

Summer 1997

# Transforming Childhood: Apprenticeship in American Law

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## Recommended Citation

Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 New Eng. L. Rev. 1113 (1997)

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# Transforming Childhood: Apprenticeship in American Law

Janet L. Dolgin\*

## I. INTRODUCTION

Primarily through the analysis of relevant cases in law, this Article reviews the history of a single idea central to a heated modern debate of momentous social and legal import. It does so in the hope that an historical perspective will afford each of the two major parties to the modern debate a heightened understanding of its own agenda, and of the agenda of its adversary, and will thus contribute both to the tone and to the substance of the debate.

The debate is about the meaning of family in contemporary American society and law. The idea central to this debate is that the best interests of children should be the principal consideration in family life, and in family law. The historical survey should advance the debate by demonstrating that the idea came into existence only recently; that as it evolved it improved significantly the lives of all children but those of the poor; and that one ancient institution whose decline it hastened was used, when near extinction, to the disadvantage of poor children.

Between the two major parties to the debate—the advocates of traditional and of post-modern conceptions of the family<sup>1</sup>—the range of

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1. The modern debate about family is intense and complicated, beset with contra-

disagreement is almost total. Apart from a shared focus on the welfare of children, the two sides agree about virtually nothing. And the value of their consensus about the idea that children's best interests should be paramount is diminished by the fact that both parties, equally uninformed by history, espouse the idea with insufficient awareness of its antecedents, its nature and function as originally conceived, and therefore its usefulness in the modern debate about family.

In the opinion of the traditionalists, families can survive as supportive, life-giving institutions only insofar as traditional forms—usually, private social units consisting of married adults and their biological children—are safeguarded from threats to their vibrancy and even to their existence. In the post-modern opinion, nurturing, loving families can survive in a variety of new forms that differ from, or even undermine, traditional forms. The traditionalists defend the “old-fashioned” family, validated, in their opinion, by millennia of success as a social norm. Their antagonists, by contrast, applaud the advent, especially within the past several decades, of such innovations as non-marital cohabitation, same-gender marriage, and no-fault divorce. Neither party to the on-going debate questions the desirability of family as an institution. But their conceptions of how it should be structured differ almost completely.

On one point alone do they seem to agree: that, however structured, the family should protect the interests of children. And this agreement derives from a consensus grounded basically in a myth: a shared conviction, accepted as axiomatic, that the family is a sacred unit; that childhood constitutes a natural, and thus inevitable, stage of development; that the passage from childhood to adulthood, though open to social manipulation and reform, is a natural and thus culturally universal process; and that children are special, treasured beings, closer to nature than to culture, purer and more innocent than adults, and thus deserving, on metaphysical grounds, of particular care.

Like all myths, the myth of the family is less a description of social fact than a statement of human aspiration. Actual families, and the family of myth, differ in substantial ways.<sup>2</sup> Moreover, the tendency of

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dictions and ideological cross-currents. Reference to “traditionist” and “post-modern” views of family suggests prototypic and extreme positions in the debate but should not be taken to suggest the existence of a discrete number of clearly differentiated positions about the meaning and desired fate of the contemporary family.

2. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992); JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* 14-31 (1997)

its adherents to regard it as an archetype independent of history obscures the danger that ideas central to it may be mutable, or even mortal, if imprudently espoused; a danger unsettling in proportion as such ideas are valued.

From this danger both the traditionalist and post-modern adherents of the myth of the family described above can be protected only by an adequate understanding of history. This Article offers one such understanding—the understanding of a social construct which preceded the modern myth of family; the effect of an idea central to that myth upon the social construct; and the manner in which the construct, though nearly defunct, was invoked to serve an oppressive social end essentially unrelated to it.

The present Article provides this understanding by tracing the evolution of the conception of childhood, as that conception is reflected in the response of American law to the institution of apprenticeship.<sup>3</sup> By focusing upon this institution, the Article demonstrates that, before the Enlightenment, the myth of the family described above did not exist; that it was created as a series of seminal upheavals in Western culture (to be discussed, of necessity, only in passing) began to erupt; that its most significant effect was to establish, in moral theory and then gradually in social fact, the idea that the interests of children (of the upper and middle classes) must be central to family life and to family law; and, finally, that, as it was gradually undermined by that idea, the institution of apprenticeship was found to be useful rhetorically to advocates of exploitative child labor and foster care.

The presumption by both parties to the debate that the myth of the family they both adhere to has always existed is belied by the facts. Until the fifteenth or sixteenth century, infants in the Western world grew into personhood at about seven years of age.<sup>4</sup> At seven, children became little adults, wearing adult clothing and participating in adult activities. Previously, Western society had no notion of an extended period of slow adjustment and development into adulthood.<sup>5</sup> During the

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(considering transformation of Western family since feudal period).

3. I am thankful to Professor Katherine Van Wezel Stone of the Cornell Law School who several years ago called my attention to the large body of case law involving indentured children in the United States during the nineteenth century.

4. See generally PHILLIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (Robert Baldick trans., 1962). Aries documents the invention of the very notion of childhood from about the sixteenth century. He describes the notion to have been applied first to boys from middle-class and aristocratic homes. See *id.* at 61.

5. See JOHN DEMOS, *PAST, PRESENT AND PERSONAL: THE FAMILY AND THE*

subsequent three or four centuries, society internalized and elaborated the conception of childhood (and a conception of motherhood compatible with it), but not until the late eighteenth century did the modern conception of childhood become a crucial element in society's construction of a new myth of family.

With the Enlightenment, ancient patriarchal bonds were undone. Within families, these bonds were slowly replaced with a new spirit of equality and individuality. The ancient *pater*, whose rule of family had paralleled the priest's rule over church and the local "fathers" rule in town,<sup>6</sup> was replaced by a far less secure father. Fathers continued to dominate, but with old certainties under siege, the justification for that domination was exposed to unprecedented challenge.

At first, the family, as much affected by the development of the Industrial Revolution as by the Enlightenment, became a refuge from, a pleasant antithesis to, the tensions of the marketplace. The new marketplace quickly replaced the family as a productive unit. Instead of men, women, and children working together at home, men became wage-earners, departing from home each morning to work. Society, struggling with a dramatic uprooting of realities, and assumptions about them, that had once seemed secure, responded with dramatically new conceptions of work and home, of personhood, motherhood and childhood.<sup>7</sup> As the Western world reeled under the overwhelming shifts in economic process and ideological belief that characterized the late eighteenth and nineteenth centuries, a myth of family emerged which offered solace from the chaos of apparently unrelenting change. Central to that myth was the idea that children were treasured prizes for their anxious bourgeois parents, and therefore deserved to be coddled and protected as never before in Western history. Thus defined, children began, for the first time, to enjoy a clearly defined stage of life completely cordoned from economic process.

As men were identified with work and money, children (and their nurturant mothers) were identified with home and hearth. This post-Enlightenment ideology<sup>8</sup> of family developed rapidly during the second

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LIFE COURSE IN AMERICAN HISTORY 76 (1986).

6. See BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 7 (1978).

7. See STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 52-60 (1988).

8. By "ideology" this Article does not refer to a system of political beliefs, but to the basic, pervasive forms through which people understand themselves their relationships, and their world. See Janet L. Dolgin & JoAnn Magdoff, *The Invisible*

half of the nineteenth century, attended by a set of moral directives about proper treatment of children and proper conceptions of childhood. Not all children benefitted. The poor were excluded, almost always in fact, and often in theory as well. But for the children of the upper and middle classes an overwhelming ideological and social shift had occurred.

This Article explores the ramifications of that shift, by analyzing the fate of the ancient institution of apprenticeship during the century that followed the acceptance of Enlightenment ideology. As will be shown in detail, during the colonial and early post-Revolutionary period, before the shift occurred, apprenticeship was basically a matter of business. A parent (generally a father) or guardian and a master negotiated a contract that stipulated how a commodity—an apprentice—would be used for mutual profit. Since during this period a venerable conception of family as an organic, mutually supportive unit still existed, the contracts presumed that certain moral and practical benefits would accrue to the apprentice. This presumption notwithstanding, the contracts were almost always in essence commercial. With the shift in social conceptions of childhood, such contracts became, perforce, increasingly anachronistic. Since custom and law almost invariably respond in a tentative and uncertain fashion to major cultural shifts, essentially commercial apprenticeship contracts continued to be written. But increasingly, as the nineteenth century unfolded, they represented the tardiness of society in grasping the shift, or involved only the children of the poor, who were typically excluded from the benefits of the ideological shift. For the children of the upper and middle classes, American law, reflecting its empowered constituents, gradually provided protection appropriate to treasured darlings, by gradually asserting that their interests were of paramount legal import. And as apprenticeship was increasingly seen as incompatible with those interests, it was doomed to gradual obsolescence.

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*Event*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 363 n.7 (Janet L. Dolgin et al. eds., 1977). This definition of ideology is close to that of the French social theorist, Louis Dumont. Dumont wrote:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

*Id.*

Its usefulness as rhetorical device, however, persisted. Long after it had ceased to function as social construct, apprenticeship served as effective argument for social programs to which it bore no relation, and in whose behalf it could not be—but nonetheless was—invoked. Industrialists eager to exploit child labor, and politicians eager to trim budgets by removing poor children from their parents' homes, found in a social construct almost defunct rhetorical support for their goals. To the fulfillment of these goals apprenticeship could be made to lend rhetorical assistance.

In its heyday it had functioned far less quizzically. Most colonial parents apprenticed their children soon after infancy ended (generally between the ages of seven and fourteen), to learn a trade and to be educated at least minimally in the home of a master. Master-apprentice relationships were usually the product of contractual negotiations<sup>9</sup> that led to written agreements between a child's parent (generally father) and master; agreements that today would be labeled immoral, and proffered as evidence necessitating neglect, or even abuse, proceedings.

Within less than a century of the American Revolution, the practice of indenturing as apprentices any children except the those of the poor had become obsolete. The idea of middle- and upper-class children as inestimable treasures having taken hold, apprenticing them had become morally repugnant. Poor children were less fortunate, and remained so until at least the first decades of the twentieth century.<sup>10</sup> Until the end of the nineteenth century, poor children were subjected to indentured servitude, either "voluntarily" by their impoverished parents, or involuntarily under state poor laws. Such servitude, often referred to as "apprenticeship" as the two terms became increasingly synonymous, often

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9. The terms of an apprenticeship were negotiable in theory and were usually, in fact, negotiated. However, the extent of the negotiation was limited. As with most contracts before the nineteenth century, indenture agreements almost always reflected social custom far more than they reflected negotiations between the parties. See Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE TECHNIQUE* 373-75 (David Kairys ed., rev. ed. 1990). The resulting agreements were understood and enforced by courts as contracts.

10. A number of states (such as Massachusetts and Connecticut) passed early child labor legislation in the second half of the nineteenth century. The legislation had little effect on the number of child laborers. The first federal child labor legislation was passed in 1916 and prohibited certain forms of child labor used in interstate commerce. The law was soon declared unconstitutional. Significant federal legislation limiting child labor was not passed until the New Deal. See Michael B. Katz, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 133-34 (1986).

closely approximated slavery, and demonstrated that poor families, and their children in particular, were disadvantaged, often deliberately, by the rhetorical ghost of a social construct once a powerful force in American life and law, but rendered obsolete by the emergent conception of family and by the idea central to it (the best interests of children).

The second Part of this Article traces the origins of that construct in the late medieval world, its regulation by English statutes in the sixteenth and seventeenth centuries, and its incorporation, basically intact, into colonial American life.<sup>11</sup> The third Part, through close examination of court cases involving apprenticeships, demonstrates that, as the evolving interest in the welfare of children (and, to a lesser degree, and for the most part indirectly, the welfare and power of women) displaced the law's traditional respect for paternal rights as the governing principle in cases involving children's custody, courts relied on competing understandings of the master-apprentice and parent-child relationships.<sup>12</sup> It demonstrates further that the law responded in a tentative and uncertain fashion to the vast transformations that redefined the worlds of home and of work during the Industrial Revolution, but gradually undermined the system of apprenticeship because it conflicted with an emerging conception of children of upper- and middle-class families as treasured beings deserving, on metaphysical grounds, of especial care and legal protection.<sup>13</sup> And finally it demonstrates that the emerging conception excluded poor children; that, indeed, as it was increasingly undermined by evolving conception of children, apprenticeship was invoked, but now to exacerbate rather than to improve, the situation of the poor.<sup>14</sup>

## II. APPRENTICESHIP: TO THE INDUSTRIAL REVOLUTION

The system of apprenticeship,<sup>15</sup> instituted in European towns during feudal times by local trade guilds, was transferred with some changes, but basically intact, to the colonies, where it flourished for well over a century. In British North America the system became indispensable in the seventeenth and eighteenth centuries for socializing and educating children and training them to enter trades and professions.

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11. See *infra* notes 15-43 and accompanying text.

12. See Part III.

13. See Part III.

14. See Part III.

15. The term apprentice stems from the verb *apprendre*, meaning "to learn." 1 WILLIAM BLACKSTONE, COMMENTARIES 588.



### A. The English System

In England local ordinances began to regulate relations between apprentices and masters during the last part of the thirteenth century.<sup>16</sup> These early regulations included some of the basic principles that characterized later English legislation. Among the rules applied to English fishmongers in 1280, for instance, were those requiring public registration of each master-apprentice relationship; those limiting the number of a master's apprentices to one or two, but in no case more than a number that the master could support; and those requiring that the master-apprentice relationship continue at least seven years.<sup>17</sup> In addition to these rules, by the middle of the thirteenth century all London craft guilds required apprentices to pay an "entry fee" and an "exit fee." The latter represented acceptance into a guild and status as a "freeman," including local political rights and significant economic privileges.<sup>18</sup> Able to control admission to the rank of master and to plan the training of the next generation of masters, guilds had considerable power within late medieval towns.<sup>19</sup>

In the late middle-ages many English families placed their children in apprenticeship positions after the age of about seven. Masters, acting as parent and teacher, became responsible for the moral, as well as professional or vocational training of their apprentices. Guild rules and town ordinances placed limits on the sorts of punishments that masters could inflict and thus limited the authority of medieval masters.<sup>20</sup> One

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16. See ROBERT FRANCIS SEYBOLT, *APPRENTICESHIP & APPRENTICESHIP EDUCATION IN COLONIAL NEW ENGLAND & NEW YORK* 4 (1917). Seybolt notes a reference to apprentices in amended London ordinances respecting the trade of fishmongers. The rules regulating fishmongers and their apprentices, including the requirement that the contract and its term be officially registered, were applied to other trades by ordinances passed in the early fourteenth century. See *id.* at 2-3.

17. See *id.* at 2-3, 6-7.

18. See J. L. BOLTON, *THE MEDIEVAL ENGLISH ECONOMY* 255 (1980).

19. See *id.* at 262-65. Guilds supervised the quality of products. By the fifteenth century, in England, guilds limited entry as well as the number of apprentices taken on. Bolton suggests that the monopolistic tendencies of many guilds at this time drove developing industry from towns to the countryside. See *id.* at 265.

20. The Executor Tailors recorded the following:

Md., of a-wards y-made bi the magister and Wardons the 16th day of July, the yeere of the Reigne of Kyng Edward the 4th, the 21st (1480), bitwene William Peeke and John Lynch; for that the said William un-lawfully chasted hym, in brusyn of his arm and broke his hedd. And for that it was chuged, bi the said magister and wardons, that the said William Peeke shuld pay, for his leche craifte, 5s; and for his table, for a moneth 3s. 4d; and for amendis, 15s; and to craifte, 20d, for a fyne for his mysbehaueing aynst the craift.

rather uncomplimentary fifteenth century account of English families, written by an Italian, asserts that the entire system of apprenticeship reflects the unaffectionate relations that pertained between English parents and their children:

The want of affection in the English is strongly manifested towards their children; for after having kept them at home till they arrive at the age of seven or nine years at the utmost . . . , they put them out, both males and females, to hard service in the houses of other people, binding them generally for another seven or nine years. . . . And these are called apprentices, and during that time they perform all the most menial offices; and few are born who are exempted from this fate, for everyone, however rich he may be, sends away his children into the houses of others, whilst, he, in return, receives those of strangers not his own.<sup>21</sup>

Early indenture agreements contained most of the basic provisions found in such agreements during subsequent centuries. Three agreements, written respectively in 1291, 1496 and 1414, obliged the master to instruct the child<sup>22</sup> in the master's trade and to provide for the child's maintenance; the apprentice, in turn, agreed to live with the master, to serve him and obey his "reasonable" commands, to keep the master's secrets, and to refrain from immoral behavior.<sup>23</sup>

In England, the apprenticeship system came under national scrutiny when it was established as a national trade program in 1562 with passage of the Statute of Artificers. The system, like its feudal counterpart, was meant to ensure that master craftsmen would transmit their skills but, even more, was directed at creating and maintaining foreign com-

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Smith, Eng. Gilds, 322, *quoted in* SEYBOLT, *supra* note 16, at 14 n.61.

21. A RELATION OF THE ISLAND OF ENGLAND XIV (Camden Society, 1897), *quoted in* THE BABES BOOK (F. J. Furnivall ed., 1868), *quoted in* ARIES, *supra* note 4, at 365. The ellipses in the text, as quoted, indicate the omission of explanatory language that Aries added to the original description.

Aries further comments that although the Italian writer of the text quoted apparently believed that the English sent away their own children only to receive others into their homes in order to assure themselves of better service, in fact the explanation of the practice by the English themselves was probably more accurate. The English explained that sending their children away to be socialized in the homes of others better assured the transmission of manners than did socialization at home. *See* ARIES, *supra* note 4, at 365.

In any case, the account might easily be mistaken as having been written many centuries later about apprenticeships in the United States in the nineteenth century.

22. The three indenture agreements that Seybolt describes seem to have all involved male apprentices. However, girls were apprenticed to master craftsmen on the same terms as boys. *See* SEYBOLT, *supra* note 16, at 15.

23. *See* SEYBOLT, *supra* note 16, at 12-13.

mercial interest in English products.<sup>24</sup> The statute established rules for managing the system of apprenticeship, though enforcement of those rules was still left largely to local guilds.<sup>25</sup>

Under the Statute of Artificers only a master's child or the child of parents possessing freeholds worth at least forty shillings was entitled to serve as a voluntary apprentice.<sup>26</sup> Almost from the start, however, this system for establishing voluntary apprenticeships co-existed alongside another system which established involuntary apprenticeships for impoverished children. Soon after the Statute of Artificers preserved voluntary apprenticeships for children of the artisan class, the English poor laws established a system of apprenticeship for poor children. A series of English statutes, culminating in the Poor Law of 1601,<sup>27</sup> required town overseers (a position created by statutory law about thirty years earlier)<sup>28</sup> to provide relief to the poor and seek work for them and apprenticeships for their children.<sup>29</sup> These apprenticeships, unlike others, were

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24. See RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 22 (1946).

25. See I. GRACE ABBOTT, *THE CHILD AND THE STATE: LEGAL STATUS IN THE FAMILY APPRENTICESHIP AND CHILD LABOR: SELECT DOCUMENTS WITH INTRODUCTORY NOTES* 82 (1938) [hereinafter I ABBOTT].

26. See Statute of Artificers, 5 Eliz. ch. 4 (1562) (Great Britain, Stats. at Large, VI, 159-75), reprinted in I ABBOTT, *supra* note 25 at 91-97. An instance of the limitation is found in Section XXVII of the Statute, which reads:

Provided always and be it enacted, That it shall not be lawful to any person dwelling in any city or town corporate, using or exercising any of the mysteries or crafts of a merchant trafficking by traffick or trade into any of the parts beyond the sea, mercer, draper, goldsmith, ironmonger, imbroiderer or clothier, that doth or shall put cloth to making and sale, to take any apprentice or servant to be instructed or taught in any of the arts, occupations, crafts of mysteries which they or any of them do use or exercise; except such servant or apprentice be his son; (2) or else that the father and mother of such apprentice or servant, shall have, at the time of taking such apprentice or servant, lands, tenements or other hereditaments, of the clear yearly value of forty shillings of one estate of inheritance or freehold at the least, to be certified under the hands and seals of three justices of the peace of the shire or shires where the said lands, tenements or other hereditaments, do or shall lie, to the mayor, bailiff or other head officers of such city or town corporate, and to be inrolled among the records there.

*Id.*

27. Poor Law of 1601, 43 Eliz. ch. 2 (Eng.).

28. WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE* 9-10 (3d ed. 1984).

29. See *The English Poor Laws 1531-1782*, 15-25 (prepared by Paul Slack 1990); TRATTNER, *supra* note 28, at 9-12. A couple of statutes promulgated in England in the late sixteenth century prefigured most of the provisions that would become fa-

aimed at "binding children out" more than at teaching them the skills of a trade.<sup>30</sup> The system was widely praised. Blackstone remarked that English laws

have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children; and are placed out by the public in such a manner, as may render their abilities, in their several stations, for the greatest advantage to the Commonwealth.<sup>31</sup>

In fact, most apprenticeships in the skilled trades were closed to poor children, who were not infrequently left unsupervised during non-working hours and were often subjected to harsh punishment during working hours.<sup>32</sup>

In England apprenticeships remained important until the middle decades of the nineteenth century, although the Statute of Artificers was repealed in 1814, thereby ending the compulsory system of apprenticeship that had been in operation for over two centuries.<sup>33</sup> By the end of the nineteenth century children who worked had become independent wage-earners, preferred to their parents as laborers only because they were cheaper.

