel, or their own particular knowledge about why continued contact might harm the children. And of course children have strong stakes in maintaining these relationships (or sometimes in resisting them). These disputes require a choice between conflicting interests, only some of which depend on a right to intimacy. Nonetheless, intimacy might be important to how we analyze the conflicts.

Ongoing relationships differ from new relationships.[23] In new relationships, the potential for alternative relationships posed a challenge to anyone asserting that intimacy justified access to a specific person. Few people could meet that challenge – primarily genetic or intentional parents. In ongoing relationships, genetic connection and alternatives play a lesser role. Lost intimacy can be painful even for those who lack genetic connection and who had no right to establish the relationship from the start.

Family law scholars advance two conflicting arguments, assumption of risk and reasonable reliance, to explain which adult should prevail in continued-association disputes. Assumption-of-risk arguments favor custodial parents who oppose contact rights for grandparents or step-parents, or who seek to relocate after separation. According to this argument, vulnerability to loss is inherent in intimacy.[24] Because this vulnerability is well

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Ireland, 717 A.2d 676 (Conn. 1998). Other states delegate substantial discretion to trial courts. See Marriage of LaMusga, 88 P.3d 81 (Cal. 2004).

[23] It might be thought that the potential relationships discussed above could be better understood as actual relationships. This description reflects the idea that all relationships exist partly in our imaginations, and that most people begin to imagine their lives as parents long before parenting begins. I see some virtue in recognizing that relationships have emotional and cognitive antecedents. But the mere psychological fact of anticipated intimacy is not the same as an ongoing relationship. Real relationships are usually much longer and more complicated -- more deeply connected to a life – than brief periods of intensely imagined relationships. And actual relationships have particularity. For both these reasons, I do not see much advantage in collapsing actual and potential relationships into a single category.

[24] Vulnerability and intimacy are linked in multiple ways. Psychological account of intimacy treat vulnerability to loss is a consequence of intimacy. We come to rely on our close friends and family for companionship and support and mourn the loss of these comforts when intimates depart. Other accounts

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known, becoming attached to another person should always be interpreted as accepting the risk that the relationship will end.

Reasonable-reliance arguments favor those sympathetic to maintaining relationships. Vulnerability accompanies intimacy; loss is always possible, through untimely death or rejection by the other person. But this well-known vulnerability does not mean that people who become intimate accept all risks of loss. Vulnerability is equally well known to those who allow others to establish relationships with them, or with their children, as is the fact that adults who form such relationships will be harmed if the relationship ends. This knowledge imposes a burden of protection on people who permit (and often benefit from) these relationships.

These two perspectives on voluntary vulnerability – that people who make themselves vulnerable assume risks of loss, or that people who knowingly accept another's vulnerability owe duties not unreasonably to disappoint those who rely on them – are pervasive in both legal and moral relationships. The appropriate choice between perspectives has itself been the subject of intense debates. Some people think the answer depends on whether the specific sort of vulnerability ought to be encouraged (perhaps because vulnerability is necessary to some desirable institution).[25] Others think it depends on whether one party can better take precautions to mitigate the harms of loss. Still others think our rules or customs should encourage contractual allocations of risk.

In the case of intimate relationships, I do not think any simple choice between assumed risk and reasonable reliance can solve the problem, for the simple reason that both

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treat vulnerability as a prerequisite to intimacy; we gain trust and build close ties by exposing our thoughts, feelings, and weaknesses to others as we become their friends.

[25] One example might be love between spouses. On some (controversial) accounts, no-fault divorce – and its parallel in morality – is desirable not because ending relationships whenever one party is dissatisfied is morally attractive, but because allowing loveless relationships to end is necessary to the integrity of marriage based on love.

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sides in these cases are vulnerable to each other (depending on what background norm we assume). Consider an example:

Molly and Dan have twin children. Shortly after the kids are born, Dan leaves the house (either he dies or he and Molly divorce). After a time, Molly falls in love with Stephen, who moves in and helps care for the twins. Dan's parents visit frequently, often watching the children after school while Molly and Stephen are at work. When the twins are 10, Molly becomes angry with Stephen and with Dan's parents. She learns that they have been doing something she finds unforgivable -- perhaps supporting a political cause she detests, or exposing the twins to violent sports, or using drugs. She decides to end her relationship with Stephen and to cut off all contact between the twins and Stephen and the grandparents.

