

The Problem of Authority and Divorce

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Abstract

In this paper, I argue against any state intrusion and interference that amounts to scrutiny of parents based on their decision to separate. The state, to my mind, ought not to be involved in childrearing decisions in cases of divorce unless there is a sufficient reason, and, as I will argue, divorce *per se* does not present a level of risk to children that justifies state intervention. The claims I am about to make apply not only to parental capability tests but also to the entire process of legal divorce, which allows the courts to decide who they *believe* is a better parent—a decision that, in my view, the state is not capable of (and should not be) making. I do not claim that states ought not to interfere at all but rather that, unless parents fail to do what they are morally required to do, state interference should not be permitted.

To make this case, I present two claims: claim A, that only a risk reaching a certain level (which I will call level H) justifies state intervention; claim B, that the act of divorce does not meet level H; and therefore C, there is no justification for state intervention in divorce.

I. Introduction

In most liberal states, state interference in the parent-child relationship typically only occurs when parents fail to live up to the basic expectations that society has for them, as for instance, in cases of abuse or neglect. In some liberal states, however, parents' decision to separate or to divorce is, in itself and regardless of the circumstances, regarded as presenting a risk to the welfare of the children and on that basis, thought to justify state intervention. The fact that parents are divorcing *itself* serves as a basis for such state intervention in childrearing decisions, and thus, diverse states have diverse methods of intervention.¹ All separating parents must submit their proposed custody arrangements

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¹ Laws that require a religious rationale lack, to my mind, moral legitimacy. Religion, I believe, should not play a role in family law (or any other law for that matter). But religion does sometimes play a role in family law, at least in some liberal states, even if it is not always explicit. When this is the case, the decision to divorce, at least in such *liberal* states, is perceived to be an act against *family values* (in terms of religious

to the court—even when the arrangement is consensual—and await the court’s approval. If the court does not approve of the arrangement or if the two parents cannot agree, then the court issues an order for a parental-capability test (or appoints a social worker to evaluate the parents’ competency to parent). This is not because the parents are suddenly ill-equipped to parent but simply because of the fact that the parents have decided to divorce. In Israel today, the courts do not order a co-parenting arrangement (in which the parents have shared time after separation and equal obligations with regard to their children) unless both parents agree to it. In fact, the courts have said that such an arrangement is an unacceptable child-rearing practice and that it is preferable for a child to have one main household.²

There are good reasons to limit state interference in childrearing. From a liberal perspective, state interference with separating-adequate-parents is problematic, since it involves the state defining the terms of the intimate parent-child relationship and restricting parents to those terms.³ The jurisprudential concept of divorce, even if not that problematic, is perceived as poor parental judgment and as such, it is assumed that children of separated parents need protection. I think that most cases of state interference should be understood as instances of government attempting to engage in a transfer of parental rights, for example, through looking at the role of the state as *parens patriae*, which is often taken to be a hallmark of children’s protection. Judicial intervention in private custody disputes should be circumscribed and limited to cases that raise clear child-protection issues (commonly called abuse and neglect proceedings). As argued by Emery, “Like married parents, parents who live apart—ideally and in practice—maintain relationships not only with their children but also with each other. Because of this, protecting the coparenting relationship is an important public-policy goal for both married families and for families in which parents live apart, a goal that might trump well-intentioned efforts by the courts to intervene to protect children’s best interests. Perhaps the lesson learned is that courts do best when treating the separated, divorced, or unmarried half of American parents as they do the married half: by staying out of parental

rationale). And thus, although there may have been historical reasons for justifying *family values*, it does not follow that separating parents should be treated as acting wrongly, immorally or in a blameworthy manner, especially when such justifications no longer hold. However, I do not intend to explore the topic of religious rationales in this paper.

² The typical response to arguing against state involvement in parental separation is that states do *not* intervene when parents *agree* upon childrearing terms. This is, in fact, wrong. On the contrary, states do intervene in many different ways when parents separate; for instance, the state reviews parental agreements in terms of schedule, living arrangement, etc. To this claim, people often respond with something like the following: *if* it is a morally charged situation, then states *should* intervene. I reject both claims and argue that a) states *do* interfere and intervene even when parents agree (though interference with agreement is not my main point) and b) they do so for reasons other than potential risk to children or ill-equipped parents (which is my point).

³ I share Clare Chambers’ argument against regulating marriage as a personal relationship, since it violates state neutrality and endorses a particular conception of the good. Clare Chambers, ‘The Limitation of Contract’, in Elizabeth Brake (ed), *After Marriage, Rethinking Marital Relationships* (OUP 2016) 51-83.

disputes.”⁴ Agnes Callard describes unilateral breakups as violent. Divorce I say, is often the case. But in *private dispute settlements* (such as divorce), the unilateral breakup is not the only thing that is violent. State interference in the intimate relationship between a separating-adequate-parent and her child is, to my mind, a violent act (or at the very least, aggressive and unjustified). Callard asserts that “If your life is entwined with someone, then a new arrangement between the two of you must be the product of an agreement you can both live with.”⁵ Parental separation (in most liberal states)⁶ occurs in one of two ways: either it is consensual and then the court must approve the terms of the settlement, or it is initiated unilaterally. Whichever of the two given alternatives is the case, state involvement cannot be avoided or objected to by the parents. I focus on the rationale behind the policy of the justiciability of childrearing disputes between separating parents, and then turn my attention to questions of why the same rationale has not kept the courts from deciding such disputes in other cases (e.g., death of a parent, marriage, etc.).⁷

For the past decade, there has been much legal discussion in western jurisdictions with respect to children: to promote the child's best interests or the child's welfare; to allow the child to express her views on any matter affecting her interests as well as support the state's role as a protector of children. These are important issues, but I think that this discussion is bereft of the *most* important issue, namely, the value of parent–child attachment. Herein, I offer a theory rooted in the principle of parental freedom and the recognition of the inherent value and exceptional circumstances of the parent-child relationship.⁸

⁴ For a very good discussion of the child's best interest and (wrongful) judicial intervention in divorce, see: Kimberly C. Emery and Robert E. Emery, ‘Who Knows What Is Best for Children? Honoring Agreements and Contracts between Parents Who Live Apart’ (2014) 77 Law & Contemp. Prob. 151.

⁵ Agnes Callard, ‘Romance without Love, Love without Romance’ (2021) 1 Liberties 221.

⁶ In Australia, shared-time parenting after separation is often criticized, but it remains an important family form even if still for a minority of families. In Canada and the US, traditional language has been changed: ‘guardianship’ was replaced by ‘parental responsibility’, and court orders are now called ‘residence’ orders, ‘contact’ orders, and ‘specific issues’ orders. Moreover, the language of parental authority and custody as well as parents’ authority over children is outdated, but the idea of *shared parenting*, even if supported through the UNCRC is, nonetheless, often rejected. Philosophers and jurists offer new standards for childrearing that focus on children's interests. Colin Macleod offers a specification of a standard of parental competency that is grounded in the justice-based entitlement of children. Colin Macleod, ‘Parental Competency and the Right to Parent’, in Sarah Hannan, Samantha Brennan and Richard Vernon (eds), *Permissible Progeny? The Morality of Procreation and Parenting* (OUP 2015) 227-245. For the functions of the law in Australia, see: Bruce M. Smyth and Richard Chisholm, ‘Shared-Time Parenting after Separation in Australia: Precursors, Prevalence, and Postreform Patterns’ (2017) 55 Fam Ct Rev 586 and the references there. See also: Jo Bridgeman, Heather M. Keating and Craig Lind (eds), *Regulating Family Responsibilities* (Routledge 2011), for the development in child and family law research and responsibility.

⁷ The same rationale has not kept regardless of the parents’ marital status: Kimberly C. Emery and Robert E. Emery claim that “Separated, divorced, and never married (whether cohabiting or not) parents with children under the age of eighteen all are potential candidates for judicial intervention in custody matters”. Emery & Emery ‘Who Knows What Is Best for Children?’ (n 4) 151.

⁸ Gheaus claims that procreators lack the right to rear their children, if they are not the *Best Available Parents*. Relevant to my argument, she asserts that adequate but *less-than-optimal* parents should not rear

In this paper, I argue that these legal procedures and requirements with respect to child welfare are unjustified. Specifically, I argue against any state intrusion and interference that amounts to the scrutiny of parents' capacity to parent simply on the basis of their decision to separate.⁹ To my mind, the state ought not to be involved in childrearing decisions in cases of divorce unless there is a sufficient reason. As I will argue, divorce *per se* does not present a sufficient risk to children such that it justifies state intervention.¹⁰ The claims that I am about to make apply not only to parental-capability tests, but also to the entire process of legal divorce, which allows the courts to decide who they *believe* to be a better parent—a decision that, in my view, the state is not capable of (and should not be) making. As in child neglect proceedings, divorce proceedings are meant to determine which of the parents should be responsible for the child. The assumption of the law is that by virtue of the separation, one of the parents may be ill-equipped to continue a parental relationship in terms of duties and obligations without intervention or guidance.¹¹ In response, I argue for a principle of *parental autonomy*. I do not claim that states ought not to interfere at all, but rather, that state interference should not be permitted unless parents fail to do what they are morally required to do.

I am convinced that adequate parents should determine their children's best interests after separation, just as they do in marriage. To this end, I propose the adoption of a default joint-custody policy, the restriction of evaluations of parental capability and a narrowing of the scope of state intervention in divorce.¹² My account goes even further in that I propose a minimalist approach according to which there should be no default assignment of sole custody, but instead a default joint custody arrangement that may be

their biological children “if somebody who would make a better parent is willing to parent instead of them”. Anca Gheaus, ‘The Best Available Parent’ (2021) 131 *Ethics* 431. I reject this view in a separate paper that is forthcoming.

⁹ Although my discussion of state competency makes various substantive claims about the right of children, I do not provide a detailed account of how the relevant considerations of justice that ground these rights are to be defended. I set aside specific jurisdictions, legislation and jurisprudence and focus on whether disputes between parents that does not involve anything immoral or harmful to the welfare of the child, should be reached by the law. The idea of ‘pre-decided’ shared-time parenting after separation and other matters concerning the upbringing of children is the answer to the conflict but it is not the emphasis of this paper. No end of difficulties would arise should judges try to tell parents how to bring up their children. See, for example: *People ex rel. Sisson v Sisson* 2 N.E. 2d 660 (N.Y., 1936) at 661.

¹⁰ Many argue that courts are not competent to judge what is in the child's best interest even as they argue about what the legal standard for contact and residence should be. This is not the case here; I do not think that the law should determine child arrangements at all. The popular assumption is that the state must determine contact and residence in divorce because ‘someone’ has to assign physical custody to one of the two parents who hold competing legal claims to parental responsibility. But this assumption is misleading because parental competence, duties and care are not *relinquished* upon divorce.

