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Children's Rights: The Destruction and Promise of Family

Barbara Bennett Woodhouse*

In her report, *Individualism and Communitarianism: Individual, Family and State in Western Europe*, Professor Marie Thérèse Meulders-Klein chronicles sweeping changes in the law and sociology of European families. These changes, which are evidenced by rising rates of divorce, single parenthood, and the erosion of marriage as an institution,¹ are even more pronounced in the United States than in Europe.² I have neither the erudition nor the time and space to equal Professor Meulders-Klein's comprehensive and subtle discussion. Let me offer, instead, my own peculiarly American perspective—as an advocate for children operating in an urban American landscape—on some of the themes of individualism and communitarianism which she describes so well.

In America, much of the blame for the breakdown of the traditional family has been laid at the door of excessive individualism. I will argue, however, that the breakdown of family structures is not simply a product of self-centered individualism or legal laissez-faire. It has been driven, in large part, by respect for children and a growing reluctance to punish chil-

* Assistant Professor of Law, University of Pennsylvania.

1. Professor Marie Thérèse Meulders-Klein suggests that this so-called breakdown or crisis of family is the product of hybrid tendencies born of the tensions between individual, family and state—on the one hand, to protect individual liberty and, on the other hand, to protect vulnerable family members. Marie T. Meulders-Klein, *Individualism et communautarisme: L'Individu, la famille et L'Etat en Europe occidentale*, 1993 B.Y.U. L. REV. 645, 659-60. See, e.g., David Blankenhorn, *American Family Dilemmas*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 3, 15-17 (David Blankenhorn et al. eds., 1990).

2. See, e.g., MARY A. GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989) (highlighting individualist thrust of U.S. family law and identifying a general trend, in U.S. and in Europe, towards dejuridification of marriage); NATIONAL COMM'N ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 18 (1991) [hereinafter BEYOND RHETORIC] (stating that America has the highest divorce rate in the world); Meulders-Klein, *supra* note 1, at 654-56.

dren for their parents' nonconformance to social norms. Paradoxically, while children's rights may be a root cause of family breakdown, children are also the best hope for reconstituting the family as a community of responsibility.

The family, like each of the communities explored in this symposium, illustrates the potential oppressiveness of individualism untempered by concern for the group and of communitarianism untempered by respect for the individual. Indeed, both individual and group are threatened when either of them lacks a dimension of the other, and the existence of that shared dimension is essential to their continued vitality. I believe that our concern for children can provide that dimension. In commitment to the next generation, individual and group, self and other, meet. Moreover, this concern for children can play a pivotal role not only within the family, the most basic community, but also in the larger social and political communities that surround and define families and individuals.

Children, even more than adults, illustrate the dilemmas of freedom-within-community that have been a recurrent theme of this symposium. For children, connection to others is a precondition to autonomy and individuality. From this truth flows a paradox: Can we give adults the autonomy to define and restructure their families without undermining family stability—the very stability that nurtures a child's growth into an autonomous adult? Can we protect vulnerable children born into nontraditional families, by protecting their functional relationships of care without, at the same time, undermining the formal marital family—the institution traditionally entrusted with protecting society's vulnerable members?

Professor Meulders-Klein poses a number of key questions about the tensions between family, state and individual in Western European law.³ America is wrestling with its own variations on these themes. Is the family an intermediate group with values distinct from the individual's interests?⁴ If so, what is the family's relation to its individual members, other intermediate communities, and the state? And finally, the

3. Meulders-Klein, *supra* note 1, at 645.

4. Professor Meulders-Klein highlights European law's explicit grant of special status to the family, which distinguishes it dramatically from American law. Where the U.S. Constitution is silent, many European laws and constitutions acknowledge that family has value distinct from individual privacy interests or adult personal growth. *See id.* at 683.

quintessential New World puzzle, how do we define or redefine "family"? Of particular concern to Americans is determining the balance, in deciding what constitutes a family, between formal legal tradition and informal and evolving custom.

At the close of her paper, Professor Meulders-Klein offers a metaphor that seems to capture the dilemmas posed by individualism in families and diverse family forms in pluralist societies. "How can an orchestra hope to play a symphony," she asks, "if each musician wishes to perform as a soloist?"⁵ I find her metaphor has several layers of meaning. Imagine an orchestra bristling with every imaginable instrument in which no player feels compelled to follow the conductor or read from the same score. Yet what kind of music would be produced if every player piped the identical melody on the same type of instrument? Clearly, the richness and vitality of families and communities depends not only on a diversity of voices, but on some shared understanding of the individual's responsibilities to the group and each player's part in the collaborative enterprise.⁶ Can we foster harmony and improvisation, interweave new or seemingly dissonant voices, without surrendering to cacophony?

From where I stand—looking out upon the ivory towers and housing projects, the houses of worship and crack houses, the bustling neighborhoods and empty lots of West Philadelphia—I see the United States as a society both challenged and defined by its cultural, ethnic, regional, class and religious diversity. Whether it is possible to join such a diversity of voices in a common theme is a matter of great debate among Americans. Depending on one's perspective, recent changes in family law to accommodate new family structures may be viewed as an unalloyed threat to family or an indication of family law's continuing vitality.

