Rhetoric and Clarity

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James G. Dwyer, Misused Concepts and Misguided Questions: Fundamental Confusions in Family Law Debates, 4 **Int'l J. Jur. Fam.** 239 (2013).

In “Misused Concepts and Misguided Questions,” Jim Dwyer is working within an important tradition of thinkers (going back at least to George Orwell’s famous essay, “Politics and the English Language”) who correct the sloppy arguments, rhetoric, and terminology the rest of us make, to bring us collectively towards clearer moral and policy arguments. There is also more local and recent precedent for this effort. In his critique of the misleading rhetoric of “government intervention,” Dwyer rightly notes (p. 239 n. 2) that he is making essentially the same point that Frances Olsen made in her famous 1985 article “The Myth of State Intervention in the Family,” 18 *U. Mich. J. L. Reform* 835 (1985). Family law scholarship can certainly use more of the sort of critique that Olsen and Dwyer bring.

Dwyer’s point (like Olsen’s earlier) is that it is wrong and misleading to view the policy choices relating to the regulation of families as being between “government intervention” and “non-intervention.” Government intervention in the family is inevitable, if only to set the baseline rights and duties of the individuals. Especially when one considers the prerogatives spouses have to one another, and the powers parents have over their children, it is hard to discern what “non-intervention” could mean. No government presence at all would entail a sort of Hobbesian world, the war of all against all. Instead, all interactions are regulated and constrained by basic rules creating criminal and civil sanctions for assault, fraud, robbery, rape, murder, etc. No one is suggesting that these “interventions” be removed.

Further, in our society, spouses have duties of support, certain property rights relating to one another’s property during marriage (especially in community property states), and rights and duties regarding property and alimony (spousal support) at divorce. These are rules put in place by the legal system above and beyond the baseline rules that govern property rights between strangers. A couple could try to mimic some of these effects through private agreement, but this generally can be done only imperfectly, and, of course, it must be noted that state enforcement of private agreements is itself a form of government intervention. The rules that give spouses rights and duties *inter se* that other people do not have in relation to one another, and that give parents rights and duties in relation with their children that other people do not have in relation to those children, are all in a sense government “interventions” – the only question is whether they are good rules relative to possible alternatives.

Some commentators and advocates would respond that while the distinction between “intervention” and “non-intervention” is inaccurate (and thus unhelpful), one should distinguish situations where the state is “merely” supporting existing social norms and those where it is “intervening” to change existing norms and practices. The argument would be that some family forms and spousal and parental prerogatives are “natural,” while others are imposed by a meddling government. The difficulty with that argument, as Dwyer points out, is that there is no consensus about what rights and duties family members should have, so government action will never be “merely supportive” for everyone; for at least some individuals (and some couples), the legal rules will be coercive “interventions.” Also, the fact that parental rights to control children in particular ways (including in relation to medical care, education, religious upbringing, discipline, etc.) is normal and accepted does not entail that it is not in need of justification. (Dwyer argues that while the state is justified in protecting “non-autonomous

persons" like children, this limited justification would not support the current wide prerogatives parents have in decisions regarding children.)

A final point Dwyer makes is that the rhetoric of "autonomy" and "privacy" in family law arguments is frequently misplaced, especially when the subject is parental rights. Autonomy is about a person's control over the choices affecting *that person's* life; the concept is inapt when the question is the control one party (a parent) has over the choices or actions of another person (a child). Also, while American family law routinely refers to government deference to choices within a family as "family privacy," it is not actually a matter of privacy in any normal sense of that term. Dwyer's reasonable concern is that too often the policy analysis surrounding family matters – especially regarding what powers parents should have over their children – is being done by the positive connotations of terms like "autonomy" and "privacy" when those terms are, at best, misleading descriptions of the arguments being offered.

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