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

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

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B. Responses to the Individualization of Family: Redefining Childhood? ........................................ 418

1. Preserving the Traditional Family or Redefining Childhood .................................................. 420

2. Responses of the Transforming Traditional Model... 423
   a. Preserving Childhood Without Families ........... 423
   b. Preserving Childhood for Some Children: The Expansion of Adolescence....................... 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

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1 "Ambivalence," as Martha Minow notes, represents not rejection but the pull of contrar-

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. 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. 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.

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.

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. Traditionalists and modernists alike have joined, and in large part continue to join, in that rhetoric, which considers safeguarding children

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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”).


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 ideological\(^11\) and demographic transfo-

\(^8\) 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.

mation of American family life in the second half of the twentieth century, has begun to fade.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{12} See POSTMAN, supra note 3, at 3-5 (arguing that as childhood disappears the boundary between childhood and adulthood blurs).
\item \textsuperscript{13} See infra notes 21-153 and accompanying text.
\item \textsuperscript{14} See infra notes 154-409 and accompanying text.
\item \textsuperscript{15} See infra notes 197-354 and accompanying text.
\item \textsuperscript{16} See infra notes 355-409 and accompanying text.
\item \textsuperscript{17} See infra notes 355-409 and accompanying text.
\item \textsuperscript{18} See infra notes 410-511 and accompanying text.
\item \textsuperscript{19} See infra notes 416-59 and accompanying text (setting forth analysis of ten cases addressing the abortion rights of pregnant minors).
\item \textsuperscript{20} See infra notes 410-511 and accompanying text.
\end{itemize}
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 Intergenerational 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-

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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{37} Children, treasured and coddled as perhaps never before, became the \textit{raison d'etre} and spiritual center of the family.\textsuperscript{38} Ironically, this vision of

\textsuperscript{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”).

\textsuperscript{33} See GROSSBERG, supra note 21, at 6-7 (redefining family against “patriarchal authority”).

\textsuperscript{34} See DEMOS, supra note 23, at 31 (describing the contrast as an “adversary relation”).

\textsuperscript{35} See id. (recognizing the “ongoing struggle for ‘success’” that faced the “‘self-made man’ in the nineteenth century).

\textsuperscript{36} See id. (describing family as “highly sentimentalized” and of “unwavering devotion to people and principles beyond the self”).

\textsuperscript{37} See id. (describing the home and family as a safe refuge and loving “fortification” against the “dangers” of the outside world).

\textsuperscript{38} See id. at 33 (noting this treatment of children occurred because they were the ones who would “carry[ ] 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,
were expected utterly to separate home from work. 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. 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.

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.

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. Families were autonomous, but family members, as such, were not. 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. 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.

For well over a century, family law resisted with apparent success the impulse of modernity toward autonomous individuality. 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).


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.\textsuperscript{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.\textsuperscript{53}

Only beginning in the 1960s did society and law expressly recog-
nize and begin widely to accept an understanding of family that al-

lows for, and even encourages, individualism and choice.\textsuperscript{54} It did so
almost unreservedly and with startling rapidity.\textsuperscript{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.\textsuperscript{56} So, for instance, within a little over a decade, begin-
ning in the late 1960s, divorce became widely available without ac-
cusations of “fault,” simply on the grounds that the parties
chose to end their spousal relationship.\textsuperscript{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.\textsuperscript{58} At
about the same time, courts began to recognize and enforce ante-
nuptial agreements, previously considered invalid as violative of
state public policy.\textsuperscript{59} Moreover, in enforcing such agreements,
courts now rely on principles derived from standard contract law. 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. 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.

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. In *Eisenstadt v. Baird*, 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. *Eisenstadt* declared unconstitutional a Massachusetts statute that prohibited the sale of contraceptives to unmarried adults. Seven years earlier, the Court had reached an apparently similar decision in *Griswold v. Connecticut*. There, the Court declared Connecticut's birth control statute unconstitutional. 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-
dent on which *Eisenstadt* could easily rest. However, a fundamental difference between *Griswold* and *Eisenstadt* separates the Court's approach in the two cases. 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.

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. In *Eisenstadt*, the Court declared:

It is true that in *Griswold* the right of privacy in question in-hered 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

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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 inter- preted 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*).