We could say that Stephen and the grandparents assumed a risk that Molly would refuse to allow them access to the twins. Or we could conclude that Molly assumed a duty not to cut Stephen and the grandparents off (absent strong reasons) when she allowed them to start spending time with her children and thus to rely on an ongoing relationship.[26]

Some people have no difficulty choosing a perspective. Treating intimacy as assumption of risk seems callous. Siding with Molly in the hypothetical favors selfish unconcern and rigid parental prerogatives over human feeling. But dismissing Molly's position like this ignores at least two complexities. First, even if Molly seems cruel on these facts, most people accept the assumption-of-risk argument in appropriate cases. For example, Molly might fire a nanny who has grown attached to the twins. Caretakers

[26] Stephen's claim might be seen as less strong than the grandparents'. Perhaps his failure to adopt the twins as a step-parent should count as evidence that he assumed a risk of loss. Given the well known possibility of such adoption, failure to make use of this option could be evidence of his intent. On the other hand, if Dan was still alive, Stephen would not have been able to adopt. And even if Dan was dead, Molly might have refused this option, or the couple might not have considered it.

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predictably form attachments to children. But because parents might hesitate to allow contact with baby sitters if they could not later end these relationships, and because customary parental rights in this case are widely known, assumption of risk seems a far more natural interpretation.

Second, siding with Stephen and the grandparents – perhaps protecting their relationship with legal rights to visit or seek custody – reverses the vulnerability, creating a mirror image of the reliance and assumption-of-risk arguments. By presuming that ongoing relationships deserve protection, we treat Molly's decision to allow Stephen and the grandparents to form bonds with the twins as assuming the risk of unwanted intrusions into her life (and potentially control over where she lives if we extend this analysis to relocation cases). Seen in this way, the real interpretive choice is about allocation of risk. Either Molly assumed a risk that she will cede control over her own associations, or Stephen and the grandparents assumed a risk of lost intimacy. These are not identical risks. But they are both serious enough that neither interpretation should be dismissed as obviously callous.

How then can we distinguish intimacy as assumed risk from intimacy as reasonable reliance on continuity? Laws or customs sometimes help sort this out. If everyone knows that step-parents have no enforceable rights of access to their spouse's children, then perhaps it seems fair to regard the decision to enter this family relationship as assuming a risk of later loss. But this resolution is not always plausible. Do grandparents really choose to grow close to their grandchildren knowing what law applies to later disputes? More importantly, this analysis offers no guidance on what laws or customs are desirable.

Choosing a side in these disputes might turn on a difficult comparison of harms. If step-parents like Stephen are entitled to visit the twins, or even seek custody, then Molly's decision to allow Stephen into her life meant risking regular forced association with him for

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a decade or more, and perhaps significantly less control over her residence and schedule than she might otherwise expect. If Stephen has no such rights, then affection for these children and concern for their lives all developed with an implicit understanding that it could be cut off unilaterally by Molly. Which of these seems appropriate might depend on which loss – intimacy or non-association and control – seems greater under the circumstances. Or perhaps we will find both harms roughly equivalent, and resolve disputes on another basis, such as the child's welfare or fairness to adults.[27]

Alternatively, one might try to resolve this case based on protecting the parent-child relationship. Parents necessarily have some authority over children if they are to carry out core functions of protecting children and making important decisions. Is the ability to cut off contact with grandparents or step-parents not presumed by parental status?

I do not think that one can solve problems of grandparent or step-parent access so easily. The appropriate scope of parental authority needs justification. The fact that some decisions need to be made by parents does not show which decisions must be so made or what constraints are appropriately placed on parental decisions. Whether exclusionary rights are necessary to the parental relationship – necessary either to sustain parent-child intimacy, or for some other purpose -- is the topic addressed next.

The Right to Preserve Intimacy by Exclusion

Parents often regard themselves as having property-like rights over children – not only a right of unfettered access to the child, but also a right to exclude others from such access. No doubt this sentiment owes something to the property analogy, at least historically: parents produce and sustain children (much as they do crops) and naturally feel themselves entitled to control children. But almost everyone now rejects the property

[27] On the role of fairness in child-custody and relocation disputes, See Scott Altman, Should Child Custody Rules be Fair, 35 **J. Fam. L.** 325 (1996).

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analogy. Other accounts of parental authority (both to exclude and more broadly to control a child's upbringing) derive parental rights from children's needs. Because children need protection and guidance (and because parents usually care about their children and are in a good position to have information about dangers) parents are entitled to broad decisional authority.