#### B. The System in British North America

With some changes, but basically intact, the English system of apprenticeship was brought to the colonies during the seventeenth century. It persisted in its imported form until the end of the eighteenth century, as basically a commercial arrangement. Because, as will be seen, colonial society viewed itself as a single continuous family, unified by a traditional world-view and moral system, the position of principle was maintained and often enunciated that apprenticeship was concerned not only with commercial profit but with the moral as well as technical education of the apprentice. This position notwithstanding, the apprenticeship contract was essentially, as will be seen, a stipulation of busi-

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mous through the 1601 poor law. See TRATTNER, *supra* note 28, at 11.

30. See SEYBOLT, *supra* note 16, at 20.

31. See 1 WILLIAM BLACKSTONE, COMMENTARIES 450.

32. See 1 ABBOTT, *supra* note 25, at 83.

33. See *id.* at 82 & 82 n.3. Inadequate treatment of poor children, bound as apprentices, especially in textile mills during the nineteenth century, led to condemnation of the system of apprenticeship in general, which was important in leading to the repeal of the Statute of Artificers. Repeal of the Statute did not end the system of apprenticeship completely because that remained important, especially for poor children, until passage of the Poor Law Reform in 1834. See *id.* at 82 n.3.

ness interests.

In the typical arrangement, journeymen and apprentices labored together in a craft workshop for a master.<sup>34</sup> Colonial apprentices, who lived with the families of their masters, owed those masters reverence and obedience, and were entitled, in turn, to decent treatment.<sup>35</sup> During the colonial years most children received basic parts of their moral and practical education away from "home," usually as apprentices.

The colonial family typically housed many children, including young relatives such as nieces and nephews, apprentices, as well as other servants, and the basic unit of husband and wife.<sup>36</sup> This family was understood as joined with the wider community to create a continuous social whole.<sup>37</sup> Family and church represented complementary and interconnected aspects of the colonial community; each espoused the same moral vision of reality. As one seventeenth century "Puritan" preacher explained:

A family is a little church, and a little commonwealth, at least a lively representation thereof, whereby trial may be made of such as are fit for any place of authority, or of subjection, in church or commonwealth. Or rather, it is as a school wherein the first principles and grounds of government are learned; whereby men are fitted to greater matters in church and commonwealth.<sup>38</sup>

During this period, family and church together constituted the core institutions through which the colonial world socialized and trained children. Not for over a century did formal schooling begin to appropriate significant parts of each task.

Within the family, the system of apprenticeship constituted the central educational institution, providing vocational, as well as moral and intellectual, training during the colonial years:

Servants of almost every degree were included within the family, and it was the family's discipline that most directly enforced the condition of bondage. The master's parental concern for his servants, and especially for apprentices, included care for their moral welfare as well as

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34. See MORRIS, *supra* note 24, at 22.

35. By the standards of later centuries, the treatment of all children within families, including apprentices, was often exceedingly harsh. See EDMUND S. MORGAN, *THE PURITAN FAMILY: ESSAYS ON RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND* 66-69 (1944).

36. See BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY: NEEDS AND OPPORTUNITIES FOR STUDY* 15-16 (1960).

37. See DEMOS, *supra* note 5, at 28.

38. WILLIAM GOURGE, *OF DOMESTICALL DUTIES* (1622), *quoted in* DEMOS, *supra* note 5, at 27.

for their material condition. He was expected and required by law to bring them up in good Christian cultivation, and to see to their proper deportment.<sup>39</sup>

Almost always the master-apprentice relationship was created pursuant to a written indenture agreement, signed by the master, the apprentice (if deemed old enough to understand the meaning of consent) and the child's father or in the absence of a father, the child's mother or guardian.<sup>40</sup> These agreements, though negotiable to some limited extent, usually followed closely the model that had been created by medieval guilds.<sup>41</sup> A typical indenture agreement leading to the creation of a colonial master-apprentice relationship required the apprentice to learn his master's trade while serving the master faithfully, and required the master to educate the apprentice and supply him or her<sup>42</sup> with lodging, clothing, and food. One such agreement stipulated

that Henry Nap, son of Joseph Nap, of Boston, in the County of Suffolk, Ship Carpenter, hath put himself, and by these presents doth voluntarily put himself Apprentice to William Stone of Charlestown, Butcher; to learn his Art, after the manner of an Apprentice to serve him from the day of the date hereof, for and during the term of seven years, thence next following: During all which term, the said Apprentice his said Master faithfully shall serve, his secrets keep, his lawful commandments every where obey, He shall do no damage to his said Master, nor seen to be done of others, without letting or giving notice thereof to his said Master: He shall not waste his said Masters Goods, nor lend them unlawfully to any; he shall not commit Fornication, nor contract Matrimony within the said term; at Cards, Dice, or any unlawful Game he shall not play, whereby his Master may have damage with his own Goods or others: He shall not absent himself day or night from his Masters service without his leave, nor haunt Ale house, nor Tavern, but in all things behave himself as a faithful Ap-

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39. BAILYN, *supra* note 36, at 17.

40. Master-apprentice relationships were sometimes created without contractual support, but such arrangements could not be enforced in court. State laws typically required indenture agreements to include the consent of the apprentice, except in cases involving very young apprentices, and to be executed by the master and a parent or guardian to the apprentice or, in appropriate cases by the overseers of the poor (or two other specified officials such as justices of the peace). Statutes often required that indenture agreements include the age of the child being indentured and a provision stating that the master would educate the apprentice and teach him or her the skills of a particular trade. *See, e.g.,* REV. STATS. N.Y. (prepared by Duer, Butler and Spencer), pt. II, ch. VIII, art. 3 (1846).

41. *See infra* note 43 and accompanying text (providing an example of a feudal indenture agreement establishing master-apprentice relationship).

42. Girls were indentured on the same terms as boys though less often. *See supra* note 22.

prentice ought to do; during all the said term, And the said Master shall use the utmost of his endeavor, to teach or cause to be taught or instructed, his said Aprentice in the Trade or Mystery that he now followeth; and to find and provide for him sufficient meat, drink, apparel, lodging and washing befitting an Apprentice, during all the said term. And for the true performance of all and every the said Covenants and Agreements either of the said parties binds himself unto the other by these presents. In witness, whereof, they have interchangeably set their hands the 10th day of April, &c.<sup>43</sup>

The situations and contracts described briefly above are typical. As had been the case in Europe for centuries, apprenticeships in colonial America were designed to benefit people in organic communities. Fathers and masters, as heads of hierarchical family units, entered into contracts that stipulated how a commodity—the apprentice—was to be used for mutual gain. Because of prevailing social norms, it was sometimes necessary to stipulate further that the apprentices were to be treated humanely, and to be taught conventional social values, moral and religious. But they were certainly not children, as modern society understands the term; the category “children” in its modern sense did not exist. Nor did the further stipulation effectively mask the essentially commercial nature of the contract in which it sometimes appeared. The master and the apprentice’s parent (usually, the father) would profit from the contract. The apprentice would learn a trade. It was business as usual, as it had been for centuries.

### III. APPRENTICESHIP: THE INDUSTRIAL REVOLUTION

But it was business that was about to cease. As the direct result of a huge upheaval, irresistible forces were about to restructure Western culture almost unrecognizably, and in consequence to sweep abruptly away institutions hoary with legitimacy and age, among them the institution of apprenticeship.

The upheaval was the Industrial Revolution. A full discussion of its social effects is obviously beyond the scope of this Article. But a brief discussion of a number of them will help to explain the gradual demise of apprenticeship as an institution.

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43. The indenture agreement quoted was that of H.B. (Benjamin Harrison), found in *Boston Almanack for the year of our Lord God 1692* (in pages at end) (emphasis omitted) (spelling as in original), quoted in MORGAN, *supra* note 35, at 71-72. Spelling and grammatical errors were retained from Morgan’s presentation of this indenture agreement.

### A. The Middle Class

The decline and rapid disappearance of indentured servitude for white adults,<sup>44</sup> and soon thereafter of apprenticeships and indentured servitude for all but poor children, coincided with the re-definition of both family and work in the United States beginning in the early years of the Industrial Revolution. At the start of the nineteenth century, the system of apprenticeship could still be seen as educational,<sup>45</sup> and thus salutary, and some young apprentices still came from middle-class homes. By the end of the century, the system of apprenticeship had disappeared completely as a means of educating middle-class children and providing them with the training and position needed to become economically self-sufficient.

The transformation and eventual disappearance of the system of apprenticeship for the middle class was closely connected to sweeping shifts in the larger society. In particular, relations at home and relations at work were reconceptualized so that the two sorts of relations became increasingly incompatible. This reconceptualization made it difficult to sustain an institution that, especially in the American context, assumed compatible understandings of home and work and that, assumed further, that work could be, and usually was, conducted at home. Even at the start of the nineteenth century, the world of family was beginning to be defined in express contrast to the world of work. Moreover, "home," the domain of family, was separated, not only in theory, but physically as well, from the "office" and the factory—from the domain of work. Home was becoming the sphere of women and children; work was becoming the sphere the men.<sup>46</sup>

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44. Slavery existed for several decades after indentured servitude. In the years surrounding the Civil War, the two forms were sometimes hard to distinguish. Although laws promulgated during the eighteenth, and early nineteenth, centuries to regulate the practice of indentured servitude were made mostly for whites, some blacks were indentured. This became increasingly common in the nineteenth century. See EDWARD RAYMOND TURNER, *THE NEGRO IN PENNSYLVANIA: SLAVERY-SERVITUDE, FREEDOM* 104-07 (1969) (describing use of indentures to bind blacks in Pennsylvania in late eighteenth, and early nineteenth, centuries).

45. By the start of the nineteenth century, the development of systems of formal, state schooling was only beginning to become a pressing concern. See BAILYN, *supra* note 36, at 21. For instance, New York began to provide for a system of common schools with a 1795 statute called "An Act for the Encouragement of Schools."

46. This conceptualization of life was elaborated during the course of the succeeding century and a half. David Schneider, anthropologist and student of the American family, studied the ideology of kinship that began to develop clearly in the early nineteenth century and eventually defined American families during the middle de-



In the patriarchal family of the colonial years, family and work blended together within one economic and social unit. Husbands and fathers had authority over wives and children, but men, women and children all worked in the home and in the community to make the familial unit prosper.<sup>47</sup> And relations in the rest of life (the village, the church) mirrored those at home. With the start of the Industrial Revolution, this family began to collapse. The holistic, hierarchical family of the colonial years, a family that merged into and was part of the social fabric outside the home, was largely replaced by a new form of family. As work moved out of the home and into the marketplace, the home and the family were redefined as areas of "private life" within which women raised children. Men, who spent their days elsewhere—in the "public" world of the marketplace—became less integral to everyday life at home.

Legitimate work was redefined to exclude women and children as the central presumption of the nineteenth-century marketplace became clear. That presumption—that in the marketplace each autonomous individual could, and must, negotiate the terms of his own reality—contrasted sharply with the presumption of the home—that woman's nature suited her to the tasks of raising children and keeping house.<sup>48</sup> For the children of the wealthy and middle classes, childhood itself changed. Earlier seen as small, inexperienced adults, these children were removed with their mothers from the world of the marketplace, and socialized in an increasingly permissive and secular world, one carefully

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cades of the twentieth century. Schneider wrote:

[T]he contrast between home and work . . . can best be understood in terms of the contrast between love and money. . . . Indeed, what one does at home, it is said, one does for love, not for money, while what one does at work one does strictly for money, not for love. Money is material, it is power, it is impersonal and universalistic, unqualified by consideration of sentiment and morality. Relations of work and money are temporary, transient, and contingent. Love on the other hand is highly personal and particularistic, and beset with considerations of sentiment and morality. . . . [P]ersonal considerations . . . are paramount in love—who the person is, not how well he performs, while with work and money it does not matter who he is, but only how well he performs his task.

David M. Schneider, *Kinship, Nationality, and Religion in American Culture: Toward a Definition of Kinship*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANING*, *supra* note 8, at 66.

47. See MAXINE MARGOLIS, *MOTHERS AND SUCH: VIEWS OF AMERICAN WOMEN AND WHY THEY CHANGED* 13 (1984).

48. See *infra* Part III.A.2.a (considering romanticization of women in nineteenth century and class dimensions of that process).

differentiated from the domain of men and work.<sup>49</sup> Having lost the productive function it had enjoyed in the colonial years, the family remained important, with children at its center, as a unit of bonding and affection. In this context, childhood was elaborated and extended as a distinct stage in life, with distinct characteristics and needs. With these changes in understandings of the family and of the significance of children and childhood, the notion of apprenticeships became less and less compatible.

Equally important, with the Industrial Revolution came a basic reconceptualization of legitimate work. The eighteenth century understood both apprentices and indentured servants as voluntary laborers in contrast to slaves. Unlike slavery, indentured servitude and apprenticeship had been understood as based in contractual freedom and therefore as legitimate forms of work.<sup>50</sup> By the start of the nineteenth century, Americans were redefining indentured servitude (including apprenticeship), and categorizing it with slavery, as a form of involuntary servitude. By this time wage labor was clearly emerging as the only legitimate form of labor.

In sum, the amalgamation of home and work necessary to the system of apprenticeship as it had been practiced since originating in feudal Europe was replaced by two separate, almost antagonist domains of human endeavor. Concomitantly, both the father-child and the master-servant relationship were redefined. The father-child relationship identified with private, domestic life, grew more uncertain as the mother-child bond became the predominant familial tie. The master-servant relationship shifted almost beyond recognition to meet the demands of the marketplace. Finally, childhood was redefined as a stage of life fit for play and learning, but not for work, and legitimate work was redefined to exclude indentured servitude. Inevitably these changes culminated in the decline and eventual disappearance of the institution of apprenticeship and indentured servitude, for children, as well as for adults, in the United States.<sup>51</sup>

As the changes were momentous, they were greeted in a tentative, confused, and wary fashion; understandably so, since they necessitated basic alterations in the understanding of family, and in the distribution

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49. See MARY CABLE, *THE LITTLE DARLINGS: A HISTORY OF CHILD REARING IN AMERICA* 100 (1972).

50. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870*, 7 (1991).

51. See MORRIS, *supra* note 24, at 200.

of power within the family. The process by which those alterations were made—primarily for the benefit of the middle class—is reflected clearly in the shifting responses of the legal system to the institution of apprenticeship as it decayed. The changes discussed forced reconsideration of the following basic aspects of family: the authority of fathers; the nature and social power of mothers; and the nature and rights of children. And, as will now be seen, profoundly unsettling conclusions were broached, shied away from, and, because increasingly unavoidable, broached again: that the authority of fathers should, in appropriate circumstances, be curtailed; that mothers deserved heightened respect, and perhaps even some modicum of power; that the idea of the best interests of children was a legitimate—perhaps even a central—concern of law; and—perhaps most startling, given the age in which it was asserted—that children should sometimes be free to choose their own fate.

### 1. Indentured Children and Paternal Authority

After the Revolution, American society and law definitively reconceptualized the status and role of fathers. The paramount authority fathers previously enjoyed began to be challenged successfully in court as judges began to replace the old rule (that fathers enjoyed near absolute authority over their children) with a new rule (the best-interests of the child). Law, reflecting the larger society, questioned the assumption that paternal custody followed inevitably from a property interest that a man enjoyed in this children. That assumption, once challenged, began to seem increasingly inconsistent with newly romanticized images of romping children enjoying the natural freedoms of childhood. By the start of the nineteenth century, as court began to focus on the welfare of children in domestic disputes, mothers, and sometimes even third parties, achieved some success in disputes against fathers.

In general, the source of paternal authority remained a subject of debate for society and law at the end of the eighteenth, and start of the nineteenth, centuries. Disputants continued to assert that paternal authority stemmed inexorably from the fact of paternity.<sup>52</sup> But this assertion no longer seemed self-evident. Alternative understandings had become imaginable, and as a result, the character of debate was transformed. Even in cases in which a father's right to custody was presumed, the source of that presumption had become disputable. Thus, a father's

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52. Blackstone understood the source of paternal authority to lie in the nature of fatherhood while, in comparison, mothers had no authority with regard to their children but were only entitled to "reverence and respect." See 1 WILLIAM BLACKSTONE, COMMENTARIES 453.

right to custody, even when presumed, was often premised on his role as family provider rather than on his inherent status as *pater*.<sup>53</sup>

As a result, resolution of disputes about indenture agreements came increasingly to rest on conclusions about the scope and bases of the right of fathers to bind their children as apprentices—once the fundamental presumption that legitimized master-apprentice relationships. Courts entertaining a variety of disputes about apprenticeships began to consider and re-consider the limits and implications of paternal authority. Such cases involved, for instance, disputes about a father's right to receive payments earned through his child's labor as an apprentice; disagreements about a father's contractual obligation in cases in which his child absconded from an apprenticeship before expiration of the term of service; or disputes about the need for paternal consent to his child's entering an apprenticeship.

a. Entitlement to Wages

Traditionally in England, apprentices did not receive wages. However, even in the colonial period, and more commonly after the Revolution, American apprenticeship agreements began to provide for the payment of wages, either during the term of the indenture or at its termination.<sup>54</sup> This new practice reflected the breakdown of a system of apprenticeship in British North America that had understood home and work as compatible—often identical—spheres and reflected a growing identification of apprenticeships with the world of the marketplace—with the world of work and money.

When indenture agreements did begin to provide for wages, it was unclear whether a noncustodial parent (the apprentice was in the custody of a master) had any right to the earnings of the minor child. That question was disputed in a number of cases that came to nineteenth century courts for resolution.<sup>55</sup> These cases, and the debates they engen-

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53. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY* 236 (1985).

54. See MORRIS, *supra* note 24, at 383-84. By the 1830s most apprentices received wages for their service at least in some places. See W. J. RORABAUGH, *THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE IN AMERICA* 69 (1986). Earlier, some apprentices received periodic wages (such as weekly or monthly), but more often an apprentice would receive money, and even more often a suit or two of new clothing, at the end of the apprenticeship. See MORRIS, *supra* note 24, at 381-82.

55. Some of the cases considered in this Article were reported before the existence of official reporting systems. Moreover, it is not always clear whether opinions were written down by judges or rendered orally and written down by court reporters.

dered, illustrate many of the parameters of the nineteenth century concerns about family. In particular, old assumptions about the source of parental status and control competed with new ones. As a result, these assumptions (the old and the new) were debated and reformulated. As a result, courts, even within a single district, depended on contradictory understandings and reached discrepant results in cases involving wages owed to indentured children or their parents. At stake most obviously were the comparative rights of parents, children, and masters. But more important, these cases considered, and then questioned, the bases of parental (and especially paternal) custody and, accordingly, the scope and the implications of fathers' rights to the custody and control of their children.

For example, if paternal custody and the right to control one's children<sup>56</sup> was premised on an inherent ownership right, then a father could legitimately claim the earnings of an indentured child on the ground that he "owned" the services provided by the child. If however, paternal custody and a father's right to control his children was premised on the father's role in providing for them, then his right to continued control of them and of their earnings lasted only as long as the father provided for their needs.

So, for instance, in 1810, a Massachusetts court considered whether payments provided for in an indenture agreement involving a minor boy had to be made to the boy directly or to the child's father. In deciding that question, the court in *Day v. Everett*<sup>57</sup> considered the justification and scope of the paternal right to custody and control and concluded that the father of an apprentice could be the legitimate recipient of wages paid for the services of the child.

The decision of the court and the arguments of the parties in *Day v. Everett* recognized a developing social concern with children and their interests, a concern beginning to be seen in custody cases decided during the same period. The court as well as all the parties to the litiga-

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In addition to reporting judicial decisions, early reporters summarized the arguments of counsel. Often these summaries were based on counsel's oral arguments rather than on written presentations to the court. See ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 41-44 (1990).

56. Similar questions were asked about maternal authority, but usually not when the father was alive. Even at the beginning of the nineteenth century the law generally did not oblige children to obey their mothers except insofar as the "reverence" and "respect" children owed their mothers called for obedience. See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* 453 (explaining that "a mother, as such, is entitled to no power, but only to reverence and respect" (footnote omitted)).

57. 7 Mass. (7 Tyng) 145 (1810).

tion stressed the importance of children's interests or at least referred to those interests as a legitimate matter for judicial concern. However, in the end, neither the parties nor the court premised their arguments or conclusions on concern for the child's interests. The more encompassing concern involved the *bases of* the father's right to custody and control of his child.

In *Day*, Aaron Everett, the master, focused on the moral significance of protecting children involved in apprentice relationships. However, Everett's stance seems unappealing, given the facts of the case, and did not, in fact, convince the court. Everett, responding to a claim brought by Levi Day, his apprentice's father, for \$50, argued that the indenture agreement entered into by himself, Levi Day, and Day's son in 1799, should be declared void because the agreement provided for a termination payment to the father rather than to the boy. Everett, however, made this argument at the expiration of the indenture term, *only after* he had benefitted from six years of service from the boy (the period agreed upon in the indenture contract under dispute). Everett did not propose that he pay the boy rather than the father. He hoped to pay no one.