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.\textsuperscript{74}

The presumptions about family undergirding \textit{Eisenstadt} are far more revolutionary than those undergirding \textit{Griswold}. The reference in \textit{Eisenstadt} to a married couple as an “association of two individuals” and its affirmance 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.\textsuperscript{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.\textsuperscript{76} \textit{Eisenstadt} unmistakably demarcates a fundamental shift in society’s presumptions about families and familial relationships.\textsuperscript{77}

As \textit{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.\textsuperscript{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

\textsuperscript{74} Id.

\textsuperscript{75} Dolgin, supra note 49, at 1545 (discussing the implication of \textit{Eisenstadt}).

\textsuperscript{76} See supra notes 41-48 and accompanying text (discussing Schneider’s and Maine’s analysis of the family as holistic).

\textsuperscript{77} Compare \textit{Eisenstadt}, 405 U.S. at 453 (describing a marital couple as “an association of two individuals”), with \textit{Griswold}, 381 U.S. at 486 (calling marriage “intimate to the degree of being sacred”).

\textsuperscript{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. However, with regard to children, and the parent-child relationship in particular, society and the law have responded to the shift toward the valorization 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.

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. In the early

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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 inex- 
tricably intertwined with the production and socialization of 
emotionally and physically healthy children. Understood during the 
colonial period as a productive member of familial and communal 
units, the nineteenth-century middle-class child did not, and was 
not expected to, participate in the productive process. Thus, there 
appeared, in Viviana Zelizer's phrase, the “economically ‘worthless’ 
but emotionally ‘priceless’ child.” Such children became the raison 
d'être of the home, and along with their nurturing mothers, repre-
sented a world apart from the world of the marketplace. At the 
start of the nineteenth century, the law, recognizing this new un-
derstanding of children and of childhood, began to construct and to 
rely on the best interest standard for deciding cases about custody 
and parentage. Almost two centuries later, the best interest stan-
dard remains the governing principle for adjudicating such cases.

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

83 See Dolgin, supra note 82, at 1163 & n.173 ("The precious children of middle-class nine-
teenth 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, com-
pletely separate from the interactions of the working world, poor children were being ex-
ploited by the industrial enterprise. Child labor was, for instance, essential to the develop-
ment 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 wist-
fully 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 pro-
cceeding 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), 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), almost no one is satisfied with the consequences of the substitution of state, for parental, authority for the children involved or for their parents. 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—

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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-


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{107} that children not be “incarcerated against their will” in schools,\textsuperscript{108} and that they be given the opportunity to avoid their parents’ “daily influence.”\textsuperscript{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.”\textsuperscript{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-

\textsuperscript{103} Id. at 108.
\textsuperscript{104} See id. at 139-42.
\textsuperscript{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.
\textsuperscript{106} See id. at 139-40 (calling proponents of this form “child liberators”).
\textsuperscript{107} RICHARD FARSON, BIRTHRIGHTS 146-48 (1974).
\textsuperscript{108} Id. at 96-100.
\textsuperscript{109} Id. at 43.
\textsuperscript{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, 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.

Within the law, the birth of the children's rights movement has been connected to two decisions of the United States Supreme Court. The first, Brown v. Board of Education, protected African-American children from inferior treatment in schools. Brown recognized the potential autonomy of the children involved as African-Americans, but did not expressly recognize their autonomy as children. The second case, In re Gault, resembled Brown in extending constitutional protection to a group of children. 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. The explicit intention was to protect children rather than to reconceptualize them. 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. 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. It is not

111 See, e.g., BARBARA DAFOR 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.
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 \textit{Gault} responded to the law's failure to treat children justly by, in effect, redefining children and childhood.\textsuperscript{123} Construed as autonomous individuals, children could no longer be precluded from the protections afforded by due process.\textsuperscript{124} The Court's explicit aim was to protect, not to redefine, children and childhood.\textsuperscript{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.\textsuperscript{126}

Thus, \textit{Gault} represents one step toward defining children through an ideology that valorizes equality and autonomous individuality.\textsuperscript{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.\textsuperscript{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.\textsuperscript{129} Thus, it is not surprising that the Supreme Court, in \textit{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.\textsuperscript{130} That ascription was, it seems, expected to do little more than ensure children constitutional protections otherwise de-

