

## Articles

# MATURITY, DIFFERENCE, AND MYSTERY: CHILDREN'S PERSPECTIVES AND THE LAW

Wendy Anton Fitzgerald\*

INTRODUCTION.....	12
I. PERSONHOOD OF CHILDREN UNDER CONSTITUTIONAL LAW .....	22
A. <i>The Liberal Model of Constitutional Personhood</i> .....	23
B. <i>The Supreme Court's Solution: Pretending Children Are Adults</i> .....	26
C. <i>The Liberal Alternative: Treating Children as Potential Adults</i> .....	30
II. PERSONHOOD OF CHILDREN UNDER CHILD SUPPORT LAW .....	34
A. <i>The Parent-Child Contract</i> .....	35
1. <i>Parental Rights</i> .....	37
2. <i>State Interests</i> .....	41
3. <i>The Disappearance of Children from Child Support Law</i> .....	45
B. <i>Children's Claims for Support from the State</i> .....	46
III. PERSONHOOD OF CHILDREN UNDER CUSTODY LAW .....	51
A. <i>The "Best Interests of the Child" Rule</i> .....	53
1. <i>The Myth of Empirical Objectivity</i> .....	56
2. <i>The Myth that the "Best Interests" Standard Responds to Children</i> .....	59
B. <i>The Substitution of the State's Interests for the Child's</i> .....	64
1. <i>Abuse and Neglect Custody Cases</i> .....	65
2. <i>Private Custody Disputes</i> .....	71
C. <i>The Case of Jessica DeBoer</i> .....	72
1. <i>The Schmidts' Constitutional Challenge of State Power</i> .....	74
2. <i>Jessica DeBoer's Interests</i> .....	78
3. <i>Jessica's "Best Interests"</i> .....	80
4. <i>Familial and Family Interests</i> .....	83
IV. MATURITY, DIFFERENCE, AND MYSTERY .....	84
A. <i>Maturity and Power</i> .....	85

---

\* Assistant Professor of Law, University of Florida College of Law.

The author thanks Nancy E. Dowd, Alyson C. Flournoy, Elizabeth McCulloch, Kenneth B. Nunn, Sharon Elizabeth Rush, and Walter O. Weyrauch for very helpful criticism of drafts of this article; Jason H. Wilson and Caitlin F. Bellis for perspectives on parenting and childhood; Roberta Ann Henderson for excellent research assistance; Trudi Reid for superb secretarial help; and the University of Florida College of Law Foundation for crucial financial support.

B. Difference and Perspective.....92  
C. Valuing Children as Children.....99  
    1. The Family Estate.....99  
    2. The Family Dispute Restructured.....102  
CONCLUSION.....110

INTRODUCTION

*When I was a child, I spoke as a child,  
I understood as a child, I thought as a child:  
but when I became a man, I put away childish things.<sup>1</sup>*

In his letter to the Corinthians, Saint Paul described each person's struggle for virtue and enlightenment as thwarted by mere partial knowledge.<sup>2</sup> "For now we see through a glass darkly," Saint Paul wrote, until the day "when that which is perfect is come."<sup>3</sup> Before heaven and the fulfillment of virtue, said Saint Paul, we now stand as the child to the man.<sup>4</sup> Speaking, understanding, and thinking as children, our vision and knowledge remain impaired until we "put away childish things."<sup>5</sup> Children thus figure for Saint Paul as impaired adults, unable to perceive and understand until transformation to adulthood. Saint Paul's image of children pervades our law today. Under the law, children share several attributes of personhood with us adults, but their immaturity impairs them and indeed legally disables them. Children are like us, only lacking. Until fully possessed of mature reason and adult perspective, then, children cannot assume either the prerogatives or burdens of full legal personhood.

The law alights, for good or ill, upon the age of majority for full investment in citizens of constitutional rights, of legal prerogatives and burdens. Behind the age of majority, we imagine a continuum of childhood where children, in fits and starts, advance toward fulfillment of their potential as adults. At any point in the continuum—the age, say, of physical coordination sufficient to drive a car—the law may invest children with legal benefits and burdens commensurate with their maturity. Hence, the child of sufficient maturity may express a legally cognizable preference for custody with one divorcing parent,<sup>6</sup> or the child of sufficient maturity may assert a constitutional right to an abortion.<sup>7</sup> The law thus seems to manifest a gradual investment in children of legal personhood roughly corresponding to their gradual attainment of adulthood. Until the age of majority, however, the law views children as

---

1. I Corinthians 13:11.  
2. I Corinthians 13: 9, 10.  
3. I Corinthians 13:10, 12.  
4. I use the gender-specific "man" here because both the biblical passage and the analogy I draw to our law reflect a gendered perspective.  
5. I Corinthians 13:11.  
6. See, e.g., CAL. CIV. CODE § 4600 (West Supp. 1991); FLA. STAT. ANN. § 39.467 (West 1992).  
7. Bellotti v. Baird, 443 U.S. 622 (1979) (if a minor can prove her maturity in an ad hoc hearing, the court must permit her to proceed with a desired abortion without parental consent).

lacking in at least some essential attributes of adulthood necessary to their exercise of legal rights and assumption of legal burdens.

If children are only inferior adults, awaiting the day as in Saint Paul's imagery that they become whole, then children and childhood are not inherently valuable. Our law reflects this judgment. We view children as potential adults and childhood as the gradual preparation for adulthood. Thus our law concerns itself with utilitarian policies designed to "raise" children into better adults. We seek to break "cycles" of poverty, child abuse, and criminality from one generation to the next, for example, because poor, abused, delinquent children become poor, abusive, criminal adults.<sup>8</sup> We seek to educate children so that they may become economically self-sufficient and join a responsible electorate as adults. Moreover, although we may cherish due process for every adult, we assume that children are legally incompetent to represent their own interests. The law therefore disables children from appearing as parties to legal disputes, no matter how directly such disputes may bear upon children's lives.<sup>9</sup> That children are inferior to adults under the law makes rational sense, of course, because we understand children as potential adults, and childhood as their preparation for adulthood.

Nevertheless, even a cursory review of the treatment of children under the law seems to undermine the logic of disabling children as a class. An uninformed and politically indifferent adult may vote, for example, while a child prodigy well-versed in the salient issues may not. The millionaire's child may, on second thought, void an eminently reasonable contract for lack of capacity, while the adult consumer fast-talked into a barely conscionable deal likely has no legal recourse. For their protection from the hazards of the workplace, teenagers cannot take work in the safest of manufacturing enterprises,<sup>10</sup> while adult workers routinely face demonstrably dangerous working conditions. A seventeen-year-old fully possessed of her faculties and fully informed of the risks cannot undergo the most minor of medical treatments without parental consent,<sup>11</sup> while the parents of an adult who is devoid of intellect, abiding in a persistent vegetative state, have no legal say in their daughter's medical treatment.<sup>12</sup> These comparisons of the legal treatment of children and adults belie the rationale that we invest children with legal

---

8. For a discussion of utilitarian views of childhood, see John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307, 315 (1991) (describing one view of childhood as "a period when the little beast must be tamed and shaped for the future").

9. See, e.g., *Kingsley v. Kingsley*, 623 So. 2d 780, (Fla. Dist. Ct. App. 1993) (the child "Gregory K.'s" nonage legally disabled him from petitioning for termination of his mother's parental rights). "As a general rule, states 'may require a minor to wait until the age of majority before being permitted to exercise legal rights independently.'" *Id.* at 784 (quoting *Bellotti v. Baird*, 443 U.S. 622, 650 (1979)).

10. For federal child labor regulations, see 29 U.S.C. §203(1) (West 1993) (defining "oppressive child labor").

11. Parents exercise constitutional authority to control their minor children's medical treatment, subject only to state intervention in parental decisions arising to child abuse or neglect. See, e.g., *In re Green*, 292 A.2d 387 (Pa. 1972); *In re Phillip B.*, 156 Cal. Rptr. 48 (Ct. App. 1979); *Guardianship of Phillip B.*, a Minor, 188 Cal. Rptr. 781 (Ct. App. 1983). My location of these and other exemplary cases and my thinking about children in the law have been aided greatly by ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* (2d. ed. 1989).

12. See, e.g., *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 286 (1990) (state is not required to abide by parental decision making about medical care of adult daughter in persistent vegetative state).

benefits and burdens in proportion to their maturity. Instead, our legal demarcation of majority as the age for recognition of full legal personhood appears more arbitrary than empirically or logically justified.

Other critics and scholars have demonstrated the arbitrary character of legally disabling children as a class. Some conclude that, because chronological age at best only approximates maturity, the law ought not to disable children as a class, but rather should provide for ad hoc determinations.<sup>13</sup> Others conclude that, while legal disability as a class may work some injustices on some children, the alternatives are either unworkable<sup>14</sup> or too dangerous for too many immature children in need of the law's protection.<sup>15</sup>

Martha Minow, on the other hand, has argued that children's relative immaturity is a pretext for sustaining a legal system intent on trivializing children and the issues important to them.<sup>16</sup> The legal disabling of children excludes them from all public forums (legislatures and courts), and consigns children to the private realm of their parents' care and control.<sup>17</sup> Whatever claims children may make upon their parents within the confines of private family life, the public and public law need not entertain children's needs and claims. Children and the issues important to them remain obscured behind a screen of family "privacy," Professor Minow explains, while public law preoccupies itself with matters deemed more important, such as crime and commerce.<sup>18</sup>

Professor Minow's explanation rings true, despite the popular rhetoric that American society loves and values children. Our political choices reveal

---

13. See, e.g., David A. J. Richards, *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 23-28 (1980) (only demonstrated protection from injury or enhancement of education and nurture can constitutionally justify paternalistic limits on minors' liberties); Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1324-30 (1988) (courts must entertain minors' perspectives to determine "whether denial of a right is consistent with a child's apperception of human worthiness"); Hillary Rodham, *Children under the Law*, 43 HARV. EDUC. REV. 487 (1973).

14. See, e.g., Coons et al., *supra* note 8, at 339-349.

15. See, e.g., Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1 [hereinafter Hafen, *The Waning of Belonging*]; Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605 [hereinafter Hafen, *Children's Liberation*] (arguing for protection of parental rights for children's sake).

For a persuasive "integrationist" view regarding parents' and children's rights, see Sharon Elizabeth Rush, *The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461, 501 (1985) (in cases involving fundamental constitutional rights, courts should "apply the same legal principles to the child's case as would be applied to an adult in a similar situation, unless demonstrable evidence exists to justify treating the child differently").

16. Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 6 (1986) [hereinafter Minow, *Rights for the Next Generation*] ("[T]he inconsistent legal treatment of children stems in some measure from societal neglect of children. The needs and interests of children ... are too often submerged below other societal interests.").

17. *Id.* at 7.

18. *Id.* at 7-8. "[T]he framework [of the law] assigns childcare responsibilities to parents, and thereby avoids public responsibility for children.... At a societal level, the basic framework essentially authorizes public neglect of children while assigning duties to parents entrusted with children's care." *Id.*

societal hostility to children.<sup>19</sup> We have succeeded in lifting the elderly from poverty, for example, while condemning ever greater numbers of children to malnutrition.<sup>20</sup> We deny children standing to see their interests represented in custody disputes, those legal disputes most profoundly affecting the lives of most children.<sup>21</sup> Yet we accord children standing in those legal disputes of keen interest to us as adults, abortion<sup>22</sup> and free speech rights.<sup>23</sup> We thus retrieve children's issues from the private realm of family life when responding to children's needs also serves our own purposes as adults. As adults, we care about minors' abortion and free speech rights because those rights bear upon our own freedoms as well. From the perspective of children, however, the most urgent issues of childhood are not government constraints on individual freedoms, but the threat of poverty and loss of parental nurturing. Adult society consigns these imperatives of children to "family law," a legal realm where children have no standing and their perspectives are ignored.<sup>24</sup> If anything, in those issues of most importance to children, child support, and custody, the law endeavors to assure that children's needs and claims do not fetter adult prerogatives<sup>25</sup> or burden the public fisc.<sup>26</sup>

We have long been on notice of the counts against American society's treatment of children: a fifth of all our children subsist in poverty, and five million are chronically hungry;<sup>27</sup> we tolerate infant mortality and preschool child death rates higher than nineteen other nations,<sup>28</sup> and eight million of our

---

19. Professor Minow likewise demonstrates American political hostility to children. *Id.* at 6-7.

20. Government benefits raised seventy-four percent of otherwise impoverished Americans aged sixty-five and older above the poverty line, but raised only twelve percent of all otherwise impoverished children, and only nine percent of otherwise impoverished children under age six. CHILDREN'S DEFENSE FUND, *The State of America's Children 1992*, 28 (1993) [hereinafter CHILDREN'S DEFENSE FUND]. Meanwhile, an estimated five million American children go hungry. *Id.* at ix.

21. For a critique of the rationale for denying children standing in custody disputes, see discussion *infra* part III.

22. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (recognizing a minor's standing to petition a court for permission to forego parental consent when seeking an abortion despite general rule that nonage disables minors from seeking legal redress on their own behalf).

23. See, e.g., *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969) (recognizing students' first amendment rights against school censorship in a landmark decision for "children's rights"). But see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (limiting the *Tinker* holding to cases where school punished student for protected speech and permitting censorship of school-sponsored student expression).

24. For analysis of how family law excludes children and treats them as legal nonentities, see discussion *infra* parts II and III.

25. See, e.g., discussion *infra* part II of parents' constitutional defenses to child support obligations.

26. See discussion *infra* part II of the state's fiscal interests in enforcing child support obligations.

27. CHILDREN'S DEFENSE FUND, *supra* note 20, at x. As the Children's Defense Fund depicts poverty in our nation, "Today every seventh American is poor as is every sixth family with a child under 18. Every fifth child and every fourth preschooler is poor. Every third black and brown child is poor, and every second black preschooler is poor. Two out of every three preschoolers of any background are poor if they live in a female-headed family in the richest nation on earth." *Id.* at ix. The Children's Defense Fund notes that American children are two to thirteen times likelier to be poor than Australian, Canadian, Swedish, German, Dutch, French, and British children, and concludes that "Our extraordinarily high child poverty rates . . . are highly unusual and represent conscious value and political choices." *Id.* at xi.

28. *Id.* at x.

children lack medical care;<sup>29</sup> over one million of our children are physically brutalized and over one thousand murdered in their homes annually;<sup>30</sup> year after year, over four hundred thousand of our children linger in foster homes or youth shelters,<sup>31</sup> and over a million more resort to the streets as runaways;<sup>32</sup> across the nation, school funding is in crisis, and schools themselves increasingly racially segregated.<sup>33</sup> These counts and more comprise a moral indictment and compelling case of guilt. Why, then, do we fail to redress these wrongs?

As a society and a legal system, we have ignored other moral indictments before: slavery, Jim Crow, and the oppression of women are but a few examples. Historically, the law justified treating people of color and white women as property, justified denying these people legal personhood, because of their perceived inferiority.<sup>34</sup> Our perception of children's inferiority likewise permits us to ignore children's legal claims against adults individually and collectively for decent food, housing, medical care, and education, and for protection from violence. By denying children legal personhood and standing, we refuse to entertain and hear their claims. We thus continue to exclude children from redress for injustice just as historically we excluded white women and people of color.

The legal denigration of children appears not nearly so overt as the dehumanization of other oppressed peoples.<sup>35</sup> Arguably, we exclude children from legal standing and personhood for their own protection, providing other

---

29. *Id.*

30. *Id.* at 62.

31. *Id.* at 62.

32. *Id.* at x. Note also that an estimated 2.4 million children are involved in prostitution, *id.*, and 100,000 children number in the nation's homeless. *Id.* at 35.

33. In the past two decades, the proportion of funding for elementary and secondary schools from federal sources has decreased relative to other sources. *Id.* at 45. Meanwhile, children attending schools with predominantly minority student bodies often received no standard science, foreign language, or other college preparatory classes, and minority children attending schools with predominantly white student bodies often found themselves "tracked" into nonacademic classes. *Id.*

See also A. LEON HIGGINBOTHAM, JR., *America's Children at Risk: A National Agenda for Legal Action*, A.B.A. PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES (1993) (describing children's problems in legal representation, poverty, child care, housing, education, health care, abuse and neglect, foster care, juvenile justice systems, and child support).

34. Courts reasoned that women could not bear the rights and burdens of legal personhood, for example, because, women were like "children." See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140-41 (1872) (Bradley, J., concurring); *Mueller v. Oregon*, 208 U.S. 412, 422 (1908).

35. By analogizing children to adult peoples oppressed because of gender, race, class, sexual-orientation, religion or other differences, I do not mean to offend those who have experienced such oppression. To some, the assertion of children's claims as an oppressed class may "trivialize" or "dilute" the claims of oppressed adults. I note, for example, the dismay of some African-Americans over comparing the racial integration of the military to the integration of lesbians and gay men in the military. To any I have unintentionally offended, I would offer two insights. First, children also experience gender, race, class, sexual-orientation, religious and other bias. They experience these biases at least as painfully as adults, but perhaps with less societal notice. Second, to scoff at the analogy of children to other oppressed peoples (or at the analogy of lesbians' and gay men's plight to racial minorities') is to suppose that others somehow deserve either the societal maltreatment they face as a class or the legal disabilities which help trap them in such maltreatment. In part IV, *infra*, I attempt to deconstruct both suppositions.

remedies for their claims. Indeed, the law assigns children's claims to parents and the state, assuming one or the other party will best represent children's interests. Children, the law reasons, are but partially filled vessels who lack essential ingredients of personhood. Children cannot, the reasoning follows, know or do what is best for them. The real experience of children belies even this benevolent reasoning, however. If parents or the state did know and do what is best for children, then we would not now countenance the moral indictment of our chronic maltreatment of children.

Parents and the state might know and do what is best for adults. Individual and collective adults can readily define and achieve adult purposes. Neither, however, gives voice to the compelling needs and experiences of real children. Instead, when representing children, parents and the state tend to perceive only those claims which serve adult purposes and protect adult interests.<sup>36</sup> Children's advocates thus justify spending or reforms for children because of the utility for adults. We should rehabilitate the juvenile offender now so as to spare adult society another dangerous, expensive criminal later.<sup>37</sup> We should enforce child support obligations so as to relieve the public treasury of child welfare burdens.<sup>38</sup> We should assure minors' unfettered access to abortion so as to protect absolute reproductive rights in adult women.<sup>39</sup> We accept that children's claims must fit adult purposes because children are potential adults and childhood is preparation for adulthood. To the extent any child's claim diverges from adult purposes, then, the law refuses to entertain it. Any purpose or interest of value only to children as children can command no legal recognition or representation because, by definition, any such interest or purpose is merely childish, and inferior. Children's claims to our care and concern are not childish or inferior, of course, but so long as they serve no politically powerful adult purpose, those claims remain unvoiced.

As a society we may ignore children's claims in part because, different from us as they are, we simply do not like children. The suffering of children, so long as we do not suffer, may simply not move us to act.<sup>40</sup> Even if as a

36. For discussions of adult self-interest compromising children's advocacy, see Coons et al., *supra* note 8, at 333-39; Martin Guggenheim, *The Right to be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 93-99 (1984).

37. See, e.g., CHILDREN'S DEFENSE FUND, *supra* note 20, at xv.

38. See 42 U.S.C. § 654 (West 1993) (requiring states to enforce parental child support obligations as a condition of states' receipt of Aid to Families with Dependent Children federal monies.).

39. See Minow, *Rights for the Next Generation*, *supra* note 16, at 6 ("Traffic safety, control of violent crime, and regulation of abortion, for example, are social goals in which children may have incidental roles, and the laws affecting children in these areas actually play out political and practical debates which make children quite beside the point.").

40. Courts' rejection of "emotional" appeals on behalf of children manifests this refusal to allow children's suffering to move us. See, e.g., *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 201 (1989) (in denying the § 1983 claims of an abused child, Joshua, against state child protective services agents, the Court observed:

"[J]udges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua ... to receive adequate compensation for the grievous harm inflicted upon [him]. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father ...."

*Id.* at 202-203 (emphasis added)). In contrast, Professor Minow urges courts to "consider the human consequences of their decisions ..., rather than insulating themselves in abstractions." Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 89 (1987) [hereinafter Minow, *Justice Engendered*]. She "petition[s] all judges to open

society we sincerely devote ourselves to children, however, we cannot respond to their claims so long as we refuse to hear them. Our jurisprudence and family law now disable children not only from exercising rights and assuming burdens, but also from voicing their perspectives and relating their experiences. Instead, the law might elicit children's stories, conferring legal standing and hence importance on their perspectives.

Other oppressed peoples initially forced a hearing of their claims to legal personhood by asserting their equality and demanding equal treatment. White women and people of color thus transformed themselves from property under the law to property owners themselves.<sup>41</sup> I neither advocate nor expect that children likewise will empower themselves and receive equal treatment under the law.<sup>42</sup> The struggles of other oppressed peoples nonetheless point a way for our legal system to begin entertaining and hearing children's claims. Critical race theorists and feminists have asserted that the law's definition of personhood must expand to include racial, gender, cultural, and other differences.<sup>43</sup> Attributes of gender, race, or culture which the law once

---

up to the chance that someone may move them—the experience will not tell them what to do, but it may give them a way outside of routinized categories to forge new approaches to the problem at hand." *Id.* at 89–90. Professor Minow distinguishes such openness to others' perspectives and experiences from sympathy. "Sympathy, the human emotion, must be distinguished from equal respect, the legal command." *Id.* at 77.

41. Compare, for example, women's status under the law before the passage of Married Women's Acts when the law disabled married women from property ownership and after (although, even after passage of Married Women's Acts, the law failed to recognize a married woman's property interests in her domestic services, for these belonged to her husband). *See, e.g.,* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 4–9 (1923); *see also* WALTER O. WEYRAUCH & SANFORD N. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* 290 (1983) (noting that the Married Women's Acts originated in Mississippi in 1839, probably to enable white women to own slaves). For Married Women's Acts, *see, e.g.,* FLA. STAT. ANN. § 708.08 (West 1992), N.Y. GEN. OBLIG. LAW § 3–301 (McKinney 1993).

42. The call for "children's rights" captures the American cultural imagination. We resort reflexively to our legal rights as panaceas for individual and societal suffering. Hence, for some decades, legal scholars have considered the responsiveness of a rights-based jurisprudence to children's needs and claims as our fellow citizens. *See, e.g.,* Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979) (suggesting that "equal rights" for children makes legal sense in some contexts, but not in others); *but see* Hafen, *The Waning of Belonging*, *supra* note 15 (critiquing the "children's rights movement"). In her illuminating work *RIGHTS TALK*, Professor Mary Ann Glendon compares American rights-based jurisprudence to other legal cultures. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). Professor Glendon demonstrates how our national focus on individual rights disserves family, community, and other human relations. *Id.* Her observations bear forcefully upon children, for whom individual empowerment is at least impractical and potentially destructive. My envisioning of a jurisprudence more inclusive for children thus relies heavily on Professor Glendon's insights. *See* discussion of this transformed jurisprudence *infra* part IV.

43. Scholars associated with critical race theory have argued, for example, for legal (and academic) listening to the perspectives and experience of people of color. These perspectives and experiences, voices and stories, challenge our legal assumptions about objectivity, neutrality, and universality. *See, e.g.,* Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?* 76 VA. L. REV. 95 (1990); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L. J. 2007 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) [hereinafter Matsuda, *Public Response to Racist Speech*]; PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) [hereinafter WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*].

Feminist scholars have specifically criticized the exclusion from our jurisprudence of qualities they attribute to female culture identified, for example, as human connectedness and practical concreteness. Experiences from these perspectives, voices and stories, demonstrate the gendered nature of our legal assumptions and methodology. *See, e.g.,* Martha L. Fineman,



regarded as manifestations of inferiority, we are learning, the law should now respect and appreciate as manifestations of difference. I propose that, instead of dismissing children's perspectives as immature and hence inferior, the law should respect and appreciate children's perspectives as simply different.

Suppose we imagine that childhood is an inherently valuable state of being. Suppose children are not inferior versions of adults, but are qualitatively different from us as adults. Suppose that being a child and childhood itself has some value even if most children never survived to adulthood. I suspect that something in all of us, perhaps some remnant of childhood, responds to these proposals with affirmative recognition. We want to rescue children from poverty, abuse, or delinquency, not only because rescue serves our adult purposes, but because children should be rescued for their own sake. We want to educate children not only because education serves our adult purposes, but also because it serves some inherent purpose of childhood. We adults must provide for children, it seems, not only to serve our adult purposes, but also to serve the purposes of children as children. While we identify with alacrity our own adult purposes, however, we may but dimly perceive the value of being a child to a child.

In fact, a deep gulf divides us from children and childhood. Recollections of our own childhood may help bridge that gulf, but even our memories yet interpose an adult perspective. Children and childhood appear across the divide, not as comprehensible lesser versions of adults, but as mysteriously different from us. Having irretrievably "put away childish things," as Saint Paul wrote, we no longer speak, understand, or think like children.<sup>44</sup> Just as gender, race, and culture traps us in subjectivity,<sup>45</sup> so too does adulthood.

When the law treats children as potential adults and childhood as preparation for adulthood, it denigrates children and childhood and dismisses children's perspectives as irrelevant because they are immature. I propose that the law instead validate children's personhood by recognizing their perspectives. Because we cannot speak for children, we should listen to them. We should legally entertain and hear their voices and experiences. Upon hearing the child's speech, understanding, and thoughts, we in the law can begin to value children and childhood for their own sake. "For now we see through the glass darkly,"<sup>46</sup> but upon hearing children we might dispel some of the mystery surrounding their lives. We can also include "childish things," whatever they are, in our understanding of legal personhood. The law may then

---

*Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990) [hereinafter Fineman, *Challenging Law*]; Lucinda M. Finley, *Breaking Women's Silence in the Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986) [hereinafter Matsuda, *Liberal Jurisprudence*]; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE]; Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1 (1992).

These few citations indicate the rich trove of critical scholarship available to help shape reassessment and re-imagining of children in the law. For a description of such scholarship, see Sharon Elizabeth Rush, *Understanding Diversity*, 42 FLA. L. REV. 1 (1990).

44. I Corinthians 13:11.

45. Minow, *Justice Engendered*, *supra* note 40, at 46; *see also* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 43, at 52.

46. I Corinthians 13:11.

begin to respond to children as they are, and not simply as it conveniences us for them to be.

In this article, I critically examine models of personhood from constitutional, child support, and child custody law, demonstrating how both constitutional and family law jurisprudence now exclude children's personhood. In Part I, I review the prevalent theory of constitutional interpretation, a system of negative rights constraining the state from infringing the liberties of autonomous individuals. Under this theory of the Constitution, children assume constitutional personhood only by pretense. In some instances, the law pretends that children are autonomous like adults, and therefore invested like adults with constitutional rights. In other instances, the law treats children, not as they are, but as speculative potential adults who will eventually mature into possession of adult constitutional liberties. Both alternatives blind constitutional analysis to the possibility that the law could serve real children as they are, and value them for themselves as children.

In Part II, I take up the legacy of family law traditions now juxtaposed in tension with our constitutional jurisprudence of autonomous individuals.<sup>47</sup> Under family law tradition, children historically appear first as the chattel of their parents. More recently, children appear in family law as parties to a parent-child contract, exchanging their services for parental support. I argue that the law sustains the child's service obligation to parents while undermining the parents' support obligation to children. The demise of the child's claim for support follows inexorably from parents' assertion of their constitutional rights as autonomous individuals to be free from obligation to other private individuals, even their children. Against their parents' constitutional rights, children can assert only the legislative mandate that parents must support their children. Because legislative child support mandates represent only narrow state interests, support conflicts pit the state against parents, obliterating children's own interests in their support and sustenance.

In Part III, I examine child custody cases, cases which arise when the state moves against allegedly neglectful or abusive parents and when private parties dispute the child's custody. I discuss in particular the recent *DeBoer v. Schmidt* case.<sup>48</sup> As in the law of support, the parents' assertion of constitutional rights structures these custody disputes as state action against parents. The state's promotion of its own interests under the rubric of the "best interests of the child," I argue, prevents legal recognition of the real experiences and interests of the actual child whose custody is disputed. In sum, with the advent of constitutional analysis in family law, we have recognized parental rights and prerogatives and have defined state interests. We have also effaced the child,

---

47. For examination of the tension between constitutional and family law jurisprudence, see GLENDON, *supra* note 42; Hafen, *The Waning of Belonging*, *supra* note 15.

48. See *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1 (1993). In these cases consolidated on appeal, the Michigan Supreme Court held that the DeBoers, the putative adoptive parents of two and a half year old Jessica DeBoer, had no standing to petition for a Michigan court hearing to determine custody in the child's "best interests." Further, the court held that Jessica's complaint for such a hearing raised no cognizable claim. The court therefore ordered restoration of Jessica's custody to her birth parents, the Schmidts. The case received national attention in newspapers and magazines and was featured on television nightly news broadcasts and on television news magazines.

thus forfeiting the opportunity to illuminate family law conflicts with the child's unique perspective.

I advocate, finally, in Part IV, legal recognition of and respect for children's perspectives in those legal disputes most profoundly affecting their lives: support and custody. I propose an initial mechanism, grounded in children's property rights, for according children standing in support and custody disputes. Recognition of children's property rights and standing in these disputes may help transform children from legal nonentities to rights-bearers like their parents. If so, I argue, children's appearance in legal evolution as rights-bearers contesting parental and state authority will remain, at best, exceptional. Instead, I advocate a mechanism for securing children's standing in support and custody disputes so that adult society, parents and courts alike, must hear and learn from children's experiences and perspectives. If forced to listen to children, I argue, we as adults can begin to understand children as speaking, not from a position of inferiority, but from a position of difference.

The task of listening to children legally and incorporating children into our legal model of personhood is at least problematic and potentially frightening.<sup>49</sup> We face reconstructing not only our jurisprudence, but also our legal procedures to accommodate children's needs and differences. I do not presume to undertake in this article the project of formulating the legal rules and procedures which will enable adults to listen to children's perspectives and show legal respect for children's differences, nor can I detail a new jurisprudence underpinning such laws. That legal evolution will require not only time, but also children's perspectives and experiences to inform and catalyze it. Until we undertake the task, we do not know what we will hear from children.

I do, however, speculate on new directions for the law, and I envision in broad outlines new touchstones for our jurisprudence. Whatever we hear from children and however we hear it, children's perspectives will certainly reflect their experiences, not as legally autonomous individuals, but as dependent family members.<sup>50</sup> This perspective of childhood, a perspective of dependence on and membership in family, can help hasten the transformation of our legal model of personhood. Starting from a more inclusive view of legal personhood, we can begin to transform our jurisprudence from one constrained by individualism to a jurisprudence responsive to families. We now structure family disputes as conflicts between adult individuals and state interests. Upon transforming our model of legal personhood to include children and their family belonging, we can begin candidly to adjudicate the claims of family bonds and fears of loss that real children and parents experience in support and custody cases. I do not foresee, therefore, a new generation of rights-bearing

---

49. See discussion *infra* part IV regarding objections to children's standing in support and custody cases.

50. Others have promoted before me, of course, rethinking our jurisprudence, particularly in family law, to reflect the interdependence of children, families, and communities (or the state). For groundbreaking and pathbuilding in this endeavor, see, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) [hereinafter Bartlett, *Re-Expressing Parenthood*]; GLENDON, *supra* note 42 at 133-36; Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1992-93); Minow, *Rights for the Next Generation*, *supra* note 16; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent's Rights*, 14 CARDOZO L. REV. 1747 (1993) [hereinafter Woodhouse, *Hatching the Egg*].

children asserting claims of autonomy from their families. Instead, I envision a jurisprudence evolving which respects children's claims as children to dependence on adults, as well as parents' claims as parents to nurturing children.

Our law continues to evolve in response to the imperatives of differences among adults. In fits and starts, we have begun to accord legal recognition of and respect for gender, race, class, sexual-orientation, religion, and other differences among adults. Adults speaking from these positions of difference compel our rethinking of legal personhood as more than autonomous individuals. Likewise, children speaking from a position of difference can reform our legal understanding of personhood, allowing, for example, better recognition of human interdependence. Children speaking from a position of difference will also challenge the stereotype of children as inferior beings, inferior because they are not like us adults. If we can begin to view children not as lesser versions of adults, but as simply different, then our law can begin to appreciate the mystery that is childhood.

## I. PERSONHOOD OF CHILDREN UNDER CONSTITUTIONAL LAW

If the law is to recognize the personhood of children, our Constitution and its interpretation must include children and childhood. Both explicitly and implicitly, the Supreme Court has included children as people under the protection of the Constitution. In 1967, the Supreme Court declared in the landmark case *In re Gault*,<sup>51</sup> that children are persons under the Constitution. The state of Arizona could not deprive fifteen-year-old Gerald Gault of his liberty, the Court said, without affording him the procedural rights guaranteed to all in the Constitution.<sup>52</sup> Arizona's legislature had perhaps intended the state's juvenile delinquency procedures to provide special protection for immature offenders, the Court agreed.<sup>53</sup> These protective measures operated oppressively, however, exposing the *Gault* child to far harsher punishment than adults faced for similar infractions.<sup>54</sup> The Supreme Court therefore applied constitutional criminal procedures to young Gault's delinquency proceeding, and inspired rethinking of children's place under the Constitution.<sup>55</sup> Since at least the *Gault* decision, then, we have taken for granted that children are persons under the Constitution. As constitutional persons, children are theoretically invested with constitutional rights and liberties, subject only to

---

51. 387 U.S. 1 (1967).

52. *Id.* at 41.

53. *Id.* at 15.

54. *Id.* at 29.

55. Over a decade before the *Gault* decision, the Supreme Court recognized the application of the fourteenth amendment to school children in *Brown v. Board of Education*, 347 U.S. 483 (1954). Children's access to fourteenth amendment analysis and remedies might have proved a more fertile ground for a children's constitutional jurisprudence than the Court's holding about quasi-criminal due process rights in *Gault*. Nonetheless, the *Gault* Court's dicta that, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," *Gault*, 387 U.S. at 29, proved most influential, appearing as authority in such landmark cases as *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (recognizing children's first amendment rights, though those rights were not abridged by a pornography statute) and *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (recognizing minor's constitutional right to obtain an abortion).

limitations the state can justify constitutionally.<sup>56</sup> In the decades since the *Gault* decision, however, children have not themselves somehow become constitutional persons, and our understanding of constitutional personhood has not evolved to include them. Comparison of the predominant jurisprudence of constitutional personhood with any understanding of real children's personhood compels this conclusion.

### A. The Liberal Model of Constitutional Personhood

A generation of legal scholars has propounded the liberal theory of constitutional interpretation.<sup>57</sup> The text of the Constitution itself and its historical origins in the Age of Enlightenment, these scholars explain, manifest a certain description of the individual and of the individual's relationship to the state.<sup>58</sup> That individual is preeminently "rational" and "autonomous," and the function of law is to accord such individuals "dignity."<sup>59</sup> As a rational individual, each person is capable of choosing his or her own "conception of the good" in such matters as religion or morality, occupation, or any of life's purposes.<sup>60</sup> Respecting the dignity of individuals thus requires that the state respect the autonomous individual's choices and decision making. Originating in these principles, our Constitution thus describes a constrained state, and our Bill of Rights a shield for individuals to raise against potential state interference with autonomous choice.<sup>61</sup> Our constitutional liberties ensure that the state must respect at least the "rational" choices of individuals.<sup>62</sup> Liberal theorists conclude, moreover, that the Constitution and its origins also manifest the principle of equality. All humans bear the capacity for rational, autonomous choice, they argue.<sup>63</sup> To constrain the state from interfering with any

---

56. See *Bellotti v. Baird*, 443 U.S. 622, 633-635 ("A child, merely on account of his minority, is not beyond the protection of the Constitution ...." but, "although children generally are protected by the same constitutional guarantees against governmental deprivation as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs ....").

57. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971), and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) (works generating this corpus of jurisprudence). Some of these scholars have attempted to demonstrate that the liberal theory of constitutional interpretation encompasses children's imperatives as well. See, e.g., Richards, *supra* note 13; Tremper, *supra* note 13.

58. RAWLS, *supra* note 57, at 11; Tremper, *supra* note 13, at 1297-1311.

59. See, e.g., RAWLS, *supra* note 57, at 142-50, 433-46, 513-20; (autonomous individuals act "from principles that we would consent to as free and equal rational beings," including freedom from the primary influence of "tradition and authority, or the opinions of others;" *id.* at 516; DWORKIN, *supra* note 57, at 199 (a "man's" right against the state is "fundamental," like free speech, "if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence;" *id.* at 199); see also Richards, *supra* note 13, at 3; Tremper, *supra* note 13, at 1301-04.

My references to John Rawls' and Ronald Dworkin's monumental works are reductionist by necessity. I seek here to describe the prevalent liberal constitutional jurisprudence only to demonstrate the Supreme Court's reference to the tenets of that jurisprudence in children's cases.

60. RAWLS, *supra* note 57, at 407-16; DWORKIN, *supra* note 57, at 272 ("Government must treat those whom it governs ... with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.").

61. See, e.g., RAWLS, *supra* note 57, at 28; DWORKIN, *supra* note 57, at 204-05.

62. RAWLS, *supra* note 57, at 407-16.

63. See, e.g., RAWLS, *supra* note 57, at 504-12, 505 (describing the basis of equality as humans' equal capacity for moral personality; in turn, moral persons first "are capable of having (and are assumed to have) a conception of the good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally

individual's choice, the Constitution must guarantee all individuals liberty from state interference, and equally.<sup>64</sup> In sum, all persons under the Constitution enjoy equal liberty from state interference with their individual, autonomous choices.

This liberal model of the autonomous individual's relationship with the state admits, of course, of many exceptions. The state may interfere with an individual's choices, for example, in order to preserve the liberties and autonomy of other individuals. Liberal scholars can thus justify criminal codes safeguarding life, liberty, and property against private individuals' misconduct consistently with the principles they elucidate.<sup>65</sup> Moreover, the protection of autonomous decision making compels a host of civil codes, from compulsory education in some scholars' views,<sup>66</sup> to Affirmative Action programs in others'.<sup>67</sup> Liberal scholars also recognize that innate inequality (mental illness, for example) or economic inequality can undermine an individual's capacity for autonomous choice. Such inequalities may justify affirmative state action as an exception to the general principle of respecting individual choice equally. Thus, some scholars propose that the Constitution compels state redistribution of private assets.<sup>68</sup> Further, constitutional analysis has long required that the state articulate interests of varying gravity to justify the unequal treatment of certain classes of persons such as the mentally ill.