In the court's view, a 1794 Massachusetts statute, rather than Everett's concern for the child's welfare, posed the major stumbling block for the father's case. That statute provided that "all considerations which shall be allowed by the master or mistress, in any contract of service or apprenticeship, shall be secured to the sole use of the minor thereby engaged."<sup>58</sup> The court held for the father, however, and concluded that the 1794 statute implicitly preserved the right to enter into indenture agreements under the common law. Therefore the court ordered Everett to pay Levi Day the sum that the parties had originally agreed would be paid to the father at the end of the boy's six-year apprenticeship. The court did not premise that conclusion on the apparent equities of the case, but on a common law right to payments such as that at issue in *Day*.

In reviewing and explaining its decision, the court recognized some of the advantages that might have followed from a different holding—one favoring the defendant/master. The court explained its refusal to declare the indenture void and thereby deny the father the money he claimed his son's master owed him. That explanation as well as arguments presented by the parties<sup>59</sup> suggest some of the shifting

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58. *Day*, 7 Mass. (7 Tyng) at 145.

59. Most published cases during this period were summaries prepared by court reporters (by whose names the volumes they compiled were known). Usually, these re-

parameters in terms of which people understood the system of apprenticeship at the start of the nineteenth century.

Everett,<sup>60</sup> arguing that the 1794 statute rendered void the indenture agreement at issue in the case, stressed the statute's moral ends. The statute, he asserted, was "calculated to protect children from the mercenary views of parents, who might sacrifice the present comfort and future prospects of their children to a present gain for themselves."<sup>61</sup> The argument, though apparently disingenuous when offered by Everett, a man who had himself already profited from young Day's labor, was recognized as legitimate—though not conclusive—by both the plaintiff father and the court.

Day did not depend heavily on moral arguments in responding to Everett's invocation of statutory law. However, he acknowledged those arguments and at one point buttressed his own position through reference to a concern for children. Day suggested that the statutory provision on which the defendant relied was applicable only to cases involving children with no available parent or guardian, whose indenture agreements had therefore been approved by town selectmen. He argued further that even if the 1794 statute invalidated the agreement involving his son insofar as it defined relations between Everett and the boy, still the agreement remained valid as between himself and the master. Day acknowledged the harm that might befall children subject to unsavory indenture agreements. But ultimately he placed contractual promises before children's welfare. "[N]otwithstanding all the dangers and mischiefs which have been stated to arise to minor children from the unfeeling avarice of unnatural parents," continued Day, the contract into which the parties had entered was good at common law and thus had to be judged valid in fact.<sup>62</sup> While acknowledging the moral advantages of the statutory rule, Day was apparently content to have the state ignore that rule not only in his case but in all indenture cases in which it

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porters presented their own summaries of the parties' arguments. Sometimes reporters also summarized a court's holding and explanation in their own words. More usually, judicial decisions were written down by the judges who authored them or were transcribed by the reporter as judges rendered their decisions orally.

Following contemporary custom, this Article refers to summaries of attorney's arguments as if these arguments were voiced directly by disputing parties.

60. Following modern usage, this Article attributes arguments presented by counsel to the client represented by such counsel. Thus, the positions attributed here to Everett and Day were summarized by the court reporter as the arguments of the parties' respective lawyers.

61. *Day*, 7 Mass. (7 Tyng) at 146.

62. *Id.*

could be shown that an indenture agreement had been entered into pursuant to common, rather than statutory, law. It cannot be known whether he reached this conclusion with the comfort that he, himself, was not the sort of unnatural parent of whom he spoke; because the weight of the moral argument impressed him only dimly; or because he assumed most parents, being natural, rather than "unnatural,"<sup>63</sup> would act to the benefit of their children. In any case, even Day acknowledged, though he then chose to ignore, the implications of the claim that "dangers and mischiefs" might affect children indentured through the agreements of their "unnatural parents" influenced by "unfeeling avarice."

However, Day did rely on the interests of children in justifying his conclusion that the statutory provision in question should be considered applicable only to cases in which a selectman, rather than a parent or guardian, entered into an indenture agreement. Selectmen, he suggested, unlike parents and guardians, could not be trusted to serve the interests of their wards. Thus, "selectmen might, through carelessness or negligence, approve of contracts which might be prejudicial to the minor."<sup>64</sup>

The court, though ultimately holding for Day, noted simply that the statute in fact contained no ground for differentiating between agreements approved by parents, guardians or town selectmen.<sup>65</sup> Similarly, in responding to Day's suggestion that parents and guardians, as opposed to town selectmen, could be trusted to protect a child's interests, Everett shifted the terms of discourse away from children and their interests. Now, instead of focusing on the children, Everett focused on the legitimate bases of a father's right to the custody and control of his minor child and declared:

If a father assigns the service of his minor son for a time, he may be well entitled to his earnings, for he is still bound to provide for him; but where he places him as an apprentice, he puts the master in his own place, and the latter contracts to educate him, to clothe him, to take care of him in sickness, &c.; so that there is no shadow of reason, why the parent should make a pecuniary benefit to himself out of the contract.<sup>66</sup>

The court presumed differently. Holding for Day, the court ordered Everett to pay his former apprentice's father the amount agreed upon in

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63. The term "unnatural," as used by Day's lawyer seems to mean "not normal" in the sense that nature endowed parents with an interest in their children. An "unnatural" parent lacks that interest.

64. *Day*, 7 Mass. (7 Tyng) at 148.

65. *See id.*

66. *Id.* at 146.



the indenture instrument as due at the expiration of the apprenticeship period. The court expressly grounded this decision on a straightforward finding that the statutory provisions enacted in Massachusetts in 1794 were not exclusive and therefore covered only those indenture agreements expressly entered into pursuant to the statute.

Behind the court's conclusion, however, lay a set of assumptions about the character and scope of paternity that contrasted with the assumptions of Everett. The court echoed Everett in acknowledging the moral and social advantages of the statutory rules. But for the court, paternal status, regardless of a particular father's behavior, constituted the essential truth justifying the provision in common law that a father had the right to custody and control of his children as well as the right to benefit from those children, which included the right to benefit from their labor. "There is no question," wrote Chief Justice Parsons in *Day*, "but that a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may, at the common law, assign those services to others, for a consideration to enure to himself."<sup>67</sup> In the view of the Chief Justice, this entitlement included the right of a father to sell the labor of his child to a third party so long as the child remained a minor. This conclusion depended on the presumption that a father's "entitle[ment] to the services of his minor son" flowed from the fact of fatherhood and not from the behavior of any particular father or from the quality of the relation between a particular father and his child. That presumption differed significantly from Everett's presumption that a father could control his child and receive benefit from that child's labor only to the extent that the father was the child's primary provider.

When *Day* was decided, both sorts of presumptions—one reflecting a past in which paternal authority was paramount and the other a future in which paternal authority competed with, and was sometimes displaced by, the inexorable ties of affection newly seen to connect mothers to their young children—seemed plausible. Thus, almost four decades after the English chancellor Lord Mansfield ignored longstanding precedent in deciding an English custody case in 1774 in favor of the child's mother by "doing what appeared best for the child, notwithstanding the father's natural right,"<sup>68</sup> and some time after American courts had begun to voice concern with protecting the welfare of chil-

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67. *Id.* at 147.

68. *Blisset's Case*, 98 Eng. Rep. 899 (K.B. 1774). Lord Mansfield granted custody of a young child to the mother rather than the father because the father had mistreated both mother and child.

dren, that concern continued to contend with the older view that virtually no interest competed with a man's inherent right to control his children's lives and labor. And in *Day*, although the parties and the court all relied on, or at least acknowledged, the significance of protecting children from unsavory parents, concern with the welfare of the child involved was easily outweighed by a surviving concern with the rights of a child's father to control his child and to benefit from his child's labor.

The explicit debate in *Day* was not about the importance of children and their interests or about the fact *vel non* of paternal authority. It was about the shifting parameters and scope of paternal authority. But the implications of that debate for the character of the nineteenth-century family were momentous.

#### b. Paternal Consent

As the nineteenth century progressed, some courts continued to invoke the paramount right of fathers to custody and control of their children; others self-consciously limited that right in the name of a new and developing understanding of family and of the parent-child relationship; still others invoked traditional understandings of paternal authority while in fact qualifying that right in the name of public good or children's welfare. *United States v. Bainbridge*,<sup>69</sup> decided by a federal circuit court sitting in Massachusetts, six years after the decision of the Massachusetts state court in *Day*, represents the third approach. *Bainbridge* involved a minor, bound, not to an apprenticeship, but to serve a term of enlistment in the United States military.

Robert Treadwell was nineteen when he enlisted in the navy without paternal consent. Before finishing his term of service, Robert deserted. He was court-martialed, convicted of desertion, and sentenced to two additional years of military service. Robert responded to the sentence with a habeas corpus action in which he argued that his original enlistment was invalid because his father's consent had not been obtained. Robert's father, at sea at the time of trial, was not available to testify.

Justice Story, writing for the court that decided *Bainbridge*, reached a holding completely at odds with *Day*. The court noted *Day* in the first paragraph of its opinion, but found the reasoning of the *Day* court "extremely difficult to . . . maintain."<sup>70</sup> There are significant differences between the facts that led to the dispute in *Day* and those that led to

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69. 24 F. Cas. 946 (Cir. Ct. D. Mass. 1816) (No. 14, 497).

70. *Id.* at 951.

the dispute in *Bainbridge*. *Day* involved an indentured child whose father consented to his son's servitude. *Bainbridge*, in contrast, involved an absent father and a boy who enlisted in the United States navy, and then attempted to free himself from the commitment after having been convicted of desertion by arguing that he had enlisted without paternal consent. Whether the differences in the two courts' assumptions and conclusions derived in any part from differences in the litigants' stories is not clear. In any event, the differences between the assumptions and assertions of the *Day* and *Bainbridge* courts illustrate starkly the intensity of competing understandings of parents and children in legal deliberations during the first few decades of the century.

Each court asserted a right to paternal custody and control of a minor child. The state court in *Day* relied on that assertion in concluding that paternal authority empowered fathers to enter contracts that promised them wages in exchange for the sale of their children's labor. In contrast, the federal court in *Bainbridge* invoked paternal authority but immediately limited and qualified that authority so as to validate the enlistment of young Robert despite the apparent absence<sup>71</sup> of paternal consent.<sup>72</sup> Together, the two cases present the shifting, often contradictory, understandings of father-child relationships and of relationships within families more generally that underlay social and legal responses to cases such as *Day* and *Bainbridge* during the early nineteenth century.

In *Bainbridge*, Robert Treadwell, the boy, contended that the contract of enlistment was invalid because Congress had not, and in any case could not, authorize the enlistment of a boy under twenty-one years of age without paternal consent.<sup>73</sup> He further contended that the contract of enlistment was invalid under the common law rule that

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71. Because the boy's father was at sea and thus not present at the trial it was not completely clear to the court whether the father had given any sort of consent to his son's enlistment. *See id.* at 952. "If it had been necessary in this case to ascertain, whether there had been any consent of the father," Judge Story asserted, "I should have thought it necessary to have required more explicit affidavits than have been made, and a preemptory denial of assent on the part of the father . . ." *Id.*

72. *Bainbridge* also presented the court with important questions about the power of Congress under the Constitution to enlist minors in order to "raise and support armies" and "to provide and maintain a navy." *Id.* at 949. A discussion of those questions is beyond the scope of this Article. The important point here is that in recognizing a congressional right to allow minors to enlist without paternal consent, the court was willing to abridge paternal authority which had been considered paramount in earlier periods.

73. *See id.* at 947.

minors not be permitted to enter into contracts except in special cases. He claimed that his own case did not involve any such exception because, among other things, he had not enlisted "for his benefit."<sup>74</sup>

This contract, then, is not an exception from the general rule, and not binding on the infant, but the father is the natural guardian of the son, and has a right to control his person, and dispose of his services and labor; the consent of the father is, therefore, necessary to render the contract valid.

Commodore Bainbridge, Robert's commanding naval officer, to whom the writ of habeas corpus had been issued, claimed that Congress had the authority to enlist minors, and argued more particularly for recognition of an actual intention on the part of Congress to permit the enlistment of minors without parental consent. Moreover, Commodore Bainbridge responded to the claim that the contract was of no benefit to Robert by noting that Robert's enlistment served the "public good," and that benefit was similar enough to Robert's own to render the difference irrelevant.

Commodore Bainbridge acknowledged that at one time paternal authority, as defined under the laws of ancient England, might have precluded the enlistment of a child in the military without paternal consent. However, he explained, English law had long since limited the father's right so that paternal consent had become unnecessary in such cases. Blackstone himself, the Commodore declared, had settled the matter in asserting that a father "may indeed have the benefit of his children's labor while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants."<sup>75</sup> In fact, Blackstone's express language does not settle the question, as becomes clear from an examination of Blackstone's language in context. It appears in the *Commentaries* immediately after a paragraph describing the absolute power—"a power of life and death"<sup>76</sup>—enjoyed by fathers over their children under ancient Roman law. Blackstone was concerned to show that in comparison to Roman law, the eighteenth century English father had limited power. In fact, when Blackstone wrote, though hardly more than a half-century before *Bainbridge*, the effects of the Industrial Revolution were only beginning

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74. *Id.*

75. 1 WILLIAM BLACKSTONE, COMMENTARIES 453. The language from Blackstone was misquoted in the court report. See *Bainbridge*, 24 F. Cas. at 948. It cannot be known whether Alwyn, counsel for Commodore Bainbridge, or the court reporter (presenting Alwyn's argument) misquoted Blackstone's words.

76. 1 WILLIAM BLACKSTONE, COMMENTARIES 452.

to undermine the system of apprenticeship established as a national system in England in 1562; and thus to compare paternal authority to the authority of a master over apprentices and servants was hardly to consider a father's authority as insignificant. Puritans in the seventeenth century thought servants and apprentices bound by Divine order to obey and revere their masters,<sup>77</sup> and even in Blackstone's day, masters enjoyed considerable authority over apprentices and servants. Blackstone's language did not definitively settle the question at issue in *Bainbridge*.

Justice Story began his opinion in the case by reaffirming the existence of a father's right to custody and control of his children. However, he almost immediately limited the scope of that right and ordered that Robert be returned to his commanding naval officer. First, Justice Story described the rights a father holds over his children:

By the common law, the father has a right to the custody of his children during their infancy. In whatever principle this right is founded, whether it result from the very nature of parental duties, or from that authority, which devolves upon him, by reason of the guardianship by nature, or nurture, technically speaking, its existence cannot now be brought into controversy.<sup>78</sup>

In the same paragraph, however, Justice Story recognized that the absolute, or near-absolute, right to paternal custody that had been assumed a century earlier *was* being "brought into controversy."<sup>79</sup> In fact, though a remarkable and novel flexibility had appeared in some late eighteenth and early nineteenth century custody decisions, granting custody to mothers, and even third parties, rather than to fathers, many other cases were still being decided according to the traditional rule that a father's right to custody of his children was absolute. Justice Story acknowledged both trends by citing first a set of custody cases in which courts strictly preserved paternal control<sup>80</sup> and then, a set in which courts lim-

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77. See MORGAN, *supra* note 35, at 64.

78. *Bainbridge*, 24 F. Cas. at 949.

79. The cases that Justice Story cited in support of his assertion that the father's right to the custody of his children "cannot now be brought into controversy" provide ample evidence that that right had already been brought into controversy. In *DeManneville v. DeManneville*, 32 Eng. Rep. 762 (K.B. 1804), one of four cases cited, the Kings Bench explicitly moved away from several decisions of the late eighteenth century in which English courts broadened judicial discretion to consider depriving certain fathers of custody. See, e.g., *Blisset's Case*, 98 Eng. Rep. 899 (K.B. 1774); *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763).

80. See, e.g., *Ex parte Hopkins*, 3 P. Wms. 151; Co. Litt. 88, and Hargrave's notes; *Rex v. DeManneville*, 5 East 222; *DeManneville v. DeManneville*, 10 Ves. 52, cited in *Bainbridge*, 24 F. Cas. at 949, by Justice Story.

ited, and even sometimes completely revoked, paternal control.<sup>81</sup>

As Justice Story clearly understood—his disclaimer notwithstanding—if the social and moral justifications of a right, such as the right to paternal custody and control, can be challenged then, inevitably, the right itself can be challenged as well. Thus, in effect at least, Justice Story invoked the father's right to custody and control in order to provide an acceptable frame within which to limit that right. Accordingly, the court thus echoed Bainbridge's reliance on Blackstone's understanding of paternal entitlement to the benefits of a child's labor.<sup>82</sup>

Justice Story's understanding of the scope of paternal control put him at odds with the court that decided *Day*. In contrast with the court in *Day*, Justice Story concluded that fathers did not have authority to bind their children as apprentices without the consent of the children:

The custody of minors is given to their parents for their maintenance, protection, and education; and if a parent, overlooking all these objects, should, to answer his own mercenary views, or gratify his own unworthy passions, bind his child as an apprentice upon terms evidently injurious to his interests, or to a trade, or occupation, which would degrade him from the rank and character, to which his condition and circumstances might fairly entitle him, it would be extremely difficult to support the legality of such a contract.<sup>83</sup>

Finally, at the end of the opinion, Justice Story settled the question that he had raised at the start, but which he had there asserted need not be answered: whether a father's right to custody of his children stemmed from "the very nature of parental duties, or from that authori-

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81. See, e.g., *Archer's Case*, 1 Ld. Raym. 6783; *Rex v. Smith*, 2 Strange. 982; *Rex v. Delaval*, 3 Burrows, 1434; *Com. v. Addicks*, 5 Bin. 520 (as quoted by Justice Story, 24 F. Cas. at 949).

82. See *Bainbridge*, 24 F. Cas. at 949. In quoting Blackstone, Justice Story omitted the word "apprentices" at the end of Blackstone's sentence. Thus, as he presented the quotation, Blackstone asserted that the entitlement of a father to his child's labor was "no more than he is entitled to from his apprentices and servants." 1 WILLIAM BLACKSTONE, COMMENTARIES 453. By omitting the word "apprentices," Justice Story suggested an even greater limitation on a father's authority than that suggested by Commodore Bainbridge. Although Blackstone's own language did not distinguish between servants and apprentices, and although child servants and apprentices were increasingly indistinguishable in the American context during the nineteenth century, the position of voluntary apprentice carried more prestige than that of servant and at least at the start of the century was more immediately identified with a familial, rather than an employment, relationship than the position of servant. See MORRIS, *supra* note 24, at 364 (differentiating apprenticeship from indentured service and asserting that if indenture agreements contained no promise that apprentice would be trained, then agreement was for an indentured servant, not an apprentice).

83. *Bainbridge*, 24 F. Cas. at 949.

ty, which devolves upon him, by reason of the guardianship by nature, or nurture."<sup>84</sup> In the end, he sided with the second option. Although he grounded his decision on the conclusion that the Constitution permitted Congress to authorize the enlistment of minors into the navy without parental consent and that Congress had so provided, he proclaimed clearly that had that not been the case, it would have been necessary to have inquired further into the relation between Robert and his father.

I should have thought it necessary to have required more explicit affidavits than have been made . . . [including] a special statement of the facts, as to the mode of life and place of residence of the minor previous to his enlistment; for an assent of the father need not be express, but may be implied from circumstances. If a father should voluntarily send his minor children away from home, to obtain a maintenance and support in any manner, that they could; this would be an implied consent to any contract for that purpose, into which they should enter, and a waiver of his parental rights.<sup>85</sup>

For Justice Story paternal authority was a legal fact only when paternal obligations were fulfilled. A father's authority extended only so far, and lasted only so long, as he fulfilled his obligations as a father.

The court in *Bainbridge* ultimately sided with the future of American family law rather than with the past in its understanding of the parent-child relationship. Yet the court did not ignore the past completely. It recognized young Robert's right to enlist in the navy without his father's consent on common law<sup>86</sup> as well as on constitutional grounds, and thus declared Robert's enlistment valid. But the court also paid deference, as Justice Story explained in the conclusions to his opinion, to assumptions of an earlier period that might have led to a different holding in the case. The competing presumptions voiced in *Bainbridge* about the limits of paternal authority were equally in question as society and law redefined the meaning and scope of the system of apprenticeship in the nineteenth century.

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84. *Id.*

85. *Id.* at 952.

86. The court declared that under common law a contract signed by a minor was valid if the contract was for the minor's benefit. Thus, for example, contracts signed by minors for "necessaries" were valid. Foreshadowing a later century's invocation of the best-interest standard as a pretext in support of other ends, Justice Story concluded that any statute authorizing minors to enter public service was by definition "for their benefit" as well as "for the public benefit." *Id.* at 951; see also Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILDREN'S LEGAL RTS. J. 2, 3 (1996) (describing the subversion of children's interests despite the invocation of the best-interest standard).

c. A Father's Profit

In 1852, when a New York court decided *Van Dorn v. Young*,<sup>87</sup> a father's right to custody and control of his children was securely premised on the responsible fulfillment of a particular father's paternal obligations. Neither the court nor the parties in *Van Dorn* even hinted that paternal authority should be premised on a man's inherent status as *pater*. One of the parties in *Van Dorn* stated (and neither the court nor the other party disagreed) that a father "has no property in his child. His right to its labor grows out of and is dependent upon his care over it; and is intended as a just compensation, not a source of pecuniary profit."<sup>88</sup> For the court in *Van Dorn*, the extent to which a particular father accepted the obligations incumbent upon him as a father determined the scope of his authority to benefit from his child's labor. Moreover, the concern voiced expressly in *Day* and *Bainbridge* about the fact, and source, of paternal authority is displaced in *Van Dorn* by concern for defining and securing a child's welfare.