\textsuperscript{123} See id. at 14-24 (suggesting the importance of change in the rights of juveniles because traditional treatment of juveniles resulted in arbitrariness).
\textsuperscript{124} See id. (noting that the lack of due process procedures has, historically, resulted in arbitrariness).
\textsuperscript{125} See id. at 29-31 (holding that proceedings involving juveniles must provide essential due process protections).
\textsuperscript{126} See id. at 27-31 (narrowing the distinction between adults and children in criminal proceedings).
\textsuperscript{127} See supra note 80 and accompanying text (discussing the valorization of individuality).
\textsuperscript{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).
\textsuperscript{129} See id. at 442 (discussing how the Civil Rights Movement for African-Americans in the 1960s stimulated the women's movement).
\textsuperscript{130} See \textit{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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{143} If children are not quite as dependent and immature as they some-

\begin{thebibliography}{99}
\bibitem{137} Id. at 144.
\bibitem{138} Id. at 151.
\bibitem{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).
\bibitem{140} Id. at 153.
\bibitem{141} See generally id. at 153-81 (discussing weakened and stressed bonds between divorced parents and their children).
\bibitem{142} Id. at 187.
\bibitem{143} See supra notes 79-103 and accompanying text (describing societal changes in familial relationships).
\end{thebibliography}
times appear, they could become more responsible for their own
care, and for their own decisions. They would in consequence be
less burdened by their parents' physical or emotional absence, and
parents would be less burdened by the responsibilities of parent-
hood. 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 fam-
ily. 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.

In short, society's concern to preserve childhood as a distinct
status, unaffected by other redefinitions of personhood and of fam-
ily, 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 mean-
ing and strength of the parent-child relationship, and the scope of
childhood. Not surprisingly, the law's responses to such cases
have been contradictory and uncertain. Sometimes children, de-
defined through a status that gives them little autonomy, are assumed
to be best protected when their individuality is effectively subsumed
by parental authority. 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. Farsen, supra note 107, at 23-24 (stating that the traditional nuclear family over-
burdens parents not only in their responsibilities to their children, who are incapable of car-
ing 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 par-
ents or the state, or parents are in conflict with the state).
149 See infra Part II (discussing varying interpretations of childhood, and analyzing con-
flicting 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 mandat-
ing 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.\textsuperscript{151} Sometimes the law reinforces parental authority even against children burdened by the exercise of that authority.\textsuperscript{152} But in other cases the law limits parental authority, granting children a degree of independence.\textsuperscript{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.\textsuperscript{154} Yet, in recent decades, the Supreme Court has interpreted the Constitution both to grant parents broad authority over their children,\textsuperscript{155} and to limit that authority in the face of state interests in the rearing of children's own views because children are also "persons' within the meaning of the Bill of Rights." \textit{Id.} at 243 (Douglas, J., dissenting in part).

\textsuperscript{151} \textit{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); \textit{In re Gault}, 387 U.S. 1 (1967) (extending due process rights to juveniles in delinquency proceedings); \textit{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).

\textsuperscript{152} \textit{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).

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

\textsuperscript{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. \textit{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").

\textsuperscript{155} \textit{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"); \textit{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).
Moreover, the Court has interpreted the Constitution both to grant various rights to children, and to fail to grant them other rights. 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. 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.

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. 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'd sub nom. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

160 See, e.g., Parham v. United States, 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. 610 (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. 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. 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. 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. At the same time, state lawmakers were dismantling family law as it had been established in the nineteenth century. 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.

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. As a group, Supreme Court cases involving children illustrate the

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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").
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.\textsuperscript{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.\textsuperscript{170} Each model depends on a particular vision or set of visions of childhood, and of the parent-child relationship.\textsuperscript{171} Two of the models reflect one pole of society’s present uncertainty about how to define children.\textsuperscript{172} The oldest model—here called the Traditional Model—first articulated as a constitutional matter in the 1920s, reinforces 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{175}

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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{172} See infra notes 199-354 and accompanying text (examining the Traditional Model and the Transforming Traditional Model).