Critics have argued, however, that the liberal conception of a person under the Constitution as an autonomous individual excludes many more classes of people than it describes, and maybe even excludes all real people.<sup>69</sup> Feminists have attacked the liberal theory as excluding people whose choices are compelled, not by their rational autonomy, but by their connectedness and

---

effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree"); Richards, *supra* note 13, at 34-35 n.160 (arguing that human fetuses have no such moral personality).

64. RAWLS, *supra* note 57, at 14-15 (describing justice principles of equality); DWORKIN, *supra* note 57, at 272-73 ("Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality ....").

65. See, e.g., DWORKIN, *supra* note 57, at 191.

66. See, e.g., Richards, *supra* note 13, at 43-44 (arguing that children need exposure through compulsory public education to views other than their parents' in order to formulate independent (autonomous) and rational conceptions of the good); Tremper, *supra* note 13, at 1346-48 (arguing that, if the Supreme Court accorded minors equal dignity under the Constitution, then public education would become an affirmative state obligation akin to a right in children).

67. See, e.g., DWORKIN, *supra* note 57, at 223-39.

68. See, e.g., RAWLS, *supra* note 57, at 14-15, 100-08 (explaining the "difference principle" of justice which "represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well"); see also Frank Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

69. See, e.g., MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 175-83 (1982) (arguing that the model of the autonomous individual lacks the formative influences and relationships which, happily, shape actual people and their choices).

interdependence with others.<sup>70</sup> Critical legal scholars have attacked the liberal theory as excluding people whose economic poverty makes individual liberties almost meaningless in their bare struggle for survival.<sup>71</sup> Critical Race Theorists have attacked the liberal theory as so focused on the process of state respect for individual liberty as to perpetuate the result of racial inequality.<sup>72</sup>

For these critics, the liberal model of the constitutional person, the autonomous individual capable of rational choice, is at best irrelevant to real people's experience, and at worst oppressive. Indeed, in the hands of political conservatives, the liberal tenets of autonomy, individualism, and a constrained government recognizing only "negative rights" become a rationale for blaming the less fortunate for their misfortunes.<sup>73</sup> The Supreme Court has held constitutional the denial of federal funding of abortions for poor women<sup>74</sup> and the denial of disability benefits to pregnant women<sup>75</sup> under principles of autonomy and equality, and has gutted civil rights legislation designed to remedy racial discrimination in political enfranchisement<sup>76</sup> and employment<sup>77</sup> with the same, ostensibly principled rationale. People who are hungry, homeless, uneducated, unemployed, or disenfranchised have only themselves to blame under this ideology.

Liberal scholars form the vanguard with other critics of this ideology, arguing that, if properly interpreted, the Constitution compels no such cruel result. The literature, then, abounds in liberal defenses of welfare benefits<sup>78</sup> or Affirmative Action programs.<sup>79</sup> Nonetheless, the liberal theory of autonomous individualism pervades several decades of politically conservative Supreme Court decisions.<sup>80</sup>

70. See, e.g., Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Matsuda, *Liberal Jurisprudence*, *supra* note 43; Frances Olson, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

71. See, e.g., William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1499-1504 (1986).

72. See, e.g., Matsuda, *Public Response to Racist Speech*, *supra* note 43; Kenneth B. Nunn, *Rights Held Hostage: Race Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993); Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Opportunity*, 87 MICH. L. REV. 2128 (1989).

73. See, e.g., Simon, *supra* note 71, at 1441 (describing liberalism's moral contempt for the economically dependent); WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 43 (describing her student's righteous defense of wealth as earned by hard work).

74. *Harris v. McRae*, 448 U.S. 297 (1980).

75. *Geduldig v. Aiello*, 94 S. Ct. 2485 (1974); for congressional response, see 42 U.S.C. 2000e(k) (1978) (Pregnancy Discrimination Act).

76. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (although used to remedy past voting rights violations, conscious use of race in redistricting violates the Equal Protection Clause).

77. *Richmond v. Croson*, 488 U.S. 469 (1989) (the proportional disparity between the number of contracts awarded to minority contractors and the city's minority population could not justify constitutionally a city ordinance requiring a set-aside for minority contractors).

78. See, e.g., Michelman, *supra* note 68; Richards, *supra* note 13, at 21-23 (family income support, full employment, and daycare are constitutionally compelled to rectify inequality).

79. See, e.g., DWORKIN, *supra* note 57, at 223-39.

80. With the political shift from the Warren to the Burger and Rehnquist Courts came also a shift in results in civil rights and public benefits cases, despite the Court's consistent adherence to a liberal jurisprudence.

If the liberal model of the constitutional person fails to recognize many aspects of humanity—in people of color, white women, and other oppressed groups—even more so does the model deny personhood to children. Children, as a group, simply are not autonomous. They are dependent physically, economically, and legally on adults. Moreover, at least upon first impression, children are incapable of what courts and many liberal scholars would recognize as “rational” decision making.<sup>81</sup> Logically it would seem, therefore, the law defines a period of minority incapacitating children from such otherwise protected autonomous decision making<sup>82</sup> as whether to imbibe alcohol, drive a car, or marry.<sup>83</sup> Nonetheless, at least since its landmark 1967 decision in *In re Gault*,<sup>84</sup> the Supreme Court has assumed that children are persons under the Constitution. The liberal constitutional view of persons as autonomous individuals and the popular view of children as anything but autonomous individuals clash irreconcilably. As a result, when deciding constitutional issues involving children, the Supreme Court has inadvertently demonstrated the inadequacy of the liberal model of personhood for children.

### *B. The Supreme Court's Solution: Pretending Children Are Adults*

In some cases, the Supreme Court imposes the model of individual autonomy regardless of how absurd the fit. In *DeShaney v. Winnebago County Department of Social Services*,<sup>85</sup> for example, the Court expressed its sympathy for the plaintiff four-year-old child beaten into mental retardation by his father.<sup>86</sup> The Court concluded, however, that the state child services agency bore no duty to rescue the child from his tormentor, even though state agents knew of the child's peril.<sup>87</sup> While the Constitution generally restrains the state from interfering with individual liberties, it affords no affirmative right, the Court said, to state action.<sup>88</sup> Those who would obligate the state to rescue children from such heinous abuse may lobby the legislature to enact appropriate legislation, but will find no remedy in the Constitution.<sup>89</sup> The Court's decision in *DeShaney* comports well with a liberal jurisprudence. We must rely on democratic processes to define the state's affirmative obligations, if any, in

---

81. See discussion of mature decisionmaking *infra* part IV.

82. See, e.g., Coons et al., *supra* note 8, at 312 (arguing that the incapacity of children necessitates their legal disability).

83. See, e.g., CAL. BUS. & PROF. CODE § 25658 (West 1993); N.Y. ALCO. BEV. CONT. LAW § 65-C (McKinney 1993) (alcohol consumption disabilities); CAL. VEHICLE CODE § 12814.6 (West 1993); N.Y. VEH. & TRAF. LAW § 502 (McKinney 1993) (automobile driving disabilities); CAL. CIV. CODE § 4101 (West 1993); N.Y. DOM. REL. LAW § 7 (McKinney 1993) (marriage disabilities).

84. 387 U.S. 1, 13 (1967).

85. 489 U.S. 189 (1989).

86. *Id.* at 191.

87. *Id.* at 199.

88. *Id.* at 195. Joshua DeShaney had alleged in a 42 U.S.C. § 1983 action that state agents deprived him of a liberty interest, his personal security, without due process of law by failing to remove him from his father's home. The Court reasoned that state agents' failure to act on Joshua's behalf did not constitute a state action remediable under § 1983. Absent a constitutional or statutory affirmative obligation to act on Joshua's behalf, the Court said, the state's “inaction” in Joshua's case was not a deprivation of due process. The litigants' and divided Court's arguments, therefore, centered on whether the state did bear Joshua some affirmation obligation to rescue him from his father once state agents became aware of his peril.

89. *Id.* at 203.



order to assure each individual's constitutional right to resist state interference with autonomous choices.

Central to this paradigm, however, is the assumption that each individual also has the right, indeed the unfettered opportunity, to participate in the democratic process.<sup>90</sup> Legally and practically, of course, the *DeShaney* child had no such right. Disenfranchised, disabled, and disempowered, the boy had no recourse to democratic processes upon reaching the limit of his negative constitutional rights. The Court lectured the "people of Wisconsin" on the distinction between constitutional and legislative prerogatives, respecting in a narrow way at least their free right as individuals to achieve a different result in similar child abuse cases.<sup>91</sup> In its lecture to the people of Wisconsin, however, the Court ignored the plaintiff at bar, the litigant before it seeking redress, the child. The *DeShaney* Court thus demonstrated concretely how a Bill of Rights interpreted for autonomous individuals denies personhood to children.<sup>92</sup>

By distinguishing individual constitutional rights from legislative prerogatives as in *DeShaney*, the Supreme Court may well manifest a political ideology intolerant of claims upon the public fisc.<sup>93</sup> The Court also reflects principles of liberal jurisprudence intended to define permissible state action narrowly so as to prevent interference with autonomous individual choice. Faced with the harsh results of cases such as *DeShaney*, liberal critics have argued that sometimes the Constitution requires affirmative state action in

---

90. For a critique of such assumptions, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1468-79 (1989).

91. *DeShaney*, 489 U.S. at 203.

92. The *DeShaney* dissenters would have reached the opposite result, identifying an affirmative duty in the state to have aided the child. *Id.* at 203 (Brennan, J., dissenting); *id.* at 212 (Blackmun, J., dissenting). Nonetheless, Justice Brennan's reasoning in dissent fails to encompass the actual child within the model of a constitutional person. The child had a constitutional right to state intervention on his behalf, Justice Brennan said, because the state had already obligated itself to abused children. *Id.* at 207-08 (arguing that once a state provides a benefit, it cannot deny the benefit arbitrarily or capriciously without running afoul of due process rights). Most importantly, by obligating itself to aid abused children, Justice Brennan argued, the state had deprived the child of recourse to private resources (neighbors, doctors, good Samaritans) lulled into complacency by the state's obligation. *Id.* at 209-10. Absent the state's assumption of responsibility for abused children, then, the *DeShaney* child would have found aid in the charity of private individuals.

This rationale is as unrealistic as it is intellectually adroit. Justice Brennan's dissent depends on the fiction that the child bore sufficient autonomy and rational decision making capacity to have sought aid from his neighbors or emergency room physicians. Cf. DOROTHY ALLISON, *BASTARD OUT OF CAROLINA* (1993) (in this novel, a thirteen year old girl refuses, after rape and brutal beating by her stepfather, to describe the assault or name her attacker to hospital personnel, police, or even family members). Alternatively, the dissent assumes that neighbors or others, absent state action, would have voluntarily and successfully intervened on the child's behalf. This child would likely have denied abuse in response to direct questions, and in all events was unable to dial a telephone to summon aid against his father (the *DeShaney* case lacks any information on what the child said at any time, despite four hospital visits and monthly visits to the child's home by the social worker. *DeShaney*, 489 U.S. 189). Under Justice Brennan's theory of the case, therefore, the Constitution assured the child a remedy for the state's failure to rescue him only if individually he possessed the wherewithal to have helped himself. Because such an autonomous child is not real, the Justice's conception of a constitutional person excludes all real children.

93. Indeed, the *DeShaney* Court's distinction between state action and inaction, as Justice Brennan demonstrates in dissent, dissolves upon analysis. *Id.* at 206-07. For criticism of such semantical distinctions, see Sullivan, *supra* note 90.

order to enable autonomous individual decision making. In *Plyler v. Doe*,<sup>94</sup> for example, the Supreme Court posited state provision of education to children, not as a mere legislative prerogative, but as state action necessary to secure the democratic liberties of an educated electorate.<sup>95</sup> Liberal commentators have likewise argued that the Constitution implicitly compels state provision of other necessities—nutrition, housing, and medical care—to enable all individuals to exercise explicit constitutional freedoms.<sup>96</sup> Needless to say, the Supreme Court has failed to embrace this seemingly logical extension of the liberal jurisprudence. As a result, our law reflects a peculiar anomaly. Under *Plyler*, denial of public education to certain classes of children must overcome heightened constitutional scrutiny,<sup>97</sup> but an abused child in fear of his life has no constitutional recourse against the state aware of his peril.<sup>98</sup>

Nor does the child whose hunger threatens bare survival have constitutional recourse against the state. In *Bowen v. Gilliard*,<sup>99</sup> the Supreme Court emphasized that state aid to impoverished children is a mere legislative prerogative, not a constitutional right.<sup>100</sup> Accordingly, a state legislature may limit benefits or choose not to provide benefits whatsoever.<sup>101</sup> In *Gilliard*, the plaintiff challenged the state's inclusion of his child support payments in family income calculated for purposes of determining AFDC payments to his mother.<sup>102</sup> The legislature's desire to limit claims against the public fisc by minimizing AFDC benefits was at least rational, the *Gilliard* Court concluded, and hence constitutional.

The child countered that inclusion of his child support payments in his family's income for AFDC benefit purposes constituted an unconstitutional state taking of his personal property.<sup>103</sup> The Court dismissed the child's takings claim as well. The child's entitlement to support payments from his non-custodial father, the Court reasoned, is not a vested property right due constitutional protection.<sup>104</sup> Instead, child support is a mere statutory obligation subject to modification (perhaps even nullification) by the legislature at any time.<sup>105</sup> Under the Court's reasoning, then, the child has no cognizable constitutional claim to support, to the provision of basic nutrition, against either the state or his parents. Under our Constitution, the child is an autonomous individual, ultimately responsible for himself.

In his dissent, Justice Brennan repudiated the *Gilliard* majority's decision, but not its jurisprudential underpinnings. Under the majority decision, so long

---

94. 457 U.S. 202 (1982).

95. *Id.* at 222.

96. Professor Kathleen Sullivan explains this logic: "At a minimum, government must affirmatively create and maintain some preconditions for the exercise of autonomy by the right holder—for example, by protecting speakers from mob veto. Although the extent of this affirmative obligation is deeply controversial, it should at least be clear that government can sometimes burden a right by eliminating the minimal preconditions for its exercise." Sullivan, *supra* note 90, at 1455.

97. *Plyler*, 457 U.S. at 231.

98. See *DeShaney*, 489 U.S. 189, and discussion *supra* notes 85–97.

99. 483 U.S. 587 (1987).

100. *Id.* at 596.

101. *Id.* at 604.

102. *Id.* at 596.

103. *Id.* at 604.

104. *Id.* at 605.

105. *Id.*

as the plaintiff child remained in his mother's custody, Justice Brennan noted, the child must lose the benefit of his father's support to help sustain the rest of his family.<sup>106</sup> To secure the full benefit of his father's support, then, the child must leave his mother's custody for his father's.<sup>107</sup> Forcing the child to choose between constitutionally protected parent-child relationships, Justice Brennan argued, imposes an unconstitutional burden on the child's freedom of choice in family relationships.<sup>108</sup>

As in the *Gilliard* majority's rationale, the plaintiff child in Justice Brennan's dissent appears as an autonomous individual at liberty to make essential life choices about his familial relationships and living arrangements. The autonomous child of the dissent is as surreal as the autonomous child of the majority. Children generally, and the *Gilliard* child in particular, have no legal or practical opportunity to choose for themselves with which parent they shall reside. The insistence of liberal jurisprudence that only autonomous individuals capable of free choice are persons under the Constitution denies the very existence of real children seeking constitutional redress. The failure of our jurisprudence to establish constitutionally a child's claim to food, shelter, and security from assault betrays the singularly adult perspective of our jurisprudence.

In discussing claims for state relief, the Court sometimes speaks of a claim's "constitutional import."<sup>109</sup> Claims such as Joshua DeShaney's may arouse strong passions, the Court reasons, yet not arise to constitutional import.<sup>110</sup> Constitutional import means that our society so values a claim that we identify the claim as fundamental to self-government and inherent in the relationship of individuals with the state. Constitutional import means that our society so hates a harm that we provide for protections in our organic legal principles, insulated from majority will. From an adult perspective, free speech and access to abortion are of constitutional import, and so children enjoy these rights as well as adults.

From a child's perspective, however, food, shelter, and freedom from assault are far more important claims than free speech and access to abortion. The autonomous adult can rely on himself to secure life's necessities and perceives no imperative for the Constitution to respond to these needs. The child, however, dependent on adult society, has no recourse unless society recognizes the child's dependency as fundamental to self-government and inherent in the child's relationship with the state. The child has no recourse unless society so hates hunger, homelessness, and battering as to protect the child in legal principles insulated from the majority's funding priorities. The *DeShaney* and *Gilliard* children's claims were not of constitutional import because the Court viewed the Constitution from an exclusive, adult perspective.

---

106. *Id.* at 610 (Brennan, J., dissenting).

107. *Id.*

108. *Id.* at 612 (citing *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)).

109. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 112 n.7 (1976).

110. *DeShaney*, 489 U.S. at 202 ("Because ... the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause.").

### C. The Liberal Alternative: Treating Children as Potential Adults

The Supreme Court's opinions in *DeShaney* and *Gilliard* are curious writings, at once depicting concretely the real pain of the children at bar, but abstractly dehumanizing them as autonomous individuals in the legal analysis. We learn in *DeShaney* that the father prevented the social worker from examining the plaintiff Joshua during home visits over a six-month period because, the father said, the boy was sick.<sup>111</sup> Indeed, alone and confined to his room, the four-year-old was suffering from his father's repeated beatings, which eventually rendered the boy comatose.<sup>112</sup> We know from the *Gilliard* case that Sherrod Thomas was a seven-year-old member of the plaintiff class whose father stopped paying child support and visiting him when the state dedicated Sherrod's child support to the support of his entire family.<sup>113</sup> Sherrod's father strongly objected to his son's appearance on state welfare rolls, a result the father had sought to prevent by regularly paying child support for Sherrod.<sup>114</sup> When his father rejected Sherrod as a welfare recipient, Sherrod struggled to understand why.<sup>115</sup> Sherrod's performance in school suffered, and he began wetting his bed.<sup>116</sup> Juxtaposed against these glimpses into the plaintiff children's real lives appears the *DeShaney* and *Gilliard* Courts' abstract discourse on the children's liberty to change residences or to petition their legislatures for reform.

If only because the liberal rhetoric of autonomy and liberty bears so little relevance to the lives of real children, legal scholars and the Court frequently discuss children as potential adults. Scholars who have attempted to fit children within a liberal jurisprudential framework, for example, conceptualize childhood as a period of preparation for the autonomous individuality of adulthood.<sup>117</sup> This concept of childhood dovetails neatly with the utilitarian argument that children require certain public benefits—education, for example, or rehabilitation from delinquency—so that they do not mature into even more costly burdens on society as adults.<sup>118</sup> The concept of childhood as preparation for adulthood receives immediate acceptance in the adult imagination. We think of “raising” children in such a way as to achieve more ideal adults, however each of us may define that ideal. The Supreme Court likewise, in its cases involving children, conceptualizes the litigants as potential adults. By characterizing children as potential adults, we fail to see or hear children as children. We lose the opportunity to understand any child's own, real experience of childhood.

---

111. *DeShaney*, 489 U.S. at 193.

112. *Id.*

113. *Gilliard*, 483 U.S. at 621 (Blackmun, J., dissenting).

114. *Id.*

115. *Id.*

116. *Id.* at 622.

117. See, e.g., Richards, *supra* note 13, at 20–21 (“The principle of equal opportunity requires that [childhood] be structured to allow each person an equal chance to develop ... his or her own ends in life ...”); Tremper, *supra* note 13, at 1328–29 (“A principal value of liberty for children is enhancing the likelihood of their being able to pursue their own interests in the future”); cf. Hafen, *Children's Liberation*, *supra* note 15, at 656 (“[T]he fulfillment of individualism's promise of personal liberty depends, paradoxically, upon [families wherein] both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine form”).

118. See, e.g., Richards, *supra* note 13, at 21–23; Tremper, *supra* note 13, at 1332–33.

The Supreme Court's decisions in *Plyler v. Doe*<sup>119</sup> and *Wisconsin v. Yoder*<sup>120</sup> illustrate this adult tunnel vision. In *Plyler*, the children of illegal aliens sued to gain enrollment in the Texas public school system. The Supreme Court held that Texas had failed to propound a rational basis for its statute barring the children's enrollment.<sup>121</sup> Consequently, the statute fell before a constitutional due process review.<sup>122</sup> Although couched in terms of a rational basis examination, the Court's analysis evinces heightened scrutiny of a statute infringing on the children's access to public education.<sup>123</sup> Public education merits such judicial regard, it appears from the opinion, because of the importance of education to adult society. Education is a prerequisite to gainful adult employment, the Court noted.<sup>124</sup> Those deprived of an education in their youth have little hope of overcoming their deficit in adulthood, condemning the deprived to an adult lifetime in the same lower economic class as their childhood.<sup>125</sup> Further, and of greater constitutional import, education is a prerequisite to adult citizenship in a democracy.<sup>126</sup> For our democracy to thrive as our founders envisioned, the Court concluded, the state must endeavor to raise all of its children into an educated adult electorate. The *Plyler* opinion is thus a justly-celebrated paean to the blessings of an education from an adult point of view.

If children were only potential adults, then the *Plyler* opinion might fully canvass the constitutional importance of equal access to public education and exhaust the justifications for enrolling all children in the Texas public schools. The *Plyler* opinion offers no insight, however, as to the importance of education to the plaintiff children as children. Is there any reason, for example, to educate terminally ill children, children who will not survive childhood to reap the adult benefits of gainful employment and participation in elections? I posit this line of inquiry as a counterpoint to the Court's myopic focus on children as potential adults. That focus, like the characterization of children as autonomous individuals, blinds us to the experience of children as children. The *Plyler* Court decided the case, not for the real children at bar with their own concerns at issue, but for an imagined class of potential adults. The Court thus betrayed less concern for the real plaintiff children than for its own preoccupation with adult society. We must educate these undocumented children, the Supreme Court seems to say, not for their own sake, but for the sake of our adult society threatened with an influx of more uneducated, unemployed, and disenfranchised members.

In *Wisconsin v. Yoder*,<sup>127</sup> the Supreme Court evinced its concern for adult society more overtly. The *Yoder* parents challenged the constitutionality of a state statute penalizing them for refusing to send their teenage children to public school.<sup>128</sup> The *Yoder* parents argued that Wisconsin's compulsory education statute impermissibly infringed their constitutional rights to educate

---

119. 457 U.S. 202 (1982).

120. 406 U.S. 205 (1972).

121. *Plyler*, 457 U.S. at 230.

122. *Id.* at 230.

123. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

124. *Plyler*, 457 U.S. at 221.

125. *Id.* at 223.

126. *Id.* at 222.

127. 406 U.S. 205 (1972).

128. *Id.* at 208-9.

their children in the Amish religion and tradition.<sup>129</sup> The Supreme Court agreed.<sup>130</sup> Wisconsin, the Court said, has a cognizable state interest in educating its children because education is essential to producing responsible adults.<sup>131</sup> Lacking an education, the *Yoder* children might fail to secure employment and might become a burden to Wisconsin as welfare recipients.<sup>132</sup> Education is also essential, the Court said, to the children's eventual participation in democratic processes as adults.<sup>133</sup> Wisconsin's arguments in this case were not compelling, however, the Court concluded, because the Amish vocational education these children received instead would serve the state's interests equally well.<sup>134</sup> The Court noted approvingly that members of the Amish community rarely seek public welfare assistance.<sup>135</sup> Thus focusing on the *Yoder* children as potential adults, the Court could imagine them only as potential benefits or burdens to adult society. The Court could not imagine, and did not try to imagine, what an Amish education on the family farm or a public school education might mean to these children as children.

Justice Douglas chastised the *Yoder* majority in his dissent for failing to elicit the preferences of the *Yoder* children themselves.<sup>136</sup> He would have remanded the case for a hearing to inquire what kind of education the children themselves desired.<sup>137</sup> Justice Douglas did not say how a court should treat the children's desires, whether their preferences were dispositive, for example. He did, however, indicate his criteria for evaluating educational options, favoring those which inculcate critical thinking and adaptability to technological advances.<sup>138</sup> These abilities, Justice Douglas argued, are essential in our democratic society and modern workplaces.<sup>139</sup> Indeed, Justice Douglas worried that, even if the children now preferred an Amish education, they might choose as adults to leave Amish society and discover themselves ill-educated to compete in the larger American society.<sup>140</sup>

Justice Douglas' criteria, like the majority's, thus reflect his view of the *Yoder* children as potential adults. His belief that the district court should have inquired into the children's own preferences may accord the children the respect they are due as autonomous individuals. As persons under the Constitution, logically, the children should be able freely to choose among their educational options and to reject their parents' religious convictions. Indeed, as autonomous individuals, the *Yoder* children should have enjoyed the opportunity to choose among educational options free of the influences or coercion of either their parents or the state.<sup>141</sup> If the state had declined to support the *Yoder* parents in imposing their Amish religion and culture on these children, Justice Douglas' reasoning implies, then these children's likelier

---

129. *Id.* at 209.

130. *Id.* at 219.

131. *Id.* at 221.

132. *Id.*

133. *Id.* at 226.

134. *Id.*

135. *Id.* at 222.

136. *Id.* at 242 (Douglas, J., dissenting).

137. *Id.* at 246.

138. *Id.* at 244-45.

139. *Id.*

140. *Id.*

141. *Cf. RAWLS, supra* note 57, at 516 (describing autonomous individuals as free of the influence of "tradition and authority, or the opinions of others.").

"autonomous" choice would have been to attend public school and develop critical thinking rather than to remain within the Amish family, community, and church. To posit these children as free of the influence of their parents and community, however, is to pretend they are not children. From a child's perspective, family and community influence are inherent to growing up, to childhood itself.<sup>142</sup>

*Plyler* and *Yoder*, both landmarks in education law, illustrate again the limits of a liberal jurisprudence for children. If we treat children the same as adults constitutionally and accord them the respect due autonomous individuals capable of decision making, then we may abandon them, bereft of adult guidance, to foolish choices regretted in later life.<sup>143</sup> Likewise, as in *DeShaney* and *Gilliard*, treating children as autonomous individuals means we abandon children, bereft of adult aid, to the misfortune of victimization or poverty.<sup>144</sup> Alternatively, we could force fit children into the liberal jurisprudential model by characterizing them, not as autonomous individuals, but as *potential* autonomous individuals. We then may permit our adult interests in protecting society from burgeoning welfare rolls to determine what children can claim from adults. Both alternatives comport with liberal principles, but neither enables us to see and hear the experience of the child litigant pressing a claim.

What indeed might the *Yoder* children, as children, have needed or wanted from an education? Abstractly, they might have concerned themselves with becoming self-supporting members of an Amish community or participating members of hurly-burly American democracy. When asked, some school children assert that they need an education "to get a job" when they grow up.<sup>145</sup> I suspect that of far more importance to the *Yoder* children, though, was the effect of schooling on their personal relationships. Public schooling threatened to alienate these children from the close-knit family, community, and church on which they depended. For these children, their very identity and security may have hung in the balance of the litigation conducted by their parents and the state. Were these particular children so bonded to their families, community, and church, however? Perhaps instead these children felt irresistibly enticed by the modern ideas and modes proffered at public school. Perhaps these children loathed farmwork and yearned to spend their childhoods engaged in the more usual pursuits of American school children. If these children had formed any friendships precious to them with non-Amish children before the *Yoder* parents removed them from school, perhaps they desired most of all to sustain these friendships. Indeed, as most parents intuit, what

---

142. Indeed, family and community influence may be innate to all of human identity. See SANDEL, *supra* note 69, at 175-183.

143. See Hafen, *The Waning of Belonging*, *supra* note 15, at 4 (arguing that the authoritarian family tradition necessarily complements the individualism of liberalism).

144. That is, we recognize no affirmative or constitutional obligation in the state to protect or provide for children.

145. Jeffrey Marks, a senior at the University of Florida College of Law in 1993, interviewed children at a Florida Boys' and Girls' Club to learn more about children's perspectives on legal issues. Jeffrey Marks, *Giving Children a Voice: Should They Be Seen and Heard* (1993) (unpublished manuscript, on file with the author). Marks recorded the children's comments and his insights in a paper for a seminar I taught in the Spring of 1993. Marks learned that in response to his question, "What is the purpose of going to school?", most children voiced such pat answers as "to get a job" or "make a lot of money" when they become adults. *Id.* at 6-7.

children may like best about going to school is seeing their friends.<sup>146</sup> The second most attractive feature of school for children may be a favorite teacher.<sup>147</sup>

For want of asking them, we do not know the *Yoder* children's perspectives on school. We may fairly speculate that they valued most their personal relationships, whether with their parents and other Amish or with public school friends and teachers. Our model of constitutional personhood, the autonomous individual, however, excludes consideration of the real *Yoder* children's interests in relationships and interdependence.<sup>148</sup> Instead, our constitutional jurisprudence can encompass only fictional *Yoder* children: the *Yoder* children as autonomous or the *Yoder* children as potential adults. Regardless of the *Gault* landmark precedent, then, children are not yet persons under the Constitution. To accord children constitutional personhood, we must broaden constitutional perspectives to include children's.

## II. PERSONHOOD OF CHILDREN UNDER CHILD SUPPORT LAW

An examination of the legal personhood of children might logically begin and end with constitutional jurisprudence. All legislative enactments and judge-made law ought theoretically to flow from the organic law of our Constitution, reflecting and abiding its model of personhood. We encounter, however, the legacy of family law, evolving separately from constitutional law, and often in contradiction.<sup>149</sup> Family law manifests the optimistic assumption that the state can define and regulate relationships within families. Of particular importance to children, the state requires that parents financially support their children. When the state or individuals invoking state law attempt to enforce state definitions and relationships, however, respondents have in recent decades increasingly raised constitutional defenses.<sup>150</sup> Constitutional rights restrain the state from burdening autonomous individuals' liberties, regardless of the state's view of those individuals' obligations to their family members. The legal rationale for child support may not survive the clash between family law traditions and constitutional jurisprudence. Analytically, the constitutional

---

146. See *How Schools Rate*, PARENTS, July 1993 at 111 (based upon the response of 61% of 10,000 readers participating in a survey).

147. *Id.*

148. Cf. feminist and other scholars likewise criticizing our jurisprudence, e.g., Law, *supra* note 70; Matsuda, *Liberal Jurisprudence*, *supra* note 43; SANDEL, *supra* note 69; Sherry, *supra* note 70.

149. See Hafen, *The Waning of Belonging*, *supra* note 15. For Professor Hafen, family law necessarily departs from constitutional jurisprudence in order to establish and protect the institution of family. The family, Professor Hafen argues, is an authoritarian structure, empowering and obligating parents to benefit their children without recompense. *Id.* at 30. The authoritarian family structure requires members to relinquish individual liberties and prerogatives, some of them constitutional, Professor Hafen observes. *Id.* The formation of citizens prepared to assume the benefits and burdens of constitutional government, however, requires a childhood spent within the authoritarian family. *Id.* at 41. Thus, while families and family law exist outside of constitutional law, Professor Hafen reasons, they are necessary to the sustenance of democratic, constitutional society. *Id.* Professor Hafen therefore concludes that constitutional law defines and shields families, even from certain constitutional imperatives or liberties, in order to perpetuate constitutional self-government. *Id.* See also Hafen, *Children's Liberation*, *supra* note 15.

150. For analysis of the "constitutionalization" of family law, see, e.g., GLENDON, *supra* note 42, at 134.



justification for the state's obligating one private individual to support another remains elusive.<sup>151</sup>

From the child's perspective of dependency and family membership, the adult obligation of child support is a crucial bond. The obligation determines whether childhood is impoverished, middle-class, or rich; may determine, indeed, whether the child survives. Moreover, from the child's perspective, the source of support—whether from the family or the state—may serve to strengthen or destroy the child's identity and sense of belonging as a family member. Any constitutional imperative freeing individuals or the state from obligations to children is inimical, then, to real children's interests. In response, some scholars have advocated rejuvenating family law models to undergird child support obligations.<sup>152</sup>

Family law fails to offer, however, legal models of either personhood or family relationships that reflect real children's perspectives and experiences. Originating in property and contract law concepts, the law of child support, like constitutional jurisprudence, comprehends only fictional children. The fictional child appears historically in family law as a party to a contract exchanging the child's services for parental support. Because legally disabled, however, the child cannot enforce the contract. Instead, the state replaces the child as the enforcer of parental obligations. Upon assertion of the state's interest in child support, the real child and the child's interests disappear. Along with the real child, the state's interest subsumes the family bonds and defeats an adult understanding of children's personhood.

### A. The Parent-Child Contract

Drawing from the Roman law of *pater familias*,<sup>153</sup> the English common law bequeathed to our nation a model of the family in which the father held dominion over his wife and children much as he controlled his property.<sup>154</sup> Voices from the American past tell us that many people actually ordered their

151. Professor Twila Perry has provided new rationales for alimony at least by analogizing alimony to tort damages. See Twila Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 54 (1991).

152. See, e.g., Herma Kay Hill, *Commentary: Toward a Theory of Fair Distribution*, 57 BROOK. L. REV. 755, 766-67 (1991) (discussing legislative reforms of property distribution and family support); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 733-39 (1991) (proposing legislative reforms based on her empirical study).

153. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 483, 569 (1983). Under the Roman law of *pater familias*, a man's wife and children belonged to him as chattel in his household, along with slaves and other items of personal property. See Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 664 (1923). Roman law recognized a husband's and father's entitlement to the obedience and service of his family members, but no reciprocal entitlement in them. *Id.* Possessed of full dominion and control over his children, a Roman father had the legal prerogative even to kill his child. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 491 (2d ed. 1991); see also WEYRAUCH & KATZ, *supra* note 41, at 495-96 (discussing how paternal control of property required also, historically, paternal custody and control of children because children held potential property interests in inheritance; paternal control also included in colonial Massachusetts the right of the father to kill his disobedient child).

154. ELLMAN ET AL., *supra* note 153, at 492.

family relationships quite differently from the legal model.<sup>155</sup> Nonetheless, under the law of the land, wives and children owed to the man of the household their obedience, and the man could legally compel their obedience with physical chastisement.<sup>156</sup> A man could legally beat his wife and children into submission. Neither wives nor children could hold earnings or property separately from the man, but they were legally entitled to his financial support.<sup>157</sup> In exchange for support, wives owed their husbands domestic and sexual services.<sup>158</sup> Children owed their fathers their labor and any income they earned in exchange for their father's support of them in the household.<sup>159</sup>

Historically, then, the law located a parent's obligation to support a child in the parent's receipt of the child's services. Moreover, while the parent could forcefully compel services from a child, the child could not enforce the parental support obligation. The support for services exchange was no contract between voluntary parties, therefore, but rather manifested the parent's ownership of the child.<sup>160</sup>

Whatever the popular view that the law has long since recognized the personhood of children and wives, that they are no longer a man's chattel, the status of women under the law has changed only little,<sup>161</sup> and the status of children less still. In all jurisdictions, statutes now obligate both parents to support their biological children financially, and none requires children to

155. See Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819 (1985).

156. Parents may still physically chastise children with legal impunity. See, e.g., MODEL PENAL CODE § 3.08 (1962) ("The use of force upon or toward the person of another is justifiable if (1) the actor is a parent or guardian ..."); RESTATEMENT (SECOND) OF TORTS § 147 (1974) ("A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for proper control, training, or education."). For the historical legal sanction of wife beating, see U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 5-11 (1982).

157. See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS 286-89 (2d ed. 1988).

158. See, e.g., *Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940) (nullifying marital private contract which abrogated essential support and sexual services terms of state marital contract). For location of this case and other resources, I have relied on ELLMAN ET AL., *supra* note 153.

159. See, e.g., CAL. CIV. CODE §§ 197, 211 (West 1992) (§ 197 repealed by statute, see CAL. FAM. CODE § 3010); 5 VERNIER, AMER. FAM. LAWS § 282; *Roe v. Doe*, 272 N.E.2d 567, 579 (N.Y. 1971).

160. See Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1005 (1992) (demonstrating Supreme Court precedents evince parental ownership of children as property).

161. Courts no longer refer overtly to the marital contract as a husband's support exchanged for a wife's services, and beating one's spouse is legally criminal. Indeed, all states obligate spouses to support one another in gender neutral terms. Nonetheless, in many American jurisdictions, marriage remains an absolute defense to rape because, as the Model Penal Code Commissioners tell us, marriage implies consent to sexual intercourse. See MODEL PENAL CODE § 213.1, § 213.6(2); Part II, Vol. I MODEL PENAL CODE AND COMMENTARIES 344-46 (1980). Moreover, a spouse's ability to enforce the support obligation depends now on the weak doctrine of necessities, limiting a spouse's recourse to incurring medical debt in the other spouse's name. See, e.g., *North Carolina Baptist Hospital v. Harris*, 354 S.E.2d 471 (N.C. 1987). While in the majority of states a divorced spouse's entitlement to alimony depends on financial need, state law also disentitles a divorced spouse who cohabits or remarries to alimony, regardless of need. See, e.g., N.Y. DOM. REL. LAW § 248 (McKinney 1993); CAL. CIV. CODE § 480.5 (West 1993). The law thus sustains the unmistakable *quid pro quo* that support is exchanged for sexual services, or at least for sexual fidelity to a spouse's former partner.

serve their parents as a condition of parental support.<sup>162</sup> The modern law thus seems to reverse the historical model, obligating parents unilaterally to their children. Constitutional prerogatives, however, still permit parents to extract service obligations from their children and to thwart children's claims for support. The modern law of child support, therefore, yet reflects a historical model of children as parental property. Moreover, the statutes requiring parents to support their children fail to provide an alternative model of legal personhood and family interdependence for children.

