

1997

The Fate of Childhood: Legal Models of Childhood and of the Parent-Child Relationship

Janet L. Dolgin

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Janet L. Dolgin, *The Fate of Childhood: Legal Models of Childhood and of the Parent-Child Relationship*, 61 Alb. L. Rev. 345 (1997)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/193

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

ARTICLE

THE FATE OF CHILDHOOD: LEGAL MODELS OF CHILDREN AND THE PARENT-CHILD RELATIONSHIP

*Janet L. Dolgin**

INTRODUCTION.....	347
I. THE TRANSFORMATION OF FAMILY AND THE LAW'S RESPONSE..	351
A. <i>As Among Adults</i>	352
B. <i>As Concerns Children</i>	360
II. LEGAL MODELS: CHILDREN, CHILDHOOD, AND THE PARENT-CHILD RELATIONSHIP	371
A. <i>The Traditional Model and the Transforming Traditional Model</i>	378
1. The Traditional Model: <i>Meyer v. Nebraska</i> and <i>Pierce v. Society of Sisters</i>	378
2. The Transforming Traditional Model: <i>Parham v. J.R.</i> , <i>Wisconsin v. Yoder</i> , and <i>Bellotti v. Baird (Bellotti II)</i>	382
a. <i>The Place of Children in a Dispute Between Parents and the State</i>	383
b. <i>Disputes Between Parents and Children</i>	388
B. <i>The Individualist Model</i>	400
III. RESPONSES TO THE TRANSFORMATION OF FAMILY: THE CONTRACTION OF CHILDHOOD AND THE DISPLACEMENT OF PARENTAL CONTROL	409
A. <i>Parents, Girls, and the Right to Abortion</i>	410

* Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra University School of Law. B.A., Barnard College; J.D., Yale Law School; Ph.D., Princeton University. I am grateful to Steven H. Shiffrin for his insights on several of the cases analyzed in this Article and to John DeWitt Gregory for comments on an earlier draft of the Article. I also thank Daniel May, Esq., Assistant Director of the Hofstra Law Library, for his bibliographic advice and assistance. Finally, I am appreciative to Mark Milone, a student at the Hofstra Law School, for his assistance with research.

<i>B. Responses to the Individualization of Family: Redefining Childhood?</i>	418
1. Preserving the Traditional Family or Redefining Childhood	420
2. Responses of the Transforming Traditional Model...	423
<i>a. Preserving Childhood Without Families</i>	423
<i>b. Preserving Childhood for Some Children: The Expansion of Adolescence</i>	426
CONCLUSION	429

INTRODUCTION

In contemporary American culture the traditional nuclear family, forged in the late eighteenth and early nineteenth centuries, has been eroding, but a deep nostalgia for the enduring, solidary bonds that seem once to have connected spouses to each other, and children to their parents, persists. In the service of that nostalgia, society clings with particular force to images of loving, vulnerable children, ideally separated from the harsh reality of adult life by virtue of the innocence of childhood. However, as the familial context within which society is thought once to have actualized those images disappears, and society and the law face the plight of actual children, the traditional images seem less and less compelling. Alternative images are proposed, but are approved with ambivalence¹ because they contrast with familiar assumptions and social expectations about children and childhood. Traditional images are sometimes manipulated, in the hope that, so reconstructed, familiar understandings of children and childhood can be preserved, and children's best interests can be safeguarded. As often as not the result is confusion and contradiction.

The law, reflecting the larger society, long presumed the autonomy of the family unit, but not of its interconnected members, and certainly not of women and children within families. By the 1960s, however, the law, responding to astonishing shifts in the scope and meaning of family, began to recognize adult family members as autonomous individuals vis-à-vis one another, and to grant them wide freedom to design their own relationships, from beginning to end.² Within a decade, the legal structures that had sustained and directed the vision of family constructed during the preceding century and a half were being dismantled. Regrets were expressed but were widely balanced by appreciation for startling new freedoms. With regard to children, especially children within families, the law, again reflecting the society, has moved more slowly and with more confusion in remodeling established understandings. As a result, a

¹ "Ambivalence," as Martha Minow notes, represents not rejection but the pull of contraries. It is, she writes, "that wonderful word for our simultaneous commitments and attractions to inconsistent things." Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 277 (1995).

² See ARLENE S. SKOLNICK & JEROME H. SKOLNICK, *Introduction to FAMILY IN TRANSITION* 1, 1-4 (Arlene S. Skolnick & Jerome H. Skolnick eds., 5th ed. 1986) (describing some changes in views and meaning of family during the 1960s, 1970s, and 1980s).

core contradiction defines much of contemporary family law. Children—and, even more, childhood—continue to be understood in traditional terms, but the legal and familial structures within which those terms once made sense have largely disappeared.

Traditional understandings of childhood, constructed during the Enlightenment, and firmly institutionalized in the early years of the Industrial Revolution, identified childhood as a stage of innocent purity and largely untrammelled enjoyment completely at odds with the dictates of the marketplace.³ Children, because vulnerable both to the demands of the world outside the domestic order and to their own immaturity, were to be treasured and protected within loving, nurturing family settings.⁴ Carl Degler, who described the differentiation of children from adults as the most significant shift in the development of the nineteenth-century family, explained:

[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.⁵

That view of children was clearly reflected in the law by the early decades of the nineteenth century in the form of the "best-interest" standard, which became, and has remained, the dominant rule for adjudicating family law cases involving questions of custody and visitation.⁶

Thus, for almost two centuries society and the law depended on a uniform rhetoric about the sacred prerogatives of childhood, and about the centrality of children to understandings of family.⁷ Traditionalists and modernists alike have joined, and in large part continue to join, in that rhetoric, which considers safeguarding children

³ See NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 56-64 (1994) (describing how the "intellectual climate" during the Enlightenment "helped to nourish and spread the idea of childhood").

⁴ See *id.* at 67 (noting that children were "assigned a preferred status and offered protection from the vagaries of adult life").

⁵ CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 66 (1980).

⁶ For example, almost every custody decision cites this rule. See, e.g., *Park v. Park*, 610 P.2d 826, 827 (Okla. Ct. App. 1980) (applying a "best interest" standard to a custody decision).

⁷ See POSTMAN, *supra* note 3, at 67 (noting that this was the "period during which the stereotype of the modern family was cast" and "in which parents developed . . . a full measure of empathy, tenderness, and responsibility toward their children").

and preserving the innocence of childhood to be feasible and morally privileged tasks.⁸

However, besides these broad agreements about the moral value of childhood, and beneath the rather consistent rhetoric that considers childhood distinct from adulthood, an increasingly insistent and conflicting reality has been emerging. The law is more ready than it was fifty years ago to define children in various contexts and for various purposes, as autonomous individuals.⁹ Moreover, and potentially more important, courts, asked to determine the boundaries or details of children's domestic lives, and dealing with actual children and their parents, are more and more frequently unable to rely on traditional assumptions about the character of domestic life, and about the scope and value of parental authority.¹⁰

These changes reflect, and in turn, encourage a series of clearly developing, though still incipient, shifts in the character of childhood in contemporary society. Although society clings to traditional images of childhood, the everyday lives of actual children are changing. As children dress and entertain themselves, as they play and compete, the differences between their lives and the lives of their adult counterparts become increasingly indistinguishable. Thus, as Neil Postman argued, an understanding of childhood constructed during the fifteenth century, and elaborated during the past two centuries, an understanding that alone seemed for a long time to have survived the ideological¹¹ and demographic transfor-

⁸ See *id.* (noting that "childhood had come to be regarded as every person's birthright, an ideal that transcended social and economic class").

⁹ See *infra* notes 268-354 (describing *Parham* and *Bellotti II* and their definitions of childhood and the understanding of children's autonomy).

¹⁰ See *infra* notes 268-354 (describing cases which challenge the scope of parental authority).

¹¹ By "ideology" I do not mean a system of political beliefs, but rather, the pervasive forms through which people understand what it means to be human. See Janet L. Dolgin & JoAnn Magdoff, *The Invisible Event*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 351, 353, 363 n.7 (Janet L. Dolgin et al. eds., 1977). This definition of ideology is similar to that used by the French anthropologist, 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.

LOUIS DUMONT, *FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY* 22 (1977).

mation of American family life in the second half of the twentieth century, has begun to fade.¹²

This Article examines, in three parts, the transformation of childhood, and the law's complicated, rarely satisfying, often contradictory responses. In Part I, the Article describes a set of fundamental ideological shifts, during the past several decades, in understandings of the family in American society.¹³ In Part II, the Article outlines three distinct models through which, since the start of the twentieth century, the law has understood children and the parent-child relationship.¹⁴ The first model (the Traditional Model), though largely replaced by a second (the Transforming Traditional Model), continues to be invoked, primarily to justify the second.¹⁵ Though clearly generated from the first, the second model connects as well to a third, very different model for understanding children and their relationships to their parents.¹⁶ This third model (the Individualist Model), more often applied outside the domestic context than within, reflects modernity's suggestion that children should be assimilated to an egalitarian view of interaction that prizes autonomy, and that denies any fundamental distinction between childhood and adulthood.¹⁷ In Part III, the Article focuses on the many contradictions generated by the second model as it attempts to mediate between the demands of modernity and of tradition.¹⁸ This analysis focuses upon a set of decisions rendered by the United States Supreme Court beginning in 1976 that concern the abortion right of pregnant minors.¹⁹ In addition, Part III delimits two general legal responses to the dilemma presented by society's continuing concern to preserve venerable images of childhood, and its increasing inability to actualize those images within the social world of contemporary families.²⁰

¹² See POSTMAN, *supra* note 3, at 3-5 (arguing that as childhood disappears the boundary between childhood and adulthood blurs).

¹³ See *infra* notes 21-153 and accompanying text.

¹⁴ See *infra* notes 154-409 and accompanying text.

¹⁵ See *infra* notes 197-354 and accompanying text.

¹⁶ See *infra* notes 355-409 and accompanying text.

¹⁷ See *infra* notes 355-409 and accompanying text.

¹⁸ See *infra* notes 410-511 and accompanying text.

¹⁹ See *infra* notes 416-59 and accompanying text (setting forth analysis of ten cases addressing the abortion rights of pregnant minors).

²⁰ See *infra* notes 410-511 and accompanying text.

I. THE TRANSFORMATION OF FAMILY AND THE LAW'S RESPONSE

The family of the nineteenth and early twentieth centuries, now recognized as the model of traditional family life and of old-fashioned family values, was itself unlike the family of the preceding century.²¹ The shifts that transformed the colonial family into its post-Revolutionary counterpart were demographic as well as ideological.²² During the colonial period, the American family, fully integrated into the surrounding community—in John Demos's phrase, "continuous" with that community—was an economically productive unit.²³ To the colonists, the family appeared as one, only weakly differentiated, part of an interconnected social universe.²⁴ Colonial families, reflecting the larger society, were hierarchical and patriarchal.²⁵ Within these families, husband and wife typically co-existed with an assortment of children and workers that included sons, daughters, other relatives, apprentices, and perhaps journeymen.²⁶

After the colonial period, families declined in size.²⁷ Inter-generational influences waned.²⁸ Families, previously essential as units of economic production that joined parents, children, various relatives and apprentices together within working households, lost their productive capacity to become, instead, units of consumption.²⁹ At about the same time, paternal authority weakened while new images of nurturing mothers, inexorably bonded to their treasured infants, began to compete with older, patriarchal images of parentage.³⁰ Society became newly self-conscious about family,³¹ and fam-

²¹ See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 4-7 (1985) (describing the shift from colonial to republican families).

²² See *id.* at 6-7 (noting the influence of "republican theory and culture").

²³ JOHN DEMOS, *PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 28 (1986).

²⁴ See GROSSBERG, *supra* note 21, at 4 ("Family and community were . . . 'a lively representation' of each other.").

²⁵ See *id.* at 5.

²⁶ See DEMOS, *supra* note 23, at 28.

²⁷ See GROSSBERG, *supra* note 21, at 6 (attributing this decline to new fertility patterns).

²⁸ See *id.* (referring to influences on family function).

²⁹ See *id.* (noting that the "economic moorings of the household shifted from production toward consumption").

³⁰ See *id.* at 6-7 (noting the rise of a "new domestic egalitarianism" which "emerged to challenge patriarchy").

³¹ See DEMOS, *supra* note 23, at 30 (noting that there was a "new sense that the family had a history of its own" in the nineteenth century).

ily members became self-conscious about, and began to experiment with, a variety of new options for relating to each other.³²

A. *As Among Adults*

These last changes suggest the significance of essential shifts in the ideology of family that began to appear during the post-colonial period. These shifts, generated through a complicated set of social responses to the pressures of the Industrial Revolution and the values of the Enlightenment, led, initially, to a redefinition of family in express, even outspoken, opposition to forms of interaction associated with the nineteenth-century marketplace.³³ By the middle of the nineteenth century, traits associated with the ideal bourgeois family had come to contrast, almost point for point, with traits connected to the world of work and money.³⁴

The marketplace, envisioned as a domain of transient, goal-oriented preferences selected by autonomous individuals, unconnected except insofar as they chose connection, prized liberty, individuality, and unlimited choice.³⁵ Families, in contrast, came to be seen as differentiated social units of enduring, committed love grounded in inexorable bonds of association and that for a time, at least, prized hierarchy over equality, and connection over individuality.³⁶ Within the nineteenth- and early twentieth-century family, portrayed as a protective haven from the harsh tensions associated with the world of work, caring women were expected to provide sanctuary to their beleaguered husbands, and to extend spiritual, as well as physical nourishment to their growing children.³⁷ Children, treasured and coddled as perhaps never before, became the *raison d'être* and spiritual center of the family.³⁸ Ironically, this vision of

³² See *id.* at 30-31 (noting how "divorce and desertion were increasing . . . authority was generally disrupted . . . the family no longer did things together . . . [and] women [became] more and more restless in their role as homemakers").

³³ See GROSSBERG, *supra* note 21, at 6-7 (redefining family against "patriarchal authority").

³⁴ See DEMOS, *supra* note 23, at 31 (describing the contrast as an "adversary relation").

³⁵ See *id.* (recognizing the "ongoing struggle for 'success' that faced the 'self-made man'" in the nineteenth century).

³⁶ See *id.* (describing family as "highly sentimentalized" and of "unwavering devotion to people and principles beyond the self").

³⁷ See *id.* (describing the home and family as a safe refuge and loving "fortification" against the "dangers" of the outside world).

³⁸ See *id.* at 33 (noting this treatment of children occurred because they were the ones who would "carr[y] the hopes of the family into the future").

family was most tenaciously espoused and most often actualized during the mid-twentieth century, just before it began completely to collapse.³⁹

Anthropological and sociological accounts of the Western family after the middle of the nineteenth century recognized that the distinction between home and work lay at the center of the domestic enterprise.⁴⁰ During the mid-twentieth century, David M. Schneider, an anthropologist studying American kinship relationships, said that Americans contrast their families in almost every regard with the world of work and money.⁴¹ He wrote:

The set of features which distinguishes home and work is one expression of the general paradigm for how kinship relations should be conducted and to what end. These features form a closely interconnected cluster.

The contrast between love and money in American culture summarizes this cluster of distinctive features. Money is material, it is power, it is impersonal and unqualified by considerations of sentiment or morality. Relations of work, centering on money, are of a temporary, transitory sort. They are contingent, depending entirely on the specific goal—money

[T]he opposition between money and love is not simply that money is material and love is not. Money is material, but love is *spiritual*. The spiritual quality of love is closely linked with the fact that in love it is personal considerations which are the crucial ones. Personal considerations are a question of who it is, not of how well they perform their task or how efficient they are. Love is a relationship between persons. Morality and sentiment in turn are the essence of the spiritual quality of love, for they transcend small and petty considerations of private gain or advantage or *mere* gratification.⁴²

Sir Henry Maine, writing a century earlier, attributed a historic dimension to the social distinctions that, in the ideology of his age,

³⁹ See *id.* at 39 (noting that “[m]uch of the same viewpoint has survived into our own time”).

⁴⁰ See DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 45-49 (1968) (contrasting features of home and work to define familial relations).

⁴¹ See *id.*

⁴² *Id.* at 48-49 (second emphasis added).

were expected utterly to separate home from work.⁴³ Maine captured the distinction by differentiating a world of "status"—a world in which rights and duties are grounded in inexorable truth (i.e., the truths of biological connection)—from a world of "contract"—a world in which putatively equal individuals negotiate the terms of their own interactions.⁴⁴ Although intended as a historical description, Maine's account is more useful as a summary of the ideology of home and work that developed during the century within which he wrote:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.⁴⁵

Thus, Maine and Schneider recognized as fundamental, and contrasted, the holistic sentimentality and inexorability of the world of family, and the individualistic rationality and negotiability of the world of work.⁴⁶

⁴³ See SIR HENRY JAMES SUMNER MAINE, *ANCIENT LAW* 67-100 (J.M. Dent & Sons Ltd. 1917) (1861) (discussing "family" in ancient law and society, especially in the history of Roman law).

⁴⁴ See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* 68-70 (1997) (describing the relevance of Maine's distinction between the world of status and the world of contract to contemporary disputes about surrogate motherhood arrangements).

⁴⁵ MAINE, *supra* note 43, at 99.

⁴⁶ See *supra* text accompanying note 45 (discussing Maine's argument that the individual obligation has taken the place of family); *supra* text accompanying notes 41-42 (discussing Schneider's contention that spheres of work and home were vastly different). The French anthropologist Louis Dumont, analyzing the ascription of moral value to social forms in various societies, contrasted societies that are primarily holistic from those that are primarily individualistic in their social structures and ideologies. See DUMONT, *supra* note 11, at 4-10. Dumont writes:

The family that Maine assumed, and that Schneider described, resisted the recognition of autonomous individuality *within* the familial constellation.⁴⁷ Families were autonomous, but family members, as such, were not.⁴⁸ Even today, despite vast changes in the structure and meaning of family during the past several decades, contemporary understandings of family continue to presume, and to be measured against, a "traditional" family that valued hierarchy and holism long after society had come to value equality over hierarchy and individualism over holism in almost all other domains of social life.⁴⁹ Though society has redefined the family in revolutionary fashion within the past few decades to incorporate autonomous individuality within the domestic sphere, society continues widely to assume that familial relationships are, or at least should be, intensely affectionate and loyal.⁵⁰

For well over a century, family law resisted with apparent success the impulse of modernity toward autonomous individuality.⁵¹ So, for instance, nineteenth-century lawyers and reformers pressed for

On the one hand, most societies value, in the first place, order: the conformity of every element to its role in the society—in a word, the society as a whole; this is what I call "holism." On the other hand, other societies—at any rate ours—value, in the first place, the individual human being: for us, every man is, in principle, an embodiment of humanity at large, and as such he is equal to every other man, and free. This is what I call "individualism."

Id. at 3-4.

⁴⁷ See MAINE, *supra* note 43, at 67-100 (describing "family" in ancient law as rested on the patriarchal power of the father to which the wife, children, and slaves were subject).

⁴⁸ See *id.* at 73 ("The eldest male parent . . . is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves."). The notion of familial autonomy, long important to American family law, presumes the independence of families vis-à-vis the state. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (noting the living standards of a family are a matter of the family's concern, not the court's). As Frances Olsen, and others, have pointed out, the law's presumption of family autonomy never precluded the law's involvement, in fact, in the regulation and definition of family matters. See Frances Olsen, *The Myth of State Intervention in the Family*, in *FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW* 277, 279-81 (Martha Minow ed., 1993) (listing situations where people are "victims of state intervention"). Within the law, the notion of family autonomy was grounded on the understanding that the family was a substantive whole, different from the world of work and money, and that, for the most part, family members would behave as they were expected to behave. See SCHNEIDER, *supra* note 40, at 45-49 (discussing the different domains of work and family).

⁴⁹ See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1531-34 (1994) (describing preservation of hierarchical forms within family).

⁵⁰ See DEMOS, *supra* note 23, at 31 (noting that the redefinition of the family led to a division of the sphere of "home" and that of wider society).

⁵¹ See GROSSBERG, *supra* note 21, at 84-86 (discussing the movement for more stringent marriage and divorce laws).

stricter regulation of marriage and divorce.⁵² And, in the early nineteenth century, just as Americans evinced a new determination to limit the size of their families, abortion was first defined as a statutory offense.⁵³

Only beginning in the 1960s did society and law expressly recognize and begin widely to accept an understanding of family that allows for, and even encourages, individualism and choice.⁵⁴ It did so almost unreservedly and with startling rapidity.⁵⁵ Suddenly, it seemed, a new understanding of family was dramatically reflected in the rapid approval of forms of familial interaction that the state and large segments of society had deemed unacceptable only a few years earlier.⁵⁶ So, for instance, within a little over a decade, beginning in the late 1960s, divorce became widely available without accusations of "fault," simply on the grounds that the parties *chose* to end their spousal relationship.⁵⁷ Previously, divorce had been available only because the state deemed the actions of one or both parties so deviant that the marriage was rendered nonexistent.⁵⁸ At about the same time, courts began to recognize and enforce antenuptial agreements, previously considered invalid as violative of state public policy.⁵⁹ Moreover, in enforcing such agreements,

⁵² See *id.* (recognizing the nineteenth-century belief that "lax marriage and divorce laws" were the "prime causes of the all-too-apparent social disintegration").

⁵³ See *id.* at 159-62 (discussing the crime of abortion in colonial and nineteenth-century America). In 1821, Connecticut was the first state to promulgate a statute making abortion an offense. See *id.* at 161.

⁵⁴ See Dolgin, *supra* note 49, at 1560-61 (noting, as examples, the courts' recognition and enforcement of antenuptial agreements in contemplation of divorce, and permission of no-fault divorce).

⁵⁵ See *id.* (concluding that within the past 30 years, family law has increasingly recognized family matters as matters of negotiation and choice).

⁵⁶ See *id.* at 1561 (noting that "the American legal system has practically come to view adult family members as business associates, free to negotiate the terms of relationships and the terms of their demise").

⁵⁷ See *id.* (noting that prior to the permission of no-fault divorce, divorce was ordered only because the state deemed action of either spouse aberrant).

⁵⁸ Grounds for divorce before the so-called "divorce revolution" included adultery, willful desertion, and absence so long that it led to a presumption of death. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 204-07 (2d ed. 1985). Some states have preserved such "fault" grounds for divorce and added a no-fault option. See *id.*; see also Dolgin, *supra* note 49, at 1560-61 (describing family law's recognition of individualism and choice in the decades after World War II).

⁵⁹ See, e.g., *Posner v. Posner*, 233 So. 2d 381, 386 (Fla. 1970) (finding antenuptial agreement valid if made under the proper conditions); *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982) (holding antenuptial agreements are not per se void as against public policy); *Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981) (upholding a premarital contract).

courts now rely on principles derived from standard contract law.⁶⁰ Further evidence of the law's increasing willingness to define families, at least with regard to adult members, as collections of putatively equal, negotiating individuals is the growing acceptance of cohabitation agreements between parties never married to one another.⁶¹ Enforcement of such agreements presumes that cohabitants may negotiate and ensure the terms of their potential separation much as business partners may determine the conditions of a firm's dissolution.⁶²

Family law's growing acceptance of individuality and choice in family matters was reflected as well in a series of United States Supreme Court decisions beginning in the early 1970s.⁶³ In *Eisenstadt v. Baird*,⁶⁴ decided in 1972, the Court expressly recognized family members as autonomous individuals, connected to each other as such rather than as inseparable parts of a holistic social unit.⁶⁵ *Eisenstadt* declared unconstitutional a Massachusetts statute that prohibited the sale of contraceptives to unmarried adults.⁶⁶ Seven years earlier, the Court had reached an apparently similar decision in *Griswold v. Connecticut*.⁶⁷ There, the Court declared Connecticut's birth control statute unconstitutional.⁶⁸ The language of the decision in *Griswold*, however, clearly limits the Court's decision to married couples. *Griswold* has usually been understood as a prece-

⁶⁰ See Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 560 (1988) (describing states as generally enforcing antenuptial agreements if they are "(1) free from fraud and overreaching, (2) reflect a full and fair disclosure by and between the parties of their respective assets, and, in some states, (3) not unconscionable as to property division or spousal support").