The case involved an 1846 indenture agreement, entered into by John Young and Frederick Van Dorn. Under the agreement Young agreed that his son Henry would work as an apprentice for Van Dorn for five years, until Henry turned twenty-one. Van Dorn promised to teach Henry graining and sign-painting, and to make periodic payments to Henry's father during the term of the apprenticeship.<sup>89</sup> In 1850, after serving Van Dorn for almost four years, Henry "voluntarily left, and refused to work for the plaintiff any longer"<sup>90</sup> even though, under the indenture agreement, he was obliged to serve Van Dorn for another year. Van Dorn then sued Henry's father for breach of contract,<sup>91</sup> claiming \$450, the estimated value to Van Dorn of Henry's unfulfilled work obligation.<sup>92</sup> No argument was made, nor apparently could one be

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87. 13 Barb. 286 (N.Y. App. Div. 1852).

88. *Id.* at 292.

89. Under the indenture agreement Van Dorn agreed to pay John Young \$5 after Henry served three months of his apprenticeship, and thereafter, to making quarterly payments amounting to \$30 in the second year, \$40 in the third year, \$50 in the fourth year and \$60 in the fifth year as well as an addition \$50 at the end of the five-year apprenticeship. *See id.* at 287.

90. *Id.*

91. The court considered, and then overruled, John Young's demurrer to Frederick Van Dorn's complaint. *See id.* at 286.

92. Although not considered in *Van Dorn*, this master's suit indicates the increasing value an apprentice held for a master as the apprenticeship went on in time. In fact, Van Dorn was apparently torn in his statement to the court between arguing that Henry was "careless and negligent in the performance of his work" (and that Henry's



made, regarding Henry's own liability to Van Dorn because the boy had not been a party to the indenture contract. Van Dorn argued only that Henry's father, John, was responsible for *trying* to effect Henry's return to Van Dorn's service, though not necessarily for actually effecting it. The court agreed. Judge Strong, for the court, took "notice of [John Young's] power as a parent," and concluded that Young "might have done *something* towards securing a return of his son, by making search for him, if ignorant of his residence, and on finding him exercising parental authority over him to effect his return."<sup>93</sup>

The father, in an argument reminiscent of the master, Aaron Everett, in *Day v. Everett*,<sup>94</sup> asked that the contract be declared void because, lacking the boy's consent, it failed to comply with state law and was, in addition, violative of "public policy and the interest of the state."<sup>95</sup> Young, however, was more explicit than Aaron Everett about the character of the apprenticeship and its unfortunate consequences for the child involved. "The contract," he asserted, "in this case is the sale of the child's labor. It contains no provision for his benefit, save the benefit of work."<sup>96</sup> The claim—that the apprenticeship was at best of slight value to Henry—seems remarkable to contemporary ears because it was voiced by Henry's father, the very man who had arranged for Henry to be bound as apprentice to Van Dorn for the final six years of Henry's

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father, although notified, did nothing to correct Henry's behavior) and arguing that Henry's work had become valuable: "Henry had become a very good workman at the business in which he was engaged, and could perform his work well, if so disposed." *Id.* at 287. (Since these assertions were offered by the court reporter in his summary of the facts of the case, it is not possible to claim with certainty that the summary accurately reflects Van Dorn's position with regard to Henry's work.)

Van Dorn's claim for \$450 suggests further that the boy's work was more valuable than the combined payments owed to the father under the contract for the last year of work and as termination pay. Van Dorn estimated Henry's value to him at the time of the boy's departure at \$1.25 a day. Apparently in asking for \$450, Van Dorn took account of the sums he would have owed John Young had the boy completed the term of apprenticeship agreed to between Van Dorn and Young.

93. *Id.* at 295.

94. *See supra* notes 57-68 and accompanying text.

95. *Van Dorn*, 13 Barb. at 291. This Article's analysis of *Van Dorn* focuses more fully on the positions voiced by John Henry, the father, than by those voiced by Frederick Van Dorn, the master. This focus follows from that of the court reporter who, in summarizing the case and the parties' arguments, devoted several pages to Young's arguments, but only one paragraph to Van Dorn's. *See id.* at 288-94. It cannot be known whether Young's arguments were in fact as long and as detailed as those of Van Dorn.

96. *Id.* at 292.

minority. John Young's assertion that the apprenticeship was without value for young Henry was echoed and elaborated elsewhere in the arguments that he presented to the court. So, for instance, John Young, arguing for the exclusivity of statutory rules in the valid creation of indenture contracts, described those rules to be "for the benefit and protection of the infant, and in some measure [to] *compensate him for the loss he sustains in leaving his parents' care and being deprived of the benefit and protection of home.*"<sup>97</sup> John Young's contention that Henry's apprenticeship was without value to the boy did not depend on claims about Van Dorn's actual treatment of the boy. Rather, the matters about which John Young complained were apparent in the indenture agreement that first positioned Henry as Van Dorn's apprentice. Whether Henry's father in fact agreed with, or even knew specifically about, his lawyer's characterizations of the apprenticeship system and of the loss—specifically the loss of family—endured by young apprentices such as his son, can no longer be known. Whether John Young suffered pangs of conscience or at least conflicting emotions for having bound Henry to Van Dorn, even if his decision to do so was grounded in economic necessity, can only be guessed. But, whatever Mr. Young's own conflicts, and however he resolved them, it is clear that by the mid-nineteenth century, there was nothing remarkable about the claim that apprenticeships served children poorly. That view would have surprised an earlier American generation which expected parents to arrange either college education or an apprenticeship for children (especially sons) of Henry's age.

For a Puritan child, training in almost every trade necessitated a period of apprenticeship (usually from age 7 to 14 until age 21), and so, most Puritan parents sent their children from home (often as apprentices, but sometimes to live with schoolmasters, friends or relatives). It is not clear whether colonial parents believed children could be socialized more successfully outside the orbit of parental affection.<sup>98</sup> Henry Young's own case shows that as late as the middle of the nineteenth

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97. *Id.* at 291 (emphasis added).

98. Edmund Morgan suggested that Puritan parents believed children benefitted from being raised in contexts untouched by parental affection. He further asserted that Puritan parents, concerned that they should not love their children too much and God too little, handled this danger by sending children to become apprentices. See MORGAN, *supra* note 35, at 29-30, 38-39. In her book about the history of custody decisions in the United States, Mary Ann Mason concludes that testimony in contemporary court records provides no support for Morgan's claim. See MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 37 (1994).

century, society and law continued (though with increasing reluctance) to provide for parents such as John Young, who chose "voluntarily" to enter into contracts that arranged for their children to become apprentices. But by 1852 when *Van Dorn* was decided, even parents who indentured their children into positions of apprenticeship viewed the practice as an unfortunate expedient.

Indeed, this sentiment was so common that John Young, apparently unconcerned with preserving his own dignity as a decent parent,<sup>99</sup> explained that the contract, of no benefit "save . . . work" to the child, was entered into for the benefit it provided him as a parent. By placing Henry as an apprentice with Van Dorn, John Young explained, he had saved himself from "the obligation of maintenance and education; and secure[d] by [the apprenticeship] to himself, pecuniary profit."<sup>100</sup> But the indenture agreement was illegal, Young asserted, because paternal authority was limited. Young proclaimed that a father's authority to arrange an apprenticeship for his child, an authority based in the father's obligation to care for the child, did not include the right to profit from the child's labor. Young described a father's right to benefit from his child in formulaic fashion, by asserting that a father's right to his child's labor "is intended as a just compensation, not a source of pecuniary profit."<sup>101</sup> Even more, argued Young, a father who did seek pecuniary gain by apprenticing his child was thought not only to violate his duty to child and state, but to contravene "the relations which *nature* has imposed on him."<sup>102</sup> Such an agreement constituted a breach of paternal duty, and therefore could not be enforced.<sup>103</sup>

The court, overruling the father's response to the master's complaint, viewed the system of indenturing children as well as the father-child relationship differently than John Young did. After asserting that the contract bound only Van Dorn and John Young, but not Henry Young, the court considered the legality and acceptability of a father's "*binding himself* that the services of his infant child shall be rendered to another . . . for instruction to be rendered to the child, and in addition a compensation to be paid to himself."<sup>104</sup> Such an arrangement,

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99. In fact, it is possible, even likely, that Young apprenticed Henry because he believed he had few economic options. It is also possible that Young was unaware of the specific arguments made by his attorney on his behalf.

100. *Van Dorn*, 13 Barb. at 292.

101. *Id.*

102. *Id.* at 294 (emphasis added).

103. *See id.*

104. *Id.* at 296 (emphasis added).

the court concluded, was entirely acceptable:

This obligation, imposed as well by municipal law as by the laws of nature and religion, to maintain and educate the child, is in no respect diminished by such a contract; there is nothing in a fair contract of that character inconsistent with the proper discharge of that obligation; and the parental duty may often be better discharged in that way than in any other.<sup>105</sup>

Judge Strong did not respond to the father's warning that allowing a parent to bind a child into servitude for the parent's financial gain—a practice not provided for by statutory law—could easily leave such a child without protection from a cruel master and a cruel or simply greedy parent. Neither did the court respond to the father's suggestion that nature endowed parents with a special obligation to socialize their children, an obligation that could not therefore be easily transferred to others.<sup>106</sup>

Perhaps the discrepant claims of the defendant and the court about the dangers and benefits of apprenticeships, and more particularly about the value of Henry Young's apprenticeship, were merely strategic. Certainly John Young was anxious to have the contract binding Henry to Van Dorn invalidated. And the court, in asserting that children are often best cared for and educated outside the parental home, might have been influenced by its concern with reaching a fair and just decision in the particular case. After all, Young was in effect saying that he had participated in mistreating his child, but should be allowed to benefit from

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105. *Id.*

106. *See Van Dorn*, 13 Barb. at 293. The defendant argued more specifically that parents could transfer the obligation for educating and maintaining their children only in cases in which those parents complied with state statutory rules, rules designed to protect the "welfare comfort, and interest of the child." *Id.*

The assertion, voiced by John Young in the early 1850s, that parents are naturally endowed to provide for their children better than others, remained attractive to society and law during the remainder of the nineteenth, and through the twentieth, century. In 1979 the United States Supreme Court invoked the same presumption in validating a Georgia statute that allowed parents to commit their children to state mental institutions upon authorization of the superintendent of the hospital. *See Parham v J.R.*, 442 U.S. 584 (1979). In *Parham* the Court explained:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.

*Id.* at 602; *see also* DOLGIN, *supra* note 2, at 236 (considering the presumption that parents are best endowed by nature to provide for their children).

the consequences of that act. But whatever the motives of the parties and the bench (and they can no longer be known with certainty) their various and conflicting positions about the virtues of the apprentice-master relationship show clearly that by the mid-nineteenth century conclusions about appropriate models for socializing children were open to energetic debate.

d. From Patriarchy to Modern Fatherhood

During the colonial period, the system of apprenticeship presumed a patriarchal family. Within that unit, fathers enjoyed enormous authority over wives and children. A father's relation to other members of his family, reflecting the inherent prerogatives of paternal status, was a matter of fact, not a matter of choice.

Moreover, family members lived and worked together under the consistent aegis of paternal control. In such a world, children served masters as they served fathers. With the advent of the Industrial Revolution, and the dissociation of home and work, the inexorable ties that defined women and children as subservient to their husbands and fathers loosened. Images of dominant and harsh Victorian fathers notwithstanding, the security of the old order had begun to crumble and with it the inevitability of paternal control.

Thus, in *Day*, decided at the turn of the nineteenth century, the court sided with an earlier century's understanding of paternal authority in premising that authority on the fact of paternity: paternal authority derived from the status of the *pater*. But the decision in *Day*—a decision that would have been inevitable a century previous—represented a judicial *choice* about the scope and meaning of paternity. Only six years later, a federal court, deciding *Bainbridge*, while proclaiming the security of a father's right to custody, allowed for an understanding of paternal authority essentially incompatible with that assumed in *Day*. Justice Story in *Bainbridge* recognized assessments of paternal behavior as central in defining the scope of a particular father's authority. Finally, in *Van Dorn*, decided at mid-century, a New York court followed a middle course between respect for the parties' contractual obligations and the defendant-father's strong plea that the child's best interests should be paramount. The *Van Dorn* court held the father liable under the contract to his son's master but found the contract binding only on the father and not on his son.

As a group, *Day*, *Bainbridge*, and *Van Dorn* illustrate the modification and eventual eradication of patriarchal families. As society challenged the inexorability of rights previously understood as inherent to paternal status, alternative principles appeared for understanding and

ordering familial relationships. Concern for the welfare of children followed from a startling redefinition of childhood<sup>107</sup> that had begun several centuries earlier. By the nineteenth century, American law began to institutionalize that concern in formulating the best-interest principle. Concomitantly, women, though increasingly confined to the domestic arena, were romanticized as uniquely capable of providing for the nurturance and socialization of their children and thereby gained new rights as parents and as custodians to their children.

## 2. Indentured Children and the Changing Nature of Motherhood

At the beginning of the nineteenth century, most courts asked to consider the legal power and authority of mothers either agreed with Blackstone—or claimed to, despite holdings that argued otherwise—that a mother, “as such, is entitled to no power, but only to reverence and respect.”<sup>108</sup> By the end of the century, mothers were routinely preferred over fathers in disputes about custodial arrangements for their children.

### a. The Romanticization of Motherhood

In fact, however, even at the start of the nineteenth century, the position of mothers within families had already shifted significantly in a direction that became more and more obvious throughout the century. As society and law redefined mothers and maternity, new understandings of children and of their social and economic worth appeared. The nineteenth century created the “economically ‘worthless’ but emotionally ‘priceless’ child.”<sup>109</sup> This pervasive reconceptualization of childhood contributed to a strong preference by century’s end for socializing children within their parents’ homes and for protecting them from the tensions of the world of work. Felix Adler reflected this preference forcefully when he declared at the start of the twentieth century that to profit from the work of a child was to “touch profanely a sacred thing.”<sup>110</sup>

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107. See *infra* Part III.B.

108. 1 WILLIAM BLACKSTONE, COMMENTARIES 453.

109. VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 3 (1985). As Zelizer notes, children were economically valuable for working class families throughout the nineteenth century. Children from poor families joined the new, “nonproductive world of childhood” only in the first decades of the twentieth century, largely as a result of child labor legislation and universal compulsory schooling. *Id.* at 5-6.

110. Felix Adler, Child Labor in the United States, Annual Meeting of the Nation-

As work moved out of the home and into the marketplace, the domain of home, reconceptualized as the private arena of familial affection, was identified with women and children.<sup>111</sup> This identification occurred through the elaboration of a set of images about home and family that contrasted in almost every regard with the tensions and harsh uncertainties identified with the marketplace. Woman emerged as nurturer of children, guarantor of moral values, and self-effacing symbol of hearth and home. *Ladies' Magazine*, a popular nineteenth century magazine for women, described the contemporary woman as "forming the future patriot, statesman, or enemy of his country, [but] more than this, she is sowing the seeds of virtue or vice which will fit him for Heaven or for eternal misery."<sup>112</sup>

Such images of woman—along with a new romantization of childhood<sup>113</sup> which directed courts to examine children's "best interests"—did not always result in grants of custody to mothers rather than to fathers but did provide the rhetoric through which courts were newly able to consider, and increasingly to affect, that possibility. The first such holding in the United States was made by a South Carolina court in 1809. In that case, *Prather v. Prather*, the court granted custody of a child to the mother rather than to the father even though fathers, in the court's view, were their children's "natural guardian[s], invested by God and the law of the country with reasonable power over them."<sup>114</sup> That view notwithstanding, the court in *Prather* considered the mother, "a prudent, discreet and virtuous woman," a better parent to the five-year old girl than the father, who was living in an adulterous relationship with a woman he had brought into his home after throwing out the

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al Child Labor Committee, 1905, cited in ZELIZER, *supra* note 109, at 6, citing II CHILDREN AND YOUTH IN AMERICA 653 (Robert H. Bremmer 1971).

111. See MINTZ & KELLOGG, *supra* note 7, at 43-65. Mintz and Kellogg assert that the family as a "self-sufficient economic unit began to disappear" at the start of the nineteenth century. They write:

By the middle of the nineteenth-century, the older pattern in which husbands, wives, and children worked together as participants in a common economic enterprise had been replaced by a new domestic division of labor. The middle-class husband was expected to be the breadwinner for the family. Instead of participating in domestic industries, the middle-class wife was expected to devote herself full-time to keeping house and raising children.

*Id.* at 50.

112. MASON, *supra* note 98, at 52-53, citing MAXINE MARGOLIS, MOTHERS AND SUCH: VIEWS OF AMERICAN WOMEN AND WHY THEY CHANGED 38 (1984)).

113. See MASON, *supra* note 98, at 55.

114. *Prather v. Prather*, 4 Desau. 33, 34 (S.C. 1809). The *Prather* court did not give the mother custody of the older children.

child's mother.

By mid-century courts began to justify grants of maternal custody by invoking the "natural law" presumption that mothers better serve their children's interests than do fathers. In *Mercein v. People*, decided in New York in 1842, the court granted custody of a young girl to her mother, declaring that "the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree."<sup>115</sup> By the end of the nineteenth century, a "new orthodoxy"<sup>116</sup> had emerged in custody law: mothers, not fathers, had become the preferred custodians in cases of parental dispute, as well as in disputes involving third parties.

However, that orthodoxy, though increasingly applicable to middle-class mothers, did not often protect the interests of poor mothers in custody disputes. Similarly, the newly romanticized conception of woman, which defined her as intuitive, emotional, nurturant, and selfless—as everything the market was not—was not applied, and was usually not applicable, to most poor mothers who, compelled to enter the marketplace as workers in order to sustain themselves and their children, were unable to enjoy the prestige bestowed upon those able to concern themselves exclusively with middle-class housewifery. Such women became increasingly marginal in a society anxious to identify men with work and money, and women with home and hearth.

Increasingly during the nineteenth century, apprenticed children, regardless of which parent consented to the placement, came from poor homes, or, because poor, were involuntarily apprenticed without either parent's consent. While many colonial families sent their children from home to serve as apprentices, by the middle decades of the nineteenth century, middle-class children were kept at home long into adolescence. Further, middle-class families became less interested in having other people's children in their homes.<sup>117</sup> More and more, indentured children came from poor families, and, once indentured, were treated as servants rather than as family members.

The changing class dimensions of the system of apprenticeship, especially for children indentured "voluntarily," were especially evident in cases involving children whose mothers, rather than fathers, negotiated and signed contracts of indenture that placed them in positions of servitude. Mothers who apprenticed their children usually did so to

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115. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 101 (N.Y. 1840).

116. GROSSBERG, *supra* note 53, at 253.

117. See STEVEN MINTZ, *A PRISON OF EXPECTATIONS: THE FAMILY IN VICTORIAN CULTURE* 14 (1983).



provide relief from poverty. In fact, the law continued to discourage, or completely to prevent, mothers from negotiating and executing indenture agreements involving their children. A number of states simply precluded mothers by statute from signing indenture agreements to bind out their children as apprentices or servants. Others allowed mothers to place their children as apprentices only if the children's father had died.<sup>118</sup> As a matter of law, as well as of custom, therefore, generally only mothers of fatherless children participated in legal arrangements for apprenticing those children. Such mothers were often impoverished.

In earlier centuries the law relied on separate rules for regulating voluntary apprenticeships and involuntary apprenticeships. However, by the nineteenth century, children apprenticed voluntarily were hardly distinguishable in their class origins from those indentured voluntarily. At the same time, within family law, a more subtle reliance on a two-tiered response to cases involving children worked to the disadvantage of indentured children and their parents, but most especially their mothers. The law's evolving idealization of sheltering, self-sacrificing mothers did not, and usually could not, apply to the impoverished mothers of indentured children. Images of nurturant mothers, freed from the pressures of the marketplace and therefore able to devote selfless love to the socialization of affectionate children—though perhaps nowhere actualized in fact as much as in imagination—were images that, almost by definition, excluded poor women in their relationships to their children.

Courts, newly concerned with children's interests and welfare, and beginning to associate both with a certain kind of mother, saw a mother's poverty and her failure to reflect emerging images of the 'good mother' as evidence that she would not serve her children well and should, therefore, be denied the right to preserve or regain custody of them. Ironically, therefore, the new focus on children's interests, which served middle-class mothers well in custody disputes against fathers or third parties, by providing a jurisprudential foundation for overturning centuries of precedent that automatically granted fathers, but not mothers, custody, worked to the detriment of poor mothers.