I confess that I am an optimist. I see the erosion of traditional family forms as related not solely to self-centered individualism, but also to an evolving social concern for the needs and rights of vulnerable family members, especially children. I see legal recognition of de facto marriage not purely as evidence of family breakdown, but also as playing an important

5. *Id.* at 691.

6. See, e.g., Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1877-79 (1985) (suggesting that some commonality of belief about central moral issues of family law is necessary to society).

role in preserving and reconstituting families to meet their dependent members' needs. Where others may identify legal recognition of nontraditional families as an aspect of American libertarian individualism, I discern an equally American quest for a pragmatic re-invention of family to incorporate changing ideals.

Many observers describe America as having its own brand of libertarian/democratic individualism in family matters.⁷ From America's beginnings, however, public intervention in an effort to protect and guide children and to shape families to an Americanized model has provided a strong counter theme to individualism. Even in colonial times, communities often exerted stringent oversight of child-rearing and conjugal relations.⁸ The Industrial Revolution ushered in state intervention on a massive scale, and by the early twentieth century, community policies regarding families found expression in labor, child protective, and compulsory schooling laws.⁹ Indeed, because American regulation of the family has taken so many forms, it is easy to attribute too much weight to the declining importance of formal marriage as evidence of rising legal tolerance for individualism, and to overlook the communitarian thrust of much public law regulating *de facto* and nonmarital families.¹⁰

7. See, e.g., MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 48, 125 (1991) (describing a legacy of libertarian individualism in the American image of the "lone rights-bearer" and relating this legacy to a "missing dimension of sociality," reflected in invisibility of children in public discourse); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 26 (1985) (quoting Alexis de Tocqueville's early 19th century observations on the "democratic" family's individualism).

8. See, e.g., GROSSBERG, *supra* note 7, at 4-5; EDMUND S. MORGAN, *THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* (rev. ed. 1966).

9. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960* (1988) (discussing child protective laws); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 119, 128 (1988) (discussing "progressive" reforms and organized state intervention); Barbara B. Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1038-41 (1992) (discussing rise of children's rights movement and child protective laws); *id.* at 1059-68 (discussing child labor laws).

10. I use the term "de facto" to describe persons who may lack blood or legal ties to each other but are tied together by functional relationships of care and affection. De facto families may be composed of committed same sex couples, heterosexual cohabitants, children's "psychological parents" (those whom children identify as their primary parenting figures), extended family, and others who function as family but do not necessarily fall within the traditional norms. See Barbara B. Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 282

Perhaps my view is colored by my intensive exposure to law as practiced in the Dependency Branch of Philadelphia's Family Court, which deals mostly with poor families rather than the propertied families that populate traditional texts on family law.¹¹ From the perspective of a children's advocate in a troubled inner city, American law is far from *laissez-faire*. When looking at contemporary America, it is difficult to maintain the fiction of family autonomy. One sees law regulating families intensively, but not through prescriptive norms for entry and exit from marriage. From the legislature to law enforcement agencies, the American legal system is now in the business of crisis intervention. Family courts are inundated with the casualties of domestic violence, child abuse, neglect, family break-up, truancy, and disputes over custody, paternity, and child support.¹² As American law has expanded to protect all children, not just rich or marital children, these family courts have become equal opportunity centers for disaster relief. They do not discriminate on the basis of legal parentage or

(1990) (reviewing GLENDON, *supra* note 2) (proposing that we shift our focus from whether people look like a family to whether they act like one).

11. Every city (or county) has its own version of the Dependency Court—a court that takes jurisdiction of cases involving children in crisis. Children come into the system through many different routes, including temporary foster care placements by overburdened parents, reports of abuse or neglect, children's medical or educational needs, school truancy, or brushes with juvenile law. In 1989, Philadelphia's overburdened Dependency Court heard 36,000 cases of abuse and neglect, truancy, incorrigibility, and mental health, allocating less than 15 minutes to 90% of the cases heard. PHILADELPHIA CITIZENS FOR CHILDREN AND YOUTH, DEPENDENCY COURTWATCH PROJECT 5 (1990).

I owe any insights I can claim in this area to Philadelphia's active family advocacy community. Attorneys from the Juvenile Law Center, Support Center for Child Advocates, the City Solicitors Office, the Public Defenders and Community Legal Services all have shared their expertise with me and my students, as have advocates from Philadelphia Citizens for Children and Youth, the Philadelphia Children's Network, and Pennsylvania Partnership for Children. Without their invaluable contributions as collaborators and teachers, my project of building a family policy curriculum around a realistic abuse and neglect case study would not have been possible. I am indebted also to the students and clinicians from our Penn Law Clinic and Public Service Program who have shared their thorniest child support, paternity, and custody cases with me in seminar papers and consultations.

12. America has the highest divorce rate in the world—at present rates, half of all U.S. marriages can be expected to end in divorce, involving a million children per year in legal dissolution of their parents' marriages. Another million children annually are born to single mothers. BEYOND RHETORIC, *supra* note 2, at 18-19. Moreover, children whose families are disrupted by poverty, abuse and neglect have overwhelmed many state child welfare systems, and the National Commission on Children estimates that 550,000 children will be in out-of-home placements by 1995. *See id.* at 283-85.

marital status. The courts and agencies that deal with families in crisis, poor people, and children at risk apply the same rules to marital and nonmarital children alike. Spurred by pragmatism, they increasingly adopt policies that recognize and attempt to support children's de facto and extended families.