⁶¹ See, e.g., MINN. STAT. ANN. § 513.075 (West 1990) (permitting cohabitation agreements regarding property and finances); *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (enforcing nonmeretricious contracts between domestic partners); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (sustaining an express contract between nonmarried persons).

⁶² See, e.g., *Marvin*, 557 P.2d at 116 (noting that the opinion was based upon "the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights").

⁶³ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977) (holding unconstitutional a New York statute forbidding nonpharmaceutical sale of contraceptives to minors whether married or not); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (granting women limited right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding unconstitutional a Massachusetts statute that prohibited distribution of contraception to unmarried adults).

⁶⁴ 405 U.S. 438 (1972).

⁶⁵ See *id.* at 453 (recognizing marriage as an association of two individuals).

⁶⁶ See *id.* at 443 (finding that the "goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims").

⁶⁷ 381 U.S. 479 (1965).

⁶⁸ See *id.* at 485-86 (holding that Connecticut's birth control statute unconstitutionally intruded on the right of marital privacy).

dent⁶⁹ on which *Eisenstadt* could easily rest.⁷⁰ However, a fundamental difference between *Griswold* and *Eisenstadt* separates the Court's approach in the two cases.⁷¹ In *Griswold*, the Court grounded its decision in the unique character of familial relationships:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁷²

In marked contrast, the decision in *Eisenstadt* reached seven years later discards the significance of the family unit as a social whole, and attaches the right of privacy to the autonomous individual.⁷³ In *Eisenstadt*, the Court declared:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy

⁶⁹ In *Griswold*, the Court first established a constitutional right to privacy. See *id.* at 483-85 (finding the right to privacy in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments). The Framers established a right to privacy only through the Fourth Amendment's protection against unreasonable searches and seizures. See U.S. CONST. amend. IV.

⁷⁰ The text of *Griswold* clearly asserts that the decision protects the family, as a sacred unit, from state intrusion. See *Griswold*, 381 U.S. at 486 (noting that the right of privacy at issue involved the marital relationship). In fact, however, commentators have frequently interpreted the Court as having extended protection to the private sexual behavior of individual adults. See Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 687 (1992) ("The *Griswold* case appeared to signal that the courts would strictly protect against laws impinging upon privacy."); Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 404 (1991) ("In a long line of cases beginning with *Griswold v. Connecticut*, the United States Supreme Court has recognized an individual's right to intimate associations without interference from the State." (footnote omitted)). See generally Dolgin, *supra* note 49, at 1539-46 (analyzing and contrasting *Griswold* and *Eisenstadt*).

⁷¹ See DOLGIN, *supra* note 44, at 39-62 (analyzing *Griswold* and *Eisenstadt*). See generally Dolgin, *supra* note 49, at 1540-46 (same).

⁷² *Griswold*, 381 U.S. at 486.

⁷³ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (positing that the right of privacy is not limited to a married couple).

means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁷⁴

The presumptions about family undergirding *Eisenstadt* are far more revolutionary than those undergirding *Griswold*. The reference in *Eisenstadt* to a married couple as an "association of two individuals" and its affirmation of the *individual's* right to privacy seem familiar to a world that presumes putatively equal, autonomous individuals free to choose the terms of their relationships.⁷⁵ The Court's assumptions are far more radical in reference to the family, long assumed to be a holistic unit contrasting in almost every regard with the individuality and presumed equality of the marketplace.⁷⁶ *Eisenstadt* unmistakably demarcates a fundamental shift in society's presumptions about families and familial relationships.⁷⁷

As *Eisenstadt* suggests, and as the widespread acceptance of antenuptial agreements, "no-fault" divorce and cohabitation contracts indicate concretely, the law, reversing its express stance almost completely, has, within several decades, firmly attached itself to an understanding of adult family members as autonomous individuals, not remarkably different from business partners.⁷⁸ The society continues to expect family members, adults and children alike, to feel affection for one another, and to exhibit a sentimentality that continues to contrast with the rationality of the marketplace. However, that affection and sentimentality are no longer understood as grounded in the nature of things. Rather, they are choices, not terribly different from the choice of a new carpet or shampoo.

Thus society faces a series of essential contradictions with regard to the meaning and scope of family. The redefinition of family members as autonomous individuals whose separate preferences and shifting choices demand social respect and legal protection conflicts utterly with traditional conceptions of family that presumed

⁷⁴ *Id.*

⁷⁵ Dolgin, *supra* note 49, at 1545 (discussing the implication of *Eisenstadt*).

⁷⁶ See *supra* notes 41-48 and accompanying text (discussing Schneider's and Maine's analysis of the family as holistic).

⁷⁷ Compare *Eisenstadt*, 405 U.S. at 453 (describing a marital couple as "an association of two individuals"), with *Griswold*, 381 U.S. at 486 (calling marriage "intimate to the degree of being sacred").

⁷⁸ See *supra* notes 54-62 and accompanying text (discussing the shift in family law in recognition of individualism).

familial connections to be grounded in inexorable truth (i.e., the "truth" of "genes," or of "blood"). The redefinitions multiply. But society continues to pine for grounded connection and enduring affection. In short, the ancient anchors that once fettered—and connected—family members have been removed, but the yearning toward committed, affective connection remains.

B. As Concerns Children

Society and the law alike seem to have concluded, though not without regret, that, with regard to adults, proper respect for personhood demands the sacrifice of enduring familial connections, secured through placement in fixed hierarchies within which rights and obligations followed automatically from status.⁷⁹ However, with regard to children, and the parent-child relationship in particular, society and the law have responded to the shift toward the valorization⁸⁰ of individuality and choice with greater restraint, and with uncertainty.

Here—in the understanding of children and childhood—more perhaps than anywhere, society must decide—or, depending on perspective, must passively witness—how completely modernity's unrelenting pull will redefine the family and the meaning of personhood itself. Against the pressures of preservation the pressures of transformation contend.⁸¹

On the one hand, images of childhood's innocence and of treasured, loving children have been central to society's conception of the affectionate family since the late eighteenth century.⁸² In the early

⁷⁹ See Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 517-23 (1990) (considering "status" and "contract" components of contemporary family).

⁸⁰ Louis Dumont uses the term "valorize" to indicate levels of social value. So, for example, in a society in which individualism is valorized, the autonomous individual provides the central metaphor in terms of which social relationships are comprehended. See LOUIS DUMONT, *HOMO HIERARCHICUS: AN ESSAY ON THE CASTLE SYSTEM* (Mark Sainsbury trans., 1970); see also Dolgin & Magdoff, *supra* note 11, at 353, 362 n.2 (explaining Dumont's theory).

⁸¹ Consideration of the multitude of pressures for and against the reconceptualization of children and childhood in the contemporary world is beyond the scope of this Article. In particular, this Article does not focus on large-scale economic changes (such as those connected with the development and growth of the electronics industry) that clearly play a part in molding society's understanding of childhood and children.

⁸² For analyses of the developing understandings of children and childhood during the nineteenth century, see GROSSBERG, *supra* note 21, at 236-85 (delineating transforming responses of society and law to the parent-child relationship in the nineteenth and early twenti-

years of the Industrial Revolution, the value of family became inextricably intertwined with the production and socialization of emotionally and physically healthy children.⁸³ Understood during the colonial period as a productive member of familial and communal units, the nineteenth-century middle-class child⁸⁴ did not, and was not expected to, participate in the productive process.⁸⁵ Thus, there appeared, in Viviana Zelizer's phrase, the "economically 'worthless' but emotionally 'priceless' child."⁸⁶ Such children became the *raison d'être* of the home, and along with their nurturing mothers, represented a world apart from the world of the marketplace. At the start of the nineteenth century, the law, recognizing this new understanding of children and of childhood, began to construct and to rely on the best interest standard for deciding cases about custody and parentage.⁸⁷ Almost two centuries later, the best interest standard remains the governing principle for adjudicating such cases.⁸⁸

It is almost impossible to imagine the so-called traditional, nuclear family without imagining children. Children served to justify both the husband-father's remunerative efforts in the marketplace,

eth centuries); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 43-65 (1988) (considering development of the "democratic" family); VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985) (analyzing development and consequences of the sentimentalization of children and childhood); Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1162-74 (1997) (discussing nineteenth-century society's treatment of children).

⁸³ See Dolgin, *supra* note 82, at 1163 & n.173 ("The precious children of middle-class nineteenth century homes were no longer 'object[s] of utility.' They had become 'object[s]s [sic] of sentiment.'" (footnote omitted)).

⁸⁴ Just as society was redefining the ideal childhood as a period of pristine innocence, completely separate from the interactions of the working world, poor children were being exploited by the industrial enterprise. Child labor was, for instance, essential to the development of the textile industry. See ZELIZER, *supra* note 82, at 59 (citing, as an example, the Rhode Island textile mills). Moreover, during the nineteenth century, child labor accounted for an essential part of the income of poor, urban families. See *id.* at 58-59 (reporting statistics that nineteenth-century children provided a primary source of income for their families).

⁸⁵ See *id.* at 59 (noting that "[t]he middle class, with its own children in school, still wistfully admired the moral principle of early labor").

⁸⁶ *Id.* at 3.

⁸⁷ See, e.g., *Mercein v. People*, *ex rel. Barry*, 25 Wend. 64, 106 (N.Y. 1840) (giving custody of a child to the mother because "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"); *Prather v. Prather*, 4 S.C. Eq. 33, 43-44 (4 Des.) (1809) (giving custody of a five-year old girl to the mother rather than the father because the mother was deemed a better parent to the child).

⁸⁸ See, e.g., CAL. FAM. CODE § 3011 (Deering 1994) (explaining the factors the court should consider when determining what is in the best interest of the child); N.Y. DOM. REL. LAW § 70 (McKinney's 1997) (requiring the court to decide a child's custody in a habeas corpus proceeding according to the child's best interest).

and the wife-mother's non-remunerative homemaking efforts. As David Schneider wrote, characterizing Americans' own views of their families in the middle of the twentieth century:

A married couple without children does not quite make a family. . . . For the married couple without children, one may say, "They have no family," or, "Their family has not arrived yet," if they are very young. "Family" here means that the addition of children to the married couple will complete the unit and will bring about that state.⁸⁹

For children, and around children, the affectionate, nuclear family of the nineteenth and twentieth centuries defined itself.

Even as the traditional family changes, and the culture labels a wide variety of associations "family," children, and the parent-child bond, continue to represent the essence of the familial sphere, and to suggest that the family, however nontraditional, has remained essentially affectionate. Indeed, children remain central to understandings of family for both traditionalists and modernists.⁹⁰ For traditionalists, images of nurtured children and their protective, loving parents (especially mothers) illustrate the purpose and the joy of the affectionate family as it should be, and as it was before it was opened to redefinition through the exercise of individualistic free choice.⁹¹ Further, traditionalists view negative social and psychological effects for children as inevitable consequences of the demise of the traditional family.⁹² But, equally, modernists, though willing, even anxious, to redefine dramatically the indices and scope of family, consistently invoke childhood and the significance of the parent-child bond, suggesting in those invocations that nothing essential will be lost to children through the generalization of affectionate (familial) associations onto a wide, new variety of relationships.⁹³ As a result, the force of nostalgia, felt by almost everyone, for images of childhood produced almost two centuries ago consti-

⁸⁹ SCHNEIDER, *supra* note 40, at 33 (1968).

⁹⁰ See DEMOS, *supra* note 23, at 107 (noting adolescence has been studied "by a veritable army of contemporary authorities"); GROSSBERG, *supra* note 21, at 306-07 (noting understanding and treatment of children as one of the major conflicts in family law).

⁹¹ See GROSSBERG, *supra* note 21, at 304 (summarizing features of nineteenth-century family law).

⁹² See *id.* at 296-300, 305 (discussing legal changes in domestic relations law and its effects on the traditional family unit).

⁹³ See generally DEMOS, *supra* note 23 (comparing and contrasting developments in families during different chronological periods).

tutes a chorus of voices that opposes the disintegration of those images.

A further impulse toward the preservation of traditional understandings of children and childhood is largely practical. Insofar as society does continue to care deeply (even if in theory more often than in practice) about safeguarding children and their interests, no satisfactory replacement has been found for the family as the locus of the socialization and care of children. Although the law provides for removing children from their parents' custody (as in the case of "unfit" parents),⁹⁴ or for substituting state authority for parental authority (as in the case of pregnant minor girls seeking abortion but not deemed mature enough to make the decision without assistance),⁹⁵ almost no one is satisfied with the consequences of the substitution of state, for parental, authority for the children involved or for their parents.⁹⁶ Thus, even in cases and in situations in which it seems clear that parents serve their children poorly, society, although willing to limit and displace parental control, has found no generally satisfactory alternatives to the socialization of children, and the regulation of their behavior by parents within families.

Clearly, many social impulses—some practical, some romantic, and some so deeply ingrained in the culture that they seem more products of nature than of history—speak for the preservation of childhood in its traditional guise, as it was defined beginning in the late eighteenth century, and for the preservation of traditional nuclear families as they developed during the same period. In short, strong voices from different ends of the political spectrum speak against the disruption of parental authority and against empowering children with the rights and obligations of autonomous individuality.

But other voices speak as well, suggesting contrary conclusions. The romanticization of childhood, central to the development of the traditional nuclear family, depended on the separation of children—

⁹⁴ See, e.g., Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 988 & n.20 (1975) (developing criteria to determine when coercive state intervention is justified in the childrearing process).

⁹⁵ See *infra* notes 416-59 and accompanying text (analyzing cases delineating the right to choose abortion by pregnant minors).

⁹⁶ See *infra* notes 427-32 and accompanying text (discussing the change from parental to state authority over minors seeking abortions).

in theory and in fact—from the world of autonomous individuality.⁹⁷ The separation of home and work during the Industrial Revolution produced a sentimentalized conception of childhood that came to signal the central function of the traditional family. Women and children, identified with home and hearth, were separated from the world of men, money, and individualistic choice.⁹⁸ During the twentieth century, a long crusade for the recognition of women as autonomous human beings, definable apart from their place in relation to men and family, began to succeed.⁹⁹ As a result, women's inexorable status as wife, mother, and homemaker was replaced by a new set of options for self-identification and for participation in the world outside the home.¹⁰⁰ Old notions, deeply embedded in the culture's understanding of gender and personhood, linger, but few continue to argue that women *should* be excluded from the privileges and burdens of autonomous individuality.¹⁰¹ A similar process redefines children, but more slowly, and with less certainty.

As society and the law have, in general, dismantled traditional social hierarchies, even the sharp boundary that once separated children from adults has become blurred. This is especially evident in popular culture. In advertising, in entertainment (especially television), in dress, in the games that people buy and play, even in the crimes that people commit, society demonstrates a startling amalgamation of childhood and adulthood. For example, parents buy and wear the same styles of clothing as they buy for their little children. Organized, competitive sports such as those formed through Little League teams replace the games children once played, games that involved neither umpires nor spectators, and that were "played for no other reason than pleasure."¹⁰² Perhaps the strongest, and most upsetting, evidence of the dissolution of child-

⁹⁷ See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 187-90 (1994) (linking the breakdown of romanticized notions of childhood to instances of children asserting individual rights).

⁹⁸ See *id.* at 52-55 (discussing prevailing attitudes towards women, including the denial of women to the Bar because their "timidity and delicacy" made them "unfit[] . . . for many of the occupations of civil life").

⁹⁹ See *supra* Part I (analyzing societal trends toward individualization and autonomy).

¹⁰⁰ See *supra* Part I, I.A (discussing the changing roles of women during the nineteenth and twentieth centuries).

¹⁰¹ See *supra* Part I, I.A (discussing the transformation of families and the law's response through recognition of the importance of individual choice).

¹⁰² POSTMAN, *supra* note 3, at 4.

hood comes from television and from television commercials. As Neil Postman writes:

[T]he TV commercial does not present products in a form that calls upon analytic skills or what we customarily think of as rational and mature judgment. It is not facts that are offered to the consumer but idols, to which both adults and children can attach themselves with equal devotion and without the burden of logic or verification.¹⁰³

The amalgamation of childhood and adulthood is evident in the law as well. One of the strongest voices behind this shift is the so-called children's rights movement. That movement, as Neil Postman observed, takes two forms.¹⁰⁴ In the first, older form, understandings of social and legal responsibility toward children are grounded in notions of childhood's fragility, and the consequent social obligation to safeguard children and their welfare.¹⁰⁵ In the second form, children are not recognized as fragile beings in need of special protections, and childhood, as traditionally understood, is not recognized as an especially pleasing or attractive state.¹⁰⁶ For example, Richard Farson, arguing for the "liberation of children," suggests that children be given the freedom to engage in, or to refuse, sexual encounters with one another as well as with adults,¹⁰⁷ that children not be "incarcerated against their will" in schools,¹⁰⁸ and that they be given the opportunity to avoid their parents' "daily influence."¹⁰⁹ Farson justifies the last suggestion in concluding that children need parents no more than parents need children. Each needs the other, he declares, "for the same reason . . . simply because they have them."¹¹⁰

Despite the great differences between the two approaches to "children's rights" in their extreme forms, in practice the two forms of the children's rights movement merge. Both were spawned by a similar realization that children have often suffered under adult control, whether exercised by parents or by the state. Both recog-

¹⁰³ *Id.* at 108.

¹⁰⁴ *See id.* at 139-42.

¹⁰⁵ In this form, the Children's Rights Movement has long-standing precedents in, for instance, nineteenth century "child savers," responsible, among other things for the promulgation of child labor laws and special criminal codes applicable to children. *Id.* at 139.

¹⁰⁶ *See id.* at 139-40 (calling proponents of this form "child liberators").

¹⁰⁷ RICHARD FARSON, BIRTHRIGHTS 146-48 (1974).

¹⁰⁸ *Id.* at 96-100.

¹⁰⁹ *Id.* at 43.

¹¹⁰ *Id.*

nize as well that the increasing fragility of the marriage bond makes it increasingly unlikely that the family sphere will offer enduring stability,¹¹¹ and both recognize, further, that at least in certain contexts, and for certain purposes, children *can* be defined either in traditional status terms, or through the terms of modernity—the terms of autonomous individuality and choice.¹¹²

Within the law, the birth of the children's rights movement has been connected to two decisions of the United States Supreme Court.¹¹³ The first, *Brown v. Board of Education*,¹¹⁴ protected African-American children from inferior treatment in schools.¹¹⁵ *Brown* recognized the potential autonomy of the children involved as African-Americans, but did not expressly recognize their autonomy *as children*.¹¹⁶ The second case, *In re Gault*,¹¹⁷ resembled *Brown* in extending constitutional protection to a group of children.¹¹⁸ The decision in *Gault*, however, which extended due process protections to children in delinquency proceedings, did define children—at least certain children, for certain purposes—as autonomous individuals.¹¹⁹ The explicit intention was to protect children rather than to reconceptualize them.¹²⁰ Justice Fortas, writing for the Court in *Gault*, framed the decision as a necessary reaction to the pervasive failure of the juvenile court system to safeguard children's interests.¹²¹ That system, premised on the understanding that childhood constitutes a status, and that children deserve special protection, had, in fact, failed children consistently and abysmally.¹²² It is not

¹¹¹ See, e.g., BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 139-40 (1997) (noting that the dissolution of marriage makes parent-child bonds more difficult to sustain).

¹¹² See POSTMAN, *supra* note 3, at 139-42.

¹¹³ See Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1559 (1995) (claiming *Brown v. Board of Education*, 347 U.S. 483 (1954), and *In re Gault*, 387 U.S. 1 (1967), laid the "foundation" for the "modern children's rights movement").

¹¹⁴ 347 U.S. 483.

¹¹⁵ See *id.* at 495.

¹¹⁶ See *id.* at 487, 493.

¹¹⁷ 387 U.S. 1.

¹¹⁸ See *id.* at 13 (declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

¹¹⁹ See *id.* at 27-31 (defining children in such a way in order to safeguard their rights in juvenile proceedings).

¹²⁰ See *id.* (noting that the lack of due process procedures has, historically, resulted in arbitrariness).

¹²¹ See *id.* at 14-19 (describing traditional treatment of children under the law).

¹²² See *id.* at 12-31. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

surprising that in 1967, in the era of civil rights and women's rights, an era in which society (and the Supreme Court, in particular) had become self-consciously concerned about the need to end persistent inequalities, the Court in *Gault* responded to the law's failure to treat children justly by, in effect, redefining children and childhood.¹²³ Construed as autonomous individuals, children could no longer be precluded from the protections afforded by due process.¹²⁴ The Court's explicit aim was to protect, not to redefine, children and childhood.¹²⁵ It was not, however, accidental that in the late 1960s the Court, in effecting that aim, contributed to the erosion of childhood as a status and to the amalgamation of childhood and adulthood.¹²⁶

Thus, *Gault* represents one step toward defining children through an ideology that valorizes equality and autonomous individuality.¹²⁷ It is not hard to understand the temptations that prompted such a step. Since the Civil War, the nation had become increasingly cognizant of the basic, enduring contradiction in the American social order between an ideology that prized equality and a reality that reenforced inequality.¹²⁸ By the late 1960s, the country had begun to recognize, and to be concerned about, unequal treatment accorded groups other than African-Americans, for example, women.¹²⁹ Thus, it is not surprising that the Supreme Court, in *Gault*, facing the almost uniform failure of the American court system to deal satisfactorily with criminal acts by juveniles, responded by defining children—like African-Americans and women—as autonomous individuals.¹³⁰ That ascription was, it seems, expected to do little more than ensure children constitutional protections otherwise de-

¹²³ See *id.* at 14-24 (suggesting the importance of change in the rights of juveniles because traditional treatment of juveniles resulted in arbitrariness).

¹²⁴ See *id.* (noting that the lack of due process procedures has, historically, resulted in arbitrariness).

¹²⁵ See *id.* at 29-31 (holding that proceedings involving juveniles must provide essential due process protections).

¹²⁶ See *id.* at 27-31 (narrowing the distinction between adults and children in criminal proceedings).

¹²⁷ See *supra* note 80 and accompanying text (discussing the valorization of individuality).

¹²⁸ See DEGLER, *supra* note 5, at 27-28 (noting that although the theory of separate roles for the sexes indicated equality to nineteenth-century philosophers, it was later attacked as being "repressive and limiting" for women).

¹²⁹ See *id.* at 442 (discussing how the Civil Rights Movement for African-Americans in the 1960s stimulated the women's movement).

¹³⁰ See *Gault*, 387 U.S. at 20-24 (giving juveniles the right to procedural safeguards and noting "[d]ue process of law is the primary and indispensable foundation of individual freedom").

nied them and was, therefore, intended quite differently than was the recognition of various groups of adults as putatively equal, autonomous individuals. From a contemporary perspective at least, the implications of the ascription of autonomy to children are thus more startling, and the potential consequences harder to discern, than with the ascription of autonomy to adults.

In fact, however, after *Gault*, pressures to redefine children—and childhood—have extended beyond the context of a failed juvenile court system.¹³¹ The changing structure and demography of the traditional nuclear family have created new concerns about the socialization of children.¹³² Less and less often is the law sanguinely able to assume that families will perform the tasks of child care, as those tasks were understood a century ago.¹³³ In particular, as the traditional, nuclear family—centered around husband and wife—has been replaced by a looser, more vulnerable association—centered around the shifting ties between various autonomous adult figures—the bond between children and adults within families has inevitably altered as well.¹³⁴ As the rate of divorce increased beginning at the start of the twentieth century, and even more dramatically between the 1960s and the 1980s, courts were more and more often asked to determine the parameters of young children's everyday lives.¹³⁵ As society has come routinely to understand husbands and wives as unconnected except insofar as they choose connection, the temptation similarly to redefine children has grown.¹³⁶

Barbara Whitehead describes this process in *The Divorce Culture*. Referring to what she calls the new "love family" that appeared in the late twentieth century, and that has begun to replace the traditional nuclear family, Whitehead writes:

A family is defined not by blood, marriage, or adoption but by bonds of voluntary affection. While nuclear family ideology

¹³¹ See *infra* notes 154-96 and accompanying text (discussing changes in the ways children and childhood have been viewed since *Gault* in several other areas, including abortion, education, voting, and parental authority).