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118. For instance, a 1793 Maryland statute authorized fathers, but not mothers, to bind out their children. See Act of 1793, ch. 45, sec. 4, cited in *Ballard v. Edmonston*, 2 F. Cas. 558 (1823); see also 1794 MASS. ACTS ch. 64 (authorizing mother to enter into such agreements only when father of children was not alive).

b. Motherhood and the System of Apprenticeship

Moreover, throughout the first half of the century, as courts began to recognize both the best interests of children as a governing principle in custody cases as well as the authority of mothers to limit, and sometimes completely to outweigh, paternal authority, the law also more often recognized the authority of mothers to bind their children out as servants. But, especially at the start of the century, in cases involving children who had been indentured by their mothers, other courts invoked, and relied strictly on, the traditional rule that fathers, but not mothers, had the right to control their children and to benefit financially from their children's remunerated services. In the early decades of the century, several courts refused completely to recognize indenture agreements signed by mothers but not by fathers.<sup>119</sup>

In an 1812 Pennsylvania case, involving facts similar to those in *United States v. Bainbridge* which would be decided four years later,<sup>120</sup> the state supreme court validated young John Connor's enlistment in the navy against his mother's wishes.<sup>121</sup> As would the federal court in *Bainbridge*, the Pennsylvania court in *Commonwealth v. Murray* found parental consent unnecessary to the validity of the child's enlistment.<sup>122</sup> However, the court in *Murray* identified with tradition in rejecting the plea of John's mother that her son be released from the naval service to which he had committed himself in opposition to her wishes. In contrast, the court in *Bainbridge*, in similarly validating a boy's enlistment despite the absence of paternal consent, re-examined and re-interpreted social tradition and common law in reaching its holding in the case.<sup>123</sup>

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119. See, e.g., *Barrett v. McPherson*, 2 F. Cas. 928 (Cir. Ct. D.C. 1834) (No. 1, 049) (declaring void indenture of child under relevant statutory law because child-apprentice was bound by justices of peace with consent of mother but not of father); *Ballard v. Edmonston*, 2 F. Cas. 558 (Cir. Ct. D.C. 1823) (No. 817) (declaring void indenture signed by mother but not father for boy to be apprentice to tailor). For a decision involving the right of a mother at century's end to the labor of her working child, see *Bradley v. Sattler*, 41 N.E.2d 171, 172 (Ill. 1895) (concluding that "upon the death of the father, the mother becomes the head of the family, and is entitled to the services and earnings of her minor children").

120. See *United States v. Bainbridge*, 24 F. Cas. 946 (Cir. Ct. D. Mass. 1816) (No. 14,497); see also *supra* notes 69-86 and accompanying text.

121. See *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812).

122. John Murray was 17½ years old when he enlisted without his mother's agreement. See *id.*

123. The comparison is stronger still because the father in *Bainbridge* was at sea during the trial and was thus not available to make any claims regarding his son's

In *Murray*, Justice Tilghman considered the limits of Congress's authority to provide a navy and found those limits broad, as Justice Story would in *Bainbridge* in 1816. However, Justice Tilghman was able to judge *Murray* on familiar grounds, because young John "had neither father, guardian nor master." "As for his mother," continued Justice Tilghman, "although he owed her reverence and respect, yet she had no legal authority over him."<sup>124</sup> Justice Tilghman further explained that for a boy such as John, "without father, guardian or master," the normal uncertainty one might feel about the benefits of naval service for a minor could be replaced with the near certainty that John's enlistment agreement was for him "a beneficial contract."<sup>125</sup> As the court had done, the lawyer for the United States echoed Blackstone's declaration that a mother is owed nothing but "reverence and respect," and declared, even more conclusively, that "[i]n relation to the present question, it is as though [John] had no mother."<sup>126</sup> A second justice, less sanguine about the law's failure to accord mothers the authority to preclude the enlistment of their sons, felt himself compelled nonetheless to agree with Justice Tilghman's conclusions in the case. Justice Yeates declared:

It has not been contended by the attorney for the district, that an infant under the years of discretion, or one whose services have been engaged by a prior contract, can lawfully engage in the navy of the United States, but that at all events a mother after the death of the father has no legal right to prevent her son from forming such engagement.

The father is intitled to the services of his sons while they live with him, but however strange it may appear, the mother has no such right.<sup>127</sup>

Justice Yeates' concern at the law's assessment of maternal authority might have been intensified had he noted that under state law the responsibility of John's mother to support and provide for her son was identical to that of a living father.<sup>128</sup>

*Murray* is notable not simply because the court returned John to

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enlistment or his own consent or lack therefore to that enlistment, see *Bainbridge*, 24 F. Cas. at 952, while the mother in *Murray* was an active participant in the legal proceedings asking that her son be freed of his commitment to the navy and returned to her custody. See *Murray*, 4 Binn. at 488.

124. *Murray*, 4 Binn. at 492.

125. *Id.* at 493.

126. *Id.* at 488.

127. *Id.* at 494 (citations omitted).

128. See *id.* at 491. This argument was voiced by the attorney for the petitioner (the Commonwealth, in name, though actually John Connor).

Commodore Murray. A similar result was reached four years later in *Bainbridge* even though there the boy's father was alive and had not given his consent to the boy's enlistment in the navy. *Murray* is also notable because it illustrates the continuing strength in family law cases decided at the start of the century of the supposition that maternity qualified a women for reverence and respect from her children, but did not give her any power over them or over their acts involving third parties.

Within a half-century, alternative understandings of maternal, as compared with paternal, status and authority, though still sometimes competing with older understandings, had become conventional. Generally courts reserved these new understandings for middle-class mothers, but sometimes even poor mothers, involved in disputes with their children's masters or employers, benefitted from the century's evolving conception of maternal status and authority. In one such case, *Osborn v. Allen*,<sup>129</sup> decided in 1857, the New Jersey Supreme Court declared that maternal authority, though not as extensive as paternal authority, was predicated on the same understanding of parentage: "The authority and rights of parents over their children result from their duties."<sup>130</sup> The Court's Chief Justice further explained that, Blackstone's eighteenth-century view of maternity notwithstanding, the proposition that mothers enjoy no legal power with regard to their children "is not consistent with the principles of natural law, with the rules of the common law, or with the dictates of sound public policy."<sup>131</sup>

*Allen* involved a mother, Rebecca Cottrell,<sup>132</sup> who brought suit against Thomas Osborne to collect wages due as a result of the labor of her minor son. Osborne argued that in the absence of clear evidence that the boy's father had died, he should be presumed alive thereby precluding the mother's right to sue. But Osborne further argued that, even were the father to be presumed dead, the mother had "no right to sue for a child's wages; her rights are not the same as those of a father."<sup>133</sup> The court's Chief Justice thought otherwise, and thought,

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129. 2 Dutch. 388 (N.J. 1857). Three judges wrote decisions for the mother in *Osborn*. A fourth judge concurred in the outcome in the case but did not write a separate opinion.

130. *Id.* at 391.

131. *Id.*

132. Rebecca Cottrell was deceased when the case came before the New Jersey Supreme Court. The case was therefore continued on her behalf by the administrator of her estate. See *id.* at 388.

133. *Id.*

moreover, that his views, as compared with those of Osborne, represented modernity and enlightenment. He declared:

The extent of this natural authority of parents over children is the subject of municipal regulation, and has greatly varied in different ages and under different systems of laws. It has undoubtedly been greatly modified by the progress of intelligence and refinement, by the diffusion of the benign principles of Christianity, and the consequent elevation of the female sex. The ancient Roman laws gave to the father the power of life and death over his children. The mother had no authority over her children. She could have none, because the Roman laws subjected women, except they were under the cover and authority of a husband, to a perpetual guardianship.<sup>134</sup>

*Allen* illustrates new understandings of maternity. However, the decisions of the judges who wrote opinions in the case continued to reflect traditional understandings of parental authority in that they regarded authority (whether in the hands of mothers or fathers) as the central determinant of familial matters. Thus, Justice Elmer, agreeing with the court's Chief Justice that the mother was entitled to collect wages earned by her son's labors, concluded that the son's "work and labor for others, actually or virtually at [the mother's] request, was the same as if she had performed the services with her own hands." This court, which benefitted the working child's mother, did not focus upon the interests of the child, as later courts invariably would.

While the New Jersey Supreme Court was deciding *Allen*, other courts, asked to consider the law's understanding of intra-familial relationships, were as likely to examine the welfare of children as to examine the limits of parental authority. In many of these cases, mothers in disputes involving their indentured children fared badly. That the new attention being paid to children's interests and welfare did not always lead to the expansion of maternal rights,<sup>135</sup> especially in cases involving poor mothers, is illustrated by three cases decided at mid-century, each of which involved children indentured by their mothers to Shaker communities.<sup>136</sup> In these cases courts relied on children's inter-

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134. *Id.* at 392 (citations omitted).

135. See GROSSBERG, *supra* note 53, at 262.

136. The Shakers, one of a variety of utopian communities that flourished in the nineteenth century, believed that their founder, Mother Ann Lee "embodied the second coming of the Christ spirit." See Barbara Taback Schneider, *Prayers for Our Protection and Prosperity at Court: Shakers, Children, and the Law*, 4 YALE J.L. & HUMAN. 33, 38 (1992) (quoting PRISCILLA BREWER, SHAKER COMMUNITIES, SHAKER LIVES 6 (1986)). The Shakers, who practiced celibacy, recruited new members by obtaining custody of children through formal indenture agreements and through less formal means. See *id.* at 34-35.

ests to subvert, rather than to expand, maternal rights.<sup>137</sup> All three cases (two from Massachusetts and one from New York) involved mothers seeking to retrieve a child who had been indentured, either through a formal, written indenture agreement, or informally through a verbal agreement, to a Shaker community. In all three cases, the Shakers were ultimately allowed to keep the child who had been indentured to them,<sup>138</sup> although in the New York case, two lower courts would have returned the child to her mother. In each case, a court considered the interests of the child involved.<sup>139</sup>

The importance of class to the three courts that allowed the Shakers to retain custody of children in disputes with those children's mothers is hard to assess definitively, since none of the opinions provides much detail about the economic situation of the families involved. However, it is likely that each of these decisions was at least in part a consequence of judicial conclusions about the extent to which the background and home of the mother seeking custody reflected, or failed to reflect, middle-class resources and values.<sup>140</sup>

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137. The limitation of maternal rights through reliance on a child's best interests was not unique to cases involving Shakers or other religious communities. For instance, at the start of the century, Margaret Larey asked a Massachusetts court to order her daughter Catharine returned to her. See *Commonwealth v. Hamilton*, 6 Mass. (6 Tyng) 273, 273 (1810). At the time Catharine, less than fourteen years of age, was serving as an apprentice to William Hamilton under an indenture entered into in a foreign jurisdiction. The child, questioned by the court about her preferences, expressed a desire to remain with Hamilton and his family. The invalidity of the indenture notwithstanding, the court rejected the mother's petition, stressing that "the child appears to have been well treated, and to be attached to the family of the defendant." *Id.* at 275. The court then refused to recognize a maternal right to custody because the mother was remarried to a man who was not Catharine's father and had thereby "ceased to have any power of controlling her own actions, or of providing for the support and education of her child." *Id.* The court continued: "Whatever rights she might have had as guardian by nurture, they have certainly ceased at the age of this child; and the husband is under no legal obligations to be at any expense for that object." *Id.*

138. The significance of these courts' having rejected maternal custody in favor of custody by the Shaker communities to which the children in question had been indentured is framed by another case, decided in Ohio in 1848, in which a widowed father who had himself become a member of a Shaker community lost custody of two children to their maternal grandmother. The court in that case, *Ball v. Hand*, regarded neither the father nor the Shakers as adequate parental figures. See *State ex rel. Ball v. Hand*, 5 West. L.J. 361 (Ohio Super. 1848); see also Schneider, *supra* note 136, at 53-55 (analyzing Ohio court's view of father and of Shakers in *Ball*).

139. Other cases involving children indentured to Shaker communities during the nineteenth century are considered in Schneider, *supra* note 136, at 42-57.

140. See *infra* notes 154-69 and accompanying text (discussing class aspects of

The first case, *Commonwealth v. Hammond*,<sup>141</sup> was decided in Massachusetts in 1830. Margaret Holst, a young girl,<sup>142</sup> was given by her mother to Joseph Hammond, a member of the Shaker community at Harvard, pursuant to a verbal agreement which obliged Hammond to support and educate the girl until she turned twenty-one.<sup>143</sup> Later, a local probate court appointed Ephraim Tufts to act as the child's guardian. Tufts applied for a writ of habeas corpus asking that the child be removed from Hammond and from his community. Although both Margaret's mother and Tufts desired that the girl be removed from Hammond's control, the two apparently disagreed about the best custodial arrangement for the child. Margaret wanted to remain with Hammond.<sup>144</sup> The court, unwilling to intervene between the guardian and the mother, concluded that the girl, anxious to stay, and, all agreed, not ill-treated in Hammond's custody,<sup>145</sup> be permitted to determine her own custodial arrangements.<sup>146</sup>

Twenty-five years later, a Massachusetts court entertained the petition of Emily Curtis, a sixteen-year-old girl, who asked to be freed from her mother's custody and returned to the custody of Joseph Fairbank, a member of the community of Shakers at Enfield, Connecticut.<sup>147</sup> Emily, along with two younger siblings, had been placed with the Shakers by her widowed mother when Emily was eleven years old. The indenture agreement obliged the Shakers to educate the three children and instruct them in Shaker "usages, principles and rules of the society." In exchange, Emily and her siblings were committed to serve Fairbank and to obey him.<sup>148</sup>

In 1855, the Massachusetts court, pondering the arguments of Emily, her mother, and Fairbank, cited *Hammond* and focused even more expressly than had the court in that case on the interests of the child,

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New York case in which two lower courts would have returned child from Shaker community to mother).

141. 27 Mass. (10 Pick.) 274 (1830).

142. Margaret was 11½ when a writ of habeas corpus was issued to Hammond, seeking to have the girl removed from his custody. It is not clear how old Margaret was when her mother first placed her with Hammond.

143. See *Hammond*, 27 Mass. (10 Pick.) at 274.

144. See *id.*

145. See *id.*

146. It is unclear whether or not the court considered factors beyond the child's own choice in deciding whether or not she would be well served by remaining with Hammond. See Schneider, *supra* note 136, at 47.

147. See *Curtis v. Curtis*, 71 Mass. (5 Gray) 535 (1855).

148. *Id.* at 535.

defining those interests as the "principal thing to be considered."<sup>149</sup> The chief justice took Emily's welfare so seriously that he interrogated the girl about her interests and preferences<sup>150</sup> and then ordered that she be discharged from her mother's custody<sup>151</sup> and returned, according to her preference, to the custody of Fairbank. On the basis of Emily's opting to be sent back to Fairbank, and the court's assessment of Emily's maturity,<sup>152</sup> the court was willing to forego careful examination of the indenture agreement, asserting that, in light of Emily's preference, the indenture agreement—whether taken as "a contract or an estoppel"—provided grounds for concluding that the mother had relinquished her maternal rights to Fairfield.<sup>153</sup>

Finally, in *People ex rel. Barbour v. Gates*, the mother of a young girl asked the New York courts to declare invalid an indenture agreement, ostensibly binding her child, Maria Barbour,<sup>154</sup> to Benjamin Gates of the New Lebanon Shaker community.<sup>155</sup> Maria was six when indentured to a seamstress, and nine when her mother attempted to regain custody.<sup>156</sup> Judge Miller, writing for the lower court, agreed that the indenture was defective as to the child, but not as to the mother, who "voluntarily" transferred custody of her child to Gates.<sup>157</sup> Concluding that the child was "without a lawful protector," the court proceeded to find one for her by determining her "interest."<sup>158</sup> On this

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149. *Id.* at 537.

150. *See id.*

151. The girl, while travelling on a day-trip with several members of the Shaker community from Enfield to Springfield, Massachusetts, was seized by her mother and two brothers and taken by them to another county. *See id.* at 536.

152. The court described itself as "satisfied, by an examination, that this girl is capable of judging what will best promote her own welfare." *Id.* at 537.

153. *See Curtis*, 71 Mass. at 537.

154. *See People ex rel. Barbour v. Gates*, 57 Barb. 291 (N.Y. App. Div. 1869), *rev'd*, 43 N.Y. 40 (1870). The mother bound Maria as well as another minor child to Gates of the New Lebanon Shaker community. *See Barbour v. Gates*, 43 N.Y. 40, 40 (1880). The lower court opinion refers to the child as Maria; the opinion of the higher court on appeal refers to her as Marion.

155. The mother, Sara Barbour, argued that under state law a mother was permitted to sign an agreement indenturing her child only in cases in which the father was dead or had abandoned his family and that in such cases the indenture agreement required certification from an appropriate judicial figure. Sara asserted that the indenture binding her daughter Maria was invalid because the endorsement was made by a justice of the peace from the wrong town and that the endorsement was not made on the indenture itself. *See Gates*, 57 Barb. at 293-94.

156. *See Gates*, 57 Barb. at 292.

157. *See id.* at 295.

158. *Id.*



score, the court unequivocally sided with the mother, not because the Shakers had proved themselves inadequate caretakers, but because a mother, as such, is better endowed by the "laws of nature" than anyone else to care for her child.<sup>159</sup> The lower court declared:

It is too clear to admit of an argument, that a mother who is the guardian of infant children by nature and nurture as well as by law, where the father is dead, is better calculated than any other person to train and protect them, during infancy, both in sickness and in health, and prepare them for future usefulness.<sup>160</sup>

Judge Miller noted the child's long and apparently successful residence with her Shaker caretakers, but asserted that it would be balanced by the "solicitude and care" of the mother "who has evinced so much anxiety to assume the responsibilities which must be incurred in promoting the future welfare and happiness of her only child."<sup>161</sup>

Although Judge Miller's opinion was later reversed,<sup>162</sup> it is worth considering because it contrasts so sharply with the opinion of the state's highest court on appeal and with the opinions of the courts that decided *Hammond* and *Curtis*. Several explanations are possible.<sup>163</sup> First, competing notions of motherhood and maternal authority co-existed as social understandings of family, and family law itself, changed during the nineteenth century. Certainly, some courts were more willing to abandon, more quickly than others, the law's traditional, once almost sacrosanct, respect for paternal authority, and replace it with a new emphasis on loving mothers, treasured children, and the natural affec-

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159. See *id.* at 298 (citing *People v. Wilcox*, 22 Barb. 178, citing *People v. Mercein*, 3 Hill 399 (N.Y. 1842)).

160. *Id.* at 297.

161. *Gates*, 57 Barb. at 299. In fact, Sara Barbour had other children. Sara had indentured not only Maria, but a second daughter, Eliza, to the Shakers; the indenture agreement involving Eliza was not contested, apparently because the defects alleged to have invalidated the indenture agreement regarding Maria were not found in the agreement regarding Eliza. See *Barbour v. Gates*, 43 N.Y. 40, 41 (1870).

162. Justice Miller's opinion was affirmed at the general term of the court (in March, 1870), 57 Barb. at 299, and then later reversed, 43 N.Y. 40 (1870) (declaring the indenture agreement valid because approval of justice of peace was only required if father had abandoned family, not if father had died).

163. Other explanations exist. These include the possibility that the decision of the two lower New York courts in *Gates* or of the Massachusetts courts in *Hammond* or *Curtis* were idiosyncratic, either because of the particular judge who decided each case or for some other reason. It is also possible that the mother in *Gates* was, at least in Justice Miller's view, clearly superior (in character, in her relation to her child, in some other obvious way), while the mothers in *Hammond* and *Curtis* were not so viewed by the courts that decided those cases.

tions associated with the mother-child bond. (A few courts applied this emphasis even in cases involving poor families.) Judge Miller referred expressly to the importance for a child of "that affection, regard and love which none but a mother can feel and manifest towards her offspring."<sup>164</sup>

It is possible also that to two of the three courts that rendered opinions in *Gates*, the mother in that case appeared more middle-class, and was therefore more closely identified with contemporaneous visions of a good mother, than did the mothers in *Hammond* and *Curtis* appear to the courts that decided those cases. Sara Barbour, the mother in *Gates*, had herself been a member of the Shaker community<sup>165</sup> to which she indentured Maria and Maria's sister. Therefore, her decision to place her children in such a community was likely influenced by her own identification with, and knowledge of, the Shakers and their way of life as well as by her interest in keeping her children with her. No information is provided about Sara Barbour's financial situation<sup>166</sup> or about why she joined the Shakers, or about her willingness to relinquish custody of her children.<sup>167</sup> However, Sara's membership in the Shaker community suggests that she may have shared the Shaker's general sophistication, stress on usefulness and interest in social service—all middle-class traits.<sup>168</sup>

Most children indentured to Shaker communities during the middle decades of the nineteenth century came from poor homes; some were placed with the Shakers by state authorities as an alternative to almshouses and orphanages. To state officials, anxious about how best to provide for impoverished children, Shaker communities may have provided an option that had few of the disadvantages of almshouses and that, in addition, cost local towns nothing.<sup>169</sup> Perhaps, in sum, the moth-

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164. *Gates*, 57 Barb. at 298.

165. In fact, Sara Barbour attempted to regain custody of Maria only when she herself decided to leave the Shaker community to which her children had been indentured. See *Gates*, 43 N.Y. at 41.

166. On appeal, the court that returned Maria Barbour to the Shakers notes the absence of any information about the ability of Sara to care for her daughter. See *id.* at 48. However, even if Sara was financially insecure, she may have impressed the lower courts with middle-class values and manners.

167. In joining the Shakers, Sara was required to transfer custody of her children, either to the Shaker community or to some other party. See Schneider, *supra* note 136, at 34 (describing Shaker commitment to celibacy and communities' methods for recruiting children).

