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# “Out of Children’s Needs, Children’s Rights”: The Child’s Voice in Defining the Family

Barbara Bennett Woodhouse\*

## I. INTRODUCTION

In *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*,<sup>1</sup> I advocated a new approach to thinking about families, which I termed a “generist perspective.” A generist perspective views nurturing of the next generation as the touchstone of the family. This perspective views an adult’s relationship with children as one of trusteeship rather than as one of ownership. Adult “rights” of control and custody yield to the less adversarial notions of obligation to provide nurturing, authority to act on the child’s behalf, and standing to participate in collaborative planning to meet the child’s needs. A generist perspective involves taming the expression of adult power known as “rights talk” in order to redirect the discussion in terms of meeting children’s needs.

In this paper I take a tentative step toward rehabilitating rights talk by suggesting that a new rights discourse (one that speaks of *children’s* rights to have their basic needs met by adults) may offer a powerful tool of generist politics.<sup>2</sup> The

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1 Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747 (1993). The term “generist” should evoke words like generation and regeneration, generous (willing to share, unselfish), genius (guardian spirit) and genus (ours is *homo* as in *homo sapiens*) and derives from the Latin verbs *generare* and *genere* (to beget) and the Greek *gignesthai* (to be born). *Id.* at 1754. A generist perspective borrows the tools of feminist method to examine how the needs, experiences, and voices of children have been overlooked by courts and legislatures.

2 I use the term “politics” advisedly, recognizing that I am talking about

paradox of children's rights, as many have observed, lies in the dissonant and yet inseparable meanings of the term. On one hand, the term "children's rights" refers to a collective social claim to protection based on children's essential dependence. On the other hand, children's rights can represent the individual child's claim to autonomy. Lee Teitelbaum describes the former as "integrative" rights and the latter as "autonomy" rights.<sup>3</sup> The tension between the two is inevitable, since children must be dependent to grow into independence and must become independent to function as autonomous citizens.<sup>4</sup>

My title and discussion reflect an attempt to bridge the gaps or even harness the energy between these dissonant conceptions of children's rights. I take my title from a theme voiced by children's rights advocates of the early Twentieth Century: "Out of the nature of children arise their needs; and out of children's needs, children's rights."<sup>5</sup> At the beginning of this century, this statement reflected a growing recognition that children, as dependent yet evolving citizens, had special developmental needs that translated into collective positive "rights"—such as rights to recreation, to education, and to adult care. These rights both defined public responsibility towards children and limited parental power to make unregulated decisions about children's custody, control, and education or their deployment as economic assets in the labor market. Needs-based children's rights provided a powerful

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family policy and not about constitutional or family law. Definitive arguments about the source of justification or mechanisms for enforcement of children's rights are beyond the exploratory scope of this paper. Assume for present purposes that I am indulging in an "all things considered" form of moral reasoning that is most concerned, at this stage, with how we *talk* about children. See LAWRENCE BECKER, PROPERTY RIGHTS 17 (1977) (describing an "all things considered" form of moral reasoning as one that includes a wide range of justifications, including not only typically "moral" reasons but also considerations of prudence, utility, and the moral agent's desires and interests).

3 Lee W. Teitelbaum, *Foreword: The Meanings of Rights of Children*, 10 N.M. L. REV. 235 (1980). Needs-based rights seek a necessary "integration" of children into society while rights of "autonomy" promote the independence that is needed to achieve mature citizenship. *Id.* at 237, 243. Martha Minow likewise notes the tension between autonomy and connection rights but proposes a version of children's rights that promotes relationships of connection rather than separation of parent and child or parent and community. Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 24 (1986).

4 Woodhouse, *supra* note 1, at 1842.

5 Raymond G. Fuller, *Child Labor and Child Nature*, 29 PEDAGOGICAL SEMINARY 44, 46 (1922).

weapon for promoting policies and providing environments conducive to children's growth toward autonomy.

Modern scholars distrust talk of children's needs, having seen the failures of bureaucratic intervention and the potential for judicial bias and gender gerrymandering of the "best interests" standard.<sup>6</sup> Given children's necessary dependence on adults, how can one give independent content to the notion of children's "needs"? In *Hatching the Egg*, I urged that we must learn to draw on children's own voices and experiences—not only through direct testimony, but by bringing a child-centered perspective to children's law.<sup>7</sup> By paying attention to children's lives and to what they say and do, as opposed to merely listening to what others say *about* children, perhaps we can begin to reduce the dissonance between dependence and autonomy and connection and individualism. By incorporating children's perspectives and stories in our deliberations, we can move children's rights towards a discourse that neither assumes a premature autonomy nor denies children the respect necessary for their growth toward autonomy.

In exploring the notion of a reformed children's rights discourse, I will begin by sketching a framework for thinking about children's rights as an outgrowth of children's needs. Next, I will draw on history and international law to show an

6 See *infra* text accompanying note 26. See generally Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Woodhouse, *supra* note 1, at 1756, 1825-27. Critics view the best interest standard as indeterminate and reflecting judges' personal biases and adults' power struggles as much as children's interests. Among the early critics of the best interest standard were JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979), and Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289-91 (1975). The political nature of custody adjudication has been criticized by Martha A. Fineman, *The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making in the USA*, in *CHILD CUSTODY AND THE POLITICS OF GENDER* (Carol Smart & Selma Sevenhuijsen eds., 1989). The best interest standard has found a defender in Carl Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1989), who argues that the best interest standard is a means, albeit imperfect, of achieving individualized justice.