¹³² See *infra* notes 133-53 and accompanying text (describing the effect of the new "love family" on children and childhood).

¹³³ See WHITEHEAD, *supra* note 111, at 142-43 (arguing that the instability of marriage forces a new understanding of the parent-child relationship).

¹³⁴ See *id.* at 142-45.

¹³⁵ See *infra* note 490 and accompanying text (listing aspects of childrens' lives that family courts rule on).

¹³⁶ See WHITEHEAD, *supra* note 111, at 7-8.

affirmed love as the foundation of intimate partnership, it anchored that commitment within the institution of marriage. By contrast, the Love Family ideology liberates sexual, companionate, and parental love from its institutional and cultural moorings in marriage. Love alone dictates the arrangements and content of family life.¹³⁷

Whitehead likens the ideology behind this new family to that of the nation's history:

In the post-nuclear family story, as in the story of the nation's founding, the dramatic interest revolves around one defining event: the dissolution of affectionate bonds that have grown empty and cold and the formation of a new and "more perfect union" based on ties of mutual interest and affection.¹³⁸

Whitehead admires the new ideology of family (and of nation) for encouraging and fostering equality, in general, and more equitable arrangements for socializing and supporting children, in particular.¹³⁹ But she also finds a basic self-interest to be central to the new "love family" which replaces the child-centeredness of traditional nuclear families.¹⁴⁰ The new family, premised on the equality and free choices of the adults involved, cannot provide adequately for dependent children, at least not insofar as children are understood, as they have been for over two centuries, as dependent treasures, to be nourished and safeguarded by their loving parents.¹⁴¹ Whitehead, considering in particular the effects of divorce on children, concludes "that the current [divorce] trends cannot be sustained for another twenty-five years without profound loss and damage to children, families, and the society."¹⁴²

The widespread social disruption for children that has followed from the redefinition of familial relationships among adults encourages society and the law to redefine children and childhood.¹⁴³ If children are not quite as dependent and immature as they some-

¹³⁷ *Id.* at 144.

¹³⁸ *Id.* at 151.

¹³⁹ See *id.* at 148 (stating that the post-nuclear family "promotes sociability and tolerance" because it often includes a wider variety of family members).

¹⁴⁰ *Id.* at 153.

¹⁴¹ See generally *id.* at 153-81 (discussing weakened and stressed bonds between divorced parents and their children).

¹⁴² *Id.* at 187.

¹⁴³ See *supra* notes 79-103 and accompanying text (describing societal changes in familial relationships).

times appear, they could become more responsible for their own care, and for their own decisions.¹⁴⁴ They would in consequence be less burdened by their parents' physical or emotional absence, and parents would be less burdened by the responsibilities of parenthood.¹⁴⁵ In these regards, the erosion of the notion of childhood, and the empowering of actual children with the responsibilities of autonomous individuality even within the familial arena, constitute one response to the transformation of the traditional nuclear family.¹⁴⁶ Here, perhaps—in the need to respond to the consequences for children of the collapse of the traditional nuclear family—lies the greatest or at least the most transparent pressure on society and law to redesign the lives of most children, and the very notion of childhood.¹⁴⁷

In short, society's concern to preserve childhood as a distinct status, unaffected by other redefinitions of personhood and of family, faces strong pressures to redefine children, and to contribute to the disappearance of childhood. In cases involving disputes between parents and children, between children and the state, and between parents and the state, the law is compelled to reconsider the meaning and strength of the parent-child relationship, and the scope of childhood.¹⁴⁸ Not surprisingly, the law's responses to such cases have been contradictory and uncertain.¹⁴⁹ Sometimes children, defined through a status that gives them little autonomy, are assumed to be best protected when their individuality is effectively subsumed by parental authority.¹⁵⁰ But sometimes children are recognized as

¹⁴⁴ See, e.g., POSTMAN, *supra* note 3, at 139-42 (discussing the "child liberation" form of the children's rights movement).

¹⁴⁵ Cf. FARSON, *supra* note 107, at 23-24 (stating that the traditional nuclear family overburdens parents not only in their responsibilities to their children, who are incapable of caring for themselves, but also in the parents' need to meet societal expectations).

¹⁴⁶ See *infra* notes 355-409 and accompanying text (recognizing the Individualist Model as empowering children).

¹⁴⁷ See *infra* notes 168-69 and accompanying text (considering the redefinition of children within the domestic sphere).

¹⁴⁸ See *infra* Part II (discussing cases where children are in conflict with either their parents or the state, or parents are in conflict with the state).

¹⁴⁹ See *infra* Part II (discussing varying interpretations of childhood, and analyzing conflicting cases where children are viewed as autonomous individuals and other cases where children are deemed incapable of making their own decisions).

¹⁵⁰ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (declaring state law mandating high school attendance unconstitutional as applied to Amish parents, thereby recognizing Amish parents' authority in deciding their children's education). Justice Douglas, however, argued that parents should not be allowed to vindicate children's rights without the Court's

complete human beings, capable of making, and ready to be responsible for, their own choices and the consequences of those choices.¹⁵¹ Sometimes the law reenforces parental authority even against children burdened by the exercise of that authority.¹⁵² But in other cases the law limits parental authority, granting children a degree of independence.¹⁵³ Behind the apparent confusion presented by such diverse responses, however, certain patterns can be discerned.

II. LEGAL MODELS: CHILDREN, CHILDHOOD, AND THE PARENT-CHILD RELATIONSHIP

The text of the Constitution does not expressly consider the meaning or parameters of the parent-child relationship. In fact, the Constitution does not mention children at all.¹⁵⁴ Yet, in recent decades, the Supreme Court has interpreted the Constitution both to grant parents broad authority over their children,¹⁵⁵ and to limit that authority in the face of state interests in the rearing of chil-

hearing the children's own views because children are also "persons' within the meaning of the Bill of Rights." *Id.* at 243 (Douglas, J., dissenting in part).

¹⁵¹ See, e.g., *In re Winship*, 397 U.S. 358 (1970) (extending Sixth Amendment procedural safeguards to a juvenile charged with an act that would have been criminal if committed by an adult); *In re Gault*, 387 U.S. 1 (1967) (extending due process rights to juveniles in delinquency proceedings); see also *infra* Part II.B (discussing a model of the parent-child relationship which sees the child as responsible for making decisions and suffering the consequences).

¹⁵² See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding Georgia's statute allowing parents to commit their children to a mental hospital).

¹⁵³ See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) [hereinafter *Bellotti II*] (declaring Massachusetts parental consent provision for abortions by minors unconstitutional for failure to provide minors with judicial by-pass option); see also *infra* Part III.A (analyzing Supreme Court decisions involving statutory regulation of minors' rights to obtain abortions).

¹⁵⁴ Depending on how one understands the term "children," the Twenty-Sixth Amendment to the Constitution, ratified in 1971, provides an exception. That amendment reads in pertinent part: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1.

Professor Clark has concluded that concern with children or with the parent-child relationship was absent from the records and debates that preceded ratification of the Constitution. See Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 1 & n.1 (1992) (citing several sources which indicate the omission of children's rights from the "records or debates leading to the drafting and ratification of the Constitution").

¹⁵⁵ See, e.g., *Parham*, 442 U.S. at 620-21 (upholding Georgia statute allowing parent to institutionalize his or her child in mental hospital as a "voluntary commitment"); *Yoder*, 406 U.S. at 207 (holding unconstitutional as to Amish parents Wisconsin compulsory education law requiring attendance in school until age 16 or completion of high school).

dren.¹⁵⁶ Moreover, the Court has interpreted the Constitution both to grant various rights to children,¹⁵⁷ and to fail to grant them other rights.¹⁵⁸ In some cases, the Court has recognized children as autonomous individuals, free to make their own choices, and to design important aspects of their own lives.¹⁵⁹ Elsewhere, the Court has refused to recognize children as autonomous individuals, and has refused to recognize a constitutional right of children to make choices, or to have choices made for them, that differ from the choices of their parents.¹⁶⁰

With only a few exceptions, the Court did not entertain cases implicating the character of familial relationships until the second half of the twentieth century.¹⁶¹ The Court did decide two cases in the 1920s, each time defending a Victorian model of the family against

¹⁵⁶ See, e.g., *Bellotti II*, 443 U.S. at 651 (prohibiting states from requiring parental consent for girls under 18 seeking abortions unless the girls are given the option of obtaining judicial, rather than parental, consent).

¹⁵⁷ See, e.g., *Breed v. Jones*, 421 U.S. 519, 532-33 (1975) (holding the prohibition against double jeopardy applicable to juveniles in state court proceedings); *In re Winship*, 397 U.S. 358, 365-68 (1970) (requiring that a case against a delinquent child must be proven beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 29-31 (1967) (holding several due process rights applicable to minors in adjudication of juvenile delinquency proceedings).

¹⁵⁸ See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (concluding that the right to trial by jury is not required by the Constitution in juvenile delinquency proceedings in state court).

¹⁵⁹ See, e.g., *Bellotti II*, 443 U.S. at 643-44 ("[T]he unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.'" (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976))). An even more far-reaching recognition of children as autonomous individuals is found in a variety of cases decided in state courts that did not focus, in particular, on the constitutional dimensions of the parent-child relationship. See, e.g., *Peregood v. Cosmides*, 663 So. 2d 665, 667 (Fla. Dist. Ct. App. 1995) (granting a child standing to appeal dismissal of child's challenge to his adoption by natural mother), *rev. denied*, 673 So. 2d 29 (Fla. 1996); *Gregory K. v. Ralph K.*, No. C192-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992) (granting young foster child standing to initiate parental rights termination proceeding), *rev'd sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

¹⁶⁰ See, e.g., *Parham*, 442 U.S. at 603-04 (concluding that the parent retains the dominant role in decisionmaking on behalf of the child).

¹⁶¹ In addition to *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), considered in *infra* notes 201-26 and accompanying text, the exceptions include *Prince v. Massachusetts*, 321 U.S. 158, 170-71 (1944) (upholding conviction of Jehovah's Witness for involving 9 year-old child for which she was custodian in public distribution of religious literature in violation of state law prohibiting a minor from selling, or an adult from aiding a minor in selling, literature or other merchandise in public places); *Maynard v. Hill*, 125 U.S. 190, 209 (1888) (upholding statute providing for dissolution-divorce against claim that this abridged right to contract); and *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (upholding conviction of Mormons who practiced polygamy).

the challenge of alternatives.¹⁶² That the Court began to consider cases about the family in much larger numbers in the 1960s and 1970s was due in significant part to widespread challenges to the understanding of family that made it possible, essentially for the first time, to consider family members as autonomous individuals to whom constitutional rights could be extended.¹⁶³ By this time, the traditional family was clearly under siege.

Indeed, the decade of the 1960s was a "demographic watershed" in the character of the America family.¹⁶⁴ By the 1970s, half of American marriages were ending in divorce; a quarter of households consisted of one person; and only about one-third of American households included two parents and their minor children.¹⁶⁵ At the same time, state lawmakers were dismantling family law as it had been established in the nineteenth century.¹⁶⁶ The Supreme Court responded in harmony with these wider transformations by recognizing adult family members as autonomous individuals, unconnected except insofar as they chose connection and by sometimes recognizing children, at least in certain specific contexts, as almost equally entitled to the privileges of autonomous individuality.¹⁶⁷

Although it has been willing to redefine children outside the domestic sphere, the Court has been more cautious with regard to redefining children within families, reaffirming a traditional model of the family more often than disparaging or replacing that model.¹⁶⁸ As a group, Supreme Court cases involving children illustrate the

¹⁶² See *infra* notes 199-226 and accompanying text (discussing *Meyer* and *Pierce*).

¹⁶³ See DOLGIN, *supra* note 44, at 35-39 (arguing that the no-fault divorce statutes and the recognition of cohabitation and prenuptial agreements that emerged in the 1960s and 1970s contributed to treatment of the family as a "collection of separate individuals").

¹⁶⁴ Elaine Tyler May, *Myths and Realities of the American Family*, in A HISTORY OF PRIVATE LIFE 539, 583 (Antoine Prost & Gérard Vincent eds. & Arthur Goldhammer trans., 1991).

¹⁶⁵ See *id.* at 583 (describing marriage as "much less 'normative'" in the 1970s).

¹⁶⁶ See *supra* notes 57-62 and accompanying text (describing changes in state law in response to family matters beginning in the 1960s).

¹⁶⁷ See, e.g., *Bellotti II*, 443 U.S. 622 (1979) (granting children autonomy by invalidating a state law which failed to provide a judicial bypass around the requirement of parental consent to minor's abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (declaring that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup").

¹⁶⁸ See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 518-19 (1925) (recognizing right of parents to send children to parochial or private schools); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (invalidating law prohibiting teaching foreign languages below eighth grade in public schools because it interfered with the "natural duty" of the parent to educate children); see also *infra* notes 198-226 and accompanying text (discussing the Court's decisions in *Meyer* and *Pierce*).

depth and the intensity of social uncertainty about the implications of childhood and of the parent-child relationship.¹⁶⁹ Society seems as anxious to preserve childhood as a distinct status, representative of traditional, loving families as to liberate children, as it has liberated their parents and guardians, from social hierarchies that define traditional family relationships.

Corresponding broadly to these options, the Supreme Court has relied upon three—or arguably only two—distinct, often contradictory, models for regulating the behavior and choices of children and for defining the limits of the authority of those who care for children.¹⁷⁰ Each model depends on a particular vision or set of visions of childhood, and of the parent-child relationship.¹⁷¹ Two of the models reflect one pole of society's present uncertainty about how to define children.¹⁷² The oldest model—here called the Traditional Model—first articulated as a constitutional matter in the 1920s, reenforces strong parental authority, and assumes children's choices to be nonexistent, or to be rightly displaced by the choices of their parents, except in the most unique circumstances.¹⁷³ That model, though in large part still preserved, was significantly revised in the 1970s, leading to what this Article labels the Transforming Traditional Model.¹⁷⁴ A very different model for understanding children, first voiced in the 1960s—here called the Individualist Model—presents children as complete, or almost complete, human beings, capable of making their own decisions, and thus as being responsible before the law for their consequences.¹⁷⁵

Even in recent years, in cases involving disputes between parents and children, the Court has preserved much of the Traditional

¹⁶⁹ See *infra* notes 170-363 and accompanying text (examining the Supreme Court decisions with respect to three models through which the law has understood children and the parent-child relationship).

¹⁷⁰ See *infra* notes 171-363 (examining the three models the Court has relied upon to understand children and their relationships with their parents and the state).

¹⁷¹ See *infra* notes 199-226 and accompanying text (discussing the Traditional Model); *infra* notes 227-354 and accompanying text (discussing the Transforming Traditional Model); *infra* notes 355-409 and accompanying text (discussing the Individualist Model).

¹⁷² See *infra* notes 199-354 and accompanying text (examining the Traditional Model and the Transforming Traditional Model).

¹⁷³ See *infra* notes 199-226 and accompanying text (analyzing the Traditional Model and Supreme Court decisions that follow it).

¹⁷⁴ See *infra* notes 227-354 and accompanying text (analyzing the Transforming Traditional Model and Supreme Court decisions that follow it).

¹⁷⁵ See *infra* notes 355-409 and accompanying text (analyzing the Individualist Model and Supreme Court decisions that follow it).

Model.¹⁷⁶ However, modifications to that model have been significant enough to warrant reference to an alternative form of the traditional model, the Transforming Traditional Model.¹⁷⁷ In one sort of case in particular—that involving challenges to state laws regulating the availability of abortion to minor girls—the Court has elaborated the details, and suggested some of the implications of the differences between this model and the Traditional Model.¹⁷⁸ As this Article shows in detail below, the Court's continuing attention to cases involving the right of girls to terminate their pregnancies as well as the Court's failure, despite its extraordinary efforts, to produce a generally satisfying response to the conflicting interests involved, indicate the extent, more generally, of society's confusions about children and the parent-child relationship.¹⁷⁹ More specifically, these cases suggest a basic contradiction, lying at the core of the Transforming Traditional Model, and in consequence a fragility that makes the model inherently unstable.¹⁸⁰

Unlike the other two models, the Individualist Model broadly redefines children. This model has been applied by the Supreme Court in cases involving disputes between parents and the state,¹⁸¹ as well as in disputes between children and the state.¹⁸² Moreover, the model has been invoked by state courts in resolving disputes be-

¹⁷⁶ See *infra* notes 416-59 and accompanying text (discussing recent abortion rights cases and requirement of judicial bypass as examples of the application of the Traditional Model).

¹⁷⁷ This Article uses the term "transforming" in characterizing recent modifications to the Court's traditional model for understanding children and the parent-child relationship in order to indicate the extent to which the modifications, because in conflict with central aspects of the traditional model, have themselves engendered additional modifications in the understanding of children and childhood. While this model constitutes an important transformation of the Traditional Model, it is itself especially vulnerable to transformation.

¹⁷⁸ See *infra* notes 230-33 and accompanying text (discussing the evolution from Traditional Model to Transforming Traditional Model); *infra* notes 416-59 and accompanying text (analyzing the two models with respect to cases involving the availability of abortion to minor girls); *supra* note 177 and accompanying text (defining the Transforming Traditional Model as an expression of the Court's recent modifications to the Traditional Model).

¹⁷⁹ These cases also reflect the intensity of the contemporary debate about abortion. See *infra* notes 418-59 and accompanying text (analyzing recent cases involving the availability of abortion for minors).

¹⁸⁰ See *infra* Part II.A.2 (examining the Supreme Court's decisions that follow *Meyer* and *Pierce*, yet challenge certain aspects of the traditional parent-child relationship).

¹⁸¹ See, e.g., *In re Gault*, 387 U.S. 1, 29-31 (1967) (holding children have a due process right in delinquency proceedings in habeas corpus action brought by parents).

¹⁸² See, e.g., *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506-07 (1969) (finding First Amendment rights available to teachers and students in action by students to enjoin a regulation banning the wearing of arm bands).

tween parents or guardians and children.¹⁸³ The Individualist Model, exemplified, and first articulated expressly, by the Supreme Court in *In re Gault* and applied in First Amendment cases such as *Tinker v. Des Moines Independent Community School District*,¹⁸⁴ does not define children through their status within families.¹⁸⁵ Rather, this model allows for the autonomy of children and defines them, at least in theory, as complete human beings under the Constitution.¹⁸⁶ As such, children are freed from both the limitations and protections that follow from their inclusion within the holistic social hierarchy of the traditional family.¹⁸⁷ In the Individualist Model, children, no longer distinguished from adults in the nature of their personhood, are empowered under the Constitution, protected by the Bill of Rights, and, at least in theory, become free to make their own decisions and bear responsibility for the consequences of their actions.¹⁸⁸ The Supreme Court has applied the Individualist Model to children involved in delinquency and criminal proceedings,¹⁸⁹ and the Court has used the model to allow children protection under the First Amendment.¹⁹⁰ So far, the Court has not generalized this model by applying it in cases that directly implicate the scope of parental authority. Moreover, in most of the cases in which the Court has recognized children's autonomy, such recogni-

¹⁸³ See, e.g., *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *3 (Fla. Cir. Ct. Aug. 18, 1993) (granting standing to teen to challenge stipulation concerning legal parentage); *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992) (granting child standing in proceeding to terminate his biological mother's legal parentage), *rev'd sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

¹⁸⁴ 393 U.S. 503.

¹⁸⁵ See, e.g., *id.* at 506 (protecting juveniles' right to wear arm bands to school in order to symbolize objection to U.S. involvement in Vietnam). Justice Fortas, for the Court, declared: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*

¹⁸⁶ See *infra* notes 355-409 and accompanying text (discussing court decisions under the Individualist Model).

¹⁸⁷ See *infra* notes 355-409 and accompanying text (recognizing children's autonomy under the Individualist Model).

¹⁸⁸ See *infra* notes 366-401 and accompanying text (noting cases that give standing to children in disputes with either parents or the state).

¹⁸⁹ See, e.g., *In re Winship*, 397 U.S. 358 (1970) (applying same burden of proof for juveniles in delinquency proceedings as is applied to adult criminal defendants); *In re Gault*, 387 U.S. 1, 29-31 (1967) (recognizing child's autonomy when applying due process guarantees to a juvenile in a delinquency proceeding).

¹⁹⁰ See, e.g., *Tinker*, 393 U.S. at 511 ("[Students] may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

tion can be interpreted to reenforce traditional notions of family autonomy.¹⁹¹ This is so insofar as the children involved in cases such as *Gault* and *Tinker* were not opposed by their parents but were supported by them.¹⁹²

Because the Supreme Court has not expressly and clearly applied the Individualist Model to cases involving disputes between children and their parents,¹⁹³ it can be argued that the Court, in redefining *children* as autonomous individuals, has hoped, though not necessarily with conscious intent, to preserve traditional understandings of *childhood* within the family context as it redefines children in other contexts. However, such an effort—to recognize children as complete human beings in some contexts (i.e., vis-à-vis schools or the state) but not in others (vis-à-vis their parents) would seem to be doomed to failure. Traditional understandings of the parent-child relationship depend on an understanding of childhood as a status, and of children as special beings who, because of their status, must obey and respect parental authority. Once children are recognized as autonomous individuals in one context, it is likely that that recognition will eventually be extended to the familial context as well.

Although the Supreme Court has not (yet) made that leap, several state courts have done so in cases in which children have asked the law to respect their desire for a change in custody,¹⁹⁴ or for termination of their mothers' or fathers' parental status.¹⁹⁵ In these cases,

¹⁹¹ See, e.g., *Gault*, 387 U.S. at 4-5 (demonstrating support for child by parent through attendance at hearing and subsequent suit for habeas corpus); *Tinker*, 393 U.S. at 504 (noting complaint filed on behalf of petitioners by their fathers).

¹⁹² See, e.g., John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 785 (1978) (describing *Tinker* as a case about "family rights"); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 646 (noting parental support for students in *Tinker* and other similar cases).

¹⁹³ To some extent, aspects of the model have found their own way into Supreme Court cases involving the character of the parent-child relationship. See *infra* notes 413-56 and accompanying text (analyzing cases involving minor girls' right to abortion). That is so insofar as aspects of the Individualist Model also inform the Transforming Traditional Model.

¹⁹⁴ For over a century, the law has entertained children's choices in custody decisions as between one parent and another or in cases of parental unfitness. Not until recently, however, have courts been willing to entertain children's initiating shifts in custody from a parent to some third party, including even the state. See *infra* Part II.B (considering cases in which state courts allowed children to bring suits requesting termination of parental role or status).

¹⁹⁵ See, e.g., *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *3 (Fla. Cir. Ct. Aug. 18, 1993) (granting standing to child to challenge stipulation regarding her legal parentage); *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992)

courts, generalizing the Individualist Model to the familial context, have recognized children as equal under the law—equal even when opposing their parents' status and authority.¹⁹⁶ Thus, here, the redefinition of children as autonomous individuals harmonizes with the erosion of the traditional nuclear family. The consequences of this redefinition for the culture have only begun to emerge.

A. The Traditional Model and the Transforming Traditional Model

The traditional nuclear family, forged in response to the ideals of the Enlightenment and reenforced as part of a wide set of social readjustments demanded by the Industrial Revolution, replaced a utilitarian understanding of the parent-child relationship with an affectionate understanding.¹⁹⁷ At least for a while, parental authority remained more or less intact, but its grounding had shifted. Whereas, during the colonial period, parental (more particularly, paternal) authority was assumed to follow inexorably from the very fact of paternity—from the status of pater—by the beginning of the nineteenth century society began to ground parental authority on the parents' role as provider, and to focus on the welfare of children, rather than on the fact of social hierarchy.¹⁹⁸ Nineteenth-century society preserved from an earlier age the notion that parents could and should direct their children's lives, but justified parental authority through the claim that strong parental control safeguarded the best interests of children.