I do not dispute that some parental authority can be derived from children's interests. But the derivative account has difficulty explaining moral (rather than legal) rights of exclusion. Consider the example of Molly. Perhaps the law rightly allows Molly very broad discretion to exclude Stephen and the grandparents. She thinks they exposed the children to violent activities. Allowing her to make this choice, without having to prove her fears justified in court, may best protect the children. But evidentiary concerns need not constrain moral inquiry. Is Molly morally entitled to cut off Stephen and the grandparents without strong justification? What if the violent sport they allowed the children to see was football? A broad parental right of exclusion, derived perhaps from a larger parental right to direct a child's upbringing, is often thought to include a right to make idiosyncratic decisions about child welfare and in so doing to impose harms on others without having to offer good reasons.

Might a non-derivative parental right based on intimacy justify a right to exclude? Intimacy requires some seclusion – close friends and lovers need time apart from others. But this commonplace observation cannot justify a broad right to exclude. One does not need a right to bar others from access in order to have sufficient private time needed to sustain intimacy. Only inappropriately obsessive friends and lovers demand the right to veto all one's other friendships.

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Perhaps the analogy with adult intimacy misses a crucial element: the parent-child relationship does not begin (as do ideal relationships among adults) with equality or consent. The intimacy between parents and young children does not arise from symmetrical reciprocity, but from care-giving and authority.

How might intrusions on parental authority undermine parent-child intimacy? Some psychologists think that parent-child bonding requires children to view their parents as authorities.[28] Perhaps bonding also requires parents to view themselves as authorities. Even so, it seems unlikely that parent-child bonds demand absolute dominion. No one imagines that police should be forbidden from giving parking tickets to parents in front of their children. Likely, teachers should refrain from criticizing parents in front of children – calling into question a parent's skills as a parent. Which analogy – parking tickets or humiliating lectures – most resembles compelling parents to allow grandparent or step-parent visitation? Unlike traffic stops, visiting over parental objection calls into question a parent's authority as a parent. But unlike acts that humiliate a parent in front of a child, it stems from general laws applicable to all. Whether intimacy is sturdy enough to withstand public enforcement of visitation rights is an empirical question. But since we already force visitation for non-custodial parents, I suspect the addition of grandparents and step-parents would not further undermine intimacy.

I expect there are strong reasons, both moral and practical, for allowing parents authority over who has access to children and generally how children are reared. But I do not think these are justified by a parental right to intimate association.

A more promising argument for parental authority – to exclude and to direct a child's upbringing – is worth exploring. Intimacy is a core reason that people become

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[28] Goldstein, Freud & Solnit, **Beyond the Best Interests of the Child** (1973).

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parents; it plays a crucial role in human flourishing. It is not, however, the only important reason for becoming a parent. Parenting is also an act of creation. Those who choose to become parents seek not only an ongoing relationship – comparable in some ways to friendship and romantic love. They also seek an opportunity to shape another person – influencing her values, exposing her to ideas (and sheltering her from others), supporting and perhaps directing her interests, religious commitments, and character. In short, parenting is not only intimacy, it is also creation.[29]

In identifying parents as creators, I mean to compare them with artists, writers, and artisans (not with god the creator) who bring something into being and shape its features. Comparing parents with artists might seem like a return to treating children as property. But I think it avoids the most problematic elements of property-based theories. First, on most understandings, an artist's claim to control her creation comes to an end at some specific point – the core claim to control is based on integrity of the process, not on having been the causal creator of the work. Puzzles over children as property often arise when critics ask why children cease being property at adulthood, and indeed why they are not owned by their grandparents, who – after all – plausibly own the parents. The analogy to artist allows us to see why parental rights fade. As children grow older, parents' ability to shape them fades, and of course they come to have rights of their own – not coincidentally rights to shape themselves.

I do not mean to valorize the delusional and destructive approach to parenting in which adults seek to live through their children's accomplishments or measure success through their children. I mean only to notice that parenting makes sense to most people as a creative project. The longevity and demands of this project, and its centrality to a life well

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[29] A justification for parental rights along these lines is discussed in Edgar Page, Parental Rights, 1 **J. Applied Phil.** 187 (1984).

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lived for those who choose it, suggest that the element of shaping another person deserves as much attention as the basis for parental rights as does the pursuit of intimacy.

Indeed, intimacy and creativity may merge in the project of rearing children. Parents no doubt have more in mind as they try to mold children than simply creating friends for themselves. But it is through intimacy that parents and children shape each other. Just as most artists regard the act of creation as intimate, so too intimacy and creativity likely merge with parents and children.

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