7 Woodhouse, *supra* note 1, at 1864. In this article, I argue that children and their perspectives have been silenced by traditional legal rules and advocate "hard listening" to what children say. Children's perspectives can be incorporated in our deliberations through studies of children's development, expert evaluations of children's psychological status, children's own stories, play and drawings, children's literature, and even adults' memories of childhood. In short, we must draw on all our resources to comprehend children's actual experiences of family life. *Id.* at 1827-44.

evolving conception of a child's place in the world and an evolving understanding of the basis and scope of adult authority over children. Finally, in order to illustrate a needs-based, child-centered perspective on family rights in application, I will highlight several difficult cases that suggest how a child's own experiences of family can be incorporated into our deliberations and used to give substance to children's rights.

## II. RECONSTITUTING RIGHTS TALK: CHILDREN'S NEEDS AS THE BASIS OF FAMILY RIGHTS

### A. *Replacing Parents' Rights with a "Generist" Focus on Children's Needs*

"Rights talk" permeates modern American family law. Custody law is structured around paternal and maternal rights in children and around family rights of autonomy. These rights are exercised by parents with children as the objects of parental decision-making. Recent commentary, from every point of the political compass, has sharply criticized "rights talk." Some charge that rights talk is a conservative force against movements for social change. Others contend that rights talk elevates individualistic notions of personal freedom over traditional social norms. Still others claim that it undermines the ethic of care and the collaborative values needed to sustain families and communities.<sup>8</sup>

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8 See, e.g., MARY ANN GLENDON, RIGHTS TALK (1991) (critiquing the individualist thrust of rights talk); Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 28-30 (critiquing notions of both parents' and children's rights as eroding "familistic" norms); Catherine MacKinnon, *Feminism, Marxism, Method and the State*, 8 SIGNS 635, 656-59 (1983) (arguing that rights talk authorizes a male, abstract view of the world); Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1848-60 (1985) (noting the decline of shared norms and the rise of the isolated, self-absorbed individual, i.e., the "psychologic man"); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364, 1392-94 (1984) (critiquing contemporary notions of rights as a conservative force permeated by possessive individualism). Among those seeking to defend or reform rights discourse are Hendrik Hartog, *The Constitution of Aspiration and "The Rights that Belong to Us All"*, 74 J. AM. HIST. 1013, 1018 (1987) (describing how the American "dream of autonomous identity" uses rights to rise above and reconstitute dependency through group action); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (arguing that rights can serve as evolving tools to express human aspirations); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 652 (1986) (asserting that rights discourse, although flawed, is a necessary aspect of strategies for legal

If rights talk raises conflicts within communities, it is especially problematic when used to describe parents' relationship with children. Parents need authority to fulfill their responsibilities towards children. The presumption that parents will act to meet children's needs is reflected in the protections conferred by parental rights. Parental rights discourse, however, has the power to influence as well as to reflect cultural assumptions. The way we talk about parents and children affects how we, as parents, neighbors, and citizens, actually behave towards children. A rhetoric of parental rights, when repeated often enough in connection with parents' power over children, has the potential to undermine the child-centered basis of adult authority. Rights rhetoric privatizes and objectifies children. It keeps neighbors and, more importantly, family at arms length when children need them most. This rhetoric also excuses the community from accepting responsibility for the material conditions of poor and minority children—encouraging their marginalization as “other people's children.”<sup>9</sup>

Parental rights are closely linked with an historic legacy of viewing the child as the family patriarch's private property, which, like other economic rights, is secured from state expropriation, confiscation, or regulatory taking.<sup>10</sup> The parental

and political change); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (suggesting that rights empower outsider and minority voices).

9 W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN* 43-66, 78-80 (1988); Barbara B. Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1117 (1992); Woodhouse, *supra* note 1, at 1841.

10 To say that parental rights are linked to property rights is not to say that children are chattels but rather that our culture adopts ways of thinking about children analogous to property rights, including the rights to use, to transfer, and to exclude others. Woodhouse, *supra* note 9, at 1042-47. It would also be simplistic to depict parent-child relations as an unbroken progression from a “primitive” property theory towards an “enlightened” theory of children's individual liberty. Conceptions of the parent-child relationship and the community's role in monitoring it have varied widely from one region to the next, in different periods of United States history, and even in competing visions within a given era. *See id.* at 1036-41; Mary Ann Mason, *Masters and Servants: The Colonial Model of Child Custody and Control* (May 28, 1993) (unpublished paper presented at Law & Society Annual Meeting, Chicago, Ill., on file with author). Colonial descriptions of child-rearing as a highly regulated civic duty contrast with the privatized, *laissez-faire* rhetoric of the late 19th Century, a rhetoric that faded in the face of Progressive Era and New Deal reforms, but seemed to reappear in the individualist approach to family characteristics of trickle down economics and no-fault divorce in the seventies and eighties.

rights of control and custody, constitutionalized by the Supreme Court in cases like *Meyer v. Nebraska*<sup>11</sup> and *Stanley v. Illinois*,<sup>12</sup> confer a strange liberty that consists in the right to control not one's self or one's goods, but another human being.<sup>13</sup> Echoing the rationalizations used to support male dominance over women and masters' control of slaves, parents' rights are justified by assuming unity of interest between powerful and weak. These rationalizations are bolstered by exaggerating children's dependence, incompetence, and inability to know or describe their own minds or their own experiences. I believe this legacy is reason enough to proceed with care in authenticating a rights rhetoric for power over children.