1. The Traditional Model: *Meyer v. Nebraska*¹⁹⁹ and *Pierce v. Society of Sisters*²⁰⁰

The Supreme Court first expressly entertained, and in entertaining, applauded the traditional nuclear family in the 1920s, in two cases involving disputes between parents and the state about the

(entertaining action by child to terminate mother's parental rights), *rev'd sub nom.* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

¹⁹⁶ See, e.g., *Gregory K.*, 1992 WL 551488 (allowing 11-year-old boy standing to terminate his mother's parental rights).

¹⁹⁷ See DOLGIN, *supra* note 44, at 25-28 (describing the change in the perception of families over time).

¹⁹⁸ See Dolgin, *supra* note 82, at 1130-31 (noting the focus on "romanticized images of romping children enjoying the natural freedoms of childhood").

¹⁹⁹ 262 U.S. 390 (1923).

²⁰⁰ 268 U.S. 510 (1925).

limits of the state's right to control the content and scope of public schooling.²⁰¹ In *Meyer v. Nebraska* the Court declared unconstitutional a Nebraska statute that prohibited the use of any language other than English in elementary teaching.²⁰² Two years later, in *Pierce v. Society of Sisters*, the Court recognized the right of parents to send their school-age children to parochial or other private schools, thus declaring unconstitutional an Oregon statute that required compulsory public schooling.²⁰³ This statute, the Court asserted, "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."²⁰⁴

In both *Meyer* and *Pierce* the Court assumed a traditional view of families as units within which parents should enjoy almost complete control over their children, even vis-à-vis opposing claims by the state.²⁰⁵ Both cases have been widely applauded as early and impressive instances of the Court's willingness to defend religious and intellectual liberty and to protect children from state-imposed homogeneity of thought and spirit.²⁰⁶ Moreover, both cases are almost invariably cited by contemporary judges concerned with expanding the protection of family privacy against state intrusion.²⁰⁷ However, as Barbara Bennett Woodhouse has skillfully demonstrated, these cases carried another, equally essential, message about the proper

²⁰¹ See *id.* at 534-35 (involving the right of parents to send their children to private rather than public schools); *Meyer*, 262 U.S. at 401-03 (involving the right of schools to teach foreign languages and the right of parents to send children to such instructors).

²⁰² See *Meyer*, 262 U.S. at 400 (stating "the right of parents to engage [a teacher] to instruct their children, we think, [is] within the liberty of the [Fourteenth] Amendment").

²⁰³ See *Pierce*, 268 U.S. at 534-35 (condemning the Oregon statute under the rule in *Meyer*).

²⁰⁴ *Id.*

²⁰⁵ See *Meyer*, 262 U.S. at 399-400 (holding that the Due Process Clause protects the freedom of individuals to "establish a home and bring up children . . . according to the dictates of his own conscience"); *Pierce*, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

²⁰⁶ See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 996-98 (1992) (discussing the protection extended to the families in *Meyer* and *Pierce*).

²⁰⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (citing *Meyer* and *Pierce* as providing personal privacy in family relationships); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (explaining that state's interests must bow to the interests of parents in educating and raising their children); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (discussing the right of parents, extended in *Meyer* and *Pierce*, to educate their children as they please).

meaning and scope of the family and about the essence of the parent-child relationship.²⁰⁸

The *Meyer* opinion, which provided ample precedent for the Court's decision in *Pierce* two years later, stressed the Fourteenth Amendment "liberty" interests of teachers, such as Meyer, who made their living teaching in foreign languages²⁰⁹ as well as the "fundamental rights" of those who spoke English as a second language, or not at all.²¹⁰ Thus, the Court found the statute at issue in the case an interference with "the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."²¹¹ Underlying the Court's language suggesting its tolerant recognition of heterogeneity, and its concern with limiting state usurpations of parental authority, and essential to the Court's conclusions in *Meyer*, was a particular understanding of the proper relationship between parents, children, and the state.²¹² In delineating that understanding, Justice McReynolds, writing for the Court, invoked as a counterexample the communistic family presented by Plato in the *Republic*.²¹³ Justice McReynolds wrote:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

²⁰⁸ See Woodhouse, *supra* note 206, at 997 (discussing the conservative view of the family expressed in *Meyer* and *Pierce*).

²⁰⁹ See *Meyer*, 262 U.S. at 399 (explaining that the Fourteenth Amendment protects the freedom to engage in any "of the common occupations of life").

²¹⁰ See *id.* at 401-02 (explaining that the "Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue").

²¹¹ *Id.* at 401.

²¹² See Woodhouse, *supra* note 206, at 997 (discussing the *Meyer* Court's traditional conception of the family and the parent-child relationship).

²¹³ See *Meyer*, 262 U.S. at 401.

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians.²¹⁴

Such families, in such a world, concluded Justice McReynolds, even though impressive to "men of great genius," contrasted absolutely with the American ideal.²¹⁵ In consequence, the Court, in acting to preclude a communistic transformation of the American family, had no choice.²¹⁶ Clearly, no state legislature "could impose such restrictions" as those described by Plato—presumably restrictions seen to resemble those at issue in *Meyer*—"without doing violence to both letter and spirit of the Constitution."²¹⁷

Similarly, in *Pierce*, the Court grounded its decision to declare unconstitutional Oregon's statute making public schooling compulsory on the property interests of the appellee schools in their own continued existence,²¹⁸ as well as on the liberty interests "of parents and guardians to direct the upbringing and education of children under their control."²¹⁹ In the latter regard, the Court declared:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²²⁰

Woodhouse argues convincingly that the commanding metaphor in *Meyer*, and by implication in *Pierce*, is the specter of the communistic world suggested by the Court's reference to Plato's ideal commonwealth, a world in which parents lose control of their children's upbringing to the state.²²¹ In sharp contrast with that essentially

²¹⁴ *Id.* at 401-02 (quoting Plato's *Republic*).

²¹⁵ *Id.* at 402.

²¹⁶ *See id.* (stating that to hold otherwise would be to offend the "letter and spirit of the Constitution").

²¹⁷ *Id.*

²¹⁸ *See Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1925) (holding that the Fourteenth Amendment protects those who run private schools from "arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property").

²¹⁹ *Id.* at 534-35.

²²⁰ *Id.* at 535.

²²¹ *See Woodhouse, supra* note 206, at 1089 (describing the specter of communal families as "[t]he dramatic focal point of the opinion").

un-American world is the one protected by the Court—a world in which parents are free to direct the socialization of their children, and in which parents, though not, it would seem, their children, enjoy the Constitution's protection in choosing to deviate from state assessments of how best to achieve that end.²²²

Both *Meyer* and *Pierce* rejected state control of children's education in favor of parental control.²²³ Both decisions were premised on a deep-seated fear of state control and on a presumption that parents enjoy a natural right of control over their children.²²⁴ Woodhouse has described the Court's understanding of this right to represent "the dark side of *Meyer* and *Pierce*," i.e., "the right to control another human being."²²⁵ She explains: "Stamped on the reverse side of the coinage of family privacy and parental rights are the child's voicelessness, objectification, and isolation from the community."²²⁶

2. The Transforming Traditional Model: *Parham v. J.R.*,²²⁷ *Wisconsin v. Yoder*,²²⁸ and *Bellotti v. Baird (Bellotti II)*²²⁹

About a half-century after the Court decided *Meyer* and *Pierce*, and several years after it declared in *Gault* that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"²³⁰ the Court, in three cases decided in the 1970s, reaffirmed, though far from completely and with significant hesitation, the traditional model of the parent-child relationship that undergirds *Meyer* and *Pierce*.²³¹ In two of these cases, the Court recognized, although not

²²² See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (noting the liberty of parents to engage an instructor to teach a foreign language to their children).

²²³ See Woodhouse, *supra* note 206, at 1041-42 (explaining that *Meyer* and *Pierce* confirmed the right of the parent to control the child even in the face of state powers).

²²⁴ See *Meyer*, 262 U.S. at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."); *Pierce*, 268 U.S. at 534-35 (noting that in regards to the rights of parents, children are under their parents' control).

²²⁵ Woodhouse, *supra* note 206, at 1000-01.

²²⁶ *Id.* at 1001 (footnote omitted).

²²⁷ 442 U.S. 584 (1979).

²²⁸ 406 U.S. 205 (1972).

²²⁹ 443 U.S. 622 (1979).

²³⁰ *In re Gault*, 387 U.S. 1, 13 (1967).

²³¹ See *Bellotti II*, 443 U.S. at 637-39 (recognizing "the guiding role of parents in the upbringing of their children"); *Parham*, 442 U.S. at 602 (recognizing parental right and duty to "prepare [their children] for additional obligations"); *Yoder*, 406 U.S. at 212-14 (citing *Pierce*

expressly, the dilemma posed for traditional understandings of the parent-child relationship by the transformation (whether generally or in specific cases) of the traditional nuclear family.²³² In large part, the model of the parent-child relationship articulated by the Court in the 1970s—although more confused and ambivalent than its 1920s counterpart—continues to inform present-day constitutional jurisprudence in Supreme Court decisions implicating the meaning and dimensions of the parent-child relationship.²³³

Two of the cases at issue, *Bellotti II* and *Parham* arose as disputes between children and their parents about the limits of parental authority in decisions involving children's health and welfare.²³⁴ The third, *Yoder*, was occasioned, in contrast, by parental disregard of a state statute.²³⁵ *Yoder* therefore directly implicated the scope of parental power vis-à-vis the state rather than vis-à-vis children.²³⁶ The case adds a significant dimension to our understanding of the Court's assumptions about parents and children, and therefore cannot be ignored in an analysis of the parameters of those assumptions.

a. The Place of Children in a Dispute Between Parents and the State

Of the three cases, two (*Yoder* and *Parham*) are closer in their explicit assumptions to the Traditional Model than to the Individualist Model, and one (*Bellotti II*) is closer to the Individualist Model in

and *Meyer*, among other cases, to support parental discretion in the education and religion of their children).

²³² See *Bellotti II*, 443 U.S. at 638 (noting, without explaining, competing theories about the most effective way to educate children); *Parham*, 442 U.S. at 602-03 (noting that sometimes parents act against the best interests of their children).

²³³ See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (stating "the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 38-39 (1981) (Blackmun, J., dissenting) (stating "the Court has accorded a high degree of constitutional respect to a natural parent's interest . . . in controlling the details of the child's upbringing").

²³⁴ See *Bellotti II*, 443 U.S. at 625 (concerning constitutionality of a Massachusetts statute requiring that a pregnant minor under the age of 18 seeking an abortion obtain parental consent); *Parham*, 442 U.S. at 588 (concerning action by children in Georgia state mental hospital for a declaratory judgment of unconstitutionality of a Georgia statute permitting a parent to voluntarily commit his or her minor child to a mental hospital).

²³⁵ See *Yoder*, 406 U.S. at 207 (explaining that the issue before the Court was the respondent's refusal to comply with Wisconsin's compulsory school attendance laws).

²³⁶ See *id.* at 214 (balancing a State's interest in universal education against "the traditional interest of parents with respect to the religious upbringing of their children").

certain important regards. Each case, however, acknowledges—though sometimes indirectly or, as with *Yoder*, in a dissenting opinion—the contradictory assumptions that inform the other cases.²³⁷ As a group, therefore, these three cases illustrate the underlying uncertainties and contradictions that undergird the Transforming Traditional Model's understanding of childhood and of the parent-child relationship.

On one reading, *Yoder* reflects an understanding of family and of the parent-child relationship in almost complete harmony with that depicted in *Meyer* and *Pierce*.²³⁸ However, implicit in the way the majority framed its decision, and explicit in Justice Douglas's dissent, is a serious challenge to important aspects of the traditional view of childhood, and of parental authority.

In *Yoder* the Court invalidated the conviction of Amish parents for violating a Wisconsin compulsory school-attendance law.²³⁹ The statute required attendance in school by any child between the ages of seven and sixteen who had not graduated from high school.²⁴⁰ The Amish parents, believing that attendance in high school was contrary to their way of life in that it exposed their children to "worldly influences," refused to send their children to school after eighth grade.²⁴¹

The Court, grounding its decision on some combination of the First Amendment's free exercise right and on a right of parents, located in the Fourteenth Amendment, to raise their children as they deem appropriate, held the state compulsory school-attendance law unconstitutional, at least in application to Amish high school chil-

²³⁷ See *Bellotti II*, 443 U.S. at 637-38 (acknowledging a child's entitlement to constitutional protection, but also the vulnerability of a child, and thus the duty of parents to prepare the child for "additional obligations," including the "inculcation of moral standards, religious beliefs, and elements of good citizenship" (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)); *Parham*, 442 U.S. 600-02 (noting that the child has a substantial liberty interest, but that parents have the high duty to "recognize and prepare [their children] for additional obligations" (quoting *Pierce*, 268 U.S. at 535 (alteration in original))); *Yoder*, 406 U.S. at 243 (Douglas, J., dissenting in part) (noting the conflict between the recognition of parents' power over their children's education and that of the recognition of children's rights under the Constitution as "persons").

²³⁸ See *supra* notes 201-26 and accompanying text (discussing the views on family relationships expressed in *Meyer* and *Pierce*).

²³⁹ See *Yoder*, 406 U.S. at 234.

²⁴⁰ See *id.* at 207 n.2 (setting forth the Wisconsin statute in pertinent part). Certain exceptions to the statute existed but were inapplicable to the Amish children involved in the case. See *id.*

²⁴¹ *Id.* at 218.

dren.²⁴² Relying expressly on *Pierce*, the Court extolled the "high place in our society" of "the values of parental direction of the religious upbringing and education of their children in their early and formative years."²⁴³ And later, the Court reemphasized the point, writing:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters*²⁴⁴

In fact, however, Justice Burger's opinion for the majority did not recognize a general parental right to refuse to comply with state legislative and school board decisions regarding compulsory schooling.²⁴⁵ Rather, the Court's holding rested on the particular (arguably unique) characteristics of the Amish community.²⁴⁶ Thus, unlike *Pierce* which gave all parents the constitutional right to have their children educated in parochial or other private schools, *Yoder* established the right of Amish parents to end their children's formal education after the elementary years.²⁴⁷ That decision seems to have been predicated on a particular view of the Amish community at least as much as on a more general right of parents to make choices about their children's schooling.²⁴⁸ The Amish are described in *Yoder* as almost quintessential, though certainly not mainstream, Americans.²⁴⁹ The Court wrote:

[Amish] view secondary school education as an impermissible exposure of their children to a 'worldly' influence in con-

²⁴² See *id.* at 234 (finding that the religious objections of the Amish outweighed the state's interest in compulsory education).

²⁴³ *Id.* at 213-14.

²⁴⁴ *Id.* at 232.

²⁴⁵ See *id.* at 221 (recognizing the Amish case as an exception to the general compliance required).

²⁴⁶ See *id.* at 222-29 (discussing the particular characteristics of the Amish community).

²⁴⁷ Compare *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding "the liberty of parents . . . to direct the upbringing and education of children under their control" to be "guaranteed by the Constitution"), with *Yoder*, 406 U.S. at 234 (focusing on the religious objections of the Amish rather than on the rights of parents in general).

²⁴⁸ See *Yoder*, 406 U.S. at 209-12, 222-25 (setting forth the specific characteristics and views of the Amish people which supported their religious objection to compulsory education after the eighth grade).

²⁴⁹ See *id.* at 225-26 (noting Amish communities reflect the "virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of . . . a democratic society").

flict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.²⁵⁰

In the Court's view, the Amish community's rejection of worldly values, including those of science and intellect, rendered them marginal to the American enterprise from a sociological, but certainly not from a moral, perspective.²⁵¹ The Court declared:

Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.²⁵²

Thus, even the majority opinion in *Yoder*, in spite of its sweeping language approving extensive parental authority, can be read to reaffirm the wide scope given parental authority in the decision only in a very limited context—that of a religious community such as the Amish—perhaps the Amish uniquely—that the Court could describe as exemplifying the essential moral values of the nation's founders.²⁵³

In contrast to the majority's dependence on traditional understandings of the parent-child relationship, Justice Douglas's dissent expressly challenges the entire edifice, voiced in *Meyer* and *Pierce*, for assessing parental authority and defining children.²⁵⁴ Justice Douglas dissented from the opinion of the Court insofar as it ig-

²⁵⁰ *Id.* at 211.

²⁵¹ *See id.* at 224-25 (describing Amish qualities as those of "reliability, self-reliance, and dedication to work").

²⁵² *Id.* at 225-26 (footnote omitted).

²⁵³ *See id.* at 246-49 (Douglas, J., dissenting) (criticizing the majority's reliance on the "law and order" record of this Amish group of people" as irrelevant).

²⁵⁴ *See id.* at 243-46 (stating that cases subsequent to *Meyer* and *Pierce* have held children themselves have rights under the constitution, that they should be given opportunity to be heard, and that wishes of parents should not be followed blindly).

nored the voice of the children.²⁵⁵ For him, it was not the dispute between the parents and the state that was central, but the possibility of a dispute between the children and the state.²⁵⁶ The non-existence of that dispute, he declared, had not been adequately demonstrated.²⁵⁷

For Justice Douglas the personhood of the Amish children affected by the Court's decision was at stake.²⁵⁸ Those children, he asserted, having "identif[ied] with and assume[d] adult roles from early childhood," were fully competent to entertain the "moral and intellectual" questions at issue in the case.²⁵⁹ Citing *Gault* and *Tinker* among other cases,²⁶⁰ Justice Douglas described the Court's decision as imperiling "the future of the student, not the future of the parents."²⁶¹ For Justice Douglas, the respect, demanded by the Constitution, for the individuality of the children involved necessitated their participation in decision making about their education.²⁶² This conclusion contrasts absolutely with the traditional model of the parent-child relationship delineated in *Pierce* and *Meyer*, and relied on by the Court's majority in *Yoder*.²⁶³ Even today, almost three decades after the Court decided *Yoder*, Justice Douglas's understanding of children and of the parent-child relationship in that case contrasts markedly with almost all Supreme Court jurisprudence involving conflicts between parents and the

²⁵⁵ See *id.* at 241-46 (Douglas, J., dissenting) ("Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."). One of the Amish children whose parents were respondents in *Yoder* had testified on cross-examination that she was not attending high school as a result of her own religious convictions and for no other reason. See *id.* at 237 (Stewart, J., concurring) (quoting testimony of Frieda Yoder). With regard to that child's parents, Justice Douglas concurred in the Court's holding. See *id.* at 243 (Douglas, J., dissenting) (joining in the judgment of the Court as to Jonas Yoder).

²⁵⁶ See *id.* at 242 (opining that if a mature Amish student wanted to go to high school, the state "may well be able to override the parents' religiously motivated objections").

²⁵⁷ See *id.* at 241-43 (rejecting the argument that the issue before the Court involved only a parent's religious freedom vis-à-vis the state's authority, not the right of the Amish children to religious freedom).

²⁵⁸ See *id.* (noting it is the religious views of the children, rather than their parents, that are relevant).

²⁵⁹ *Id.* at 245-46 n.3.

²⁶⁰ See *id.* at 243-44.

²⁶¹ *Id.* at 245.

²⁶² See *id.* at 243-46 (arguing that children are "persons" and have interests protected by the Constitution; thus they should be heard on the issue of their education).

²⁶³ See *id.* at 213-14 (setting the rule regarding the balancing between state powers and parental rights on the education issue *without* regard to the rights of the children).

state.²⁶⁴ Even, however, in comparison with other cases involving conflicts between children and parents, cases in which the Court has moved, though slowly, toward a modification of the traditional understandings of the parent-child relationship found in *Meyer* and *Pierce*, Justice Douglas's recognition of children's autonomy is unusual.²⁶⁵

Especially when read together, *Parham* and *Bellotti II* suggest the continuing allure of the model encapsulated in *Meyer* and *Pierce*, and a significant modification in that model.²⁶⁶ Yet, these two cases—taken separately or together—do not suggest a reconceptualization of the parent-child relationship as absolute as that presented by Justice Douglas in *Yoder*.²⁶⁷

b. Disputes Between Parents and Children

Decided by the same Court in the same year, *Parham* and *Bellotti II* seem to present irreconcilable visions of childhood and of the scope of parental authority.²⁶⁸ The conflict between the two cases is obvious when they are compared.²⁶⁹ More important, the conflict inheres in each opinion, viewed alone. Although, for instance, *Parham* seems to grant great scope to parental authority, while *Bellotti II*, in contrast, limits that authority, each case recognizes—even if more explicitly in *Bellotti II* than in *Parham*—the need for the state to limit and review parental authority in decisions about a child's health and welfare.²⁷⁰ Similarly, although *Bellotti II* seems

²⁶⁴ Compare *supra* notes 254-62 (detailing Justice Douglas's dissent in *Yoder*), with *Pierce v. Society of Sisters*, 268 U.S. 510, 534-36 (1925) (discussing the conflict between the state's interest and the parent's right to control the child without discussing the child's interest at all), and *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that the parents have a right to guide their child's education). See also *supra* notes 201-26 and accompanying text (discussing the Traditional Model as exemplified by *Meyer* and *Pierce*).

²⁶⁵ See, e.g., *Bellotti II*, 443 U.S. 622 (1979) (granting a limited constitutional protection to adolescent girls from parental consent requirement for abortion); see also *infra* notes 311-33 and accompanying text (discussing the *Bellotti II* case).

²⁶⁶ See *infra* notes 349-54 and accompanying text (discussing the non-traditional message contained in the *Parham* and *Bellotti II* opinions that children do have constitutional rights to make certain choices).

²⁶⁷ See *infra* notes 268-354 and accompanying text (discussing *Parham* and *Bellotti II*).

²⁶⁸ See *infra* notes 268-354 and accompanying text (discussing *Parham* and *Bellotti II*).

²⁶⁹ See *infra* notes 346-54 and accompanying text (comparing the *Bellotti II* and *Parham* cases).

²⁷⁰ See *infra* notes 346-54 and accompanying text (discussing similarities and differences in *Bellotti II* and *Parham* with regards to parental authority and children's rights).

more ready than *Parham* to question traditional understandings of childhood, each decision is ambivalent about the meaning of childhood, and about the contexts in which, and the extent to which, the Constitution regards children as autonomous individuals.²⁷¹

In *Parham* the Court approved a Georgia statute²⁷² permitting parents to effect the “voluntary commitment” of their children to state mental hospitals.²⁷³ Institutionalized children challenged the statute in a class action as a violation of the Due Process Clause of the Fourteenth Amendment.²⁷⁴ While recognizing a child’s “substantial liberty interest in not being confined unnecessarily for medical treatment,”²⁷⁵ the Court found for the State—and by implication for the parents who had had their children committed to Georgia mental hospitals.²⁷⁶

The statute at issue in *Parham* allowed a “parent or guardian” to have his or her child institutionalized temporarily for “observation and diagnosis.”²⁷⁷ If, after that time, the hospital’s superintendent found the child “suitable for treatment,”²⁷⁸ the child could be institutionalized for an indefinite period.²⁷⁹ However, the hospital superintendent was required to discharge any child found no longer mentally ill or in need of therapy.²⁸⁰ In approving the state’s commitment procedure, the Court overturned the District Court’s conclusion that the Constitution required review of each child’s com-

²⁷¹ See *infra* notes 308-54 (discussing the Court’s analysis of children’s rights and status in *Bellotti II* and *Parham*).

²⁷² GA. CODE ANN. §§ 88-503.1-503.2 (1975) (current version at GA. CODE ANN. §§ 37-3-20, 37-3-21 (1995)). At the time of *Parham v. J.R.*, 442 U.S. 584 (1979), § 88-503.1 provided:

The superintendent of any facility may receive for observation and diagnosis . . . any individual under 18 years of age for whom such application is made by his parent or guardian If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law.

Parham, 442 U.S. at 588 n.3 (quoting GA. CODE ANN. § 88-503.1 (1975)) (omissions in original).

²⁷³ *Parham*, 442 U.S. at 596 (emphasis added).

²⁷⁴ See *id.* at 587-88 (explaining the claims made by the children).

²⁷⁵ *Id.* at 600.

²⁷⁶ See *id.* at 620-21.

²⁷⁷ *Id.* at 590-91 (quoting the Georgia statute); *supra* note 272 (setting forth text of the Georgia statute for voluntary parental admission of children as mental illness patients).