In America, children's rights have been instrumental in undercutting the significance of formal marriage. Custody laws that once assigned virtual ownership of children to their fathers now recognize that children are not chattel and that custody rules must be structured to place the interest of children first.¹³ Divorce is now a real option for American mothers, as it is possible for them to leave unhappy marriages without also losing custody of and support for their children.¹⁴ Statutes and judicial decisions applying constitutional principles have broken down the boundaries between marital and nonmarital unions by refusing to recognize many traditional distinctions between legitimate and illegitimate children.¹⁵ Thus, whether a child's father was married to her mother has no bearing on the child's entitlement to support.

In recognition of children's need for continuity, state and federal policies often provide that children under state care should be placed by preference with family members or persons who know them, even if not related to the child by blood or legal ties.¹⁶ Kinship foster care programs have expanded the boundaries of the foster family by placing children with marital

13. See GROSSBERG, *supra* note 7, at 237-53 (creation of the best-interests-of-the-child doctrine); MINTZ & KELLOGG, *supra* note 9, at 127 (best interests of the child a decisive factor in awarding custody); Woodhouse, *supra* note 9, at 1038-41, 1050-59 (emergence of children's rights and best interest standard).

14. See GROSSBERG, *supra* note 7, at 250 (discussing changing economics of divorce); MINTZ & KELLOGG, *supra* note 9, at 129 & n.70 (noting evolution of moral obligation into legal obligation of support). Although Americans have been comparatively free to avoid long-term responsibilities for children and former spouses, this may be changing with recent reforms in child support levels and new methods of collection and enforcement. BEYOND RHETORIC, *supra* note 2, at 97-104; see also IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY (1992) (proposing new plans for enforcement and insuring all children receive a minimum payment).

15. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (protecting family relationship between unmarried father and his children); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding unconstitutional a state law that barred illegitimates from bringing wrongful death suits).

16. See, e.g., 20 Pa. Bull. 112, Rev. Local Court Rule 1676 (1990) (court is directed to consider placements that would provide familiar surroundings and caretakers); Elizabeth Killackey, *Kinship Foster Care*, 26 FAM. L.Q. 211, 214 (1992) (state statutes encourage placement with relatives).

and nonmarital grandparents, aunts, and cousins.¹⁷ Moreover, kinship foster care has expanded communal responsibility for families by subsidizing de facto caregivers of children. In some jurisdictions, even the strong taboos about recognizing gay and lesbian unions are subordinated to the pressing need for foster care and the interests in protecting de facto as well as biological parent-child relationships.¹⁸ The needs of children have inexorably forced us to work with their real, functional families, and not the formal family described by traditional law. These changes, in my view, indicate a necessary recognition of the reality faced by today's children, and they illustrate the many ways that informal communities adapt to provide "families" that can support and nurture vulnerable individuals.¹⁹

Much of this change is occurring at the grass roots level, in municipal ordinances and family courts that issue few published decisions. In true common law fashion, American family law is trickling up as well as down. In areas ranging from reproductive technology to abortion, from child custody to paternity, from alimony to child support, the American legal system is struggling to strike a proper balance between communitarian values and individual rights.²⁰ Like many state

17. *Miller v. Youakim*, 440 U.S. 125 (1979) (construing 42 U.S.C. § 608 as requiring equal funding of kinship foster care programs for poor children); M.A. Farber, *A Growing Foster-Care Program Is Fraught with Ills*, N.Y. TIMES, Nov. 22, 1990, at B1 (in 1990 42% of the 45,500 foster children in New York City were in kinship placements).

18. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting from ruling denying lesbian partner status as child's de facto parent); *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992) (approving adoption by lesbian co-parent based on child's interest in sustaining relationship); Donna J. Hitchens et al., *Family Law, in SEXUAL ORIENTATION AND THE LAW* § 1.04[2] (National Law Guild, Supp. 1992) (noting roles of gay and lesbian foster and adoptive parents in finding homes for hard-to-place children and gay adolescents); *id.* § 1.03[1][a], at 1-11 n.19 (noting cases that find continued custody or visitation with gay or lesbian parent is in child's best interest).

19. For a classic account of such adaptation, see CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974).

20. For example, courts and legislatures deciding whether to enforce surrogacy contracts must balance the individual's reproductive autonomy against the integrity of the family as a social institution. See, e.g., *In re Baby M.*, 537 A.2d 1227, 1246-50 (N.J. 1988) (rejecting surrogacy contract as violating public policy against commodification of parent-child relationships). In addressing issues of child support, stepparent adoptions, and relocation of custodial parents, judges and legislatures must harmonize personal liberties with the needs of post-divorce family and the competing interests of reconstituted families. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978) (placing unity of family seeking stepparent adoption above biological father's claims of individual right); *Lozinak v. Lozinak*, 569 A.2d 353 (Pa. Super.

courts and legislatures, the Supreme Court continues to thrash out many threshold questions. Some recent decisions suggest greater attention to the interplay of individual and group interests in shaping family policy.