Rights of children, however, seem almost as conceptually problematic as rights in children. Liberal theories of individual rights invoke images of autonomous rights bearers exercising free will in choosing among an array of rights and asserting potentially contradictory claims.<sup>14</sup> Because of children's dependence on adult actors, many observers view with skepticism attempts to articulate "children's rights" as a counterweight or substitute for parents' rights.<sup>15</sup> How do we measure rights, or

11 262 U.S. 390 (1923).

12 405 U.S. 645 (1972).

13 See Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response* to DeShaney, 105 HARV. L. REV. 1359, 1365-72 (1992) (characterizing state recognition of parent's rights that resulted in return of child to abusive parent as a form of slavery); Douglas Sturm, *On the Suffering and Rights of Children*, 42 CROSS CURRENTS 149, 154-55 (1992) (pointing out striking similarities between the dominating parent-child relationship and the slave-master relationship of 19th Century Plantation America); Woodhouse, *supra* note 1, at 1827-28.

14 GLENDON, *supra* note 8, at 47; Martha Minow, *Listening the Right Way*, 64 N.Y.U. L. REV. 946, 957 (1989) (reviewing PAUL CHEVIGNY, *MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY* (1988)). Minow notes Chevigny's claim that "the only appropriate holder of [a right to free expression or procedural right relevant to solving problems] is one who can contribute an interpretation to discourse; she must be able to participate by using language and similar structures." Professor Minow challenges this claim as dismissing infants and others who lack an independent means of expression. *Id.*

15 See, e.g., John E. Coons et al., *Puzzling over Children's Rights*, 1991 B.Y.U. L. REV. 307, 308 (expressing bafflement over the notion of children's rights and identifying quandaries and enigmas relating to the temporal boundaries of childhood, children's entitlement in the face of their essential interdependency, children's responsibilities, and children's voice as translated through child advocates); Martin Guggenheim, *A Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 77 (1984) (expressing skepticism about independent advocacy for children); Hafen, *supra* note 8 (critiquing divisiveness of children's rights); Martha Minow, *Are Rights Right for Children?*, 1987 AM. B. FOUND. RES. J. 203, 211 (expressing concern that litigation

determine when a child graduates from dependence to autonomy? How can we, as adults, purport to speak disinterestedly for children? If children's rights, as I suggest, derive from children's "natures" and "needs," how can we give authentic content to such highly contingent and value-laden terms? As Martha Minow has illustrated, the very term "children's rights" provides cover for a variety of social judgments about what children need, their sameness or difference, how much autonomy they should be entitled to claim at a given age, and how much decision-making autonomy adults want to give them.<sup>16</sup>

While the puzzles and dangers involved in articulating children's rights are intimidating, the status quo presents its own dilemmas. The current discourse, in which children's mere "interests" are easily overwhelmed by parents' powerful "rights," entails less obvious but equally problematic choices about allocating power over children and about when action or inaction constitutes state "intervention" or "oppression."<sup>17</sup> Perhaps children, as the least powerful members of both the family and the political community, are also the least dangerous of rights-bearers and the most in need of an affirmative rights rhetoric in order to be heard. By defining children's rights as flowing from their needs, we can affirm rather than undermine an ethic of care for others. By listening to children's voices and experiences as evidence of their needs, and by trying to come to terms with the children's reality, we can confront our own adult ambivalence and conflicts of interest regarding children's rights.

### *B. The Progressive Vision: Children's Rights as a Corollary of Children's Dependence and Their Capacity for Growth*

I can offer, as yet, no fully developed theory of children's rights to complement a generist theory of family, but I can imagine a place to start, albeit a controversial one. A century

to enforce children's rights imposes a preference for procedural rather than substantive solutions).

16 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 283-89 (1990). "Rights for children, thus far, have expressed rather than resolved adult ambivalence about them." *Id.* at 288; see also Minow, *supra* note 3, at 24.

17 See Frances Olsen, *The Myth of State Intervention*, 18 U. MICH. J.L. REF. 835 (1985) (arguing that state intervention is an incoherent concept and questioning why we consider it intervention when the state *removes* a battered child from her home but not when the state *returns* a runaway child to her parents).

ago, in an America reacting to the excesses of laissez-faire economics and the industrial revolution, the children's rights movement challenged parents and society to revisualize relations between children, parents, and community. These challenges were not claims of children's autonomy.<sup>18</sup> Progressive Era advocates for children made broad claims about the child's human dignity, yet frankly accepted children's dependence and used it as a springboard for asserting children's collective claim of rights to adults' respect, protection, and care. In their discourse, these advocates harnessed the moral force of dependence and interdependence, using it not only to rebut individualist arguments of absolute parental rights of autonomy and control, but also to persuade the polity of the "rightness" of legislation to protect and benefit all children.

Children's rights, for these advocates, were not contingent on children's autonomy but existed in service of their *nature*, defined as a *capacity for growth toward autonomy*. Drawing upon notions of intrinsic human dignity used by abolitionists and women's advocates, the so-called "child savers" argued that children's capacity for growth proved their *rights* to those things essential to physical growth and social development.<sup>19</sup> Accordingly, the child savers went on to argue that parents possessed no rights, and have only the responsibilities of a "sacred trust."<sup>20</sup> The metaphor of trusteeship is, of course, a property metaphor, but trusteeship is significantly different from fee simple estate or chattel ownership.