Parents can compel obedience and services from their children but children cannot compel support from their parents because the parents' rights are constitutional, while the child's are merely statutory. Parents have long enjoyed Supreme Court recognition of their right to determine their children's education,<sup>163</sup> to determine their children's religion,<sup>164</sup> to determine their children's medical care,<sup>165</sup> and to exercise plenary power over all other aspects of child-rearing.<sup>166</sup> A long-standing tenet of our jurisprudence is that parents have a fundamental constitutional right to the care, custody, and control of their children. We conceptualize these fundamental rights in parents as constitutional protection against state action. Parents' constitutional rights have proved effective against children as well, however.

Parents wield constitutional rights against children themselves in the law of corporal punishment and child support. In both these areas, children's claims against parents fall before the parents' asserted constitutional rights. Children have no yet-recognized constitutional right against their parents' physical assaults, nor a yet-recognized constitutional right to their parents' support. Instead, children's claims against parental abuse and for parental support arise from only statutorily imposed obligations.<sup>167</sup> A parent can resist a child's claim against assault or for support, therefore, with constitutional defenses which surmount the mere statutory parental obligations.

### 1. Parental Rights

A parent's constitutional right to punish a child physically remains a powerful enforcement mechanism for a parent's claim to the obedience and services of the child. The law characterizes the parent's right to punish a child as constitutional because the right resides in a parent's broad constitutional right to the care, custody, and control of children. Child abuse statutes constrain the degree of severity of a parent's physical assault on a child.<sup>168</sup> In prosecutions for child abuse, then, courts may discern a compelling state interest in the child's welfare sufficient to overcome the parent's right to assault the child.<sup>169</sup>

---

162. See, e.g., CAL. CIV. CODE § 4720 (West 1993); N.Y. FAM. CT. ACT §§ 413, 545 (McKinney 1993). These statutes are gender neutral as well, reflecting historically recent reforms.

163. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

164. *Prince v. Massachusetts*, 321 U.S. 158 (1944), *petition for rehearing denied*, 321 U.S. 804 (1944); *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

165. *Parham v. J.R.*, 442 U.S. 584 (1979).

166. See, e.g., *Meyer*, 262 U.S. at 399 (citing parental rights to "establish a home and bring up children" as a constitutional liberty interest).

167. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 597 (1987).

168. See, e.g., FLA. STAT. ANN. § 415.502-415.514 (West 1992).

169. See, e.g., *In re Juvenile Appeal* (83-CD), 455 A.2d 1313 (Conn. 1983).

Nonetheless, underneath all such cases lies the parent's implicit constitutional right to coerce obedience and services from a child through physical force.

Once framed as a conflict between state interests and parental rights, the issue of corporal punishment and child abuse no longer pertains to the child actually at risk. The parent asserts a constitutional right to control the child by force, while the state counters with its general interest in the safety and welfare of all its children. Both the parents' and state's perspectives are myopically adult, excluding the child's perspective and experience as the victim of the parent's blows. The parent seeks to govern a child free of state interference. The state likewise promotes an interest in enhancing parental authority lest the state have to supervise the child upon parental default.<sup>170</sup> Only to the extent that corporal punishment becomes criminally abusive, then, does the state identify an interest in regulating a parent's forceful control of a child. Neither perspective thus recognizes the perspective or interests of the child who shrinks from parental blows.<sup>171</sup> In sum, once the law recognizes the parent's claim as constitutional in nature, a child's only refuge lies in the assertion of a vague state interest deriving, like the parent's, from a singularly adult perspective.

Juvenile delinquency and commitment statutes bolster parents' constitutional right to coerce obedience from children. These statutory schemes can also enable parents to repudiate support obligations to children in subtle ways. In a majority of jurisdictions, for example, parents may petition a juvenile court for a declaration that their child is "delinquent" on the grounds the child is continually disobedient to the parents.<sup>172</sup> Upon a declaration of juvenile delinquency, the state child services agency may remove the child from the parents' home to a shelter, foster care, or even incarceration in juvenile detention facilities.<sup>173</sup> Removal of an incorrigible child from the parents' home effectively relieves the parents of their duty to support the child.<sup>174</sup> These status

---

170. See, e.g., *District of Columbia v. B.J.R.*, 332 A.2d 58, 61 (D.C. 1975), *cert. denied*, 421 U.S. 1016 (1975) (citing "the broad social policy of reinforcing parents in carrying out their responsibility to support and promote the welfare of their children").

171. I, like many critics, do not believe that corporal punishment benefits any child. See, e.g., IRWIN A. HYMAN, *READING, WRITING AND THE HICKORY STICK* (1990). Assuming, however, that some children experience corporal punishment with at least no adverse effect, then I cannot assume that every child would oppose corporal punishment if permitted to express a view. Those children who would prefer their parents not hit them find no voice in either their parents' or the state's positions. Some would argue, of course, that children do benefit from corporal punishment, and that children benefit regardless of their preference. Even if true, no reason inheres in this argument to exclude the child's perspective from dispute of the issue. See *infra* part IV for further discussion of hearing children's perspectives even when we disagree with them or overrule them.

172. For procedures to declare a juvenile "delinquent" or a "child in need of supervision," both subjecting a juvenile to judicial jurisdiction, see, e.g., CAL. WELF. & INST. CODE § 601 (West Supp. 1991); FLA. STAT. ANN. § 39.01(23) (West 1992); N.Y. FAM. CT. ACT § 712 (McKinney 1993).

173. See, e.g., CAL. WELF. & INST. CODE § 319 (West Supp. 1991); N.Y. SOC. SERV. LAW § 398 (McKinney 1993); *but see* FLA. STAT. ANN. § 39.043(b) (West 1992) (prohibiting detention to "allow a parent to avoid his or her legal responsibility").

174. *But see*, e.g., FLA. STAT. ANN. § 402.33 (West 1992) (requiring parents to reimburse the state for state provision of shelter and treatment to delinquent children or children in need of supervision).

offense laws function together to obligate children to obey and serve their parents in exchange for children's support in their parents' home.<sup>175</sup>

Parents' ability to commit their children to psychiatric institutions, another example of the constitutional right of parents to control children,<sup>176</sup> further bolsters children's obedience and service obligations to parents. Children's rebelliousness, indeed their conflicts with parents and teachers and the tentative assertions of independence normally associated with child development, can also result in clinical diagnoses of mental disorders.<sup>177</sup> At state mental institutions, parents can commit their children upon complaint and petition to the state child services agency.<sup>178</sup> A child's opportunity to present justification for the disobedience or other proof of mental health arises only after deprivation of the child's liberty, commitment to the state institution, and relief for the parents from the duty to support the child in their home.<sup>179</sup> At private psychiatric institutions, children have no recourse to even the minimal safeguards due process provides. A parent may commit a child to any private psychiatric institution willing to receive the child.<sup>180</sup> Children therefore face the possibility that their failure to obey or serve their parents, however normal or even healthy their disobedience may be, can land them in a psychiatric institution. Parents commit tens of thousand of children to psychiatric institutions annually, effectively enforcing their children's obligation to serve and obey them in exchange for support in their homes.<sup>181</sup>

Runaways are another category of children losing the support and shelter of their parents' home. Estimates peg the number of runaway children at over a million each year.<sup>182</sup> In most jurisdictions, running away from home is a child

---

175. So long as parents pay for their children's support, whether children reside in the parents' home is arguably irrelevant to the analysis. Sharing a home and all its resources with children, however, is qualitatively and quantitatively different from parents' reimbursing the state or another institution for care of their children.

176. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979).

177. See Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988); see also the child J.R.'s arguments, albeit rejected by the Court, *Parham*, 442 U.S. at 602.

178. See, e.g., FLA. STAT. ANN. § 394.467 (West 1992); N.Y. LAWS SERV. MENTAL HYGIENE LAW § 9.13; CAL. WELF. & INST. CODE § 6000 (West 1993). A psychologist or other mental health professional must interview the child and parents and review relevant records prior to committing the child, but the child is not entitled to a pre-commitment hearing or advice of counsel. *Parham*, 442 U.S. 584 (1979).

179. *Parham*, 442 U.S. at 593.

180. See, e.g., James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 850-51 (1974); *In re Roger S.*, 569 P.2d 1286 (Cal. 1977).

181. Weithorn, *supra* note 177, at 783 n.68. Concerned mental health professionals and child advocates are now sounding the alarm about the unwarranted "dumping" of children by their parents in state and private psychiatric institutions. *Id.* at 788-89 (estimating two-thirds of admissions of children are for the symptoms of "troublesome" and not mentally ill youth). Private psychiatric care has become a growth industry, feeding on insurance plans which cover inpatient services disproportionately to outpatient. *Id.* at 835-37. Advertising campaigns, visible in every market, persuade parents to commit their children for inpatient psychiatric care as an act of love. *Id.* Critics worry that such private institutions have become a fashionable dumping ground for the problem children of the upper classes. *Id.* While the parents' insurer provides the financial support for children committed to private psychiatric facilities, commitment yet relieves parents of support of their children in their homes. The failure of the law to prevent the unwarranted commitment of children to private psychiatric facilities signals parents that they need not abide a disobedient child in their homes.

182. CHILDREN'S DEFENSE FUND, *supra* note 20, at x.

status offense, exposing the child who is located to a delinquency declaration and possible incarceration.<sup>183</sup> Though arrested runaway children themselves face quasi-criminal prosecution in juvenile delinquency proceedings,<sup>184</sup> many runaways flee homes because of sexual or other physical abuse they can no longer endure.<sup>185</sup> Indeed, professionals working in the juvenile delinquency system dub the majority of runaway children as "throwaways," children whose parents do not want them and will not welcome them home.<sup>186</sup> These throwaway children spend their childhood alternating between juvenile justice system shelters and the street life, unable legally to compel their parents' support.<sup>187</sup>

Modern family law codifies the parental support obligation unqualified by any obligation in the child to serve or obey the parents. Nonetheless, parents' constitutional right to chastise, declare delinquent, or commit their children sustains the historical legal model of a support-for-services exchange. Responding to parents' rights, the juvenile delinquency and mental health systems provide parents an effective and frequently utilized means for banishing disobedient children from their homes and subverting their parental support obligation. Even the most obedient of children, moreover, cannot enforce a parent's support obligation. The parental duty to support children, to provide children with a home and other necessities of life, is thus for many children contingent if not ephemeral. The historical model for families endures, with parental dominion and control over children, the hallmarks of property ownership.

If children could enforce their parents' obligation to support them, children might evolve legally from the status of chattel to some form of personhood. Children could appear in the law as autonomous individuals enforcing their contractual rights to parental support in exchange for their obedience and services. The law does not now confer such personhood on children, nor can it without pretending, as in constitutional jurisprudence, that children are adults. While an adult may enjoy sufficient autonomy to contract with someone else upon breach of a support-for-services contractual exchange, a child realistically cannot choose some new parent who will honor the support obligation in exchange for the child's services. If only for lack of a market, then, the contract model fails to recognize children's personhood. More pointedly, the support-for-services exchange reflects not only a historical model of family, but also a model of personhood, the autonomous individual, which excludes real children. Even if we imbue the historical model of family with the constitutional jurisprudence of personhood, then, children will remain excluded. Their experiences and perspectives of dependency find no recognition in any legal model positing an exchange between autonomous individuals.

---

183. See, e.g., N.Y. FAM. CT. ACT § 718 (West 1993); FLA. STAT. ANN. § 39.01 (West 1992).

184. See, e.g., N.Y. FAM. CT. ACT § 718 (West 1993); FLA. STAT. ANN. § 39.01 (West 1992).

185. CHILDREN'S DEFENSE FUND, *supra* note 20, at 65.

186. See, e.g., *Homeless Youth: The Saga of "Pushouts" and "Throwaways" in America*, Hearing Before the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 15 (1980); U.S. DEP'T. OF JUSTICE, AMERICA'S MISSING AND EXPLOITED CHILDREN: THEIR SAFETY AND THEIR FUTURE (1986).

187. U.S. DEP'T. OF JUSTICE, AMERICA'S MISSING AND EXPLOITED CHILDREN: THEIR SAFETY AND THEIR FUTURE (1986).

## 2. State Interests

Neither family law nor constitutional jurisprudence now invests the child with individual autonomous rights to enforce the contractual parental support obligation. Instead, family law now locates the child's entitlement to parental support in the statutory obligations of parents. Indeed, as the *Gilliard* Court observed, child support obligations are entirely state-created, as a state legislature can modify or even nullify the parental support obligation at will.<sup>188</sup> The state and not the child thus figures as the interested party for both requiring and enforcing parental support obligations. Against state mandates to support their children, parents sometimes assert constitutional defenses. In the resulting conflict between a parent and the state, the state's interests subsume the child's. Legally prevented from voicing their own experiences and perspectives, children remain legal nonentities in child support conflicts pitting the state against parents.

Child support actions against non-custodial parents illustrate how state interests obliterate the child's own experiences and perspectives. In a typical case, a custodial mother may resort to public assistance<sup>189</sup> upon the father's failure to pay child support.<sup>190</sup> The state AFDC agency then sues the non-custodial father to recoup public benefits paid and to compel his support of his children thenceforth.<sup>191</sup> The non-custodial parent's most common and most effective defense against the child support action is inability to pay.<sup>192</sup> If forced to pay child support, the respondent will argue, he will be unable to meet his own personal expenses for housing, food, car, and such other necessities of life.<sup>193</sup> Indeed, respondents argue, payment of child support, at least at the level sought, will drive them into poverty.<sup>194</sup> If the respondent can prove the alleged inability to pay, then the court must relieve the parent of the state-imposed child support obligation.<sup>195</sup> Constitutionally, of course, the state cannot compel such a parent to increase his income<sup>196</sup> or punish such a parent for inability to pay his debts.<sup>197</sup>

The analysis demonstrates that assertion of constitutional rights and defenses gain individuals the opportunity to vivify their experiences and

188. *Bowen v. Gilliard*, 483 U.S. 587, 597 (1987).

189. The custodial mother typically resorts to Aid to Families with Dependent Children programs [hereinafter AFDC].

190. CHILDREN'S DEFENSE FUND, *supra* note 20, at 28; U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, 51, 457 (112th ed. 1993) (showing that a majority of custodial parents are female and a majority of AFDC families are female single-parent); *see also*, e.g., *State v. Hall*, 418 N.W.2d 187 (Minn. App. 1988).

191. *See* 42 U.S.C. § 602(a)(26) (1989), 45 C.F.R. §§ 232.11, 232.12 (1992) (requiring assignment of child support action to AFDC agency).

192. *See* U.S. DEP'T. OF COMMERCE, *supra* note 190, at 51; *See also*, e.g., *In re Marriage of Dennis*, 344 N.W.2d 128 (Wis. 1984); *Hicks v. Feiock*, 485 U.S. 624 (1985).

193. *See*, e.g., *Dennis*, 344 N.W.2d 128; *Hicks*, 485 U.S. 624.

194. *See Dennis*, 344 N.W.2d at 129.

195. *Id.* At least one judge failed to comprehend the justice of permitting the children to abide in poverty, subsisting on AFDC, so that non-custodial parents can avoid plunging into poverty themselves. *See Dennis*, 344 N.W.2d at 140 (Ceci, J., dissenting).

196. *See*, e.g., *Dennis*, 344 N.W.2d 128 (a self-employed mechanic whose small garage netted enough only to support himself successfully defended against a court order that he seek more lucrative employment as a wage-earner).

197. *Cf. Hicks*, 485 U.S. 624 (the state can constitutionally compel compliance with court orders for child support through contempt sanctions where the failure to comply is willful).

perspectives in court.<sup>198</sup> The non-custodial parent, usually the father, has the opportunity to tell the court his story from his perspective. He cannot afford to pay child support, the father may say, because he will lose his car or his apartment.<sup>199</sup> He cannot earn income sufficient to support his children, the father may say, because an economic recession has foreclosed job opportunities or because his chosen field of work, precious to his life's goals, is low-paying. The judge hearing the father's story can respect the father's real experience and perspective and may even empathize personally with the father's straits.<sup>200</sup> The child, however, enjoys no constitutional right either to parental support or to a hearing. Instead, invocation of the statutory support obligation permits a hearing only of the state's narrow interests in child support.

In the typical case I have described, the state prosecutes the child support claim by way of assignment from the custodial parent receiving AFDC benefits.<sup>201</sup> When the state prosecutes an AFDC case, it asserts the state's interest in recouping AFDC benefits already paid and of minimizing AFDC benefits payable in the future.<sup>202</sup> These are legitimate state interests and reflect taxpayers' interests as well, but they are not the child's interests. In the legal contest between the state and the non-custodial parent, therefore, the court hears only a bureaucracy and an individual adult. The child whose real interests lie at stake may never actually or imaginatively appear before the court.

Suppose the child did appear in a child support action. The court might hear of the child's home in overcrowded, ill-maintained, crime-ridden public housing.<sup>203</sup> The court might hear of the child's diet reduced to dry cereal by the end of the month when the assistance check runs out.<sup>204</sup> The court might perceive the child's opportunity for a decent, happy childhood if freed from mere subsistence state support.<sup>205</sup> Because no one represents the child's

---

198. See MINOW, MAKING ALL THE DIFFERENCE, *supra* note 43 (individual rights enable the rights-bearer to command legal attention to the rights-bearer's individual experiences and perspective).

199. See, e.g., Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Commission*, 42 FLA. L. REV. ix, 827 (1990) (describing typical defenses to child support actions).

200. See, e.g., *id.* at 824-29 (describing pervasive judicial sympathy with respondents' plights).

201. Congressional policy in establishing the AFDC child support enforcement system included narrowing the multi-billion dollar gap between court-ordered support and support received. See Family Support Act 42 U.S.C.S. § 666(a)(e) (Law. Co-op. 1985); See also, e.g., *Donahue v. Getman*, 432 N.W.2d 281 (S.D. 1988).

202. *Id.* See also *Dennis*, 344 N.W.2d 128; *Zablocki v. Redhail*, 434 U.S. 374 (1978).

203. See ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991). Alex Kotlowitz documented the lives of two young brothers, African-Americans, growing up in Chicago's Horner housing project under such conditions. Over a two-year period, the author and children became friends. Pharaoh was seven and Lafayette ten when they met the author. During that period, up to ten people resided in the children's cramped apartment. The heating and plumbing were broken and the basement reeked of animal carcasses and garbage. The project offered the children neither play areas nor playground equipment. Frequent gun battles from illegal drug trade drove the boys to cower in inside hallways. Both lost young friends to errant bullets. Their mother, the only parent consistently in the home, could not find steady work and collected AFDC benefits.

204. *Id.*; see also CHILDREN'S DEFENSE FUND, *supra* note 20, at ix.

205. See KOTLOWITZ, *supra* note 203. At the outset of their chronicle, *THERE ARE NO CHILDREN HERE*, both Pharaoh and Lafayette yearned to move from the projects. By the end of the chronicle, Lafayette had given up hope, had narrowly escaped juvenile jail, and believed he (like so many young African-American males he knew) would die young. Pharaoh yet sustained a dream. He would grow up to be a congressional representative, he said, because, "I want to



particular interests, however, the court's only glimpse into palpable human experience remains the non-custodial parent's evidence that payment of child support will result in repossession of the parent's car.

The child's interest is no more apparent to courts where custodial parents bring the actions instead of the state. In those cases too the state's interest subsumes the child's because the custodial parent seeks enforcement of only a state statute. Analytically, a court has no constitutional authority to order one private individual to pay money to another. Instead, the court must identify a compelling state interest to overcome a private individual's constitutional liberty and property rights. In child support cases, courts find constitutional authority to obligate private individuals to others in the state's compelling interest in its children.<sup>206</sup> Concerned that its children receive adequate support and that its taxpayers not shoulder the burden of other people's children, states can constitutionally oblige parents to support their children. In the legal contest over child support, it is these narrow state interests that the custodial parent must assert to force the non-custodial parent to pay.<sup>207</sup> As a result, the child who enjoyed a middle-class lifestyle prior to the parents' divorce has no constitutional entitlement to sustaining that lifestyle. Instead, the custodial parent's necessary reliance on state interests constrains the court's view to awarding child support sufficient to keep the child off welfare rolls and from burdening state taxpayers.<sup>208</sup>

In most jurisdictions, courts allude to the principle that the child is "entitled" to share in the income of both parents,<sup>209</sup> and even that, in dissolution cases, the parents must sustain the child in a standard of living comparable as nearly as possible to the marital lifestyle.<sup>210</sup> Further, every state now codifies child support guidelines designed, at least in part, to fulfill those principles.<sup>211</sup> A child's statutory support claim, therefore, theoretically exceeds mere subsistence levels. The child's claim, however, faces a myriad of defenses from the non-custodial parent, including the very effective defense of inability to pay. In the contest between the child's statutory claim and the non-custodial parent's defenses, often constitutional in nature, the child's entitlement to sustaining a particular standard of living is ephemeral.

Indeed, allusions in the case law to a child's support entitlement beyond subsistence levels amount to no more than loose talk. Inherent in parents' constitutional rights to the care, custody, and control of their children lies the discretion to determine the relative luxury of the child's lifestyle.<sup>212</sup> The millionaire's child holds no entitlement to easily affordable luxuries, for millionaires have the constitutional prerogative to raise their children as

---

change a lot of rules .... I want to change them and everybody move out of the projects .... Let the people who live in the projects live in other houses. Any gang member who has their hat turned, they'd go directly to jail. Stop stealing and stuff ... [After a pause:] If you be a congressman, there be people guarding me so you won't get hurt. I like that." *Id.* at 255.

206. See, e.g., *Dennis*, 344 N.W.2d at 133; *Zablocki v. Redhail*, 434 U.S. 374, 388-89 (1978).

207. See, e.g., *State v. Hall*, 418 N.W.2d 187 (Minn. App. 1988).

208. See, e.g., *State v. Hall*, 418 N.W.2d at 190; *Dennis*, 344 N.W.2d at 133.

209. See, e.g., *State v. Hall*, 418 N.W.2d at 189.

210. *Id.* See also ELLMAN ET AL., *supra* note 153, at 397-399.

211. As a condition of AFDC funding, Congress required all states to enact such guidelines statutes. 42 U.S.C. § 667 (1993).

212. See, e.g., *State v. Hall*, 418 N.W.2d at 190.

Spartans.<sup>213</sup> Spending decisions are, after all, intrinsic to parenting itself, and parenting receives constitutional protection.

Upon petition by the custodial parent, the state may impose a child support obligation calibrated to parental income as in the guidelines statutes. Analytically, however, the state's successful imposition of guidelines support obligations depends upon the showing of a state interest sufficiently compelling to overcome the parent's constitutional spending prerogatives. In support actions against even wealthy non-custodial parents, therefore, the state's interest must subsume the child's statutory entitlement. The state bears no interest in assuring children sustenance in middle or upper class lifestyles, lifestyles children would have enjoyed had their parents not parted. Instead, the state's only compelling interests appear as the political imperative to shield taxpayers against children's welfare claims and as the moral imperative to prevent children from falling beneath minimal subsistence levels.

The legal structure of child support guidelines reflect these state interests and the constitutional rights of parents. Guidelines manifest, first, a legislative determination of child support levels, and hence a political assessment of parents' support obligations. Typically, legislatures begin and end this assessment with demographic studies showing amounts parents actually *do* spend on their children.<sup>214</sup> We see no attempt, no hearings, no studies, and certainly no consideration of a child's perspective in the determination of how much money parents *should* spend on their children. Legislatures thus accept politically the lack of adult public consensus on this sensitive parenting issue, and bow to parents' constitutional discretion.<sup>215</sup>

By substituting the state for the child in child support enforcement actions, the law focuses on state interests and individual adult rights. Neither state interests nor adult rights represent the child's interests or personhood. From a child's perspective, the law of child support thus fails to recognize an inherent attribute of childhood, dependency and family belonging. From a child's perspective, for example, the child's own standard of living depends upon the custodial parent's, as the parent and child share a home and its resources. Indeed, the child's housing, transportation, and food—expenses

---

213. *Id.*

214. States derive guidelines support levels not from calculations for mere subsistence, nor from ideals of child support, but rather on demographic studies of amounts parents actually do spend on their children. See ELLMAN ET AL., *supra* note 153, at 368–373 (excerpting THOMAS J. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES 1–6* (1984)); see also Child Support Enforcement Amendments, Pub. L. No. 98–378, 98 Stat. 1305 (1984); Family Support Act of 1988, Pub. L. No. 100–485, 102 Stat. 2343 (1988); 42 U.S.C. § 667 (1988).

215. In enacting guidelines, legislatures also sought, of course, to curb wide ranging judicial discretion in setting child support awards. See Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 15 FAM. L.Q. 325, 326 (1991). Before universal imposition of statutory guidelines, child support awards varied drastically for factually similar cases, reflecting a court's subjective view of a parent's support obligation. See ELLMAN ET AL., *supra* note 153, at 368–73. The guidelines have yet to achieve the consistency legislatures sought. See Thoennes et al. at 345 (impact of guidelines is “modest”). Even if successful in achieving consistency, however, guidelines schemes still reflect states' political unwillingness or constitutional inability to codify a child's entitlement to share in parental wealth (only at middle-income levels, for example, have guidelines produced orders approaching expenditures on children in intact families. See Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L. Q. 279, 296 (1993)). Instead, guidelines schemes continue to reflect the state's own, narrow interests.

amounting to seventy-two percent of usual spending on children<sup>216</sup>—are bound inextricably with the custodial parent's. The law of child support, however, reflects not this childhood perspective of family interdependence, but rather an adult perspective of individual autonomy. Thus, while courts speak of a child's entitlement to share in both parents' income, they also guard vigilantly against indirectly benefiting the custodial parent with child support payments.

Respondents wield a most effective defense against a child support claim when they argue that payments will lift the custodial parent's standard of living as well as the child's.<sup>217</sup> Lest the custodial parent should benefit from child support payments, courts routinely compromise children's claims to share in the non-custodial parent's standard of living.<sup>218</sup> In these cases also, non-custodial parents' constitutional rights prevail. A state cannot compel private individuals to support other unrelated private individuals without offending at least the takings clause of the Constitution, and perhaps guarantees against involuntary servitude as well.<sup>219</sup> The state cannot, therefore, compel the non-custodial parent to benefit the custodial parent, even indirectly, in an effort to fulfill a child's supposed entitlement to share in both parents' incomes. As a result, the argument that custody with the more financially able parent offers children a better standard of living remains forceful in child custody determinations.<sup>220</sup> The child's entitlement to parental support is thus ephemeral, often depending finally on the custody determination,<sup>221</sup> while the parents' individual rights remain firmly grounded in the Constitution.

### 3. *The Disappearance of Children from Child Support Law*

With the stroke of a pen, legislatures abolished the historical support-for-services exchange which had long legally characterized children as parental chattel. The statutory parental support obligations imposed in place of the exchange might have permitted us to value children legally as family members dependent upon parents' unconditional support. Instead, the statutory parental support obligations have replaced children's interests with state interests. Children's entitlement to parental support is vulnerable to constitutional attack as mere legislative pronouncement. Moreover, constitutional law yet enshrines parents' entitlement to children's services, now understood as the child's filial loyalty and obedience to parents. The confluence of constitutional analysis and

216. ELLMAN ET AL., *supra* note 153, at 369 (quoting THOMAS J. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES 1-6 (1984)).

217. See, e.g., *State v. Hall*, 418 N.W.2d at 190.

218. *Id.*

219. Alimony appears as an exception to the constitutional right individuals wield against state-imposed obligations to support other individuals. Arguably, state creation and regulation of the institution of marriage empowers the state to impose alimony obligations on divorcing spouses. The state does not likewise create parent-child relationships, empowering the state to impose child support obligations. Moreover, despite the marriage institutions rationale, state authority for imposing alimony obligations is constitutionally controversial. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1, 5 (1989).

220. See, e.g., Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1266 (1981); but see *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986) (parents' relative standards of living should be immaterial to custody and addressed in child support orders).

221. See, e.g., *Gilliard*, 483 U.S. at 587 (both the Court and its dissenters speculated that the plaintiff children, then benefiting from AFDC, would have enjoyed improved economic circumstances if in their fathers' custody instead).

family law in recent decades has thus failed to provide a firm rationale for child support.

That the state may obligate a parent to support a child upon a showing of an important state interest offers children only minimal comfort. When the state thus obligates parents, the state can vindicate its own, adult interests such as protecting taxpayers from the child's welfare claims. The state's interests, however, are not identical to the child's own interests in receiving support from a parent. As a result, children's interests never find a voice in child support law, and their perspectives remain excluded. We never inquire, from the point of view of childhood, why or how much support the actual child may require. Our courts fail to hear the child's story of her banishment to the streets or a juvenile detention center upon conflict with her parents. The courts fail to hear another child's story of abruptly moving from the marital home to a cramped apartment, forced to leave a familiar school and friends behind upon his parents' divorce. The courts fail to hear the stories of thousands of children subsisting with their families in poverty who view the AFDC caseworker not as a representative of their interests, but as a threat to their family's security.<sup>222</sup> The statutory parental support obligations imposed in place of the support-for-services exchange structured child support disputes as forums for a hearing of adult individual and state interests, and the children remain unheard.

### *B. Children's Claims for Support from the State*

Parents' opportunity to subvert their statutory support obligations and the vestiges of the support-for-services relationship shadowing our law prevent legal security for children in their parents' obligations to them. Even if the law extracted from parents every available cent for support of their children, however, the children of impoverished parents would remain impoverished themselves. The response of the state, the adult collective, to the children of impoverished parents reflects an adult perspective. The law treats these children as autonomous, albeit misfortunate, individuals and their parents as individual failures. Our national policies toward children in poverty inevitably undermine family bonds, teaching children to depend on the state for support instead of on their families.

State child services agencies, for example, routinely rely on child neglect statutes to remove children from the homes of parents too poor to support them.<sup>223</sup> Despite statutory safeguards excusing poverty, a parent's inability to

---

222. See, e.g., KOTLOWITZ, *supra* note 203. In Alex Kotlowitz's chronicle, both Pharaoh and Lafayette knew their mother received AFDC for the family's support. When their mother mercifully permitted their father, an alcoholic and drug addict newly-unemployed, to stay with the family, the AFDC agency disqualified the family for benefits. The children anxiously awaited their mother's return from the AFDC agency each time she reapplied for benefits, and they began to criticize their father, a once-respected figure. Meanwhile, the mother kept the family afloat by gambling, but was then unable to supervise the children. See also ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 17 (1965) (describing the young Malcolm's fear and resentment of the social worker assigned to monitor his family).

223. See, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 834 (1977); *In re S.A.D.*, 555 A.2d 123 (Pa. Super 1989); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1432-1436 (1991); Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337, 340 nn.11-13, 341 (1990-91); HIGGINBOTHAM, *supra* note 33, at 50-51.

provide adequate housing or nutrition for children often results in a finding of neglect.<sup>224</sup> Upon a finding of child neglect, the state may remove the child to government-funded foster care, substituting itself for the parent as the child's source of support.<sup>225</sup> Moreover, when faced with sudden homelessness or other economic exigency, parents often "voluntarily" surrender their children to state foster care.<sup>226</sup> Children whose parents cannot find housing or employment, both looming risks in recent years,<sup>227</sup> thus face removal from their parents' custody and loss of parental support.

From a child's perspective, the destruction of family bonds upon placement in foster care may well rival hunger as a dread.<sup>228</sup> Rather than placing the children of poor parents in foster care, the state could instead strengthen parental support obligations and family bonds by assuring the *parent* housing and employment. Indeed, a hearing of the child's perspective might well compel a national policy of family support, assuring that failures of a market economy or even a parent's personal failure cannot deprive families of decent living standards.<sup>229</sup> Better assisting parents in providing for their children requires state aid only indirectly benefiting children. Importantly, from the child's perspective, however, the parent remains the source of support.<sup>230</sup>

Congress has long since recognized that assisting parents out of poverty is the less expensive and more just response to children neglected by reason of their parents' poverty.<sup>231</sup> Overall, to preserve the family intact and aid the parent in achieving economic security costs less than providing foster care.<sup>232</sup> While federal monies for state-administered foster care programs are readily

224. See, e.g., CAL. CIV. CODE ANN. §§ 270, 310, 1110512 (Deering 1993); N.Y. SOC. SERV. LAW § 371 (N.Y. Cons. Law Serv. 1993).

225. See, e.g., CAL. CIV. CODE ANN. §§ 270, 310, 1110512 (Deering 1993); N.Y. SOC. SERV. LAW § 371 (N.Y. Cons. Law Serv. 1993).

226. CHILDREN'S DEFENSE FUND, *supra* note 20, at 61-65.

227. Herr, *supra* note 223, at 340 nn.11-13, 341.

228. Prior to his petition to terminate his mother's parental rights, *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Ct. App. 1993), Gregory K. had striven to stay with his mother and brothers. Pat Wingert & Eloise Salholz, *Irreconcilable Differences*, NEWSWEEK, Sept. 21, 1992, at 84-90. When left with his abusive father, Gregory himself petitioned for return to his mother and brothers. *Id.* at 85. Upon two separate placements in foster care, Gregory begged to be allowed to return home to his family. *Id.* Gregory's attorney, Jerri Blair, reported that Gregory sought termination of his mother's rights so he could be adopted because he feared most returning to foster care. *Id.* at 87. Though his mother's home was impoverished, often without electricity, *id.* at 85, Gregory reportedly did not complain about hunger. He dreaded foster care.

229. See, e.g., MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW, 134-38 (1987) (advocating western European family support policies) [hereinafter GLENDON, ABORTION AND DIVORCE]; Nancy E. Dowd, 30 HARV. J. ON LEG. 335 (1993) (criticizing 1993 Family and Medical Leave Act as inadequate); CHILDREN'S DEFENSE FUND, *supra* note 20, at 61-67.

230. See KOTLOWITZ, *supra* note 203. Although the children knew their mother received welfare, Pharaoh and Lafayette both identified their mother as a responsible parent who provided for them. Aggressive state programs to house and employ parents would oblige parents also to view themselves as the source of support for their children instead of destructive foster care. See SUSAN SHEEHAN, LIFE FOR ME AIN'T BEEN NO CRYSTAL STAIR (1993) (chronicling three generations of foster care families and the ill effects of foster care on parenting).

231. See Adoption Assistance and Child Welfare Act of 1980 (codified as 42 U.S.C. §§ 670-676) (affirmatively requiring states to support family stability and reunification as a condition of state receipt of federal foster care funding).

232. CHILDREN'S DEFENSE FUND, *supra* note 20, at 61-67.

available, however, funding for job training and housing programs and the jobs and homes themselves are not.<sup>233</sup> These political funding decisions offer a perverse incentive to state child services agencies. The politics induce agencies to respond to parental inability to support children with the destruction of the family itself by removing poor children to foster care.<sup>234</sup> Moreover, race, class, and cultural bias continues to prompt state removal of children from their parents on the grounds of neglect<sup>235</sup> and thwarts the political courage our nation requires to respond to children in poverty. As a result, the number of children now in foster care has ballooned to over 400,000.<sup>236</sup> The law of child neglect and foster care informs these children that their parents are failures from whom they cannot expect support. The law thus undermines children's security in a parental obligation the law purports to mandate. Children born to poor families soon learn they have no entitlement to support from their parents, but instead are subject to continual state supervision and resettlement, like refugees, among foster homes.<sup>237</sup>

The much publicized case of *Gregory K.*<sup>238</sup> vivifies the destructive effect of the foster care system on a child's security in parental support and family bonds. In *Gregory K.*, the single mother of three young boys twice "voluntarily" placed her children in foster care when she was unable to support them on the minimum wages she earned.<sup>239</sup> When she attained better financial stability, the mother brought all three children home.<sup>240</sup> Each time, the mother responded to Gregory's anxiety by promising him she would not place him in foster care again.<sup>241</sup> Unable the last time to provide food and adequate shelter to her children, the mother called upon the Florida child services agency for aid. The agency offered the mother, not aid in securing food and shelter for her children, but rather placement for her children in foster care.<sup>242</sup> If the mother complied with the agency's plan, the state told her, she could regain custody.<sup>243</sup>

The state sent Gregory to live in a juvenile shelter<sup>244</sup> where he grew to loathe his mother for failing to support him, for breaking her promise to keep him at home with her. Gregory angrily accused his mother of "voluntarily" abandoning him to foster care. Indeed, the law of foster care taught Gregory

---

233. *Id.*

234. See Roberts, *supra* note 223; Herr, *supra* note 223; CHILDREN'S DEFENSE FUND, *supra* note 20, at 61-67.

235. See Roberts, *supra* note 223 (describing the disproportionate state surveillance of impoverished, African-American families resulting in disproportionate state removal of African-American children from their families); Santosky v. Kramer, 455 U.S. 745, 763 (1982) (justifying the standard of proof in neglect cases as reinforcing parental rights against pervasive race, class, and cultural bias in state removal actions).

236. CHILDREN'S DEFENSE FUND, *supra* note 20, at 62.

237. Children linger in foster care for years at a time, often shuffled from one foster care family to another, and assigned to a social worker responsible for a hundred other children. CHILDREN'S DEFENSE FUND, *supra* note 20, at 63. See also SHEEHAN, *supra* note 230 (describing continual changes in foster care placements and abusive foster parents); HIGGINBOTHAM, *supra* note 33, at 50-51.

238. *Kingsley v. Kingsley*, 623 So. 2d. 780 (Fla. Ct. App. 1993).

239. Wingert & Salholz, *supra* note 228, at 85. I rely on this Newsweek article because the reported case fails to tell Gregory's story.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 87.

244. *Id.* at 85.

that his mother's inability to keep and support him at home was "voluntary," and that she bore no obligation to him. The mother pleaded that, with no housing or money or state aid, she had no choice but to place Gregory in foster care or see him go hungry.<sup>245</sup> "The state was willing to pay a stranger to care for my children," the mother said, "when if they could have helped me a little, I could have kept my children."<sup>246</sup> Nonetheless, when Gregory sued for termination of his mother's parental rights so he could be freed for adoption, the case could be reduced to the age-old legal model for parent-child relationships. If you will not keep and support me, Gregory may as well have argued to his mother, then I will not obey and serve as your son.<sup>247</sup>

Foster care policies have undermined parental support obligations and other family bonds crucial to children, and welfare policies yet permit a multitude of American children only subsistence living standards. In response, political leaders have proposed reviving family law principles obligating non-custodial parents to support their children. In the 1992 campaign, for example, President Clinton denounced "dead beat dads" and called for tougher enforcement of child support laws. Even before the current rhetoric favoring tougher enforcement, Congress enacted comprehensive legislation requiring state attorneys to assist AFDC clients, indeed any custodial parent, in child support actions.<sup>248</sup> Our response to children in poverty, then, has been to reaffirm that parents alone are financially responsible for children.