The Supreme Court's 1992 abortion ruling in *Planned Parenthood v. Casey*,²¹ and the lesser known 1989 case, *Michael H. v. Gerald D.*,²² are two examples of decisions in which the tensions between individual rights and the family as a community are central issues. In *Casey*, the Supreme Court reaffirmed its position that women's reproductive freedom is a constitutionally protected privacy right—a position that, in focusing on the individual woman's autonomy, represents a relatively individualist interpretation of family rights.²³ But the Court qualified its holding by recognizing a societal interest in protecting potential life that could justify regulations of abortion as long as they did not create an "undue burden" on the abortion decision itself.²⁴

As an advocate for choice, I welcomed *Casey*'s reaffirmation that women, as those who take the risks and pains of pregnancy and childbirth, must be the ones to make the critical choices about reproduction. As an advocate for children, however, I welcomed *Casey*'s affirmation that future generations are the community's concern and responsibility as well as the individual's. Casting reproduction as a purely private enterprise had the advantage of establishing a zone of deregulation around reproductive choice, protecting women from destructive and demeaning intrusions. But this laissez-faire, individualist description also tended to devalue and commodify children and made it harder to frame the work of bearing and rearing children as a critical shared concern, calling for meaningful sup-

Ct.) (allowing child's interest in maintaining network of family contacts to outweigh mother's interest in relocating with a new husband), *appeal denied*, 590 A.2d 758 (Pa. 1990); GARFINKEL, *supra* note 14, at 74 (reviewing debate about aggressive enforcement of fathers' obligations to children with whom they no longer live). These examples illustrate law's increasing attention to the interconnectedness of individuals within families, even after divorce. See Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (arguing that the law's traditional focus on "rights" of isolated parent-child dyads fails to capture the complex reality of family interdependence).

21. 112 S. Ct. 2791 (1992).

22. 491 U.S. 110 (1989).

23. *Casey*, 112 S. Ct. at 2812 (plurality opinion) (describing *Roe* as standing for a woman's personal autonomy).

24. *Id.* at 2817, 2819 (plurality opinion).

port to mothers, infants and families.²⁵

Casey has been criticized as opening the door to acrimonious disputes, as states push to discover the limits of the "undue burden" standard articulated in the plurality opinion.²⁶ Perhaps, however, there is something to be gained from such a dialogue, if it serves to expand discussion about the dualities of pregnancy and parenthood and about family and children, as an individual choice, a complex relationship, and a community value. In its own way, then, *Casey* may signal an era in which the American people grapple with more complex descriptions of our selves and each other as autonomous individuals embedded in interconnected communities of responsibility and care. It remains to be seen whether courts and legislatures will interpret the undue burden test with sensitivity to women's real experiences or with more than rhetorical concern for potential life.²⁷

Like the *Casey* court, the Court in *Michael H.*²⁸ addressed

25. Cf. ELIZABETH FOX-GENOVESE, FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM 83 (1991) (contending that casting abortion as a woman's individual privacy right tended to dissolve men's responsibility to the next generation); Barbara B. Woodhouse, *Poor Mothers, Poor Babies: Law, Medicine, and Crack, in CHILD, PARENT, AND STATE: LAW AND POLICY READER* (S. Randall Humm et al. eds., forthcoming 1994) (arguing that, in our national obsession with abortion, we fail to recognize the shared interests of mothers, infants and the community in a healthy start and fail to give meaningful support to pregnant women and young families).

26. See, e.g., Joan Biskupic, *America's Longest War: At 20, Roe Conflict Enters New Era*, WASH. POST, Jan. 22, 1993, at A1, A16.

27. In considering the husband notification provision in *Casey*, for example, the plurality gave substantial weight to women's real life experiences of battering and domestic violence. 112 S. Ct. at 2831. The burden of a 24-hour waiting period, which the plurality did not find facially invalid in *Casey, id.* at 2825-26, may constitute a substantial obstacle to choice for women in communities where they must travel hundreds of miles or run a gauntlet of violent protesters to reach a clinic. See *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring) (stating that a provision in an abortion law does not satisfy the undue burden test and is facially invalid if the provision operates as a substantial obstacle to a woman's choice in a large fraction of the cases in which the provision is applicable).

Similarly, legislative concern for potential life rings hollow in cities like Philadelphia where lack of prenatal care, drug epidemics, homelessness, and lack of immunizations contribute to infant mortality rates above those of many third world countries. See PHILADELPHIA CITIZENS FOR CHILDREN AND YOUTH, OUR VILLAGE, OUR CHILDREN 14-16 (1991) (reporting rising infant mortality rates, especially in minority neighborhoods where mothers were four times as likely to receive inadequate prenatal care). Nationally, one in four women goes without adequate prenatal care. See BEYOND RHETORIC, *supra* note 2, at 123.