The trusteeship metaphor imposes an ethic of care and condemns selfish exploitation. Adults may claim the "right" to serve in capacities of trusteeship without claiming the full panoply of property "rights" to exclude, transfer, or exploit without concern for their beneficiaries' needs.<sup>21</sup> The Progressive reformers stressed that parents' trusteeship was shared by the community at large and reflected recognition of a collective as well as an individual stake in "generativity." "The care of children," they reminded robber baron America, is essential not

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18 Teitelbaum, *supra* note 3, at 252; Woodhouse, *supra* note 9, at 1050-58.

19 Woodhouse, *supra* note 9, at 1051; cf. Elizabeth B. Clark, *Religion, Rights, and Difference in the Early Woman's Rights Movement*, 3 WIS. WOMEN'S L.J. 29, 48 (1987) (describing the notion within the women's rights movement that "the wing of the bird indicates its right to fly").

20 Minot J. Savage, *The Rights of Children*, 6 ARENA MAG. 8, 13-14 (1892).

21 See *supra* note 9 and accompanying text.

only to a family dynasty's perpetuation but also "to the preservation of the community."<sup>22</sup>

Although couched in images of dependence and interdependence, this articulation of children's rights provided a platform for real strides in meeting children's needs for health care, education, and protection from exploitation as they grew into autonomous citizens.<sup>23</sup> It also conveyed a powerful cultural image, one at odds with *laissez-faire* understandings of children as private property, one that asked individual parents to give up traditional forms of unregulated control. Thus the parents' right of custody must yield to child-centered concepts like "best interest" and "tender years." The parents' right to exploit children's labor must yield to the child's rights to recreation and to a free public education.

The discourse of needs-based children's rights charged individual parents, the community, and the nation with responsibility for insuring children's well-being. This discourse also reflected changing views on the status of children as people, as well as on the developmental needs of children.<sup>24</sup>

We have been experiencing a rapidly changing family sociology in the United States and worldwide, marked by poor children having more children, affluent adults having fewer children, fewer adults actually sharing households with children, families with children losing economic ground, and increasing numbers of children living in extremely poor families.<sup>25</sup> In the public policy arena, an impassioned revival of social concern similar to the Progressives' turn-of-the-century assault on the *laissez-faire* legal regime may be needed to counteract the growing risk that children's critical social value will be overlooked by an individualistic, market-oriented society

22 Hastings H. Hart, *The Child-Saving Movement*, 58 BIBLIOTECCA SACRA 520, 520 (1901).

23 See generally ROBERT H. BREMNER, *CHILDREN AND YOUTH IN AMERICA* (1979) (reprinting primary documents relating to maternal and child health bills, compulsory education, and labor laws).

24 One of the most effective rhetorical weapons of the child labor movement was comparing power over children with ownership of animals and other living chattels, a comparison borrowed from attacks on slavery. See, e.g., *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* 91-92 (discussing how family members were sold "like so many sheep"); Woodhouse, *supra* note 9, at 1065 (children analogized to slaves and horses); cf. VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* 3 (1986) (tracing changing notions of child's role in society and family).

25 See A.B.A., *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* v-viii (1993); Woodhouse, *supra* note 1, at 1761-67 (gathering statistics).

groping to adjust to rapid and destabilizing structural change. On the level of private ordering, a discourse structured around children's needs-based rights could help families in dissolution reach less adversarial and more functional restructuring outcomes.

I recognize my revitalization of Progressive traditions is a controversial move, as it seems to accept uncritically the Progressives' faith in human perfectibility and to discount evidence that Progressive reformers, like do-gooders and bureaucrats in every era, were guilty of destructive, paternalistic intervention in the lives of the poor.<sup>26</sup> The child savers' failures reflect the serious but inherent risks of action taken "on behalf" of children, and of establishing norms of conduct in a heterogenous democratic society marked by inequalities of race and class. Nevertheless, the child labor, mental health, education and settlement house movements, maternal and infant health initiatives, and those earliest calls for mothers' allowances produced real benefits for children—not the least important of which was a renewed sense of children's connection to the community. Perhaps we can avoid some of the child-savers' cultural myopia and paternalism by bringing children's own voices to bear on defining children's rights. Particularly in state interventions involving poor children and children of color, policy-makers and judges need to see children not as abstract constructions of innocence detached from their surroundings, but as real people embedded in families and communities. These children have their own deep attachments, experiences, and individual needs that may not conform to the child saver's own values or experience.<sup>27</sup>

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26 LINDA GORDON, *HEROES OF THEIR OWN LIVES passim* (1988); GRUBB & LAZERSON, *supra* note 9, at 43-66; Teitelbaum, *supra* note 3, at 252.

27 See Woodhouse, *supra* note 1, at 1834 n.387 (listening to Malcolm X, the foster child, describing the destruction of his home and family by "the welfare"); Olsen, *supra* note 17, at 858-61 (stating that the state often fails to listen to children, harming them more through intervention than by state neglect). I personally am stunned each year at the number of students in my course on abuse and neglect who believe that a "normal" child would wish to be rescued from an otherwise fit home because it lacks running water or to be saved from a mentally ill but non-violent and attached mother.