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

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

\textsuperscript{175} See infra notes 355-409 and accompanying text (analyzing the Individualist Model and Supreme Court decisions that follow it).
Model. However, modifications to that model have been significant enough to warrant reference to an alternative form of the traditional model, the Transforming Traditional Model. 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. 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. 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.

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, as well as in disputes between children and the state. Moreover, the model has been invoked by state courts in resolving disputes be-

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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).

between parents or guardians and children. 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, does not define children through their status within families. Rather, this model allows for the autonomy of children and defines them, at least in theory, as complete human beings under the Constitution. 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. 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. The Supreme Court has applied the Individualist Model to children involved in delinquency and criminal proceedings, and the Court has used the model to allow children protection under the First Amendment. 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-
tion can be interpreted to reinforce traditional notions of family autonomy.\textsuperscript{191} This is so insofar as the children involved in cases such as \textit{Gault} and \textit{Tinker} were not opposed by their parents but were supported by them.\textsuperscript{192}

Because the Supreme Court has not expressly and clearly applied the Individualist Model to cases involving disputes between children and their parents,\textsuperscript{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,\textsuperscript{194} or for termination of their mothers' or fathers' parental status.\textsuperscript{195} In these cases,

\begin{itemize}
    \item \textsuperscript{191} See, e.g., \textit{Gault}, 387 U.S. at 4-5 (demonstrating support for child by parent through attendance at hearing and subsequent suit for habeas corpus); \textit{Tinker}, 393 U.S. at 504 (noting complaint filed on behalf of petitioners by their fathers).
    \item \textsuperscript{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.
    \item \textsuperscript{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).
\end{itemize}
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.\(^1\) 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 reinforced 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.\(^2\) 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.\(^3\) 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: \(\text{Meyer v. Nebraska}\)\(^4\) and \(\text{Pierce v. Society of Sisters}\)\(^5\)

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), \textit{rev'd sub nom. Kingsley v. Kingsley}, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

\(^1\) See, e.g., \textit{Gregory K.}, 1992 WL 551488 (allowing 11-year-old boy standing to terminate his mother's parental rights).

\(^2\) See \textit{DOLGIN}, \textit{supra} note 44, at 25-28 (describing the change in the perception of families over time).

\(^3\) See Dolgin, \textit{supra} note 82, at 1130-31 (noting the focus on "romanticized images of romping children enjoying the natural freedoms of childhood").

\(^4\) 262 U.S. 390 (1923).

\(^5\) 268 U.S. 510 (1925).
limits of the state's right to control the content and scope of public schooling. In **Meyer v. Nebraska** the Court declared unconstitutional a Nebraska statute that prohibited the use of any language other than English in elementary teaching. 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. This statute, the Court asserted, "interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control."

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. 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. Moreover, both cases are almost invariably cited by contemporary judges concerned with expanding the protection of family privacy against state intrusion. However, as Barbara Bennett Woodhouse has skillfully demonstrated, these cases carried another, equally essential, message about the proper
meaning and scope of the family and about the essence of the parent-child relationship.\textsuperscript{208}

The \textit{Meyer} opinion, which provided ample precedent for the Court's decision in \textit{Pierce} two years later, stressed the Fourteenth Amendment "liberty" interests of teachers, such as Meyer, who made their living teaching in foreign languages\textsuperscript{209} as well as the "fundamental rights" of those who spoke English as a second language, or not at all.\textsuperscript{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."\textsuperscript{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 \textit{Meyer}, was a particular understanding of the proper relationship between parents, children, and the state.\textsuperscript{212} In delineating that understanding, Justice McReynolds, writing for the Court, invoked as a counterexample the communistic family presented by Plato in the \textit{Republic}.\textsuperscript{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.'

\textsuperscript{208} See Woodhouse, \textit{supra} note 206, at 997 (discussing the conservative view of the family expressed in \textit{Meyer} and \textit{Pierce}).

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

\textsuperscript{210} See \textit{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").

\textsuperscript{211} \textit{Id.} at 401.