²⁷⁸ *Parham*, 442 U.S. at 588 n.3 (quoting GA. CODE ANN. § 88-503.1 (1975)).

²⁷⁹ See *id.* (citing GA. CODE ANN. § 88-503.1 (1975)).

²⁸⁰ See *id.* (citing GA. CODE ANN. § 88-503.2 (1975)).

mitment decision in an adversarial hearing before an impartial tribunal.²⁸¹

In support of its determination that the "substantial liberty interests" of children were met by Georgia's ordained procedures, the Court reviewed, and applauded, traditional understandings of the parent-child relationship.²⁸² The Court presumed those understandings to have long protected, and to continue to protect, children within the domestic context.²⁸³ Thus, the Court declared that the "child's interest in not being committed" could safely be conflated with "the parents' interest in and obligation for the welfare and health of the child."²⁸⁴ Moreover, the Court declared, the law has "historically . . . recognized that natural bonds of affection lead parents to act in the best interests of their children."²⁸⁵ Then, by implication and directly, the Court reiterated the message of its earlier decisions in *Meyer* and *Pierce*, proclaiming that parental authority should not be limited by contrary conclusions of the state or of the children involved.²⁸⁶ "The statist notion," the Court wrote, "that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."²⁸⁷ Then, referring expressly to *Meyer* and *Pierce*, the Court declared irrelevant the choices of children contrary to those of their parents:

We cannot assume that the result in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.²⁸⁸

²⁸¹ See *id.* at 597, 606-07 (finding such case-by-case review by an impartial tribunal to be beyond the requirements of due process).

²⁸² *Id.* at 600.

²⁸³ See *id.* at 619 ("[T]he concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." (quoting *Addington v. Texas*, 441 U.S. 418, 428-29 (1979))).

²⁸⁴ *Id.* at 600.

²⁸⁵ *Id.* at 602 (citations omitted).

²⁸⁶ See *id.* at 602-03 (stating that parents, as opposed to the state, have broad authority over their children).

²⁸⁷ *Id.* at 603.

²⁸⁸ *Id.* at 603-04 (citations omitted).

Thus the Court apparently premised the decision in *Parham* on its conclusion that "parents act in the best interests of their child."²⁸⁹

In fact, however, the Court premised its decision at least as much on a separate set of conclusions about the character of childhood as on assumptions about the parent-child bond, including the beneficence of parental direction.²⁹⁰ In *Parham*, the Court deemed children incapable "even in adolescence" of "mak[ing] sound judgments concerning many decisions, including their need for medical care or treatment."²⁹¹ The fragility of the Court's express reliance on the natural bonds that connect parents to their children is indicated rather startlingly by the final section of the opinion in which the Court considered the constitutional dimensions of commitments initiated by state officials for children defined as wards of the state.²⁹² Presumably, in such cases, the Court acknowledged, the state could not be expected to evince as high a level of concern for its wards as do "natural parents" for their children.²⁹³ Yet, in fact, the Court found no determinative difference between the two situations. Justice Burger wrote:

For a ward of the state, there may well be no adult who knows him thoroughly and who cares for him deeply. Unlike with natural parents where there is a presumed natural affection to guide their action, the presumption that the state will protect a child's general welfare stems from a specific state statute. Contrary to the suggestion of the dissent, however, we cannot assume that when the State of Georgia has custody of a child it acts so differently from a natural parent in seeking medical assistance for the child.²⁹⁴

Thus, the Court's glowing characterizations of the traditional family in general and of parental bonding in particular notwithstanding, its conclusions in *Parham* are not fully explained by the assumption that parents will almost inevitably care well for their children and should therefore make crucial decisions for those chil-

²⁸⁹ *Id.* at 604.

²⁹⁰ *See id.* at 603 (explaining the child's need to have a mature, decisionmaking parent).

²⁹¹ *Id.* The Court concludes expressly from the quoted language that as a result of children's incompetence, "[p]arents can and must make those judgments." *Id.* In fact, however, as the discussion following this note in the text indicates, that conclusion tells only part of the story suggested by the Court's decision.

²⁹² *See id.* at 617-19 (discussing the state's application for a ward of the state).

²⁹³ *Id.* at 619.

²⁹⁴ *Id.* at 618 (citations omitted).

dren despite contrary choices by the children.²⁹⁵ In fact, the statute at issue in *Parham*, presuming, as did the Court, that children should not be considered competent to gainsay a parent's decision to initiate commitment proceedings, granted a variety of adults, including parents, state officials, and doctors, the authority to commit children "voluntarily" to state mental institutions.²⁹⁶

Thus, in *Parham*, the Court, though clearly concerned to reenforce traditional understandings of the parent-child relationship, did not rest its decision conclusively on those understandings.²⁹⁷ Rather, the Court justified the scope of parental authority through reference to the limitations childhood imposes on personhood.²⁹⁸ That reference does not, however, justify the free exercise of parental authority. Rather, it justifies the exercise of *adult* authority. So, in a remarkable circle, the Court, having defined the parent-child relationship as a unique product of "natural" bonding,²⁹⁹ proceeded to justify the generalization to various adults of authority over children by comparing the treatment these adults (i.e., state officials) afford children favorably to that afforded by parents.³⁰⁰

Parham contains at least two distinct messages about children, each of which harmonizes with the Court's holding, but about neither of which the Court seems to have been completely certain.

²⁹⁵ It is difficult to tell from *Parham* the extent to which the Court's decision rested on a sense that children whose parents chose to place them in mental hospitals would likely be particularly incompetent to make their own life decisions. To the extent that is so, however, one might argue equally that in just such a situation—one in which the parent-child relationship has deteriorated so seriously that the parents desire to institutionalize their child—it is especially important that the child's voice be heard in order to protect that child's liberty interest.

²⁹⁶ *Parham*, 442 U.S. at 588 n.3 (citing GA. CODE ANN. § 88-503.1 (1975), as permitting voluntary admission by application of a "parent or guardian").

²⁹⁷ It is hard to know the ways in which the facts of the case influenced the Court's understanding of the children involved and of the scope of parental authority. Children suffering from mental illness might be less capable than most children of making mature decisions. However, a central challenge—perhaps more implicit than express—in *Parham* was to the diagnoses of the children involved in the case as mentally ill. In addition, the assumption that parents almost inevitably act in their children's best interests might seem especially fragile in the case of parents attempting to commit their children to mental institutions.

²⁹⁸ See *Parham*, 442 U.S. at 603 (noting that the inability of children and adolescents to make "sound judgments" in connection with medical treatments requires parents to make such decisions for them).

²⁹⁹ See *id.* at 602 (commenting that such bonds "lead parents to act in the best interests of their children").

³⁰⁰ See *id.* at 618 (declaring that "[c]ontrary to the suggestion of the dissent, . . . we cannot assume that when the State of Georgia has custody of a child it acts so differently from a natural parent in seeking medical assistance for the child").

First, children are defined through their status within families.³⁰¹ As such, they are defined vis-à-vis their parents; in this regard, the scope of parental authority is grounded in, and justified by, the inexorability of the parent-child bond.³⁰² That message comports with the conclusion that parents should be authorized to institutionalize their needy children. However, the Court's readiness to liken state officials to parents in their ability to make choices for children suggests that the message about the strength and significance of the parent-child bond is as much rhetoric as historical or moral truth.³⁰³ Second, children are defined generally as unable to "make sound judgments" about many matters.³⁰⁴ In consequence, it becomes necessary, as a practical and moral matter, that adults not only be permitted, but obligated, to make those judgments for children.³⁰⁵ In this regard, again, it matters little whether children's choices be subsumed by those of parents or by those of other adults.

However, at the start of its jurisprudential discussion, the Court, citing *Gault*, recognizes a child's "substantial liberty interest" in being free from unnecessary institutionalization.³⁰⁶ Although *Gault* itself recognized the immaturity of childhood, the attribution of a liberty interest to children suggests their individuality and, in consequence, the erosion of the distance that once firmly separated the world of childhood from the world of adults.³⁰⁷

In sum, in *Parham*, a particular understanding of childhood serves to justify the preservation of parental authority at least as much as the purported character and origins of parental authority justify the treatment of children.³⁰⁸ However, within the decision itself, both the understanding of childhood and the understanding of the parent-child bond are challenged by the hint of alternative un-

³⁰¹ See *id.* at 600 (noting the child's "interest is inextricably linked with the parents' interest").

³⁰² See *id.* at 602 (noting the historical "concepts of the family as a unit" and parents' "broad . . . authority over minor children").

³⁰³ See *id.* at 617-18 (holding the situation involving a state requesting commitment is not so different from that involving the same request from a natural parent that it requires a different procedure).

³⁰⁴ *Id.* at 603.

³⁰⁵ See *id.* (stating "[p]arents can and must make those judgments" as to medical care and treatment of their children).

³⁰⁶ *Id.* at 600.

³⁰⁷ See *supra* text accompanying note 130 (discussing the Supreme Court's movement toward recognizing children as autonomous beings in certain situations).

³⁰⁸ See *Parham*, 442 U.S. at 602-04; *supra* notes 288-96 and accompanying text (discussing the Court's concept of the child as one not yet able to make sound decisions, thus necessitating the parents' power to do so).

derstandings.³⁰⁹ Moreover, insofar as the Court's understanding of childhood and of the parent-child relationship depends on its understanding of the other, shifts in either understanding will inevitably affect the other. Thus, *Parham* begins to suggest the vulnerability of traditional understandings of childhood, and of the parent-child relationship.³¹⁰

That vulnerability is demonstrated far more forcibly through examination of *Bellotti II*, and through comparison of *Bellotti II* with *Parham*.³¹¹ *Bellotti II* contains a series of conflicting messages about children and parents. The decision grants constitutional protection to children (adolescent girls) from parental involvement in an important life decision.³¹² However, *Bellotti II* frees girls from parental authority only to require that their choices be approved by state judges.³¹³ Moreover, the decision defines adolescent girls as vulnerable and immature, but demands startling maturity of pregnant adolescents anxious to end their pregnancies, in asking them, at a time likely to be filled with emotional turmoil, to petition courts, and to respond sensibly to judges' intimate questions about their lives and choices.³¹⁴ The decision in *Bellotti II* preserves traditional understandings of children as incapable of making their own choices about important matters and as needful of direction, but challenges those understandings by compelling the children involved to respond with remarkable maturity.³¹⁵ Thus, *Bellotti II*

³⁰⁹ See *Parham*, 442 U.S. at 602-04 (reaffirming the presumption that "parents act in the best interest of their child," while stating that, in voluntary commitment situations, "parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized").

³¹⁰ See *id.* at 604 (explaining that parents are not entitled to a dominant role as decision makers vis-à-vis their children, but merely a substantial one).

³¹¹ Compare *Parham*, 442 U.S. at 602-04 (retaining parental and state authority to commit children to state mental hospitals due to immaturity and inability of children to make "sound judgments"), with *Bellotti II*, 443 U.S. 622, 643-44, 647 (1979) (requiring that state establish "alternative procedure" to determine adolescent girls' maturity and ability to make an informed decision concerning an abortion in lieu of parental consent).

³¹² See *Bellotti II*, 443 U.S. at 643 (holding a state must provide an alternative procedure to parental consent in minor's abortion, if parental consent is required).

³¹³ See *id.* (requiring a judicial proceeding where the minor must show the court she is mature enough to choose an abortion, or that an abortion is in her best interest without regard to her level of maturity).

³¹⁴ See *id.* at 655 (Stevens, J., concurring) (noting burden on adolescent girls to disclose "personal matters" during "judicial proceedings" is possibly greater than actually obtaining parental consent).

³¹⁵ Compare *id.* at 635 (noting "minors . . . lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"), with *id.* at 643-44

echoes the understanding of children (though not of the parent-child relationship) in *Meyer* and *Pierce*, while following *Gault* in the suggestion that at least for some purposes children be recognized as autonomous.³¹⁶

Bellotti II was decided six years after *Roe v. Wade*³¹⁷ gave limited constitutional protection to a woman's right to have an abortion.³¹⁸ Three years after *Roe*, in *Planned Parenthood v. Danforth*,³¹⁹ the Court declared that the right extended in *Roe* does not appear "magically only when one attains the state-defined age of majority[;] [m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."³²⁰ In consequence, the Court concluded that, in spite of an interest in "safeguarding . . . the family unit and . . . parental authority," the state lacked the authority under the Constitution to gainsay a minor's decision to terminate her pregnancy through an absolute veto by a parent or guardian.³²¹ *Danforth* seems to have created as many questions as it answered. The decision of the five-person majority suggested that some pregnant girls might not be mature enough to consent effectively to an abortion, thereby indicating that a more restrictive statute than that at issue in *Danforth* might prove constitutional.³²²

Bellotti II arose three years later as a class action, asking the courts to invalidate a Massachusetts statute that required a minor girl (defined as an unmarried girl under eighteen) anxious to terminate a pregnancy to obtain parental consent.³²³ Only if that consent was sought and denied was the girl permitted to seek judicial consent "for good cause shown."³²⁴ In a plurality opinion, the Court, premising its decision on the unique quality of the abortion deci-

(allowing a minor to show she is mature enough or the abortion would be in her best interest, as an alternative to parental consent).

³¹⁶ See *id.* at 634-35 (acknowledging that while many of the Supreme Court's decisions have given children full constitutional protections, there is no assumption that the "constitutional rights of children are indistinguishable from those of adults").

³¹⁷ 410 U.S. 113 (1973).

³¹⁸ *Id.* at 164-66.

³¹⁹ 428 U.S. 52 (1976).

³²⁰ *Id.* at 74.

³²¹ *Id.* at 75.

³²² See *id.* (emphasizing that by invalidating the statute the Court "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy").

³²³ See *Bellotti II*, 443 U.S. 622, 625-26 (1979) (seeking to declare Mass. Gen. Laws ch. 112, § 12S unconstitutional).

³²⁴ *Id.* at 625 (quoting the challenged statute).

sion,³²⁵ declared the statute unconstitutional.³²⁶ The Court then described the sort of parental consent statute that might be upheld. Such a statute, the Court explained, would provide a judicial bypass option that would not require a girl to seek parental consent before seeking judicial consent to terminate a pregnancy.³²⁷ The Court concluded:

[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.³²⁸

Thus, the decision in *Bellotti II*, in contrast with that in *Parham*, focused on protecting the choices of the children involved against the contrary choices of their parents.³²⁹ Moreover, in *Bellotti II* the Court suggested the sort of judicial review of a child's decision opposing that of her parents that was denied the class appellees in *Parham*.³³⁰ In short, the recognized constitutional right in *Bellotti II* belonged to the girl far more than to her parents, while the right recognized in *Parham* was characterized as belonging in concert to parent and child.³³¹ In this regard, the two cases seem strongly at odds. *Parham* expressly extols the parent-child bond, and approves the exercise of enormous parental authority in the institutionaliza-

³²⁵ See *id.* at 642-43 (stating that a state must act with sensitivity when legislating for parental involvement in the abortion decision).

³²⁶ See *id.* at 651.

³²⁷ See *id.* at 647 (recognizing that "young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court").

³²⁸ *Id.* at 643-44.

³²⁹ See *id.*

³³⁰ See *Parham v. J.R.*, 442 U.S. 584, 598-604 (1979) (noting that absent any findings of neglect or abuse, parents retain a "dominant" role in decisionmaking without judicial review of such decision).

³³¹ Compare *Bellotti II*, 443 U.S. at 642 ("requir[ing] a State to act with particular sensitivity when it legislates to foster parental involvement in this matter"), with *Parham*, 442 U.S. at 600 (describing a child's interest as "inextricably linked with the parents' interest in and obligation for the welfare and health of the child").

tion of a child.³³² *Bellotti II*, in contrast, stresses the importance of a girl's independence from parental authority in seeking to abort a pregnancy.³³³

However, in *Bellotti II*, as in *Parham*, the Court premised its conclusions on a lengthy consideration of the character of childhood.³³⁴ And although the holdings in the two cases contrast, the Court's description and assessment of childhood in *Bellotti II* echoes that in *Parham*.³³⁵ Indeed, the rhetoric about childhood (though not the holding) in *Bellotti II* would seem to differ from that in *Parham*, if at all, only in attributing more importance to potential liberty interests of the children involved.³³⁶ In *Bellotti II* the Court delimited "three reasons" that justified the law's differentiating between the constitutional rights of children and those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."³³⁷ The state, the Court explained, may "adjust its legal system to account for children's vulnerability" and for their "lack [of] experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."³³⁸ It further described the preservation of parental authority as essential in a society "constitutionally committed to the ideal of individual liberty and freedom of choice."³³⁹ These characterizations and conclusions about childhood and about the parent-child relationship notwithstanding, the Court invalidated the imposition of Massachusetts's parental consent requirement on minor girls anxious to obtain abortions.³⁴⁰ That conclusion was expressly premised on the specific character of the abortion decision.³⁴¹ In fact, however, the Court's attempt concretely to distinguish the abortion decision from other

³³² See *Parham*, 442 U.S. at 604 (stating that parents "retain plenary authority" to seek institutionalization of their child).

³³³ See *Bellotti II*, 443 U.S. at 642-47 (noting that parents do not have the right to veto a minor's decision to have an abortion).

³³⁴ See *id.* at 633-39.

³³⁵ See *id.* at 637 (noting that the "guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors").

³³⁶ Compare *Parham*, 442 U.S. at 600-03 (holding a child has a liberty interest in not being committed unnecessarily, yet noting a child lacks the ability to make "sound judgments" in important matters), with *Bellotti II*, 443 U.S. at 647-49 (giving pregnant minors the ability to circumvent parental authority in order to have an abortion).

³³⁷ *Bellotti II*, 443 U.S. at 634.

³³⁸ *Id.* at 635.

³³⁹ *Id.* at 638.

³⁴⁰ See *id.* at 651.

³⁴¹ See *id.* at 648 (noting the constitutional right to seek an abortion).

decisions facing children that may, under the Constitution, be governed by parental preference, is unconvincing. "[T]here are," the Court proclaimed, "few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."³⁴² Yet, the decision at issue in *Parham*—to institutionalize a child in a mental hospital—would seem, much like the abortion decision, to have far-reaching, possibly conclusive, implications for the child's life in almost every regard.

To some extent—even if certain other decisions facing children may be as determinative and serious as the abortion decision—the Court's decisions in *Bellotti II*, and in the long string of subsequent cases challenging state laws limiting the abortion right of girls,³⁴³ follow from, and must be interpreted in light of, the larger politics of abortion. In general, the debate about abortion, a debate characterized by profound emotional intensity, holds far-reaching implications for the moral tone and social dimensions of society and family. In particular cases, the urgency of that debate intensifies and alters social responses to other pressing matters such as the meaning of childhood and the limits of parental authority.³⁴⁴ Moreover, as a result of the many complicated connections between the politics of abortion and cultural assumptions about familial relationships, the success or failure of opposing claims about abortion inform, and thus affect, social conclusions about matters such as the scope of parental authority and the character of childhood.

In addition, the Court's greater readiness to recognize the individuality of minors in the abortion cases compared to other cases that also involve decisions of enormous moment for a child's well-being, can be partly attributed to an interest in demarcating a particular stance with regard to the right to abortion. More specifically, the Court's construction of the judicial bypass option, freeing girls from parental authority, but imposing on them the heavy burden of petitioning and appearing before a judicial tribunal,³⁴⁵ can be

³⁴² *Id.* at 642.

³⁴³ See *infra* notes 416-59 (considering cases involving right of minors to terminate pregnancy).

³⁴⁴ See *infra* notes 416-59 (considering the affect of the abortion cases on the character of childhood).

³⁴⁵ Professor Carol Sanger describes the harm that is often inflicted on a young, pregnant girl asked to participate in a court proceeding in order to obtain permission to terminate a pregnancy. See Carol Sanger, *Compelling Narratives: Teenage Abortion Hearings and the Misuse*, Faculty Workshop at Cornell Law School (May 2, 1997).

attributed to the politics of abortion—here to an interest in balancing support for the right to abortion with circumscribed support for that right. Whatever the interplay between the Court's understanding of abortion and its actual treatment of children's rights in *Bellotti II* and in the other cases involving minors' right to abortion, however, the understanding of childhood and of the parent-child relationship articulated in these cases cannot, as a social if not a legal matter, be restricted to certain children in certain contexts.

However, even if the child described in *Bellotti II* does not ultimately differ from the child described in *Parham*, the Court's actual treatment of children in the two cases differs clearly.³⁴⁶ And regardless of how much of that difference can be attributed to the politics of abortion, the Court, in limiting the scope of parental authority as it did in *Bellotti II*, added a new dimension to constitutional understandings of children. In short, the Court in *Bellotti* denied, or at least mitigated, the implications of its holding by describing children and the parent-child relationship in the most traditional terms.³⁴⁷ But, the holding presents a non-traditional message that children, though vulnerable and immature, do sometimes have the constitutional right to make crucial choices about their lives without parental interference.³⁴⁸

Thus, on one reading, *Parham* and *Bellotti II*, taken together, rely on an understanding of children and the parent-child relationship that can clearly be traced back to the model underlying the Court's decisions in *Meyer* and *Pierce*.³⁴⁹ As in those cases, in which an earlier Court was self-consciously concerned with preserving familiar understandings of the parent-child relationship,³⁵⁰ so the Court in *Parham* and *Bellotti II* expressly described the preservation of strong parental authority within the parent-child relationship as

³⁴⁶ Compare *Bellotti II*, 443 U.S. at 643 (limiting the authority of the parent over minor child decisionmaking by requiring a judicial bypass option in decision to terminate pregnancy), with *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (upholding authority of parents to seek commitment of minor child to mental health facility on basis that "[m]ost children . . . simply are not able to make sound judgments concerning many decisions" and "[p]arents can and must make those judgments").

³⁴⁷ See *supra* notes 337-41 and accompanying text (explaining that *Bellotti II* stands for the proposition that children are incapable of making their own decisions on important issues).

³⁴⁸ See *Bellotti II*, 443 U.S. at 643-44 (discussing what factors a minor is entitled to show at a proceeding to bypass parental consent).

³⁴⁹ See *supra* notes 201-26 and accompanying text (discussing the understanding of the child-parent relationship expressed in *Meyer* and *Pierce*).

³⁵⁰ See *supra* notes 205-08 and accompanying text (discussing the court's refusal to look beyond the traditional conception of the parent-child relationship).

deeply ingrained in social consciousness and as essential to the successful socialization of children.³⁵¹ However, *Bellotti II* openly, and *Parham* implicitly, carried another message as well—that certain liberty interests belong to children as well as to (or perhaps along with) their parents or some other adult.³⁵² Moreover, in *Bellotti II* the Court proclaims expressly that parental choices do not always serve their children's best interests.³⁵³ Thus, in the late 1970s, the frame within which the Court securely countered attacks against challenges to traditional visions of family life a half-century earlier began to totter. The rhetoric is preserved, but seems less convincing. Indeed, in *Bellotti II* that rhetoric is belied expressly by the recognition of a girl's right to circumvent parental, though not all adult, authority in making the abortion decision and is belied, though far more subtly and implicitly in *Parham*, by the Court's clear recognition that children enjoy, much as adults do, liberty interests *extended to individuals* under the Constitution.³⁵⁴ Even at present, the Transforming Traditional model of childhood and of the parent-child relationship described in *Parham* and *Bellotti II*, taken as a unit, continue to inform the law's conclusions about children and about parental authority. And so, the remarkable force of traditional understandings of childhood and of the parent-child relationship begins to wane but not yet to falter absolutely.

B. *The Individualist Model*

In other cases not directly implicating the meaning of family and the scope of parental authority, the Court has voiced a completely distinct model of childhood and of parents in relation to their chil-

³⁵¹ See *Bellotti II*, 443 U.S. at 638 (stating that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder*" (alteration in original) (emphasis added in original) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1940))); *Parham*, 442 U.S. at 602 (declaring "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children" and "[o]ur cases have consistently followed that course").

³⁵² See *Bellotti II*, 443 U.S. at 634 (stating that "the child's [liberty] right is virtually coextensive with that of an adult"); *Parham*, 442 U.S. at 604 (noting that "parents cannot always have absolute and unreviewable discretion").