¹¹ A child contact and residence order may be instigated by one of the parents, but then again, it may not. Even if it is, it is as much an interference with the parent-child relationship as is the judicial decision to interfere with the parent's duties and obligations.

¹² The details of these arrangements are beyond the scope of this paper. According to Emery and others, “custody evaluators follow the law and only offer opinions for which there is an adequate scientific basis”. Robert E. Emery, Randy K. Otto, and William T. O'Donohue, ‘A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System’ (2005) 6 *Psychological Science in the Public Interest* 1

re-examined only at a parent's request. To make this case, I present two claims: claim A, that only a risk that reaches a certain level (which I will call level H) justifies state intervention, and claim B, that the act of divorce does not meet level H. It thus follows that there is no justification for state intervention in divorce.

The first part of the paper—section II—is devoted to claim A. Section 2.1 shows that state interference with childrearing constitutes a kind of harm that provides an exclusionary (or *quasi-exclusionary*) reason for not interfering when parents are divorcing. In section 2.2, I offer an account of the wrongness of state interference in such a case and argue that the state is not competent to make childrearing decisions. Although this subject has received considerable scholarly attention, this attention tends to focus on *the best interests of the child* and the state's *role* as a protector of these interests. I argue that this fails to appreciate the intrinsic value and exceptional nature of the parent-child relationship.

In section III, I present claim B, which is that the act of divorce does not reach level H. Level H is only reached, I argue, when parents fail to fulfill their responsibilities and their parental obligations. In section IV, I come to my conclusion that there is no justification for state involvement in divorce. Here, I offer a theory that emphasizes the value of the parent-child relationship outside the context of wedlock and attributes childrearing rights to parents on the basis of the parent-child relationship rather than the spousal relationship. I thus provide an account of the wrongness of the state violation of parental autonomy (in cases of divorce) and in support of parent-child attachment.¹³

II. Claim A: Only a Risk of a Certain Level (H) Justifies State Intervention

For the purposes of my argument, risk will be understood as an unwanted result or something that could cause such an unwanted event. An unwanted result, in turn, is a *continuing* and *untreated* diminution of wellbeing, which itself refers to the condition of faring or doing well (note that a person's welfare is similar to her wellbeing, interest, or good). Abuse and neglect are serious harms that obligate other agents (such as the state) to take responsibility for children. The state is only obligated to take responsibility for children if separating parents fail to discharge their duty of ensuring the wellbeing of their children. Spousal separation does not entail an inability to ensure the wellbeing of children, nor is it tantamount to abuse or neglect. Nor does parental separation mean less attentive interaction with one's child, less value for her and for her own sake, less desire to maintain physical and psychological proximity or less desire for reciprocation—in fact, it is the exact opposite. Parental separation often induces parents to be more cautious and vulnerable to the wellbeing of their children.¹⁴ I do not argue that abuse marks a threshold

¹³ In what follows, I will sometimes use the term 'divorce' and at other times use 'parental separation'. Both terms are used here to refer to the dissolution of the spousal bond and not to the legal meaning of divorce. When I discuss legal implications, I will specifically indicate that I am doing so.

¹⁴ It is relevant, though, to consider the rules around neglect and abuse, as all parents make mistakes. Exactly what counts as child abuse is a matter for debate. David Archard, 'Child Abuse: Parental Rights and the Interests of the Child' (1990) 7 *Journal of Applied Philosophy* 183, and David Archard, *Children Rights & Childhood* (2nd ed, Routledge 2004) Ch 14. The question of what the state should provide in cases that

above which it is permissible for others (particularly the state) to intervene, because if that were the case, by the time abuse or neglect has reached the point that the state intervenes, irreparable damage has often been caused. I do claim, however, that the state repeatedly treats separating parents as negligent or ill-equipped. Parents, as Kant writes in the *Metaphysics of Morals*, “incur an obligation to make their child content with his condition so far as they can”¹⁵ regardless, I believe, of their spousal relationship. The state has the obligation to step in when parents fail to do as they should, but not a moment before. There is indeed a gap between a parent facing difficult circumstances that require attention and a parent failing to do what they should. Within this gap, parents are entitled to exclude others, including the state, so long as they are dutiful parents, even if they decide to pursue separation. State interference in childrearing is only permissible when parents fail to live up to their responsibilities and obligations. Getting divorced does not amount to a failure to live up to these obligations, and therefore, does not warrant state interference. By Level H, I mean a significant risk of a *continuing* and *untreated* diminution of wellbeing. More precisely, level H refers to failing to do what you should as a parent in the situation of divorce, i.e., to ensure the wellbeing of your child. It is not a risk to the wellbeing of your child, but rather a risk of *failing* to ensure the wellbeing of your child that justifies intervention. And thus, intervention in the case of parental separation is only justified when a risk reaches the level of parents failing to ensure the wellbeing of their child.

1. State interference with childrearing constitutes a kind of harm that provides an exclusionary (or quasi-exclusionary) reason

The following example might be helpful: when a stranger makes negative remarks about a parent’s childrearing practices, the parent commonly responds by saying that these practices are none of that stranger’s business (rather than, for example, declaring that the person is wrong or that the accusation is untrue). This response conveys the parent’s feelings of intrusion and that their parental capability has been violated, rather than that they need to provide a justification.¹⁶ If we take a perfectionist stance, we, as parents, are morally obliged to give our children a good life (broadly construed). Many people believe

do not involve abuse or neglect remains open. See Elizabeth Brake and Joseph Millum, ‘Parenthood and Procreation’ *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018) <<https://plato.stanford.edu/archives/spr2018/entries/parenthood/>> accessed 01 September 2021.

¹⁵ Immanuel Kant and Roger J. Sullivan, *Kant: The Metaphysics of Morals* (Mary J Gregor ed, CUP 1996) 64.

¹⁶ I discuss the intrinsic goodness of the parent–child relationship elsewhere. To do so, I refer to Brighouse and Swift, who assert that a successful implementation of the fiduciary role (as they term the parent–child relationship) contributes to the parent’s wellbeing (and, conversely, its failure detracts from the parent’s wellbeing). They explain that a parent–child relationship is a “crucial contribution to the flourishing of the adult,” and that “there is something distinctive about this kind of relationship and that for many people nothing will fully substitute [for it].” An intimate relationship between a parent and her child contributes to the goodness of an individual’s life, but it does not merely raise the level of the individual’s wellbeing (by contributing something to her flourishing), but is rather something that enriches her life. Harry Brighouse and Adam Swift, ‘Parents’ Rights and the Value of the Family’ (2006) 117 *Ethics* 80.

that a good life is conditional upon an intimate parent-child relationship, and although it seems morally offensive to state that people *need* such a relationship to be happy, it does seem reasonable to claim that those who have such a relationship consider it to be autonomous and private.

I maintain that the state should not interfere with the parent-child intimate relationship. In fact, I believe that this attachment has intrinsic value, and that interfering with it can be described as wrong. State interference constitutes harm because it violates this relationship as it detracts value regardless of its causal outcomes. It does also, however, *engender* certain causal outcomes: for instance, it may result in destructive behavior or cause psychological damage to the parent or child. The violation of this relationship is highlighted by the way that the authority assigns duties (or “duty-like things”)¹⁷ which seemingly replace the parental role and thereby impair the parent’s autonomy. I wish to argue that this kind of harm yields ‘exclusionary reasons’ to refrain from state interference in all cases that do not reach risk level H.

To clarify, according to Raz,¹⁸ an exclusionary reason “is a second-order reason to refrain from acting for some reason.”¹⁹ Whereas a first-order reason is a reason *to* perform an act (that is, a reason for action that has been drawn directly from considerations of interest, desire or morality), second-order reasons refer to a general category that Raz defines as “reason[s] to act on or refrain from acting on a reason.”²⁰ An exclusionary reason, in turn, is a *type* of second-order reason—a reason *not* to act. Raz gives three different examples; to understand this concept more fully, let us examine one of these.

A friend has approached Ann with an investment opportunity, but Ann has to decide quickly whether or not to accept it, as the offer will soon be withdrawn. The deal is rather complicated, and Ann is, at the time, very tired, so she cannot make a rational decision based on the merits of the case. Although refusing to consider the offer is tantamount to rejecting it, Ann admits that she will reject the offer not based on its merits, but rather because she cannot trust her judgment at the time when she must decide. In this situation, Ann claims to have a reason for *not* acting (i.e., an exclusionary reason).²¹ This example illustrates a case of resolving a conflict between a first-order reason and a second-order exclusionary reason, not by weighing the strengths of the competing reasons, but by

¹⁷ See Enoch about authority being the source of duty. Enoch distinguishes between a preexisting duty (independent of the authority) which is triggered by the authority and new duties that are created by it. David Enoch, ‘Authority and Reason-Giving’ (2014) 89 *Philosophy and Phenomenological Research* 296, 301-29.

¹⁸ Raz distinguishes between reasons not to *act* for a reason and reasons not to *consider* a reason, where only the former qualifies as an exclusionary reason. Joseph Raz, *Practical Reasons and Norms* (2nd edn, OUP 1999) 15–49 and William Edmundson, ‘Rethinking Exclusionary Reasons: A Second Edition of Joseph Raz’s *Practical Reasons and Norms*’ (1993) 12 *Law and Phil.* 329.

¹⁹ Raz (n 18) 39.

²⁰ *Ibid.*

²¹ *Ibid.* 37.

relying on a general principle of practical reasoning; that is, by determining that exclusionary reasons prevent consideration of the first-order reasons that they exclude.