Part and parcel of our reaffirmation of parental responsibility is a denial that children should claim support from the state. The political desire to curb public assistance spending, and not a commitment to lifting children from poverty, fuels reform. Hence, prominent among welfare proposals on our political horizon are severing AFDC benefits after two years of receipt or after the birth of the third child, no matter how many children join the family thereafter.<sup>249</sup> On their face, such proposals belie public concern for children's needs. Collectively as adult taxpayers, we have sought instead to protect our pocketbooks against children's claims.

Thoughtful critics have long called instead for affirmative state commitment to supporting children. Recognizing that child support laws are realistically often unenforceable, for example, Harry D. Krause has proposed that the state assume child support obligations for alienated non-custodial parents.<sup>250</sup> Mary Ann Glendon has called for national family support programs to guarantee parents and children alike minimum support.<sup>251</sup> These proposals

---

245. *Id.*

246. *Id.*

247. In fact, Gregory could not himself deny his mother "obedience and service." Although the trial court granted Gregory standing to petition for termination of parental rights, the Florida Court of Appeals reversed. *Kingsley*, 623 So. 2d at 780.

248. Title IV-D of the Social Security Act, 42 U.S.C. §651-62 (1987).

249. See, e.g., Virginia Ellis, *Proposals Would Slash Family Welfare Benefits*, LOS ANGELES TIMES, Jan. 8, 1994, at A20; Kevin Sack, *Cuomo to Propose Package of Cuts in New York Taxes*, NEW YORK TIMES, Jan. 2, 1994, at A1; Paulette Thomas, *Administration Clears Wisconsin Plan for 2-Year Limit on Welfare Payments*, WALL ST. J., Nov. 2, 1993, at A24; Melissa Levy, *Florida Welfare-to-Work Plan's Success In Study May Influence White House*, WALL ST. J., DEC. 7, 1993, at A2.

250. See Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 395-98 (1989).

251. GLENDON, ABORTION AND DIVORCE, *supra* note 229, at 134-38; see also, GLENDON, RIGHTS TALK, *supra* note 42 at 133-36.

arise from the politically difficult but undeniable conclusion that parents alone cannot or will not fulfill children's needs for support, no matter how we reform child support enforcement mechanisms. Instead, adults as a collective—that is, the state—must respond to children's claims for support. The state must take affirmative responsibility for the support of all children through aid to their parents.

Public disapprobation of “welfare moms,” suffused with racial hostility,<sup>252</sup> thwarts our political will to assume such collective responsibility for children by aiding their parents. Behind that political view, however, also lies the self-same jurisprudence of autonomous individuality now dominating constitutional interpretation. Our legal concept of personhood as a self-determining individual easily encompasses our political expectation that each individual ought also to be self-supporting. Any person who is not self-supporting must have chosen, as an autonomous individual, an impoverished life and hence deserve its vicissitudes. As a humane society, goes the argument, we might offer an individual two years of public assistance in overcoming temporary misfortune or personal folly, but the cessation of benefits reminds recipients that they must wean themselves from dependence and fend for themselves. Indeed, as the Supreme Court reiterates sternly, no man, woman, or child bears a constitutional *right* to state aid.<sup>253</sup> Instead, the Court says, state aid reflects only public largesse, revocable at the majority's will.<sup>254</sup>

Upon this foundation of constitutional individualism, we have built a family law which disentitles custodial parents from either the other parent's or the state's aid. Some eighteen percent of divorced women yet receive alimony awards,<sup>255</sup> for example, but now most frequently in the form of “rehabilitation alimony,” an award of limited duration purporting to help women “get back on their feet” after divorce.<sup>256</sup> Our law thus instructs women upon divorce to learn quickly to become self-determining, self-supporting individuals and not to “burden” former husbands or the public with their claims for assistance. Our law treats children also as distasteful burdens on private and public “largesse.” Constitutionally, we recognize no “right” in children to claim support from their parents or the state.

In denying children a right to state support, the law treats children the same as all other people, of course. Here, as in other areas of constitutional analysis, we pretend children are autonomous adults. Child advocates could argue that the state owes children an affirmative duty of support because the

---

252. Of the over fourteen million American children living in poverty, the majority are not African-American. CHILDREN'S DEFENSE FUND, *supra* note 20, at ix. In fact, the majority of these children “live in working families and outside inner cities.” *Id.* Nonetheless, the political right promotes an archetype of a Black “welfare queen,” breeding children to increase benefits from the public dole. Among the AFDC myths the Children's Defense Fund meticulously refutes are: “Women have babies to get AFDC .... Women on AFDC have too many babies .... AFDC gives poor women a financial ‘bonus’ for childbearing .... AFDC recipients don't want to work .... AFDC is busting state budgets.” *Id.* at 31. Racism sustains these myths and thwarts an American response to poverty similar to western European models.

253. See, e.g., *Gilliard*, 483 U.S. at 596; *DeShaney*, 489 U.S. at 202.

254. *Gilliard*, 483 U.S. at 3019.

255. ELLMAN ET AL., *supra* note 153, at 300–301 (excerpting Stephen D. Sugarman, *Dividing Financial Interests at Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, 130, 132–34 (Stephen D. Sugarman & Herma Kay Hill eds. 1990)).

256. *Id.*



state has disabled children from providing financially for themselves.<sup>257</sup> That is, because the law disables children from supporting themselves in gainful employment, when parents fail to support them, children are entitled to state support. Even absent legal prohibitions on their employment, however, most children in fact are unable to support themselves in our society. Equal treatment of children constitutionally simply condemns children to their parents' economic fate.

Some cringe at the law's visiting upon "innocent" children their parents' poverty.<sup>258</sup> That response assumes that the parents are blameworthy for their poverty, a necessary corollary of our legal view of persons as autonomous individuals.<sup>259</sup> Many parents are not much more personally responsible for their poverty than their children are.<sup>260</sup> Even if all parents were personally responsible, however, the fact remains that the state cannot support "innocent" children without also supporting their custodial parents.<sup>261</sup> Nonetheless, our political, cultural, and legal hostility toward financially supporting adults whom we assume are autonomous individuals also forces us to pretend that children are autonomous and lack any claim to our collective support. Our law of state support thus excludes an essential aspect of children's personhood, that they are members of families dependent upon custodial parents. Our refusal to hear legally children's perspectives on the poverty they experience with their families, moreover, helps to sustain a self-satisfied and exclusive jurisprudence.

### III. PERSONHOOD OF CHILDREN UNDER CUSTODY LAW

From a child's perspective of dependency and family belonging, the legal issues of child support and custody bear most profoundly on childhood. Over fourteen million American children now live in poverty and millions of others in straightened economic circumstances.<sup>262</sup> Impoverished children risk removal to foster care or intrusive state supervision of their welfare families, both threatening secure custody and family bonds. The children of middle-class parents likewise risk disruption or severance of family bonds upon their parents' divorce. Indeed, half of all children whose parents are now married will likely experience the upheaval of their parents' divorce at some point in childhood,<sup>263</sup> an event threatening not only their economic security, but also the family's ability to sustain family bonds. A quarter of all children will face the

257. See *DeShaney*, 489 U.S. 189, 207-08, (Brennan, J., dissenting) (arguing that the state's usurpation of the duty to respond to child abuse reports disabled the plaintiff child from seeking recourse from private individuals).

258. Cf. *Plyler v. Doe*, 457 U.S. 202, 230-254 (1982) (concurring and dissenting discussions of visiting the consequences of parents' illegal conduct—illegal immigration—upon children).

259. For criticism of this assumption, see, e.g., Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338 (1986); Simon, *supra* note 71; WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 43.

260. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 43; see also *infra* part IV.

261. See Coons et al., *supra* note 8, at 319 (showing the impracticality of benefiting children without also benefiting their parents). As a result, it is estimated over 900,000 American children will reside away from their families in foster care or juvenile facilities by 1995. CHILDREN'S DEFENSE FUND, *supra* note 20, at 63.

262. CHILDREN'S DEFENSE FUND, *supra* note 20, at x.

263. ELLMAN ET AL., *supra* note 153, at 196-97 (citing divorce rates).

challenge of parents' remarriage,<sup>264</sup> an event which offers opportunities for forming new family bonds, but which can also imperil old ones. Another significant number of children are adopted each year, some in disputed circumstances. Children therefore face the likelihood of a custody dispute at some point in childhood.<sup>265</sup>

For the child, a custody dispute puts at risk important relationships and family belonging, from relationships with parents and siblings to those with extended family members. The upheaval and often relocation attendant upon custody disputes also threaten children's relationships with parents' unmarried partners, with long-term but unrelated caregivers, and with school and neighborhood friends.<sup>266</sup> Perhaps children countenance the severance of such close relationships with mere fleeting pain or at least resiliency. More likely, we have not heard of children's experiences and loss because of the law's refusal to entertain children's perspectives in custody disputes.

In place of children's own perspectives in custody disputes, the law of child custody offers a series of proxy interests depending on the nature of the case. In cases of alleged child abuse or neglect and the child's removal to foster care, the law structures the conflict as the state against parents and assumes one or the other party must represent the child's interests.<sup>267</sup> In contested adoption cases, the law focuses on the alleged relinquishment of biological parents' constitutional rights to their children's custody.<sup>268</sup> In custody disputes between at least minimally "fit" biological parents, courts abide the "best interest of the child" rule for determination.<sup>269</sup> The "best interest of the child" is a state interest employed to overcome one or the other of the biological parent's otherwise equal constitutional right to the child's custody.<sup>270</sup> In all custody disputes, then, courts entertain parental and state interests as proxies for the child's. As a result, named parties litigate custody from artificial perspectives. Adults must argue, for example, that custody with them is "best" for the child and leave unvoiced their own perspectives on family bonds and loss. Children

---

264. *Id.* at 362.

265. The parents of many children, of course, are not married. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1993), Table No. 98 (113th ed.) Wash. (over twenty-six percent of all births from 1985 to 1990 were to unmarried mothers). Although in this part of this article I refer to custody disputes within the context of divorce, the analysis applies to children whose parents are not married as well.

266. See, e.g., LATOYA HUNTER, THE DIARY OF LATOYA HUNTER: MY FIRST YEAR IN JUNIOR HIGH (1993). Latoya Hunter, a twelve-year-old Jamaican immigrant to New York City, devoted much of her year-long diary to expressions of longing for friends and extended family members in Jamaica, as well as for former neighborhood friends who moved away with their families. Latoya Hunter's diary reveals an adolescent's poignant helplessness and loss in the face of moves destroying relationships important to her, though perhaps unnoticed by the adults in her world. Her adult brother's break up with a long-term girlfriend and her sister's leaving the home with Latoya Hunter's nephew to live with a new boyfriend, for example, seem to impress Latoya Hunter at least as painfully as a separation from her parents for several years when they moved to New York before they could bring her from Jamaica.

267. See discussion *infra* at part III.B.1.

268. See discussion *infra* at part III.B.2.

269. Where parents are adjudicated "unfit," for example because of their abusive or neglectful conduct, and in proceedings to divest or limit parental custody rights, courts vindicate the state's interest in the health and safety of its children and so do not resort to the "best interests" standard. See, e.g., *In re Juvenile Appeal* (83-CD), 455 A.2d 1313 (Conn. 1983).

270. See discussion *infra* at part III.B.2.

themselves cannot appear as parties, and so they abide the custody dispute silenced and unrecognized.

By legally structuring custody disputes as conflicts between individual adult rights and state interests, we prevent a hearing of the issues of love and loss that brought the family to court. Instead, courts focus on such proxies as the "best interest" standard and state authority to interfere with parental rights. These proxy issues may well assure a hearing of state and other adult political interests such as how "best" to rear children into productive, law-abiding adults. By thus viewing children as potential adults, however, courts and litigants fail to respond to real children's interests as children. The law of child custody, then, denies the personhood of children and the inherent value of childhood.

### A. The "Best Interests of the Child" Rule

Courts, lawyers, parents, and the public at large bandy about the phrase "best interests of the child" as though this standard were meaningful or jurisprudentially sound. It is neither. Instead, the standard is a political construct, as virtually anyone thinking about it soon concludes.<sup>271</sup> As such, the "best interests" standard fails to address the interests of any real, individual child or even of children *en masse*. Rather, the standard implements adult agendas, in part by assuring that courts fail to examine the interests of the real, individual children whose custody is disputed.

Legal analysis provides little justification for the "best interests" standard or, for that matter, for state intervention in custody disputes between fit parents generally. Both parents, regardless of their marital status, bear the constitutional right to the care, control, and custody of their children.<sup>272</sup> We assume that in intact marriages, parents together decide on the child's care, control, and custody. Nor does the state obtrude on the custody decisions of parents who have never married and now live apart, unless one sues the other for custody. When married parents, however, seek to dissolve their marriage, family law requires judicial disposition of the children's custody along with the dissolution decree.<sup>273</sup> Divorcing parents, therefore, face court disposition of and hence state intervention in custody decisions, while parents with intact marriages and those never married remain at liberty to determine custody as freely as any other parental decision.

271. See, e.g., ROBERT H. MNOOKIN, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 229-261 [hereinafter MNOOKIN, *Child Custody Adjudication*]; Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); WEYRAUCH & KATZ, *supra* note 41, at 506-08 (arguing that, while the best interests standard is "indeterminate and speculative," in practice courts implement a "substructure of guidelines" such as gender and other preferences "that are unlikely to be published cohesively, perhaps because once fully articulated they are inherently objectionable." *id.* at 507); but see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best Interest Standard*, 89 MICH. L. REV. 2215 (1991).

272. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Stanley*, 405 U.S. 645 (recognizing the constitutionally protected rights of unwed fathers).

273. See, e.g., CAL. CIV. CODE ANN. § 4508 (Deering 1993); FLA. STAT. ANN. § 61.001 (West 1992); N.Y. DOM. REL. LAW § 240 (McKinney 1993).

If we knew that divorcing parents, or at least one of them, were legally unfit, then a legitimate state interest in children's health and safety might surmount the parents' constitutional right to determine the custody of their children and could justify the state's intervention through the judicial process. While such an assumption may appear at least constitutionally "rational," it should never survive the strict scrutiny accorded state infringement of the parents' fundamental liberties.<sup>274</sup> State intervention in the custody decisions of divorcing parents, therefore, lacks constitutional justification.<sup>275</sup>

Judicial supervision of children's custody upon their parents' divorce may thus survive as a mere relic of a family law system not yet reformed by creative constitutional challenge. I suspect, however, that we fail to think about the lack of constitutional justification for state action in divorce custody cases because we have not yet imagined an alternative for protecting children made

---

274. Precedent seems to dictate that presumptions about parental fitness employed to limit or divest parents' rights to the care, control, and custody of their children cannot survive constitutional scrutiny. *See, e.g., Stanley v. Illinois* 405 U.S. 645 (1972) (striking statutory presumption that unwed fathers are unfit parents). Indeed, as I will argue, parents' constitutional rights appropriately inhibit (and should prevent) state interference premised on political value judgments about parental attributes such as marital status, sexual-orientation, race, or class. *See infra* part III. Because the state's interest in a child's custody is always politicized, I speculate on eliminating both the state's role in custody disputes and the state's "best interests" standard. *See infra* part IV.

275. Arguably, state intervention in the custody decisions of divorcing parents arises because the parents, like other civil adversaries, hale each other into court for judicial disposition of their dispute. In the vast majority of divorce cases, however, custody is undisputed, and courts merely grant approval by decree to the parents' own agreement. NATIONAL CENTER ON WOMEN AND FAMILY LAW CHILD CUSTODY PROJECT, NATIONAL CONFERENCE OF STATE LEGISLATURES, *Joint Custody: An Attack on Women and Children*, 2 (undated). Over eighty percent of divorcing parents agree that the mother should retain custody. *Id.* at 509. This agreement represents both the personal choices of parents and their recognition of which parent is more accustomed to meeting and accommodating the children's needs. *Id.* Nonetheless, divorcing parents cannot avoid the statutorily required judicial disposition of the custody of their children, even when such disposition amounts to no more than a court's cursory review of the parents' settlement agreement. Moreover, courts wield statutory jurisdiction to reject any parental agreement about custody not in the child's "best interests," regardless of the parents' fitness. Courts also retain statutory jurisdiction over the custody of children of divorced parents, empowering courts to modify parental agreements and court orders at any time in the child's "best interests" until the child's emancipation. The decision to divorce, therefore, also entails the parents' submission to court-administered state supervision of the custody of their children. State laws require such state supervision of their constitutional parenting prerogatives even when parents agree about custody and are statutorily fit. No other parenting group, those never married or those in intact marriages, face such state intervention in their parenting decisions without themselves disputing custody.

If challenged constitutionally, a state might defend its intrusion into the parenting decisions of divorced parents on the grounds of a state interest in the institution of marriage itself. As courts often remind us, marriage is a state-created status, subject to state regulation from its creation through its dissolution. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Anderson v. Anderson*, 810 S.W.2d 153, 155 (Tenn. App. 1992) (*quoting* *Osborne v. Osborne*, 197 S.W.2d 234, 236 (1946)) ("A divorce action is really a triangular proceeding where in addition to the parties the State through the court is a quasi party."). All issues pertaining to the marriage, including property, support, and children's custody, therefore, arguably remain subject to state regulation and supervision. While the state institution of marriage confers certain status-based rights and obligations on spouses, however, marital status is irrelevant to children. Statutes universally establish children's entitlement to support regardless of their parents' marital status, *see* discussion *supra* part II, and parents certainly do not require the state-created institution of marriage to procreate. Hence, even this rationale for state infringement of the parents' constitutional right to determine their children's custody appears to fail under strict scrutiny.

more vulnerable by their parents' divorce. Upon filing for divorce, parents become legal adversaries, often represented, and entitled to appear in court as parties to vindicate their rights arising from marital status. However effective recent reforms may finally prove in reducing the adversarial nature of divorce proceedings,<sup>276</sup> parents will ultimately retain their access to judicial disposition of their marital affairs. They will remain parties, constitutionally guaranteed access to the courts. Traditionally, however, the law has refused to recognize children as parties to any aspect of their parents' divorce proceedings, including the custody dispositions to which they are subject. Our law developed the "best interests" standard, then, in order to avoid disposing of children like any other marital asset.<sup>277</sup> Because children are not parties to the divorce, yet their custody is subject to judicial disposition, the law identifies a state interest in the child's "best interest." The only alternative, seemingly, is to analyze children's custody with the same property principles courts use to determine the distribution of other marital assets.<sup>278</sup>

At its inception, our use of the "best interests" standard may well have appeared as enlightened and humane, rescuing children from the status of chattel divisible upon dissolution of their parents' marriage. The standard repudiates earlier paternal custody presumptions based on property law<sup>279</sup> and maternal custody presumptions based on gender stereotypes.<sup>280</sup> The standard may also have satisfied an earlier time which never imagined according a child standing as a party in a custody dispute. Indeed, the "best interests" standard now permits courts to appoint for children guardians ad litem, officers of the court charged with independently determining a child's "best interest."<sup>281</sup> Unlike their divorcing parents, however, children remain nonparties, unrepresented by legal counsel, and yet subject to judicial determination of

---

276. Proponents abound for alternative dispute resolution methods upon divorce in order to defuse hostilities. Critics, however, saliently observe that alternative dispute resolution methods such as mediation and arbitration may more suppress than defuse hostilities, solidifying power imbalances between spouses, *see, e.g.*, Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991), and reflecting the political agenda of a backlash against feminism, *see* Martha L. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) [hereinafter Fineman, *Dominant Discourse*].

277. MNOOKIN, *Child Custody Adjudication*, *supra* note 271, at 254-55.

278. *See, e.g.*, WEYRAUCH & KATZ, *supra* note 41, at 497:

[I]f the courts increasingly treat marriage as a partnership—that is, as a co-ownership for profit between parties presumed to be equal who deal with each other at arm's length—then children acquire new and sometimes contradictory characteristics. They are 'assets' of the marriage to be fought over in case of dissolution; they are also, in a sense, a 'product' of marriage; and, if it comes to their protection as persons, they are 'consumers' of marriage regardless of lack of privity of contract [with the marital contract]. Thus we witness conflicting trends in law according to which children are increasingly recognized as persons, while at the same time they continue to be treated as if they were chattels ....

279. English common law conferred custody on the father, further substantiating his property interests in the child's services. *See* ELLMAN ET AL., *supra* note 153, at 492; WEYRAUCH & KATZ, *supra* note 41 at 496.

280. *See, e.g.*, *Pusey v. Pusey*, 728 P.2d. 117 (Utah 1986) (rejecting maternal preference).

281. *See, e.g.*, CAL. WELF. & INST. CODE § 326 (West 1993); FLA. STAT. ANN. § 61.401 (West 1993); N.Y. CIV. PRAC. L. & R. § 1202 (McKinney 1993). Guardians ad litem are infrequently appointed in divorce cases because a dearth of volunteers for guardian ad litem service requires rationing appointments to abuse and neglect cases.

custody issues profoundly affecting their lives.<sup>282</sup> Denial to children of access to the courts in custody proceedings prevents their transformation under the law from parental chattel to persons.

Judicial intervention in custody determinations and imposition of the "best interests" standard is jurisprudentially unsound. The standard is also inherently political, identified less with any individual's interest than with the state's. The "best interest" standard is peculiarly malleable to diverse political agendas precisely because it reflects no individual's interest. Instead, the standard is a vessel which judges and legislatures may fill with their own changing definitions.

Three powerful myths sustain the "best interests" standard nonetheless. The first myth is that we can define and know children's "best interests" empirically. Second, we sustain the myth that the "best interests" standard is objective and responsive to children. Finally, the law erroneously assumes that, among the several interests advanced in a custody dispute, the two parents' and the state's, one or another must duplicate the child's best or own interests.

### 1. *The Myth of Empirical Objectivity*

Courts have entertained empirical evidence of children's "best interests" with understandable desperation. Absent some empirical basis for a "best interests" determination, after all, the court's decision must manifest little more than idiosyncratic and subjective conclusions about what living arrangements are "best" for children. Courts' selection of empirical evidence itself entails a value judgment; whether to value, for example, that which is financially "best" for children or spiritually "best" for children.<sup>283</sup> Courts usually select "psychological health" as the most valued criterion for "best interests" determinations. Psychological evidence appears to courts as objective and unassailable, vastly simplifying courts' Solomonic custody decisions and permitting reliance on a class of seemingly disinterested experts.<sup>284</sup>

A critical review of the psychological evidence now justifying custody decisions, however, dispels the myth of its objectivity. The evidence suggests, for example, that girls fare better psychologically in their mother's custody, while boys fare better in their fathers'.<sup>285</sup> Faring "better" means that girls become less aggressive when raised by women, while boys become more

---

282. Notwithstanding the novel cases such as *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) (reversing trial court's grant of standing to the child), *Twigg v. Mays*, No. 88-4489-CA-01(D. Fla. Aug. 18, 1993) (adopted child independently defended against birth parents' claims), and *DeBoer v. Schmidt* (*In re Clausen*), 502 N.W.2d 649 (Mich. 1993) (dismissing child's independent complaint), the status of children as nonparties remains the rule in family law.

283. See, e.g., *Burchard v. Garay*, 724 P.2d 486 (1986) (rejecting financial criterion); *In re Marriage of Hadeen*, 619 P.2d 374 (Wash. Ct. App. 1980) (rejecting opportunities for religious education as a criterion).

284. Indeed, some critics now propose that panels of psychology and child development experts should help decide custody cases, effectively consigning them to the therapeutic realm of human psychology. See, e.g., HIGGINBOTHAM, *supra* note 33, at 55 (recommending that "interdisciplinary panels of experts," including "mental health professionals" and pediatricians offer advice to judges in particularly complex cases). Professor Martha L. Fineman has observed that employing therapeutic models in family court fundamentally re-characterizes issues formerly understood as matters of justice. Fineman, *Dominant Discourse*, *supra* note 276, at 727.

285. See, e.g., E. Mavis Hetherington et al., *Marital Transitions: A Child's Perspective*, 1989 AM. PSYCH. 303, 303-10.

aggressive when raised by men.<sup>286</sup> The appropriate aggressiveness of the sexes may figure as an accepted norm in psychology, but it is a value judgment due no particular deference in courts of justice.<sup>287</sup>

Likewise, courts' deliberations on the psychological effects on children of their parents' sexual relations betrays normative and not objective criteria. In one case, for example, a Catholic mother demanded that the father not conduct visitation in his home with his live-in girlfriend lest he undermine the religious precepts of the children's Catholic upbringing.<sup>288</sup> The court-appointed psychologist opined that exposure to such "value conflicts" is psychologically healthy for children and that the family should receive psychological counseling to assure that the children not accept the mother's view of the father as sinful.<sup>289</sup> The court adopted the psychologist's view, intimating that vengeance against her husband's sexual infidelity motivated the mother's objections to the father's conduct.<sup>290</sup> In this not atypical case, the court thus substituted its own secular mores, elevated to the authority of psychological health, for a parent's own deeply-held religious convictions.<sup>291</sup> Constitutionally, the court could not lend its approval to particular religious beliefs.<sup>292</sup> The Constitution, however, does not compel courts to substitute the secular values of psychology for parents' own religious convictions. In this conflict, as in determinations of how well children fare by gender of child and parent, the objective psychological evidence reflects a controversial value judgment.

The stampede of state legislatures to enact joint custody presumptions may best illustrate the myth that objective, psychological evidence exists to resolve these difficult custody disputes. A majority of state legislatures have declared joint custody as the preferred custody disposition, codified in statutory presumptions or requirements.<sup>293</sup> Legislatures enact and courts apply these joint custody statutes on the premise that they serve the "best interests" of children of divorce.<sup>294</sup> The headlong legislative rush to joint custody rules began when legislators cited what seemed like definitive evidence that almost all children would benefit psychologically from joint custody dispositions.<sup>295</sup> In fact the

286. *Id.*

287. All our laws and judicial decisions reflect value judgments, of course, and we struggle in a constitutional democracy to decide whose values to codify and impose. In family law issues, at least, where the consequences of laws and decisions bear most profoundly and personally on the litigants themselves, we might scruple in particular to avoid imposing value judgments external to the family. Instead, we might seek to discern what family members themselves value to guide family law determinations. See my discussion of the "family estate" and the "family dispute restructured" *infra* part IV.

288. See *Kelly v. Kelly*, 524 A.2d 1330 (N.J. Super. Ct. Ch. 1986).

289. *Id.* at 1332; see also *Zummo v. Zummo*, 574 A.2d 1130, 1441 (Pa. Super. 1990) (in a visitation conflict between a Jewish mother and a Catholic father, the court held that exposure to such "value conflicts" is psychologically healthy).

290. *Kelly*, 524 A.2d at 1332.

291. For a discussion of psychological health supplanting moral goodness as the touchstone for decision making in family law, see Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

292. See *Zummo*, 574 A.2d at 1133-34 (describing constitutional constraints on court's preferring any religion).

293. See, e.g., CAL. CIV. CODE § 4600.5 (West 1993); FLA. STAT. ANN. § 744.301 (West 1993); N.Y. DOM. REL. LAW § 240 (McKinney 1993).

294. See, e.g., *Taylor v. Taylor*, 508 A.2d 964 (Md. 1986).

295. Evidence cited included JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

evidence, a study of some hundred families, showed that the children fared "better" psychologically when non-custodial parents sustained reliable and frequent *visitation* with their children.<sup>296</sup> The joint custody lobby represented this limited study as applicable to all children and as necessitating the imposition of joint custody in almost all cases.<sup>297</sup> No scientific or psychological evidence, however, yet supports the radical and untested joint custody presumptions now legally imposed on children and parents. Indeed, advocates of awarding sole custody to primary caregivers can summon at least as weighty psychological authority for their positions as the advocates of joint custody.<sup>298</sup> While the psychologists continue to debate the issue, then, political forces have prevailed upon legislatures to declare joint custody as presumptively in the "best interests" of all children.

Joint custody rules are, then, a political declaration, reflecting the relative power of the joint custody lobby and not children's "interests."<sup>299</sup> Instead of subjecting our children's fate to the vicissitudes of the political process, we might seriously attempt to learn the consequences of divorce upon children and what custody disposition best suits their psychological needs. The dearth of available evidence and the subjectivity of psychological pronouncements, however, dooms such an attempt.<sup>300</sup> We lack basic empirical studies on most every aspect of divorce, and grope in the dark for empirical conclusions and neutral policies.<sup>301</sup> Surveying what little evidence there is, disinterested scholars equivocate.<sup>302</sup> Divorce and the subsequent alienation of one custodial parent may adversely affect some children in school performance, for example.<sup>303</sup> The fact that divorce plunges many children suddenly from a middle class to an impoverished standard of living, however, complicates even such tentative conclusions.<sup>304</sup> Indeed, the only firm conclusion we can draw from the empirical evidence is that divorce significantly threatens children's

296. *Id.*

297. See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WISC. L. REV. 107, 116-17 (1987) (joint custody statutes often apply even where domestic violence subverts any likelihood of post-divorce cooperation in parenting).

298. For such evidence, see, e.g., ANNA M. FREUD ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973) (advocating, on the basis of psychological evidence, that the primary caregiver should receive sole physical and legal custody, including the authority to exclude the other parent from the child's life).

299. See Fineman, *Dominant Discourse*, *supra* note 276 at 730 (exposing the misogyny of psychological studies and the political agenda—reduced child support obligations and continued control by the non-custodial parent over the custodial parent—of the joint custody lobby).

300. In family law as in no other area, we countenance sweeping reform without resort to empirical evidence substantiating the imperative. Jane Rutherford, *An Address to the Family Law Section of the American Association of Law Schools*, 1993 Section Program on Effects of Divorce on Children, Jan. 1993.

301. *Id.*

302. See, e.g., Paul Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCH. BULL. 26-46 (1991); Paul Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. OF MAR. AND FAM. 23-28 (1993) (the effects of divorce on 2,000 children in their transition to adulthood); E. MAVIS HETHERINGTON & GLENN CLINGEMPEEL, *COPING WITH MARITAL TRANSITIONS: A FAMILY SYSTEMS PERSPECTIVE* (1992); E. Mavis Hetherington, *A Review of the Virginia Longitudinal Study of Divorce and Remarriage: A Focus on Early Adolescence*, 7 J. OF FAM. PSYCH. 39-56 (1993); ELEANOR E. MACOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

303. Amato & Keith, *supra* note 302, at 26.

304. *Id.*



economic security, besetting them with sudden and drastic reductions in standards of living and, often, with poverty.<sup>305</sup>

## 2. The Myth that the "Best Interests" Standard Responds to Children

Challenged with heartbreaking choices and no-win dispositions in custody disputes, we would like to believe that psychology experts and studies can assure a disposition in the child's "best interests." Instead, psychological norms merely disguise morally complicated choices. Moreover, the psychological evidence now routinely adduced in custody cases fails to serve children's interests, and instead lends the power of ostensibly objective authority to adult political interests. The power struggle between women and men in the courts and legislatures, constitutional issues such as race and religion, and the subjective perspective of the judge deciding any particular custody case all obscure and finally prevent examination of any real child's interests in custody disputes.

The power struggle between women and men, feminism and its backlash, infects both the "best interests" standard and the psychological evidence used for the standard's criteria. Martha Fineman has well demonstrated, for example, how the use of the "best interests" standard premised in psychological norms reflects a political backlash against women.<sup>306</sup> Professor Fineman documents a pervasive misogynist perspective in the psychological literature used to trivialize women's custody claims as merely vengeful or neurotic.<sup>307</sup> Further, court-sponsored gender bias studies from across the country depict a mostly male judiciary hostile to women's claims, particularly those involving domestic violence.<sup>308</sup> Increasingly now, courts greet with incredulity a woman's allegations upon divorce that the father abused the children during the marriage.<sup>309</sup> Psychological stereotypes of women and courts' identification with

305. *Id.*

306. Fineman, *Dominant Discourse*, *supra* note 276, at 738-39.

307. *Id.* at 152; see also Fineman & Opie, *supra* note 297.

308. See Karen Czapanskyi, *Domestic Violence, the Family and the Lawyering Process: Lessons From Studies on Gender Bias in the Courts*, 27 FAM. L. Q. 247 (1993) [hereinafter Czapanskyi, *Domestic Violence, the Family, and the Lawyering Process*]; Junda Woo, *Widespread Sexual Bias Found in Courts*, WALL STREET JOURNAL, Aug. 20, 1992, at B1, B3, (reporting on state supreme court sponsored gender bias studies in California, Connecticut, Massachusetts, and Utah); Tannen, *supra* note 199, at 856-57, 863-68. The conventional wisdom that courts routinely favor mothers in custody disputes derives from statistical surveys conflating custody disputes settled and those litigated. That mothers receive sole custody of the children in roughly ninety percent of the cases reflects settlement agreements negotiated by parents themselves and approved by the courts. See NATIONAL CENTER ON WOMEN AND FAMILY LAW CHILD CUSTODY PROJECT, *supra* note 275. In the roughly ten percent of cases actually adjudicated in court, fathers won sole or joint custody over half the time. *Id.* No evidence sustains, then, the often repeated maxim that courts favor women.

309. See, e.g., *In re Fromdahl*, 61 U.S.L.W. 2332 (Or. 1992) (reversing trial court award of custody to father upon disproof of mother's allegation that father had sexually abused children, though father had failed a polygraph test regarding the allegations); *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988) (court imprisoned mother for contempt in thwarting father's unsupervised visitation despite physical evidence child was sexually abused) (For a description of the custody case, see, e.g., Anne Gearan, *Lives of Two Families Consumed by Custody Fight That Began in 1984*, LOS ANGELES TIMES, May 31, 1992, at A14); *Chrissy F. v. Mississippi Dep't of Public Welfare*, 883 F.2d 25 (5th Cir. 1989) (court refused to entertain mother's evidence, the examining physician's testimony, that father sexually abused the child, and ordered continued unsupervised visitation with father); Czapanskyi, *Domestic Violence, the Family, and the Lawyering Process*, *supra* note 308. See also Pearson, *supra* note 215, at 295

fathers, both clashing with feminists in a political struggle, thus infect any "best interests" determination. Courts then choose between parental interests and ignore the child's.

Likewise, the joint custody movement betrays these political struggles and adult agendas.<sup>310</sup> Championed as beneficial for children because of greater involvement by divorced fathers in their children's lives, joint custody presumptions have not in fact altered the residency and visitation patterns attendant to sole custody awards to mothers. Mothers remain the primary residential parent in joint custody jurisdictions, the child's sole physical custodian in fact if not in name.<sup>311</sup> Joint custody awards have, however, resulted in a significant decrease in court-decreed child support obligations imposed on the nonresidential parent, usually the father.<sup>312</sup>

Further, the "best interests" of any particular child always yield to the constitutional claims of their parents. Some advocates of joint custody, for example, argue that joint custody is the only constitutionally permissible method to balance each parent's constitutional right to the continued care, control, and custody of the children upon divorce.<sup>313</sup> The parental right to care, control, and custody of children certainly underpins the non-custodial parent's visitation rights. Thus, parents who refuse to support their children and even abusive parents retain their constitutional visitation rights, enforceable against the child's will and regardless of the child's "best interests."<sup>314</sup> Upon assertion of a parent's constitutional right to joint custody, any particular child's interests in one parent's sole custody will yield to this constitutional imperative.

---

(the "impact on the court system" of child sexual abuse allegations in custody cases "remains disproportional to their incidence").

One study shows that some small percentage of child abuse allegations raised upon divorce indeed prove unverifiable. Pearson, *supra* note 215, at 294 (in sexual abuse cases, for example, 33% were determined unfounded, and no evidence suggests that sexual abuse allegations arise more frequently upon contested custody cases than in the general population). We do not know how many of these unverified charges arise from reasonable mistake of fact, from hysterical or unworthy motives, or from the well recognized difficulty in proving child abuse cases in all events. Nonetheless, in the majority of cases, these charges were verified. *Id.* Nothing, then, justifies courts' impatience with such charges and hostility toward the women who bring them besides the relative political power of feminists and "fathers' rights" advocates. *See, e.g.*, Tannen, *supra* note 199, at 925-26 (describing dismissive or hostile judicial attitudes to female litigants in Florida). *See also* Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process*, *supra* note 308; Woo, *supra* note 308.

310. For feminist critiques of joint custody, *see, e.g.* Fineman, *Dominant Discourse*, *supra* note 276 (advocating a legal presumption of custody with the child's primary caregiver); Fineman & Opie, *supra* note 297; Dianne Post, *Arguments Against Joint Custody*, 4 BERKELEY WOMAN'S L. J. 316 (1989-90).

311. *See* ELLMAN ET AL., *supra* note 153, at 581; MACOBY & MNOOKIN, *supra* note 302, at 581-83 (reporting higher rates of shared physical custody in California).

312. ELLMAN ET AL., *supra* note 153 at 581-83; *but see* Pearson, *supra* note 215, at 285 (although half of joint physical custody awards included no child support awards in Colorado, this phenomenon was not observed in California).

313. Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985).

314. *See, e.g.*, *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988). In *Morgan*, the custodial parent adduced a preponderance of evidence sufficient to proceed as a civil damages claim on the child's behalf against the non-custodial parent. In the custody proceeding, however, the trial court required evidence beyond a reasonable doubt in order to divest or even order supervision of the non-custodial parent's visitation right. For a description of the custody case, *see, e.g.*, Gearan, *supra* note 309, at A14.