³⁵³ See *Bellotti II*, 443 U.S. at 642-44.

³⁵⁴ See *id.* at 643; *Parham*, 442 U.S. at 600 (recognizing that the child, in common with adults, "has a substantial liberty interest in not being confined unnecessarily").

dren.³⁵⁵ A few state trial courts have applied this alternative model in cases involving children in families expressly opposing their parents' authority and status.³⁵⁶

The Court first defined children as individuals, entitled to at least some of the protections afforded adults under the Constitution, in the 1960s.³⁵⁷ A decade later Bruce Hafen noted the significant possibility that the Court's decisions in cases such as *Gault*³⁵⁸ would "be cited as authority for implications well beyond the Court's intent"—as authority, in the extreme, for the redefinition of children as autonomous individuals even within families.³⁵⁹ More than two decades later, that possibility, although not often actualized in the intervening years, would seem as real as it was when Hafen wrote about it in 1976. The Supreme Court has not generalized the implications of decisions such as *Gault*, involving a criminal proceeding against juveniles,³⁶⁰ and *Tinker*, involving a First Amendment claim by high school students,³⁶¹ to cases occasioned by intra-familial disputes.³⁶² However, some state courts have been far less reluctant to

³⁵⁵ See *infra* notes 357-63 and accompanying text (discussing *Gault* and *Tinker*).

³⁵⁶ See *infra* notes 366-401 and accompanying text (discussing cases giving children increased, non-traditional legal rights vis-à-vis their parents).

³⁵⁷ See *supra* notes 113-30 and accompanying text (discussing judicial determinations of the rights of juveniles).

³⁵⁸ See *supra* notes 117-30 and accompanying text (discussing the *Gault* decision and its implications).

³⁵⁹ Hafen, *supra* note 192, at 633. Hafen himself, apparently seeing the risk as less real today than it was 20 years ago, would seem to disagree. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449 (1996) (reassessing the risk of the law's generalizing language in *Gault* and other similar cases). In 1996 Bruce Hafen, along with Jonathan Hafen, wrote:

[T]he rhetoric of certain Supreme Court opinions in the student rights and juvenile court cases of the late 1960s seemed sympathetic to emerging children's liberation concepts. Yet the Court's experience since that time shows that it has not in fact accepted the notion of adult-level autonomy in its approach to juvenile court or public school law

Id. at 454 (footnote omitted).

³⁶⁰ See *In re Gault*, 387 U.S. 1 (1967).

³⁶¹ See *Tinker v. Des Moines Indep. Community Sch. District*, 393 U.S. 503 (1969).

³⁶² That the Supreme Court has not generalized the model articulated in *Gault* to redefine children in their relationships with their parents may stem, at least in part, from shifts in the composition of the Court since *Gault* was decided. Of the justices who sat on the Court when *Gault* was decided in 1967 (Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, and Fortas) only three (Brennan, Stewart, and White) remained by the 1980s. The justices appointed in place of those who retired or died were on the whole more conservative about family matters than were those whom they replaced. See generally Michael D. Sullivan, *From Warren to Rehnquist: The Growing Conservative Trend in the Supreme Court's Treatment of Children*, 65 ST. JOHN'S L. REV. 1139 (1991) (discussing an increased conservatism in the Supreme Court's analysis of children's rights).

define children as autonomous individuals even vis-à-vis their parents.³⁶³

That the Supreme Court has refrained from thus defining children reflects a more general reluctance within society to sanction expressly the complete erosion of traditional understandings of the family.³⁶⁴ But the fact that at least some state courts have been willing to challenge and refashion traditional understandings of children and of parental authority by granting children remarkable autonomy vis-à-vis their parents—sometimes even in express reliance on Supreme Court conclusions about the parameters of childhood³⁶⁵—suggests the competing allure of redefining childhood so that distinctions between childhood and adulthood begin to blur.

In two Florida cases adjudicated in the early 1990s,³⁶⁶ young children, one a teenager and one younger, asked the courts to determine their parentage.³⁶⁷ In 1992, eleven year-old Gregory Kingsley

³⁶³ See *infra* notes 366-401 and accompanying text (discussing state court decisions addressing children's legal rights vis-à-vis their parents).

³⁶⁴ See DOLGIN, *supra* note 44, at 24-28 (describing society's reluctance to contest traditional notions of the family).

³⁶⁵ See, e.g., *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992), *rev'd sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). The Florida trial court in *Gregory K.* relied on *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), for the proposition that "[m]inors as well as adults . . . possess constitutional rights." See *Gregory K.*, 1992 WL 551488, at *1 (quoting *In re T.W.*, 551 So. 2d 1186, 1193 (1989) (citing *Planned Parenthood v. Danforth*, 428 U.S. at 74)); see also *infra* notes 368-73 and accompanying text (considering *Gregory K.*).

³⁶⁶ See *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993); *Gregory K.*, 1992 WL 551488. *Twigg* and *Gregory K.* were not the first cases in which a state court recognized a child's autonomy in proceedings against her parents. For example, in 1975, the Supreme Court of Washington confirmed a trial court decision that allowed an adolescent girl to initiate proceedings to declare herself incorrigible, and to have herself removed from her parents' home. See *In re Snyder*, 532 P.2d 278 (Wash. 1975); see also *Buckholz v. Leveille*, 194 N.W.2d 427 (Mich. Ct. App. 1971) (granting standing to an adolescent boy to sue school board over the constitutionality of the school dress code even though the boy's parents opposed the boy in his protests against the school code). *Snyder* and *Buckholz* were both decided a few years after *Gault*, 387 U.S. 1 (1967), and *Tinker*, 393 U.S. 503 (1969), and would appear to have been, at least in part, early responses to the Supreme Court's approval of the recognition of children as autonomous individuals for some purposes. That state courts were slow to follow these precedents, and that only in the 1990s did state courts once again begin to attract public interest for expressly redefining children as autonomous individuals within the context of the parent-child relationship, suggests deep social ambivalence about the transformation of the traditional family insofar at least as the status and understanding of children are concerned.

³⁶⁷ See *Kingsley*, 623 So. 2d at 782 (describing how 11-year-old Gregory filed a petition for termination of his biological parents' rights); *Twigg*, 1993 WL 330624, at *3 (allowing a teen-

initiated proceedings to terminate his biological mother's legal parentage.³⁶⁸ Judge Kirk, writing for the trial court, granted the child standing, clearly recognizing him as an autonomous individual with legal rights under the state constitution by stating, "the right of privacy set forth in the Florida Constitution extends to every natural person and . . . minors, as natural persons, are entitled to the same privacy rights which are afforded persons who have reached the age of majority."³⁶⁹ The Florida Court of Appeal overturned the decision, declaring a child incapable under the law of filing or maintaining a petition for termination of parental rights.³⁷⁰ However, the willingness of the Florida trial court to recognize Gregory's right to request a change in his legal parentage led to intense public interest and to both condemnation of, and applause for, the new understanding of childhood, and of the parent-child relationship that the case represented.³⁷¹ Some commentators remained cautious; some decried the court's interference with the "God-given" right of parents to their children;³⁷² and at least one writer referred to Gregory as "the Rosa Parks of the movement to expand the rights of children."³⁷³

In the second Florida case, a trial court granted standing to Kimberly Mays to challenge a stipulation concerning the teenager's legal parentage.³⁷⁴ The case developed from an unusual and sad story. At birth, Kimberly had been switched with another baby girl, born on the same day in the same hospital, to Robert and Barbara

ager standing to petition the court to terminate all legal connections between herself and her parents).

³⁶⁸ See *Gregory K.*, 1992 WL 551488, at *1.

³⁶⁹ *Id.* (citing *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989)).

³⁷⁰ See *Kingsley*, 623 So. 2d at 790. The appellate court found the lower court's grant of standing to Gregory harmless error because several adults, including Gregory's foster parents, a guardian ad litem, and the State Department of Health and Rehabilitative Services had filed separate petitions for termination of Gregory's biological mother's parental rights. *Id.* at 785.

³⁷¹ See *infra* notes 386-88 and accompanying text (discussing public reactions to the Florida cases).

³⁷² Eric Harrison, *Court Will Not Force Girl to See Birth Parents*, L.A. TIMES, Aug. 19, 1993, at A1 (quoting the attorney for Ernest and Regina Twigg, whose biological daughter asked the Florida courts to sever all legal relationships between herself and the Twiggs).

³⁷³ Andrew L. Shapiro, *Children in Court—The New Crusade*, NATION, Sept. 27, 1993, at 301, available in LEXIS, News Library.

³⁷⁴ See *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *3 (Fla. Cir. Ct. Aug. 18, 1993) (granting a teenager the constitutional right to pursue a petition for termination on her own behalf).

Mays.³⁷⁵ Kimberly was taken home from the hospital by the Mays, and the other baby was taken home by Kimberly's biological parents, Ernest and Regina Twigg.³⁷⁶ The child, named Arlena, whom the Twiggs raised, died during childhood from surgery in connection with a congenital heart defect.³⁷⁷ During that child's final illness, the Twiggs learned from blood tests that she could not be their biological daughter.³⁷⁸ Later, they discovered that Kimberly was "the only other white female in occupancy at Hardee Memorial Hospital at the time of Arlena's birth."³⁷⁹ The Twiggs commenced proceedings to have Kimberly declared their child.³⁸⁰ Initially, the parties reached an agreement that would have left custody of Kimberly with Robert Mays and given visitation privileges to the Twiggs.³⁸¹ Later, the relationships among the parties disintegrated, and the Twiggs sought custody.³⁸² Kimberly responded by asking the courts to terminate all legal connection between herself and the Twiggs.³⁸³ The court granted Kimberly standing to challenge the earlier stipulation and dismissed the Twiggs' custody petition.³⁸⁴ *Mays v. Twigg*³⁸⁵ stands, though its significance is dimmed by the extraordinary facts of the case, as well as by the Florida appellate court's reversal of *Gregory K.*

Whatever the legal implications and consequences of *Gregory K.* and *Mays*, both cases attracted widespread popular interest in print and through electronic media.³⁸⁶ That interest framed for the American conscience the notion that children might be able to

³⁷⁵ Barbara Mays, the woman who took Kimberly home from the hospital in 1978 and raised her, died in 1981. See Harrison, *supra* note 372, at A1 (discussing the *Mays* case).

³⁷⁶ See *id.* (discussing the *Mays* case).

³⁷⁷ See *Mays v. Twigg*, 543 So. 2d 241, 242 (Fla. Ct. App. 1989).

³⁷⁸ See *id.* (stating that due to the child's blood type neither of the Twiggs could have been her biological parent).

³⁷⁹ *Id.*

³⁸⁰ See *id.*

³⁸¹ See *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *1-*2 (Fla. Cir. Ct. Aug. 18, 1993) (discussing the stipulation which barred the Twiggs from seeking a change in custody until the entry of a final judgment).

³⁸² See Harrison, *supra* note 372, at A1.

³⁸³ See *id.* (quoting the trial testimony of Kimberly Mays: "I want them out of my life and my life back").

³⁸⁴ See *Twigg*, 1993 WL 330624, at *3-*6.

³⁸⁵ 543 So.2d 241.

³⁸⁶ As early as 1993, the story of Kimberly Mays had become the subject of a book and a made-for-television movie. See Harrison, *supra* note 372, at A1. Gregory Kingsley appeared on many talk shows. His story was also documented in two made-for-television movies. See Shapiro, *supra* note 373, at 301.

“divorce” their parents.³⁸⁷ One early story described Gregory Kingsley as a pioneer of sorts:

The little person caught in the cross-fire of custody cases doesn't always have an opportunity to voice an opinion. But Gregory has made sure he'll be heard. No stranger to the legal system, he has gone out and hired his own attorney. When his case goes to trial on Sept. 24, he will become the first kid in America to sue to sever his ties with his natural mother forever. After years of misery and loneliness, Gregory is seeking a divorce.³⁸⁸

At least to some extent, these cases altered the tone of popular discourse about the status of children within families, if only by calling attention to the potential recognition within the law of the autonomous individuality of children vis-à-vis their parents. In consequence, the two cases suggest that just as adults are free to negotiate the terms of their relationships, and of their demise, so children may one day be free to fashion the terms—including the very existence—of their parentage.

A number of other judicial decisions and legal pronouncements in the years following *Kingsley* and *Mays* also suggest increased legal recognition of children's autonomy within familial contexts.³⁸⁹ For instance, in 1995, in *Peregood v. Cosmides*,³⁹⁰ a Florida appeals court granted standing to a young child to challenge his own adoption in a case in which the adoption was deemed to have jeopardized the boy's economic well-being.³⁹¹ The adoption of young Michael by his own biological mother had been fashioned by Michael's unmarried mother and father in order to terminate the biological father's parental rights (a result desired by the mother) and his support obligation (a result desired by the father).³⁹² On the one hand, the decision was premised on the recognition “that in family type situa-

³⁸⁷ See, e.g., Susan Campbell, DES MOINES REG., Oct. 17, 1993, at 3 (describing Gregory's lawsuit as one “to divorce his biological parents”); *What They Said*, ST. PETERSBURG TIMES (Fla.), Sept. 30, 1993, at 2 (asking whether children should “have a sweeping, no-questions-asked right to get a divorce from their parents”).

³⁸⁸ Pat Wingert et al., *Irreconcilable Differences*, NEWSWEEK, Sept. 21, 1992, at 84.

³⁸⁹ See Ellen B. Wells & Deborah S. Gordon, *In the Child's Best Interest?*, CONN. L. TRIB., Apr. 7, 1997 (considering standing of children to participate in custody and parentage disputes).

³⁹⁰ 663 So. 2d 665 (Fla. Dist. Ct. App. 1995).

³⁹¹ See *id.* at 669 (stating the adoption was “patently against [the] child's best interests”). The precedential value of the case was limited by the court's reference to its “unusual and unique facts.” *Id.* at 668.

³⁹² See *id.* at 667 (discussing the desires of Michael's biological parents).

tions, a minor's constitutional rights warrant no less respect than those of adults."³⁹³ On the other hand, the court stressed a traditional concern for the child's "best interests," which seemed adversely affected by his parents' agreement to stage a "sham adoption."³⁹⁴ Thus *Peregood*, reflecting general social ambivalence about the meaning of childhood, recognizes the autonomous individuality of children vis-à-vis their parents, but also the best interests of children, rather than their autonomy.³⁹⁵

Similarly, in *In re Pima County Juvenile Severance Action No. S-113432*,³⁹⁶ an appellate court in Arizona granted four young children the right to file a severance petition, requesting the termination of their father's parental rights.³⁹⁷ The court recognized the children's standing despite the fact that their mother was available to initiate the proceedings which, in fact, she later joined.³⁹⁸ Moreover, the court reached its conclusion notwithstanding its express recognition that state law prevented children from marrying, driving cars, joining the armed services or consenting to surgery.³⁹⁹ Thus the Arizona court, reaffirming the immaturity of most children in many contexts, gave the four children involved in *Pima County* the most remarkable of rights—the right to challenge their father's parenthood.⁴⁰⁰ The contradiction suggested by the court's reasoning in *Pima County* is real, though perhaps no longer surprising. Only in a world deeply uncertain about the meaning of childhood and the scope of parental authority is it possible for the law to grant such a wide scope for children's autonomy vis-à-vis their parents while

³⁹³ *Id.* at 668 n.4 (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976), and *Belotti II*, 443 U.S. 622, 633 (1979)). In support of its decision to grant Michael standing to contest his adoption, the Florida court also cited a number of other United States Supreme Court decisions implicating the meaning and scope of family, including *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Carey v. Population Services International*, 431 U.S. 678 (1977). See *Peregood*, 663 So. 2d at 668 n.4.

³⁹⁴ *Peregood*, 663 So. 2d at 669.

³⁹⁵ See *id.*

³⁹⁶ 872 P.2d 1240 (Ariz. Ct. App. 1993).

³⁹⁷ See *id.* at 1243 (stating that there was no distinction between a child being a party to a petition brought by someone else, and the child bringing the petition on his own).

³⁹⁸ See *id.* (holding that a child has standing "in an action to sever the parental rights of that child's parents").

³⁹⁹ See *id.*

⁴⁰⁰ See *id.* at 1242.

sanctioning definitions of children in other important contexts as immature and incapable of directing their own lives.⁴⁰¹

Courts have further considered whether children should be allowed independent counsel (in addition to, or instead of, guardian *ad litem* representation) in divorce cases between their parents that involve issues of custody, visitation, and support. These considerations have produced mixed and confusing results.⁴⁰² In 1994, the American Academy of Matrimonial Lawyers (AAML) promulgated guidelines for the representation of minors in custody and visitation cases.⁴⁰³ According to Martin Guggenheim, Reporter to the AAML for the Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (*AAML Standards*), a central concern in promulgating rules for regulating legal representation in such cases was to create standards "in conformity with the Model Rules of Professional Conduct."⁴⁰⁴ Influenced by that concern, the AAML relied heavily on a distinction between "impaired" and "unimpaired" clients. The *AAML Standards* presume that children above the age of twelve are unimpaired, and that children below age twelve are impaired.⁴⁰⁵ Thus, under the *AAML Standards* children above age twelve are generally recognized as autonomous individuals, able to direct their attorney's representation of them in cases occasioned by parental divorce. In constructing this rule, the AAML relied on Supreme Court precedents that granted "children as young as twelve"

⁴⁰¹ The court in *Pima County* declared that "[m]aturity has nothing to do with a child's interest in the substance of [a parental termination] proceeding[.]" and is thus apparently irrelevant to the child's standing to initiate that proceeding. *Id.* at 1243.

⁴⁰² See, e.g., *Hartley v. Hartley*, 886 P.2d 665, 676 (Colo. 1995) (concluding after careful consideration of each of child's claims, that child was adequately represented in parents' divorce dispute by guardian ad litem); *Newman v. Newman*, 663 A.2d 980 (Conn. 1995) (giving children the right to appeal aspect of decision concerning parents' divorce that involved child support). After reviewing these and other cases involving children's standing and right to counsel in such cases, Ellen Wells and Deborah Gordon conclude that this area of the law "is riddled with questions, notwithstanding active public debate over parental and children's rights in general." Wells & Gordon, *supra* note 389.

⁴⁰³ See generally American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) [hereinafter *AAML Standards*].

⁴⁰⁴ Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW. 35, 43 (1995).

⁴⁰⁵ See *AAML Standards*, *supra* note 403, Rule 2.2 (stating that these presumptions are rebuttable).

a variety of First and Fourteenth Amendment rights.⁴⁰⁶ With regard to younger children (rather remarkably, labeled "impaired"⁴⁰⁷), the AAML, wanting to promulgate rules that would result in uniform attorney responses, but concerned about how to effect that end in the absence of an autonomous client,⁴⁰⁸ suggested that "[p]erhaps the most important function counsel can perform when representing an impaired child is to develop a strong relationship with the child."⁴⁰⁹ Thus, in effect, the AAML defined childhood presumptively as terminating at the age of twelve with regard to the right to legal autonomy in proceedings involving relationships between children and their parents. The so-called "unimpaired" child continues to be categorized as a child, but the categorization (which presumably continues to delimit the child's role in certain interactions with parents) is essentially irrelevant to the form that legal representation of a "child" should take in divorce proceedings between the parents.

In fact, many of the judicial and legislative decisions that apparently grant children broad constitutional rights once reserved for adults rely, sometimes consciously as with the *AAML Standards*, but sometimes implicitly, on a similar delimitation between those who are children for all purposes, and those who are children for only some purposes. Moreover, sometimes the age delimitation is explicit as in the *AAML Standards*, and sometimes it is the conse-

⁴⁰⁶ *Id.* Rule 2.2 cmt. (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990), *Belotti II*, 443 U.S. 622 (1979), *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), and *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969)).

⁴⁰⁷ The term "impaired" was taken from the Model Rules on which the AAML relied. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1994) (stating that even when clients are impaired, lawyers must try to maintain a normal client relationship). However, the term suggests other categorizations throughout history that joined children with other groups such as women, African-Americans, "idiots," and "crazy" people and defined members of these groups as less than fully autonomous—as less than completely human. See, e.g., MASS. BODY OF LIBERTIES, 1641, Provisions 52, 58-91, reprinted in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 77, 78-81 (Bernard Schwartz ed., 1971). Provision 52 asserts: "Children, Idiots, Distracted persons, and all that are strangers, or new commers [sic] to our plantation, shall have such allowances and dispensations in any Cause whether Criminall [sic] or other as religion and reason require." *Id.* at 77. The same "Body of Liberties" more generally distinguishes the liberties of "free men," Provisions 58-78; women, Provisions 79-80; children, Provisions 81-84; servants, Provisions 85-88; and foreigners and strangers, Provisions 89-91. See *id.* at 78-81.

⁴⁰⁸ See *AAML Standards*, *supra* note 403, Rules 2.3-13; see also Guggenheim, *supra* note 404, at 43 n.18 (observing that both the Model Rules of Professional Conduct and Model Code of Professional Responsibility are clear on how to represent an unimpaired client).

⁴⁰⁹ *AAML Standards*, *supra* note 403, Rule 2.8 cmt.

quence of other sorts of categorizations, as in the application of Fourteenth Amendment rights to pregnant girls. A more general shift, indicative of emerging visions of childhood, has been the willingness of society during the course of the last several decades to view and to treat people at younger and younger ages more as adults than as children.

III. RESPONSES TO THE TRANSFORMATION OF FAMILY: THE CONTRACTION OF CHILDHOOD AND THE DISPLACEMENT OF PARENTAL CONTROL

American society is more willing to accept transformations in its view of adults within families than in its view of children.⁴¹⁰ In addition, society has more easily assimilated transformations in its understanding of actual children than in its vision of childhood.⁴¹¹ As the family changes, however, children are inevitably affected, and therefore, traditional visions of childhood become vulnerable to change. As the law, in its turn, responds to changes in the familial relationships between adults, it inevitably threatens sacred definitions of childhood. The result is change, however uneven, punctuated by conflict and contradiction. Thus, the law sometimes presumes, and thus struggles to preserve, traditional understandings of the parent-child bond, and of childhood.⁴¹² Or, it presumes traditional understandings of childhood, but in such a way that those very understandings are challenged by the law's treatment of actual children.⁴¹³ Alternatively, it self-consciously questions traditional understandings of childhood, acknowledging and approving the inevitability of change, while apparently unable or unwilling to discern the specific changes it has encouraged through the individualization of family life and the reconstruction of childhood.⁴¹⁴ This set

⁴¹⁰ See generally DEMOS, *supra* note 23 (giving a historical overview of the legal evolution of the American family); GROSSBERG, *supra* note 21, at 301 (same); MINTZ & KELLOGG, *supra* note 82 (same).

⁴¹¹ See generally POSTMAN, *supra* note 3, at 67-80 (discussing the erosion of symbolic views of childhood).

⁴¹² See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (discussing the judicial acceptance of traditionally broad parental authority despite the incidence of cases involving child abuse and neglect).

⁴¹³ See, e.g., *Bellotti II*, 443 U.S. 622 (1979) (recognizing the guiding role of parents in raising their children while invalidating a statute requiring parental consultation in or notification of a minor's decision to terminate a pregnancy).

⁴¹⁴ See, e.g., *In re Appeal in Pima County Juvenile Severance Action No. S-113432*, 872 P.2d 1240 (Ariz. Ct. App. 1994) (holding that a child may petition to sever parental rights); *Peregood v. Cosmides*, 663 So. 2d 665 (Fla. Dist. Ct. App. 1995) (granting a child standing to

of contradictory, uncertain responses constitutes what this Article labels the Transforming Traditional Model of childhood and of the parent-child relationship.⁴¹⁵ The uncertain social ground on which that model is being constructed, and the consequent susceptibility of the model to erosion and change, are illuminated forcibly by the Supreme Court's numerous decisions about the abortion rights of pregnant girls. In addition, the Court's decisions also illustrate general social responses to the disintegration of the traditional, nuclear family, and the consequent vulnerability of traditional notions of childhood to modern alternatives.