Enoch suggests that there are also *quasi-exclusionary* reasons, which are reasons to not even *consider* other reasons. Let us explore another example to illustrate such types of reasons. Suppose you are a relatively young cellist living in Israel, and that you are invited to perform with the Berlin Philharmonic. You are also the mother of a 16-year-old daughter, undergoing a typically difficult teenage year (your daughter also has a loving, hands-on father). Performing with the orchestra is beneficial for your career and contributes to your wellbeing, but it also requires you to travel for a full six months. You have a reason to seize this opportunity and a reason to not even consider it as a possibility; namely, because it could harm your relationship with your daughter. The difference from Raz's example is that here, the mere consideration, the act of deliberation or the conversation itself—with your daughter—is extremely worrying for her. And it is not that your daughter's wellbeing outweighs the contribution to your career as a cellist career, nor that it excludes the reason for action. Rather, it provides a reason to not even consider other reasons because the mere consideration of the possibility constitutes harm. In this case, you may not have an exclusionary reason in Raz's sense, i.e., a reason *not* to act for some reason, but rather a reason not to *consider* some reasons. In the case just described, we have a reason to not consider certain reasons against the relevant action, *as well as* reasons to not deliberate on certain reasons for the relevant recommended action. I myself think that Raz's account of exclusionary reasons can do the work here, but if potential harm to the parent-child relationship does not constitute (according to some) an exclusionary reason, then Enoch's *quasi-exclusionary* account, a reason not to consider some reasons, is sufficient.²²

We can also question the interference of the state by considering the issue of continuity of care. Continuity of care refers to the understanding that children's development depends on a lasting, continuing relationship with at least one (adequate) parent.²³ Anne Alstott argues that the continuity of care implies that parents acquire proficiency over time. Parents who remain alongside their children in the long term can best represent their interests in interactions with the healthcare system, the educational system and other public bureaucracies. A parent who shares an intimate relationship with her child tends to develop *expertise* in caring for—and identifying with—that child. Public institutions rely on parents acting as children's protectors and advocates; most importantly, when parents fail, schools and other institutions for children perform badly as well.²⁴

²² Enoch 'Authority and Reason Giving' (n 17) 321.

²³ For a comprehensive account of "continuity of care," see: Anne L Alstott, 'What Does a Fair Society Owe Children – and Their Parents?' (2004) 72 Fordham L. Rev. 1941, which draws on arguments in Alstott's book: Anne L. Alstott, *No Exit: What Parents Owe Their Children and What Society Owes Parents* (OUP 2004). See also: Joseph Goldstein, Anna Freud, & Albert J Solnit, *Beyond the Best Interests of the Child* (Free Press 1984).

²⁴ Alstott, 'What Does a Fair Society Owe Children – and Their Parents?' (n 23) 1942.

I have shown that state interference in childrearing constitutes harm. Now, I would like to discuss the attachment relationship as a survival mechanism along with the matter of continuity of care. Continuity of care, as Alstott describes it, refers to the intensive and intimate care that children need in order to develop properly. It pertains to their intellectual, emotional and moral capabilities, and it is expected to continue until children reach maturity at the age of eighteen. Parental responsibility, Alstott rightfully argues, requires that parents “do not exit” from parenthood.²⁵ Developmentalists, psychologists and other scientists who study human development refer to this relationship as an *attachment relationship*. In this context, an attachment is a connection with another human being, usually a parent, for the purpose of being taken care of; generally speaking, human beings have specific neurons in their brains that correlate to such attachment. Through attachment, humans seek the closeness that is required for survival, and thus any risk to that attachment is experienced as a threat to survival.²⁶ For a well-attached child, her parents provide a home base from which she can venture into the world and a retreat to which she can return.

Maté, an authority on neurodegenerative diseases and child development, discusses this relationship from the bio-psychosocial angle. He claims that nothing can compensate for a lack of an attachment relationship: “All the love in the world cannot get through without the psychological umbilical cord created by the child’s attachment ... Only the attachment relationship can provide the proper context for childrearing.”²⁷ Maté discusses the connection between a person’s familial environment (primarily throughout childhood) and illnesses later in life. He states that from a scientific perspective, there is no longer any controversy regarding the connection between stress and illness. He then argues that children’s physiology is influenced by their parents’ emotional state. Another of his important observations is that people who care intensively for others but who do not care for themselves are destined to be chronically ill.²⁸ This does not mean that parents ought not to take care of their children; on the contrary, it means that they should be permitted and free to do just that, as doing so not only fulfills their responsibility as parents but also contributes to their wellbeing.²⁹

²⁵ *ibid* 1941.

²⁶ According to Maté, loss of the attachment relationship in childhood causes serious emotional stress that will develop into chronic illness later in life. Gabor Maté, *When the Body Says No: The Cost of Hidden Stress* (Vintage Canada 2004).

²⁷ Gordon Neufeld and Gabor Maté, *Hold On to Your Kids—Why Parents Need to Matter More than Peers* (Ballantine Books 2006).

²⁸ Maté (n 26).

²⁹ Though I do not argue for it here, I claim that the parent-child intimate relationship is intrinsically good and that it contributes to the wellbeing of the parent as well as that of the child. My paper, ‘The Moral Good of the Parent-Child Attachment’ (forthcoming), in which I explore this idea is a work in progress.

2. **The state is not competent to make childrearing decisions**³⁰

Arguably, liberal democracies are vested with authority (i.e., the moral power to require or forbid certain actions) over their citizens, and citizens bear an obligation to obey the law (possibly extending to unjust laws). Mill writes that the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. Although my concern in this section is that of lack of competence and not a violation of parental autonomy or infringement of liberty, I extend Mill's reasoning of noninterference to incompetence.³¹ Mill argues that a child must be provided with "food for its body" and "training for its mind"³² and if the parent does not fulfil this obligation, the state ought to see it fulfilled, possibly at the charge of the parent. But for the state to exercise its power, children must be examined (the question of when and in what way is not obvious; a matter to which I return soon) before parents are assumed to be at fault. For example, if a child proves to be unable to read, or if the parent fails to supply her with a *proper* education, then the state should be permitted to exercise its power against the parent. Children's right to an education is not my concern here, but the objection which Mill raises in this respect can help, namely, that people's education should not be at the hands of the state. The objection here is not to the enforcement of education as such, but rather, to the state's taking upon itself to direct that education. The state, I believe, does not have the capacity to do the right thing (not really, anyway) and thus, it should not exercise its power in this case.

Even if we share the intuition that democracies tend to make just decisions and tend to promote some common good, the fact that a government is democratic is certainly no guarantee that it will make good political decisions. Or, as Estlund vividly puts it, "who knows what other important biases or errors people might have in their systematic thinking on issues?"³³ Estlund describes the problem of political decision as that of people having systematic views about many things. If their system is bad, such as because it is racist or sexist, then their political decisions may invariably be wrong. Thus, although a state possesses this authority over its citizens (at least, some states do, some of the time and with regard to some matters), it is not necessarily an expert in all areas, including (if not particularly) childrearing. Now, suppose that there is someone with greater expertise, who is more competent and who has an intimate relationship with the child—say, her

³⁰ I draw on a normative liberal deontologist premise, that we all have a moral reason to help but not to interfere.

³¹ The relevant part of Mill's argument against interference reads as follows: "His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise." John Stuart Mill, *On Liberty* (first published 1859) The Project Gutenberg 2011, 18 <www.gutenberg.org/files/34901/34901-h/34901-h.htm> accessed 15/09/2021.

³² Mill *On Liberty* (n 31) 200.

³³ David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2009) 16.

parent. Should we not trust the parent's judgment over the state's in general, regardless of the authority that the state might have to intervene in cases where risk reaches level H? I think that the answer to that question is almost always yes. I am inspired by Mill in his objections to government interference when it does *not* involve the infringement of liberty. What I mean by this is that whatever 'thing' (e.g., deciding about the child's activities and care during the process of spousal separation, etc.) the state decides to do is likely to be better done by parents. There is no one more fit to act in this respect than the parent who is directly interested in her child. And even if we think that, on average, a state officer (or institution) can do better, it is nevertheless desirable for the parent to be the means of reinforcing the parent-child attachment. Mill's reason against interference that does not turn upon the principle of liberty is that we do not wish to add more power to the government, especially, I say, in the case of the parent-child relationship.³⁴

To understand the issue more fully, let us ask the question of what liberal states do to protect children. The use of the word 'protect' has provided a focus for many discussions in political philosophy. Suppose that I were to agree with LaFollette's idea that licensing parents is a reasonable way of *protecting* children; according to his account, we should license parents for similar reasons that we license professionals in various other fields. For example, if we want to protect patients, we need physicians to be competent, reliable, skilled and experienced in the treatment that they provide—we must make sure that they are qualified.³⁵ Therefore, they must be licensed to practice their profession, which often requires taking exams and meeting certain conditions; additionally, a license can be annulled, revoked, suspended and so on if the physician fails to meet its requirements. But, unlike licenses to practice a profession, states do *not* grant licenses to parent (not yet, anyway), and there is no condition which states that parents must be married to fulfill this role. LaFollette argues that the same considerations that justify licensing doctors and other professionals also justify licensing parents. If we support the former, we should, in order to be consistent, also support the latter.

I do not plan to argue against LaFollette's position here. Rather, I want to point out that we do, in fact, effectively treat some parents, namely those going through the process of dissolving their marriage, as though they *have been* licensed as parents. We treat them as though they have violated the terms of their license to serve as parents by virtue of their decision to separate. But unlike the license to practice medicine, I will argue that the power to parent cannot be annulled, revoked, suspended, scrutinized and criticized as a result of parents separating. And thus, interviewing children about their parents, ordering a parental capability test, involving a social worker, etc.—practices which are analogous to those used to test a professional's expertise as they work to maintain their license—should be executed only when maltreatment or risk at a certain level occurs.³⁶

³⁴ Mill *On Liberty* (n 31) 18.

³⁵ Hugh LaFollette, 'Licensing Parents Revisited' (2010) 27 *Journal of Applied Philosophy* 327, 331

³⁶ I do not argue against LaFollette here, but if I were to argue, I would say something like this: the considerations that justify licensing doctors do not justify licensing parents. One of the reasons I can think of (there are others) is that parents, as opposed to professionals, cannot waive, abandon, relinquish or quit their responsibility for their child on a whim. If they do, it is likely that we will morally (and by law) judge them for the worst. Supporting the licensing of doctors does not, I think, mean that we should support the

Lafollette claims that we should be able to protect people who are vulnerable to those who are supposed to *serve them* and with whom they have a special relationship. Although children are vulnerable and should be protected, parents are *not here to serve them*; the parent-child relationship is not a service relationship. Additionally—and this is key to my argument—divorce should not be considered a risk in itself. Some parents *do* directly harm their children; others, as Lafollette puts it, “harm their children by failing to fulfill their fiduciary duties to them”³⁷ and there are those who violate their parental moral duties to participate in the parent-child relationship, as I argue elsewhere. In both cases, risk reaches level H, which thereby justifies state intervention. But, parents do not violate their duty simply *because* they dissolve their marriage; thus, they should not be subject to state scrutiny or punishment for that reason alone. A parent should be free to terminate her spousal relationship because of her own concerns, but she ought not to be free to do so in acting as a parent. A parent is bound to maintain her obligations towards her child under any circumstances. I have already observed that owing to the absence of any recognized general law, states do not directly punish parents for divorcing, but the actions taken by many liberal states in marriage dissolvent proceedings in which children are involved, are definitely punitive in their effect.