The celebrated case of *Palmore v. Sidoti*<sup>315</sup> offers a gloss on a parent's constitutional rights surmounting a child's "best interests." In that case, the father sued for custody on the grounds that the custodial mother's interracial marriage exposed the child to community racial bias.<sup>316</sup> Experiencing racial hatred, presumably, serves no child's "best interests." Refusing to lend state judicial support to private racial bias, the Supreme Court rejected the father's claim.<sup>317</sup> I do not quarrel with the result in *Palmore v. Sidoti* because I would elevate the collective's constitutional imperative for racial equality over the individual child's claim for freedom from the difficult experiences attendant upon integration.<sup>318</sup> The Supreme Court's decision, however, reflects not only the constitutional imperative, but also a political hierarchy of individual rights. First, the mother's constitutional right to racial intermarriage trumped the child's interest in the merely statutory custody determination of the child's "best interests." Neither the child nor the father on the child's behalf could counter the mother's individual constitutional right with an individual constitutional right in the child to appropriate custody. The child has no constitutional right. Second, the jurisprudence of the case yet permits courts to pick and choose which parental rights they may elevate over the statutory "best interests" mandate. For example, lesbian and gay male parents still lose custody of their children for precisely the reason rejected in *Palmore*, that the child will be exposed to private, community hatred of a minority.<sup>319</sup> Politically, courts can no longer render state support to private racial bias regardless of a child's "best interests," but courts yet lend state approval to private bias against lesbians and gay men in the name of the "best interests of the child." The best interests standard is thus sufficiently malleable to prevail or fall with the political fortunes of the parent. Where parents wield a well-recognized constitutional right, such as the general right to custody or right to freedom from racial discrimination, the statutory "best interests" mandate for the child is doomed.

Finally, the "best interests" standard remains so impossibly indeterminate as to invite the subjective bias of the particular court adjudicating the standard. The Supreme Court became alert to the danger of bias inherent in the "best interests" standard in termination of parental rights cases, yet continues to approve use of the standard in other contexts no less subject to bias.<sup>320</sup> In *Santosky v. Kramer*,<sup>321</sup> the Supreme Court decided that the Constitution requires "clear and convincing evidence" of child neglect or abuse before a state may terminate a parent's rights to the care, control, and custody of a child.<sup>322</sup> The Court recognized that race, class, and cultural bias regularly taints

---

315. 466 U.S. 429 (1984).

316. *Id.* at 430-31.

317. *Id.* at 433. The Court in dicta entertained the possibility that evidence of "actual harm" to the child could substantiate a claim for modification of custody. *Id.* at 432. We can only speculate what experiences might amount to such harm.

318. Indeed, it seems no less possible that this white child's exposure to the community's hatred of his mother and stepfather could uniquely educate the child, engendering an empathy for victims of racial hatred otherwise impossible.

319. See, e.g., *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985); William A. Henry III, *Gay Parents: Under Fire and on the Rise*, TIME, Sept. 20, 1993, at 66 (reporting on Sharon Bottoms' loss of custody of her son to her mother because of lesbian relationship).

320. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court employed the "best interests" standard in a custody dispute between parents, for example.

321. 455 U.S. 745.

322. *Id.* at 747-748.

child abuse and neglect adjudications, disproportionately subjecting poor and minority families to hostile state scrutiny of their private homes.<sup>323</sup> The legal definitions of child abuse and neglect remain vague, necessitating the subjective judgment of child protective service agencies in their application.<sup>324</sup> Moreover, poor and minority families disproportionately rely on public health and service institutions whose agents more frequently suspect and report child abuse than private health personnel.<sup>325</sup> State child protection agencies, therefore, more frequently intervene in poor and minority families' lives than in white, middle class families' lives, although the incidence of child abuse is identical in both groups.<sup>326</sup> To help assure that race, class, and cultural bias do not motivate states' attempts to terminate parents' fundamental rights, the Supreme Court imposed in *Santosky* the higher burden of proof for child neglect allegations.<sup>327</sup>

The "best interests of the child" standard invites the same race, class, and cultural bias upon judicial interpretation as child abuse and neglect statutes. In custody disputes between parents, the "best interests" standard also, of course, invites gender bias.<sup>328</sup> Courts have denied custody to one mother because she earned less money than her "good looking" husband,<sup>329</sup> to another because she became a Jehovah's Witness,<sup>330</sup> and to another because she married interracially.<sup>331</sup> Indeed, the family law bar in every locale quickly ascertains the biases of different judges, knowing that the luck of the draw of judge more than any other factor may determine the outcome of a custody case.

The pervasive bias observed in custody decisions is not so much an indictment of a subjective judiciary as it is the consequence of trying to accomplish the impossible. We can assail the decisions of even the most

323. *Id.* at 763.

324. These statutes beg the questions of how dirty the home can become before it is a neglectful home, and how hard a parent can spank a child before it is abusive punishment.

325. See Roberts, *supra* note 223 at 1433.

326. MNOOKIN & WEISBERG, *supra* note 11 at 306; see also Roberts, *supra* note 223, at 1433-1434 (demonstrating that different races and classes use different controlled substances during pregnancy, but with similar effects on the unborn child; yet prosecutors have charged mostly African-American crack users); HIGGINBOTHAM, *supra* note 33, at 51:

Child abuse and neglect happens to children of all races, in all kinds of communities, in all economic classes. But families of color, and poor families, are more likely to be identified and coerced into accepting interventions by the child welfare system, and more likely to have their children removed and placed in foster care, children of color are more likely to remain there for long periods of time, and to experience multiple placements in different homes before they are returned to their parents.

327. *Santosky*, 455 U.S. at 763-764.

328. For discussion, see, e.g., Fineman, *Dominant Discourse*, *supra* note 276.

329. Burchard v. Garay, 724 P.2d 486 (1986) (reported appellate decision reversing trial court).

330. Pater v. Pater, 588 N.E.2d 794 (1992) (the appellate court overturned the trial court's decision as reflecting only disfavor of the mother's religious choice and not demonstrable concern that religious choice harmed child).

331. Palmore v. Sidoti, 466 U.S. 429 (1984). See also Eric Harrison, *Her Dreams Become a Nightmare*, LOS ANGELES TIMES, Sept. 21, 1993, at A1, A20-21; Christina Cheakalos, *Did Judge Take Her Sons Because of "Last Taboo?" Interracial Couple Loses in Mississippi Courts*, ATLANTA J. AND CONST., April 25, 1993, at A1 (Mississippi trial court changed custody from mother to paternal grandparents because of mother's interracial marriage).

I cite for some of these propositions examples of biased trial court decisions subsequently reversed on appeal. In family law, trial courts' decisions remain most pertinent because of the often observed dissonance between the law developed by appellate courts and the law practiced in trial courts where most litigants cannot afford appeal of even obviously erroneous decisions.

recondite courts if only because we enjoy no national consensus on what parenting and living arrangements do fulfill children's "best interests." In the case of the Jehovah's Witness, for example, the trial court denied the mother custody for fear her religion might prevent the child's receipt of such popularly acclaimed benefits as "proper medical attention," a college education, or participation in "social activities."<sup>332</sup> Even those of us who are not Jehovah's Witnesses, however, can well imagine the potential benefits to the child of simple religious faith, of identifying with a strong religious community, and of gaining a spiritual purpose in life, all available to the child in his mother's custody.<sup>333</sup> Our nation's pluralism and diversity, then—attributes we should cherish and celebrate—will always prevent meaningful, neutral, or "objective" definitions of children's "best interests."<sup>334</sup>

While the Supreme Court has at least recognized the potential for bias to taint decisions in termination of parental rights cases, then, we yet countenance the use of an impossibly vague "best interests" standard to compromise the same parental rights the Supreme Court sought to protect. Moreover, even in termination cases, the high burden of proof imposed on the state yet offers children and parents slim protection from race, class, and cultural bias. Studies show that, after *Santosky*, state child protection agencies have brought fewer termination actions. State agencies still remove children from their parents' homes on abuse or neglect allegations in massive numbers, however. Instead of seeking timely termination of parental rights to free these children for adoption, after *Santosky*, state agencies now maintain more children in foster homes and for longer periods while accumulating "clear and convincing evidence" of abuse or neglect. The removal of children to foster homes for three, five, or seven years pending final adjudication of parental rights<sup>335</sup> hardly protects those rights or prevents race, class, and cultural bias in the removal decisions. Most importantly, the limbo of long-term commitment to foster care cannot serve a child's "best interests," however defined. Instead, the law continues to deny children's own interests as children in sustaining family bonds.

In fact, the law turns a blind eye to the child's plight altogether in both custody disputes and in abuse and neglect cases. We never see the child in such cases because the law directs our attention instead to parental rights and to the

332. *Pater v. Pater*, 588 N.E.2d 794, 799 (1992).

333. Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Both the *Yoder* and *Pater* courts grounded their decisions in the parents' First Amendment and parental liberties, (*Yoder*, 406 U.S. at 213-215; *Pater*, 588 N.E.2d at 798), while I would urge taking the child's perspective. Nonetheless, neither the father in *Pater* nor the state in *Yoder* could demonstrate to the courts' satisfaction that the religious practices at issue would harm the children, and the *Yoder* Court considered potential benefits, albeit secular, of an Amish upbringing to the children. *Yoder*, 406 U.S. at 224. Professor David Richards and Professor Charles Tremper have both argued that a focus on the *Yoder* children's constitutional rights instead of on their parent's rights would have compelled the children's enrollment in public school. See Richards, *supra* note 13 at 50; Tremper, *supra* note 13, at 1340. Their conclusion, however, merely reflects their own subjective judgment that a public school education designed to foster independent, critical thinking is more important to all children than security in and identity with a religious community.

334. I join others in thus criticizing the "best interests" standard. See, e.g., Bartlett, *Re-Expressing Parenthood*, *supra* note 50; Elster, *supra* note 271; Elizabeth S. Scott, *Pluralism Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

335. See ELLMAN ET AL., *supra* note 153 at 1166; CHILDREN'S DEFENSE FUND, *supra* note 20, at xiv-xvii, 18, 23, 24 for lengthy durations children spend in foster care.

amorphous "best interests of the child." In the process, we vindicate an adult's constitutional right, such as religious freedom, or an adult political agenda, such as joint custody. We fail to advance children's own interests, however, because our law adamantly denies the existence of a child's perspective.

### *B. The Substitution of the State's Interests for the Child's*

Historically in family law, we have denied the existence of children's perspectives by denying children access to the courts in custody disputes. In a private custody dispute, the parents appear and the state, through the court, asserts the child's "best interests." In abuse and neglect cases, the parents appear and the state also appears to assert its own interests in the child's welfare. In neither type of custody case does the child individually appear. The law justifies the exclusion of children with one of two rationales. The law either denies that the child bears any cognizable interest to assert or, when it does recognize a child's interest, the law assumes that the child's interest is coterminous with a parent's or with the state's. Both rationales function to deprive courts of children's perspectives on their own custody, directing courts' attention instead to the interests of powerful adults.

We should consider what children's perspectives and interests might be. While a line of Supreme Court precedents helps to define individual parental interests and rights—from their children's education<sup>336</sup> to religion<sup>337</sup> to custody<sup>338</sup>—the cases fail to inform us much about a *child's* interests.<sup>339</sup> We understand the parental right to custody of children as a natural, human right, predating our Constitution, and originating in the private bonds of familial relationships.<sup>340</sup> As recently as 1989, however, the Supreme Court equivocated whether children bear a cognizable interest in familial relationships parallel with their parents'.

In *Michael H. v. Gerald D.*,<sup>341</sup> the child Victoria, whose paternity was disputed, appeared as a party through her guardian ad litem. Victoria argued that a California statute preventing her putative biological father from establishing paternity unconstitutionally interfered with her right to sustain a familial relationship with him.<sup>342</sup> Writing for a plurality, Justice Scalia declared, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parents, in maintaining her familial relationships."<sup>343</sup> Assuming for its purposes that Victoria had such an interest, the Supreme Court still denied her claim.<sup>344</sup> Nor did justices dissenting from or concurring in the plurality opinion recognize or even discuss Victoria's

---

336. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

337. See *Yoder*, 406 U.S. 205 (1972).

338. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

339. In *Rivera v. Minnich*, 483 U.S. 574 (1987), for example, the Court described only a child's property interest in a paternity proceeding.

340. See, e.g., *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843-47 (1977). The Supreme Court has located this "natural right" in the Constitution's privacy guarantees. *Id.*

341. 491 U.S. 110 (1989).

342. *Id.* at 116.

343. *Id.* at 130.

344. *Id.*

constitutional interest in her familial relationships.<sup>345</sup> Precedent provides us little guidance, then, in defining a child's interests. Instead, the cases form a historical tradition of denying that children bear any cognizable interests in their familial relationships.

If we think about children as persons, however, we cannot fail to recognize that children have profound interests in their own care, support, control, custody, and familial relationships. No modern court or commentator would now deny these interests in children, yet we struggle with how legally to account for them. As a starting point in that struggle, family law refuses to accord children's interests constitutional equal protection and due process. Hence, children do not themselves appear as parties in custody actions. Instead, our law resorts to flawed proxies for children's interests and assumes that either a parent's or the state's interest is coterminous with the child's. Parents' interests often diverge from the child's, however, and the state's interests—as the interests of the adult collective—can never coincide with the child's.

This failure of the law to recognize children's own interests in their custody pervades all the cases, whether they arise as abuse or neglect actions, as divorce actions, or as contested adoptions. In the balance of this analysis of custody law, I examine Supreme Court precedents in abuse and neglect cases and the controversial *DeBoer v. Schmidt* adoption case to demonstrate our custody law's systematic exclusion of real children's experiences and perspectives. The analysis compels our rethinking, I argue, of how we structure custody conflicts and attend to children's interests in any custody dispute, regardless of the context.

### *1. Abuse and Neglect Custody Cases*

In *Santosky v. Kramer*, New York's child services agency had removed three children from their parents to foster care, and then sought to terminate the parents' rights and place the children in adoptive homes.<sup>346</sup> The agency had proved by a preponderance of the evidence that the parents neglected these children.<sup>347</sup> The state's interest in preventing the neglect of its children established the state's compelling interest for infringing the parents' constitutional rights to custody.<sup>348</sup> The Supreme Court held, however, that the preponderance of evidence burden of proof insufficiently protected the parents against biased or unwarranted termination of their fundamental rights.<sup>349</sup> The Court weighed the risk of bias or error and the constitutional nature of parental rights on one side, and the state's interest in child protection on the other.<sup>350</sup> In such contests between parents and the state, the Court concluded, the state should bear the risk of error.<sup>351</sup> The Court held that New York must prove

345. *Id.* at 132–136 (Stevens, J., concurring) (Justice Stevens instead wrote of California's statutory “best interests” standard and its relationship to the challenged paternity statute); *id.* at 136–57 (Brennan, J., dissenting); *id.* at 157–163 (White, J., dissenting).

346. 455 U.S. 745 (1982).

347. *Id.* at 751–52.

348. *Id.* at 766.

349. *Id.* at 762–64.

350. *Id.* at 758–68.

351. *Id.* at 768. In fact, of course, children always bear the risks.

, neglect allegations by clear and convincing evidence before terminating parental rights.<sup>352</sup>

Aware that the children bore interests in their own custody, the Court reasoned that either the parents' or the state's interests must coincide with the children's.<sup>353</sup> If the neglect charges are unfounded or if state assistance to the parents can ameliorate parental neglect, then the parents' interest in preserving family integrity also represents the children's interests.<sup>354</sup> Thus, vindicated or educable parents resisting termination of their rights also advocate for their children, the Court reasoned, because it is in the children's "best interests" to return to their families of origin.<sup>355</sup> If, on the other hand, the state proves by clear and convincing evidence that the parents remain neglectful and are unfit, then the children's interests coincide with the state's.<sup>356</sup> The state's interests, as defined by the Court, are in "promoting the welfare of children" and a "fiscal" interest in minimizing the associated costs.<sup>357</sup>

The Court's identification of the children's interests with either their parents' or the state's reveals both logical reasoning and well-justified concern that race, class, or cultural bias can wrongfully motivate a state agency's termination petition.<sup>358</sup> From the majority's opinion, however, we learn virtually nothing about the children themselves. The Court presumed to characterize and weigh these children's interests, then, without ever looking at their circumstances or hearing from them.

From Justice Rehnquist's dissent, we learn a few details about these children.<sup>359</sup> The state removed Tina from her parents' home when she was two after she suffered a fractured femur, bruises over most of her body, and abrasions on her leg.<sup>360</sup> At the time of the Supreme Court's decision, Tina was about eleven years old and had spent about nine years in foster care.<sup>361</sup> The state removed John when he was less than a year old and a year after Tina's removal.<sup>362</sup> John was malnourished, bruised on his eye and forehead, cut and blistered on his foot, and evidently pin-pricked on his back.<sup>363</sup> About nine years of age when the case reached the Supreme Court, John had spent over eight years in foster care.<sup>364</sup> Citing the parents' treatment of Tina and John, the state removed Jed when he was but three days old.<sup>365</sup> By the time of the Supreme Court case, Jed was about eight years old and had spent his entire life in foster care.<sup>366</sup>

---

352. *Id.* at 769.

353. *Id.* at 765 ("[T]he parents and the child share an interest in avoiding erroneous termination.") In defining the child's interest, the Court noted only the child's claims to support and inheritance from the parents. *Id.* at 760 n.11.

354. *Id.* at 759-60.

355. *Id.* at 760-61.

356. *Id.* at 759-60.

357. *Id.* at 766.

358. *Id.* at 673.

359. *Id.* at 781 (Rehnquist, J., dissenting).

360. *Id.* at 781 n.10.

361. *Id.* at 751.

362. *Id.* at 781 n.10.

363. *Id.*

364. *Id.* at 751.

365. *Id.* at 781 n.10.

366. *Id.* at 751.



We do not know what these children's foster care experiences were, whether stable and loving or, as "frequently" occurs, if their foster care was more dangerous than their parents' home.<sup>367</sup> The state sought termination of their parents' rights in order to free these children for adoption, but we do not know whether adoption of these older children was a realistic prospect or whether they faced the balance of their childhoods in different foster homes and state institutions.<sup>368</sup> We do not know what kind of relationship these children had with their parents, if any, except the parents' claim that the state attempted to prevent visitation.<sup>369</sup> All we really know is that, after the *Santosky* decision, these children lost the opportunity for a permanent home with either their parents or with an adoptive family. The state's inability to prove the parents' neglect by clear and convincing evidence did not restore these children to their parents' custody, but instead consigned them to continued foster or institutional care.<sup>370</sup> On this record, then, we cannot possibly define Tina's, John's, and Jed's interests. We remain ignorant of their experiences, their home life, their hopes, their relationships with parental figures and friends.

We know enough, however, to conclude that Tina's, John's, and Jed's interests do not coincide with either their parents' or the state's. Their parents' interests in sustaining parental rights, we know, will not restore these children to their parents' home and secure for them family integrity. Their parents successfully resisted termination of their rights, but could not overcome the state's evidence for maintaining the children in foster care. Nor will the state's interest in minimizing costs and in terminating their parents' rights necessarily secure for these children permanent placements and protection from further neglect or abuse. By treating the case as a conflict only between the parents and the state, between parental rights and governmental power, then, the Supreme Court also assured that no court would consider the actual and particular interests of these individual children. The parental and state interests subsumed the children's, but failed to represent them. Indeed, our law's focus on parental and state interests obliterates the child's and casts the child not only as a nonparty, but also as a nonentity.

Likewise in *Smith v. OFFER*,<sup>371</sup> the Court obliterated the children's interests, subsuming their interests under the state's and foster parents'. In *Smith*, a class of foster parents and foster children challenged state procedures for removing children from their foster homes for placement with their biological parents or with another foster family. The foster families alleged that the procedures infringed their constitutional interest in familial relationships without adequate due process of law.<sup>372</sup> The district court agreed, requiring New York to recognize the foster parents, biological parents, and the children themselves as parties to removal proceedings, and to permit the children as well as foster parents the opportunity to initiate hearings upon a state removal mandate.<sup>373</sup> The Supreme Court reversed, holding that New York's procedures

---

367. *Id.* at 765 n.15.

368. *Id.* (noting the several years' duration children spend in foster care or state institutions prior to adoption).

369. *Id.* at 763 n.13.

370. *Id.* at 765-66 n.16 (when the state's efforts to terminate parental rights fail, a court may extend foster care placement).

371. 431 U.S. 816 (1977).

372. *Id.* at 823.

373. *Id.* at 820.

were adequate.<sup>374</sup> In particular, the Supreme Court denied that foster children required standing either to initiate a removal hearing or to appear, reasoning that the foster parents' or the state's interests must coincide with the child's.<sup>375</sup>

As in *Santosky*, we know little about the *Smith* children. Footnotes to the opinion reveal that five class representatives had resided with their foster families for at least seven years before the state sought to remove them.<sup>376</sup> We know enough about these children, though, to conclude that neither their foster parents nor the state could represent their interests in sustaining familial relationships with their foster parents.

In considering the foster parents' claims, the Supreme Court recognized that the bonds of affection and nurture arising in foster families are akin to the bonds of a biological family.<sup>377</sup> The Constitution protects not only the genetic ties of biological families, but also the familial relationships developed among genetic strangers during the nurturing contact of daily life.<sup>378</sup> Biological parents' constitutional rights and relationships derive, however, from private human decisions to form families, the Court reasoned, while foster parents' rights and relationships derive from their contract with the state to provide foster care.<sup>379</sup> Moreover, state policy discourages foster parents from establishing strong bonds with foster children which could interfere with the eventual reunification of the genetic family.<sup>380</sup> The foster parents' interests in familial relationships with foster children, therefore, do not receive the same constitutional protection as the natural, human rights of biological parents.<sup>381</sup> Nor could foster parents' contractually derived rights divest biological parents of their natural, human rights.<sup>382</sup> The Supreme Court concluded, therefore, that New York's removal procedures provided sufficient protection for foster parents' familial relationships with foster children, even if those relationships enjoy some constitutional protection.<sup>383</sup>

The state's role in forming foster families only arguably attenuates foster parents' claims to constitutional protection for their familial relationships. I would join others in arguing, instead, that demonstrated love and sacrifice, obligation and interdependence should serve as legal touchstones for identifying constitutionally-protected family relations.<sup>384</sup> That such relationships originate in state-sanctioned arrangements such as foster care, or adoption, or through step-parenting or other variations on traditional family structures should be irrelevant to the central inquiry of whether people have, in fact, established

---

374. *Id.* at 828.

375. *Id.*

376. *Id.*

377. *Id.* at 829.

378. *Id.* at 832.

379. *Id.* at 830.

380. *Id.* at 854; *see also id.* at 856 (Stewart, J., concurring).

381. *Id.* at 817.

382. *Id.* at 856.

383. *Id.*

384. For discussions of such legal touchstones, *see, e.g.*, Bartlett, *Re-Expressing Parenthood*, *supra* note 50; Martha Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459 (1990); Woodhouse, *Hatching the Egg*, *supra* note 50.

family relationships. People's demonstrated commitment to family relationships in non-genetic family structures surely manifests as much private, individual decision making as procreation. Such committed non-genetic family relationships, therefore, manifest much more than the invocation of state contracts or statutes. They manifest an exercise of fundamental human rights. The law ought to respect such familial commitments and choices at least as much as the law respects procreative choices.

Even if we agree, however, that the foster parent's claim depends upon the contract with the state, we must recognize that the foster child's claim does not. The foster children are not parties either to the state's removal of them from their biological parents or to the state's placement of them with foster families. The foster child's plea for protection of the relationship with foster parents thus arises only from the bonds of love and dependence established in daily life with the foster family. So long as foster parents' claims remain clouded by their contractual obligations, therefore, foster parents cannot adequately represent foster children's interests. Instead, foster children require the opportunity to challenge their removal from foster homes themselves, founding their claims on the same fundamental human right to form family relationships that their genetic parents can assert. Moreover, foster children require standing to present evidence of the strength, the constitutional import, of their bonds with foster parents.<sup>385</sup>

If the foster parents' attenuated claims inadequately represent the child's, the state's interests bear even less similarity to the child's. Upon removing a child from the biological parents' custody, the state bears the affirmative duty to reunite the family as quickly as possible.<sup>386</sup> Indeed, under federal law, the state cannot maintain a child in foster care beyond a year without court approval,<sup>387</sup> and the state must facilitate the genetic parent-child relationship even during separation.<sup>388</sup> These statutory imperatives and the humane public policy to rehabilitate and reunify troubled families prompts the state to discourage the formation of lasting family bonds between foster parents and children.<sup>389</sup> Despite these imperatives and policies, however, children remain in

---

385. In *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Ct. App. 1993), the child won just that opportunity at trial, successfully terminating his biological parents' rights and securing his adoption by his foster family. The appellate court reversed the trial court's grant of standing to the child, however.

386. Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 671, 672 (1986).

387. That is, federal funding of foster care is contingent upon the state's assuring judicial review and supervision of foster care placements continuing beyond one year. 42 U.S.C. § 672 (1986).

388. 42 U.S.C. § 671; see also 95 C.F.R. § 1357.15(e)(2) (1986) (describing services states can offer to hasten reunification, including shelter, financial aid, and counseling).

389. I am not convinced that a child's formation of family bonds with foster parents is indeed inimical to the sustenance of the child's bonds with biological parents. We do not assume that a child's bonds with extended family members such as grandparents threaten the parents' relationship with the child. I suspect, therefore, that the concerns manifested in policies against the formation of familial bonds in foster families reflect more our legal and cultural values that only one set of parents may claim the exclusive possession and love of a child. Cf. Woodhouse, *Who Owns the Child?*, *supra* note 160 (describing children as property under the law, with parents as exclusive owners); Polikoff, *supra* note 384 (lesbian mothers and children); Minow, *Redefining Families*, *supra* note 384; Woodhouse, *Hatching the Egg*, *supra* note 50; Fineman, *Intimacy Outside of the Natural Family*, *supra* note 384.

foster care for long periods of their childhood.<sup>390</sup> The *Santosky* and *Smith* children had all lived with foster families for at least seven years, the majority of their short lives. During their foster care, the *Smith* children did in fact establish lasting family bonds with their foster parents, regardless of state policies. The interest of these children in sustaining familial relationships already established with foster parents irreconcilably conflicts with the state's interest in preventing such relationships. The state's advocate at a removal hearing, therefore, cannot represent the child and the child's own interests.<sup>391</sup>

Undeniably, foster children also bear a vital interest in sustaining their relationships with genetic parents and in reunification with the genetic family. Foster children share this interest with their genetic parents and are as vulnerable as their genetic parents to a state's unwarranted destruction of these natural family bonds. Once the state has countenanced the destruction of genetic family bonds, however, it cannot achieve justice by then severing secure familial relationships established in foster families. The genetic parent who loses the love and dependence of a child because of the state's failure to reunify the family expeditiously bears a loss for which the state should pay. State liability to genetic parents for state failures at reunification cannot compensate the parents' tragic loss of a child, but it can help to induce state agencies to reunify families as quickly as possible. The state does not, however, rectify the genetic parent's loss by imposing the loss of secure foster family relationships on the child.<sup>392</sup> The law now pretends to rectify the parent's loss only by denying legal recognition to the child's suffering.

Our law thus permits the child to suffer for the state's failures. When the state fails to provide adequate services and programs to reunify the biological family, when the state complacently consigns thousands of children to foster care for durations of several years, the state has failed its affirmative obligations to parents and children alike. Federal spending on foster care services has skyrocketed in recent decades, reflecting the growing numbers of children placed in foster care limbo and for longer periods.<sup>393</sup> Meanwhile, state spending on services designed to aid troubled families, to preserve these families intact or to restore children from foster care quickly, has remained almost level and always inadequate.<sup>394</sup> As a consequence of these political funding decisions, children become alienated from their genetic parents and bonded to their foster families. The remedy, of course, is not for the state further to disrupt children's familial relationships with foster parents, established over long durations, but to appropriate the funds necessary to prevent long-term commitment to foster care in the first place. So long as the state's political and financial interests produce long-term foster care relationships, however, the state cannot represent the child's interest at a removal hearing.

---

390. CHILDREN'S DEFENSE FUND, *supra* note 20, at xiv-xvii, 18, 23, 24.

391. Cf. Charles B. Schudson, *Foreword: Symposium on the Rights of Children*, 7 NOTRE DAME J.L. ETHICS AND PUB. POL'Y 365, 365-67 (1993) (Judge Schudson writes of his experience as a family court judge and his conclusion that state agents cannot represent the child and the child's "best interests.").

392. We should consider also the possibility of the child sustaining relationships with *both* sets of parents.

393. CHILDREN'S DEFENSE FUND, *supra* note 20, at 64, 70.

394. *Id.*

## 2. *Private Custody Disputes*

In both *Santosky* and *Smith*, the Supreme Court concludes that either parents or the state, one or the other, must represent the child's interest. The same conclusion underpins all child custody disputes, though the state may not appear as a named party. In custody disputes between parents, the court itself serves as the state guardian of the child's "best interests." The court may therefore appoint its own psychologists, for example, and guardians ad litem to adduce evidence supplementing or rebutting the evidence of the only named parties, the parents.<sup>395</sup> Even in custody disputes ostensibly involving only parents, then, the state's interest in the child's "best interests" receives a hearing, and the law assumes that the state's or a parent's interests must coincide with child's. All custody cases, therefore, include parental and state interests, but exclude children themselves as parties. Likewise, in all custody cases, the law fails to recognize that the child's interests may well diverge from both parents' and state interests. However much parents may love and care for their children, for example, their own quite valid interests in distancing themselves from former spouses may conflict with a child's interests in sustaining relationships with both parents or other loved ones. Moreover, the state, compromised by its own fiscal and other political imperatives, does not serve as a proxy for any real child's interests in a custody dispute. The law of child custody, whatever the nature of the case, thus fails to secure a hearing of the perspectives and interests of the children whose custody is disputed.

In an adoption case recently commanding national attention, *DeBoer v. Schmidt*,<sup>396</sup> no court ever entertained or heard the child's perspective. No court ever recognized that the child's interests indeed diverged from her genetic parents', from her putative adoptive parents', and from the state's. The case illustrates the consequences of subsuming the child's interests under either parental or state proxy. The nation watched in horror the televised removal of a screaming two-year-old child from the only people she knew as her parents and family. While the legal community threaded its way through the complicated jurisdictional issues of the case,<sup>397</sup> the public cried out in amazement, "What about the rights of the *child*?"<sup>398</sup>

The *DeBoer* case will justly receive political and scholarly analysis aimed at reforming adoption law to prevent the recurrence of such heartbreaking cases.<sup>399</sup> I do not undertake analysis of the *DeBoer* case here as illustrative of

395. For discussion of these procedural mechanisms, see Guggenheim, *supra* note 36.

396. *DeBoer v. Schmidt* (*In re Clausen*), 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1 (1993).

397. The bulk of the seven court opinions rendered in this case focus on the jurisdictional issues arising from interstate custody disputes under the Uniform Child Custody Jurisdiction Act, adopted in both Iowa and Michigan.

398. See, e.g., Leslie Bennetts, *Why The Court Was Wrong*, PARENTS, Sept. 1993 at 197-98; Bill Hewitt, *Losing Jessi*, PEOPLE, July 19, 1993 at 49-54; Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 48-49.

399. Others have already commented, for example, on the need for lengthening statutory waiting periods between a baby's birth and the parents' surrender of the child for adoption to help guard against hasty and regretted surrenders; the need for assuring biological fathers adequate notice of their children's birth and opportunities to challenge the birth mother's decision to surrender the child for adoption; and the need for expedited judicial disposition of contested adoptions so that children do not become bonded to adoptive parents who finally cannot retain custody. For a discussion, see Nancy E. Dowd, *A Feminist Analysis of Adoption* 107 HARV.

the need for adoption law reform, however. Instead, the *DeBoer* litigation illustrates, unusually in one case, both a conflict between state power and parents' constitutional rights, and a custody conflict between private adults determined under the "best interests of the child" standard. Litigated across such a broad spectrum of child custody law, the *DeBoer* case illustrates the failure of all child custody law to recognize legally the perspectives and experiences of the child.

### C. The Case of Jessica DeBoer

The facts underlying the court battles of *DeBoer v. Schmidt* are ingrained in the national consciousness through wide media coverage. In 1991, Cara Clausen gave birth to a baby girl in Iowa and knowingly named the wrong man as the father.<sup>400</sup> An attorney for Jan and Roberta DeBoer secured Cara Clausen's consent and the consent of the man she had named to the DeBoers' adoption of the baby girl.<sup>401</sup> The DeBoers, a childless married couple, happily took the baby home to Michigan.<sup>402</sup> Three weeks later, Cara Clausen had a change of heart and sought to revoke her consent.<sup>403</sup> She also confirmed to Daniel Schmidt, the child's genetic father and a coworker of hers, that the girl was his issue.<sup>404</sup> Upon this legal notice,<sup>405</sup> Daniel Schmidt intervened to contest the adoption prior to its finalization in Iowa court.<sup>406</sup> Advised that the birth mother's revocation claim was tenuous, but that the birth father's was strong, the DeBoers prepared to surrender the baby girl.<sup>407</sup>

The DeBoers soon learned, however, that Daniel Schmidt had fathered two other children, neither of whom he supported and only one of whom he even sporadically visited.<sup>408</sup> The DeBoers resolved to fight the genetic parents' custody claims in Iowa court, alleging that Clausen's consent was irrevocable and that Schmidt was an unfit parent for the baby girl.<sup>409</sup> The DeBoers lost at trial, at intermediate appeal, and finally before the Iowa Supreme Court.<sup>410</sup> While Schmidt was no exemplary parent, these courts concluded, he was statutorily fit.<sup>411</sup> Schmidt was therefore constitutionally entitled to the custody

---

L. REV. 913 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993)).

400. *DeBoer v. Schmidt*, 502 N.W.2d 649, 652 (Mich. 1993).

401. *Id.* at 651.

402. Lucinda Franks, *Annals of Law: The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56, 57. Ms. Franks provides a comprehensive profile of the case.

403. *DeBoer*, 502 N.W.2d at 652.

404. Franks, *supra* note 402, at 57.

405. As Cara Clausen's coworker and former lover, Daniel Schmidt likely had actual notice that the child Clausen carried was his issue. Schmidt's legal notice belatedly occurred when Clausen informed him he was the father.

406. Franks, *supra* note 402, at 64.

407. *Id.* at 65.

408. *Id.* In addition, the DeBoers learned that Schmidt had assaulted his ex-wife, that Schmidt had reason to believe during Clausen's pregnancy that the child was his issue, and that allegedly perjured testimony supported Clausen's revocation claim. *Id.* at 62.

409. *Id.* at 66. The DeBoers alleged that Schmidt was unfit because he had abandoned two other children. While willing to surrender the child to Cara Clausen at that point, the DeBoers learned that Clausen could not assume custody because her rights were terminated. *Id.* Pending adjudication of Daniel Schmidt's fitness, then, the DeBoers faced the alternatives of keeping the child in their custody or placing her in foster care.

410. *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992).

411. *Id.* at 245-46.

of his genetic daughter.<sup>412</sup> Because Schmidt had by then married Clausen, the Iowa Supreme Court would not deny her custody either.<sup>413</sup> By the time the Iowa Supreme Court dismissed the DeBoers' claims and ordered the child into the custody of her genetic parents, Jessica (as the DeBoers had named the child) was over a year old and had spent all of her life but her first days with the DeBoers in their Michigan home.<sup>414</sup>

Child psychologists then consulted by the DeBoers warned that to remove Jessica from their home would permanently scar the child's psyche.<sup>415</sup> Invoking the Uniform Child Custody Jurisdiction Act,<sup>416</sup> the DeBoers sought a custody hearing in Michigan to contest the Iowa order and to determine Jessica's "best interests."<sup>417</sup> The Michigan trial court held that the DeBoers as custodians/putative adoptive parents had standing to contest the Iowa order and that Michigan law entitled the child to a "best interests" custody hearing.<sup>418</sup> At the hearing, the genetic parents (then married and both known as Schmidt), the DeBoers, and a guardian ad litem appointed for Jessica presented evidence.<sup>419</sup> The Michigan court found as a matter of fact that the DeBoers were loving, giving, responsible parents and that Jessica had bonded deeply with them.<sup>420</sup> Further, the court found that, while Daniel Schmidt was perhaps statutorily fit, he was not a responsible parent, as his conduct toward his other children revealed.<sup>421</sup> Finally, the court found that to remove Jessica from the DeBoer home then threatened the child with lasting psychological damage.<sup>422</sup> To sever Jessica's child-parent relationship with the only parents she had ever known would impose a profound loss upon a child then two years old and unable to understand any legal rationale for her loss.<sup>423</sup> The Michigan trial court concluded, therefore, that termination of the Schmidts' parental rights and adoption by the DeBoers was in Jessica's "best interests."<sup>424</sup>

The Schmidts appealed. The Michigan appellate court held that the trial court lacked jurisdiction to hold a "best interests" hearing and that the DeBoers must obey the Iowa court order to give up Jessica's custody to the Schmidts.<sup>425</sup> Attorneys directed by the guardian ad litem appointed for Jessica by the trial court then filed an independent cause of action on the child's behalf in Michigan state court.<sup>426</sup> Jessica's complaint alleged that Michigan law entitled the child herself to a "best interests" custody determination.<sup>427</sup> Further, the complaint alleged that denial of a "best interests" hearing violated Jessica's constitutional

---

412. *Id.*

413. *Id.* at 246-47.

414. Franks, *supra* note 402, at 67-68.

415. Brief for Appellee (Jessica DeBoer), at app. 86b-90b, *DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich. 1993) (No. 96441, 96531-2) (affidavits of psychologists consulted).

416. See MICH. COMP. LAWS § 600.651 (1993); CODE OF IOWA § 598A.1 (1993).

417. *DeBoer*, 502 N.W.2d at 653.

418. *Schmidt v. DeBoer*, No. 92-44098-DR, *DeBoer v. Schmidt*, No. 92-44124-DC, slip op. at 7 (D. Mich., Feb. 12, 1993).

419. *Id.*

420. *Id.* at 9, 11.

421. *Id.* at 10, 12.

422. *Id.* at 16-18.

423. *Id.*

424. *Id.* at 18.

425. *DeBoer v. Schmidt (In re Clausen)*, 501 N.W.2d 193 (Mich. Ct. App. 1993).

426. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649, 653 (Mich. 1993).