168. See Schneider, *supra* note 136, at 67-75.

169. See *id.* at 68.

er in *Gates*, was different enough from the mothers in *Hammond* and *Curtis* (at least in the eyes of two of the courts that heard the case) that, unlike them, she benefitted from the century's developing veneration of the mother-child bond and from the related romanticization of woman as mother.

c. From Woman to Mother

These cases, as a group, reflect the century's new understandings of woman as mother. Defined as inadequate by nature to act in the marketplace, women, or at least middle- and upper-class women, were increasingly enthroned—and empowered—at home where they were defined as incomparably superior to men at providing for the welfare of children. As a result, women, though denied the basic rights of those who participated in the world of work (the rights, for example, to enter into contracts, to sue, and to practice the professions), gained unprecedented authority at home and in regard to their children. However, poor women, unable to afford the life of homemaker, entered the marketplace, defined as less than fully human, and therefore enjoyed virtually no rights or protections in that arena; moreover, *because* poor women spent much of their everyday lives in the marketplace rather than in the home, they were judged wanting as mothers and therefore rarely benefitted socially or legally from the century's transformed images of maternity.

As a result, poor women were nowhere defined as fully human. A similar fate befell their children. In contrast, upper- and middle-class children, identified as treasures produced by their loving mothers' nurturance, became central to understandings of the domestic arena during the nineteenth century.

3. Indentured Children and the Elaboration of Childhood

Indeed, changes in the society's understanding of children were at least as important as contemporaneous transformations in understandings of motherhood and maternal authority in altering custody law, generally, and the law's response to indentured children, more specifically during the nineteenth century. By mid-century, attention to children and their interests was competing, though far from inevitably, with both paternal and maternal authority as the touchstone of the law's rule for settling cases involving children's familial, and working, relationships.<sup>170</sup>

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170. Legal precedent for attention to children's welfare in custody disputes could be found a century earlier in Lord Mansfield's 1763 decision in *Rex v. Delaval*, 3

Carl Degler, placing the transformation of the modern American family at the end of the eighteenth century, describes the differentiation of children from adults as the most notable of the changes that re-defined the family. According to Degler, society re-conceptualized childhood as essentially "innocent":

[C]hildhood itself was perceived as it is today, as a period of life not only worth recognizing and cherishing but extending. Moreover, simply because children were being seen for the first time as special, the family's reason for being, its justification as it were, was increasingly related to the proper rearing of children.<sup>171</sup>

The precious children of middle-class nineteenth century homes were no longer "object[s] of utility." They had become "object[s] of sentiment."<sup>172</sup>

As early as the first decades of the nineteenth century, the appearance of the best-interest standard in family law cases suggests that the law, reflecting the changed understanding of childhood that Degler describes, had begun to adjust its own role in adjudicating disputes about children. Not all children were similarly affected by these shifts, but the families of those who were—mostly middle-class families—were viewed by the law as important *because* they provided sanctuaries for the preservation of childhood and for the consequent socialization of emotionally and physically healthy children.<sup>173</sup> That effort came to be associated with the demand that children be separated, as a matter of preference and of fact, from the harsh demands of the working world.

Thus, like their mothers, children were associated with home and family, even becoming the *raison d'être* of that social world. However, unlike their mothers, children were not ideally supposed to spend their days at home. Rather, more and more, they were expected to attend school. During these years systematized public schools were established widely by the states,<sup>174</sup> and then compulsory school attendance laws

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Burr. 1435 (K.B. 1763).

171. CARL A. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 66 (1980).

172. ZELIZER, *supra* note 109, at 7.

173. Rich children were certainly affected by the century's new understanding of childhood and of the place of children within families. However, such children were less likely to have been put to work even in the previous century. Although the majority of colonial families apprenticed their children to master craftsmen, even at that time, very rich families sometimes allowed their children instead to become people of leisure. See RORABAUGH, *supra* note 54, at 3.

174. Not until the second half of the nineteenth century, were free public schools clearly integrated into the American experience. See R. FREEMAN BUTTS & LAW-

were promulgated.<sup>175</sup> The continuing extension of childhood during the nineteenth century was closely connected to the development and gradual universalization of institutional schooling.<sup>176</sup> Children were removed from the business of learning through work, and put to the business of learning in school.<sup>177</sup>

Ironically, however, in precisely these years—years during which childhood was redefined to preclude participation in the marketplace at least for middle-class children,<sup>178</sup> and years during which the marketplace was redefined as a domain of putatively equal, autonomous individuals, able at least in theory to negotiate the terms of their own participation—poor children became a prime source of cheap labor for the burgeoning industrial enterprise.<sup>179</sup> These children were not sheltered by

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RENCE A. CREMIN, *A HISTORY OF EDUCATION IN AMERICAN CULTURE* 242-59 (1953). However, some states such as Massachusetts, provided earlier for some public schooling in towns. A 1789 Massachusetts statute required towns with at least fifty families to provide at least six months of elementary schooling for the town's children. See *id.* at 246.

The task of providing education was not mentioned in the Constitution. Thus, that job fell to the states when common schooling was institutionalized in the nineteenth century. See LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876*, 164 (1980).

175. The first compulsory school attendance law was enacted in Massachusetts in 1852. See KATZ, *supra* note 10, at 131.

176. The cultural process of extending childhood began in the sixteenth and seventeenth centuries. See ARIES, *supra* note 4, at 33-49, 329; NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 13-19 (1982).

First childhood was extended beyond the age of infancy (about seven) and then later the notion of childhood was extended further to include adolescence. For a long time, the extension of childhood excluded girls who reached adulthood, and marriageable age, at about twelve from the Middle Ages until the end of the seventeenth century. See ARIES, *supra* note 4, at 331-32.

177. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1142-44.

178. The developing understanding of children and childhood did not prevent the exploitation of poor children in the nineteenth century marketplace. See *infra* notes 229-30 and accompanying text. For children from wealthy families, participation in the marketplace would have been unlikely in any event. See *supra* Part I.

179. Child labor was an essential aspect of the development of the textile industry in particular. Vivian Zelizer reports that the first employees in Samuel Slater's Rhode Island spinning mill in 1790 were nine children between seven and twelve years old, and that, within thirty years, fifty-five percent of the workers in the spinning mills of Rhode Island were children. See ZELIZER, *supra* note 109, at 59. The use of child labor in factories continued until the first decades of the twentieth century. In the last decades of the nineteenth century, child labor provided the prime source of income for poor, urban families. See *id.* (citing Michael R. Haines, *Poverty, Economic Stress,*

the romanticization of childhood that protected more fortunate children nor by the presumption of autonomous individuality that in theory at least protected white, adult men. And so, for these children, childhood ended early, and the society's new understandings of children and of work offered almost nothing.

Faced with the glaring contradiction between the sentimentalization of childhood and society's obvious exploitation of poor children in a variety of working environments, society responded variously and inconsistently. Some social observers deplored an economic system that depended on the exploitation of young children.<sup>180</sup> Others stressed the moral value of productive work from young children while keeping their own children at home and in school.<sup>181</sup> Still others blamed the poor themselves. Impoverished parents were denounced for allowing their children to help sustain their families. Jacob Riis concluded in 1873 that "it requires a character of more disinterestedness . . . than we usually find among the laboring class to be able to forego present profit for the future benefit of the little one."<sup>182</sup> Sometimes, the practices and decisions of poor parents were attributed to the "foreign values" of new immigrants.<sup>183</sup>

Consistent with the changing definitions of children and of work, the system of apprenticeship was increasingly reserved for children from poor homes. Some of these children were placed into servitude by their impoverished parents.<sup>184</sup> Others were indentured involuntarily by local overseers of the poor. No longer did middle-class parents believe that their children would be better educated, morally or professionally, if sent from home and placed under the roof and guidance of another family, comparable to, but different from, the one from which they came. In contrast, at home and at school, middle-class children, whose

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*and the Family in a Late Nineteenth-Century American City: Whites in Philadelphia, 1880*, in PHILADELPHIA 265 (Theodore Hershberg ed., 1981)).

180. See ZELIZER, *supra* note 109, at 70.

181. See *id.* at 58-59.

182. Jacob Riis, *The Little Laborers of New York City*, XLVII HARPER'S NEW MON. MAZ., at 327 (Aug. 1873), cited in ZELIZER, *supra* note 109, at 71, 240 n.52 (Zelizer's citation is to a 1973 edition of the magazine; that is almost certainly a typographical error.).

183. ZELIZER, *supra* note 109, at 71.

184. An excellent account of the life of a poor girl, indentured into servitude by her impoverished mother is found in a novel written for children. *Lyddie* describes the experiences of a young girl who left the position her mother arranged for her to begin work as a "mill-girl" in Lowell, Massachusetts. See generally KATHERINE PATTERSON, LYDDIE (1991).

existence had come increasingly to be understood as the essence of familial matters, were separated from almost any contact with the world of work.<sup>185</sup>

Thus, as the nineteenth century evolved, courts entertaining cases involving indentured children were variously informed by two fundamentally different understandings of the children involved. One approach, essentially familial, stressed the best interests of indentured children in disputes between parents as well as in disputes between parents (or town authorities) and masters. To proponents of this approach, the increasingly commercial quality of a young apprentice's life was problematic. A second approach, essentially commercial, refrained from applying the new rules of the developing family law system to indentured children. But this second approach, no more consistent with emerging notions of family and work than the first—though inconsistent in a different way—rested on the application to children of presumptions and laws understood as applicable only to putatively equal, autonomous adults, interacting in the marketplace. Each approach to indentured children differed from the approaches of the colonial and immediately post-revolutionary periods, when the law was able to analyze cases involving indentured children as contractual matters without thereby contradicting the essentially familial character of the apprentice-master relationship. In short, as the notions of childhood and of work became incompatible, courts deciding cases involving indentured children almost invariably faced a widening contradiction between the idea and the reality of working children.<sup>186</sup> They viewed this contradiction, however, from a variety of perspectives.

Nineteenth century courts, struggling to safeguard the interests of indentured children, employed a number of approaches. Some, assuming continuity with a previous century's reality, continued to define apprenticeships as familial. Others relied on legal technicalities to terminate apprentice-master relationships. Still others, ready to apply the rules of the marketplace to disputes involving apprenticeships, defined apprentices as workers. However, the marketplace excluded children by definition, though not in fact, from its realm by presuming the autonomous individuality of its participants.

Cases such as *Curtis v. Curtis*<sup>187</sup> and *People ex rel. Barbour v.*

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185. See ARIES, *supra* note 4, at 413.

186. The contradictions noted are evident in cases described in this section as well as in cases involving children indentured involuntarily. See *infra* Part III.C (analyzing these cases).

187. 71 Mass. (5 Gray) 535 (1855). See *supra* notes 147-53 and accompanying

*Gates*<sup>188</sup> show courts concerned with children's interests permitting children to *choose* their masters (one 'family') over parents (another 'family'). In each of those cases at least one court determined the custody of an indentured child by focusing on the child's interests more than on the terms of the indenture agreement. Indeed, even New York's highest court, which reversed the decisions of the lower courts in *Gates* and found the indenture agreement that bound young Maria valid, recognized two judicial options: to focus *either* on the contractual agreement that created the apprenticeship of the child involved, *or* on the welfare of the child. In fact, the lower court appears to have found the indenture agreement invalid *in order to* have been able to consider the interests of the child.<sup>189</sup> However, explaining his decision to reverse that holding and to return young Maria Barbour from her mother to her Shaker master, Justice Allen, writing for the appellate court, declared:

It is true, that notwithstanding the validity of the indentures, it would have been competent for the Supreme Court, if sufficient cause had been shown, to take the custody of the infant from the defendant and commit her to the care and nurture of her mother and natural guardian. This might have been done by reason of the unfitness of the master to retain and have the training and education of the child, or other causes, showing that the interest of the infant required such transfer of custody; and had the decision of the court below been put upon such ground, it would have been for this court to say, to what extent it would review it, and sit in judgment upon this exercise of discretion. It would have been the subject of review, but it is not probable that it would have been very closely scrutinized or reversed except for manifest error. But this decision is not made to rest either at General or Special Term upon this ground.<sup>190</sup>

Thus, the court proclaims that the case could have been decided either as a contractual, or as a domestic, matter. But once the court below premised its holding on the validity of the indenture agreement, its conclusions about the child's welfare were to be given no weight by the reviewing court.

Other courts, while asserting that their decisions rested on the formal validity or invalidity of indenture contracts, actually provided new sorts of choices and protections for indentured children. For instance, in an early nineteenth century case involving two boys, who were appren-

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text (analyzing *Curtis* decision).

188. 57 Barb. 291 (N.Y. App. Div 1869), *rev'd*, 43 N.Y. 40 (1870); *see supra* notes 154-69 and accompanying text (analyzing *Gates* decision).

189. *See Gates*, 57 Barb. at 296; *see also supra* notes 154-69 and accompanying text.

190. *Barbour v. Gates*, 43 N.Y. 40, 46-47 (1870).



ticed by their father at ages six and eight to learn, respectively, the carpenter's and joiner's trade and the trade of blacksmith, a New York court declared that the indenture agreements had to be interpreted under statutory rather than common law, and that, as a result, the indentures were invalid, since the children had not consented in writing to their execution.<sup>191</sup> The court concluded that the defect in the contract could be relied upon by the boys, who could have departed from their master's custody, if they had *chosen* to, but that the defect could not be relied upon by the boy's father. "It is for the infant alone to take advantage of the defect," proclaimed the court, "and if he does not choose to do it, he may waive the defect, and avail himself of the benefit of the apprenticeship."<sup>192</sup> At the time of the decision the boys, ages eight and eleven years old, were asked by court-appointed representatives about their preferences. Since the boys "expressed a decided and unequivocal desire to return to their masters, and a strong and unaccountable repugnance to go back to their father," the court had the boys sent back to their masters with official escorts, who were instructed to safeguard the boys and ensure their safe return.<sup>193</sup>

Other courts relied on formal legal rules to free children anxious to escape their apparent fate as apprentices. In 1826 a Vermont court granted John Whipple freedom from an apprenticeship into which he

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191. See *In re McDowle*, 8 Johns. 328 (N.Y. Sup. Ct. 1811). It is possible that the contradiction faced by the *Gates* and *McDowle* courts in returning the indentured children to their masters despite each court's recognition that the welfare of the children involved was, or could have been, a central concern was mitigated because each master was a member of a Shaker community. See Schneider, *supra* note 136, at 67-75 (describing Shaker communities as sophisticated and hard-working). On the other hand, however, courts sending children back to Shaker masters returned those children to contexts quite different from mainstream families in that Shakers, who practiced celibacy, did not marry or have biological children.

192. *McDowle*, 8 Johns. at 331.

193. See *id.* at 332. Similar concern for an indentured child's preference was expressed by the dissenting judge in a 1808 New Jersey case. See *State v. Taylor*, 3 N.J.L. 467 (1808). In a one-sentence opinion, the New Jersey Supreme Court validated an indenture agreement through which an immigrant father bound his son into servitude to pay for passage from Germany. Justice Pennington dissented, in a much lengthier opinion, on the ground that the boy did not participate in the execution of the indenture agreement. Justice Pennington concluded that "the true construction of the act is, that a father cannot bind his infant son a servant, nor even an apprentice [without the child's consent]."

Other courts agreed with Justice Pennington that a valid indenture depended on the consent of the apprentice. See generally *Harper v. Gilbert*, 59 Mass. (5 Cush.) 417 (1850); *Ivins v. Norcross*, 3 N.J.L. 977 (1812).

had been bound by his father six months earlier.<sup>194</sup> In March 1825 John's father and Bulkey Squire entered into an oral agreement whereby John would "truly and faithfully serve and labor for" Squire for four years, and Squire, in turn, would teach John the "art, trade and mystery of a tanner and currier."<sup>195</sup> After working for Squire for six months, John departed and refused to return. Squire argued that the contract into which he had entered with John's father bound the boy as a servant and not an apprentice, and that the father, because "entitled to the services" of his son had the authority to assign those services to Squire.<sup>196</sup> The court, split on the matter of whether the contract might have bound John as a servant rather than as an apprentice, decided for John and his father, because the contract into which the parties had entered was oral, rather than written. In so deciding, the court refused to avoid the Statute of Frauds by deciding that the contract was good for a year, though not for a longer period.<sup>197</sup> Thus, the contract was declared void, and John was liberated from his relationship with Squire.

*Blumenthal v. Shaw*, decided at the end of the century, illustrates a contrary sort of judicial response to an indenture case—one that gave no consideration to the minor's interests and welfare.<sup>198</sup> In *Blumenthal* a federal court applied to a minor laws that governed relations in the marketplace. In 1888, Mark Shaw's father, and Charles Mullin entered into an agreement indenturing Mark to serve as Mullin's apprentice for four years. Mark was to learn the trade of shaver in Mullin's leather factory. Before the apprenticeship ended, Mullin transferred his business to F. Blumenthal and Co. With the business, he transferred rights to Mark as an apprentice. In 1890, the new owner's foreman argued with Mark and as a result informed the boy that he was fired. Later, the foreman testified that he had not really fired Mark. He explained: "It is a way we had of disciplining apprentice boys. . . . We expected Shaw to come back."<sup>199</sup>

Mark, having interpreted his discharge as real, or perhaps having preferred to depart from his apprenticeship, sought work in other leather factories in the same city. However, he was prevented from finding

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194. See *Squire v. Whipple*, 1 Vt. 69 (1826).

195. *Id.* at 69.

196. *Id.* at 70.

197. Squire so argued. See *id.* Had the court agreed with him, John would presumably have been returned to his employ but only for the remainder of John's first year of service (about six months).

198. 77 F. 954 (3d Cir. 1897).

199. *Id.* at 955 (omission in original).

alternative work because, following an "unwritten law" that no leather manufacturer in the area would hire an apprentice "belonging to" another concern, a representative<sup>200</sup> of Blumenthal notified other companies about Mark's position as apprentice with Blumenthal.<sup>201</sup> Mark sued the company for damages that he had suffered as a result.

Mark was successful in court, but only because the court concluded that the original indenture agreement had not in fact created a valid apprenticeship. The court was unhesitating, however, in suggesting the proper result, had Mark been an apprentice to Blumenthal: "To reclaim a runaway apprentice, and to notify the trade not to harbor him, is the right, and perhaps the duty, of the master."<sup>202</sup>

This case, decided at the end of the century, when apprenticeships in which children benefitted through training and socialization had vanished, acknowledges and approves of the continued use of the apprenticeship form, but in a world with no place for traditional apprenticeships. The possibility of appropriating the apprenticeship form to serve new ends, though not actualized by the court in *Blumenthal*, posed serious risks for laboring minors, bound to their employers under indenture agreements.<sup>203</sup> Deprived of protections previously afforded apprentices by the character of the master-apprentice relationship which, though paternalistic, assumed masters' responsible for their apprentices' welfare, these new apprentices—because children—could claim no rights in the marketplace either. By the late nineteenth century, apprentices, defined as children in a universe that presumed autonomous individuality, could be exploited as laborers *and* prevented from enjoying even the illusion of the rights held by other workers.<sup>204</sup> Finally, by the middle of the century, cases such as *Blumenthal* made it increasingly apparent that the ancient system of apprenticeship survived in name alone.

The evolving view, reflected in the cases thus far discussed, that the idea of the best interests of children legitimately concerned American law is far less startling than a related view, far more radical, that began to appear at about the same time: the view that, in certain carefully

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200. Of importance in the case was whether the representative who sent out the notifications about Mark was acting in a proper agency relationship to the Blumenthal company. The Third Circuit concluded that he was. *See id.*

201. *See id.* at 954.

202. *Id.* at 955.

203. *See* *Flaccus v. Smith*, 48 A. 894 (Pa. 1901); *see also infra* notes 238-52 and accompanying text (discussing *Flaccus*).

204. *See* Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1546-56 (analyzing illusory quality of rights enjoyed by laborers at end of nineteenth century).

circumscribed situations, children themselves should determine their own best interests, and that the courts should be bound by their preferences. This view is reflected in a number of cases in the nineteenth century which, by legitimating the transfer of custody of indentured children in their own best interests, legitimated also the extraordinary option that those interests might best be determined by the children themselves. Typically in such cases, judges interpreted indenture agreements as having effected a transfer of custody *insofar as the parent* was concerned, but left the children free to choose actual custodial arrangements. For example, in *Commonwealth v. Hammond*,<sup>205</sup> involving the indenturing of young Margaret Holst to a member of the Harvard Shaker community, the court focused on a child's interests and respected her choice to deprive a parent of custody and parental authority despite the invalidity of the indenture agreement that purported to transfer custody of Margaret to Joseph Hammond. A similar decision was reached by a New York court in *In re McDowle*.<sup>206</sup> Despite the invalidity of the agreements under New York law<sup>207</sup> by which Matthew McDowle appeared to have indentured two children to two different masters, the court held that the indentures were binding with regard to the father, but not with regard to the boys. Thus, the sons were free to remain with their masters if they so chose. The court was apparently serious about acceding to the children's own choices. A note attached to the court's decision states that the chief justice appointed a special group of three lawyers to question the boys after the father suggested that the children's expressed preferences resulted from coercion by their master.<sup>208</sup>

In each of these cases, the parent lost custody despite the fact that valid apprenticeships had not been created. The loss of custody was not grounded on contractual promises binding these children to the masters. Under the law, no contracts existed. Rather, the transfer of custody followed because the parents were estopped from disassembling a transfer to which they had once consented, even though the document that affected the transfer was not a valid contract. The law respected the transfers of custody even though it did not recognize the apprenticeships

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205. 27 Mass. (10 Pick.) 274 (1830); *see supra* notes 141-46 and accompanying text (considering decision in *Hammond*).

206. 8 Johns. 328 (N.Y. Sup. Ct. 1811); *see supra* notes 191-93 and accompanying text (considering decision in *McDowle*).