Returning to the question of whether we should trust the parent’s judgment over the state’s, it is important to note that successful childrearing (by adequate or “*good enough*” parents)³⁸ relies in part (though not exclusively) on an intimate parent-child relationship.³⁹ As evidenced by the fact that different children and parents respond differently to similar situations, and that children can react negatively to remote sources of authority (i.e., those with whom they have no relationship), parenting requires a context in order to be effective. Parenting is not something that any given adult can engage in with just any child. Children do not automatically grant an adult the ability to parent just because that adult loves them or thinks they know what is good for them and has their best interests at heart.⁴⁰ A child must be receptive to the person who is nurturing, comforting, guiding and directing her.

licensing of parents. LaFollette acknowledges that states do not grant licenses to parents; his point is that they *should*. I do not agree with LaFollette on this point. My point is that I think states already act as if licenses were granted to parents. What I mean by this is that states treat separating parents as “license terms violators” for their decision to dissolve their marriage, and thus (states) permitted to take responsibility for their children.

³⁷ LaFollette (n 35).

³⁸ Note that my only concern here is that of *adequate parents*. I am not concerned here with the actions of neglectful or abusive parents, since, as I have already explained, I accept that neglect and abuse are sufficient grounds for the state intervening in childrearing.

³⁹ In a separate paper, I argue that parents have a moral right to childrearing based on the intrinsic value of the parent-child intimate relationship. The interesting aspect of this argument is its parent-centered, rather than child-centered, view. For the indispensability of the parent-child relationship, or the “attachment relationship,” to use the term preferred by developmental psychologists and psychiatrists, see Neufeld and Maté (n 27).

⁴⁰ Parental ability is not something granted by children to adults, but rather an attachment relationship, which is important for substantiating competence such that childrearing and parenting can succeed. The *willingness* of children to participate in the relationship is influenced by the parents’ behavior: does she

In this respect, states do not have the capacity to do the right thing, but they nevertheless exercise it. Making a good childrearing decision requires an epistemic component. It relies on having knowledge about the child. This knowledge is not akin to facts about *a* child or about *the* child, as this does not amount to knowledge of the child. When it comes to childrearing, we want actual knowledge, and not mere opinion or values. An adequate parent is well-acquainted with her child, has a perceptual relation to her child, can distinguish her from other children and knows her. Making childrearing decisions in the particular condition of parental separation does not require ‘a conception of what is good’ in terms of ‘value theory’, but rather, a conception of what is good for *my* private child under *these* conditions. A good enough parent knows, rather than merely guesses, what is good for her child. Gabor Maté is explicit about the nature of this special kind of relationship, explaining that only an *attachment relationship* can provide the proper context for childrearing and that impinging upon that relationship can cause damage (as I outline in the next section). The advice of “experts,” he continues, as well as the confused expectations of society, result in parents losing their parenting instincts and their natural competence.⁴¹ This gives rise to two arguments regarding duties and obligations in the case of childrearing, which have important moral differences: a) that state interference with childrearing constitutes the kind of harm that serves as an exclusionary reason and b) that the state is not competent to make childrearing decisions and that its interference constitutes an instrumental harm which should be considered based on its merits, rather than on speculation or preconceptions.

Regarding the argument that the state is not competent to make childrearing decisions, we can say that, generally speaking, good political decisions promote justice and the common good, and that they do so in a justifiable manner.⁴² But state interference in childrearing disrupts the continuity of parental care, and the discretion exercised by state officials with respect to childrearing poses the risk of making incompetent decisions about childrearing.

Arguably, authorities have a right to rule or, perhaps, are entitled to do so with the agreement of their subjects.⁴³ As explained earlier, liberal states enjoy some authority over parents with regard to their minor children. I do not wish to argue that such states should have no influence on parenting whatsoever; rather, I claim that children have

listen to her child, does she talk to her, is she a considerate companion, and does she praise or even scold when needed? A child has a need for intimacy and for love, and the child’s compliance depends on how the parent shows her love; thus, in that sense, a child *does* grant adults the authority to parent. See James Rachels, *Can Ethics Provide Answers? And Other Essays in Moral Philosophy* (Rowman and Littlefield 1996) 223.

⁴¹ In psychological terms, attachment is at the heart of the relationship (in human relationships), and it manifests in the pursuit and preservation of closeness and connection. I side with this definition, seeing it as part of what I refer to as the intimate parent–child relationship (see the section on the value of childrearing). See Neufeld and Maté (n 27) 6–8. In the current paper, I do not discuss natural law theories, but I do hint at Aquinas’ view that the good is prior to the right, and I hope to do this in future work. Thomas Aquinas, *Summa Theologiae*.

⁴² Estlund (n 33) 1–22.

⁴³ Enoch ‘Authority and Reason Giving’ (n 17) 323.

rights and that their parents (not the state), as the *corresponding duty-bearers*, have an obligation to ensure that those rights are protected. One may ask the following: why assume that parents are the corresponding duty-bearers of children's rights? I address this question below. However, if a parent does not fulfill her responsibilities toward her child—if she is neglectful or abusive—then the state is surely justified in intervening.⁴⁴

Still, a question remains regarding the *suitability* of the duty holder. This is an important point: lawmakers and state officials may be elected to their positions, inherit them or seize them by force, but none of those possibilities equips them to make decisions about childrearing on behalf of other people's children. Adequate parents are the best candidates for raising their own children; the state is not.⁴⁵ Simmons therefore asks why state authorities should not be open to moral challenge from those who disagree with these authorities' values and the way that they perform necessary tasks. Although limiting parental freedom is necessary in some cases (where risk reaches level H) for the benefit of the child and in order to prevent her from being harmed, in other cases, as Simmons observes, when there is no threat of harm to others, an argument for obeying the rules may look like a rationalization for the authorities to have their way, without any reasonably acceptable justification.⁴⁶

Lastly, following Alstott, I wish to argue that even when there is a reasonable justification to interfere, the best interests of the child test, which is applied in every child-related decision and is executed by judges and state officials, may actually foster incompetence. State officials exercise discretion, and this discretion is not grounded in some kind of objective measure, but in their own values. Whether exercised in good faith or otherwise, such discretion leaves considerable room for personal, cultural and professional norms and ideologies that differ from those of the child's parents.⁴⁷ I do not mean that parental decisions regarding what is best *guarantee* what is best; rather, what is best is something

⁴⁴ There is a conceptual matter at play here: legitimate authority can interfere with childrearing (on some matters, within limits, and on some occasions) based on a justified exercise of authority; it cannot, however, act upon every change in the wellbeing of children—regardless of parental care or the level of risk (see the next section). Mill wrote that it is a crime against the child not to provide him with instruction and training for his mind, yet it is within parental autonomy to decide what those are. See John Stuart Mill, *On Liberty* (n 31).

⁴⁵ Christopher Wellman and John Simmons, *Is There a Duty to Obey the Law?* (CUP 2005) 133-42.

⁴⁶ Simmons refutes most attempts in favor of obedience, whether between citizens and states or between parents and children, see: *ibid* 149. For an overview of changes in policy of family courts regarding shared time parenting, see: J. Herbie DiFonzo, 'From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy' (2014) 52 *Family Court Review* 213.

⁴⁷ Mill insists that preventing harm to others is the only legitimate basis for restricting individual liberty. He argues that an agent is a more reliable judge of her own good and that even well-intentioned rulers will not promote the good of the citizens as well as the citizens would themselves. John Stuart Mill *Essential Works of John Stuart Mill* (Max Lerner ed, Bantam Matrix edn, Bantam Books 1965) Ch IV. Also found in *Mill On Liberty* (n 31) Ch IV.

else entirely, namely, the special relationship (parent-child) that binds the parent to the child.⁴⁸

States, I assume, have an interest in the safety of children, but they lack the understanding and intimacy that relates to the wellbeing of *specific* children and, thus, are incompetent to make childrearing decisions. Thus, state interference should only be permitted when parents fail; that is, when risk reaches level H. In a 2008 paper, Emery criticizes courts' policies of intervention and argues that courts are reluctant to intervene in disputes between married parents, but not in the same kinds of disputes between separated, divorced or never-married parents. That is, married parents share similar disagreements regarding such issues as choice of schooling, relocation and more, but the courts refuse to entertain such disputes between married parents.⁴⁹ I argue that a court's refusal of jurisdiction in such conflicts between married parents ought to extend to divorced parents as well.⁵⁰

Perhaps we see it as morally desirable or virtuous for the state to (arguably) 'fulfill' a parent's duties toward their children on the parent's behalf. Alternatively, perhaps we think that the state is under a special obligation to promote the wellbeing of children, so the constraints that normally apply to intervention in childrearing fade away together with the marriage.⁵¹ However, the negative results of state decision-making are both intrinsic and instrumental. Such decision-making is instrumentally bad because state incompetency leads to bad results; it is intrinsically bad (and this is my main argument on this matter) because the intervention itself, regardless of the consequences, constitutes harm.⁵²

⁴⁸ It is possible, of course, to enter this relationship unwillingly, such as through rape, a threat or other kinds of forceful inducement, but this is not what I am referring to. This paper is part of a larger project that includes an explanation that is also needed here: I only discuss cases where parents willfully bring a child into the world, adopt a child or otherwise legally and voluntarily rear a child.

⁴⁹ Emery claims, "Even following decades of judicial (and parental) uncertainty, law and society have failed to embrace a clear, enduring, and widely accepted definition of children's best interests." The courts intervene primarily (if not only) when the parents live separately or are in the process of separating. It seems that parental autonomy and the judgment of parents is reduced (in the eyes of the courts) when they dissolve their *coupled* status. *Kilgrow v. Kilgrow* 107 So. 2d 885 (Ala, 1958) at 889. Robert E. Emery and Kimberly C. Emery, 'Should Courts or Parents Make Child-Rearing Decisions: Married Parents as a Paradigm for Parents Who Live Apart' (2008) 43 Wake Forest L Rev 365. See: *Sisson* (n 9) 661 and Emery and Emery 'Who Knows What Is Best for Children?' (n 4).

⁵⁰ See Emery and Emery 'Should Courts or Parents Make Child-Rearing Decisions' (n 49); *Sisson* (n 9) 661; and Emery and Emery 'Who Knows What Is Best for Children?' (n 4).

⁵¹ The threshold for state interference in childrearing in the case of separating parents must be evidence-based. The level of evidential support needed in order to justifiably believe that parents will make a poor decision should be much higher than it currently is. In other words, divorce is not sufficient evidence that adequate parents will make the wrong decision and then follow through on it. I discuss parental disagreement and the way of understanding painful situations later in the paper.