C. *The United Nations Convention on the Rights of the Child: Harmonizing Dependence and Capacity, Needs and Voice*

Like history, international law supplies another source of children's rights discourse. The 1989 United Nations Convention on the Rights of the Child, drawing on a spectrum of human rights traditions, invokes broad notions of children's autonomy combined with needs-based integrity rights.<sup>28</sup> Its most important role is not in articulating claims of rights to be asserted by children in courts of law, but in proposing norms of justice to guide adults in acting on children's behalf and in constructing laws and social policies.<sup>29</sup> These norms sound odd to United States lawyers, accustomed as we are to litigating negative rights to be left alone and concrete positive rights that give rise to a legal cause of action. The Convention's norms are an amalgam of both connection and autonomy, combining notions of children as dependent members of families and communities with notions of children as individuals with unique personalities and emerging moral and social lives which parents and governments are explicitly charged with acknowledging.

Most importantly, according to the scheme of this Convention, children have the capacity for growth toward autonomy and deserve the right to be treated in a manner consistent with this capacity.<sup>30</sup> The Convention identifies the right of children who are capable of forming their own views to express these views in matters affecting them, either directly or through a representative.<sup>31</sup> It talks of children's freedom of thought, conscience and religion, and assigns to parents the duty of providing direction in a manner consistent with the child's evolving

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28 Evaluating the state of children's rights in the United States today, observers conclude we are far from meeting many of these goals, especially in providing substantive rights to care. CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 94-95 (Cynthia P. Cohen & Howard A. Davidson eds., 1990) [hereinafter CHILDREN'S RIGHTS IN AMERICA] (pointing out poor performance in health care, child care); see *id.* at 163-64 (shortcomings in effective access to decision-making in courts and administrative proceedings); *id.* at 337 (noncompliance in removing children from poverty).

29 See Frances Olsen, *Sex Bias in International Law: The U.N. Convention on the Rights of the Child*, 3 INDIAN J. SOC. WORK 491, 496 (1992) (noting potential of positive rights to set agendas for change but expressing concern about burdens on caretakers).

30 CHILDREN'S RIGHTS IN AMERICA, *supra* note 28, at xiv (Art. 5 of the Convention, evolving capacity).

31 *Id.* at xvi (Art. 12 of the Convention, expression of views).

capacities.<sup>32</sup> Some articles acknowledge children's human rights to respect, including freedom from arbitrary attacks on their privacy, family, home, or correspondence, as well as from attacks based on ethnicity and religion, and freedom from discrimination.<sup>33</sup> Others are social or economic rights: to an adequate standard of living, to education, health care, and social insurance.<sup>34</sup> Government entities must seek to further these standards to "the maximum extent of their available resources."<sup>35</sup>

Additionally, under the Convention, children have unique rights that reflect their special status of dependency coupled with their capacity for growth: the right to recreation, to protection from physical abuse and sexual or economic exploitation, and "the child's right to preserve his or her identity."<sup>36</sup> Entitlement to support and guidance from both parents, who will make the child's best interest "their basic concern," is articulated as a child's right, not a parents' privilege,<sup>37</sup> as are the rights to know, and be cared for by, one's "parents," and not to be separated from them "except [when] in the best interest of the child."<sup>38</sup> A comparison with the 1959 United Nations Declaration on the Rights of the Child, suggests a continuing concern with meeting children's material and developmental needs, but an increased respect for children's voices, for their personal dignity, and their membership in family and community.<sup>39</sup>

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32 *Id.* at xvi (Art. 14 of the Convention). Compare this formulation with much of our First Amendment jurisprudence which emphasizes parents' expression of religious autonomy through their children rather than children's own rights to a religious identity. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

33 CHILDREN'S RIGHTS IN AMERICA, *supra* note 28, at xvii (Art. 16 of the Convention, freedom from attacks on privacy); *id.* at xxiv (Art. 30 of the Convention, protection of continuity of care and ethnic, religious, cultural, linguistic background).

34 *Id.* at xxi (Art. 24 of the Convention, economic rights).

35 *Id.* at xiii (Art. 4 of the Convention, states undertake all appropriate efforts to implement children's economic, social, and cultural rights "to the maximum extent of their available resources and, where needed, within the framework of international cooperation").

36 *Id.* at xxiv (Art. 32 of the Convention, economic exploitation); *id.* at xxv (Art. 34 of the Convention, sexual exploitation); *id.* at xxiv (Art. 31 of the Convention, need for recreation); *id.* at xxviii (Art. 19 of the Convention, protection from abuse); *id.* at xiv (Art. 8 of the Convention, identity).

37 *Id.* at xxii (Art. 27 of the Convention, right to support); *id.* at xviii (Art. 18 of the Convention, child's best interest).

38 *Id.* at xiv-xv (Arts. 7 and 9 of the Convention).

39 *Declaration of the Rights of the Child*, U.N. Res. 1386 (XIV) (1959); see

Clearly, such a broad charter raises many familiar issues of interpretation. What is a parent? A family?<sup>40</sup> How do we evaluate evolving capacities? When is a child capable of forming its own views? What are the child's best interests? What exactly are available resources? Nevertheless, the Convention creates a normative framework for considering children as dependent but evolving individuals; not autonomous, and yet possessing rights; not articles of traffic but people whose care is entrusted to adults who are charged with acting in their best interests. Children are seen as individuals belonging to and having claims upon families and larger communities. Most importantly for this discussion, children's needs for continuity of relationships and for protection in the formation and preservation of their religious, cultural, and family identity are articulated as children's rights and adults' responsibilities.