427. *Id.* at 665.

equal protection and due process rights.<sup>428</sup> Without trial on the merits of the child's complaint, the Michigan Supreme Court joined Jessica's cause of action with the DeBoers' appeal of the intermediate court's decision.<sup>429</sup> The Michigan Supreme Court then denied the DeBoers' appeal and dismissed the child's independent cause of action in the same opinion.<sup>430</sup> Jessica's complaint, the court said, was merely an attempt to circumvent the well-settled law governing the DeBoers' dispute with the Schmidts.<sup>431</sup>

In ruling against the DeBoers, the Michigan Supreme Court denied that these putative adoptive parents had standing under Michigan law to compel a "best interests" custody determination.<sup>432</sup> The legal crux of the case, however, was the propriety of a judicial "best interests" determination in a case pitting fit genetic parents against genetic strangers. Because the Schmidts were adjudicated statutorily fit parents, any court order purporting to divest them of their fundamental rights to the care, control, and custody of Jessica was simply unconstitutional.<sup>433</sup> To permit a court to divest fit genetic parents of their custody rights because of its determination that some other set of parents would better serve the child's "best interests" would be a dangerous slippery slope leading to the destruction of parents' constitutional rights.<sup>434</sup>

Attorneys for the DeBoers and Jessica petitioned the U.S. Supreme Court for emergency stays of the Michigan Supreme Court order to return Jessica to the Schmidts. Justice Stevens denied the motions.<sup>435</sup> Upon motions for reconsideration, the full U.S. Supreme Court, Justices Blackmun and O'Connor dissenting, denied the motions.<sup>436</sup> Having lost their motions for emergency stay before the U.S. Supreme Court, the DeBoers and Jessica's guardian ad litem decided against appeal of the Michigan Supreme Court's decision itself. The DeBoers prepared Jessica for her removal as best they could.<sup>437</sup> On August 2, 1993, the DeBoer's attorney carried the crying Jessica from her home, transported her to a police station, and handed the child to the Schmidts' attorney.<sup>438</sup> The Schmidts' attorney later reported a safe trip to Iowa with Jessica and the subsequent seclusion of the Schmidts with the child.<sup>439</sup>

### *1. The Schmidts' Constitutional Challenge of State Power*

In their analysis of the case, the Michigan and U.S. supreme courts cast the conflict as an assault on the constitutional rights of genetic parents by the Michigan trial court's assumption of jurisdiction, an exercise of state power, to determine the child's "best interests." The DeBoers themselves, as genetic strangers and losers in their bid to adopt Jessica under Iowa state law, did not

---

428. *Id.*

429. *Id.* at 653-54.

430. *Id.* at 652.

431. *Id.* at 652 n.44.

432. *Id.* at 652, 664.

433. *Id.* at 652, 666-67.

434. *Id.* at 666-67.

435. *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1 (1993).

436. *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 11 (1993).

437. *See Tears, Then Sleep for the Little Girl in the Middle, Jessica*, CHI. TRIB., Aug. 3, 1993, at 1N.

438. *See Desda Moss, Child's Painful Parting: Jessica Handed to Birth Parents*, USA TODAY, Aug. 3, 1993, at 3A.

439. *Id.*



figure as interested parties for the state and federal supreme courts.<sup>440</sup> Indeed, their position appeared even weaker than the *Smith* foster parents who could premise their claims on at least some legal relationship with the children. For the appellate courts, then, the conflict arose from the Schmidts' assertion of their fundamental constitutional rights to custody against the state's power to interfere with those rights. Absent a showing of the Schmidts' unfitness or some other compelling state interest, the Michigan trial court lacked jurisdictional power to interfere with the Schmidts' constitutional rights.<sup>441</sup>

Analytically, the Schmidts' conflict with state power seeking to divest them of their parental rights certainly structured the case. Whether through invocation of state adoption statutes, the Uniform Child Custody Jurisdiction Act ("UCCJA"), or the "best interests" custody rule, the Michigan trial court wielded the authority of the state in terminating the Schmidts' constitutional rights to Jessica's custody. Both the DeBoers and the child herself in their different pleadings resorted to these statutory bases for their claims. They argued for their standing and for Michigan jurisdiction by asserting that state legislatures in adoption statutes and in the UCCJA had conferred state power on the court to terminate the Schmidts' rights.<sup>442</sup> Predictably, in the clash between statutory authority and constitutional claims, between state power and individual rights, the DeBoers' and Jessica's claims failed.

Viewed from the perspective of state power infringing individual parental rights, the final judicial decision in the *DeBoer* case is the only possible correct result. We can applaud the judiciary's vigilant safeguarding of parental rights against the potentially biased and always political state interest in securing a child's "best interests." The group motivating the Schmidts in their pitched battle, Concerned United Birthparents, rail with justification against any legal rule, including the "child's best interests," which in operation disproportionately divests poor genetic parents of their children's custody in favor of placement in more affluent or culturally acceptable homes.<sup>443</sup> Had the courts divested the Schmidts of their parental rights, however justly in popular opinion, no principle appeared to protect all other fit genetic parents against state removal of their children in the children's supposed "best interests," to be raised by parents with higher incomes or different religions, of different race or sexual-orientation.<sup>444</sup> In denying the DeBoers' and Jessica's claims for a

---

440. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649, 651-52, 666-67 (Mich. 1993); *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1, 2 (1993).

441. *DeBoer*, 502 N.W.2d at 651-52, 666-67; *DeBoer*, 114 S. Ct. at 1-2.

442. *DeBoer*, 502 N.W.2d at 651-52, 666-67; *DeBoer*, 114 S. Ct. at 1-2.

443. See Franks, *supra* note 402, at 57. Along with such trenchant criticism of the American adoption system, Concerned United Birthparents also argue that biological parents are always superior to adoptive parents because of the birthparents' genetic similarities to their children. *Id.* at 59. This argument, grounded in genetic determinism, enjoys little empirical support, see, e.g., John Horgan, *Trends in Behavioral Genetics: Eugenics Revisited*, SCI. AM., June, 1993, at 123, and deserves legal and moral disapprobation. See, e.g., Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313 (1992) (showing how theories of genetic determinism have been used to undermine crucial justice principles of individual responsibility and to repress disfavored minorities).

444. In Gregory K.'s case, for example, the appellate court remanded the case for rehearing of the adoption proceeding, holding that the trial court erred in hearing both the parental rights termination case and the adoption case together. *Kingsley v. Kingsley*, 623 So. 2d 780, 783 (Fla. Dist. Ct. App. 1993). The appellate court agreed with Rachel Kingley's concern that unfavorable comparisons of an impoverished genetic parent's home with the

"best interests" determination, the state and federal courts seemed steadfastly to secure the constitutional protection of poor and minority genetic parents against intrusive and biased majority public opinion.<sup>445</sup> Indeed, the Constitution should protect parents against majority views embodied in legislation purporting to divest parents of their rights on the pretext of the child's "best interests."

In fact, however, the *DeBoer* case was not about state power infringing on individual rights. It was a case about love and heartbreak, families and loss. In their focus upon the Schmidts' constitutional rights and jurisdiction, the appellate courts steeled themselves against the human anguish displayed everywhere about them. Repeatedly on television we saw Cara Schmidt dissolve into tears of remorse and loss as yet again her preparations for Jessica's "homecoming" met with disappointment. We saw Daniel Schmidt in Michigan court stiffly facing a barrage of painful, accusatory testimony about his failures as a husband and father.<sup>446</sup> We saw Jan and Roberta DeBoer fiercely fighting to protect their child and preserve their family, Roberta DeBoer collapsing in grief as the appellate court denied her identity as Jessica's mother.<sup>447</sup> We saw Jessica herself, happily playing in her backyard, chasing the DeBoer dog, delighting in Roberta DeBoer's songs.<sup>448</sup> We saw Jessica learning, exploring and adventuring, secure in the closeness of her mother's arms, secure in her self, her place, her parents, family, and home.<sup>449</sup> At the end, we saw Jessica pushing away from the arms of the DeBoer attorney carrying her from her home, crying and screaming, to be strapped into a car seat and sent to a new home, new parents, and new identity.<sup>450</sup> The appellate courts ignored these real life scenes, refused to hear these voices, as though the power of these anguished experiences might somehow subvert the rule of law.<sup>451</sup>

I saw in these media reports of the *DeBoer* case two sets of parents and a child beseeching the justice system to hear their stories, to try to take their perspectives. From the Schmidts I heard a plea for vindication, some compassionate understanding of how in distress Cara Schmidt could relinquish her baby,<sup>452</sup> a plea for recognition that the Schmidts would now fight to rectify past mistakes and attempt to redeem a scarred family. I heard the Schmidts' plea to Jessica to understand that—win or lose—her genetic parents had not

---

affluent home of the adoptive parents could improperly influence termination decisions. *Id.* at 788.

445. *DeBoer*, 502 N.W.2d at 651–52; *DeBoer*, 114 S. Ct. at 1–2.

446. See Franks, *supra* note 402 at 67; Edward Walsh, *Two Parents Too Many for a Little Girl; Michigan Supreme Court Hears Emotional Adoption Case*, WASH. POST, June 4, 1993, at C1 (after questioning Daniel Schmidt's claim to paternity, the DeBoers challenged his fitness as a parent by focusing upon allegations that Schmidt had previously abandoned two children born to women other than his wife Cara).

447. Hewitt, *supra* note 398 at 49, 51, 54.

448. Hewitt, *supra* note 398, at 54; Gibbs, *supra* note 398 at 45–49.

449. Moss, *supra* note 438, at 3A. Franks, *supra* note 402, at 67; Hewitt, *supra* note 398; Gibbs, *supra* note 398, at 45–49. Jessica DeBoer so clung to her mother, Roberta DeBoer, that she cried when Roberta DeBoer left a room. See Bennetts, *supra* note 398, at 197.

450. See, e.g., Moss, *supra* note 438, at 3A.

451. See Minow, *Justice Engendered*, *supra* note 40, at 11; Professor Minow invites lawyers and judges to permit ourselves to be moved by the experience of the litigants whom we represent and judge as a method of overcoming our blindness to human difference. Cf. Supreme Court's rejection of "emotional" arguments in *DeShaney*, 489 U.S. 189, 197–98 (1989). But see *id.* at 203 (Blackmun, J., dissenting); see also, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

452. See, e.g., Dowd, *A Feminist Analysis of Adoption*, *supra* note 406, at 927–28.

abandoned and forgotten her, but were willing to expose themselves to public calumny to prove their love for her. From the DeBoers' perspective I heard the sheer horror of losing a child they had raised since birth, never to see her, hear her, or embrace her again, and only because of some legal exaltation of the genetic connection over the emotional. I heard their fear of relinquishing their cherished daughter to people whose lives were shaped by brutality and guilt.<sup>453</sup> I heard the DeBoers' despair, once having nurtured Jessica's unquestioning trust and security in them, now to breach that trust and destroy that security, as though they, Jessica's seemingly omniscient parents, had willingly let her go.

From Jessica's own frightened tears, as we last saw her, I heard Jessica's perspective of, "Who are these people," and "Mommy and Daddy, why are you letting them take me away?"<sup>454</sup> I do not doubt that the appellate judges also glimpsed these perspectives as they pondered their decisions. They concluded, however, that the law brooked no place for such human experience in their analysis of jurisdiction, state power, and individual rights.

The *DeBoer* case cruelly illustrates, therefore, family law's inability to encompass and comprehend family. The legal analysis mechanistically sorted the Schmidts', DeBoers', and Jessica's claims into cognizable categories of state power and individual rights, permitting both sets of parents and most certainly the child to become lost altogether to the court's view. Under this mechanistic analysis, the Schmidts represented, not their human need for compassion, vindication, and redemption, but fundamental constitutional rights to custodial possession of a child. The DeBoers represented, not parents in terror of losing their child, but genetic strangers without legal standing to invoke state authority to protect their legal position. Jessica herself never received human recognition. The state's interests in its proper exercise of jurisdiction or, at most, in the amorphous "best interests" of its children subsumed Jessica wholly. The appellate decisions in the *DeBoer* case thus appear surreally detached from the palpable human drama to which the public readily responded in the popular media. Small wonder, then, that in the public's view, the appellate courts' decisions in the *DeBoer* case compelled so little respect, and many advocated defiance of the law, urging the DeBoers to flee with the child.<sup>455</sup>

Whenever we perceive that rules of law fail to comprehend our humanity, the integrity of the law lies besieged and invites defiance. In the annals of slavery law, the *Dred Scott* decision persists as the well-recognized symbol of the law's failure to accord people of color recognition of their very humanity. Justice Blackmun, in his *DeShaney* dissent, compared the Court's formalistic rationale in denying Joshua's claims to the shameful history of the

---

453. Daniel Schmidt informed the press that he had struck his former wife on several occasions. Franks, *supra* note 402, at 70. Cara Schmidt concealed her pregnancy in shame. *Id.* at 56.

454. See Moss, *supra* note 438, at 3A (at the police station before transfer to the Schmidts' attorney, Jessica cried "I want my dad. Where's my dad?").

455. See, e.g., Sandra Sanchez, *Sentiment Strong Against Jessica Ruling*, USA TODAY, Aug. 4, 1993, at 1A (78% of those participating in a USA Today/CNN/Gallup Poll felt Jessica should have been allowed to remain with the DeBoers); Thomas Sowell, *Outraged Citizens Continue the Fight for Little Jessica DeBoer's Rights*, THE ATLANTA CONST., Aug. 24, 1993, at A8 (readers had expressed feelings of helpless outrage, and were in tears, over Jessica's case; furthermore, people were moved to action, forming the "Jessica DeBoer Committee for Children's Rights"); Bennetts, *supra* note 398; Hewitt, *supra* note 398.

federal judiciary in denying the claims of fugitive slaves.<sup>456</sup> Likewise in the *DeBoer* case, we witness the courts formalistically denying humanity to the DeBoers, to the Schmidts, and most especially to Jessica.

At bottom of the law's failure to accord this child recognition of her personhood is our insistence upon identifying the child's interests with those of the state or her parents. This identification of interest structurally shielded the courts from hearing Jessica's story and from taking her perspective. As in the *Smith* and *Santosky* cases, neither the state nor any parent could adequately serve as proxies for Jessica's personal claims and interests. So long as family law structures custody cases as conflicts entailing only individual adults and the state, it excludes the enlightening perspectives of the children whose lives are at stake.

## 2. Jessica DeBoer's Interests

Regardless of the courts' crabbed analysis of her case, we can well imagine at least some of Jessica's own interests. Suppose that Jessica's own interests in the case begins with the love she obviously gave to and received from the DeBoers in a child-parent relationship.<sup>457</sup> Jessica also bore an important interest in knowing the identity of her birthparents and in a future child-parent relationship with them. Further, Jessica bore an interest in knowing at some point that she was beloved and wanted by both the Schmidts and the DeBoers.<sup>458</sup> Indeed, from Jessica's perspective, no reason appears why she could not have developed and enjoyed strong familial bonds with both the DeBoers and the Schmidts. While she may have craved security and stability, love relationships with more than two parental figures posed no inherent threat to her.<sup>459</sup>

None of the adult participants in this case, not the DeBoers or Schmidts or the state as an adult collective, represented these interests of Jessica. Under

---

456. *DeShaney*, 489 U.S. 189, 212 (1989) (citing Robert M. Cover, *Justice Accused* (1975)) (Blackmun, J., dissenting) ("Like the antebellum judges who denied relief to fugitive slaves ... the Court today claims that its decision, however harsh, is compelled by existing legal doctrine."). *Id.*

457. Jessica's interests amount to much more, but many seem to spring from this child's bond of love with her parents. Jessica DeBoer had property interests, for example, in financial support from her parents and perhaps an eventual claim as an heir to parental estates. Whatever their statutory bases, these property interests arose with the DeBoers from their love for the child. The DeBoers not only satisfied Jessica's immediate property needs, for example, but also wanted to establish a college trust for her. Franks, *supra* note 402, at 72. In providing this property to Jessica, the DeBoers seemed to respond not to any legal mandate, since their custody was continuously challenged, but to the obligations entailed in a loving parent-child relationship.

458. It seems obvious that Jessica should receive some explanation at some point of the dispute over her custody so she would know, whatever the outcome, that no parental figure had willingly abandoned her.

459. In *Michael H. v. Gerald D.*, members of the Court opined that, were Victoria to sustain relationships with more than one father figure, she would become confused and lose the security and stability of a two-parent family. 491 U.S. 110, 135 (1989). The presence of two fathers may confuse and destabilize adult society accustomed to recognizing a single father's exclusive paternity and structured to accommodate at most two parents. The positive experiences of step children and children raised in conjunction with extended families, however, reveals the Court's concerns as merely a cultural bias for a two-parent nuclear family. See, e.g., Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Minow, *Redefining Families*, *supra* note 384; Fineman, *Intimacy Outside of the Natural Family*, *supra* note 384; Polikoff, *supra* note 384.

the appellate courts' analyses, the DeBoers had no standing at all to represent either their own or Jessica's interests.<sup>460</sup> Under the appellate courts' analyses, therefore, no one could speak of the love Jessica shared with the DeBoers or defend that child-parent relationship against destruction. The law excluded both the DeBoers' and Jessica's voices expressing that love relationship. Nor did the Schmidts attempt upon appeal to represent Jessica's present interests in her love relationship with the DeBoers. The Schmidts asserted instead their constitutional rights to custody of their genetic child against state interference. Further, the Schmidts asserted their right to custody of Jessica against the DeBoer's interference, ignoring Jessica's interest in sustaining familial bonds with both sets of parents. Like property owners resisting a DeBoer adverse possession claim, the Schmidts sought quiet title in and exclusive possession of the child.<sup>461</sup>

The Schmidts' parental rights may have reflected some of Jessica's interests. In *Santosky*, the parents' constitutional rights to custody of their children, the Court declared, presumably encompass the child's interest in a relationship with genetic parents as well.<sup>462</sup> The Schmidts' appellate defense of their own parental rights may also, then, have served to defend Jessica's interests in a future relationship with her genetic parents against unwarranted state intrusion. In this case, however, the Schmidts' assertions arose in a vacuum devoid of other parties able to assert any of Jessica's interests contrary to the Schmidts'. In *Santosky*, the state presumably represented at least a general interest in the welfare of its children.<sup>463</sup> In the *DeBoer* case, however, the appellate courts concluded that the state had no jurisdiction, absent a finding of unfitness, to interfere with the Schmidts' rights and to attempt to secure the child's welfare.<sup>464</sup> Hence, neither the DeBoers nor the state could even attempt to contest the Schmidts' assertions on Jessica's behalf.<sup>465</sup> Jessica's interests in sustaining familial relationships with the DeBoers, or with both sets of parents, therefore, remained unvoiced.

Indeed, under the appellate courts' analysis, no cognizable legal dispute arose at all, for neither the DeBoers nor the state had any grounds or standing for challenging the Schmidts' legal rights to custody.<sup>466</sup> The appellate courts thus viewed the case as pitting the DeBoers' invocation of state power against the Schmidts' individual rights, just as the state moved against parental rights in

---

460. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649, 651-52 (Mich. 1993); *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1, 2 (1993).

461. The analogy to property law is particularly apt in this case. No doubt our legal assumption that only one set of parents can legitimately claim a child's custody reflects family law's origins in a property-based view of family. See Woodhouse, *Who Owns the Child?*, *supra* note 160; see also WEYRAUCH & KATZ, *supra* note 41, at 496-98 (noting the property-based origins of custody law and that a judicial preference for preserving children's custody with their long-term custodians may help effect a form of "adverse possession," perpetuating the legal view of children as chattel).

462. *Santosky v. Kramer*, 455 U.S. 745, 759-60 (1982).

463. *Id.* at 766.

464. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d at 651-52, 666-67; *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. at 1-2.

465. I argue, *infra*, that neither the state nor the DeBoers could have fully or accurately represented Jessica's interests in all events.

466. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d at 651-52; *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. at 1-2.

*Santosky*. In *DeBoer*, the Michigan trial court had interfered with the Schmidt parental rights without jurisdiction, determining the outcome of the analysis.

### 3. Jessica's "Best Interests"

Attorneys for the DeBoers and independent counsel for Jessica had sought to cast the case in a different mold. They argued that the Uniform Child Custody Jurisdiction Act required that the state conduct a hearing into Jessica's "best interests" in custody.<sup>467</sup> The DeBoers and Jessica thus argued that this case was not a dispute between state power and parental rights, as in *Santosky*, but rather was a dispute between individual parents, much like divorce custody disputes, in which the state's assertion of the child's "best interests" determines the outcome. Under a different and certainly plausible interpretation of the Uniform Child Custody Jurisdiction Act, the appellate courts might well have agreed with the DeBoers and Jessica's arguments.<sup>468</sup> Even had the DeBoers and Jessica won a "best interests" hearing, however, no party to that hearing would yet have represented Jessica's own interests in her relationships with the DeBoers and the Schmidts.

The Michigan trial court had, of course, conducted just such a "best interests" hearing, and had concluded that custody with the DeBoers served Jessica's "best interests."<sup>469</sup> The evidence showed that the DeBoers provided Jessica a home designed to nurture her growth into a healthy adult.<sup>470</sup> The evidence also showed that both Daniel and Cara Schmidt were at risk of forsaking Jessica's welfare in the future as Daniel Schmidt had forsaken his two previously born children and as Cara Schmidt had forsaken prenatal care when carrying Jessica.<sup>471</sup> Most important to the court, however, was the psychological evidence adduced at trial, on which the court placed more "weight" than any other.<sup>472</sup> The psychologists testified that removal from the DeBoer home then would likely result in Jessica's permanent psychological damage, impairing her future emotional capacities to love and to trust others.<sup>473</sup>

From a strategic viewpoint under the present state of the law, the substantial risk of permanently damaging Jessica's psyche was the most important evidence. Such a clear and present danger to the child's welfare could perhaps justify the state's divesting the Schmidts of their constitutional rights as parents, even absent a showing of their parental unfitness. Moreover, the threat to Jessica's psychological development as a potential adult conformed neatly with the state's general interest in its children's welfare. The state's interest in developing law abiding, economically self-sufficient adults from its children depends upon the basic psychological health of these individuals. Attorneys for the DeBoers and for Jessica thus argued on appeal that a "best interests" hearing

---

467. *DeBoer*, 502 N.W.2d at 660, 665.

468. Justices in both the Michigan and U.S. Supreme courts vigorously dissented from the majorities' views, for example. See *DeBoer*, 502 N.W.2d at 668-689 (Levin, J., dissenting); *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 11, 11-12 (1993) (Blackmun, J., O'Connor, J., dissenting).

469. *Schmidt v. DeBoer*, No. 92-44098-DR, *DeBoer v. Schmidt*, No. 92-44124-DC, slip op. at 18 (D. Mich., Feb. 12, 1993).

470. *Id.* at 16-18.

471. *Id.* at 12.

472. *Id.* at 16.

473. *Id.* at 16-18.

would, as it had in Michigan trial court, result in Jessica's continuing custody with the DeBoers.<sup>474</sup>

While a "best interests" hearing might thus have secured a better result for Jessica, the trial court's "best interests" analysis yet failed to give voice to Jessica's own interests or to assure recognition of her personhood as a child. At the outset, the result in this case depended upon the court's subjective evaluation of the ill-defined and malleable "best interests of the child" standard. Referring to the Michigan statute, the trial court assessed eleven different factors bearing on its determination of the child's "best interests." The court chose to place the most weight upon the last factor, a provision granting trial courts the discretion to consider "any other relevant factor" in determining the child's "best interests."<sup>475</sup> Under this catch-all provision, the court emphasized the threat of removal from the DeBoers to Jessica's psyche. Another court might have disbelieved the DeBoers' experts and have emphasized instead psychological evidence which purports to show that adoptees are likelier to become juvenile delinquents or other social undesirables.<sup>476</sup> A court more inclined to believe psychological evidence about speculative threats to Jessica's psyche as an adoptee than the speculative threat from her abrupt removal from her "psychological parents," the DeBoers,<sup>477</sup> would have decided that custody with the Schmidts was in Jessica's "best interests."

Likewise, any of the other statutory factors gave the trial court discretion, dependent on its subjectivity, to have found Jessica's "best interests" served by custody with the Schmidts. As the trial court noted, for example, both the DeBoers and Schmidts marshalled evidence against one another of petty crimes and other "youthful" transgressions potentially bearing upon the different parents' "moral fitness."<sup>478</sup> While the court concluded that most of this evidence was irrelevant,<sup>479</sup> Daniel Schmidts' prior conduct as a father certainly influenced the court's decision for custody with the DeBoers.<sup>480</sup> Another court with different values and priorities might have determined that the allegation that Jan DeBoer once engaged in petty theft years ago now disqualified him as an appropriate parent for Jessica.<sup>481</sup> The trial court found that Jessica's two years of custody with the DeBoers was of sufficient duration to warrant continuity.<sup>482</sup> Another court could have concluded that two years is finally insignificant over the lifetime of a parent-child relationship. In sum, the DeBoers' success in the Michigan trial court demonstrated only that the court's subjective view of Jessica's "best interests" comported with their own. Before a

---

474. DeBoer v. Schmidt (*In re Clausen*), 502 N.W.2d 649, 651-52 (Mich. 1993).

475. Schmidt v. DeBoer, No. 92-44098-DR, DeBoer v. Schmidt, No. 92-44124-DC, slip op. at 16 (D. Mich., Feb. 12, 1993) (citing MICH. COMP. LAWS § 710.22(b)(xi) (1974)).

476. See, e.g., Brief for Appellee (Jessica DeBoer) at 88b, DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993) (No. 96441, 96531-2) (affidavit of psychologist citing and refuting as methodologically unsound studies purporting to show adoptees' maladjustment).

477. See *id.* at 86b-90b (affidavits of psychologists describing the DeBoers as Jessica's "psychological parents" and the adverse effects of severance of the child's bond with psychological parents).

478. Schmidt v. DeBoer, No. 92-44098-DR, DeBoer v. Schmidt, No. 92-44124-DC, slip op. at 14 (D. Mich. Feb. 12, 1993).

479. *Id.*

480. *Id.* at 12, 14.

481. *Id.* at 14; Franks, *supra* note 402, at 69.

482. Schmidt v. DeBoer, No. 92-44098-DR, DeBoer v. Schmidt, No. 92-44124-DC, slip op. at 12-13 (D. Mich. Feb. 12, 1993).

different court, the "best interests" determination could have as easily resulted in Jessica's removal to the Schmidts' custody.<sup>483</sup>

The "best interests" standard not only forced the Michigan trial court to engage in subjective and speculative evaluations of the litigants, but also prevented the court from hearing the litigants' and Jessica's real experience and claims. At issue before the trial court was the DeBoers' and Schmidts' respective rights, if any, as parents, and the state's interest in securing the "best interests of the child." Because the Schmidts bore undeniable constitutional rights to Jessica's custody, the court imposed upon the DeBoers the burden of proving by "clear and convincing evidence" that custody with them served Jessica's "best interests."<sup>484</sup> This structure gave some legal recognition to the Schmidts' experience of parenthood, protecting their own interests in establishing a relationship with their child. The structure gave the Schmidts an opportunity to vindicate publicly their past conduct and to redeem their genetic family from their past mistakes. The structure gave no recognition to the loss facing the DeBoers, however, no recognition to the grief they had and might endure with the prospect of losing Jessica. Their experience as parents remained legally irrelevant. Jessica's experience as a child, finally, also remained voiceless, excluded from recognition in the "best interests" determination.

By focusing on the state's general interest in custody arrangements which serve children's "best interests," the court viewed Jessica as a potential adult and as a potential benefit or burden to adult society. Psychologists' testimony that Jessica's removal from the DeBoer home would impair her psychologically as an adult was therefore dispositive for the court. From the state's perspective, utility demands that we produce psychologically healthy adults capable of economic self-support and responsible citizenship.<sup>485</sup> The psychologists' testimony thus supported the state's interest in benefiting adult society. Had the psychologists testified instead that Jessica would certainly suffer upon losing her psychological parents, but for a finite childhood period with no repercussions to her as an adult, the trial court seemed ready to countenance such suffering and to return Jessica to the Schmidts. From an adult perspective weighing competing adult claims, Jessica's temporary suffering might not preclude her restoration to the Schmidts' custody.

By viewing Jessica as a potential adult, the court trivialized Jessica's experience and personhood as a child. From Jessica's perspective, the loss of her parents in the DeBoers was an excruciating emotional event. We saw her trauma in news reports of her removal from the DeBoer home. That Jessica's

---

483. See, e.g., Henry, *supra* note 319 (describing Virginia Bottoms case wherein a lesbian mother lost custody of her son to maternal grandmother only because of mother's sexual orientation); Harrison, *supra* note 331; Cheakalos, *supra* note 331; *Mississippi Court's Removal of Son from Custody of White Mother Dating Interracially*, LOS ANGELES TIMES, Sept. 2, 1993, at A21 (describing Mississippi Brown case wherein an interracial married mother lost custody of her sons to paternal grandparents because exposure to interracial relationships was not in the "best interests" of young southern children).

484. Schmidt v. DeBoer, No. 92-44098-DR, DeBoer v. Schmidt, No. 92-44124-DC, slip. op. at 7-8 (D. Mich. Feb. 12, 1993). Note that the burden of proof resembles the *Santosky* standard for proof of parental unfitness before state divestment of parents' constitutional rights. *Santosky v. Kramer*, 455 U.S. 745, 768-770 (1982).

485. See discussion *supra* part I.C of Wisconsin v. Yoder, 406 U.S. 205 (1972) and Plyler v. Doe, 457 U.S. 202 (1982).



suffering may be temporary, may be confined to childhood, should not negate its significance. That resilient children may recover from trauma finally should not blind the law to their experience. Through claims for loss of consortium, the law respects and seeks to vindicate the grief of adults suffering the loss of loved ones. We do not disregard adult grief in these claims, though we fully expect the victims eventually to recover emotionally like Jessica. By disregarding the "temporary" suffering of children, the law treats children as beings so inferior to adults as to deny their personhood. Instead of noticing Jessica's experience as a child, the law seeks to vindicate only the state's interest in her eventual adulthood.

The court's "best interests" hearing denigrated not only Jessica's childhood suffering, but also her childhood desires. The court noted the statutory requirement that it consider the child's "reasonable preferences, if any" in its custody determination.<sup>486</sup> Because Jessica was but two years old at the time of the hearing, the court concluded, she had no "reasonable preferences" and her desires were irrelevant.<sup>487</sup> Jessica knew only a few dozen words, of course, but she communicated her preference. Each time she showed affection to the DeBoers and played happily in their home, Jessica expressed a custody preference. As Jessica cried and raged against her removal from the DeBoers, she expressed a custody preference. The law assumes, however, that because Jessica was two years old, her preference was not reasonable and was therefore irrelevant.

Of course, much of the adult public watching in the media as Jessica demonstrated her preference thought her preference reasonable. Adult evaluation of Jessica's reasonableness depended finally on agreement or not with her expressed preference.<sup>488</sup> The court could ignore as presumptively unreasonable the custody preference of a two-year-old, not because her preference was "unreasonable," but because her preference apparently served no *state* interest in securing Jessica's "best interests." By ignoring Jessica's evident preference for custody with the DeBoers, the law further deemed insignificant her experience of childhood and her personhood as a child.

#### 4. Familial and Family Interests

By use of the "best interests" rule, the law may attempt to elevate children's interests above individual parental rights when parents or the state dispute custody. Invocation of the child's "best interests" permits the state to overcome parents' constitutional objections to state interference with their families and children. The "best interests" rule, however, assures the substitution of politicized state interests for the child's own. In the place an actual child's interests and perspectives, the court attends to the interests of children as potential adults and the effect of custody arrangements on adult society. Thus, in one of the more crucial legal issues likely to bear upon a

---

486. Schmidt v. DeBoer, No. 92-44098-DR, DeBoer v. Schmidt, No. 92-44124-DC, slip op. at 16 (D. Mich. Feb. 12, 1993) (citing MICH. COMP. LAWS § 710.22(b)(ix) (1974)).

487. *Id.*

488. The Michigan statutory standard of reasonableness reflects the maturity standard our law employs for determinations of whether to hear a child at all. See Bellotti v. Baird, 447 U.S. 622, 650 (1979). In part IV of this Article, I argue that the maturity standard reflects only political power, and is not a principled basis for excluding children's perspectives from legal disputes.

child's life, the child's custody, the law denies children a hearing and the import of childhood for children. Instead, the law erects an artificial conflict between individual adults and the state.

The conflict is artificial because custody cases do not arise from or finally resolve individual adult's relationships with the state. Custody cases arise from children's and parent's relationships with each other and from their very identity as children and parents. Custody cases arise from the strength and passion of family bonds and the dread of their severance. By forcing parents to litigate how a child's custody with them best serves state interests, the law prevents a hearing of their real interests in sustaining familial bonds with children. Likewise, by denying children a voice at all in their custody disputes, the law prevents a hearing of children's real interests in sustaining familial bonds with genetic, foster, adoptive, or other parental figures.

#### IV. MATURITY, DIFFERENCE, AND MYSTERY

Upon critical examination, constitutional, child support, and custody law reveals the systematic exclusion of children from legal personhood and their consequent maltreatment under the law. We adults may not have intended such results. Adults sympathetic with children apparently threatened by overbearing state action, for example, have advanced children's constitutional rights in such issues as minors' abortion rights and free speech. Even sympathetic identification with children, however, has produced a constitutional jurisprudence which yet countenances children only as autonomous individuals like us. Likewise, the desire to protect children from neglectful parents or contentious litigation may have motivated the state—all of us as an adult collective—to structure child support and custody disputes as conflicts between state interests and adult individual rights. The child support and custody jurisprudence we have developed, however, replaces children in the law with state interests instead. Regardless of our adult motives, moreover, our constitutional and family law jurisprudence now fails to serve children's tangible interests in those issues of most concern to most children, poverty and custody. Because children's security in support and family custody remains ephemeral, our jurisprudence requires rethinking for children.

Further, even if somehow demonstrably efficient for children, our jurisprudence yet requires our rethinking because it allows us to deny children their personhood as children. We provide in the law for hearings of adult rights and utilitarian state interests, but refuse to hear children's experiences and perspectives. Children command legal respect for their personhood, then, only when their interests coincide with adults'. We remain focused on adult concerns and blind to children's because the law permits us adults to believe that children are lesser beings, mere potential adults, inferior because they are immature. Because children are immature, we can justify the law's exclusion of their perspectives and personhood. Other oppressed classes such as white women and racial minorities have faced myriad justifications for their legal inferiority and have forced the law to reconsider supposed inferiorities as human differences. Thinking about children as children compels reconsideration of their alleged inferiority as well. I suggest that children manifest, not inferiority, but human difference commanding our legal respect.

### A. Maturity and Power

In *Bellotti v. Baird*,<sup>489</sup> the Supreme Court struck down a Massachusetts statute requiring a pregnant minor to obtain parental consent for an abortion and attempted to articulate a constitutional jurisprudence for children. Minors, like adults, hold constitutional privacy rights entitling them to access abortions free of undue burdens imposed by the state.<sup>490</sup> The state's requirement of parental consent, at least without providing minors an alternative judicial process accessing them abortions, the Court said, unduly burdened minors' constitutional rights.<sup>491</sup> In recognizing a minor's right to an abortion without parental consent, the Court reaffirmed that the Constitution applies to children as well as to adults.<sup>492</sup> The Court further stated, however, that, "three reasons [justify] the conclusion that the constitutional rights of minors cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing . . . ."<sup>493</sup> The Court's three reasons finally telescope into one, that children are immature. Children are "peculiarly vulnerable" and require their parents to rear them because they are immature.<sup>494</sup> Under the Court's reasoning, then, we may constitutionally

---

489. 443 U.S. 622 (1979).

490. See *id.* at 642-44; see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832 (1992) (The "[s]tate may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.").

491. *Bellotti*, 443 U.S. at 643-44.

492. *Id.* at 640.

493. *Id.* at 634.

494. Indeed, the Supreme Court has said that parents' constitutional rights over the care, control, and custody of their children are "coupled with the high duty" to instruct, guide, acculturate, and socialize their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (permitting parents to educate children in parochial schools without unreasonable state interference). From such Supreme Court precedent, some legal scholars have identified parental obligations to children as inherent in parental rights. See, e.g., Richards, *supra* note 13; Tremper, *supra* note 13. Moreover, Professor Bruce C. Hafen has movingly argued that, between parents and the state, parents are far more worthy for deciding child-rearing issues because of parents' natural impulse to sacrifice unconditionally for their children. See, e.g., Hafen, *Children's Liberation*, *supra* note 15; Hafen, *The Waning of Belonging*, *supra* note 15; see also Coons et al., *supra* note 8. The Supreme Court's repeated affirmation of parental rights, moreover, may respond to democratic as well as children's imperatives. Parents' constitutional rights serve to guard cultural and religious diversity by restraining the state from dictating the raising and education of children. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (protecting parents' decision to teach their children German despite state prohibitions); *Pierce*, 268 U.S. 510; *Wisconsin v. Yoder*, 406 U.S. 205, 225-226 (1972) (reversing Amish parents' convictions for refusing to have their children comply with compulsory school attendance statute); *Santosky v. Kramer*, 455 U.S. 745, 762-63 (1982) (safeguarding parents from state removal of their children for biased reasons). The imperatives of diversity, therefore, may also underpin constitutional protection of parents' child-rearing and education decisions. See Hafen, *Children's Liberation*, *supra* note 15; Hafen, *The Waning of Belonging*, *supra* note 15 (arguing that family privacy is the keystone to democratic self-government). Professor Barbara Bennett Woodhouse, on the other hand, has incisively criticized the Supreme Court's deference to parental decision making and stalwart protection of parental rights as yet indicative of children's status under the law as property of their parents. Woodhouse, *Who Owns the Child?*, *supra* note 160. The legal approval and encouragement of parents' virtual ownership of their children, Professor Woodhouse argues, thwarts developing legal responses to children's needs for support and nurturing. *Id.*

disable children, denying them legal standing, for example,<sup>495</sup> because as a class, children are immature.