⁵² Jurisprudential questions ultimately depend on moral considerations. And thus, questions regarding children rights are interesting and important enough to merit explicit attention all by themselves. It is also likely that a better understanding of the law, in particular of the UN Convention on the Rights of the Child, will have relevant implications. UN Convention on the Rights of the Child (adopted 20 November 1989,

Perhaps it is important to clarify that childrearing decision-making should be *partial*.⁵³ Partiality in the (adequate) parent-child intimate relationship is often what makes the parent (at least, most parents and most of the time) competent to make good decisions about her child—and what makes the state completely fail. Parental judgment cannot—and should not—be substituted with that of the state because of the mere act of parental separation.⁵⁴

Whether the state should push parents to become ‘better’ is a political question. ‘Pushing’ is not the alternative to waiting for them to cause harm; rather, it would be an intervention based on good, content-independent reasons for questioning the parent’s judgment— I do not, however, believe that there are any *good reasons* for questioning the parent’s judgment. Perhaps the logic runs in the other direction; that is, maybe the state’s *non-intervention* should be based on content-independent reasons to *respect* the parent’s judgment. In other words, the reasons for the state’s non-intervention are not necessarily that the parents are automatically correct, but that they have a legitimate responsibility, or that the value of their autonomy ought to prevent others from imposing their own judgment upon them. Additionally, although the state certainly ought to secure children from destruction, it also increasingly intervenes between parents and children in harmful ways and is gradually becoming one of the “chief engines for the breakup of the family system” and the parent-child relationship. This should be avoided unless it is absolutely necessary.⁵⁵

In summary, children have the right to some level of safety; their parents are bound to not perform any action that might have a harmful outcome. Thus, a distinction must be made between a reasonable and an unreasonable imposition of risk.⁵⁶ Parental separation may indeed lead to an elevated risk of stress, anger and anxiety in children, particularly during the initial period following separation.⁵⁷ However, the right to be shielded from risk must be subject to a threshold level of probability; that is, there must be an actual risk

entered into force 2 September 1990) 1577 UNTS 3. For reasons of scope, I do not enter the legal discussion here. Archard offers a comprehensive discussion on this point, see: David Archard and Marit Skivenes, ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *International Journal of Children’s Rights* 1. See also a new article by Ruth Halperin-Kaddari, ‘Parenting Apart in International Human Rights Family Law: A View from CEDAW’ (2020) 22 *Jerusalem Rev. Leg. Stud.* 130.

⁵³ By “parental partiality”, I mean more than a mere preference. Rather (at least some of the times), I mean a favorable bias and prejudice toward one’s children. For a very good analysis of parental partiality, see Harry Brighouse and Adam Swift, ‘Legitimate Parental Partiality’ (2009) 37 *Philosophy & Public Affairs* 43.

⁵⁴ As the Supreme Court of Alabama held, state interference serves as *the spark to a smoldering fire: Kilgrow* (n 49) at 889.

⁵⁵ Bertrand Russell, *Marriage and Morals* (W.W. Norton & Company Ltd 1970) 204.

⁵⁶ Nozick argues that a probability limit for risk is not credible in a “tradition which holds that stealing a penny or a pin or anything from someone violates his rights.” Children have rights, but their rights cannot preclude all parental actions. In parental separation, children often experience a sense of loss and hardship, but this cannot reasonably be used as an argument to prohibit divorce or to mandate automatic state involvement. See Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) Ch. 4, 75–6.

⁵⁷ Parental separation is a better alternative than a marital state of conflict (see the section below on “Parental Conflict”).

or evidence of potential harm, at which point the right to protection can be activated. Before that point, however, the risk remains reasonable and therefore does not warrant state intervention, as is the case in many instances of divorce.

III. Claim B: The Act of Divorce Does Not Reach Level H

I have argued that only a certain level of risk (H) justifies state intervention. Again, state interference in childrearing is only permissible when parents fail to live up to their responsibilities and obligations, and getting divorced does not amount to a failure to live up to these responsibilities. Therefore, getting divorced does not warrant state interference in childrearing. Level H is met when a breach of childcare responsibilities and parental obligations occurs, that is, when parents fail to meet their responsibilities and their parental obligations.⁵⁸ Level H is only reached when a parent is not trustworthy, is not a good enough parent or breaches her parental responsibilities and obligations, thereby justifying state interference. But divorce *per se* does not mark a breach of parental responsibilities and thus does not constitute a level H risk; even if divorce affects a child's wellbeing to some extent, it does not present a level of risk that justifies state interference (or that exceeds the risks posed by such interference).

That being said, a breach of parental responsibility *can* legitimize state intervention, as in the case of a child who appears to be neglected, unhappy, unhealthy, socially troubled or whose grades have sharply declined and whose parent, when contacted by a teacher, nurse or any other person caring for the child, is dismissive, inattentive or indifferent. A breach of parental responsibilities need not be so serious as to amount to abuse or neglect (which occurs when a child is not medically treated or not adequately fed or is physically harmed in some way) in order to warrant state intervention. Breaching one's parental responsibilities means taking bad care of your child.⁵⁹

1. *Challenging the perception that divorce is a risk factor that renders appropriate stricter supervision by the state*

One might object that the question of whether divorce poses a risk to children is an empirical question. And, indeed, a large body of empirical research confirms that divorce

⁵⁸ Neglect is commonly defined in state law as the failure of a parent (or another person responsible for the child) to provide food, clothing, shelter, medical care or supervision to the degree that the child's health, safety and wellbeing are threatened. Parental separation may reduce the child's wellbeing, but if such a challenge is detected and treated by the parent, it cannot be considered neglectful behavior or a breach of responsibility (I discuss the conflict hypothesis below).

⁵⁹ For the 'good enough mother' account, see René Syler and Karen Moline, *Good-Enough Mother: The Perfectly Imperfect Book of Parenting* (Simon and Schuster, 2008.) See also Norvin Richards, *The Ethics of Parenthood* (OUP 2010) about children's rights from the parent-child (emphasis on parents) perspective rather than the child-centered perspective. Colin M. Macleod, *The Good Parent*, in Anca Gheaus, Gideon Calder and Jurgen De Wispelaere (eds), *The Routledge Handbook of the Philosophy of Childhood and Children* (Routledge 2020); See also: Liam Shields, 'How Bad Can a Good Enough Parent Be?' (2016) 46 *Canadian Journal of Philosophy* 163.

increases the risk of adjustment problems in children.⁶⁰ The children of divorced parents have been shown to be more likely to have behavioral, social and academic problems than children whose parents stay married.⁶¹ However, studies have also highlighted several protective factors that moderate the risks of parental separation and contribute to children's adjustment and future development. These factors include the quality of the parent-child relationship and the extent and nature of the conflict between the parents. Adequate parents and the continuity of parenting are protective factors, and the quality of parenting is the best predictor of a child's wellbeing in the process of parental separation.⁶² Put simply, a child's wellbeing is secured by good parenting, regardless of a parent's marital status.

One might object that wellbeing is objectively good for people and that a parent may fail to recognize what is best for her child. However, the essence of my argument is that the adequate parent is in the best position to recognize the good of her own child and is often the only one on whom we can rely for this information. As I discuss elsewhere, a moral right to childrearing (insofar as such a right exists) renders a parent with the right to *recognize* the child's good, which is reflected by the parent's own values (to a normative extent). I believe that this process lies within the field of parental autonomy and judgment, and is not a matter for the state to decide.

Imagine an authoritative directive that could contribute to a child's wellbeing; for example, imagine that it would be beneficial for a child to attend meetings with a psychologist who specializes in spiritual or religious enrichment. Surely, we would not want the school to provide such services without parental observation or consent.

⁶⁰ After reviewing numerous studies, I have come to the conclusion that the relevant studies on the subject of divorce and the wellbeing of children are somewhat partial (though this trend is now changing). The empirical literature on the adjustment of children of divorce, reviewed from the perspective of stressors, elevated risks and a decrease in the level of wellbeing, seems to be based largely on certain preconceptions. The questions are formulated in the form of the presupposition of harm, namely, a matter of extent rather than an objective examination of the phenomenon. I believe that this kind of questionnaire prevents objective consideration of this issue. See Thomas L. Hanson, 'Does Parental Conflict Explain Why Divorce is Negatively Associated with Child Welfare?' (1999) 77 *Social Forces* 1283.

⁶¹ Studies have shown that marital conflict, especially if it is persistent, appears to be as harmful as the disruption caused by divorce. Poor parent-child relationships lead to more negative child behavior, yet maintaining good relationships with parents reduces the negative effects of conflict and disruption on behavior. That is, reductions in negative effects are associated with better parent-child relationships for children in high-conflict or disrupted family situations. James L. Peterson and Nicholas Zill, 'Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children' (1986) 48 *Journal of Marriage and Family* 295; Israel Oron Ostrey, 'The Best Interest of the Child, Parental Capability and a Deprivation of Fathers in Parental Disputes Over Child Custody' (2001) 24 *Medicine and Law* 86 (tr by author); Timothy M. Tippins & Jeffrey P. Wittmann, 'Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance' (2005) 43 *Family Court Review* 193; Josef Goldstein, Anna Freund, Albert J. Solnit, *The Best Interests of the Child: The Least Detrimental Alternative* (Free Press 1996)

⁶² A serious discussion of the concept of welfare is beyond the scope of this paper. I discuss this briefly here and later in this text. For an interesting discussion of a subjective theory of welfare, see L.W. Sumner, *Welfare, Happiness, and Ethics* (Clarendon Press, 1996) 26-42. See also Stephen Darwall, *Welfare and Rational Care* (Princeton University Press 2002).

Intuitively, we may assume that this is a matter of values and that it lies within the scope of parental autonomy.⁶³ Now, imagine a different example: two (legally and psychologically competent) parents happily raise their child together. Around the child's twelfth birthday, one of the parents dies. The remaining parent may be overwhelmed, or perhaps even in a crisis. The child's wellbeing decreases, but the state will not intrude into the child's life without parental consent, and it will not reevaluate parental competence or issue directives that challenge the parent's capabilities. If both of the child's parents die, the state appoints a close family member who is perceived to be adequate and willing to serve as the child's main caregiver without the legal psychological assessments that are imposed in divorce.⁶⁴

Why does the state treat these situations as though they differ from divorce in terms of parental capacities? My sense is that the answer lies in prejudice. I believe that divorcing parents are perceived as immoral or even, with regard to family tradition, as deviant,⁶⁵ whereas death is more likely to be perceived as honorable. But, even if we consider divorce to be a predictor of parental conflict, parental death is no less (and is possibly more) likely to affect the wellbeing of the surviving parent and the child. Again, this suggests that the state's interference in the childrearing of divorcing parents is based on a fallacy and on a preconceived notion of family values.⁶⁶

Another explanatory possibility by which state intervention may be justified (assuming that both parents are good, adequate and willing to care of their child) is that the state must intervene to determine who is a *better parent* in order to make custody arrangements. But the premise seems faulty, as there is no better parent; both parents are deserving of childrearing. Thus, I a) reject the theory of "one main caregiver"⁶⁷ and b)

⁶³

The boundary between the parents' right to instill their values in their child and the school's (i.e., the state's) right to instill societal values in the child is not obvious. There's currently a controversy about this in the UK, because certain conservative Muslim parents have objected to aspects of the national curriculum (i.e., the curriculum taught in all UK state schools) that have to do with same-sex relationships, transgender issues, etc. They believe that they should be able to opt their children out of these lessons because they conflict with their (the parents') values, which they take themselves to have a right to instill in their children. But the state takes *itself* to have a right to teach children about, and instill in them a respect for, different sorts of relationships – gay, lesbian, etc. A similar situation is occurring in Israel between Jewish orthodox parents and secular parents, instigating a conflict in these sorts of cases as well.