### III. RECONSTITUTING CUSTODY CLAIMS AS CHILDREN'S NEEDS-BASED RIGHTS TO IDENTITY AND CONTINUITY

#### A. *Thomas S. v. Robin Y.*<sup>41</sup> *Respecting the Child's Perspective*

How, if at all, would family law dilemmas be addressed differently or better through a discourse of children's needs-based rights? I give you the case of *Thomas S. v. Robin Y.*<sup>42</sup> This 1993 New York case involved a claim by a biological father, a gay man, who had donated sperm to a lesbian woman, Robin Y. He had agreed not to assert parental rights in the child, a daughter named Ry, but to be available should the child want to establish a relationship with him. Robin Y.'s

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Teitelbaum, *supra* note 3, at 238 (describing the Declaration of the Rights of the Child as focused on children's needs rather than desires).

40 The Convention does not define the terms "parent" or "family," and Frances Olsen (as well as the text of Art. 5) suggests room for cultural pluralism and recognition of a "multiplicity of family forms." See CHILDREN'S RIGHTS IN AMERICA, *supra* note 28, at xiv (Art. 5 of the Convention, stating that state parties shall respect the "responsibilities, rights, and duties of parents, and where applicable, the members of the extended family or community as provided by local custom, legal guardians or other persons legally responsible for the child," to provide guidance appropriate to his or her capacities in the exercise of the child's rights); Olsen, *supra* note 29, at 510.

41 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993). As this article went to press, *Thomas S.* is on appeal to the New York Supreme Court, First Appellate Division. Briefs have been filed, including an amicus curiae brief by the Legal Action Project of the National Committee for the Rights of the Child.

42 *Id.*

partner, Sandra R., had conceived and given birth to a daughter, named Cade, through a similar arrangement with another donor the previous year. When the girls were four and five, respectively, they expressed curiosity about their origins, and the couple initiated contact with the biological fathers. Thomas S., Ry's biological father, established a relationship of visits and correspondence with the family. When Ry was nine, however, this informal arrangement broke down. In encouraging visits with Thomas S., the women had stressed the importance of treating the two girls equally and of respecting and affirming Ry's perception of her two mothers and sister as her family circle. Thomas S. found it increasingly difficult, however, not to favor Ry as his biological child. When he asked to take the children to visit his biological family in California, but without either of their mothers, the mothers refused. Thomas S. filed a petition seeking a declaration of paternity and court-ordered visitation with Ry.

In denying the father's petition, the judge carefully examined the child's own definition of her family. Instead of addressing the question primarily as one of a parent's rights in a child, or even as one of reciprocal rights within a parent-child dyad, the court considered the entire family system and Ry's perception of her place in it:

The reality of her life is having two mothers, Robin Y. and Sandra R., working together to raise her and her sister. Ry does not now and has never viewed Thomas S. as a functional third parent. To Ry, a parent is a person who a child depends on to care for her needs. To Ry, Thomas S. has never been a parent since he never took care of her on a daily basis.<sup>43</sup>

The judge made the following observations concerning the dispute's effect on Ry:

[It has] already caused Ry anxiety, nightmares, and psychological harm. Ry views this proceeding as a threat to her sense of family security. For her, a declaration of paternity would be a statement that her family is other than what she knows it to be and *needs* it to be. To Ry, Thomas S. is an outsider attacking her family, refusing to give it respect.<sup>44</sup>

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43 *Id.* at 380.

44 *Id.* at 382.

It would be futile, the judge concluded, to force Ry to visit Thomas S. and his biological relatives, who were all complete strangers to her.<sup>45</sup>

Suppose we were to apply to this case a discourse based on children's rather than parents' rights. Ry, through her own concrete description of her family, asserted a needs-based right to continuity of functional relationships and to protection of her family's integrity and to her own social identity. The court did not dismiss out of hand another of Ry's potential rights, the right to know her biological identity—it noted that she understood the biological connection but viewed it with indifference. The judge acknowledged that, inevitably, Ry's views had been shaped by the views of her mothers about what constitutes a family, but the court respected the apparent integrity of her strongly held conviction—conveyed by concrete examples and actions as well as words—that she had more to lose than to gain from a forced legal recognition of the father-child relationship.

This case illustrates how a child-centered perspective on family rights interprets children's needs for continuity and protection of a network of family attachments. These needs, viewed through the child's eyes, took precedence over the father's "right" to redefine Ry's family along biological lines and establish a father-child relationship destructive to the child's own family experience.

The court also stressed an estoppel theory based upon the father's role in knowingly creating and approving of Ry's functional family unit.<sup>46</sup> Thus, the court's description of Ry's needs for integration and connection was reinforced by the more traditional argument, based in notions of adult autonomy and contract, that Thomas S. had waived any parental claims.

### *B. Children's Rights to Identity*

But what of cases in which these traditional elements of consent, waiver, and estoppel are lacking? When children are separated from their biological families by accident, error, or violation of law, how do we balance the child's perspective on her own identity with the biological parents' rights? Several

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45 *Id.*

46 *Id.* at 381-82.

recent cases have dominated the media with stories involving children of differing ages and circumstances.