207. The indenture agreements were deemed invalid because they failed to contain the consent of the boys, as required by state law. *See McDowle*, 8 Johns. at 330-31.

208. *See McDowle*, 8 Johns. at 331-32.

upon which the transfers had originally been premised.

In short, the courts in both *Hammond* and *McDowle* recognized transfers of custody from a parent to some third party despite the absence of a valid contract. The indenture agreements in each of these cases provided *evidence* of parental consent, but, because the contracts were invalid, they could not constitute that consent. However, the evidence of parental consent provided by the invalid contracts was considered adequate to ensure the end that each contract had attempted, but failed, to effect. Thus, as Jamil Zainaldin notes, "[i]n this twilight area of quasi-legal apprenticeship, the traditional and well-guarded perimeters of voluntary transfer were ruptured."<sup>209</sup> In consequence, "[f]oreign indentures, defective deeds, and even parol agreements might bind the parent."<sup>210</sup> Furthermore, in each case, the placement of the child depended on the courts' assessments of the children's choices and interests.

A startling transformation of the holdings in *Hammond* and *McDowle* is found in an 1875 New York case which, like the other two, validated an adoptive relationship between a master and a child that began pursuant to an indenture agreement. In *People v. Weissenbach*,<sup>211</sup> the court concluded that because an indenture agreement had been executed, the father could not rely on its imperfections to regain his child.<sup>212</sup> The surprising fact about *Weissenbach* was that the child's father, Alexander Wehle, unlike the fathers in both *Hammond* and *McDowle*, had not signed or participated in the execution of the indenture agreement that bound his six-year old daughter to Henry Weissenbach. Rather that agreement had been signed by representatives of the board of commissioners of charities and corrections of New York City. The court, asserting that the board members stood *in loco parentis*, defined their action as binding on the father. The indentures, the court declared, were "as valid [as to the father] as though [the father] had acted personally in their execution."<sup>213</sup> The court con-

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209. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Custody, Adoption and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1078 (1979).

210. *Id.*

211. 60 N.Y. 385 (1875).

212. The imperfection in the indenture agreement resulted from its failure to include a provision stating that Weissenbach was obliged to the people of the state to "undertake to kindly treat" the child being placed with him. *Id.* 392. That provision was required by chapter 411, Laws of 1869. *See id.*

213. *Id.*

cluded this remarkable *tour de force* by recognizing the then seven-year old child's right to choose her custodian, and by acknowledging, but in the same sentence dismissing as of no real relevance in *this* father's case, "the feelings of a parent who from good motives seeks the care, custody and society of his own offspring."<sup>214</sup> Thus Alexander Wehle's "feelings" for his child as well as his noninvolvement in the indenturing of his daughter notwithstanding, the court rejected his plea that the child be returned to him. Its decision, the court proclaimed, was "in consonance with the best interests of the minor."<sup>215</sup> For parents such as Wehle, the developing judicial concern with protecting the interests of particular children resulted in a diminution of rights the law freely accorded most parents.

The astonishing view expressed in *Hammond*, *McDowle*, and *Weissenbach*, that children themselves should sometimes be empowered to determine their own best interests reflects accurately the extent to which traditional verities regarding children had, as the nineteenth century unfolded, been undermined. Childhood, to begin with, indisputably, for the first time, *existed*, a clearly defined stage of life.<sup>216</sup> Human beings between seven and about twenty years of age were not simply small adults; they were children. Moreover, as they were inherently precious, the law was obliged to protect their interests, sometimes as they themselves defined them. Thus, behind the understanding of young people as children—an understanding that began to develop several centuries previous—appears an incipient understanding of children as autonomous individuals whose own choices should be articulated, and once articulated, respected.

To Puritan society, its verities grounded, to all appearances, in nature itself, the evolving view in the nineteenth century of the essence and legal prerogatives of childhood would beyond question have seemed, at best, senseless, and, at worst, unholy. And its response to intimately related developments—to the evolving views of paternal au-

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214. *Id.* at 393.

215. *Id.*

216. As described by Aries, the notion of childhood began to develop in the Western world three or four centuries earlier. See ARIES, *supra* note 4, at 33-49. It was not, however, until the late eighteenth or nineteenth century that childhood was sanctified and that concern with children and their welfare became the central motif—indeed the pretext for the elaboration of—family law. See MAXWELL H. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY: 1776-1876* 97-98 (1976) (describing family law principles under common law as "derived historically from the same set of feudal conditions that had dictated the subjection of married women to their husbands").

thority and the empowerment of women—would have been, similarly, disapproval and shock. Under the pressure of a profound upheaval which transformed the economy of the West, absurd, almost literally unthinkable speculations had become social facts. Families were no longer organic communities in small. Fathers were no longer the undisputed masters of their homes. Wives and mothers, nature's ministrants, were to be revered, and sometimes even, to some modest extent, empowered. A revolution had occurred, not only in the marketplace, but in the home. A new world had appeared.

#### B. The Poor

It had not, however, appeared for the poor. From time immemorial, economic disadvantage and disempowerment have subsisted together on the same meager fare. Not surprisingly therefore, from the colonial period through the end of the nineteenth century (and beyond), poor families and their children involved in apprenticeship and in the related institution of indenture were consistently excluded (as poor people continue to be excluded) from the benefits gradually legitimized by social acceptance, and in consequence incorporated into law, for their economic betters.<sup>217</sup> In fact, in the latter decades of the nineteenth century, as apprenticeship ceased gradually to involve middle-class children, it was invoked as rhetoric to worsen significantly the situation of the poor.

The exclusion of poor children from the benefits of apprenticeship and indenture was least problematic in colonial law and custom, and increasingly problematic in the nineteenth century, as, apprenticeship involving middle-class children in decline, indenture and apprenticeship increasingly took on the same meaning for poor children, a meaning not always far removed from slavery; and as, in consequence, economic and political self-interest was afforded a new and intriguing means of harming poor children.

In the colonial period, though the distinction between apprentice and indentured servant was real, they do not seem to have been treated in a strikingly disparate fashion. Unlike apprentices, indentured servants (both children and adults<sup>218</sup>) often arrived in the colonies with debts

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217. See JACOBUS TENBROEK, *FAMILY LAW AND THE POOR* 145-212 (Joel F. Handler ed., 1964) (describing the development of a separate family law system for poor in California).

218. See generally Alfred L. Brophy, *Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania*, 28 WILLIAMETTE L. REV. 69 (1991) (describing the system of adult servitude in colonial Pennsylvania).

During the colonial years and into the first part of the nineteenth century, the

for passage that were paid through periods of indentured servitude. These people, often called redemptioners, were sold into indentured servitude by the captains of the ships on which they arrived as payment for passage.<sup>219</sup> Other immigrants entered into agreements to work as indentured servants in the colonies before departing from Europe. But all adult-indentured servants lived with their masters as part of the master's household, just as did apprentices and child-indentured servants. And young indentured servants, in particular, were often subject to the stipulation typically included in apprentice contracts, that they be instructed in social and religious values. Indentured human beings were officially servants; apprentices were officially not. Both, however, served their masters within an organic community in small, and could often expect treatment not terribly different.<sup>220</sup>

By the middle of the nineteenth century, by contrast, as the meanings of apprenticeship and indenture merged, only children entered voluntarily<sup>221</sup> into positions of indentured servitude,<sup>222</sup> and almost all

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world of adult servants contained its own broad hierarchy. That hierarchy, reflecting the English system from which it stemmed, defined various servants to have greater or lesser amounts of prestige and to be owed greater or lesser amounts of material reward. Typically, those at the bottom of the hierarchy, including slaves and people placed in servitude as punishment for a crime, were entitled to nothing from their masters beyond basic care, including food, clothing, and shelter. Much like a young indentured servant or an apprentice, an adult indentured as a servant, though usually not entitled to wages during the colonial period, often received a suit of clothes and a set of tools after remaining in servitude for the period of time set in the indenture agreement. Hired servants, in contrast, always received wages, and even in homes in which other servants received monetary compensation, hired servants were paid more than others for their labor.

Those who became indentured servants to pay the debt owed for passage were known as redemptioners. These people were often sold into servitude by the captains of the ships on which they arrived as the "cost" of transportation. See ABBOTT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA 1607-1776*, 3, 20 (1965). Other immigrants entered into agreements to work as indentured servants in the colonies before departing from Europe. These adult indentured servants lived with their masters as part of the master's household just as young apprentices did. See LAWRENCE WILLIAM TOWNER, *A GOOD MASTER WELL SERVED: A SOCIAL HISTORY OF SERVITUDE IN MASSACHUSETTS 1620-1750*, 32 (Ph.D. dissertation, N.W.U. 1955).

219. See SMITH, *supra* note 218, at 3, 20.

220. Although indenture agreements involving poor children usually required masters to educate and train them, such children did not, in fact, benefit as often as did wealthier children from that stipulation. See Edith Abbott, *A Study of the Early History of Child Labor in America*, XIV AM. J. SOC. 15, 19 (1908).

221. Although these children usually signed the indenture agreements pursuant to which they served as apprentices, most did so because their parent or guardian wished



of these children came from impoverished or struggling families or had been orphaned and left without resources. Some of these children, apprenticed "voluntarily" by parents or guardians driven by poverty, often became little more than slaves.

Also by the middle of the nineteenth century, the poor laws' charitable underpinnings, associated at least in social proclamation, with traditional society,<sup>223</sup> had practically disappeared. One seventeenth century proclamation, for example, provided:

If any that have relief from any town, do not employ their children as they ought, towards the getting of a lively hold, or if there by any family that cannot or do not provide competently for their children, whereby they are exposed to want and extremity, it shall be the power of the selectmen of each town with advice of the next magistrate, to place out such children, into good families where they can be better brought up and provided for.<sup>224</sup>

In colonial society poor laws, continuing to reflect their English model, required towns to provide for impoverished children<sup>225</sup> through indenture arrangements. State law mandated that children indentured by town officials be provided with basic education in reading, writing and arithmetic and with training in a trade. One statute, passed in Massachusetts in 1793, required that "[p]rovision shall be made [in indentures] for instructing the male [but not female] children to read, write

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it. Moreover, by this time, most parents and guardians who bound their young charges as apprentices only did so because poverty prevented their providing for the children at home. Thus, the relationship was "voluntary" only in the sense that it was not literally compelled by state order.

222. Henceforth, unless otherwise specified, this Article will use the terms "apprentice" and "indentured servant" as substitutes for one another, reflecting actual practice during the nineteenth century.

223. Poor laws were enacted during the colonial period and preserved in many states throughout most of the nineteenth century. See EDWARD WARREN CAPEN, *THE HISTORICAL DEVELOPMENT OF THE POOR LAW OF CONNECTICUT* 55-57, 94-95 (1905, 1968); HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN* 9 (1902).

224. Col. Rec., Revision of 1673, 57, *cited and quoted in* CAPEN, *supra* note 223, at 55.

225. Originally, poor laws in British North America, following the English model, provided that towns should indenture poor adults, as well as their children, into servitude. By the middle decades of the nineteenth century, this system had been replaced with one that placed poor adults in almshouses. Children continued to be indentured into servitude, though institutional care for children began to be provided as well by the first half of the nineteenth century. See CAPEN, *supra* note 223, at 97-171 (describing treatment of poor in period between 1784 and 1838, using example of Connecticut).

and cipher,” and “for such other instruction, benefit, and allowance either within or at the end of the term, as to the overseers may seem fit and reasonable.”<sup>226</sup> Similarly, a 1793 Maryland statute explained that poor children should be subjected to involuntary servitude because

it has been found by experience that poor children, orphans, and illegitimate, for want of some efficient system have been left destitute of support and have become useless or depraved members of society; And . . . it would greatly conduce to the good of the public in general and of such children in particular that necessary instruction in trades and useful arts should be afforded them.<sup>227</sup>

In the nineteenth centuries, the good of such children in particular was no longer much regarded. They rarely received useful training. They were, instead, themselves used as a source of cheap labor to those seeking household help, farm hands, and factory workers. Towns responsible for poor families probably benefitted most of all, since they were able to “provide for” impoverished children as inexpensively as possible.<sup>228</sup> The system remained useful primarily because the children’s labor, rather than local or state funds, compensated those who supplied the children with lodging, clothing and food.

Increasingly during the nineteenth century, as “apprenticeship” became more and more often a synonym for “indenture,” some former slave-holders attempted to use indenture agreements as a substitute, and replacement, for slavery.<sup>229</sup> Moreover, as the notion of master as “parent” become increasingly incompatible with the notion of master as employer, the character of the master-apprentice relation was altered

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226. Cited in FOLKS, *supra* note 223, at 39.

227. Cited in FOLKS, *supra* note 223, at 40.

228. I. ABBOTT, *supra* note 25, at 192-93. Families were often anxious to take in such children because they provided cheap help to farmers and to households seeking servants. Abbott comments:

It was a cheap and easy way of providing what passed as care for these children, and as long as work at a very young age was considered necessary to prevent them from becoming paupers in later life, the system was approved and extended. . . . Taken by farmers and housewives, not to give them a home or to train them for future work, but because they needed help and could not afford to pay farm hands or servants, the children were used for the most routine tasks so they learned little of farming and housekeeping.

*Id.*

229. Often, apprenticeships for Black slaves provided a means to gain freedom. Some Blacks, apprenticed by Southern slave owners to local masters were allowed to retain wages earned and with this money were able to purchase their freedom. In the North apprenticeships for Blacks often led to emancipation at law. See MORRIS, *supra* note 24, at 289 n.132, 388-89.

almost beyond recognition, and the "apprentice," invariably poor, sank increasingly, in fact, if not in legal status, towards the condition of slavery.

Poor children worked as indentured servants much longer and far more often than other children or adults. Impoverished children entered the marketplace defined as only incompletely human—neither autonomous adults, able in theory to negotiate the terms of their own reality, nor precious children, properly cared for by decent parents in a universe presumed absolutely unconnected to that of the marketplace. Thus, within the marketplace poor children were doubly exploited—as workers and as children. Paid less than their adult counterparts, indentured children in the second half of the nineteenth century did not enjoy the new protections that society and law accorded to other children, nor did they enjoy even the illusion of respect—however thin—paid to (white, male) adult workers who were defined (though rarely treated) as complete human beings.

The deterioration, as the nineteenth century unfolded, of the condition of poor children is evident in a number of court cases in two categories: those involving indenture agreements which constituted particularly exploitative labor contracts that legitimized work done by children for industrialists under the guise of apprenticeships; and those involving suits initiated by town officials on the authority of local poor laws, laws that, as has been shown, had existed long and that traditionally had placed poor children in situations not completely distinct from the situations of wealthier children, but which, by the last half of the nineteenth century, no longer accorded poor children treatment that even arguably resembled that accorded middle and upper class children.<sup>230</sup>

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230. In addition to these uses, indentured servitude involving both children and adults during the nineteenth century was given legal support in the south. William Cohen describes this system of indentured servitude as "[f]ar less rigid than slavery" and to have been "a fluid, flexible affair which alternated between free and forced labor in time to the rhythm of the southern labor market." William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 33 (1976), quoted in STEINFELD, *supra* note 50, at 171.

Even earlier black children were apprenticed, especially after 1790. These arrangements often led to abuse of the children involved. Edward Raymond Turner, describing apprenticeships involving black children after 1790, writes:

It began to be a regular practice for unscrupulous men, under pretext of relieving poor negroes of the burden of their children and of providing comfortable places for them, to induce these negroes to bind out their children for a term of years, often paying them a sum of money to further the transaction. Such a master would then assign his indenture for a valuable consideration, and it frequently proved impossible to trace the apprentice thereafter.

### 1. A Cheap Source of Labor

One mid-century Pennsylvania case comments explicitly on the inapplicability of eighteenth century rules to apprenticeships created in the mid-nineteenth century. *Commonwealth ex rel. Gear v. Conrow*<sup>231</sup> involved a father who petitioned to have his son freed from the bricklayer to whom the boy had been indentured at the age of fifteen. Under the indenture instrument, the father had agreed that the boy would work for nine months each year and be free for three months.<sup>232</sup> Later, the father brought suit, arguing that the indenture was void, but not primarily because the boy (or his family) could not manage without pay during three months of the year and not because the boy was forced to work too hard during the months in which he did work. Rather, the father argued that three free months each year proved disruptive to the boy's morals.<sup>233</sup> Thus, the father in *Conrow* claimed that the master was failing in his responsibility to oversee the boy's socialization rather than in his financial responsibility to the boy. The master responded with a commercial argument. He had no interest in the boy's morals; he was, he declared, content to let the father assume control over the boy's moral upbringing; but he did demand what he considered his fair share under the contract—the boy's labor for the remaining period agreed to in the indenture agreement as payment for the instruction he had given the boy during the five year period since the start of the master-servant relationship.<sup>234</sup> Siding with the master, Judge Gibson concluded that the boy had accepted the terms of the apprenticeship without argument until the time arrived when he could no longer benefit from the master's instruction. The court therefore found the boy obliged to repay the master for the five-years of maintenance and training already received by completing the term of his apprenticeship as

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For a time this evil defied all efforts made to check it; but it was directly contrary to the law of apprentices, and the zealous work of the Pennsylvania Abolition Society finally brought it to an end about 1817.

TURNER, *supra* note 44, at 107 (citation omitted).

Use of indenture agreements to bind black children in the nineteenth century both in the north and in the south forms an important part of the history of the uses of apprenticeship and indentured servitude in the United States. This subject is, however, beyond the scope of the present Article.

231. 2 Pa. 402 (1845).

232. The indenture agreement in *Conrow* provided "that the master would give [the boy] \$2.50 per week, for at least nine months in every year during the term, and two quarters night-schooling." *Id.*

233. *Id.*

234. *See id.*

specified in the indenture agreement.

In reaching this conclusion, Judge Gibson noted the transformation of the system of apprenticeship and concluded that apprenticeship laws that had been promulgated seventy-five years earlier were inapplicable to contemporary cases. He explained that it was

doubtless supposed by the legislation, when the statute of 1770 was enacted, that an apprentice bound pursuant to it would be an inmate of his master's house. In the country he is still a part of the family; and the penalties for desertion seem to have been provided on that basis. But it is not said in terms that he shall be so; and it is our duty to interpret statutes so as to fit them, as far as we may, to the business and the habits of the time.<sup>235</sup>

With this declaration, Judge Gibson in effect dismissed as insignificant all concerns peripheral to commerce. According to "the business and the habits of the time" the relationship between master and apprentice had lost its domestic component, and had become a business relationship much like any other. Therefore the court, without addressing the boy's moral training or condition as the father had requested, concluded that, because the boy had been given the commercial benefit that his father had bargained for, he was required to return that benefit by his continuing in the master's employ until the rightful termination of his period of indenture.<sup>236</sup>

As *Conrow* suggests, and later cases such as *Blumenthal*<sup>237</sup> show more explicitly, the re-conceptualization of the master-servant relationship in commercial terms would almost inevitably enable the increasing exploitation of child workers. The laws of the nineteenth-century marketplace, which presumed autonomous individuals able to negotiate their own realities, provided no safeguards to minors who, like any other workers in the marketplace, would now be held to the terms of agreements establishing working relationships often quite different than any they or their parents had envisioned.

A Pennsylvania case, decided at the turn of the century, further demonstrates the complete transformation of the system of apprenticeship into a means through which factory owners were able to exploit minors as a source of cheap labor. The case involved a group of boys and young men serving as "apprentices" in a glass factory. In each case the apprenticeship had begun with the execution of an indenture agreement signed by the boy and by his father or mother. These agree-

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235. *Id.* at 403.

236. *See id.*

237. 77 F. 954 (1901).

ments required each boy to work in Charles Flaccus's glass factory for four years.<sup>238</sup> The indenture agreements contained a provision prohibiting each apprentice from joining or allowing himself to become subject to the "rules or regulations of any labor or other organizations which shall in any manner interfere with his honest and obedient behavior as an apprentice."<sup>239</sup>

The case was commenced by Flaccus, not against the apprentices, but against several representatives and officials of the American Flint Glass Workers' Union.<sup>240</sup> In particular, Flaccus alleged that P.J. Skelley, a representative of the American Flint Glass Workers' Union, had induced a number of Flaccus's apprentices to become members of the union, thereby causing the boys to breach their indenture agreements. Skelley and the other defendants claimed in defense that they had not known that the workers in question were apprentices, and that a few of the boys in question, having been more than twenty-one when approached by Skelley, were freed from their indenture agreements.

The boys in *Flaccus* were not young children, but older teenagers or young men in their early twenties. However, each was legally a minor when he began to work for Flaccus's company, and each was hired pursuant to an agreement, entitled an "Indenture of Apprenticeship."<sup>241</sup>

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238. One "Indenture of Apprenticeship" signed between Flaccus and one of his apprentices was included as an Appendix (Plaintiff's Bill) to Paper Book of Appellants, *Flaccus v. Smith*, 48 A. 894 (1901) [hereinafter Paper Book of Appellants]. In the illustrative indenture agreement, Charles H. Lange, sixteen years of age, and his mother arranged with Charles Flaccus that the boy would serve four years as an apprentice to Flaccus. The boy agreed to "serve in all lawful business, according to his power, wit and ability, honestly, orderly and obediently in all things demean himself towards his said Master, or his heirs, executors, administrators or assigns, during said term of four years (4)." Paper Book of Appellants, *supra*, at 30. Flaccus agreed he would "teach or instruct" Charles in "the art, mystery, occupation or labor of GLASS BLOWING." *Id.* The agreement further specified wages that would amount to six and one-half cents per gross for the first and second years, and nine cents per gross for the third and fourth years, payable at the expiration of the term of apprenticeship; and five dollars per week in the first year; eight dollars per week for the second year; ten dollars per week in the third and fourth years, payable as earned "in lieu of clothing, boarding, lodging, medical attendance and maintenance, and all other necessities." *Id.* at 30-31. Charles' mother, Della Lange further certified that Charles had received a basic education "in writing, reading and arithmetic," and agreed "to send said Apprentice, when practicable, to night school for at least three months in every year." *Id.* at 31.