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

\textsuperscript{213} See \textit{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.\textsuperscript{214}

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

Similarly, in \textit{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,\textsuperscript{218} as well as on the liberty interests "of parents and guardians to direct the upbringing and education of children under their control."\textsuperscript{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.\textsuperscript{220}

Woodhouse argues convincingly that the commanding metaphor in \textit{Meyer}, and by implication in \textit{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.\textsuperscript{221} In sharp contrast with that essentially

\textsuperscript{214} \textit{Id.} at 401-02 (quoting Plato's \textit{Republic}).

\textsuperscript{215} \textit{Id.} at 402.

\textsuperscript{216} \textit{Id.} (stating that to hold otherwise would be to offend the "letter and spirit of the Constitution").

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} See \textit{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").

\textsuperscript{219} \textit{Id.} at 534-35.

\textsuperscript{220} \textit{Id.} at 535.

\textsuperscript{221} See Woodhouse, \textit{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

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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).
228 406 U.S. 205 (1972).
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.\textsuperscript{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.\textsuperscript{233}

Two of the cases at issue, \textit{Bellotti II} and \textit{Parham} arose as disputes between children and their parents about the limits of parental authority in decisions involving children's health and welfare.\textsuperscript{234} The third, \textit{Yoder}, was occasioned, in contrast, by parental disregard of a state statute.\textsuperscript{235} \textit{Yoder} therefore directly implicated the scope of parental power vis-à-vis the state rather than vis-à-vis children.\textsuperscript{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.

\textbf{a. The Place of Children in a Dispute Between Parents and the State}

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

\begin{itemize}
\item \textit{Meyer}, among other cases, to support parental discretion in the education and religion of their children).
\item See \textit{Bellotti II}, 443 U.S. at 638 (noting, without explaining, competing theories about the most effective way to educate children); \textit{Parham}, 442 U.S. at 602-03 (noting that sometimes parents act against the best interests of their children).
\item See, e.g., \textit{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”); \textit{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”); \textit{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”).
\item See \textit{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); \textit{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).
\item See \textit{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).
\item See \textit{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”).
\end{itemize}
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. 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*. 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. The statute required attendance in school by any child between the ages of seven and sixteen who had not graduated from high school. 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.

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-

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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 “inclination 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 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.
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.” 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* . . .

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. Rather, the Court’s holding rested on the particular (arguably unique) characteristics of the Amish community. 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. 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. The Amish are described in *Yoder* as almost quintessential, though certainly not mainstream, Americans. The Court wrote:

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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{252}

Thus, even the majority opinion in \textit{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.\textsuperscript{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 \textit{Meyer} and \textit{Pierce}, for assessing parental authority and defining children.\textsuperscript{254} Justice Douglas dissented from the opinion of the Court insofar as it ig-

\textsuperscript{250} \textit{Id.} at 211.

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

\textsuperscript{252} \textit{Id.} at 225-26 (footnote omitted).

\textsuperscript{253} See \textit{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).

\textsuperscript{254} See \textit{id.} at 243-46 (stating that cases subsequent to \textit{Meyer} and \textit{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.\textsuperscript{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.\textsuperscript{256} The non-existence of that dispute, he declared, had not been adequately demonstrated.\textsuperscript{257}

For Justice Douglas the personhood of the Amish children affected by the Court's decision was at stake.\textsuperscript{258} Those children, he asserted, having "identified with and assume[d] adult roles from early childhood," were fully competent to entertain the "moral and intellectual" questions at issue in the case.\textsuperscript{259} Citing \textit{Gault} and \textit{Tinker} among other cases,\textsuperscript{260} Justice Douglas described the Court's decision as imperiling "the future of the student, not the future of the parents."\textsuperscript{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.\textsuperscript{262} This conclusion contrasts absolutely with the traditional model of the parent-child relationship delineated in \textit{Pierce} and \textit{Meyer}, and relied on by the Court's majority in \textit{Yoder}.\textsuperscript{263} Even today, almost three decades after the Court decided \textit{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

\textsuperscript{255} \textit{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 \textit{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. \textit{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. \textit{See id.} at 243 (Douglas, J., dissenting) (joining in the judgment of the Court as to Jonas Yoder).

\textsuperscript{256} \textit{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").

\textsuperscript{257} \textit{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).

\textsuperscript{258} \textit{See id.} (noting it is the religious views of the children, rather than their parents, that are relevant).

\textsuperscript{259} \textit{Id.} at 245-46 n.3.