1. "*She's not Baby Jessica anymore*"

One such dispute involved three-year-old Jessica DeBoers. This child was surrendered by her biological mother, Cara Clausen, for private adoption shortly after birth. The Michigan couple with whom she was placed, the DeBoers, believed they had also obtained the biological father's consent. Nevertheless, another man, Daniel Schmidt, came forward as the child's biological father and eventually married the mother. After protracted litigation, the denial of the DeBoers' adoption petition was affirmed by the Iowa Supreme Court.<sup>47</sup> The would-be adoptive parents turned to the Michigan courts, claiming the child's interests must be considered. Framed by the media as a choice between the child's perspective ("[t]hese children don't care about biology. . . . [t]hey know who loves them and who they love") and the biological father's rights ("[t]his is the most fundamental right you have in this country"), the case was argued to the Michigan Supreme Court. The court held that Michigan courts were precluded from considering Jessica's interests as long as a fit biological parent claimed her as his own.<sup>48</sup> The United States Supreme Court denied the DeBoers' and Jessica's applications for a stay from the Michigan order returning her to her biological parents.<sup>49</sup> Only Justice Blackmun, joined by Justice O'Connor, dissented, saying he was troubled by the prospect of placing a child at serious risk without having addressed her claim that the lower court's failure to consider her interests violated her due process rights.<sup>50</sup>

In March 1994, seven months after her tearful face appeared on television screens across the country as she was removed from "the only home she had ever known," Jessica was

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47 *In re Baby Girl Clausen*, 502 N.W.2d 649, 660 n.30 (Mich. 1993); *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) (interpreting Iowa law regarding failed adoptions as allowing consideration of the child's best interest only if the biological mother is unfit).

48 *In re Baby Girl Clausen*, 502 N.W.2d 649, 657 (Mich. 1993) (applying the Parental Kidnapping Prevention Act's jurisdictional provisions to bar relitigation of the Iowa court decision); Judy Daubenmier, *Two Sets of Parents Take Custody Battle to Michigan High Court*, PHILA. INQUIRER, June 4, 1993, at A23.

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

50 *DeBoer v. DeBoer*, 114 S. Ct. 11 (1993) (Blackmun, J., dissenting).

featured on the cover of Newsweek Magazine. Smiling and apparently happy, she is now called Anna Schmidt and the media reports that she is adjusting well—"She's Not Baby Jessica Anymore."<sup>51</sup>

## 2. *In search of Arlena*

The Kimberly Mays/Arlena Twigg case involved two babies accidentally switched at birth. Mr. and Mrs. Twigg discovered during the final illness of a nine-year-old "daughter," whom they called Arlena, that she was not their biological child. When Arlena died of congenital heart defects, they searched for their "real" daughter and found her living in Florida. Her mother had died, and she lived with her father, Robert Mays, whom she had every reason to believe was her biological kin.<sup>52</sup> The Twiggs sought court-ordered blood tests and a declaration of parentage, but Kimberly and Robert Mays won a court ruling effectively blocking discovery. Later, however, the Mays voluntarily agreed to informal visits. Robert Mays became concerned when Kimberly's emotional health and school work suffered. She seemed disturbed that Mrs. Twigg had asked to call her "Arlena" and be addressed as "Mom." The visits seemed to be undermining her stability within the Mays family. Mays suspended the visits, and the Twiggs sued for custody. After years of litigation, finally teenaged Kimberly herself brought a petition to terminate whatever rights her biological parents might claim—an action the press quickly characterized as a child "divorcing her biological parents."<sup>53</sup>

In one moving courtroom interchange, the girl put her head in her arms and sobbed, as the Twigg's attorney declared that Kimberly Mays was dead and the young lady in the courtroom was really Arlena Twigg.<sup>54</sup> Kimberly Mays won the court battle to control her own identity. In August 1993, a Florida court ruled that she should not be forced against her

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51 Michele Ingrassia & Karen Springen, *She's Not Baby Jessica Anymore*, NEWSWEEK, Mar. 21, 1994, at 60.

52 For a review of the facts and allegations, see, e.g., *Mays v. Twigg*, 543 So. 2d 241 (Fla. Dist. Ct. App. 1989) (refusing the Twiggs' discovery requests pending a determination of probability of success on the merits), and sources cited *infra* notes 53-58.

53 Gail Collins, *Lawyers, Shrinks and Money Dominate Feud*, NEWSDAY, Aug. 3, 1993, at 5; Jeffrey Good, *I Want My Life Back*, ST. PETERSBURG TIMES, July 28, 1993, at 1A.

54 Good, *supra* note 53, at 1A.

will to maintain contact with her biological parents. Robert Mays would remain Kimberly's legal father. The judge reasoned that the Twiggs had disregarded Kimberly's well-being by attacking her attachments to the family that had raised her and by trying to coerce a relationship against her will.<sup>55</sup> The girl greeted the court's decision with elation. Children's advocates and opinion-makers across the country praised the decision as a victory for children's rights.<sup>56</sup>

In March of 1994, Kimberly/Arlena was back in the media spotlight, along with Baby Jessica/Anna. She had left Robert Mays' home for a youth shelter and from there, with the cooperation of both the Mays and Twigg families, she had gone to live temporarily with the Twiggs.<sup>57</sup> What are we to make of Kimberly/Arlena's change of heart? Of Jessica's apparent adjustment to her new identity as Anna? Do these sequels vindicate the critics or the supporters of a children's rights perspective?