⁶⁴ I exclude adoption. In cases where a child is a candidate for adoption, a different procedure applies (one that is similar in some respects to the legal procedures applied to divorcing parents).

⁶⁵ It is also a question of promoting the good. I think it is fair to say that the state is not neutral regarding "family values" (a dubious term at best). However, this point is beyond the scope of the present argument.

⁶⁶ I am invoking a demand for *consistency*, though consistency can be achieved in two different ways here: we can either get rid of state intervention in divorce *or introduce* state intervention in cases of parental death. My argument is perhaps teleological that, in a way, has two ends or final causes: a) parental autonomy, for adequate parents and b) security of the parent-child attachment. For a comparative analysis of judgments in the United States during the past decade regarding parental custody, see D. Marianne Blair and Merle H. Weiner, 'Resolving Parental Custody Disputes—A Comparative Exploration' (2005) 39 Fam. L.Q. 247.

⁶⁷ Children in joint (physical, legal or both) custody are better adjusted than children in sole-custody settings. The results of this meta-analytical review are consistent with the hypothesis that joint custody can

object to the idea that the state has sufficient authority to determine parental value.⁶⁸ Other motivations for intervention may be attributable to social beliefs concerning children's needs, religious influences and cultural expectations. Many of the leading studies twenty-five years ago pointed to the need for preventive interventions for young children of divorced parents based on the recognition of children's vulnerability to anxiety and depression. As valuable as these insights are, however, if they lead to the usurpation of parental accountability and the violation of the parent-child intimate relationship, they risk doing more harm than good.⁶⁹ A child has a right to an "open future," as Finberg writes; she also has the right to wellbeing and happiness, but until she reaches adulthood, such interests are vested in her parents and are largely subject to their values. She has the right to be cared for by her adequate parents, regardless of their marital status. Several explanations for the association between parental separation and child welfare have been proposed; the conflict hypothesis is an important one, but as I shall explain, parental conflict is not significantly related to the time of divorce and is a manageable condition.

2. Parental conflict

The *misguided* intuition or assumption is that divorcing parents—who may be in conflict with each other—are thereby impaired or diminished parents. Yet the stressors and elevated risk to children created by parental conflict depend on the nature and level of the conflict. They are not, I think, inherent to the act of divorce.

Additionally, parental conflict is not significantly related to the time of divorce. Studies have shown that the majority of children are intact, but high-conflict families are exposed to parental conflict over an extended period of time. In one study, the vast majority of high-conflict married couples did not divorce within five years, and more than three-quarters of high-conflict couples remained married.⁷⁰ For children in high-conflict families, divorce yielded benefits in terms of their reduced exposure to parental conflict.⁷¹

be advantageous for children, possibly because of an easier ongoing positive involvement with both parents. See Robert Bauserman, 'Child Adjustment in Joint-Custody versus Sole-Custody Arrangements: A Meta-analytic Review' (2002) 16 *Journal of Family Psychology* 91. Testing for a *better parent* is the cause of stress for most parents. Such stress harms both the parent and the child (I elaborate on this later in the paper).

⁶⁸ The case of state legitimacy exceeds the scope of this chapter. I assume state permissibility in issuing and enforcing commands on some matters and to a limited extent. I argue against state involvement in childrearing, and I challenge state competence. In this text, I do not discuss perfectionism or liberal individualism. I shall address this separately. For a good discussion of liberal neutrality, see: Will Kymlicka, 'Liberal Individualism and Liberal Neutrality' (1989) 99 *Ethics* 883. See also: Matthew Clayton, 'Anti-Perfectionist Childrearing' in Alexander Bagattini and Colin Macleod (eds), *The Nature of Children's Well-Being* (Springer 2015).

⁶⁹ Joel Finberg, 'The Child's Right to an Open Future' in Randall R. Curren (ed), *Philosophy of Education: An Anthology* (Blackwell 2007); Lynne A. Hoyt and others, 'Anxiety and Depression in Young Children of Divorce' (1990) 19 *Journal of Clinical Child Psychology* 26; see also Goldstein and others, concerning the need for continuity in the parent-child relationship and the damage done by state interruption of that relationship: Goldstein, Freund and Solnit, *The Best Interests of the Child* (n 61) Ch. 3.

⁷⁰ Hanson (n 60).

⁷¹ *ibid*

Thus, it is not true that divorce always reduces children’s wellbeing. In other words, objective differences in children’s exposure to conflict cannot fully account for the assumed connection between divorce and children’s wellbeing. Admittedly, parental conflict has an effect on the welfare of children, but given the range of individual behaviors encountered in situations involving parental separation, we may consider the risk of such behaviors to have an objective component. Thus, it may be possible to weigh or predict (and even manage) certain outcomes without detrimental recourse to state interference.

What level of risk or danger to a child’s wellbeing should the law establish as the threshold for state involvement in the relationship between parents and children?⁷² As proposed above, only a breach of parental responsibilities constitutes a level of risk that justifies state interference (on some matters, some of the time and to a certain extent). The parental decision to separate and the implementation of this decision, however, do not in themselves amount to a threat to the child’s wellbeing. When parents divorce, the state uses phrases which indicate possibility—such as ‘the probability that...’ or ‘a danger of...’ in order to justify intervention. Thus, such intervention is based not on an actual danger to the child or on parental failure to protect the child, but rather on a hypothetical deterioration of the child’s wellbeing. Although a child’s wellbeing may indeed *temporarily* decrease during parental separation, this possibility can compel the parent to take precautions—such as listening more closely to her child and restoring attachment where it has been damaged—but is not a reason for state interference.⁷³

IV. There Is No Justification for State Involvement in Divorce

As discussed earlier, any action—in this case, state interference—must be both purposive and logical. State interference in cases of divorce fails to meet these requirements. Although such action is supposedly intended to prevent the endangerment of children, it does not fully serve this purpose and is not reasonable. In particular, the parent is unreasonably expected to accept the judgment of experts, who are held to know what is best for her child better than she does, despite the fact that values and approaches vary even between any two reasonable parents, let alone among judges, social workers, etc. Additionally, as stated earlier, there is an unjustified difference between how the law treats married parents and how it treats separating parents: when parents are married, the law imposes precise obligations on parents concerning matters of childcare, gives the

⁷² I adopt Goldstein’s description of the role (and devastating power) of the state: “Judges often fail to see what must be obvious once said, that the intricate and delicate character of the parent-child relationship places it beyond their constructive (though not beyond their destructive) reach.” Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (Free Press 1973) 114.

⁷³ In this section, I will not address the authority of the state, its justification or lack thereof, or the doctrine of freedom; I discuss some of these topics elsewhere in this text. I shall confine myself to the consequences of state intervention in divorce. For an account of why it is good for children to be reared by parents and the value of the parent–child attachment, see: Harry Brighouse and Adam Swift, *Family Values: The Ethics of Parent-Child Relationships* (Princeton University Press, 2014.) See Anca Gheaus, ‘The ‘Intrinsic Goods of Childhood’ and the Just Society’ in Alexander Bagattini and Colin Macleod (eds), *The Nature of Children’s Well-Being* (Springer 2015)

parent's fair warning about what constitutes a breach of childcare responsibilities, and provides advance notice of the state's power to intervene.⁷⁴

By contrast, when parents separate, they find themselves re-evaluated and challenged by the state, even though they have broken no law and evaded no responsibility. Interference is often attributed to the 'custody dispute', but disagreement does not follow incompetence, and should not warrant psychological assessment. Under these circumstances, the state orders a forensic psychological assessment and, as part of custody disputes, parents are instructed and guided on casual, everyday matters related to their children. These actions are supposedly for protective or preventive reasons, but in fact, they have a deleterious effect on the attachment relationship and the overall wellbeing of parents and children alike. Thus, state intervention does not shield the intimate parent-child relationship, but rather exposes it to the threat of destruction. This thereby endangers children rather than protecting them.

It may seem plausible to argue that the state should interfere only as a mediator,⁷⁵ that it has authority to interfere in the family only when spousal relationships dissolve, or that it is merely 'required' to choose between two good parents. But the state's choosing the better parent after a divorce is not 'mediation', and it does not promote the good of the child or that of the parents. Rather, it is paternalistic (among other things), according to Shiffrin's understanding of the term; that is, the motive behind such action is that the intervening authority knows better than the agent, or thinks that it is better placed to implement what the agent has a duty to do herself.⁷⁶ Narrowly construed, paternalism

⁷⁴ Joseph Goldstein, Anna Freund and Albert Solnit have had an enormous impact on child welfare policy in the United States, Canada and Britain. They support nonintervention policies, yet encourage sole custody and the best interest of children as the sole criterion for child-related judgments. Nevertheless, they ask the right questions and offer some answers: why should a child's relationship to her parents become a matter for the state to decide? (There could be a case of an incompetent parent.) What grounds for placing a family under state scrutiny are reasonable? (Perhaps an obligation to protect the vulnerable.) What can justify the violation of parental autonomy, given that the legal presumption is that of parents being free to determine what is best for their child according to their own values? (A criminal offense such as child abuse, abandonment or neglect is a legitimate circumstance). According to Goldstein, et al., prior to the 1996 publication of the revised edition of their former three books, they took state interference to be an obvious solution. The best interests of children and their wellbeing must—they claimed—be determinative and must overcome those of their parents. In the 1996 edition of their work, however, they modified their previous conviction and argued that state interference with the parent-child relationship of divorcing parents can be justified only when parents request the court to determine custody. Unfortunately, when divorce laws require court approval and childcare scrutiny and where sole custody (for adequate parents) is a legal option, state interference is unavoidable. Goldstein, Freund and Solnit, *The Best Interests* (n 61) 93–100. Samantha Brennan and Bill Cameron argues that "it is time for our legal and cultural institutions to move away from assuming that there always ought to be a connection between parenting and marriage". The norms of good parenting, they claim, do not necessarily have anything to do with the norms of a romantic relationship, and thus should not be joined together. Samantha Brennan and Bill Cameron, 'Is Marriage Bad for Children?' in Elizabeth Brake (ed), *After Marriage, Rethinking Martial Relationships* (OUP 2016) 85-99.