A. Parents, Girls, and the Right to Abortion

Although the model that the Supreme Court constructed in *Bellotti II* for analyzing the abortion right of pregnant adolescents stands, many voices express dissatisfaction with that model's results.⁴¹⁶ In the period since *Bellotti II*, the Court has rearranged the specifics of that model, but has not basically transformed it, even in cases in which the facts seemed clearly to belie the express assumptions from which the model was generated, and on which it continues to rest.⁴¹⁷ However, the Court has devoted remarkable attention to the details of the model, revisiting the basic questions raised in *Bellotti II* many times, again and again examining the constitutionality of various state statutes regulating the right of a minor girl to terminate her pregnancy.

The result is a set of ten cases that represents an unusual involution of constitutional jurisprudence.⁴¹⁸ The Court has separately

challenge his adoption by his biological mother). Jana Singer uses the term "the privatization of family law" in describing a similar set of responses. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1565-66 (noting the negative economic consequences of the shift from public to private ordering of divorce).

⁴¹⁵ See *supra* Part II and note 177 (discussing the model and explaining the use of the term "transformation").

⁴¹⁶ See *infra* notes 418-59 and accompanying text (discussing cases in which the model adopted in *Bellotti II* is challenged and the Court's view of children is called into question by minors seeking to exercise rights historically enjoyed by autonomous adults).

⁴¹⁷ See *infra* notes 418-59 and accompanying text (discussing cases involving minor's abortion rights).

⁴¹⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (upholding a Pennsylvania statute requiring a pregnant girl seeking an abortion to obtain "informed consent" of one parent or guardian or seek judicial bypass of the parental consent requirement); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 507-08 (1990) (upholding a state's one-parent notification statute with judicial bypass option that required a girl to establish her maturity by clear

considered one- and two-parent notification requirements.⁴¹⁹ It has separately considered consent and notification requirements.⁴²⁰ It has also considered statutes that mandate waiting periods for pregnant minors,⁴²¹ and various sorts of judicial bypass options.⁴²² Nonetheless, it has failed rather abysmally to reach an understanding of parental authority, and of the parent-child relationship, not belied by the facts of the cases; and to provide a satisfactory model for resolving questions about the right of pregnant girls to have abortions.⁴²³

To some extent, the astonishing attention the Court has devoted to these cases reflects a concern with questions involving the right

and convincing evidence, or, if unable to do so, to show that her best interests would be served by abortion); *Hodgson v. Minnesota*, 497 U.S. 417, 436-44, 450-55, 457-58 (1990) (plurality opinion) (invalidating a Minnesota statute's two-parent consent requirement but upholding the same requirement with a bypass option); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 494 (1983) (upholding a Missouri one-parent consent requirement with a judicial bypass option of the type outlined by the Court in *Bellotti II*, and decided same day as *Akron v. Akron Center for Reproductive Health, Inc.*); *Akron v. Akron Ctr. for Reprod. Health, Inc.* 462 U.S. 416, 439-42, 452 (1983) (invalidating a one-parent consent requirement in a municipal ordinance), *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *H.L. v. Matheson*, 450 U.S. 398, 406, 413 (1981) (upholding Utah's parental notification statute on the ground that the minor plaintiff did not have standing to challenge the statute because she did not allege that she or any member of her class was mature or emancipated); *Bellotti II*, 443 U.S. 622, 651 (1979) (invalidating a Massachusetts statute requiring two-parent consent without an adequate judicial bypass option); *Bellotti v. Baird*, 428 U.S. 132, 151-52 (1976) [hereinafter *Bellotti I*] (certifying questions about a Massachusetts two-parent consent statute to the Supreme Judicial Court of Massachusetts for interpretation); *Planned Parenthood v. Danforth*, 428 U.S. 52, 73-75 (1976) (invalidating Missouri's one-parent consent requirement); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985), *aff'd sub nom.* *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (validating a 24-hour wait before an abortion after parental notification in a statute that also provided for a judicial bypass option).

⁴¹⁹ See, e.g., *Akron Ctr. for Reprod. Health*, 497 U.S. at 506 (involving a one-parent notice statute); *Hodgson*, 497 U.S. at 436-37 (involving two-parent notice statute).

⁴²⁰ See, e.g., *Bellotti II*, 443 U.S. at 639-49 (involving a consent requirement); *Zbaraz*, 763 F.2d at 1534-35 (involving a notification requirement).

⁴²¹ See *Zbaraz*, 763 F.2d at 1535-36 (involving a 24-hour waiting period after notification).

⁴²² See, e.g., *Bellotti I*, 428 U.S. 132. *Bellotti I* certified for consideration by the state's highest court a set of questions about the meaning of the statute at issue. Among those questions, the Supreme Court asked the state court whether the law would permit a minor (a) "capable of giving informed consent," or (b) "incapable of giving informed consent[,] to obtain [a court] order without parental consultation." *Id.* at 145.

⁴²³ See, e.g., Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 670-88 (1988) (reviewing legal dependence in theory to the exclusion of facts in cases involving the right of minors to have an abortion); *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 252-55 (1990) [hereinafter *The Supreme Court, 1989 Cases*] (considering justices' willingness to ignore the facts in *Hodgson*).

to abortion.⁴²⁴ This is not surprising since the widespread debate about family in contemporary American society—a debate that sometimes parallels, sometimes encompasses, and is sometimes even encompassed by the debate about abortion—assures that questions about abortion and about childhood (including questions about the dimensions of parental authority) will occur together, and that in consequence, the tone and urgency of any particular debate will be pronounced.

Concerns beyond the specific parameters of the abortion debate energized the Court's involvement with the details of parental-consent and notification statutes applicable to minor girls wanting to terminate pregnancies. These cases, more forcefully than almost any others, indicate the fragility of traditional understandings of childhood in a social order that has widely abandoned traditional understandings of familial relationships with regard to adults. And thus the temptation in the abortion cases to define children as autonomous individuals has been compelling. But in these cases, far more starkly than in others that have relied on similar redefinitions of children and childhood, the redefinitions proposed are connected directly to the scope and meaning of family in general and of the parent-child relationship in particular.

For example, *Roe v. Wade*, the original 1973 decision giving women a limited right to abortion, was premised on a privacy right and thus on an understanding of women—including women within families—as autonomous individuals.⁴²⁵ Thus *Roe*, and a set of other cases, including *Eisenstadt v. Baird*, decided at about the same time and involving constitutional rights implicative of familial relationships,⁴²⁶ represent a new view of family—a view concerned with the constitutional rights of family members as separate individuals rather than as parts of a larger, holistic social unit. Thus, within the context of the jurisprudence that *Roe* has produced, the right to abortion signals the right to autonomy.

In fact, the Court's delimitation of the reach of the privacy right enunciated in *Roe* to minors appears bafflingly contradictory.⁴²⁷ In-

⁴²⁴ See *infra* notes 424-59 and accompanying text (discussing cases involving the right to abortion).

⁴²⁵ See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

⁴²⁶ See *supra* notes 64-78 and accompanying text (discussing *Eisenstadt*).

⁴²⁷ See, e.g., Pine, *supra* note 423, at 671 (discussing the Court's dependence on theory, resulting in narrow interpretations which fail to "safeguard fundamental rights"); *The Supreme*

deed, in the cases demarcating the constitutional right of pregnant girls to abortion, even the referent of discourse is often hard to discern clearly because one set of questions (about abortion) substitutes for, and provides a code for addressing, another set of questions (about the meaning, form, and fate of family in general, and about childhood in particular). The Court extended the right to abortion to girls, but in hedged fashion. A set of contradictions followed. Girls are defined as potentially autonomous vis-à-vis their parents, but not vis-à-vis the state.⁴²⁸ Moreover, in fashioning a model through which to extend to girls the right to abortion, the Court placed an astonishing burden on pregnant girls. The demands of the judicial bypass option are draconian.⁴²⁹ A young, unmarried, pregnant girl is asked to petition a court, appear in the proper forum, and then answer a judge's questions about the most intimate matters of her life, in the hope of demonstrating to the judge that she is mature or, if she fails at that task, that an abortion would serve her "best interests."⁴³⁰ Thus, under the model constructed in *Bellotti II*, pregnant girls seeking abortions, though very likely to receive judicial consent,⁴³¹ have not been granted autonomy as the term is normally understood. Rather, they have been granted a peculiar sort of burdened autonomy that substitutes state authority for parental authority, and that asks pregnant girls to

Court, 1989 Cases, *supra* note 423, at 252-55 (considering justices' willingness to ignore facts in *Hodgson v. Minnesota*, 497 U.S. 417 (1990)).

⁴²⁸ See *supra* notes 418-24 and accompanying text (discussing cases involving a minor's right to abortion).

⁴²⁹ See, e.g., *Hodgson*, 497 U.S. at 475-79 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing the burden judicial bypass places on a pregnant girl seeking abortion); Pine, *supra* note 423, at 679 (arguing that the judicial bypass forces minors to "choose among trauma in the courthouse, crisis at home, and unwanted teen-age motherhood"); Suellyn Scarnecchia & Julie Kuncie Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 81-92 (1995) (describing judicial proceedings in which minors request judicial consent to an abortion).

⁴³⁰ *Bellotti II*, 443 U.S. 622, 643-44 (1979) (explaining requirements under the Massachusetts statute).

⁴³¹ See *Hodgson v. Minnesota*, 648 F. Supp. 756, 767 (D. Minn. 1986) (noting that only an "infinitesimal proportion" of bypass petitions brought in Minnesota since 1981 were refused by probate judges); David Oliver Relin, *Old Enough to Choose?: Debate Over Laws Requiring Parents' Consent to Minor Child's Abortion*, SCHOLASTIC UPDATE, April 20, 1990, at 13, available in LEXIS, News Library (reporting that between 1981 and 1990 only 13 of 8000 pregnant girls were denied abortions in bypass proceedings in Massachusetts).

show far more initiative and competence than the Court has asked of adult women seeking abortions.⁴³²

Further, there is a serious jurisprudential contradiction between the extension of the privacy right enunciated in *Roe* to minors, and the potential evisceration of that right in the judicial bypass proceeding. This contradiction is separate from the ordeal facing the pregnant minor, and exists regardless of the actual results of the proceedings. Specifically, the substitution of a judge's decision about a girl's maturity or her best interests for the girl's own abortion decision inevitably results in the application of judges' individual, potentially idiosyncratic values on a case-by-case basis. That result "is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [the girl's abortion] decision."⁴³³

The Court's extensive consideration of cases involving parental-consent or parental-notification statutes presents other, equally troubling problems. For instance, having once constructed a model for states to follow in regulating the right of girls to terminate a pregnancy, the Court has been stubbornly resistant to the implications of factual demonstrations that the model simply does not work. That became apparent in *Hodgson v. Minnesota*,⁴³⁴ in which case the Court upheld a two-parent notification requirement with a judicial bypass option.⁴³⁵ The *Hodgson* Court concluded that the Minnesota statute at issue in the case was constitutional because it complied with the guidelines for a judicial bypass option constructed in *Bellotti II*.⁴³⁶ However, *Bellotti II* was a facial challenge, the

⁴³² See *supra* notes 425-32 and accompanying text (contrasting the autonomy granted to adult women in *Roe v. Wade*, 410 U.S. 113 (1973), with the difficult procedural steps required of minor girls in subsequent cases).

⁴³³ *Bellotti II*, 443 U.S. at 655-56 (Stewart, J., concurring).

⁴³⁴ 497 U.S. 417.

⁴³⁵ See *id.* at 455. The holding in *Hodgson* was reached by a divided Court. Five Justices, in an opinion written by Justice Stevens, held that the two-parent notification statute without a bypass option was unconstitutional. See *id.* at 436-44, 450-55. Five Justices held that the same notification statute with a bypass option was constitutional. See *id.* at 481. Only Justice O'Connor, writing in a separate concurrence, participated in both holdings. See *id.* at 458 (O'Connor, J., concurring in part and concurring in the judgment in part).

⁴³⁶ Justice Kennedy's plurality decision that upheld the two-parent notification requirement with a bypass option noted that Minnesota's provision of a bypass option satisfied the demands of precedent. He wrote:

In providing for the bypass, Minnesota has done nothing other than attempt to fit its legislation into the framework that we have supplied in our previous cases. The simple fact is that our decision in *Bellotti II* stands for the proposition that a two-parent consent

statute at issue there never having become effective.⁴³⁷ Without facts on which to depend, the Court in *Bellotti II* assumed that parental notice and consent requirements protect at least immature minors from their inability to make informed decisions, and that parental consultation "is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns."⁴³⁸ The Court further assumed that parents "naturally" act in furtherance of their children's best interests.⁴³⁹ Moreover, in outlining the bypass option, the Court assumed that judges presiding over bypass petitions would be able to identify and act to discern mature from immature minors, and would be able to protect the best interests of those minors not deemed adequately mature to make their own abortion decisions.⁴⁴⁰

The facts, once established and reviewed by the trial court in *Hodgson*, tell a very different story.⁴⁴¹ For the first time, in *Hodgson*,⁴⁴² the Court considered an operating parental notice and bypass statute.⁴⁴³ At trial, the Minnesota District Court heard extensive testimony from judges who had presided over ninety percent of pregnant girls' bypass petitions in the state since 1981.⁴⁴⁴ Summarizing that testimony, the district court asserted that not one of the judges who testified "identified a positive effect of the law."⁴⁴⁵ Clinical counselors, involved in implementation of Minnesota's bypass option, concluded that the law failed to enhance "family integrity or

law is constitutional if it provides for a sufficient judicial bypass alternative, and it requires us to sustain the statute before us here.

Id. at 497-98 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁴³⁷ See *Bellotti II*, 443 U.S. at 625 n.1 (describing the restraining orders and stays of enforcement issued during the course of litigation).

⁴³⁸ *Id.* at 640.

⁴³⁹ See *id.* at 648-49 (discussing a state's interest in encouraging family rather than judicial resolution of a minor's abortion decision).

⁴⁴⁰ See *id.* at 647-48 (concluding that state-imposed conditions do not unduly burden the constitutional right to seek an abortion).

⁴⁴¹ See *Hodgson*, 497 U.S. 417 (upholding the constitutionality of the two-parent notice requirement in combination with a judicial bypass procedure).

⁴⁴² See Pine, *supra* note 423, at 679 (noting that the effect of the judicial bypass on minors was statistically analyzed for the first time in *Hodgson*).

⁴⁴³ See *Hodgson*, 497 U.S. at 422.

⁴⁴⁴ See *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986) (describing testimony as to the effect of the Minnesota statute); Scarnecchia & Field, *supra* note 429, at 81-93 (describing judicial proceedings in which minors request judicial consent to abortion). The Supreme Court's failure to heed the factual determinations made by the trial court in *Hodgson* is well analyzed by Rachael N. Pine, one of the attorneys for plaintiffs in the case. See Pine, *supra* note 423, at 670-88.

⁴⁴⁵ *Hodgson*, 648 F. Supp. at 766.

communication.”⁴⁴⁶ Rather, the bypass procedure “more than anything, disrupted and harmed families.”⁴⁴⁷ With regard to the parental notification part of the statute, the district court concluded that, especially in light of the prevalence of dysfunctional, violent, or broken families, Minnesota’s two-parent notice requirement had proven to be at best irrelevant, and sometimes even harmful, to parent-child communication and to the pregnant girl.⁴⁴⁸

After reviewing the factual determinations of the district court in *Hodgson*, Rachel Pine concluded that “[c]ontrary to the best of judicial prediction and logic, the experiences of Minnesota and Massachusetts have shaken the very foundation of the constitutional conclusions of *Bellotti II*, *H.L.*, *Akron* and *Ashcroft*.”⁴⁴⁹ A failure of this magnitude to take facts into account cries for explanation. Certainly, it is not the case that the Court, as a matter of jurisprudence, never rethinks earlier decisions in light of new facts.⁴⁵⁰ Some commentators have suggested that the Court’s response to the facts presented by the trial court in *Hodgson* can be attributed to an underlying interest in limiting abortions among pregnant minors.⁴⁵¹ While that is probably true, it only partially explains the Court’s startling refusal to reexamine the model erected in *Bellotti II* when the facts seem to compel such reexamination.

Reexamining—and possibly refashioning—the guidelines established in *Bellotti II* would openly threaten sacred images of childhood through which society struggles to satisfy its deep nostalgia for tradition. Largely by safeguarding these images, the Transforming Traditional Model of children and childhood in general, as well as its particular manifestation in the minor abortion cases, has, with varying degrees of success, masked or blurred the erosion of the traditional family. The model, as constructed in the abortion cases involving minors, aims to mediate the unrelenting demands of mod-

⁴⁴⁶ *Id.* at 767.

⁴⁴⁷ *Id.*

⁴⁴⁸ *See id.* at 768-70.

⁴⁴⁹ Pine, *supra* note 423, at 680.

⁴⁵⁰ *See The Supreme Court, 1989 Cases*, *supra* note 423, at 255 & n.64 (citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671-74 (1981), *Buckley v. Valeo*, 424 U.S. 1, 31-33 (1976), and *Mapp v. Ohio*, 367 U.S. 643, 650-55 (1961), as examples of the Court’s willingness to reassess their previous assumptions in light of new facts).

⁴⁵¹ *See* Pine, *supra* note 423, at 680 n.101 (alleging that the state legislature’s real motive in requiring parental notice and consent was to deter minors from terminating pregnancies rather than to protect minors’ fundamental rights).

ernity and the power of tradition by granting some children some autonomy, but by defining children, as a group, in traditional terms.

Whatever the model's success as an ideological construct, it fails, as the facts revealed by the trial court in *Hodgson* demonstrate forcefully, to serve almost anyone's real interests. To revise the model would be to further threaten traditional understandings of childhood. But to preserve the model is to belie its own apparent intent by condemning actual children to suffering. So far, the Court has opted to have children suffer.

The guidelines proposed in *Bellotti II* depend on two basic assumptions—one about the parameters of childhood, and one about the social contexts within which children can best be protected. The Court was only able to rely on one of these assumptions. First, the Court envisioned children in the most traditional terms: deeply in need of adult direction because they “lack the experience, perspective, and judgment” to safely make their own choices.⁴⁵² Thus, the Court described children as usually unprepared, through lack of experience and lack of judgment, to make life's most pressing decisions wisely.⁴⁵³ On this assumption the Court premised significant aspects of its decisions in *Bellotti II*.

Second, the Court invoked “the guiding role of parents in the upbringing of their children,” and declared that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder*.”⁴⁵⁴ On this assumption the Court was, as it recognized clearly, unable to rely. Thus, the Court proclaimed pregnant girls autonomous with regard to parental, but not with regard to all adult, authority.⁴⁵⁵ In 1976, in the first case in which the Court considered the constitutionality of a statute requiring parental consent for a girl to terminate a pregnancy,⁴⁵⁶ the Court declared it unlikely, despite a state interest in “safeguarding . . . the family unit” and “parental authority,” that a parent's “veto power will enhance parental authority or control

⁴⁵² *Bellotti II*, 443 U.S. 622, 635 (1979).

⁴⁵³ See *id.* at 640.

⁴⁵⁴ *Id.* at 637-38 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (alteration in original) (emphasis added in original).

⁴⁵⁵ See *id.* at 643 & n.22 (concluding that a pregnant minor must receive either parental or judicial consent before an abortion).

⁴⁵⁶ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (holding that Missouri could not require an unmarried pregnant woman under the age of 18 to obtain parental consent before having an abortion).

where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.”⁴⁵⁷

Bellotti II and the cases that followed rest on a recognition that the traditional family has been transformed so basically that parental authority can no longer serve traditional ends.⁴⁵⁸ But these cases rest as well on traditional notions of childhood and of children.⁴⁵⁹ The result, though often harmful to those it presumes to serve, and though internally inconsistent, has survived for over two decades, at least in part because the dilemma faced in the abortion cases involving minors is deeply ingrained, and society is deeply resistant to resolutions that would more dramatically and absolutely redefine children and childhood.

Inevitably, the project underlying *Bellotti II*—to sustain old-fashioned understandings of children, but to grant those children new freedoms vis-à-vis their parents—cannot be completed, so the Court revisits the questions posed by minors seeking abortions again and again. Each time it fails in its essential task, disguised, but never obliterated, by the jargon of constitutional jurisprudence: how to socialize children, and how to even understand children, in a world from which so many traditional domestic anchors have disappeared.

B. Responses to the Individualization of Family: Redefining Childhood?

The failure is not the Court's alone. Society as a whole is profoundly perplexed about the consequences, for children in particular, of the erosion of the traditional family. Still committed, even if largely through the force of nostalgia, to romanticized images of childhood constructed almost two centuries ago, society is perplexed as it becomes increasingly difficult to place those images in a context of supporting images of nurturing parents and affectionate,

⁴⁵⁷ *Id.* at 75.

⁴⁵⁸ See *Bellotti II*, 443 U.S. at 649 (implying that the situation where the parents are not together and the pregnant minor is not living at home is a transformation of the family where authority of parents may not serve traditional ends).

⁴⁵⁹ See *id.* (noting that the Court is “not persuaded that, as a general rule, the requirement of obtaining both parents’ consent unconstitutionally burdens a minor’s right to seek an abortion”).

solidary, and enduring families.⁴⁶⁰ Moreover, social puzzlement grows as discrepancies between traditional images of childhood and actual treatment of children in society and by the law become harder to mask.

In short, society and the law face a central conundrum in defining and regulating families. Society clings to traditional images of childhood, but the social and cultural universe within which those images made sense and could, in theory at least, be actualized, has largely disappeared. Although society continues to voice a strong commitment to traditional notions of childhood, the world within which actual children function and develop contrasts dramatically and increasingly with the world of the traditional family. As a result, the ethic of nineteenth- and early twentieth-century domestic life still predominates in social understanding of childhood, but the domestic world to which that ethic once attached itself no longer exists. The lives of actual children can be harmonized less and less often with social images of childhood. In consequence, the difficulty of preserving the ethic of childhood without familiar social anchors is evident.

A variety of responses is evident. One set of responses derives from within the Traditional Model⁴⁶¹ of children; one from the Individualist Model;⁴⁶² and most of the others from the Transforming Traditional Model.⁴⁶³ Thus, an effort to preserve traditional conceptions of childhood is being supported, at least in theory, through attempts to safeguard or to revivify traditional forms of family, including, in particular, traditional forms of parental authority and of parent-child relationships.⁴⁶⁴ Second, and in complete contrast, so-

⁴⁶⁰ This is not to suggest that so-called traditional families ever in fact existed without contradiction and significant variation. However, before the second half of the twentieth century, society had remained widely committed to traditional understandings of familial relationships for adults as well as for children. That is, a relatively uniform ideology of family was more widely accepted in the nineteenth century and in the first half of the twentieth century than in subsequent decades. See generally GROSSBERG, *supra* note 21 (discussing the development of an American law of domestic relations during the nineteenth century).

⁴⁶¹ See *supra* notes 199-226 and accompanying text (discussing the Traditional Model where parents are given a significant degree of control over their children).

⁴⁶² See *supra* notes 355-409 and accompanying text (discussing the Individualist Model and the balance between minors as autonomous individuals and society's hold on the traditional understanding of the family).

⁴⁶³ See *supra* notes 227-354 and accompanying text (discussing the Transforming Traditional Model).

⁴⁶⁴ See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 123 n.3 (1989) (plurality opinion) (defining family relationships deserving constitutional protection as those "accorded traditional respect" by society).

ciety is relinquishing traditional understandings of childhood, and providing for the amalgamation of the worlds of adults and of children over the age of absolute dependency.⁴⁶⁵ In between stand a host of other responses. Two in particular have become important in the law's approach to children and childhood. Each can be found, at least to some extent, within the Court's responses to the cases occasioned by parental consent and notification statutes.