239. *Flaccus*, 48 A. at 894.

240. The American Flint Glass Workers' Union was affiliated with the American Federation of Labor. See Paper Book of Appellants, *supra* note 238, at 26,

241. See Paper Book of Appellants, *supra* note 238, at 29-33.

That agreement preserved significant aspects of the form of a typical apprenticeship agreement from the previous century, but now in fact to benefit the master alone, and not the apprentices. The agreements contained some non-traditional provisions as well.<sup>242</sup> The agreement binding sixteen-year-old Charles Lang to Flaccus<sup>243</sup> provided that Lange or his parent was to be paid something on a weekly basis, depending in part on his production, but a significant part of the sums promised was payable only upon Lange's completion of the four-year apprenticeship. These payments were expressly characterized as protective of Flaccus's interests. The agreement provided:

[B]ut should the said Apprentice prove unfaithful, unmanageable, or refuse to be governed and controlled by his said Master, or refuse for any cause whatever, to perform all the conditions and covenants of this agreement, then the moneys, so reserved, shall not be paid to the said Apprentice, but shall, at the option of said FLACCUS, be forfeited to him, said FLACCUS, in the nature of, and as liquidating for the non-performance of these contracts.<sup>244</sup>

The agreement further described the termination payments to be "in lieu of clothing, boarding, lodging, medical attendance and maintenance, and all other necessities,"<sup>245</sup> benefits often provided young apprentices in previous decades. The traditional indenture provision, obliging the master to train and educate the apprentice was replaced by an agreement from the boy himself that during the term of the apprenticeship he would "improve himself in reading, writing and arithmetic," and an agreement from the boy's mother that "when practicable" she would send her son "to night school for at least three months in each year."<sup>246</sup> These provisions show a remarkable transfer of the responsibility to educate an apprentice from the master to the apprentice's parent. Perhaps the best indication that the relationship between the boys and Flaccus contrasted with traditional master-apprentice relationships was the very inclusion in the agreement of the prohibition on the boys' joining with a labor union. Ironically, that prohibition was justified in the agreement itself as precluding any interference with each boy's "honest and obedient behavior as an apprentice."<sup>247</sup>

Both Pennsylvania courts that rendered opinions in *Flaccus* reflected

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242. See *infra* notes 251-52 and accompanying text.

243. See Paper Book of Appellants, *supra* note 238, at 28-33; see also *supra* note 238.

244. Paper Book of Appellants, *supra* note 238, at 32.

245. *Id.* at 31.

246. *Id.* at 33.

247. *Flaccus*, 48 A. at 894.

the rhetoric of the nineteenth century marketplace as they condemned the labor union representatives for their completely illegitimate interference "between employer and employed."<sup>248</sup> But, alongside this view, and ultimately reenforcing its concern for the rights of the employer, was a second view, that portrayed the putative apprentices as *incapable* of exercising the rights of autonomous individuality. Thus the boys were treated as adults only insofar as that served the employer's interests.

The second view—that in the world of the marketplace, apprentices were less than fully human—was most transparently expressed in Flaccus's appeal, but is found in more subtle form in the decisions of each court. In this second view, the apprentices, because not yet mature, could not claim the safeguards of existing state laws that protected workers in joining, and invoking their rights as members of associations formed for their protection. Flaccus asserted:

It is perfectly evident that the Acts of 1869 and 1872 were not intended to apply to apprentices. It cannot be supposed that by either these or any other labor union acts it was intended by the State to strike down its entire system of apprenticeship without having, so expressly indicated in terms incapable of being misunderstood. Apprentices have never been regarded as falling within the designation, 'mechanic,' 'journeyman,' 'tradesman,' 'workman' or 'laborer.' *Statutes relating to apprenticeship rest largely upon the idea that a minor is incapable of having a will of his own before reaching maturity, and having no will in the matter is to be cared for and protected* in such way as in the judgment of the State will best subserve the interests both of himself and the public.<sup>249</sup>

With no apparent sense of irony, the trial court described the character of the care and protection that apprenticeship agreements such as those used by Flaccus provided for the minors involved. "If it were not for these independent factories [such as that of Flaccus]," wrote the court, "many a worthy young man would be prevented from learning the trade, for in Union factories the master cannot take an apprentice without the consent of the Union." The court accordingly described the union representatives as having interfered with each apprentice's "right to choose his trade and bind himself as an apprentice."<sup>250</sup> The court's ap-

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248. *Id.* at 895; see also opinion of the court below, reproduced by appellants in Paper Book of Appellants, *supra* note 238, at 10-14.

249. Paper Book of Appellee, Flaccus v. Smith, 48 A. 894 (1901), at 7 (citation omitted) (emphasis added).

250. Opinion of the Court of Common Pleas, *reprinted in* Paper Book of Appellants, *supra* note 238, at 10.



parent naivete notwithstanding, the profound irony of these claims is evident in the same court's characterization of Flaccus's interest in the case. "This action," declared the court, "is not to recover damages for past injuries." The court continued: "[I]t is to 'protect' the 'possession' and enjoyment of his 'property' from threatened injury. The plaintiff's interest in the indentures of his apprentices are his 'property' as much so as the buildings and machinery of his glass works."<sup>251</sup> On appeal, the higher court agreed, though its language is somewhat more elusive. For that court, it was unnecessary to decide whether or not the statutes that allowed workers to join together in protection of their own interests applied to apprentices, because the case did not involve any apprentices as actual parties. Rather, it involved a dispute between Flaccus, an employer, and various union representatives. If, however, Skelley and the other union representatives in question had done no more than show the apprentices their rights under the law, it became harder to describe their actions as unlawful for having interfered with Flaccus's business "to his prejudice or injury."<sup>252</sup>

The references, in both decisions above, to a traditional view of apprentices as minors whose interests must be served by their masters acting *in loco parentis* in transactions otherwise essentially commercial does not obscure that, if perhaps not in conscious intent, nonetheless beyond question in effect, both courts worsened the lot of poor children, by legitimating in the marketplace the oppression of powerless "apprentices" by their "masters." The industrialists had money, and therefore power. The "apprentices" had neither. Therefore, at the dawn of the industrial millennium, the industrialists proposed, and (society concurring) the law disposed.

## 2. Institutional and Foster Care

The guardians of the civic purse proposed as well. And once again the law disposed. Poor laws had traditionally imposed upon municipalities the burden of providing, at least in part, for the needs of the least fortunate members of society. And such laws had traditionally been touched, at least in formulation, with compassion. As, however, *laissez faire* began, during the nineteenth century, increasingly to encompass

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251. *Id.* at 13. Any mitigation of the court's language by the use of quotation marks around the words "possession" and "property," is more than off-set by the obvious meaning of the language used, including the court's express comparison of Flaccus's interest in the apprentices with his interest in the factory's building and machinery.

252. *Flaccus*, 48 A. at 895.

acts of charity as well as economics, politicians in search of legal means to disburden their constituents of poor children found such means in the vestiges of apprenticeship, whose decay created an intriguing legal option. That the decay was real was perfectly obvious. In 1902, Homer Folks, welfare worker and author of *The Care of Destitute, Neglected, and Delinquent Children*, described the changes that had transformed the system of apprenticeship in the nineteenth century:

It is probable . . . that in the earlier part of the century the system was not without merit, and that as the apprentice system as a whole passed away with the profound changes that occurred in industrial conditions, the indenturing of children underwent a change for the worse. The value of the instruction received from the 'masters' became less, and the value of the services rendered by the children increased. In its worst forms, and especially in some localities, certain features of the indenture system, particularly the recapture of apprentices who ran away, painfully remind one of human slavery.<sup>253</sup>

Folks' conflation (perhaps unwitting) of "apprentice" and "indenture" indicates that by the end of the nineteenth century the terms had become, even to a social worker, indistinguishable. And therein lay the legal option. Indentures—virtually all of which could now safely be called apprenticeships—were of two kinds: voluntary, and involuntary. The second kind were subject to settlement and removal provisions.<sup>254</sup> Since all "apprentices" were now poor children, it was politically feasible to refer to virtually all of them as involuntarily indentured. Thus it became more and more tempting, in dealing with them, to invoke the settlement and removal provisions, which allowed towns to petition that newcomers be "removed" to their former residences if town officials believed they were likely to become public charges.<sup>255</sup>

Such petitions were filed well into the nineteenth century.<sup>256</sup> The cases they produced were not new but could no longer be assimilated

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253. FOLKS, *supra* note 223, at 41-42.

254. Settlement and removal provisions were added to English poor laws in 1662. See BLOOMFIELD, *supra* note 216, at 100.

255. Settlement and removal provisions followed from the late-sixteenth century decision to make towns responsible for poor residents. In medieval Europe, care for the poor came from private almsgiving, especially from groups such as monasteries and guilds. See *id.*

256. See, e.g., *Franklin v. Bridgewater*, 20 N.J.L. 563 (1846); *North Brunswick v. Franklin*, 16 N.J.L. 535 (1838); *Orange v. Springfield*, 14 N.J.L. 321 (1834); *Kingwood v. Bethlehem*, 13 N.J.L. 221 (1832); *Hopewell v. Amwell*, 6 N.J.L. 169 (1822); *Franklin v. South Brunswick*, 3 N.J.L. 442 (1808); *Owasco v. Oswegatchie*, 5 Cow. 527 (N.Y. 1826); *Guilderland v. Knox*, 5 Cow. 363 (N.Y. 1826); *Niskayuna v. Albany*, 2 Cow. 537 (N.Y. 1824).

as one part of a far wider system of apprenticeship that involved all children, not just the children of poor people. In growing contrast to most nineteenth-century courts that decided cases about the care and custody of children, courts resolving "removal" disputes rarely expressed concern for the welfare of the children whose fate was at stake.

So, for instance, in 1827, a New York court was asked to resolve a dispute between the overseers of the poor of the town of Hamilton against the overseers of the poor of the town of Eaton regarding responsibility for a girl who had been bound as an apprentice in Hamilton and had served the full term of that apprenticeship.<sup>257</sup> The court concluded that the girl was the proper responsibility of Hamilton, despite the invalidity of the indenture agreement, because the agreement, being void but not voidable, had been invalidated by neither the apprentice nor the master. Thus, the town of Hamilton was in no position to declare the apprenticeship void and thereby transfer responsibility for the girl's support to a neighboring town.

A New Jersey court entertained a similar dispute between the overseers of North Brunswick and those of Franklin in 1838 regarding responsibility for the care of three poor children.<sup>258</sup> A lower court had found the children the responsibility of the town of North Brunswick, because their father had served an apprenticeship there, and therefore had the right to claim residence in the town for himself and his children. Finding that the father had not in fact served as an apprentice, the court denied the town of Franklin the right to have the father and children "removed" to North Brunswick.<sup>259</sup> Other cases involved other excuses by which towns attempted to free themselves from the need to provide for poor children. Almost always courts that heard these cases concentrated on legal technicalities that identified particular children as the responsibility of one town rather than of another. Almost never did the courts focus on the children and their needs.

It is pleasant, but misleading, to conclude with a boy named Westlake Manuel. In *Manuel v. Beck*,<sup>260</sup> a case decided at the start of this century, when apprenticeships arranged by parents were obsolete,<sup>261</sup> but state laws still gave poor-law officials as well as public,

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257. See *Hamilton v. Eaton*, 6 Cow. 658, 658-59 (1827).

258. See *North Brunswick v. Franklin*, 16 N.J.L. 535, 537 (1838).

259. See *id.* at 536-37, 538.

260. 127 N.Y.S. 266, 70 Misc. Rep. 357 (Orleans Cnty. Ct. 1910).

261. In 1911, the year after a New York court decided *Manuel v. Beck*, the United States Supreme Court declared indentured servitude unconstitutional. See *Bailey v. Alabama* 219 U.S. 219, 244-45 (1911).

and sometimes even private, institutions for dependent children the right to apprentice children.<sup>262</sup> Westlake Manuel sued William Beck, in whose home Westlake had resided for four years. Westlake did not sue Beck for failure to train him adequately, but for wages that Beck had failed to pay him. The holding in *Manuel* depended on the court's categorization of the relationship between Westlake and the Beck family. Westlake, orphaned at a young age, was placed in a state charitable institution (the Home for the Friendless). Within a year, an employee of the Home took Westlake to a family in a neighboring county. The family apparently entered into a verbal agreement to keep the boy "as one of the family."<sup>263</sup> Of the details of the relationship that developed between the boy and the Beck family, it is only reported that Westlake "addressed the defendant and his wife as his parents." However, Westlake left the Beck home after four years and instituted suit to gain payment for uncompensated labor. The court considered the possibilities that the boy might have been adopted by, or indentured to, the Becks, but rejected both, because there was no evidence that the parties had met the statutory requirements for effecting either an adoption or an apprenticeship. The court met the Becks' claim that, as a family member, Westlake was owed no payment for his labor by noting that "[t]here was no relationship or kinship existing between the parties by which any such presumption would arise; no contract or agreement was made by any one having any right to represent the infant or by the infant himself."<sup>264</sup> Thus the court affirmed the jury's decision to award Westlake \$301.32, the estimated value of Westlake's uncompensated work for the Beck family.

It is gratifying to note that Manuel Westlake was able to claim his personhood, and some part at least of the value of his labor, in a suit that defined him as an unpaid worker. It is, however, necessary to note also that his case was an exceedingly rare one. A poor and therefore powerless young man, he was able to prevail against forces typically invincible against his like. Almost all similarly situated young men, and young women, confronted with the enfranchised might of position and wealth, embodied in their minion, the law, typically conceded, or risked being crushed. For the enfranchised, as the conception of the family in the West, and in particular the conception of childhood, was transformed, something like a millennium seemed to have appeared. For the poor, as usual, and for their children, an old darkness remained.

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262. See I ABBOTT, *supra* note 25, at 192.

263. *Manuel*, 127 N.Y.S. at 267.

264. *Id.* at 269.

## IV. CONCLUSION

Through the careful study of history, human beings can hope to understand their own commitments—what they are, where they came from, what they may lead to—and how to advocate them effectively and honestly.

The commitment to family, however defined, and to one of its most important corollaries, the best interest of children, is impressive as ideology only insofar as “family” and “children” are understood in historical context. Nor, in the absence of such context, can they be advocated with impressive intellectual force. The precondition of discourse about family and children is the clear understanding that both terms are social constructs, created in time, and subject to time. And this understanding, only the study of history can provide.

In the West, before the Industrial Revolution, neither “childhood” nor “family,” as the terms are now understood, existed. To the colonial American, “child” in its present meaning, would have meant little. And “family,” in its present meaning, would have meant little. Families existed; but as organic units which mirrored in small society as an organism defined by values grounded in the nature of things, and therefore, in theory at least, universally accepted as axiomatic.

For complex economic and political reasons, with the advent of the Industrial Revolution a striking shift in the conception of family, and therefore of childhood, occurred. As industrialization rapidly produced a domain of commerce, its cultural antithesis was also produced: the domain of family, a domain of love, of permanent, non-negotiable commitment, utterly different from the domain defined by contract, profit, and autonomous self-interest. The family—or rather the upper- and middle-class family—was romanticized as a “site of altruism”<sup>265</sup> in a world increasingly defined through negotiable interactions aimed at financial reward. Though uniquely associated with this altruism, women also gained startling new powers within the home and in relation to their children, and children were redefined as treasures deserving of protection, and endowed with rights. For the first time in the history of the West, the family was conceived of as a sacred buffer against the self-interest of industrial commerce, and the best interest of children as a social imperative.

As society elaborated this new conception of family, confusions abounded, not only among family members actualizing their particular everyday lives amidst unprecedented options for defining familial roles,

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265. COONTZ, *supra* note 2, at 55.

but in the larger society, and in its courts of law. By the early decades of the nineteenth century, legislators and judges began—at least sometimes and in some degree—to define and to approve revolutionary new types of family. In these families, the certainty of paternal authority was balanced against the romanticization (and eventually the empowerment) of women in their guise as mothers, and the romanticization (and eventually the empowerment) of those mothers' newly treasured children.

The momentous shifts that reconstituted the family during the nineteenth century—and the confusions those shifts inevitably engendered—are reflected in the evolution, from the colonial period to the end of the nineteenth century in the ancient system of apprenticeship. Thus, some nineteenth century courts, asked to resolve disputes among participants to apprenticeship arrangements, reaffirmed the father's venerable—once apparently inexorable—status as *pater* as the continuing guarantor of paternal authority (e.g., *Day v. Everett*).<sup>266</sup> Other courts, though assuring themselves and their litigants about the enduring certainty of paternal authority, reached conclusions that depended on the obliteration of that certainty (e.g., *United States v. Bainbridge*).<sup>267</sup> Similarly, at the century's start, courts reiterated Blackstone's oft-cited conclusion that mothers, though owed "reverence and respect," were essentially custodians without authority (e.g., *Commonwealth v. Murray*).<sup>268</sup> Within half a century, competing understandings of maternal authority allowed other courts to conclude that mothers, like fathers, gained parental authority by fulfilling parental duties (e.g., *Osborn v. Allen*).<sup>269</sup> Finally, and most incompatible with ancient patterns, courts entertaining custody disputes about apprenticed children interrogated them and gave determinative weight to their choices regardless of the validity or lack thereof of indenture agreements (e.g., *Curtis v. Curtis*),<sup>270</sup> and, further, used the pretext of master-apprentice relationships, in cases in which, in the court's view, no apprenticeship had actually been established, to transfer custody from parents to third parties (e.g., *People v. Weissenbach*).<sup>271</sup>

At the same time, society elaborated, and the law reflected, an alternative myth of family that defined impoverished families. Eventually,

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266. 7 Mass. (7 Tyng) 145 (1810).

267. 24 F. Cas. 946 (Cir. Ct. D. Mass 1816) (No. 14,497).

268. 4 Binn. 487 (Pa. 1812).

269. 2 Dutch. 388 (N.J. 1857).

270. 71 Mass. (5 Gray) 535 (1855).

271. 60 N.Y. 385 (1875).

the longstanding tendency to differentiate poor families from other families became a legal obsession. So, for instance, as middle class parents, reversing a long tradition, found it increasingly unthinkable to send their children from home, poor children continued to be indentured as apprentices—though now without any of the protections once accorded to apprentices—becoming, in fact, the least expensive, and least protected, workers in the burgeoning nineteenth century marketplace (*e.g.*, *Flaccus v. Smith*).<sup>272</sup>

These nineteenth century decisions about apprenticed children, and the developing myth of family they both reflected and helped create, additionally reflect, with significant poignancy, a much more modern debate about the meaning and scope of family. Clearly, the intellectual roots of the modern debate—a debate at least as intense as its predecessors but more fitful and more self-conscious—lie in the emerging myth of family that marginalized apprenticeship as a form of care for impoverished children in the nineteenth century, and soon abrogated that institution entirely. More surprising and less obvious, however, are the concrete parallels between the nineteenth century debate about family and that which rages now, as well as the specific models of family that that earlier century offers to our own. Remarkably, for both traditionalists and post-modernists in the contemporary debate about family, the nineteenth century's reconceptualization of family, as evident in cases involving apprenticeship, provides useful standards and compelling support.

Thus, the nineteenth century family can serve contemporary traditionalists in its interest in securing paternal (though not patriarchal) control, in its romanticization of woman as innate nurturer and as dutiful wife (the second being, even by the nineteenth century, as often a matter of choice as of inherent design), and in its reconstitution of childhood as the *raison d'être* of the family. But equally, the nineteenth century family can serve post-modernists. Perhaps for the first time in history, nineteenth century society was alert to family as a social construct. Still, however, until the latter part of the twentieth century, self-consciousness about choice in family matters was limited by conceptions of the mother-child bond as natural and thus inevitable, and by a related understanding of love (viewed as symbol and prototype of familial relationships) as inexorable. However, the nineteenth century, unlike any before in Western history, abandoned custom and overturned precedent with remarkable abandon. Thus, a model for genuinely revo-

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272. 48 A. 894 (Pa. 1901).

lutionary change is apparent in the history of the family during the nineteenth century. That century, often credited with having created the staid Victorian family that post-modernists scorn, can as well be recognized as the century that effectively challenged virtually every assumption that undergirded the order of familial relationships in an earlier age.

Thus, as politicians and legislators, poets and judges, ethicists and presidents now argue about the moral and practical consequences of gestational surrogacy, no-fault divorce, posthumous insemination and children asking to divorce their parents, it is worth returning to an older debate, one far more similar in substance and design to that which engrosses contemporary society than the details might suggest. The outline of that earlier debate emerges clearly in the peculiar circumstances that surrounded the transformation, and eventual obsolescence, of the institution of apprenticeship during the nineteenth century.