\textsuperscript{260} \textit{See id.} at 243-44.

\textsuperscript{261} \textit{Id.} at 245.

\textsuperscript{262} \textit{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).

\textsuperscript{263} \textit{See id.} at 213-14 (setting the rule regarding the balancing between state powers and parental rights on the education issue \textit{without} regard to the rights of the children).
state.\textsuperscript{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 \textit{Meyer} and \textit{Pierce}, Justice Douglas's recognition of children's autonomy is unusual.\textsuperscript{265}

Especially when read together, \textit{Parham} and \textit{Bellotti II} suggest the continuing allure of the model encapsulated in \textit{Meyer} and \textit{Pierce}, and a significant modification in that model.\textsuperscript{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 \textit{Yoder}.\textsuperscript{267}

\textbf{b. Disputes Between Parents and Children}

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

\begin{flushleft}\textsuperscript{264} Compare supra notes 254-62 (detailing Justice Douglas's dissent in \textit{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 \textit{Meyer} v. Nebraska, 262 U.S. 390, 400 (1923) (holding that the parents have a right to guide their child's education). \textit{See also supra} notes 201-26 and accompanying text (discussing the Traditional Model as exemplified by \textit{Meyer} and \textit{Pierce}).

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

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

\textsuperscript{267} \textit{See infra} notes 268-354 and accompanying text (discussing \textit{Parham} and \textit{Bellotti II}).

\textsuperscript{268} \textit{See infra} notes 268-354 and accompanying text (discussing \textit{Parham} and \textit{Bellotti II}).

\textsuperscript{269} \textit{See infra} notes 346-54 and accompanying text (comparing the \textit{Bellotti II} and \textit{Parham} cases).

\textsuperscript{270} \textit{See infra} notes 346-54 and accompanying text (discussing similarities and differences in \textit{Bellotti II} and \textit{Parham} with regards to parental authority and children's rights).\end{flushleft}
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.  

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

The statute at issue in Parham allowed a "parent or guardian" to have his or her child institutionalized temporarily for "observation and diagnosis." If, after that time, the hospital's superintendent found the child "suitable for treatment," the child could be institutionalized for an indefinite period. However, the hospital superintendent was required to discharge any child found no longer mentally ill or in need of therapy. 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-

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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.  

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. The Court presumed those understandings to have long protected, and to continue to protect, children within the domestic context. 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." 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." 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. "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." 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.

\[\text{Vol. 61}\]

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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. 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.

Thus, in *Parham*, the Court, though clearly concerned to reinforce traditional understandings of the parent-child relationship, did not rest its decision conclusively on those understandings. Rather, the Court justified the scope of parental authority through reference to the limitations childhood imposes on personhood. 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, 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.

*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.

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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.\textsuperscript{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 in-exorability of the parent-child bond.\textsuperscript{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.\textsuperscript{303}

Second, children are defined generally as unable to "make sound judgments" about many matters.\textsuperscript{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.\textsuperscript{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 \textit{Gault}, recognizes a child's "substantial liberty interest" in being free from unnecessary institutionalization.\textsuperscript{306} Although \textit{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.\textsuperscript{307}

In sum, in \textit{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.\textsuperscript{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-

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

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

\textsuperscript{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).

\textsuperscript{304} Id. at 603.

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

\textsuperscript{306} Id. at 600.

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

\textsuperscript{308} See \textit{Parham}, 442 U.S. at 602-04; \textit{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).
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.

That vulnerability is demonstrated far more forcibly through examination of *Bellotti II*, and through comparison of *Bellotti II* with *Parham*. *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. However, *Bellotti II* frees girls from parental authority only to require that their choices be approved by state judges. 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. 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. Thus, *Bellotti II*

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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
The Fate of Childhood

...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.\textsuperscript{316}

Bellotti II was decided six years after Roe v. Wade\textsuperscript{317} gave limited constitutional protection to a woman's right to have an abortion.\textsuperscript{318} Three years after Roe, in Planned Parenthood v. Danforth,\textsuperscript{319} the Court declared that the right extended in Roe does not appear "magically only when one attains the state-defined age of majority[;] minors, as well as adults, are protected by the Constitution and possess constitutional rights."\textsuperscript{320} In consequence, the Court concluded that, in spite of an interest in "safeguard[ing] . . . 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{323} Only if that consent was sought and denied was the girl permitted to seek judicial consent "for good cause shown."\textsuperscript{324} In a plurality opinion, the Court, premising its decision on the unique quality of the abortion deci-