1. Preserving the Traditional Family or Redefining Childhood

The force of nostalgia notwithstanding, the first response is increasingly inadequate as it becomes increasingly obvious that society is simply unable or unwilling to recreate a world in which marriages endure, parental authority is sacrosanct, and the domestic sphere is defined in express opposition to the marketplace. In fact, the traditional family has largely disappeared, and, despite some efforts to return to an earlier age, or far more remarkably, to give people the illusion that they can, if they so desire, *choose* either tradition or modernity, or perhaps, both;⁴⁶⁶ divorce is easily obtained and common;⁴⁶⁷ children, more often than not, are raised for at least some period within more than one constellation of family members; mothers work;⁴⁶⁸ and the contractual metaphors of the marketplace have become almost equally familiar within the domestic sphere.⁴⁶⁹

The second option—the ideological contrary of the first—involves redefining childhood itself so that the concept comports with the in-

⁴⁶⁵ See, e.g., *In re Gault*, 387 U.S. 1, 13 (1967) (holding constitutional due process guarantees applicable in juvenile court proceedings).

⁴⁶⁶ In 1997, Louisiana passed a statute giving a choice to couples who have decided to marry. See 1997 La. Sess. Law Serv. 1380 (West) (describing "covenant marriages"). Couples may decide to marry in such a way that the relationship can be terminated with a no-fault divorce, or they may decide to marry in such a way that the relationship can be terminated only on fault grounds. See *id.* In the second case, the grounds include adultery, abandonment, a prison sentence for a felony, and spousal or child abuse. See *id.*; see also Kevin Sack, *Tough Marriage Compact*, N.Y. TIMES, June 29, 1997, at 2 ("In Louisiana now, brides and grooms can either say 'I do,' or 'I really, really do.'").

⁴⁶⁷ See Andrew Cherlin, *The Trends: Marriage, Divorce, Remarriage*, in FAMILY IN TRANSITION, *supra* note 2, at 80, 83-84 (reporting a slow, continuous increase in the divorce rate from the mid-nineteenth century to the mid-twentieth century, with a steeper increase in rate of divorce after middle of twentieth century).

⁴⁶⁸ For several decades, very few American families have contained working fathers, stay-at-home mothers, and their children. See May, *supra* note 164, at 583.

⁴⁶⁹ See *id.* (noting that many youths were encouraged to be "risk-takers in fashioning their identities" in ways similar to taking risks in the marketplace).

dividualization of the family. Such a complete deconstruction of venerable understandings of childhood is rarely proposed explicitly.⁴⁷⁰ However, at least in some part, and for some purposes, children are being redefined as autonomous individuals, and as a result, the world of children and the world of adults increasingly overlap; moreover, hallowed images of childhood are being reconstructed, though not explicitly.

Neil Postman has suggested that in certain important regards children today more closely resemble their counterparts of the thirteenth century than those of the nineteenth century.⁴⁷¹ In Postman's view, an impressive quantity of evidence suggests the disappearance of childhood in the Western world, and in the United States in particular.⁴⁷² He writes:

There is, for example, the evidence displayed by the media themselves, for they not only promote the unseating of childhood through their form and context but reflect its decline in their content. There is evidence to be seen in the merging of the taste and style of children and adults, as well as in the changing perspectives of relevant social institutions such as the law, the schools, and sports. And there is evidence of the 'hard' variety—figures about alcoholism, drug use, sexual activity, crime, etc. . . .⁴⁷³

While acknowledging the impossibility of interpreting this evidence with complete certainty, or of assigning to it a definitive set of discrete causes, Postman suggests that the disappearance of childhood can at least in part be attributed to alterations in "the symbolic arena" within which society operates.⁴⁷⁴ He refers to the development within the last half-century of new forms of electric and electronic media (chiefly television and computers) that replace logi-

⁴⁷⁰ There are exceptions. Richard Farson, in an extreme statement of children's rights, suggests that children should be understood and treated as autonomous individuals. See FARSON, *supra* note 107, at 31-32. He recommends, for example, that in order for children to become fuller participants in the world of work, they be allowed to sue and to hire attorneys and that the law recognize that children are not, in fact, "weak, innocent, and incompetent." *Id.* at 166. Farson further suggests that children be granted the rights to hold high office and to vote, and the right to sexual freedom. See *id.* at 152-53, 185. Even Farson, however, does not suggest abandoning childhood. Rather, he suggests that if children are granted complete liberation, they will be free to "make a childhood full of pleasure, invention, and exploration much too foreign to today's child." *Id.* at 5.

⁴⁷¹ See POSTMAN, *supra* note 3, at 99.

⁴⁷² See *id.* at 120.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

cal analysis and linear consideration with images.⁴⁷⁵ Thus, Postman suggests that as the invention of the printing press in the fifteenth century encouraged long years of schooling and initiation into the secrets of the adult world, so the invention of television and computers obviates the need for long initiation periods, and thereby encourages the amalgamation of childhood and adulthood.⁴⁷⁶ In addition, the widespread replacement of the printed world with a world of instantly comprehended images creates a symbolic environment "that cannot support the social and intellectual hierarchies that make childhood possible."⁴⁷⁷

Postman is too aware of the intricacies of historic process to envision a regression to a six-hundred-year old past in which infancy ended at about seven, after which point feudal children more or less immediately entered the world of adult talk, taste, and habit.⁴⁷⁸ He does, however, suggest that the world of children is merging with the world of adults as the nineteenth-century notions of both childhood and adulthood dissolve.⁴⁷⁹ He discerns not the return to feudal patterns, but the possibility that the traditional notion of childhood, understood for so long as an inexorable product of natural process, was itself a historic deviation.⁴⁸⁰

If that is so, it becomes easier to imagine society mediating existing contradictions between images of family and images of childhood. At present, the individualization of the family precludes the easy preservation of romanticized notions of treasured children protected throughout childhood from the harsh realities of adult life. To the extent that those images are discarded or refashioned, however, the contradictions will be less pressing.

Despite clear shifts in the role and understanding of children, contemporary society still clings to older impressions of childhood. It becomes harder to contextualize these impressions in contemporary family life, but the images persist. The result is a startling

⁴⁷⁵ See *id.* at 74.

⁴⁷⁶ See *id.* at 98-99.

⁴⁷⁷ *Id.* at 74.

⁴⁷⁸ See *id.* at 14 (noting that until the seventeenth century, there was no word in French, English, or German for youth between the ages of 7 and 16).

⁴⁷⁹ See *id.* at 120 (noting the merging of tastes and clothing styles as evidence).

⁴⁸⁰ See *id.*

irony. Childhood as a concept is safeguarded valiantly, even venerated, while actual children become the victims of that veneration.⁴⁸¹

2. Responses of the Transforming Traditional Model

a. Preserving Childhood Without Families

One social and legal response to these emerging contradictions, evident in cases involving the right of girls to terminate pregnancies, as well as in *Parham v. J.R.* and a variety of other cases, has been to preserve traditional understandings of childhood, and thus to preserve a sense of social responsibility for the protection of children, but, in recognizing as well that families do not or cannot routinely serve that goal, to delegate the task of protecting children to substitute authorities. Chief among these authorities has been the state, in its various guises. In the abortion cases involving minors, the Court, describing children as "vulnerable," and in need of parental guidance,⁴⁸² but also recognizing that parental guidance may fail to serve children in families beset by discord and fractionalization,⁴⁸³ established state authority as a substitute for parental authority.⁴⁸⁴ Thus, the Court declared that a pregnant girl who cannot, or chooses not to, obtain the consent of her parent to abort, must be permitted to seek the substitute consent of a judge.⁴⁸⁵

⁴⁸¹ See *supra* notes 79-153 and accompanying text (discussing the impact of family transformation on children).

⁴⁸² *Bellotti II*, 443 U.S. 622, 634 (1979) (listing vulnerability as one of the justifications for not equating the constitutional rights of children with those of adults).

⁴⁸³ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (noting the pregnancy of the minor fractures the family structure and is in contradiction to the interests of non-consenting parents).

⁴⁸⁴ See, e.g., *Bellotti II*, 443 U.S. at 643-44 (providing a judicial bypass mechanism for pregnant minors who cannot obtain parental consent to abort).

⁴⁸⁵ See *id.* One commentator has applauded the approach in the abortion cases involving minors as one instance of a "separation of powers" approach to the socialization of children. See Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1373 (1994). Lupu concluded:

Those who care for children can and should be made to grapple with others who care for the same children. This system would not be designed to comfort the grapplers; on the contrary, it might utterly discomfit them, on the theory that forcing them to confront one another over questions of child welfare, small and large, will produce greater accountability and better decisions for children. Power separation, so maintained, would serve the freedom and well-being of those over whom the struggling occurs.

Id.

The judicial bypass option represents only one context in which state authority displaces or directs the parent-child relationship. In *Parham* the Court grounded the right of parents (with the support of hospital personnel) to institutionalize their children in the inexorable bonding that connects parents to their children, but then granted the same right to the state regarding children in state custody.⁴⁸⁶ "[W]e cannot assume," the Court concluded, "that when the State . . . has custody of a child it acts so differently from a natural parent" as to justify a different set of rules for circumscribing parental and state authority over children.⁴⁸⁷

Moreover, it has become commonplace for courts presiding over divorce proceedings to fashion the frame and details of the relationship between parents and their children.⁴⁸⁸ Divorce courts not only decide who within divorcing families sees whom, who has responsibility for whom, when and under what circumstances, but encroach upon the most intimate details of everyday familial life.⁴⁸⁹ As Barbara Whitehead writes:

Family courts rule on children's participation in religious holidays, birthdays, and special family occasions like weddings or reunions. They may be called upon to resolve conflicts over parent's participation in PTA meetings and school recitals; the mailing of report cards and medical reports; their choice of dentists, pediatricians, and psychologists; even their decisions about music lessons or sports camp or religious education.⁴⁹⁰

The children whose lives are so arranged continue to be understood through images formulated in an era when divorce was rarer than it is now, and the law itself presumed that in the vast majority of cases the details of children's everyday lives would be settled

⁴⁸⁶ See *Parham v. J.R.*, 442 U.S. 584 (1979) (holding constitutional a Georgia statute that provides for voluntary commitment of children to state hospital by the application of the parents or guardians).

⁴⁸⁷ *Id.* at 618.

⁴⁸⁸ See *infra* notes 489-91 and accompanying text (discussing the court's role in the divorced parent-child relationship).

⁴⁸⁹ See WHITEHEAD, *supra* note 111, at 165-68 (noting visitation, medical care, school progress notification, and religion as just a few issues commonly determined by family courts).

⁴⁹⁰ *Id.* at 165-66.

within the domestic sphere, and within the scope of firm parental authority.⁴⁹¹

The substitute decisionmaker approach preserves an understanding of children as vulnerable,⁴⁹² and in that regard comports with traditional understandings of childhood.⁴⁹³ However, in a society still committed, at least in theory, to safeguarding children's interests, the approach depends on the assumption that substitute decisionmakers do protect children's welfare. But a great deal of evidence calls that assumption into question—for example, the procedure established in *Bellotti II*, directing young, pregnant teenagers to petition judges.⁴⁹⁴

Whether the wide scope given parental authority within the context of the traditional family served children's interests impressively could also be debated. However, the assumption that parental authority served children's interests was rarely debated. The natural origins of the parent-child bond were presumed to assure that parents would almost always protect their children's interests.

In comparison, the substitute decisionmaker approach, found in abortion cases involving minors, as well as in a variety of other contexts in which the law regulates children's lives or behaviors, is not grounded on a set of unassailable assumptions about human interaction. Nor, is it grounded on any natural truth comparable to that once considered the inviolable basis of the parent-child relationship. As a result, the consequences of the approach for children have been widely criticized. And to the extent that the approach does not seem to serve children's interests, however compelling society's need for an alternative to parental direction, it exacerbates more often than it resolves contradictions that stem from divergent understandings of childhood, children, and the domestic sphere more generally.

⁴⁹¹ See *id.* at 166-68 (noting that the "highly contractual approach to parental rights and responsibilities" taken by divorce courts destroys the independent and voluntary basis of the parent-child relationship).

⁴⁹² See, e.g., *Bellotti II*, 443 U.S. 622, 634 (1979) (recognizing the vulnerability of children when announcing the substitute decisionmaker approach).

⁴⁹³ See *supra* notes 82-88 and accompanying text (discussing the traditional understanding of children and childhood).

⁴⁹⁴ See *Bellotti II*, 443 U.S. at 643-44 (establishing a judicial bypass mechanism where the pregnant minor can seek substitute consent for abortion); see also *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986) (noting that none of the judges who testified regarding the experience of adjudicating parental notification petitions "identified a positive effect of the law"); *supra* notes 441-48 and accompanying text (discussing the facts in *Hodgson*).

b. *Preserving Childhood for Some Children: The Expansion of Adolescence*

In some contexts, particularly those in which familial dissolution is either presumed or explicit, children are being defined anew. For the most part, these are contexts in which children's delinquent, or otherwise untoward, conduct leads the law to *assume* an earlier breakdown in the parent-child relationship.⁴⁹⁵ To some extent *Bellotti II* and the other abortion cases involving minors are of this sort.⁴⁹⁶ However, in those cases the Court relied ultimately on the state as a substitute for parental authority, and thus refrained from expressly confirming the autonomy of children even for the specific purpose of consenting to an abortion.⁴⁹⁷ In other cases, the law has gone further toward redefining children. For example, the law has been willing not only to *protect* delinquent children through the ascription to them of autonomous individuality, but it seems increasingly ready to hold them responsible for their acts, and to punish them, as it holds responsible and punishes adults for similar behavior.⁴⁹⁸ In May 1997, for instance, the United States House of Representatives passed a bill to increase the severity of penalties imposed on juveniles convicted of federal crimes.⁴⁹⁹ Among other things, the bill would require that juveniles' criminal records, now sealed under confidentiality laws, be opened to public review.⁵⁰⁰

⁴⁹⁵ See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (noting interests of parents and of pregnant minors can conflict fundamentally).

⁴⁹⁶ See, e.g., *Bellotti II*, 443 U.S. at 647 (recognizing the potential difficulties a minor may have discussing her decision to have an abortion with her parents).

⁴⁹⁷ See *id.* at 643-44 (holding a state must provide for a judicial bypass if parental consent to abortion for pregnant minors is required).

⁴⁹⁸ See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 531-34 (1971) (rejecting right to jury trial in juvenile proceedings and explaining *Gault* and related decisions as efforts to repair inadequacies of juvenile court system); *In re Gault*, 387 U.S. 1 (1967) (granting juvenile due process rights because of the Court's concern with protecting children from the inadequacies of the juvenile court system); see also Hafen, *supra* note 192, at 635 (concluding cases granting due process rights to juveniles do not show "reject[ion of] the validity of a legal minority status").

⁴⁹⁹ See Juvenile Crime Control Act of 1997, H.R. 3, 105th Cong. (1997). The bill is aimed at "combat[ing] violent youth crime and increas[ing] accountability for juvenile criminal offenses." *Id.* pmbl. It would require that most juveniles over 14 (and some under 14) who have been indicted for serious crimes be treated as adults in federal prosecutions. See *id.* § 101(b)(1) (providing "a juvenile [over 14 years old] shall be prosecuted as an adult" if alleged to have committed an act which, if committed by an adult, would be a serious violent felony or drug offense).

Similarly, in England, Prime Minister Tony Blair, in announcing the legislative objectives of his new government, proposed that children between the ages of ten and fourteen become responsible to the state for their actions.⁵⁰¹

These responses have depended, at least implicitly, on the separation of childhood into at least two discrete stages, and more specifically, on the elaboration during the twentieth century⁵⁰² of the so-called adolescent stage.⁵⁰³ The expansion of the notion of adolescence,⁵⁰⁴ which allows the term to be used now in reference to children as young as ten and to people well into their twenties, has allowed the law to recognize certain children for certain purposes as autonomous individuals, while in theory safeguarding hallowed images of childhood.

The notion of adolescence is well suited to the construction of a set of rules that seem at once protective and draconian. Adolescence is itself envisioned through conflicting sets of images. The stage suggests energy, spontaneity and physical strength, but also disruptive behavior, irresponsibility, and cultural marginality.⁵⁰⁵ Thus, through the construction of a fledgling law of adolescence, society preserves traditional notions of childhood, but preserves the option of treating certain children as autonomous individuals.⁵⁰⁶ If that option is exercised, society and the law can presume either that adolescents are thereby protected from inequity⁵⁰⁷ or, in contrast, that adolescents, in being rendered directly and completely responsible for their own decisions and deeds, will be channeled and re-

⁵⁰⁰ See *id.* § 107 (providing such records would be available for "official purposes," including communication to the public).

⁵⁰¹ See Warren Hoge, *Blair, Keeping Up Pace, Pledges Package of Reforms*, N.Y. TIMES, May 15, 1997, at A3 (reporting that the British government said it would offer laws to require 10- to 14-year olds to be responsible for their actions as part of the effort to combat the rising levels of juvenile crime).

⁵⁰² Philippe Ariès described Wagner's *Siegfried* as the "first typical adolescent of modern times." PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 30 (Robert Baldick trans., 1962).

⁵⁰³ See F. Raymond Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, LAW & CONTEMP. PROBS., Summer 1975, at 78, 78 (discussing the adolescent stage).

⁵⁰⁴ See FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 21-22 (1982) (noting the "period of not-quite-adulthood" extends longer than before).

⁵⁰⁵ See ARIÈS, *supra* note 502, at 30 (discussing traits of adolescents which make them heroes).

⁵⁰⁶ See Robert Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363 (1982) (arguing that decisions of adolescents and of adults should be treated similarly by the law).

⁵⁰⁷ See, e.g., Hafen, *supra* note 192, at 644-50 (distinguishing between rights of protection and rights of choice).

strained.⁵⁰⁸ For the most part, the law, in defining certain children as autonomous individuals, has not been primarily motivated by recognition of adolescents as more mature than younger children. In fact, those children whom the law has most often defined through the terms and incidents of autonomous individuality have also been defined as troubled or delinquent, and as apparently unable or unwilling to rely on parental direction and protection.⁵⁰⁹

At present, very young children, or older children who can be associated with traditional images of childhood (most typically middle-class children within the protective frame of functioning families), are generally defined by the law as occupying a dependent status, and are not treated as autonomous individuals. These children are granted few rights but are, in theory at least, cared for and protected (usually by their parents, but if not, by the state). To other children, classified implicitly or explicitly as "adolescents," the law is readier to grant rights associated with autonomous individuality.⁵¹⁰ The apparent advantage for such children, who may be as young as nine or ten, is liberation from parental and state authority. The cost, however, is the loss of childhood.

The elaboration and expansion of adolescence as a discrete stage, necessitating discrete legal rules, may proceed. If the elaboration and expansion of adolescence continues, the law may increasingly reflect that process by further constructing and refining a body of law with specific application to people who are considered neither children nor adults. Alternatively, however, the amalgamation of childhood and adulthood suggested by the ascription of adolescence to ten-year olds (seen as acting like "grown-ups") and to twenty-two

⁵⁰⁸ Supporters of the Juvenile Crime Control Act of 1997 (passed by the House in May 1997) described the advantages of the bill that would increase penalties against juveniles convicted in federal court of certain crimes. Representative George W. Gekas, Republican of Pennsylvania, for instance, asserted that "Americans are shocked by the brutality and viciousness of crimes that are being committed by 13- and 14- and 15-year-olds, and they're equally shocked when they see a system that treats these juveniles as something less than the predators they seem to be." Jerry Gray, *House Passes Bill to Combat Juvenile Crime*, N.Y. TIMES, May 9, 1997, at A1.

⁵⁰⁹ See, e.g., *Bellotti II*, 443 U.S. 662 (1979) (involving pregnant minors); *In re Winship*, 397 U.S. 358 (1970) (concerning the conviction of a 12-year-old boy of larceny); *In re Gault*, 387 U.S. 1 (1967) (involving a 15-year-old boy placing lewd phone calls and thus committed to State Industrial School).

⁵¹⁰ See, e.g., *Gault*, 387 U.S. 1 (recognizing juveniles have constitutional rights); see also *supra* notes 117-53 and accompanying text (discussing the response of the law in children's rights cases to the evolution of family notions).

year olds (seen as acting like "kids") may lead eventually to the sort of redefinition of childhood envisioned by Postman—a redefinition that will in truth entail the disappearance of childhood.⁵¹¹ If that happens, the law will likely respond by preserving or constructing a set of rules applicable to infants (including those no older than age seven or so) and by distinguishing less and less often among those above that age.

CONCLUSION

The dilemma is clear. Society continues in large part to imagine children in traditional terms, but the overarching social context within which that understanding of children made sense has largely disappeared. Social and legal responses to the dilemma remain uncertain, and satisfying resolutions are almost nonexistent.

Images of children have proved the most resilient and deeply ingrained of the images of family constructed in the early decades of the Industrial Revolution. But, the domestic settings associated with these images have largely disappeared. The coddled children of the nineteenth- and twentieth-century middle-class family were portrayed in settings that included nurturing, stay-at-home mothers, and loving, though more authoritarian, fathers who left home each day for the world of work and money.⁵¹² Divorce, though less rare than often assumed, was disapproved, and parental authority, though less absolute than in the case of colonial parents, was secure.⁵¹³ By the last half of the twentieth century, with the traditional family transformed almost beyond recognition, but with a continuing identification of family with affectionate connection and a lasting nostalgia for families of yore, traditional images of childhood could no longer easily be contextualized within the domestic sphere.⁵¹⁴ Similarly, within family law, a view of adults as part of enduring, loyal, solidary families has been almost completely replaced with one that understands adult family members as autono-

⁵¹¹ See POSTMAN, *supra* note 3, at 120 (discussing evidence for the disappearance of childhood).

⁵¹² See Robert A. Fein, *Research on Fathering: Social Policy and an Emergent Perspective*, in FAMILY IN TRANSITION, *supra* note 2, at 429, 430 (characterizing the traditional family with the father as breadwinner and the mother as homemaker).

⁵¹³ See Andrew Cherlin, *The Trends: Marriage, Divorce, Remarriage*, in FAMILY IN TRANSITION, *supra* note 2, at 80, 84-85 (charting divorce rates from 1860 to 1980); Fein, *supra* note 512, at 429-30 (explaining that fathers were respected and feared by their children).

⁵¹⁴ See generally POSTMAN, *supra* note 3, at 120-42 (arguing that the traditional notions of childhood have been "disappearing" in the last half of the twentieth century).

mous individuals who—apart from the affection they feel for one another—could as well populate the marketplace as the home. But a comparable view of children within families, forged in the late eighteenth and early nineteenth centuries, and solidified in the subsequent two centuries, has been amended and replaced only with considerable hesitation and uncertainty.⁵¹⁵

At present the law relies on two quite different models for understanding children and for regulating their conduct and interactions. The first, constructed during the nineteenth and early twentieth century, envisions children within families, but recognizes that those families often differ significantly from traditional nuclear families, and that, therefore, the protections theoretically afforded children by the inexorability of parental affection are often fragile or non-existent.⁵¹⁶ The second model, a twentieth-century innovation, views children as autonomous individuals.⁵¹⁷ This model, applied variously to protect or to punish children, itself faces a series of contradictions in a society that continues, despite the dissolution of the traditional family, to treasure children in large part *because* they can be defined as essentially distinct from adults.

That both models have co-existed for over three decades despite the fragility of each, and the contradictions each presents to the other, suggests the depth of society's ambivalence about the role and understanding of children in a culture that, in so many other regards, has sacrificed communal solidarity for personal autonomy. If society continues to understand children as inherently different from adults, as vulnerable, immature, and in need of adult guidance, then children face the risk that, without the support of enduring familial settings, they will never mature, that they will, in effect, remain adolescents throughout life. It seems unlikely that alternative settings can be constructed within which children can be protected and guided toward responsible adulthood. Especially in a society long suspicious of the state's power, it is hard to imagine such alternatives succeeding.

But if, instead of relying on parental substitutes, society redefines children, and if, further, the almost unrelenting generalization and

⁵¹⁵ See *supra* notes 90-96 and accompanying text (stating the desire to keep children an integrated part of families).

⁵¹⁶ See *supra* notes 199-354 and accompanying text (discussing the Traditional and Transforming Traditional Models).

⁵¹⁷ See *supra* notes 355-409 and accompanying text (explaining the Individualist Model).

elaboration of individualism within American culture does lead to the amalgamation of childhood and adulthood, the consequences for children will likely be unfortunate, unless—and little beyond whim or hope suggests this to be the case—children really are “little adults” almost from the start.