28. 491 U.S. 110 (1989) (plurality opinion). For additional discussions of *Michael H.* and the "unitary family," see Bruce C. Hafen, *Individualism and Autono-*

the tension between individual and community interests—this time while unravelling a complex story of tangled family relationships. The case involved a married woman who conceived a child during an extramarital affair but later reconciled with her husband and wished to keep the marriage intact.²⁹ The couple opposed a petition by the woman's lover, Michael H., to establish his biological paternity of the child.³⁰ Michael challenged the California law that permitted them to veto his attempt to show biological paternity.³¹ Thus, *Michael H.* pitted an individualist version of family rights that focused on a natural parent's rights in his offspring against the communitarian value of the family as a functioning social entity.

The Court fractured along almost as many lines as there are Justices, unable to agree as to whether something called the "unitary family" exists and may be given precedence over the biological father's individual claims of family right, and if so, whether the "unitary family" is grounded in traditional rights attaching to marital status or in some more flexible definition of family.³² *Michael H.*, for all its doctrinal and philosophical confusion, opens a discussion about individual liberty in tension with group mutuality and interdependence and about the meaning of functional family relationships when they conflict with formal notions of status and right. Both *Casey* and *Michael H.* raise more questions than they resolve, but I interpret these decisions as evidence of an increased attention to family as a social entity and public value, as well as an aspect of individual privacy and autonomy.

In the public policy arena, despite America's romance with rights and our rhetorical appeals to family values, Americans show greater ambivalence about granting positive economic and social rights to families, mothers and children than their European counterparts. The tensions between our ideals of community and our legacy of rugged individualism and reliance on private responsibility, compounded by economic crisis, have

my in Family Law: The Waning of Belonging, 1991 B.Y.U. L. REV. 1, 18-23; Woodhouse, *supra* note 20. See also Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (discussing custody disputes in which one biological parent seeks to deny parental status to the other).

29. *Michael H.*, 491 U.S. at 113-15.

30. *Id.* at 115-16.

31. *Id.* at 117-18.

32. Compare *id.* at 123-27 & n.3 (plurality opinion) with *id.* at 142-46 (Brennan, J., dissenting).

been played out in cases and policies surrounding the state's responsibility to children in foster care.³³ Torn between concern for the community's children and a fear of undermining individual responsibility, America is still searching for a morally acceptable and politically practical theory that defines the state's obligations to children.³⁴ Two 1991 reports issued by the National Commission on Children, however, suggest a movement towards a partnership between public and private responsibility for children.³⁵ The first of these reports is a comprehensive study combined with a policy agenda, revealingly, if not optimistically, entitled *Beyond Rhetoric*. It chronicles the status of children in America and proposes a range of policy initiatives to strengthen and support families such as government insured child support, community-based day care, and comprehensive prenatal care. The second report is a survey of children's and parents' views entitled *Speaking of Kids*. This survey analyzes key issues of family life with data drawn from a large, representative sample of parents and children of diverse class, race, region, and family type.³⁶

Both of these reports serve as barometers of the contempo-

33. See, e.g., *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189 (1989) (rejecting due process claim that state owed duty of protection to abused child); *Lipscomb v. Simmons*, 962 F.2d 1374, 1381 (9th Cir. 1992) (rejecting claim of children's positive right to be placed in kinship foster families). Debates regarding kinship foster care illustrate the irreducible tensions between individual and community responsibility for children. Critics claim that programs which subsidize relatives who take in abused or neglected children undermine families by paying them to do what they would do for free, while supporters contend that they preserve family ties of children who would otherwise be placed, also at taxpayers' expense, with strangers. See Farber, *supra* note 17, at B4.

34. See, e.g., DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 134-35 (1988) (discussing ambivalence in welfare reform about helping children by helping their single-parent families); W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 301 (1988) (discussing the limitation of purely redistributive welfare programs in correcting poverty in capitalist labor markets).

35. BEYOND RHETORIC, *supra* note 2; NATIONAL COMM'N ON CHILDREN, SPEAKING OF KIDS: A NATIONAL SURVEY OF CHILDREN AND PARENTS (1991) [hereinafter SPEAKING OF KIDS].

36. Parents and children are, of course, the real experts on family. There is a new interest among social scientists, and even politicians, in discovering what children think about their lives, their families and their place in society. See, e.g., ADRIAN FURNHAM & BARRIE STACEY, YOUNG PEOPLE'S UNDERSTANDING OF SOCIETY (1991) (collecting studies on youths' perceptions); Woodhouse, *supra* note 20 (discussing the importance of children's perspectives); *President Clinton: Answering Children's Questions* (ABC television broadcast, Feb. 20, 1993) (seeking children's views on crime, education, environment, and family issues).

rary meaning of family, and I suggest they depict an America that is groping towards a new consensus on the value of children. This evolving consensus recognizes that children not only enhance the personal growth and enjoyment of adults, but also that they are individuals in their own right and are vital community and national resources. *Speaking of Kids* tells a surprising story about families; in spite of everything we read about the death of family life, most children and parents, and this is equally true in single as well as two-parent families, share deep emotional ties, strive to spend time together, and sacrifice for each other's good.³⁷

Families of all types express worries about crime, lack of money, too little time, and an uncertain economic future—worries that are profoundly felt in poor inner-city neighborhoods where deficits of economic and social capital are compounded by deficits in community resources.³⁸ Children, contrary to common belief, continue to admire and respect their parents (and grandparents) and know that their parents love them. Most parents and most children worry about families generally but feel that *their* family is functioning properly.³⁹ Perhaps my optimism is justified and a consensus on a common theme of family unity and intergenerational support is possible after all.