Not all children are immature, however. Indeed, the *Bellotti* Court assumed that significant numbers of minors are sufficiently mature to decide for themselves whether to abort their pregnancies.<sup>496</sup> The Court would not deny these mature children their constitutional right to decide private questions autonomously. The Court therefore required states to assure pregnant minors standing to petition a judge to "bypass" the state's parental consent requirement.<sup>497</sup> After *Bellotti*, if a minor can prove her maturity to the judge's satisfaction, she may proceed with an abortion without either the court's or her parents' consent.<sup>498</sup> Again, if the minor is sufficiently mature, she is presumably neither "peculiarly vulnerable" nor in need of her parents' supervision, at least for the purposes of exercising her constitutional right to an abortion. In the *Bellotti* opinion, then, the Court identifies the characteristic legally distinguishing children as a class, their immaturity. At the same time, the Court also concludes that this characteristic may not always obtain or may not always apply to every child in the class. Because immaturity is the defining characteristic for legally disabling children, and ad hoc determinations of their maturity the defining characteristic for children's exercise of constitutional rights, "maturity" merits our examination.

When a pregnant child petitions a court to seek an abortion without her parents' consent, how should the judge determine if she is sufficiently mature to exercise this constitutional right? Critics of the *Bellotti* decision have noted that the high Court provided no criteria for the maturity determination.<sup>499</sup> Instead, as in many decisions, the court considering the minor's petition has only its own frame of reference on which to rely. The court's frame of reference when determining a child's maturity is, of course, adult. The court will evaluate the child's petition on the basis, then, of whether the petition reflects an adult perspective. If the child's petition mirrors an adult perspective, then the child

---

495. See *Bellotti*, 443 U.S. at 650 for the Court's explanation of the "general rule that a [s]tate may require a minor to wait until the age of majority before being permitted to exercise legal rights independently." *Id.*

496. *Id.* at 643.

497. *Id.* at 634-44.

498. *Id.*

499. See, e.g., Katherine M. Waters, Note, *Judicial Consent to Abort: Assessing a Minor's Maturity*, 54 GEO. WASH. L. REV. 90 (1985) (arguing the Court should have propounded objective criteria for maturity decisions about minors seeking abortions). In *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court suggested that legal emancipation of minors provided guidance for maturity determinations, while dissenters looked to informed medical consent criteria. *Id.* at 451 n.49 (Marshall, J., dissenting). State statutes, meanwhile, have enumerated criteria for maturity determinations such as judicial examination of "the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences and alternatives to the abortion; and any other evidence that the court may find useful ...." Mo. Rev. Stat. §188.0282(3) (Supp. 1982), cited in *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, 480 n.4 (1983); and "the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent," 18 PA. CONS. STAT. § 320(c) (1990), cited in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, app. at 2835 (1992), where such "informed consent" includes counseling about "medical risks," the "probable gestational age of the unborn child," agencies offering alternatives to abortion, and state and private financial support available to the child upon birth. *Id.* at 2833. These statutory guidelines for maturity determinations yet fail to provide much help to courts. As I argue, whatever their merits for abortion decisions, no criteria for maturity determinations may save the flawed standard of maturity for recognition of children's legal standing generally.

must be sufficiently mature to decide on abortion herself. If the child's petition manifests instead a perspective unique to childhood, then the child must be too immature to decide for herself. Any criteria the law might enumerate for maturity determinations—that the abortion decision is informed, wise, or rational, for example—are themselves indicia for an adult perspective. The flaw in the maturity standard for children's legal standing and constitutional recognition is not its vagueness, then. The flaw in the maturity standard is that our search for maturity in children is a search for an adult perspective.

Indeed, a finding from an adult perspective in any case or controversy that a child is "immature" means little more than that the child is different somehow from an adult. The child manifesting a perspective unique to childhood differs from an adult, and is by definition "immature." The child who thinks and speaks as a child, therefore, cannot gain our legal attention.<sup>500</sup>

By legally disabling immature children from voicing their perspectives, we deny that a child's perspective bears legal significance. The law prevents us, then, from valuing children as children and permits us to value only those children who mirror adults. By legally recognizing mature children, we announce that children who manifest adult perspectives, children who seem less different from us, may also enjoy constitutional personhood. The mature minor, then, the child whose perspective comports with our own, accesses our attention with legal standing. When children voice a childhood perspective, when they remain manifestly different from us, however, we do not heed them at all.<sup>501</sup>

If we could somehow assure, empirically or by philosophical consensus, that the adult perspective is neutral, true, and right, then we might justify our refusal to hear children's own perspectives. The controversy over abortion itself may illustrate, however, that we lack such assurance. A judge favoring abortion rights for minors may be inclined to hear the child's evidence of her

---

500. By thus criticizing the maturity standard, I do not suggest that we jettison all age limits and permit all children to exercise individual, autonomous rights (indeed, as I will argue, individual autonomous rights are the least of concerns for most children in all events, for such rights are irrelevant to children's most pressing claims, those for financial support and loving custody). Instead, the critique challenges our legal refusal to listen at all to children who speak from childhood perspectives. Upon hearing children, we may yet reject their claims on the merits. We may deny children the "right" to purchase alcohol or cigarettes, for example, because of the harm these substances pose to children and childhood. We would not deny a child's claims, however, only because the child or the claim is "immature."

501. My analysis of difference and perspective in children's cases was prompted by Professor Martha Minow's account of difference and perspective generally. See Minow, *Justice Engendered*, *supra* note 40; MINOW, MAKING ALL THE DIFFERENCE, *supra* note 43. Professor Minow explains how judges, like other powerful people, mistake their own, subjective perspectives for objective standards. Minow, *Justice Engendered*, *supra* note 40, at 13. The judge who will never experience pregnancy, for example, mistakes non-pregnancy as an objective standard neutrally imposed in the workplace. *Id.* at 17. The pregnant worker differs from the workplace norm, then, but only because the "norm" reflects a singular, gendered—or at least non-pregnant—perspective. *Id.* at 18. When judges search for a worker's compliance with workplace norms, then, they search for conformity with a gendered perspective assumed to be objective, neutral, and right. *Id.* at 20. Because the pregnant worker does not conform, the worker is "different." The pregnant worker's "difference," however, depends not on a neutral norm, but on the perspective of the court. *Id.* The worker is different only from a non-pregnant judge's or employer's perspective. Similarly, I argue, children are different because they are immature, but this difference depends on the perspective of an adult court. Thus, when we demand that children manifest maturity as a prerequisite for legal standing, we demand that children not be children, but be like us, adults.

maturity favorably because, for that judge, abortion is a mature option. The judge disfavoring abortion rights for minors, on the other hand, may be inclined to disfavor the child's evidence because, for that judge, the child's decision to seek an abortion without parental consent is by definition immature.<sup>502</sup> The example of abortion reveals that legal recognition of maturity has less to do with principled distinctions than with power. The powerful court considering the child's petition can sanction the child's desire to seek an abortion or not, depending upon its own adult view of minors' abortion rights.<sup>503</sup>

As a class, children have secured constitutional recognition such as the right to an abortion when backed by powerful adult interests. Other legal issues involving children help demonstrate that children's legal rights or claims depend less upon some supposedly neutral maturity standard than upon children's alignment with powerful adult interests.<sup>504</sup> Children secured certain free speech rights in the 1969 *Tinker v. Des Moines School District* case, for example, when powerful adult interests agreed with the children.<sup>505</sup> Some years later, when political power among adults shifted, children's constitutional

---

502. My thinking about the *Bellotti* maturity standard has been aided by MNOOKIN & WEISBERG, CHILD, FAMILY AND STATE, *supra* note 11, at 170-71. They query, "To what extent is the judgment about maturity bound to be shaped by the judge's own ideology and values? Will a conservative judge think it is mature for a young woman to become pregnant? Not to want to talk to parents? Will a liberal judge think her decision not to talk to her parents is mature because she is seeking to protect her parents and assume responsibility herself? That the abortion decision itself is mature? What other value judgments may be influential?" *Id.* at 171. Professors Mnookin and Weisberg cite Family Court Judge Nanette Dembitz who concluded from her experience that "a minor's very decision to seek an abortion shows" the mature attributes of "deliberation, a sense of responsibility and foresight as to consequences ...." Nanette Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251, 1255-56 (1980). Is Judge Dembitz's conclusion a value judgment?

503. Upon a finding of immaturity, the court may insist that the child secure her parents' permission for an abortion, or the court may determine for itself whether an abortion is in the "child's best interests." *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

504. See Minow, *Rights for the Next Generation*, *supra* note 16. "It seems bizarre to justify the variable treatment of young people currently manifested in the patchwork of legal regulations as though it expressed careful judgments about their competencies for various tasks and responsibilities," Professor Minow observes. *Id.* at 4. She concludes that, in fact, "[C]hildren are not the dominant focus of many legal reforms" made in their name, as children's interests "are too often submerged below other societal interests." *Id.* at 6.

See also WEYRAUCH & KATZ, *supra* note 41, at 580-81 (arguing that the legal inconsistencies reflect ambivalence toward children, including "frustration" with politically and sexually rebellious youth. Thus, "[t]reating [children] as persons can become a vehicle of control by parents and the state in trying to curb the subversive powers of youth ...." *Id.*).

505. 393 U.S. 503 (public school officials impermissibly infringed student's First Amendment rights when officials suspended students for wearing black armbands in protest against the war in Viet Nam). The powerful adult interests allied with the *Tinker* children's were those of jurisprudentially and politically liberal adults. The sustained and influential work of the American Civil Liberties Union (whose litigators represented the *Tinker* children) is a testament to the sustained and influential (if often unavailing) lobby for individual constitutional liberties. Without denigrating the work of the ACLU or its cause, I would note by contrast that no lobby for securing children nutrition or protection from abuse, for example, has enjoyed such sustained success or influence. I do not suppose, as Justice Black implied in dissent, that the *Tinker* children were mere pawns of their parents' opposition to the war. *Id.* at 516 (Black, J. dissenting) (reciting the parents' involvement in the antiwar movement without saying why their involvement was legally relevant). Mary Beth Tinker, who was thirteen when suspended from school, later recalled her motives as a teenager in demonstrating against the Viet Nam. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 231-52 (1988).

fortunes changed as well, resulting in curtailment of their free speech rights in *Hazelwood School District v. Kuhlmeier*.<sup>506</sup> The issues themselves indicate that children's constitutional status depends on alignment with adult power. Children's constitutional rights to abortion and free speech are asserted, if embattled, because those rights are important to adults. Children's rights to child support or standing in custody disputes are denied, meanwhile, because those issues fail to rally a sufficiently powerful adult lobby.

As a society, we tell ourselves that we exercise adult power over children, not for our own conveniences or purposes, but for their protection. The *Bellotti* Court justified legally disabling children because of their "peculiar vulnerability,"<sup>507</sup> an aspect of children's immaturity which presumably compels a host of protective laws. Both federal and state laws disable children from employment,<sup>508</sup> for example, so as to protect children. Thus, in a series of precedents, the Court has upheld child labor laws to prevent children from exposure to workplace hazards<sup>509</sup> and to assure their uninterrupted attendance at school.<sup>510</sup> Yet the Court has also candidly acknowledged that one of the greater catalysts for enactment of child labor laws was the political pressure to insulate the adult labor market from cheap competition by children.<sup>511</sup> Review of the federal child labor statute reveals, in fact, that children may still labor, but only in those occupations shunned by adults. Not only may children deliver newspapers, for example, but they may also when less than twelve years old toil in agricultural fields.<sup>512</sup> Moreover, growers may seek exemptions from child labor prohibitions when agribusiness necessitates more child labor.<sup>513</sup> Our child labor laws, then, evince no comprehensive concern for children's safety and schooling. The law responds to the adult imperatives of commerce, not a child's imperative for experiencing a safe and carefree childhood. The advocates of a carefree childhood lacked the political power to defeat the newspaper and agribusiness lobbies.

Children's advocates prevail, then, when their causes coincide with other politically powerful adult interests. Those who sought to rescue children and childhood from sweatshops prevailed with the aid of the adult labor lobby, while those who would rescue the children of migrant workers from the fields continue to fail. Those who sought to rescue children and childhood from adult prison and punishment succeeded when psychologists declared that rehabilitation could cure criminal tendencies in the young and spare society the

---

506. 484 U.S. 260 (1988) (limiting the *Tinker* holding to cases where the school punished a student for protected speech and permitting censorship of school-sponsored student expression).

507. *Bellotti*, 443 U.S. at 634.

508. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 203(l), 212, 213 (1982).

509. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (barring child from street employment despite parent's constitutional assertions of parental control and First Amendment freedoms).

510. See, e.g., MNOOKIN & WEISBERG, *supra* note 11, at 826.

511. See *Wisconsin v. Yoder*, 406 U.S. 205, 228 (1972); see also, Minow, *Rights for the Next Generation*, *supra* note 16, at 6 (observing that Progressive Era reformers did not succeed in passing child labor laws until joined by self-interested organized labor).

512. See 29 U.S.C. § 1802 (West 1993). The exemption of agricultural work from prohibitions against child labor may in part reflect American nostalgia (however accurate) for the bucolic "family farm." On their face, however, the exemptions apply not only to family farmers, but also to corporate agribusiness typically employing families of migrant workers.

513. 29 U.S.C. § 213(c)(4)(A) (1982).

next generation of hardened criminals.<sup>514</sup> As adult society has lost faith in the efficacy of rehabilitation, rightly or not,<sup>515</sup> however, we witness an increase in prosecutions of children as adults<sup>516</sup> and the Supreme Court's constitutional approval of the execution of children.<sup>517</sup> To observe that the fate of children under the law waxes and wanes with their alignment with adult political power evidences the law's singularly adult perspective. In disabling children at times and empowering them at others, the law has not responded to children's variable "maturity."<sup>518</sup> Instead, the law responds to adult political pressures and to adult utility.

We adults will not transform on our own a jurisprudence designed by and for us. Neither, however, can we answer children's claims to legal personhood by empowering them with the constitutional rights adults now assert.<sup>519</sup> Indeed, assuring children "rights" fails to respond to their needs or

---

514. Once located in the humane motivations of Progressive Era reformers, the rise of the juvenile justice system has become the subject of revisionist historical debate. *See, e.g.,* FREDERIC L. FAUST & PAUL J. BRANTINGHAM, *JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS* 2-26 (2d ed. 1979). No doubt the modern emergence of psychology and social science promising a "cure" for juvenile criminality catalyzed the rehabilitative model of juvenile justice. *Id.* at 3-6. Revisionists argue that class bias intent upon culturally assimilating the children of urban, lower-class, and often immigrant families motivated the newly-massive state interference in family life wrought by juvenile justice reforms. *Id.* at 7-9. As well, revisionists have argued that middle class feminists eager to enter the public sphere of politics and employment during the Progressive Era found societal approval only for work on behalf of children. *Id.* Progressive Era feminists could propel juvenile justice reforms because such work seemed suitably feminine and maternal to their audiences. *Id.* Whatever the origins of the rehabilitative model, then, none necessarily evince particular adult concern for the juvenile offender as a child or for children's own interests and perspectives.

515. While criticism of the rehabilitation model for juvenile justice as a failure in preventing recidivism has become commonplace, our national failure adequately to fund and actually implement rehabilitation programs more likely accounts for recidivism. *See, e.g.,* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821 (1988).

516. In Florida, for example, unbridled increases in rates of prosecutions of children as adults prompted the state to require local prosecutors to adopt protocols for seeking waiver from juvenile to criminal courts. *See* Lori Cronch, *When Crime Becomes a Career*, SUNDAY ORLANDO SENTINEL, Oct. 4, 1992, at 20. In part, the increases in prosecutions of children as adults seemed responsive to political demands for retribution and protection from crime. *Id.* Upon the arrest of four children allegedly involved in the murder of a British tourist in 1993, for example, public pressure immediately bore upon Tallahassee prosecutors to try the children as adults for capital murder. *See* Mike Clary, *States Ask: Can Kids Who Kill Be Killed?*, CHI. SUN TIMES, Oct. 10, 1993, at 36. The increase in prosecutions of children as adults in Florida also appears to have resulted from a lack of available space in juvenile rehabilitation facilities and programs. Children declared delinquent in juvenile court wait at home for months before admission to such facilities and programs, while children convicted as adults proceed to jail. *Crowding Pushes Youths Into Adult Prison System*, SUNDAY ORLANDO SENTINEL, Apr. 20, 1992, at 12A. Florida's juvenile justice system, indeed, remains under federal court supervision because of the state's chronic failure adequately to fund and implement a quite progressive and humane rehabilitation system mandated by state statutes. *Id.*

517. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Brennan, J., dissenting) (the Eighth Amendment does not bar as cruel or unusual punishment the execution of people who committed capital offenses at ages sixteen or seventeen, although worldwide the United States joined only four third-world nations in failing to prohibit such executions).

518. *See* Minow, *Rights for the Next Generation*, *supra* note 16, at 4-5.

519. *See* Professor Mary Ann Glendon's critique of our rights-based jurisprudence as unresponsive and often destructive to the interests of children and their families. GLENDON, *supra* note 42.



claims.<sup>520</sup> While enfranchisement and other empowering procedures may aid white women and minorities in their struggles for legal recognition of their personhood, empowerment is largely meaningless for children. Were the law to treat children as adults' equals and permit them to vie for their interests alongside adults, the influence of children's interests on our jurisprudence would remain impotent. As a class, children are not only a minority, but also economically, politically, and even physically weak.<sup>521</sup> Even if procedurally empowered, then, children are bound to lose, as they do now, in any contest with adult interests. Likewise, feminist and critical race scholars have observed that equal access for white women and minorities to the processes of power fails to assure for them substantive equality, fails to assure legal recognition of their personhood.<sup>522</sup> Instead, the transformation of our jurisprudence and the status of children under the law may depend upon incorporating the experiences and perspectives of real children into our lawmaking.<sup>523</sup> That goal, in turn, obligates us adults to listen to and value children's perspectives.

---

520. *But see* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 43, at 299-310. Professor Martha Minow advocates empowering children with legal rights because legal rights assure hearings of claims. Children are now legally silenced in the private realm of homes and even in the public realm of schools, both sites of their maltreatment. If empowered with rights to demand hearings of their claims, Professor Minow argues, children could expose these sites of maltreatment to salutary public scrutiny. Moreover, Professor Minow envisions children's assertion of rights not as autonomous individuals (the liberal premise), but as representatives of shared or relational interests. The failure of our jurisprudence yet to recognize shared or relational interests and its myopic focus on individual autonomy leads me to doubt children's equal rights as presently meaningful.

521. I state the seemingly obvious proposition that children, for a variety of reasons, are relatively and practically powerless. Still, I am reminded of the "Children's Crusade" for civil rights in Birmingham, Alabama in May of 1963. Reverend Martin Luther King, Jr. and the Southern Christian Leadership Conference had begun to recruit high school students in their effort to fill Birmingham jails in protest of municipal segregation. *See* STEPHEN B. OATES, LET THE TRUMPET SOUND! THE LIFE OF MARTIN LUTHER KING, JR. 224-25 (1985). These high school students were, of course, children themselves, but at least of an age which did not especially trouble the SCLC leaders in their recruitment for civil disobedience and exposure to police violence and jail. *Id.* at 225. The SCLC leaders were greatly troubled, however, when the younger siblings of the high school students began to throng recruitment meetings and demand to march as well. *Id.* Unable to "keep them out," Reverend King and the SCLC decided to let the younger children march. *Id.* "[A]ll our family life will be born anew," Reverend King said, "if we fight together." *Id.* The subsequent marching of thousands of children, some as young as six, in Birmingham streets may have proved pivotal in the struggle of Birmingham's African-American community against municipal segregation. *Id.* at 230.

522. *See, e.g.,* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (demonstrating how equal enfranchisement alone fails to assure proportional political power for African-Americans); Nunn, *supra* note 72 (arguing that freedom from racial discrimination in peremptory challenges to jurors is necessarily an African-American right subverted by white use); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that subordination of groups of people through racially neutral law offends constitutional equal protection guarantees).

523. The proposals and demonstrations of "legal storytelling" from some feminist and critical race theory scholars inspires consideration of children's "stories," their perspectives and experiences, as legally transformative for children as well. Scholars and litigators intent on including children as children in legal personhood may draw from the examples, then, of such legal storytellers. *See, e.g.,* Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 183-86 (1985); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Toni M. Massaro, *Empathy, Legal*

In constitutional, child support, and child custody jurisprudence, we now systematically exclude children's perspectives from representation. The law substitutes for real children and their interests the interests instead of their parents or of the state. We craft laws that serve, not real children, but adults as autonomous individuals or, at best, children as potential adults. Listening to and valuing children's perspectives can begin to transform this jurisprudence, forcing us to countenance, not substituted interests, but the perspectives of real children. We take a step toward this transformation when we repudiate our self-serving identification of maturity as justification for denying children standing in legal disputes. When we repudiate the pretext of maturity for denying children's perspectives, we can begin to consider seriously whether and how children are different from us adults. We can then begin to propose legal mechanisms designed to value children's perspectives, designed to value children as children and childhood as inherently compelling. I take up this task with some preliminary observations in the balance of this article.

### *B. Difference and Perspective*

We adults tend to think of children as different from us because children are, among other attributes, physically weak, economically dependent, uneducated and inexperienced; they are innocent and naive, if not foolish and short-sighted.<sup>524</sup> Many children are none of these, but many adults are. We adults tend to think of childhood as different from adult experience, that in childhood children are wondrous, discovering and learning about the world. Childhood is a time for carefree fun and play as well, in a realm protected from "harsh realities." Many children experience few of these aspects of childhood, while many adults continue to enjoy wonder and play. We know that children beset by urban poverty become "wise before their years."<sup>525</sup> Some

---

*Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Matsuda, *Public Response to Racist Speech*, *supra* note 43; Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990); WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 43.

524. These attributes spring not only to my mind, but also to students' when I question them in my classes. See also Coons et al., *supra* note 8, at 315.

525. I use the example of impoverished children to deconstruct romantic stereotypes of children. Maurice Sendak, the award winning author of books for children, (books full of frightening images for me as an adult), contends that children know more about "harsh reality" than they reveal. Maurice Sendak collaborated with adult cartoonist Art Spiegelman to depict the two men strolling through a landscape, a landscape they see as a Connecticut idyll, but which reveals to the reader both humorous and horrific images. In the depiction, Maurice Sendak tells Spiegelman:

Art—you *can't* protect kids .... They know everything!

I'll give you an example .... My friend lost his wife recently, and right at the funeral his little girl said, "Why don't you marry Miss So-and-So?" He looked at her as if she were a witch! .... But she was just being a real kid, with desperate day-to-day needs that had to be met no matter what.

People say, "Oh, Mr. Sendak, I wish I were in touch with my childhood self, like you!" As if it were all quaint and succulent, like Peter Pan.

Childhood is cannibals and psychotics vomiting in your mouth!

I say, "You are in touch, Lady—you're mean to your kids, you treat your husband like [dirt], you lie, you're selfish .... That is your childhood self!"

In reality, childhood is deep and rich. It's vital, mysterious, and profound. I remember my *own* childhood vividly ....

I knew terrible things .... But I knew I mustn't let adults *know* I knew .... It would scare them.

children augment family income in street work, for example, legal or not.<sup>526</sup> Some are skilled at shielding themselves from stray bullets in gang shoot-outs in the housing projects where they reside.<sup>527</sup> Some children render care for younger siblings akin to a parent's.<sup>528</sup> Meanwhile, many adults sustain the hallmarks of childhood throughout life. Those of us in the academy, for example, continue to study and learn, and are at least as wondrous in our studies as when we were children. We adults crave toys and play; our electronic games and other leisure pursuits are only more complicated and expensive than children's. As social constructivists argue, then, children and childhood may not be innately different, but acculturated.<sup>529</sup> Likewise, observed gender and racial differences beyond the physiological may arise from different cultures or the experience of oppression itself.<sup>530</sup> The source of difference may not matter, finally, so long as people experience difference in their lives. Hence, critics from gendered and racial perspectives demand that our jurisprudence, historically crafted from a singular and exclusive perspective, recognize and include their experiences.

I have argued that the law should include children's perspectives and different experiences as well. Which differences, though, should we legally notice?<sup>531</sup> When we legally account for children's "immaturity" as a difference, for example, we merely perpetuate a power imbalance between children and adults and fail to recognize or respect difference. Using maturity standards, the law mistakes the different perspectives of children and adults for inferiority in children's personhood. How can we legally recognize and respect children's difference without denying children personhood? Answering our legal questions about children and difference compels at least two difficult tasks from us adults. First, we need actually to listen to children. Second, we need candidly to examine our motives whenever we do legally notice differences in children from ourselves.

What motivates, for example, our systematic segregation of children from ourselves in society? We assure children's segregation both *de jure* and *de*

---

Maurice Sendak and Art Spiegelman, *In the Dumps*, NEW YORKER, Sept. 27, 1993, at 80-81. See also MAURICE SENDAK, WE ARE ALL IN THE DUMPS WITH JACK AND GUY (1993) (an illustrated rhyme of homeless children).

526. Alex Kotlowitz describes impoverished Chicago children garnering money by guarding cars at the stadium or by stealing coins from video poker machines. KOTLOWITZ, *supra* note 203.

527. *Id.* at 26, 40 (describing children barricading themselves in apartment hallways and dumpsters).

528. *Id.* at 26-27 (describing a brother's protection of younger siblings from gang violence, as well as performing childcare).

529. See, e.g., Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1081, 1082, 1085-96 (1991) (describing how human definitions of childhood, from its duration to its nature, have varied historically and culturally such that childhood is entirely a social—as well as legal—construct). Of course, we cannot (or at least should not) conduct experiments to determine empirically whether the attributes that we observe as predominant in children are intrinsic to their physiological development or the result instead of our treatment of them.

530. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (arguing that gender differences reflect only the relative power of the sexes and not innate attributes).

531. See Minow, *Justice Engendered*, *supra* note 40, at 17-30 (identifying the "dilemma of difference:" the law's notice of difference or failure to notice difference both threaten to perpetuate or disrespect difference).

facto. For the majority of children's waking hours, not to mention our own, we segregate children in schools and daycare. We designate some public accommodations for "family," but allow most to exclude children. Any parent can readily confirm the sometimes insurmountable difficulties of taking younger children on buses or airplanes, of taking children to most restaurants and stores, of taking children to a workplace for the briefest of errands.<sup>532</sup> We say that we send children to school and exclude them from public places for their own good. More candid examination of our motives for segregating children might reveal that, whatever our attitudes as individuals, adult society does not really like children.<sup>533</sup> Children, with their dependency and demands, impede the pursuit of adult work and play. When we were children, adults told us to apply ourselves in school and stay out of trouble so as to prepare for the "real world" awaiting us upon legal majority. How keenly we looked forward to that emancipation.<sup>534</sup> Now as members of adult society ourselves, we permit the societal relegation of children to low or unpaid caregivers, their parents included, the better to enjoy our adult freedoms unfettered.<sup>535</sup>

---

532. Accommodations in these places for the physically disabled have eased some difficulties of traveling with a younger child, but for the most part, public places remain child hostile. See Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1991). Ramps, for example, greatly ease access for children's strollers as well as for wheelchairs.

533. Unrelenting societal maltreatment of children alone evinces societal dislike of children. Likewise, the persistent legal treatment of children as parental chattel evidences societal dislike of children. Some may object that we Americans love children and that our societal mistreatment of children is inadvertent or unintentional. If so, then the objection strikes me as merely semantical. Societal love and societal mistreatment are, for me at least, mutually exclusive by definition.

No doubt societal hostility toward children derives, in part at least, from their association with women caregivers, another societally disfavored class. Indeed, societal reactions to children often parallel societal reactions to women. Even as women, for example now experience societal "backlash" against feminism, (see, e.g., SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991)), children now experience backlash against reforms which improve children's lives, but threaten adults'. No sooner had government begun to take serious notice of child abuse, for example, prosecuting types of cases ignored in the past, than the popular media seemed intent upon impeaching the credibility of all child victims through publicizing a handful of *perhaps* dubious prosecutions. See, e.g., *Rush to Judgment*, NEWSWEEK, April 19, 1993, at 54. In a subheading this Newsweek article declared: "America is now at war against child abuse. But some recent cases suggest we may be pushing too hard, too fast." *Id.* The article decried the conviction of two white, middle-class grandparents for sexually abusing their grandchildren. The article describes efforts to identify and prosecute child molesters as "at fever pitch," "frantic," and "maniacal," *id.* at 54, though in the case featured, even the defense attorneys agreed that at least one child was molested, *id.* at 56-57, (they just did not agree the molesters were their clients). Praising reversals of convictions on appeal in two high-profile cases, the article concluded, "Both those turnarounds represent a new willingness to look at children's testimony as just that—the word of children." *Id.* at 58. We may fairly debate victim interviewing and evidentiary issues in child abuse cases. The Newsweek article, with its sensational reporting of a few *cause célèbres*, however, represents, not fair debate, but a backlash against efforts to aid abused children, numbering over a million each year. CHILDREN'S DEFENSE FUND, *supra* note 20, at 62. Again, such backlash speaks of societal hostility to children.

534. See, e.g., Marks, *supra* note 150, at 11, 20. When asked about rights and laws for children, the children in Mr. Marks' interviews wanted, *inter alia*, the right to drive and hold jobs, the right to wear what they wanted, the right to stay up late, the right to clean up later, all of them adult prerogatives eagerly anticipated. *Id.*

535. The child hostile society I describe includes workplaces and other public forums historically dominated by men. See, e.g., Minow, *Rights for the Next Generation*, *supra* note 16, at 5-8. In the "private sphere" of home and family traditionally entrusted to women, children

The segregation of children is self-perpetuating. As a society, we may segregate children because we do not like them, and we may dislike children as a society in part because we spend so little time with them. In particular, those who have devoted the time required to become lawyers, lawmakers, and judges, in the main, have had scant opportunity to spend time also with children.<sup>536</sup> Those who occupy positions of power in the legal community, then, are accustomed to a child-segregated society. When faced with a case involving a child, the child's experience and perspective (not to mention the caregiver's) are foreign to them. Some may actively dislike children, inclining them to denigrate children's claims. Even those who harbor a generalized love for children, however, lack the experience in the company of children perhaps requisite to recognizing and respecting children's claims. Hence, those workplace reforms which would enable parents of both sexes to care better for their children<sup>537</sup> would also better acquaint the legal community with children.<sup>538</sup> Such integration and much more<sup>539</sup> can help dispel the hostility of adult society for children and help us to value children for themselves.<sup>540</sup>

---

are welcomed. *Id.* The hostility of adult society that I describe, therefore, is gendered, even if perpetuated now by both sexes.

536. Mothers remain the primary caregivers for most children, and for most mothers, time devoted to childcare precludes their ascension to powerful positions in the legal community. *See, e.g.,* ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1993); *see also* Sue Shellenbarger, *Work-Force Study Finds Loyalty Is Weak, Divisions of Race and Gender Are Deep*, WALL ST. J., Sept. 3, 1993, at B1, B3 (reporting on a survey of 3,000 employees confirming the continued gendered division of domestic labor between employed spouses); Karen Czapanskyi, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) [hereinafter Czapanskyi, *Volunteers and Draftees*]. While most male lawyers, lawmakers, and judges are also fathers, a precious few have experienced primary responsibility for their children. *See generally* Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990) [hereinafter Dowd, *Work and Family*].

537. For descriptions of workplace reforms facilitating such integration and their rationales, *see e.g.,* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. C. REV. 1183 (1989); Czapanskyi, *Volunteer and Draftees*, *supra* note 536 (re gendered division of parental labor); Dowd, *Work and Family*, *supra* note 536; Nancy E. Dowd, *Work and Family: The Gender Paradox and Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

538. A televised exchange between U.S. Supreme Court Justice Ruth Bader Ginsburg and her daughter Professor Nancy Ginsburg of Columbia Law School recently illustrated self-respecting interdependence between a parent and child which can help promote legal respect as well. Professor Ginsburg presented her mother an award at Harvard Law School's "Celebration 40" honoring that school's forty years' of women graduates. In presenting the award, Professor Ginsburg cited her mother's loving teachings as a parent, lessons in integrity and compassion. In turn, Justice Ginsburg honored her daughter, noting that while a student at Harvard Law School, Justice Ginsburg was parenting the then fourteen-month-old Professor Ginsburg. Parenting as a law student, Justice Ginsburg said, put her legal studies in "perspective," forcing her to "play" as well as work. The exchange between this mother and daughter, a family so influential in the law, offered a powerful glimmering of how childhood and parenting experiences, upon integration into the legal community, can help transform our jurisprudence. How remarkable and radical that Justice Ginsburg was introduced, not just as a member of the Supreme Court, but also as a mother; that Professor Ginsburg was introduced not just as the Janklow Professor of Law at Columbia, but as a daughter and parent herself. *America and the Courts: Harvard Law School's "Celebration 40"* (C-SPAN Broadcast, Oct. 9, 1993).

539. Consider, for example, affirmative measures to integrate public accommodations and to acquaint nonparents with children. I imagine all public places restructured both physically and philosophically to welcome children: not only on-site workplace childcare, for example, but also workplace cafeterias designed for parents and children both.

540. It should go without saying that adult hostility toward children is insufficient reason to segregate them from us.

When we notice difference in children to segregate them from adult society, we use children's differences to justify their legal denigration and to mask adult hostility toward them. We may also notice difference in children to help establish their claims upon adult society, the state. Despite a jurisprudence describing autonomous individuals, for example, we notice that children differ from that legal model of personhood because they are dependent upon others for support. Moreover, we decline philosophically to hold children responsible for their economic fortunes, dependent as they are on their parents. Politicians' rhetoric disapproves of visiting the poverty of parents upon their "innocent" children, and the law recognizes children's difference of dependency in the premise of the Aid to Families with Dependent Children program. The legal recognition of children's economic dependency defines a special exception to our jurisprudence that individual autonomy equates with economic self-sufficiency.<sup>541</sup> Thus, we legally exempt children from individual economic responsibility because they are children. As a class, we posit children outside the legal personhood of autonomous individuals in order to spare "innocents" from poverty.

Alternatively, we could include children's attribute of economic dependency in the model of legal personhood. Instead of legally describing persons as wholly autonomous and hence economically self-sufficient, we could understand that some persons such as children are not autonomous and are dependent in many ways. Moreover, we could understand that other persons are caregivers, responding to dependency with obligation. Our revised model of legal personhood would then reflect, not only self-sufficient individuals, but also caregivers and their dependents; not only autonomy, but also interdependency.<sup>542</sup>

Once revised to reflect interdependency, our jurisprudence could no longer specially except children and thus exclude them from legal personhood. Neither could our jurisprudence deny the economic dependency of other people, including adults. Working poor, unemployed, and homeless adults would gain, along with children, legal recognition of their economic dependency and respect for their claims on state support. By noticing the difference in children of dependency and including their dependency in legal personhood, then, we would also recognize their likeness to us adults.

Adult society now refuses to concede our likeness to children in their economic dependency. If economic dependency established children's claims to state economic support, then likewise economic dependency would establish adults' claims. Against this slippery slope of burgeoning claims to state support, the law posits children as exceptional in their dependency. Children are dependent because they are not adults, the law tells us. We may therefore exempt them from legal personhood and its requirement of self-sufficiency. We may recognize children's claims to state support to the limited extent we do, not

---

541. For both descriptions and critiques of this equation, that a jurisprudence of individual autonomy means economic self-sufficiency, see, e.g., Fox-Genovese, *supra* note 259; Simon, *supra* note 71; WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 43, at 21-25.

542. Feminist legal scholars in particular have advanced the project of according care giving and interdependence, responsibility and connectedness, legal recognition and respect. See MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 43, at 193-214 (describing feminist scholarship and characterizing one tenet of feminist legal scholarship as, "Notice the mutual dependence of people;" *id.* at 213).

because they are economically dependent, but only because they are "innocent" children. If we take up the challenge to examine candidly our motives for noticing difference in children, however, then our special recognition of children's dependency will appear as the unwarranted denial of our obligations to all dependent people.

Indeed, examination of economic dependency in children reveals they are not so different from adults. As much as children are not individually responsible for their poverty, so most adults now in poverty are not. In our interdependent market economy, some are poor so that others may be rich, some are unemployed so that others may work, some are homeless so that others are housed.<sup>543</sup> Recognition of children's likeness to us adults, therefore, does not require that we impose individual autonomy on children and demand that they become economically self-sufficient.<sup>544</sup> Instead, recognition of our likeness to children requires that our legal model of personhood reflect both adult and child dependency and that we respect adult claims for state support as well as children's.<sup>545</sup>

Upon examination of difference in children, we can deconstruct most any difference such as dependency to perceive that children's differences from adults are also their likenesses. That perception does not relieve us of legally recognizing and respecting difference in children, however. On the contrary, perceiving our likenesses with children opens new avenues of adult empathy for children and challenges us to value a child's experiences—of joy and sorrow,

---

543. William Simon's study of American welfare systems exposes liberalism's contempt for economic dependency. Simon, *supra* note 71. Our jurisprudence justifies poverty as the result of individual failure, and wealth as the reward of individual merit. *Id.* at 1434. Instead, as Professor Simon demonstrates, national economic policies condemn some to poverty and unemployment so that others may prosper. *Id.* To Professor Simon's class analysis, Elizabeth Fox-Genovese adds the underrated factors of gender and race. Fox-Genovese, *supra* note 259. "Upward mobility depended on the exercise of individual talent," Professor Fox-Genovese observes, "which in practice turned out to be white male talent." *Id.* at 350. American distribution of wealth, then, depends on political choices favoring some and not others.

544. As Professor Minow has queried:

Does locating the interdependence of any human being with others obscure the differences between children and adults? No. Instead, it rejects the notion that our society should answer questions about children's legal status simply by asking how children differ from adults. That inquiry wrongly suggests that such differences are real and discoverable rather than contingent upon social interpretations and choices. And the inquiry into differences risks creating and then submerging a norm for inquiring about sameness and difference, rather than raising for debate the substantive questions about how we should live together. To assert that children differ from adults by their relative powerlessness, for example, obscures the range of power held and exercised by different adults and also neglects the fact that power itself is a quality of relationships, not a quantum or a possession of an isolated person.

MINOW, MAKING ALL THE DIFFERENCE, *supra* note 43, at 303.