We have much to learn about children's needs for stability and how they adjust to various state interventions. Nevertheless, the question of *what* children need is a separate one from the question of *whether* children's needs or parents' rights should guide our laws on custody. Psychologists commenting on these cases suggest that Jessica/Anna's ability to smile and Kimberly/Arlena's quest for identity should not be interpreted as proof that forced intervention to reshape their families was (in Jessica's case) or would have been (in Kimberly's case) free of harm and pain to the child. Rather, their experiences demonstrate the capacity for healing and for growth that sustains children through traumas like adoption, divorce, and death.<sup>58</sup> Arguably, a child-centered perspective on children's identity rights should be guided, like medical ethics, by the maxim of "First, do no harm."<sup>59</sup>

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55 Christina Sherry, *Judge Lets Girl Sever Birth Ties; Biological Parents Are Denied Visitation in 'Baby Swap' Case*, WASH. POST, Aug. 18, 1993, §1, at A1.

56 *Biology Doesn't Make the Parent*, N.Y. TIMES, Aug. 23, 1993, at A14; William Booth, *Tangled Family Ties and Children's Rights*, WASH. POST, Mar. 11, 1994, §1, at A3.

57 Booth, *supra* note 56, at A3; Jean Seligmann & Susan Miller, *Kimberly's About-Face*, NEWSWEEK, March 21, 1994, at 66.

58 Seligmann & Miller, *supra* note 57, at 66; Gail Collins, *Switched or Not, Teen-agers Change Their Minds*, HOUSTON CHRON., Mar. 11, 1994, at A23; *Sonya Live* (CNN television broadcast, Mar. 14, 1994).

59 This is the thrust of Goldstein, Freud & Solnit's "least detrimental alternative" under which courts are advised to respect the child's attachments and

The temptation to focus on punishing the wrong-doers or on vindicating the rights of innocent biological parents, rather than on meeting children's needs, often seems overwhelming. Nevertheless, acts that constitute "justice" between adults, such as restoring a child's "real" name, or "rescuing" a child from her "abductors" and returning her to her "real family," when examined from the child's perspective, risk compounding the original violation. The child's family integrity is violated twice: once by the erasure of her biological identity when separated from her original family and again by the assault on her social identity when her present psychological and functional family ties are destroyed. In the custody context, perhaps the principle of "do no harm" is best served by respecting the child's own perspective of her family and identity rather than forcing her to conform to the adults' perspective.

A discourse of children's rights might do a better job of prescribing just remedies in fundamentally unjust cases by shifting away from justice between adults and stressing instead the needs-based right of these children. Many adoptees, as well as specialists in child development, might argue that such children have a need to preserve and protect their lived identities and also a need to recapture and to reconstruct their lost or violated identity.<sup>60</sup> Such a goal would promise restorative justice, even if it delayed vindication of innocent adults' rights by allowing for a gradual reintegration of child and biological family. A child's needs (reflected in intertwined strands of children's rights) for connection and identity are not necessarily furthered by abrupt, coercive severing of her functional family ties—even when the bonds were formed through illegality, mistake, or unjust acts.

From the child's perspective, the right to preserve her identity may well be vindicated by knowing the truth about her past and by access to her biological family, but it may also be violated by coercive intervention inconsistent with respect for her own experiences of family attachment. More to the point,

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maintain the status quo of custody with a "psychological parent." JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1979); PENELOPE LEACH, *CHILDREN FIRST* 203-04, 218 (1994).

60 See, e.g., ELINOR ROSENBERG, *THE ADOPTION LIFE CYCLE* 89-93 (1992) (describing adoptees' struggle to integrate biological and social facets of identity); Margaret R. Brown, *Whose Eyes Are These, Whose Nose?*, *NEWSWEEK*, Mar. 7, 1994, at 12 ("Who am I?" is a hard question to answer when I don't even know where I came from.").

coercion may undervalue and even compromise the child's own capacity to examine and redefine her identity as she matures. As Kimberly's journey reminds us, in the end, each child must discover who she is and to whom she belongs. Perhaps our job, as law-makers and parents, is simply to make the child's journey to adulthood as safe and secure as possible.

#### IV. CONCLUSION

These cases, ranging from the nontraditional family to the failed adoption to the bizarre baby-switching, illustrate a basic tension between social and biological identities that is a pressing issue for modern custody law. Modern families present many such dilemmas because they are increasingly defined by functional status rather than by formal contract or genealogical kinship.<sup>61</sup> If biology and marriage can no longer provide firm criteria for defining family, where do we turn for a more functional measure? A reformed discourse of children's rights, based on children's needs and perspectives, could be instrumental in redefining families to promote values of nurture, commitment, and interdependence. Children's voices provide a means of harmonizing the intrinsic dissonance of children's rights, acknowledging children's dependency and needs for connection as well as their individuality and emerging autonomy. Initially, children draw their claims for family relationship not from any cherished individual freedom to make and unmake the family, but from a natural status of dependency—the need for reliable, functional parenting. Young children know their families only through concrete experience. As children mature, their needs may change. Law should empower them to act as subjects in shaping their identities according to their emerging capacity, rather than treating them as objects.

Applying notions of children's needs-based rights allows children's voices to be heard where the primary figures in a

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61 See Katharine 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, 962 (1984); Nancy D. 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, 574-75 (1990); Barbara B. Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497, 498. Barbara B. Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 282 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989)).

child's life fall outside the circle of the "traditional" nuclear family—cases involving grandparents, stepparents, gay and lesbian parents, adoptive families, and de facto care givers. Even in everyday cases of custody and visitation, incorporating children's voices and perspectives can inform family restructuring and anchor the indeterminacy of children's needs in children's own concrete experiences of family and developing capacity for self-knowledge.