Others, however, might be less optimistic. Whether they attribute America's shortcomings to individual or public dereliction, critics could point to ample proof that Americans do not really care about their children. In a society in which most mothers work outside the home, affordable day care is scarce or non-existent.⁴⁰ Until recently, national legislation established

37. SPEAKING OF KIDS, *supra* note 35, at 10-22 (reporting many measures of family closeness and involvement but noting children feel less loved by absent fathers); Mark Mellman et al., *Family Time, Family Values*, in REBUILDING THE NEST, *supra* note 1, at 73, 73-92 (research finding that family is central value in most Americans' lives).

38. These worries are shared equally by inner-city single and two-parent families, confirming that deficits and risks the media and politicians often attribute to family structure are linked to broader social-structural deficits. SPEAKING OF KIDS, *supra* note 35, at 24-39; see also Loïc J.D. Wacquant & William J. Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 11-16 (1989) (noting cumulative effects on families of deficits of economic and social capital in inner-city areas of concentrated poverty).

39. SPEAKING OF KIDS, *supra* note 35, at 9-10; Mellman et al., *supra* note 37, at 74.

40. See, e.g., BEYOND RHETORIC, *supra* note 2, at 266 (affordable child care in short supply); Barbara B. Woodhouse, *Uncle Sam Exploits Moms, Too*, PHILA. IN-

no right to even *unpaid* leave for mothers giving birth or caring for sick children.⁴¹ Thirteen percent of American children are without public or private health insurance; programs like Head Start, WIC food supplements, Aid for Dependent Children, and programs providing early childhood intervention for at risk children and assistance to dependent children and their families are consistently underfunded.⁴² A significant proportion of our children are growing up without the support and care of two parents.⁴³

The National Commission on Children studies also tell us that too many American children begin life "at risk." Today, one in four pregnant mothers in America does not receive early prenatal care and one in five children lives below the poverty line.⁴⁴ In contrast to Europe, where income supports reach almost all children, a significant percentage of poor American children receive no income assistance and five million live in families with incomes less than half the federal poverty line.⁴⁵ The Commissioners in *Beyond Rhetoric* noted that children are now the poorest Americans. The poverty rate for young families has doubled in the past twenty years⁴⁶ while elderly citizens, childless couples, and single individuals have grown more affluent.⁴⁷ The Commissioners concluded, "we could not avoid questioning the moral character of a nation that allows so

QUIRER, Feb. 18, 1993, at A15 (critiquing lack of public support for mothers who carry double burden of wage earning and child care).

41. After seven years of struggle, the Family and Medical Leave Act was finally passed on February 5, 1993, in the opening weeks of the Clinton administration. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6. Providing only 12 weeks of *unpaid* leave, this reform still leaves American families far behind their European counterparts for whom extended paid leave is routine. See S. REP. NO. 3, 103d Cong., 1st Sess. 19, reprinted in 1993 U.S.C.C.A.N. 21-22; Meulders-Klein, *supra* note 1, at 672.

42. BEYOND RHETORIC, *supra* note 2, at 89-93 (inadequacy of current welfare subsidies); *id.* at 191-92 (underfunding of Head Start); *id.* at 151 (underfunding of WIC); *id.* at 137 (uninsured children).

43. *Id.* at 18, 97 (noting that in 1989, 25% of American children (16 million) lived in single parent households and that more than one-third of absent parents paid no support); SPEAKING OF KIDS, *supra* note 35, at 22 (more than half of absent fathers saw children less than once a month; 36% saw less than once a year).

44. BEYOND RHETORIC, *supra* note 2, at 82, 123.

45. *Id.* at 24-25; Timothy M. Smeeding & Barbara B. Torrey, *Poor Children in Rich Countries*, 242 SCI. 873 (1988).

46. BEYOND RHETORIC, *supra* note 2, at 83 (noting that greatest increases in poverty have been in young white families and young married couples with children).

47. *Id.* at 80-82.

many children to grow up poor, to live in unsafe dwellings and violent neighborhoods, and to lack access to basic health care and a decent education."⁴⁸

What is the future of families in America? Let us assume that Americans can overcome the hurdle of accepting that the family as an entity embodies special values that are distinct from individual rights and autonomy. Assume further that we can agree that family is a matter of community and individual concern that calls for community support as well as individual responsibility. What next? To borrow from Professor Meulders-Klein's concluding discussion, the question for Americans, as it is for people everywhere, is whether we can develop a consensus on certain "essential values" that is sufficient to give democratic content and definition to the term "family."⁴⁹

While Professor Meulders-Klein in her address wisely avoided this thicket, I can not resist the temptation to make a few observations about the infamous phrase "family values." As everyone knows, family values became a watchword in America's 1992 presidential campaign. During the summer of 1992, I met with two scholars who had arrived from Konstanz, Germany to study this peculiar American phenomenon. At one extreme in the debate, they observed, family values seemed to be a description of what a family is not. Family is not gay or lesbian people; it is not single mothers or fathers, regardless of how seriously they take their responsibilities to the community and to each other. At the other extreme, they concluded, family was entirely a matter of personal choice—anything Americans wanted it to be. These scholars were puzzled that many Americans seemed to yearn for a golden age of family in which the privacy of the home was sacrosanct, creating—and they drew on Christopher Lasch's poignant phrase—a "haven in a heartless world."⁵⁰

My reading of history leads me to believe that the existence of a golden age of the private sheltering family is largely a mythical notion—family law has always been shaped by social and political forces, and legal families have always been what their respective societies wanted them to be.⁵¹ In other

48. *Id.* at xxxiv.