545. No doubt we already perceive our likeness to children in our economic interdependency. If we fulfilled the promise to children of their exemption from individual autonomy requirements, after all, we would not countenance a single child in poverty, let alone the current millions. Our societal refusal to respond to poverty in all ages, therefore, reflects an ingrained arrogance that those of us who have resources deserve them. *See, e.g.,* Simon, *supra* note 71; Fox-Genovese, *supra* note 259; WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, *supra* note 43, at 21–25 (contrasting her white student's righteous claim to wealth earned by hard work to the propertyless descendants of hardworking slaves).

for example—as much as we value our own.<sup>546</sup> If we empathize with Jessica DeBoer, for example, then we are less likely to dismiss her tears and anguish as the fleeting pangs of childhood, and accord them instead the significance we give our own pain.<sup>547</sup>

Moreover, celebrating children's differences such as their dependency can also help us better appreciate aspects of our own personhood. We might, for example, not only tolerate, but affirm dependency in children, discovering in dependency the cement of valued human relationships and discovering in ourselves the qualities of dependency and care giving alike. Including children's differences in our model of legal personhood, then, can enable us to discover and celebrate aspects of ourselves now unreflected in the adult, autonomous individual model of legal personhood.

Upon candid examination of our motives for legally noticing children's differences, we will discover many adult likenesses. At some point too, however, we reach the limits of adult subjectivity and fail to understand children's differences. We cannot know, finally, how children perceive the world and their place in it, why and how they bond with each other and adults, why their priorities are "childish" and what that means.<sup>548</sup> Unable to understand, we denigrate the child's perspective as uneducated or immature, imagining the child's perspective as an inferior version of our own. Fortified in our superiority, we then feel justified in ignoring children's perspectives and substituting adult purposes for them.

I propose vigilantly resisting this temptation and forcing ourselves, all adult society, to listen to children even when we do not understand them. Listening may eventually enlighten us more. Further, the alternative, our continued treatment of children as inferior beings of limited utility to adult society, is morally unacceptable. We must craft legal personhood and the law, therefore, to accept and even admire the mysteries of childhood forever beyond our adult apprehension.<sup>549</sup>

---

546. For an examination of the role of empathy in the law, see Henderson, *supra* note 451.

547. Cf. Minow, *Justice Engendered*, *supra* note 40, at 10–11 (discussing how people from dominant perspectives historically devalued other people's pain); Matsuda, *Public Response to Racist Speech*, *supra* note 43 (discussing the pain of hate speech for the victim).

548. By discussing children as a group and speculating that children may differ from adults in some important ways that we can neither deconstruct nor ever share as adults, I risk positing a children's or age "essentialism." Cf., e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (identifying a different, uniquely female perspective wrongly assumes that all women share the same perspective or speak with one voice). Children differ from one another in gender, race, class, religion, sexual-orientation, and age; indeed, in as many ways as adults differ from each other and from children. Were we legally to hear children's perspectives, we may gain the opportunity to celebrate children's individuality, as well as common ground.

549. Reverend Martin Luther King, Jr., once remarked upon the task of listening, the hope of mutual child-parent understanding, and the mystery of childhood. "You know," Reverend King observed to a friend, "we adults are always so busy, we have so many things on our minds, we're so preoccupied, that we don't listen to our children. We say to them, 'See, Daddy's busy.' We tend to forget that they are trying to survive in a world they have to create for themselves. We forget how much creativity and resourcefulness that takes." *Quoted in Oates*, *supra* note 521, at 175.



### C. Valuing Children as Children

Our primary legal task remains listening to children themselves and valuing their perspectives legally. Recent cases seemed to have secured such hearings for children. In *Gregory K.*, however, the Florida appellate court reversed the trial court's grant of standing to the child, holding that Gregory's minority incapacitated him from petitioning for termination of his parents' rights.<sup>550</sup> In *DeBoer v. DeBoer and Schmidt*, Jessica's own suit against both sets of parents, the Michigan Supreme Court dismissed the child's complaint for failure to state a claim.<sup>551</sup> Despite much recent publicity devoted to children's appearances in court, then, children remain unrecognized as parties to family law cases profoundly affecting their lives. Children's status under the law remains much like married women's prior to the acts granting them legal recognition as property owners, as persons able to sue and be sued, as persons compelling some legal respect.<sup>552</sup> Legal recognition of and respect for children's perspectives may evolve much as it has so far for women. I propose here a modest legal mechanism to hasten that evolution by structurally compelling our legal system to listen to children.

#### 1. The Family Estate

The legal history of women's property rights can help inform children's legal evolution. The passage of Married Women's Acts in the various states statutorily emancipated women from their husband's dominion and control, but only in those ways women resembled their husbands. Both before and after the Acts, most married women depended economically on propertied and income-earning husbands.<sup>553</sup> Only those few women, then, who mirrored men in their title to property and income actually gained essential aspects of legal personhood upon passage of the acts. For women then and now, the law offered few mechanisms for recognizing and valuing their personhood as women in traditionally female roles. A wife's labor in the home—raising children, cooking and cleaning, managing the household—enabled her husband to earn income in the workplace and to acquire property. Title to the property, however, vested only in the income earner, as the law recognized and valued the husband's labor while denying the wife's contribution and support.<sup>554</sup> Lacking a legal mechanism to value their unpaid labor, women performing traditionally female work remained legal nonentities.

In recent decades, community property law and certain equitable distribution principles have offered homemakers some legal recognition of their labor. In community property states, primarily California, both spouses may legally control property, and each spouse is entitled to receive half of the community property upon divorce.<sup>555</sup> The law requires neither spouse to demonstrate or quantify separate contributions to the acquisition of property

---

550. *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Ct. App. 1993). The court affirmed the trial court's termination of Gregory K's mother's parental rights, however, because the state child services agency had also petitioned for termination.

551. *DeBoer v. Schmidt*, 502 N.W.2d 649, 665-68 (Mich. 1993).

552. For Married Women's Acts, see, e.g., FLA. STAT. ANN. § 708.08 (West 1993); N.Y. STAT. § 303 (McKinney 1993).

553. ELLMAN ET AL., *supra* note 153, at 232-39.

554. See e.g., *Saff v. Saff*, 61 A.2d 452 (N.Y. 1978).

555. See e.g., CAL. CIV. CODE § 4800 (West 1993).

during the marriage. Rather, the law assumes that each spouse contributed equally, whether as an income earner, homemaker, or otherwise. The majority of states retain common law title systems, yet statutorily recognize the unpaid contributions of homemakers in equitable distribution schemes. Under equitable distribution statutes, typically, courts must divide marital property "equitably" between spouses upon divorce, taking into account several factors.<sup>556</sup> By statute, courts must consider not only each spouse's relative financial contribution in acquiring marital property, but also the personal sacrifices a spouse made to enable the education or career of the other and a spouse's labor in homemaking and child-rearing.<sup>557</sup> Equitable distribution schemes, unlike community property principles, yet force divorcing parties to evidence their contributions to the marital estate. Nonetheless, these statutes accord some value to the traditional female roles of homemaking and child-rearing.

Equitable distribution schemes have yet to secure equitable shares of property for women, as husbands continue to receive the great majority of marital property upon divorce.<sup>558</sup> This gender disparity obtains despite women's significant employment outside the home and men's minimal contributions to homemaking.<sup>559</sup> Still, community property and equitable distribution principles repudiate a common law which valued a spouse's contribution to the marital estate in predominantly male terms, the financial contributions of a spouse who worked only outside the home. Community property and equitable distribution principles reflect new legal valuing of women in their own terms: as the managers of households, primary caregivers for children, and domestic laborers, as well as income earners outside the home.<sup>560</sup> Moreover, despite judicial hostility to equitable distribution statutes,<sup>561</sup> women now have a legal basis for asserting that their non-financial contributions to the family's support is as important as the financial.

What if the law accorded children recognition of their non-financial contributions to the family? Envision a law defining a "family estate" as all property acquired since formation of the family. Upon severance of the parents' bond—the divorce, for example, of married parents—all family members would be entitled to an equal share in the distribution of the family estate. Children, then, would be entitled to share equally with their parents in the distribution of property upon their parents' separation.<sup>562</sup> The custodial parent would receive the child's share in trust for the benefit of the child, just

---

556. See, e.g., FLA. STAT. ANN. § 61.075 (West 1993); N.Y. DOM. REL. LAW § 236.

557. See, e.g., FLA. STAT. ANN. § 61.075 (West 1993); N.Y. DOM. REL. LAW § 236.

558. See, e.g., Garrison, *supra* note 152; Tannen, *supra* note 199, at 517–519. The failure of equitable distribution schemes so far results most likely from courts' hostility toward implementing them, as courts continue to evaluate evidence of the husband's financial contributions to the marital estate more highly than the wife's labor and support in the home. Tannen, *supra* note 199, at 517–519. Indeed, where a wife demonstrated that she earned as much as her husband, but labored more in the home, the court yet limited her claim to no more than fifty percent of the marital estate. See *In re Marriage of Stice*, 779 P.2d 1020 (Or. 1989).

559. See Shellenbarger, *supra* note 536, at B3 (reporting on survey of 3,000 employees showing wives performing most homemaking and child-rearing responsibilities whether employed outside the home or not and whether earning more or less than their husbands); see also EILMAN ET AL., *supra* note 153, at 150–53 (summarizing data).

560. See HOCHSCHILD, *supra* note 536.

561. See Garrison, *supra* note 152, at 632; Tannen, *supra* note 199, at 517–519.

562. I use the term "separation" here to emphasize that the children of unmarried parents could yet assert a claim on property titled in either parent.

as custodial parents now receive child support payments. Moreover, this new law of family property would conclusively presume each family member's entitlement to equal shares, requiring no proof of a family member's individual contribution to the family estate.

This proposed law of family estates would serve to announce, as an expression of majority and legislative will, that children are valuable as children. Under legal analysis of the family estate, we could repudiate the model of personhood prevalent in our constitutional jurisprudence. Under the proposed law, we could not think about children as autonomous individuals and seek to quantify their contributions to family life in adult terms. We could also repudiate the model of family relationships prevalent in child support law. Under the proposed law, we could not evaluate the child's service or obedience to parents as the *quid pro quo* exchanged for the child's share in the family estate. Nor would the state require that children share in the family estate in order to guard the state against children's claims for support. Under the proposed law, children share in the family estate because of their own interests as children, and not the state's interests. Further, we could repudiate the model of children as potential adults prevalent in child custody law. Under the proposed law, children would share in the family estate precisely because they are children, even if we do not know precisely what being a child means.

Unlike equitable distribution statutes, the law of family estates would not seek to define the various contributions children make to family life. Instead, the proposed law would conclusively presume that a child's presence in the family is valuable. Nor could an adult purpose or perspective disentitle children from sharing in the family estate. That children may appear to adults as burdensome, inconvenient, costly, or undeserving could not, under the proposed law, bear upon a child's share.<sup>563</sup> Rather, the law of family estates would recognize children in their own terms, even if those terms are undefinable or mysterious for adults. The law of family estates would respect the inherent value of childhood, ever undefinable and mysterious for adults.

The proposed law would also formally recognize at least one aspect of childhood universal to all children, that they belong to a family and a family belongs to them. The proposal accords this recognition through the formal definition of family members and the family estate. From this law, we receive a model, not of children dependent on and beholden to parents, but of family members all interdependent. The family estate model would confer legal respect for children's non-economic contributions to family life, whatever they are, by entitling them to share in the family estate despite children's inability to contribute tangibly to family property assets. A legal mechanism thus valuing the love and other intangibles which children contribute to and inspire in other family members would help our jurisprudence to value children in their own terms. The law of family estates would affirm, then, not only that parents as

---

563. From an adult perspective, children's apparent drain on family financial resources and their failure to contribute tangibly to family assets bedevil rationales for valuing the loss of consortium in tort claims. See, e.g., Note, Susan G. Ridgeway, *Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres*, 50 MONT. L. REV. 349, 364-69 (1989). Because the proposed family estate analysis promotes rethinking of children's value to their families in non-economic terms, it may free analysis of consortium claims in tort law from a focus on economic values as well.

parents are valuable to children, but also that children as children are inherently valuable to parents.

## 2. *The Family Dispute Restructured*

Enactment of family estate statutes could codify in our jurisprudence a model for valuing children as children. Under such statutes also, children's legal status could transform from the virtual property of their parents to property owners in their own right. White women and racial minorities have compelled their legal transformation from chattel to rights-bearers as well, without yet achieving their inclusion in our jurisprudence of personhood.<sup>564</sup> Many critics now advocate compelling the inclusion of different perspectives in our jurisprudence of personhood by requiring our legal system, in particular the courts, to listen to the experiences, the real human stories of people excluded. I have adverted before to the futility of empowering children like adults,<sup>565</sup> and I do not now identify any ultimate purpose in transforming children legally into property owning rights-bearers. Legal recognition of children's property interests in the family estate, however, could hasten the development of other legal mechanisms to accord children a voice for their experiences and perspectives in those legal disputes most important to them, child support and custody actions.

Recognition of children's property interests in the family estate, for example, could initially gain children standing as third-party intervenors in child support and custody disputes. Distribution of family estate assets may bear upon determination of the non-custodial parent's child support obligations, for example, just as distribution of the marital estate or community property now bears upon determination of spousal alimony.<sup>566</sup> Armed with cognizable interests in the family estate, children could assert that, unless permitted to intervene in the child support action, the court will adjudicate issues affecting their family estate property interests, but no named party will adequately represent their interests.<sup>567</sup> Courts could recognize that neither the non-custodial parent resisting the child support obligation nor the custodial parent bound to assert narrow state interests on the child's behalf in fact can adequately represent the child.<sup>568</sup> Custody determinations also, arguably, bear upon a child's property interests in the family estate because of the child's

---

564. Professor Williams describes, for example, how the legacy of slavery and white women's subjection yet casts descendants of former slaves and other women as property. Our culture and jurisprudence, premised on commerce and exchange and valuing personhood in property-based terms, still excludes those who neither own substantial property nor define themselves primarily as property owners. They are thus debtors, owing society instead of entitled to rights. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 43. I worry that characterizing children as property owners would only succeed in reinforcing this culture and jurisprudence. Children as property owners might theoretically "exchange" their interest in the family estate for their parents' nurture, for example. If that effect occurs, I see it as transitional to a jurisprudence valuing human relationships other than as property-based or commercial.

565. See discussion *infra* notes 1-50.

566. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT § 308 (1988) (premising alimony on spouse's economic need created, e.g., by lack of property).

567. See, e.g., FED. R. CIV. PROC. 24 (authorizing third parties to intervene in actions affecting their interests when no named party adequately represents their interests).

568. See *infra* part II, examining how neither a parent nor the state represents the child's interests in child support actions.

dependence on the custodial parent's resources and deprivation of the non-custodial parent's resources, including assets. After a time of legal evolution, therefore, the family estate proposal could provide a legal rationale for children's standing, at least as third-party intervenors, in child support and custody actions.

The potential reforms and ramifications eventually developing from recognition of children's interests in the family estate, however, remain unpredictable and problematic at the outset. One salutary possibility is that recognition of children's claims to the family estate will help bolster their claims to child support as well. The belated recognition in equitable distribution principles of a homemaker's non-economic contributions to the marital estate may have begun to bolster the homemaker's claims to share in the income-earner's post-dissolution stream of income.<sup>569</sup> Professor Twila Perry has similarly advocated rethinking our traditional legal definitions of property and ownership to help establish spouses' claims for post-dissolution support.<sup>570</sup> As property law evolves in the family law context, therefore, children's claims to a share of the family estate may also help to establish children's claims to parents' streams of incomes. Because the law of family estates presumes that children share in the estate without proof that they contributed economically to the amassing of assets, the law may also help to establish children's claims to parental income, also without children's showing their contribution to parents' earning capacity.

Upon legal evolution and the creative litigation which catalyzes it, the law of family estates may secure for children legal standing in family disputes. As problematic as children's standing in family disputes initially appears, we must yet consider standing as our law's primary mechanism for hearing and valuing different perspectives, including children's. I would not countenance children's legal standing supposing that they can litigate with us like adults. I do advocate according children standing in family disputes so that courts can no longer avoid listening to the experiences of real children and hearing real children's perspectives. Without formulating here the host of procedural reforms necessary to listen legally to children,<sup>571</sup> I suggest envisioning the substantive changes that children's standing in family disputes could enable. At the outset, I suggest that legal listening to children is legal respect, enabling the inclusion of children's differences in our jurisprudence of personhood.

Suppose the family estate law did afford children standing as parties to disputes heretofore understood under the law as requiring only their parents' involvement. In divorce actions, for example, which also resolve child support, custody, and property distribution, children's interests in the family estate would enable their participation as parties in every aspect of the action. I do not know all the resulting complications or their potential solutions. I do envision, however, that children's standing in such family law disputes would both require and compel the fundamental restructuring of the legal conflicts. If, for example, lawyers could represent real children's own interests as parties, then

---

569. For a discussion, see ELLMAN ET AL., *supra* note 153, at 292-351.

570. Twila Perry, *Post Divorce Income in a Post Industrial World*, Address at the 1993 American Association of Law Schools Property Section Program (Jan. 1993).

571. See *infra* part IV, at notes 578-584 for some discussion of such procedural reforms.

the law could relieve parents and the state of their current responsibility for promoting children's "best interests."

Indeed, imagine abolishing the much-criticized "best interests" standard altogether, along with any other state interest in the child's support and custody. If we eliminated all civil state interests,<sup>572</sup> then the dispute no longer poses a conflict between state interests and parents' constitutional rights. Upon elimination of that constitutional issue from the dispute, the court would then entertain just family members in dispute, parents and children unable to agree and resorting to court for resolution of their intra-family conflict. Each parent may desire sole custody, for example, while the child desires joint custody. Or the child may desire sole custody with the primary caregiver, while the parents dispute joint custody. The varieties of family legal conflict, as in life, are endless and complex.

How, then, would the court decide such family disputes? We shall have to develop new substantive rules and criteria newly responsive to families, a process entailing a long period of legal evolution. I envision that restructuring family legal conflicts and eliminating argument about state interests and individual rights will enable that evolution. Once freed from asserting the "child's best interests" or other state interests, children and parents could voice their own perspectives and experiences. I expect we will then learn from the family members' own stories what interests the law should value. If the law encouraged parents to cast their legal arguments from their perspectives as parents and children to cast theirs from their perspectives as children, the law could learn from family members themselves what interests to value in family law.

The court determining child support, for example, would hear, as before, evidence of the non-custodial parent's financial constraints. The court would not entertain, however, any generalized state interest in keeping children off welfare rolls. Instead, both adult parties would evidence, from their different perspectives as parents, their hopes for the child and the child's needs, as well as their own personal needs as adults. Likewise, the court would hear the child's evidence, adduced from a child's perspective, of the financial hopes and needs of childhood. As to custody issues between fit parents, the court would not consider an abstract state interest in the "best interests of the child." Instead, adults would evidence, from their different perspectives as parents, the depth of their bond with the child and the effect on each personally of separation from the child. The court would also hear the child's evidence, adduced from a child's perspective, of the child's bonds with each parent and the child's loss upon separation from either.

If the law paid attention to and valued family members' own perspectives, the law might learn to value familial bonds. Courts would entertain, not abstract adult rights or vague state interests, but children's and parents' experience as family members and their very identities as children and parents. Were the law to entertain and value familial bonds, then our jurisprudence of personhood could broaden to include parents in their identities as parents and children in their identities as children. Indeed, under such a broadened view of personhood, children and parents define one another, unable

---

572. I have neither imagined nor proposed eliminating the state's interest in criminal conduct such as abuse or neglect.

to secure their identities without relationship with each other. This interdependence of children and parents in their personhood, in turn, prompts legal recognition less of individual than of family interests. Perhaps our law will thus evolve to recognize not only individual rights, but also the inherently interdependent interests of family members.<sup>573</sup> Perhaps our legal touchstone for family disputes should not be the "child's best interests," but some new understanding of "family interests."

If shaped by the real experiences and perspectives of family members, the law might gradually recognize family bonds as the substantive touchstone for deciding family disputes. Those parents or children with the strongest family bonds stand the most to lose and so advance, together, the most compelling interests. Legally concerned for the pain that real people, children and parents alike, experience upon the severance of family bonds, courts could seek the resolution likeliest to preserve strong bonds. Neither parents' nor children's individual rights per se can direct a court to that resolution. Instead, I envision courts weighing the relative strengths of and threats to family bonds as matters of fact gleaned from the evidence, the perspectives and stories heard.<sup>574</sup>

Suppose in *DeBoer v. Schmidt*, instead of deciding the case as a state challenge to parental rights, the Michigan court could have entertained the claims of the Schmidts and DeBoers as parents and Jessica's claims as a child. The adults and the child could then have evidenced their own experiences, demonstrated their love relationships, and asserted their own claims. The court could have examined the merits of each shared claim, according the same recognition and respect for Jessica's interests in familial relationships as for the adults'. Upon such a hearing, a court may well have decided that either of the adult interests outweighed the child's. Legal recognition of Jessica's real familial interests would not have made them dispositive. We need not forestall children's assertions of meritless claims, therefore, with a reasonableness standard. Legal recognition of Jessica's perspectives and interests, however, would have accorded her personhood under the law. Upon her hearing, Jessica might lose her claims on the merits, but an adult court would have at last heard her perspective, weighing the strength of her relationships and the depth of her pain upon their severance. Under our law now, the court disregarded Jessica's own interests and claims as presumptively immature and unreasonable. The court could instead have evaluated Jessica's interests and claims on their own merits and relative to the adults' interests and claims.

Re-imagining the case as a conflict among two sets of parents and a child allows us to recognize those of Jessica's familial interests unrepresented by the Schmidts, the DeBoers, or the state. The Schmidts and the DeBoers could assert their competing interests in parenting Jessica, demonstrating for the court as a

---

573. Some feminist scholars are at work on this task. See, e.g., Minow, *Rights for the Next Generation*, *supra* note 16; MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 43 (Professor Minow describes "shared interests" which family members may assert together); Bartlett, *Re-Expressing Parenthood*, *supra* note 50 (Professor Bartlett proposes demonstrated commitment to care giving as a prerequisite for assertion of parental rights); Woodhouse, *Hatching the Egg*, *supra* note 50 (Professor Woodhouse identifies parenthood in nurturing, with the nurturer and nurtured commanding legal respect whatever the origin of their relationship).

574. Cf. Fineman, *Dominant Discourse*, *supra* note 276, at 42 (arguing that courts can achieve justice in custody disputes by determining factual issues susceptible to evidence).

matter of fact the strength of their familial relationships and the gravity of their loss if denied. Although the courts remained insulated from such testimony,<sup>575</sup> the public saw and heard it through the media, gaining the opportunity to understand the Schmidts' and DeBoers' perspectives and identities as parents. Likewise, Jessica could assert her interests in sustaining her bonds with the DeBoers and in establishing a bond with the Schmidts. Jessica could evidence the strength of her familial relationships and the gravity of her loss if denied. Once re-imagined, the case controversy derives from three distinct positions: the Schmidts and DeBoers each seek exclusive custody, while Jessica seeks a permanent relationship with the DeBoers flexible enough to permit her establishing a new and as yet undefined relationship with the Schmidts. In this controversy, the state has no interest. Instead, the court hears the perspectives and experiences of the real people, including the child, whose lives hang in the balance.

By permitting Jessica to evidence her own interests, we could eliminate the palpable danger of state interference in constitutionally protected relationships. The challenge to the Schmidts' custody of their genetic child would arise, not from state power, but from Jessica herself. Likewise, the challenge to the DeBoers' exclusive custody of their psychological child would arise, not from state protection of the Schmidt's constitutional rights, but from Jessica herself. In this restructured controversy, then, no slippery avenue appears for state interference in either the parents' or the child's constitutionally protected relationships. Instead, the court decides among competing claims by examining matters of fact.<sup>576</sup> Does Jessica have a familial bond with the DeBoers that is important to her as a *child*? Do the DeBoers have a familial bond with Jessica that is important to them as parents? Do the Schmidts have a familial relationship with Jessica that is important to them as parents? These are issues subject to factual proof. Further, these issues permit all parties to assert their own, real claims, freeing them from the obligation to vindicate political state interests. The adults can address the court from their identities as parents, and Jessica from her identity as a child.

From what we saw in the media of this case, I expect a court would conclude that all the potential parties here, adult and child, bore strong familial

---

575. The Michigan trial court did conclude from the Schmidts' evidence that they genuinely loved Jessica. *Schmidt v. DeBoer*, No. 92-44098-DR, *DeBoer v. Schmidt*, No. 92-44124-DC, slip op. at 9 (D. Mich. Feb. 12, 1993).

576. Cf. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, a pregnant woman asserted her constitutional right to an abortion, and the father, his constitutional right to procreate, mutually exclusive claims. In this restructured *DeBoer* case, both sets of parents and the child assert their rights to constitutionally protected familial relationships, and their claims are mutually exclusive also. The *DeBoer* appellate courts recognized only the Schmidts' constitutional rights, effectively choosing their rights as more important than the DeBoers' and Jessica's. The *Danforth* decision, however, illustrates that courts need not prioritize individuals' competing constitutional rights. Rather than elevate one parent's right over the other, the *Danforth* Court examined factually the effect on each party's life of the procreative decision. *Danforth*, 428 U.S. at 71. Finding that the imposition of parenthood on the woman was more personally burdensome than the deprivation of parenthood was to the man, the Court permitted the woman to abort without the father's permission. *Id.* In the *DeBoer* case too, the court could factually compare the effects of each party's exercise of rights to sustain familial relationships without elevating one party's right over another's. Instead, the appellate courts in *DeBoer* denied that either Jessica or the DeBoers had any constitutional rights to familial relationships at stake. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649, 651-52, 666-67 (Mich. 1993); *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1, 1-2 (1993).



bonds important to them and faced grievous loss if denied their claims. Recasting the case to eliminate state interests and to permit the parties to speak from their own perspectives would not make the court's painful decision about real human conflict easier. Indeed, the decision may become more complex because no adult right or child's interest is dispositive. That Jessica bears important familial bonds with two sets of parents, for example, does not dictate an open adoption or DeBoer visitation rights for her, nor does her case dictate new rules for all custody disputes. Instead, the decision in Jessica's case and other custody cases would arise from the unique contexts of the disputes themselves.<sup>577</sup> Recasting the disputes, then, would permit the court to reach the core issues of custody cases, issues of love and loss and family relationships as those issues bear on real people's lives. The court could hear and respect a real child's familial interests, conflicting as they are with real parents' familial interests, instead of deciding ever indeterminate and political state interests. As such, this re-imagined hearing for Jessica and her two sets of parents could serve as a model for family disputes generally.

To advocate that children appear as parties to those legal disputes most bearing upon their lives is to invite a barrage of objections to which I can offer only some preliminary answers.<sup>578</sup> Assuming we could overcome other

---

577. For discussions of the limits of abstract legal rules and reasoning and the promise of contextual and concretely practical judicial decision making, see, e.g., Finley, *supra* note 523; Fineman, *Challenging Law*, *supra* note 43; Henderson, *supra* note 451; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 85 MICH. L. REV. 2099 (1989); Minow, *Justice Engendered*, *supra* note 40; Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990). To suggest that courts open themselves to real human experience and the concrete context of the litigants themselves is not, as these scholars demonstrate, to launch forth on a sea of indeterminacy and lawlessness. Instead, the experienced contexts of the disputes themselves prompt the guiding principles, as I have suggested, in identifying shared familial bonds as a touchstone for decision making in custody disputes.

578. Children's legal representation raises myriad concerns about children's vulnerability to manipulation by their lawyers and parents, about infants' and young children's ability to direct their attorneys, and about who will pay the child's lawyer. Some scholars addressing these concerns despair of their solution. See, e.g., Coons et al., *supra* note 8, at 308; Guggenheim, *supra* note 36, at 93. The American Bar Association has, however, formulated thoughtful and responsive guidelines for children's attorneys. See A.B.A., *Juvenile Justice Standards* (1980) (describing "substituted judgment" method for inchoate children). See also ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993). Legitimate and grave as these concerns are, they attend the representation of adults no less than of children. See MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 43, at 303 (deconstructing supposed differences in legal representation between adults and children). Our adult clients are vulnerable to manipulation by family members or other powerful influences in their lives, including us, their attorneys. For our adult clients, the law permits us the assumption they are autonomous decision makers, despite our daily observations they are not. For our child clients, we can candidly acknowledge the influences they experience and represent their expressed desires nonetheless. Likewise, we can represent children too young to communicate verbally just as we represent incompetent adults. See *Cruzan v. Director, Missouri Dep't. of Health*, 110 S. Ct. 2841 (1990), for an example of an incompetent adult requiring legal representation. Jessica DeBoer knew few words, but could communicate a legal position. If we quail at interpreting Jessica's expressions, we submit Jessica to the Michigan Supreme Court's assumption that she has no legally cognizable claims. Without standing and representation for children, the state and parents must continue to assert interests on children's behalf which patently serve adult purposes instead of children's. See Justice Brennan's dissent in *Cruzan*, 110 S. Ct. 2872 (Brennan, J. dissenting) (the substitution of the state's interests for the individual's effaced the individual's own interests). Finally, children's general inability to pay our fees merely adds their numbers to our

practical considerations, the fact that children will likely appear only in the exceptional case, at least initially, is the most salient objection to recognizing children's legal standing to property division, child support, and custody actions. Gregory K., Kimberly Mays, and Jessica DeBoer could retain independent legal representation only because of circumstances unusual to their cases.<sup>579</sup> Bereft of legal counsel, children will no doubt find court and legal procedures as intimidating as their parents now find them.<sup>580</sup> As a result, few courts may soon be able to benefit from children's standing and children's own evidence and perspectives.<sup>581</sup> Moreover, only a small class of children able to secure legal representation may shape the law's evolution for all children, at least initially. Nonetheless, the law must change structurally to recognize children as children, to permit if not always realize a hearing for children's own voices, and to prevent state and other adult interests from usurping the child's. Upon restructuring these family disputes, the law can gradually inform itself from, respond to, and finally manifest children's perspectives.

---

existing adult pro bono obligation, at least until we reform the legal system to assure access regardless of means.

Next, scholars worry that children's access to the courts in family disputes undermines parental authority and disrupts family harmony. See e.g., Hafen, *Children's Liberation*, *supra* note 15; Hafen, *The Waning of Belonging*, *supra* note 15, at 20. Children would access courts under family estate statutes, however, only when families already experience significant disruption and disharmony, the divorce of the parents, for example. At this time of family trauma in particular, when parents themselves become adversaries, the law should recognize and courts should listen to children's perspectives. Disputing parents cannot both, after all, represent their children, and neither does the state. Our concern for maintaining parental authority over children manifests also the doctrine that parents should make decisions for children because children's own decisions are unreliable, foolish, or wrong. Absent a legal dispute involving the parents, this doctrine obtains. Once parents legally dispute one another, however, no rationale persists for excluding children's perspectives. At worst, upon a hearing of the merits, a court will reject the child's perspectives and claims just as courts routinely decide that other litigants' positions lack merit. At best, courts will perceive merit in some children's perspectives and claims, and the child's appearance in the case will illuminate it.

579. Gregory K.'s foster father, George H. Russ, is a Florida attorney, and he suggested that the child ask Jerri A. Blair, another Florida attorney well known to Mr. Russ, to represent Gregory. Wingert & Salholz, *supra* note 228, at 87. See also George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard*, 27 FAM. L.Q. 365 (1993). Ms. Blair had achieved prominence for her representation of minors, particularly in the precedent setting *In re the Matter of T.W.*, 551 So. 2d 1186 (Fla. 1989), which established a minor's right to an abortion without parental consent. Ms. Blair accepted Gregory as a pro bono client. Later, Mr. Russ undertook Kimberly Mays' representation. Russ, *supra*, at 365. In Jessica DeBoer's case, her court-appointed guardian ad litem sought independent representation for Jessica when the Michigan appellate court held that the DeBoers lacked standing to contest the Schmidts' custody of her. By that time, the case was a national *cause célèbre*, attracting the pro bono assistance of child advocacy groups and individual attorneys (I among them) across the country. Victor & Bassett, a Michigan firm, filed a complaint on Jessica's behalf under the guardian ad litem's supervision. The San Francisco firm Orrick, Herrington & Sutcliffe represented Jessica in her emergency motion to the U.S. Supreme Court requesting a stay of her transfer to the Schmidts' custody.

580. See Junda Woo, *The Lawyerless: More People Represent Themselves in Court, But Is Justice Served?*, WALL ST. J., Aug. 17, 1993, at A1, A7 (most adults—80% in many jurisdictions—are unrepresented in family law cases, experiencing humiliation and the adverse effect on case outcomes of lack of representation. See also Pearson, *supra* note 215 at 281–82; Thoennes et al., *supra* note 215, at 340. (the single greatest factor in amount of child support awarded was whether one or both parties were represented by lawyers).

581. Entitling children to standing does not require, of course, that they themselves testify or even appear in open court. Critics of our current family law adjudications as too adversarial also seek to protect children from having to appear in court and choose between parents.

Moreover, our initial objections to according children standing in family disputes proceed from our experience with courts and family law as we know them now. In re-imagining the family dispute to include children's own stories, I have presumed some necessary passage of time permitting the development of both new substantive rules to adjudicate the claims and new procedural mechanisms for courts to hear them. For now, the mechanisms of our justice system may appear impossibly child hostile and protecting children from the trauma they experience in court the primary necessity. Those valid concerns, however, could propel us to reform court procedures rather than continuing to exclude children from them.

Indeed, increasing criticism of our family justice system as unresponsive and even hostile to adult family members now spurs such reforms as court-administered mediation and parenting classes.<sup>582</sup> What if we consciously attempted to design family courts and court processes in order to integrate children as well? We might redesign court buildings and courtrooms to make them comfortable for children.<sup>583</sup> Upon reform of the substantive rules for adjudicating family disputes, we might reform also the evidence elicited at hearing. We may not need to ask the child, for example, the divisive query, "Would you rather live with Mom or Dad?" Instead, we may ask children to describe their familial bonds with parents, siblings, and extended family members.<sup>584</sup>

We may not overcome, finally, all the valid objections to children's standing in family disputes. The time and effort required for creating ways for courts to hear children's experiences and perspectives should not daunt us, however. The integration of children into the justice system and adult society generally may take generations. Generations as well may labor before our jurisprudence reflects children's perspectives and includes them in legal personhood. Our legal and social maltreatment of children morally compels our immediate start on the project nonetheless. We lawyers can begin, I hope, by listening to children ourselves and then crafting litigation strategies to amplify what we heard.

---

582. See Junda Woo, *More Courts Are Forcing Couples to Take Divorce-Education Class*, WALL ST. J., Oct. 1, 1993, at B8 (reporting on such reforms); HIGGINBOTHAM, *supra* note 33, at 53-59 (recommending such reforms); Junda Woo, *More States Use Single Court in Family Feuds*, WALL ST. J., June 25, 1992, at B1, B8. *But see* Grillo, *supra* note 276 (criticizing such reforms as oppressive to women); Fineman, *Dominant Discourse*, *supra* note 276 (criticizing such reforms as succeeding only in changing substantive law to women's disadvantage).

583. The newly-built Los Angeles children's court building where courts hear all kinds of cases involving children provides a model. In courtrooms there, the bench and other furniture are scaled to children's sizes; children may resort to separate rooms for napping, playing, and snacking; and child victims are shielded from adult criminal defendants. See Paul Boland, *The Los Angeles County Children's Court: A Model Facility for Child Abuse and Neglect Proceedings*, 18 PEPP. L. REV. 247 (1991). See also HIGGINBOTHAM, *supra* note 33, at 57-58 (citing models of courthouses in various jurisdictions with child "friendly environments").

584. Legal counsel for children empowered to put on evidence of children's experiences and perspectives may decline to call their clients to the stand in all events. Further, reform of our family justice system may redefine over time our understanding of due process in family disputes.

## CONCLUSION

In constitutional jurisprudence, child support actions, and custody disputes, the law systematically and deliberately excludes children from legal personhood. Under the law, children figure as pretend adults or as potential adults. They remain unheard and unseen behind state and other adult interests asserted instead of their own. We justify children's legal exclusion as necessitated by their immaturity, indeed their inferiority to us as adults. We assure ourselves that we exclude children from legal recourse, from legal personhood, and from most all of adult society for their own good and in their "best interests." Our benevolent rhetoric, however, conceals abiding adult hostility to children betrayed in our abysmal neglect of children's impoverishment and abandonment. Adult society seems to bestir itself on children's behalf only when politically we discern some utility for adults in aiding children.

What from an adult perspective we perceive as children's inferiority is instead human difference. Children are dependent, they belong in families, and they do not necessarily share adult priorities and values. Instead of excluding these differences from our model of legal personhood, we should elicit children's perspectives and reform the model to encompass them. We should investigate our motives for excluding children from adult law and society, deconstructing pretexts and rejecting the arrogant hostility we uncover. We should restructure the law of family disputes to force ourselves to listen to real children, to understand their experiences, and to cherish their mysteriousness. I have proposed the law of family estates and re-imagined intra-family disputes to help spur our work in these tasks.

If we begin legally to listen to real children, our law can begin to value children for themselves and not for their adult utility. Our model of legal personhood can grow to include children as children, and "childish" attributes of adult human nature as well. If we learn to love legally the dependency of children, we can learn to love interdependency in adults too. Above all else, we must learn to love legally in children even those attributes of childhood which, from an adult point of view, repel or mystify us. The alternative and the present status of the law is our exalting adult perspectives and priorities over children's only because we are more powerful than they. Once legally forced to value children as children and hear their perspectives and experiences, we adults should no longer be able to deny children's claims for parental nurturing and state economic support.

When she was four years old, my daughter and I discussed some mundane dispute of ours as a conflict between a world governed by adults and her desires as a child. Ever since, my daughter has often countered my adult edicts with her vision of a "Kids' World." In a kids' world, according to her, all the milk would be chocolate, there would be lots of snow to play in, and doctors would make all well. There would be no roads, but friends would be easy to visit. Parents would not leave for work, there would be lots of fruits and vegetables for everyone, and her friends could be her sisters and brothers. My daughter thus envisions an abundance of necessities for children's play, nutrition, and health care. She imagines an integrated world where no roads or other obstacles bar children's access to one another or to adults. She identifies with other children as kin, and asks that adults stay always available to care for

and nurture them. She also knows her vision is an ideal, and she submits to the real. If we legally listen to children, the milk will not all be chocolate. We may, however, begin to understand, admire, and even realize some of a child's vision.