\textsuperscript{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").
\textsuperscript{317} 410 U.S. 113 (1973).
\textsuperscript{318} Id. at 164-66.
\textsuperscript{319} 428 U.S. 52 (1976).
\textsuperscript{320} Id. at 74.
\textsuperscript{321} Id. at 75.
\textsuperscript{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").
\textsuperscript{324} Id. at 625 (quoting the challenged statute).
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. The Court concluded:

If 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.

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. 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. 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. 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-

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

However, in Bellotti II, as in Parham, the Court premised its conclusions on a lengthy consideration of the character of childhood. And although the holdings in the two cases contrast, the Court's description and assessment of childhood in Bellotti II echoes that in Parham. 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. 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." 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." 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." 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. That conclusion was expressly premised on the specific character of the abortion decision. 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 gov-
erned 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 in-
stitutionalize 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 charac-
terized by profound emotional intensity, holds far-reaching implica-
tions 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 re-
sult 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 pa-
rental authority and the character of childhood.

In addition, the Court's greater readiness to recognize the indi-
viduality 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 par-
ticular stance with regard to the right to abortion. More specifi-
cally, the Court's construction of the judicial bypass option, freeing 
girls from parental authority, but imposing on them the heavy bur-
den of petitioning and appearing before a judicial tribunal,\(^{345}\) can be

\(^{342}\) \textit{Id. at} 642.

\(^{343}\) \textit{See infra} notes 416-59 (considering cases involving right of minors to terminate preg-
nancy).

\(^{344}\) \textit{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. \textit{See} Carol Sanger, \text{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. 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. 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.

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*. As in those cases, in which an earlier Court was self-consciously concerned with preserving familiar understandings of the parent-child relationship, 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. 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. Moreover, in Bellotti II the Court proclaims expressly that parental choices do not always serve their children's best interests. 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. 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").
A few state trial courts have applied this alternative model in cases involving children in families expressly opposing their parents' authority and status. The Court first defined children as individuals, entitled to at least some of the protections afforded adults under the Constitution, in the 1960s. A decade later Bruce Hafen noted the significant possibility that the Court's decisions in cases such as *Gault* 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. 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, and *Tinker*, involving a First Amendment claim by high school students, to cases occasioned by intra-familial disputes. However, some state courts have been far less reluctant to

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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:

"The 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).


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 Rhenquist: 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.  

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.  

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 childhood—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, young children, one a teenager and one younger, asked the courts to determine their parentage. In 1992, eleven year-old Gregory Kingsley...
initiated proceedings to terminate his biological mother's legal parentage. 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." 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. 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. Some commentators remained cautious; some decried the court's interference with the "God-given" right of parents to their children; and at least one writer referred to Gregory as "the Rosa Parks of the movement to expand the rights of children."

In the second Florida case, a trial court granted standing to Kimberly Mays to challenge a stipulation concerning the teenager's legal parentage. 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

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).
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. The child, named Arlena, whom the Twiggs raised, died during childhood from surgery in connection with a congenital heart defect. During that child's final illness, the Twiggs learned from blood tests that she could not be their biological daughter. Later, they discovered that Kimberly was "the only other white female in occupancy at Hardee Memorial Hospital at the time of Arlena's birth." The Twiggs commenced proceedings to have Kimberly declared their child. Initially, the parties reached an agreement that would have left custody of Kimberly with Robert Mays and given visitation privileges to the Twiggs. Later, the relationships among the parties disintegrated, and the Twiggs sought custody. Kimberly responded by asking the courts to terminate all legal connection between herself and the Twiggs. The court granted Kimberly standing to challenge the earlier stipulation and dismissed the Twiggs' custody petition. 

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

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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).
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).
383 See id. (quoting the trial testimony of Kimberly Mays: "I want them out of my life and my life back").
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{389} For instance, in 1995, in Peregood v. Cosmides,\textsuperscript{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.\textsuperscript{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).\textsuperscript{392} On the one hand, the decision was premised on the recognition "that in family type situa-
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 Bellotti 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⁾ See Peregood, 663 So. 2d at 669.