49. Meulders-Klein, *supra* note 1, at 691.

50. CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977).

51. *See, e.g.*, STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMI-

ages, the unifying theme of the legal family was as likely to be protection of property or patrimony as a mandate of natural law or concern for family values. As women and children know best, family privacy can be oppressive as well as protective.⁵² Modern law has changed and adapted because change was needed.

Increasingly, I believe the catalyst for change and the unifying theme of family law and policy is children—specifically, the dignity and worth of children. Children may be central players in the demolition of the traditional family, but they are also the greatest hope for revitalization and reconstitution of the family. The erosion of the traditional family through increased recognition of cohabitation and reduced sanctions for illegitimacy has occurred, not because of hostility toward the family, but because of a growing reluctance to use children instrumentally by stigmatizing and disabling them in an attempt to influence their parent's conduct. Likewise, the growth of the welfare state reflects an unwillingness to see the community's children and their caregivers stunted and destroyed by poverty, not an ideology that individuals should be liberated from responsibility. State protective intervention in families, for all its shortcomings, has not been driven by an ideological conviction that the state is a better parent so much as by a concern that children should not be sacrificed to an ideology of family unity in those exceptional cases in which parents abdicate their responsibility or abuse their authority.

Some identify women's increasing independence and equality as the driving force behind family change. I am not persuaded. Women's dependency is not inherent—it has always been a function of their responsibility for children. Modern American women, like women the world over, work not only to support themselves, but also to support their families. The over seventy percent of American mothers with young children who

LIES AND THE NOSTALGIA TRAP 8-9 (1992) (challenging "golden age of family" myth); Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819 (critiquing traditional family law history and asserting an alternative view of the development of family law); Woodhouse, *supra* note 9 (describing interplay of law, politics and culture in genesis of parents' and children's rights).

52. See GLENDON, *supra* note 2, at 147 ("Stamped on the reverse side of the coinage of individual liberty, family privacy, and sex equality, are alienation, powerlessness, and dependency.").

work outside the home also work a second shift within the home.⁵³ The feminization of poverty, dramatized by writers like Lenore Weitzman,⁵⁴ relates directly to women's greater burden of care for children, the unpaid work they do, and the sacrifices in earning power they must make in order to meet their family's needs. Policymakers increasingly recognize that a society cannot care for its children without addressing the needs of their caregivers, who must either be subsidized at home or given the support they need to participate in the labor market as breadwinners. Support, both private and public, for homemakers and working custodial parents is neither a perpetuation of dependency nor a liberation from responsibility. Rather, such support is a recognition that, if children are to receive adequate care and nurture in a changing society, we must all share in the work of child-rearing that is now disproportionately shouldered by women.

In the struggle to balance individualism with communitarianism, the question remains whether that support ought to come from family members, binding the individual, or from the state, liberating the individual but binding the community. In responding to this question, I agree with Professor Meulders-Klein's analysis: the choice between collective and individual responsibility is a false dichotomy—family values call for both.⁵⁵ I believe the choice between the traditional family and unbridled individualism is also a false dichotomy. In fact, both tradition and responsible individualism shape the changing relationship between state, individual and family.

One need not uncritically accept all groups as families in order to tap the resources flowing from diverse family forms.⁵⁶ We can draw upon common values, such as those of "family unity" and "family life" that Professor Meulders-Klein describes in European law,⁵⁷ to construct a less formal and more func-

53. BEYOND RHETORIC, *supra* note 2, at 21-23 (over 74% of mothers with children between the ages of 6 and 13, and 58% of those with children under 6, were working or looking for work in 1990, most of them full time); *see also* ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (accounts of women's disadvantage even in two-earner families and their difficulties in balancing demands of work and family).

54. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

55. Meulders-Klein, *supra* note 1, at 674-75.

56. A recent *New Yorker* cartoon depicts four new groups claiming family status, including "Guy, Chair, Three-Way Lamp." Roz Chast, *More Nontraditional Family Units*, *NEW YORKER*, Oct. 12, 1992, at 73.