⁷⁵ Jon Elster, 'States That Are Essentially By-Products' (1981) 20 *Social Science Information* 431, 431–37

⁷⁶ For a cogent characterization of paternalism, see: Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 *Philosophy & Public Affairs* 205

may be understood as interference with the freedom of the agent, against her will, motivated by a claim that the agent will thereby be better off. However, paternalism involves more than a restriction of an agent's freedom; Shiffrin claims that an action can also be paternalistic if it entails the seizure of control of something that lies within the agent's legitimate territory of judgment or action. Although not every restriction of an autonomous right constitutes paternalistic behavior, interfering with parental judgment and ignoring the will of the parent because they are getting a divorce does satisfy this definition.⁷⁷ And, in my view, political and institutional paternalism (particularly when the paternalizing agent is the state or the law) are inappropriate.⁷⁸

To support that statement, note that whether the state should interfere with childrearing in cases of (adequate) separating parents is a political question, whereas the question of whether separating parents creates risks for their children by deciding to divorce is an empirical question. The latter is fully answered by the evidence, not by more subjective (and therefore, arguably irrelevant) considerations about parenting *style* or negative judgments about their "likely behavior".⁷⁹ Enoch distinguishes between a negative judgment about a person's *relevant* abilities or competence and a negative judgment about how that person is *likely to behave*. He claims that what we believe—either about another's abilities or about how they are likely to behave—should be determined by evidence and not by moral considerations. I argue that state intervention in parental separation is motivated by a negative moral judgment about the parent's likely behavior, and that such a judgment is not supported by the evidence. I also argue that even if it *were* supported by the evidence, it is *wrong* to act—even on evidentially justified judgments—by interviewing and questioning the child about her parent. Such intervention is paternalistic and unacceptable, and we have a moral reason to *not* act. (The reason to not act is that it constitutes harm. See section 2.1 on exclusionary reasons.) There is an inherent moral flaw in the relevant action that does not depend on whether the belief is justified, or amounts to knowledge or any other such thing.

In addition to the problems with paternalistic interference by the state, justifying the argument that the state "simply" awards the *better parent* with childrearing responsibilities require a presupposition of authority. That is, it requires believing that the state is justified in issuing an authoritative directive that chooses between two adequate parents, standing in for their parental autonomy and dictating 'when and how'

⁷⁷ *ibid*

⁷⁸ For an account against the 'parental choice approach' of upbringing (PCU), not specifically in cases of divorce, namely, that liberal states should intervene with parental choices for reasons of child interest and the good of humanity, see: Tim Fowler, 'In Defence of State Directed Enhancement' (2015) 32 *Journal of Applied Philosophy* 67

⁷⁹ I take the term from David Enoch on whom I rely extensively in this section. Enoch distinguishes between negative judgments about *relevant* abilities or competence of the paternalized and judgment about her *likely behavior*. However, if I understand Enoch correctly, he does not think that judgments are the kind of thing that can be paternalistic. He thinks that actions are the right kind of thing (perhaps some attitudes), but not judgments or beliefs. David Enoch, 'What's Wrong with Paternalism: Autonomy, Belief and Action' (2016) 116 *Proceedings of the Aristotelian Society* 21. See also Enoch's reference to Jonathan Quong, *Liberalism without Perfection* (OUP 2011) 80.

they should raise their children. However, this claim to authority is based on the (false) assumption that there is a *better parent* and that she should be awarded most (and often all) childrearing rights, despite the other parent's equivalent prerogative.⁸⁰ And this claim too is incorrect and problematic.

1. *The duty to love*

The subject of this essay is not whether to become a parent and how to go about rearing a child. But it is about a struggle between a duty to protect (and love) your child, who has it and to what extent. The legal process of divorce resembles King Solomon's psychological test to identify a child's mother.⁸¹ Solomon declared that the woman who showed the most compassion and was willing to give up her child (as opposed to the woman who declared "Let it be neither mine nor thine")⁸² was the child's true mother. Legal proceedings regarding child custody in both Solomon's time and today can provoke intense reactions in parents.⁸³ My claim is that under unreasonable circumstances that endanger the attachment between parent and child (such as those created by the state's involvement in divorce), the parent undergoes considerable stress, and children, perceiving a risk to this very central relationship, absorb this feeling of parental helplessness. They become stressed in response to the threat of losing something so essential to their survival. According to Maté, they suppress their emotions in order to cope. Such suppression can make them ill in the short term, and if this condition persists, it may have a long-term destructive effect as well.⁸⁴

⁸⁰ Two studies suggest that positive co-parenting is a protective factor for individual and family outcomes after parental divorce. They determine that co-parenting is the key in predicting family functioning and psychological wellbeing. Many studies are guided by the preconception of post-divorce catastrophe, though it is not divorce per se that triggers children's mental health problems, but rather the undermining of co-parenting, parenting practices and parental conflicts. Negatively linked are divorce litigation, parental depression and anxiety, which correlate with state interference in the childrearing of divorcing parents. Diogo Lamela and others, 'Typologies of Post-Divorce Coparenting and Parental Well-Being, Parenting Quality and Children's Psychological Adjustment' (2015) 47 *Child Psychiatry & Human Development* 716; Mark E. Feinberg, 'The Internal Structure and Ecological Context of Coparenting: A Framework for Research and Intervention' (2003) 3 *Parenting: Science and Practice* 95.

⁸¹ Solomon, son of David, was the king of Israel during the 10th century BC and was renowned for his wisdom. According to the Biblical story, Solomon was presented with a dilemma when two women claimed to be one child's biological mother.

⁸² Collins UK (ed), *The Holy Bible: King James Version* (first published 1611, Collins UK 2011) 1 Kings, 3:26.

⁸³ For an interesting analysis of Solomon's judgment and the moral dilemma, see: Gila Leibowitz and Elia Leibowitz, 'Solomon's Case' (1990) 35 *Beit Mikra: Journal for the Study of the Bible and Its World* 242, 242-244 (tr by author). The authors discuss the common interpretation of Solomon's judgment, according to which the compassionate woman is in fact the child's mother. They suggest that Solomon could not have reached his decision based solely on her behavior. A woman, they argue, can be a true mother even if she acts unreasonably.

⁸⁴ For the connection between environmental conditions, attachment theory and chronic illnesses caused by stress in childhood, see Maté (n 26).

Just as parental distress has an immediate (and potentially long-term) effect on children, parental resilience, strength and control have a positive and comforting effect in both the short term and the long term. Levine argues that harmful events or trauma that may otherwise limit children's potential for fulfillment can—with the understanding of their parents—be transformed into *positive* experiences, in the sense that they can secure resilience, power and possibility.⁸⁵ A child has a strong need to experience her parent as a safe, reliable, powerful and independent guardian, as well as, and most importantly, her source of attachment. In divorce proceedings, children react with shock to even a temporary infringement of parental autonomy and with anxiety to a disruption of the intimate parent-child relationship. Such disruption occurs when children are forced to reveal their innermost thoughts and emotions that they hitherto only shared with their parents. It occurs when they are required to cooperate with a stranger (such as a social worker or other court-appointed expert) and to be interviewed by this person, whether to establish a contact and residence order, to determine “visitation” rights or to assess parental capability. When such situations are imposed, the child perceives her parent as helpless and unable to protect her from an invasion of privacy and from suffering. The child often reacts based on what she thinks is expected (“social desirability”) or in a way that she believes may rescue the attachment that she desperately needs. A serious danger of this process is that the child may feel responsible for the final decision, which usually privileges one parent over the other.⁸⁶

Note too that the perception that “visitation” is an adequate realization of the parent-child relationship or of childrearing is mistaken. Both parents should have equal responsibilities with regard to their children as a default, and more importantly, the wellbeing of parents (primarily in the matter of childrearing) should be weighed alongside the interests of the children. As argued elsewhere, children have a right to *adequate* care, not to the best possible care.⁸⁷

How is this related to divorce? Supporters of intervention policies may argue that interference is inevitable, that parents disagree on custody matters and that such conflicts endanger children. This may indeed seem to be a reason to interfere, but to me, the evidence supports the opposite conclusion (though there is some controversy regarding exactly what the evidence indicates). Additional challenges are posed by the predispositions and partiality of the key studies on the subject to date. However, recall

⁸⁵ Peter A. Levine and Maggie Kline, *Trauma through a Child's Eyes: Awakening the Ordinary Miracle of Healing* (North Atlantic Books 2006); see also Neufeld and Maté (n 27).

⁸⁶ For an excellent analysis of parental dispute, the risk to children and state responsibility, see Ostrey (n 61).

⁸⁷ In another (work in progress), I argue that children have a right to adequate rather than the best care. My claim is that A. Children do not have a pro-tanto moral right, either enforceable or non-enforceable, against their parents or against anyone else, to best care. B. Children *do* have a moral right to adequate care. They have this right against their parents, and the correlative parents' duties are enforceable. They also have such rights against the state, and the state's correlative duties may be numerous; one of them, however, is to enforce the parental duty. And C. Children also have a moral right to *good care* against their parents. However, the correlative parental duty is not enforceable. Children may also have this right against the state with respect to other duties, such as, for instance, supplying free education above an adequate level.

that state interference is not confined to custody disputes; it is compulsory in *every* divorce.⁸⁸ State interference is a self-defeating act: its purpose is to increase children's wellbeing, but it interferes with, rather than promotes, that goal.

2. Proposing a new legal approach to parental separation and divorce

As we have discussed, when spousal separation is treated as a *judiciary* or *judicatory* event, the only way to (possibly) avoid psychological evaluation is to agree upon a custody arrangement at the time of separation and to secure court approval for that arrangement. However, involving judges and law practitioners in this way simply aggravates the tension in an already difficult process of separation. As I already explained above, among the harmful consequences of divorce are the results of the legal proceedings themselves, which intensify the conflict between the parents, elicit feelings of being under threat and other difficult emotional responses that are harmful to children. Children need their parents, especially when their family changes, so any process that adds more stress by interfering with the attachment between the parent and her child constitutes harm.

