LEVERAGING CHILDREN: USING THE CHILD AS A BARGAINING CHIP IN THE US AND EUROPE

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In the United States, recent immigration policy has brought the threat of family separation as a tool for immigration deterrence into the public conversation. The strategy of using children as bargaining chips is not new, however, nor is it exclusive to the US. Behind the appalling images of children ripped from their parents is a legal structure that allows both the state and private actors to control access to children as a means to influence adult behavior.

In both Europe and the United States the best interest of the child is a core tenant of family law. Yet in many instances, the state’s interest in deterring or compelling adult behavior supersedes the child’s welfare. This article proposes a theory for limiting the state’s power to influence adult behavior through its authority over child custody or parental recognition. The state’s power encompasses both direct force, as well as the enforcement of private arrangements. I argue that in any situation where access to a child is at stake, the best interest of the child must be included as part of the analysis. Efforts to incorporate a best interest standard—such as in a recent judgment of the Italian Constitutional Court—provide a model that could inform other jurisdictions’ efforts to promote children’s rights in areas as diverse as immigration and criminal justice reform.

Some US courts have articulated principles restricting state power to use children as pawns in conflicts with adults, primarily through an adult-oriented model. For instance, by limiting the power of police to threaten child removal as a means to induce confession to a crime. Although European law—particularly as enshrined in Article 8 of the European Convention on Human Rights—tends to be much more oriented toward the child’s welfare, courts in Europe are also confronting cases in which children have been used as leverage to impose state authority on individuals.

Overall, the law lacks a coherent and trans-substantive set of criteria for determining when using children as means to adult ends is or is not legally permissible. In the private law context, for instance, one divorcing spouse can threaten to seek custody in order to bargain down their financial obligations to the other spouse. Public law examples also abound. Recently, countries like France and Italy have refused to recognize non-genetic parents as a means to deter the practice of gestational surrogacy. In child protection cases, jurisdictions range widely as to the scope of requirements that may be put on parents seeking reunification, some of which have only tangential connections to the person’s fitness as a parent. Drawing on instances in which adults act in ways that would otherwise be contrary to their own interests in order to maintain access to children, this article delineates the rationales for using family recognition and unification as a strategy for compelling adult behavior. It compares domestic situations in which

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children are used as leverage—such as in divorce disputes or child protection cases—with cross- border contexts—such as family separation. In doing so, this article engages with both comparative and transnational legal practice.

I contend that there are two overarching objectives in incorporating a child’s best interest analysis. First, it would require the state to justify its decision to limit access to the child, rather than treating it as a collateral consequence of the parent’s decision. Second, it would require the cost of the child’s wellbeing to be internalized by both parties. Otherwise, the person who cares most about the child is often in the weakest bargaining position as a result. In other words, this approach would help ensure that children are treated as subjects of the legal analysis, not merely as objects.

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