57. Meulders-Klein, *supra* note 1, at 683-84; *see also supra* notes 37-39 and

tional definition of family. Family should continue to be defined by mutual care, self-sacrifice, and lasting cross-generational and intergenerational commitment.⁵⁸ However, a certain *other-regarding* individualism, in the form of respect for the individual dignity of children, also has its place. In contrast to *self-centered* individualism, a regard for children's individual dignity calls for an approach to defining family that goes beyond whether adults have conformed to formal procedures or followed traditional norms in establishing their family. In place of a structure that sacrifices individual children to accomplish social stability, we are beginning to erect a more humane structure for social stability. The new foundation of this structure is a community ethos that values children enough to accept them as meaningful members of our society, assign individual responsibility for their nurture and care, protect their family ties, and give meaningful support to their caregivers. This new appreciation of children, not some revolt of childhood or the right of children to sue their parents, is the real motivation behind the evolution of children's rights in American law and policy as well as in the international forum.⁵⁹

I am reminded of the scene in the film *Romancing the Stone* where the heroine, in mangled high heeled shoes, begins inching across a rickety rope bridge stretched across a jungle canyon. Before her is the treacherous bridge; below her, a chasm. She hesitates, but only momentarily, for behind her is a band of machete-wielding and Uzi-armed bandits. She has no choice but to go forward. Like the heroine, we may be terrified at the risks involved in re-defining family—in crossing the bridge that lies before us. But there is no turning back. We can no longer accept the practice of imposing sanctions on children in order to influence the conduct of their parents. This growing reluctance is seen in public policy debates about welfare reform, domestic violence, child support, legitimacy, social insurance, single parenthood, and cohabitation.⁶⁰ Children's new

accompanying text.

58. Woodhouse, *supra* note 10, at 282; cf. Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989) (asserting that recent changes in family law undermine mutual care, lasting commitment, and self-sacrifice and protect only the autonomous self).

59. For a discussion and analysis of children's emerging rights, see CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia P. Cohen & Howard A. Davidson eds., 1990).

60. This theme crosses racial, class, and political boundaries. See, e.g., MARIAN

status is evident in the United Nations Convention on the Rights of the Child and its emphasis on children as individuals with developing capacities for autonomy who are, at the same time, deeply embedded in families, groups, and communities charged with their protection.⁶¹

I suggest that we must stop wavering and press forward. In the post modern family, the needs of children and the value of adult responsibility and mutuality that are necessary to a child's survival are emerging as the key unifying themes. We must reinvent families and preserve their critical functions as the networks of care and nurture that are a precondition, not a vehicle, for adult autonomy. Children, of course, are not the *sine qua non* of family, or of community. There are many families and communities that do not involve children. But our experiences as parents and children provide a template for relationships of responsibility and connection with another human being that, I would argue, is the *sine qua non* of families of all ages, compositions, and orientations as well as the definition of community.

Let me return to Professor Meulders-Klein's evocative closing metaphor—the family as a symphony orchestra with family law as our guide to playing ensemble.⁶² I hope America can look forward to a lively symphony uniting the many diverse voices in our culture. I predict that the emerging redefinition of family may be more local and cultural than it is constitutional, that it will be respectful of differences, and that it will ultimately expand to include committed same sex, as well as heterosexual, couples, de facto and extended, as well as nuclear and marital, families.⁶³ We can, and I believe should, encour-

W. EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 24-30 (1987) (we owe children our support as a moral obligation); Blankenhorn, *supra* note 1, at 18-21 (children's welfare must be a central concern of family policy and requires public support); Isabel V. Sawhill, *The New Paternalism: Earned Welfare*, RESPONSIVE COMMUNITY, Spring 1992, at 26, 33 (arguing that welfare policy must not make children the innocent victims, while the policy stresses self-sufficiency); Lisbeth B. Schorr et al., *The Social-Policy Context for Families Today*, in IN SUPPORT OF FAMILIES 242, 255 (Michael W. Yogman & T. Berry Brazelton eds., 1986) (children's welfare should not be sacrificed to ideology).

61. U.N. Convention on the Rights of the Child, reprinted in CHILDREN'S RIGHTS IN AMERICA, *supra* note 59, at xi-xxxiii.

62. See *supra* note 5 and accompanying text.

63. On March 1, 1993, New York City began conducting registration procedures enabling "domestic partnerships" to receive some of the same rights of married couples; approximately 25 other U.S. cities, counties or states have "established some form of domestic partnerships or have offered parental leave or medical bene-

age the formation of traditional, married, two-parent families, not as a matter of ideology, but to provide children with greater stores of human capital and to provide caregivers with greater security, support, and respite in their roles as the primary resource for children. Ultimately, however, for the sake of children, our first priority must be to support and work with children's functional families, whatever forms they may take. We must affirm family values of mutual care and help families meet the needs of their dependent members.

Finally, let me add one postscript, appropriate to an international forum. America's great civil rights leader and Nobel Laureate, the Rev. Martin Luther King, Jr., wrote in his *Letter from a Birmingham Jail*, "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly."⁶⁴ Economists may argue that the single garment is woven of rational self-interest; libertarians may say its texture is freedom. To my mind, that single garment of destiny is our children—children who share a shrinking and increasingly interconnected world. Concern for their welfare provides a fitting theme for reconciliation and responsibility in the largest as well as the smallest of communities.

fits for domestic partners of unmarried government workers." Jonathan P. Hicks, *A Legal Threshold Is Crossed by Gay Couples in New York*, N.Y. TIMES, Mar. 2, 1993, at A15. Thus, the recognition of nontraditional families that many once sought in constitutional litigation, see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding criminal sodomy law); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.) (denying marital status to gay couple), *cert. denied*, 458 U.S. 1111 (1982), is slowly being won as local political communities accept these family forms.

64. MARTIN LUTHER KING, JR., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 85 (James M. Washington ed., 1992).