To prevent these additional, unnecessary challenges, I argue that equal childrearing rights that include provisions for parental separation (in addition to [different versions of] a *parentage act*, wherein the duties of parents are determined)⁸⁹ would benefit parents and

⁸⁸ In Israel, for instance, parents must submit their agreement to the court in every case of divorce involving children. It is at the court's discretion to not approve the agreement if the court concludes that the agreement is not in the *best interest of the child*, even if both parties agree upon the terms. The court can order psychological evaluation in order to determine who the custodial parent will be in cases of custody disputes, even if the dispute between the parents does not involve anything immoral or harmful to the welfare of the children, but merely because one of the parents asked for full custody and the court is unable to make such a decision. It should be noted that my recommendation is to determine parental rights with regard to the children and shared custody *a priori*, since in Israel, for example, there is no law that assumes shared custody. As explained earlier, the court in Israel has the power to a) reject a consensual agreement based on its own volition and b) to order "parental capability tests" with no indication of harm or misconduct—it suffices that one of the parents objects to shared custody for the court to appoint an external (or on behalf of the state) professional to determine "who is a better parent" deserving of full custody. No evidence of "improper parenting" is required. See the Legal Capacity and Guardianship Act 1962 s 24; see also Emery and Emery 'Should Courts or Parents Make Child-Rearing Decisions' (n 49). In his recent book about divorce, Emery claims that the first problem is that the legal system (in the U.S.) treats parents as adversaries and that lawyers, as part of the adversarial system, can fuel anger and conflict in divorce. The point is that even when parents agree to separate amicably, the legal system often motivates controversies that are sensitive to begin with, which is more of a reason for determining parents' rights with regard to their children in advance. Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* (2nd edn, Guildford Press 2011) 100.

⁸⁹ At the beginning of Goodin's paper about personal responsibility for welfare, he writes, "Things like who your parents were or where you were born are things that you could not have helped. They are arbitrary from a moral perspective." This statement is true, but it is also true in the opposite direction, namely that the child you have begotten and who is your responsibility is—in a way—unpredictable too; perhaps not in the same sense, considering that many people choose to have a child and are able to direct its paternity (though this might change soon, if we consider the developments in bioethics and such). I propose that parents, regardless of a previous (or not) pair-bond, should have *a priori* rights of care; for example, a default arrangement that determines equal division of days, maximum allowable distance between two

children at the time of separation. There have already been attempts to enact divorce laws that would settle these conflicts (those that arise in divorce), but none have specifically engaged with each parent's right to autonomy. Many divorce laws focus on the 'freedom' to divorce and assign sole custody (that is, appointing one parent as responsible and the second as a 'visitor' in the child's life) or shared custody, if all goes 'well'. Instead, I propose an act that determines childrearing rights in a way that does not depend on the relationship between the separating parents, but rather seeks to preserve the parent-child attachment. This would obviate the need for court approval of separation and render its *compulsory* interference redundant.⁹⁰ Although defining the details of such an act is beyond the scope of this paper, I will briefly present the idea here. The legislation I suggest would mandate equal or joint child custody as a default. Under this legislation, a petition for a parent capability test or an evaluation of parenthood would not be considered if it arose simply from an attempt on the part of one parent to gain sole custody. The general idea is that two people who share children and have ceased to pursue a life together can be released from the spousal bond, but a petition for sole custody of a child must be based on *fault*.

Using this approach, *fault-based custody* could only be granted for specified categories of fault; one parent could seek such custody for acts imputable to the other parent when these acts constitute unfit parenting. In other words, custody disputes ought to be considered only in cases where it is plausible to claim that one parent is ill equipped to be a parent; for instance, if the parent has been convicted of a serious crime, repeatedly flouted parental responsibilities, abused drugs, neglected the child, etc. Stated another way, sole custody must be available only in cases where the other parent is an inadequate parent. Divorce should not deprive adequate parents of legal childrearing rights. In cases

households and mainly shared custody (physical and otherwise), with all that entails (exceptions can be made with regard to parents who were coerced to have a child, such as in cases of rape and so on). The custody arrangement that children live in following parental separation is not a strong or especially important predictor of children's subsequent mental, emotional or behavioral wellbeing. Researchers have repeatedly shown that the best predictors of positive adjustment and psychological wellbeing for children after separation have to do with the parenting and relationships that they experience, followed by the economic stability of their homes after the separation. Such stability can be better achieved, to my mind, if a battle for parental rights is avoided. Robert E. Goodin, 'Against Personal Responsibility for Welfare' (2009) (The Foundation for Law, Justice and Society) 2 <www.fljs.org/sites/default/files/migrated/publications/Goodin.pdf> accessed 02/09/2021; Mianna Lotz, 'Parental Values and Children's Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 242-266; and Amy Mullin, 'Children, Vulnerability and Emotional Harm' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 266-289. Robert E. Emery, *Marriage, Divorce, and Children's Adjustment* (2d edn, SAGE Publications 1999) 81-84; Judy Dunn, 'Annotation: Children's relationships with their nonresident fathers' (2004) 45 *Journal of Child Psychology and Psychiatry* 659, 659-660. Christy M. Buchanan and Parissa L. Jahromi, 'A Psychological Perspective on Shared Custody Arrangements' (2008) 43 *Wake Forest L. Rev.* 419.

⁹⁰ The case of two people who communicate through legal contract about raising a child, but with no former spousal relationship, is not a part of this discourse. This is a new kind of parenthood, one that needs further consideration. I shall confine myself to the kind of relationship with which the law has been mostly concerned, namely marriage and divorce.

of spousal separation, shared child custody should be the legal default, and this should be overridden only if there is evidence of unfitness.

This argument for removing the courts from the divorce process is supported by the fact that, as stated earlier, legal proceedings in cases of divorce constitute substantive harm to children and their parents.⁹¹ Summarizing much of the critical literature, we can say that the empirical foundation for custody evaluation is unconvincing or nonexistent;⁹² unfortunately, there have been no attempts to relate these insights to the realities of the legal system. The system continues to fail to consider the (reduced) wellbeing of parents or the effects of litigation; visitation for example, is a “legal concession to the loser” to use Halem’s phrase, which infringes upon the moral right that an adequate parent has to childrearing and ignores the damage that such a concession causes to the essential parent-child relationship.⁹³

A comprehensive study of child participation in family disputes supports this idea, even if a bit inconsistently. In this study, Parkinson and Cashmore argue that child participation in divorce proceedings benefits children, but they also emphasize that children are at risk of significant psychological harm when parents separate, on account of children’s involvement in the legal proceedings. The state interferes by entering the child’s world, assessing her views and requiring her to meet with counselors and judges, who look for insights into the family affairs and constantly seek information. The parent-child relationship evaluations that sometimes occur place a burden of responsibility on the child; they place the child in a position that often divides her loyalties and requires her to choose between her parents, whether directly or implicitly. Although it may be argued that children to some extent benefit by speaking their mind concerning the process of separation, this particular practice is a threat to their wellbeing.⁹⁴

State action in cases of parental separation does *not* prevent harm, as it so intends. If the purpose of state involvement is to pursue the best interests of children, then the state’s interference does not serve its purpose and should be avoided unless it is absolutely necessary. Creating a system of individual parental rights that allows most divorcing parents to avoid such interference by the legal system would better serve the wellbeing of both parents and children, as well as of respecting the important value of parental autonomy.

⁹¹ Onora O’Neill and William Ruddick (eds), *Having Children: Philosophical and Legal Reflections on Parenthood* (OUP 1979.) For discussion of the damage done by the involvement of the courts, see: William Ruddick, ‘Parents and Life Prospects’ in Onora O’Neill and William Ruddick (eds) *Having Children: Philosophical and Legal Reflections on Parenthood* (OUP 1979) 123–38.

⁹² Tippins and Wittmann (n 61). For an important review of the best interest of the child perception endorsed by Goldstein, Freund and Solnit in *Beyond the Best Interests of the Child* (n 72), see Peter L. Strauss and Joanna B. Strauss, ‘Beyond the Best Interests of the Child’ (1974) 74 *Columbia Law Review* 996. See also: Patrick Parkinson, ‘Family Law and Access to Justice’ (2016) 8 *Contemporary Readings in Law and Social Justice* 37 and Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (CUP 2011).

⁹³ Lynne C. Halem, *Divorce Reform: Changing Legal and Social Perspectives* (Free Press 1980) 213–4.

⁹⁴ Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Disputes* (OUP 2008) 189–216.

V. Conclusion

The foregoing discussion can be summarized in two claims: A) only a risk above a certain level justifies state intervention; B) the act of divorce does not reach such a level; and thus, there is no justification for state involvement in divorce. This discussion has refuted certain prevailing attitudes toward interventionist policies and the wellbeing of children. My examination has focused on government competence in childrearing, its promotion of the “good” and the nature of the harm involved in separation. I have argued that state interference creates, rather than prevents, harm and thus is not warranted except in cases where one parent claims that the other is unfit.

To address this issue and to prevent such unnecessary harm, I have proposed, in broad strokes, the adoption of an Equal Care Rights Law, which would respect both parental autonomy and the intimate relationship between the parent and her child. Any person who considers bringing a child into the world together with another person ought to know that she shares the responsibilities, duties and rights with the other parent, and that if she objects to the mandate provisions, she can argue for a *fault-based custody* claim after the separation. However, this kind of proceeding would require her to substantiate a claim of unfitness. When there is any other reason for disagreement over custody—such as the fact that a parent is likely to act in a way that is (or will be) inconsistent with the other parent’s *aspirations, wishes, etc.*—we must prioritize the value of parental autonomy and the value of the parent-child attachment⁹⁵ and thus not engage the courts in mediating that dispute.⁹⁶

⁹⁵ For similar conditions - not for paternalism, but the use of exclusionary reasons and the value of autonomy, see Enoch ‘What’s Wrong with Paternalism: Autonomy, Belief, and Action’ (n 79)

⁹⁶ Much of the academic critique of the *best-interests standard* is familiar and need not be repeated in detail. However, Scott and Emery in their wide-ranging, explicit and important research of the *best-interests standard* argue that “the legal system’s confidence in the *best-interests standard* rests on a misplaced faith in the ability of psychologists and other mental-health professionals (MHPs) to evaluate families and advise courts about custodial arrangements that will promote children’s interests. They also claim that courts “encourages litigation in which parents are motivated to produce hurtful evidence of each other’s deficiencies that might have a lasting, deleterious impact on their ability to act cooperatively in the actual best interests of their children”. My proposed account of an Equal Care Rights Law is substantive. On my account, the dissolution of the spousal bond is disconnected from parenting. If a parent is good enough prior to the separation, there is no justification for challenging her parental capacity at the time of divorce. Childrearing responsibilities, right and duties (of adequate parents) ought to be determined a-priori. The idea of an automatic state intrusion based on the decision to divorce seems unjust. Elizabeth S. Scott and Robert E. Emery, ‘Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard’ (2014) 77 Law & Contemp. Probs. 69.