⁽³⁹⁵⁾ See id.


⁽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.\footnote{01}

Courts have further considered whether children should be allowed independent counsel (in addition to, or instead of, guardian \textit{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.\footnote{02} In 1994, the American Academy of Matrimonial Lawyers (AAML) promulgated guidelines for the representation of minors in custody and visitation cases.\footnote{03} According to Martin Guggenheim, Reporter to the AAML for the Standards for Attorneys and Guardians \textit{ad Litem} in Custody or Visitation Proceedings (\textit{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."\footnote{04} Influenced by that concern, the AAML relied heavily on a distinction between "impaired" and "unimpaired" clients. The \textit{AAML Standards} presume that children above the age of twelve are unimpaired, and that children below age twelve are impaired.\footnote{05} Thus, under the \textit{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"
a variety of First and Fourteenth Amendment rights. With regard to younger children (rather remarkably, labeled "impaired"), 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, 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." 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-


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 DOCU-MENTARY 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 Criminal [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. In addition, society has more easily assimilated transformations in its understanding of actual children than in its vision of childhood. 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. 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. 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.

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).

of contradictory, uncertain responses constitutes what this Article labels the Transforming Traditional Model of childhood and of the parent-child relationship.\textsuperscript{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 \textit{Bellotti II} for analyzing the abortion right of pregnant adolescents stands, many voices express dissatisfaction with that model's results.\textsuperscript{416} In the period since \textit{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.\textsuperscript{417} However, the Court has devoted remarkable attention to the details of the model, revisiting the basic questions raised in \textit{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.\textsuperscript{418} The Court has separately

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

\textsuperscript{416} See infra notes 418-59 and accompanying text (discussing cases in which the model adopted in \textit{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).

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

\textsuperscript{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.\textsuperscript{419} It has separately considered consent and notification requirements.\textsuperscript{420} It has also considered statutes that mandate waiting periods for pregnant minors,\textsuperscript{421} and various sorts of judicial bypass options.\textsuperscript{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.\textsuperscript{423}

To some extent, the astonishing attention the Court has devoted to these cases reflects a concern with questions involving the right
to abortion.\textsuperscript{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, \textit{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.\textsuperscript{425} Thus \textit{Roe}, and a set of other cases, including \textit{Eisenstadt v. Baird}, decided at about the same time and involving constitutional rights implicative of familial relationships,\textsuperscript{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 \textit{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 \textit{Roe} to minors appears bafflingly contradictory.\textsuperscript{427} In-

\textsuperscript{424} See \textit{infra} notes 424-59 and accompanying text (discussing cases involving the right to abortion).
\textsuperscript{426} See \textit{supra} notes 64-78 and accompanying text (discussing \textit{Eisenstadt}).
\textsuperscript{427} See, e.g., \textit{Pine}, \textit{supra} note 423, at 671 (discussing the Court's dependence on theory, resulting in narrow interpretations which fail to "safeguard fundamental rights"); \textit{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. 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. 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." Thus, under the model constructed in Bellotti II, pregnant girls seeking abortions, though very likely to receive judicial consent, 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

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


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
The Fate of Childhood

statute at issue there never having become effective. 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.”

The Court further assumed that parents “naturally” act in furtherance of their children’s best interests. 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.

The facts, once established and reviewed by the trial court in *Hodgson*, tell a very different story. For the first time, in *Hodgson*, the Court considered an operating parental notice and bypass statute. 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. Summarizing that testimony, the district court asserted that not one of the judges who testified “identified a positive effect of the law.”

Clinical counselors, involved in implementation of Minnesota’s bypass option, concluded that the law failed to enhance “family integrity or

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

440 *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 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 870-88.

communication." Rather, the bypass procedure "more than anything, disrupted and harmed families." 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.

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." 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. 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. 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-

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446 Id. at 767.
447 Id.
448 See id. at 768-70.
449 Pine, supra note 423, at 680.
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. Thus, the Court described children as usually unprepared, through lack of experience and lack of judgment, to make life's most pressing decisions wisely. 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." 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. 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, 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

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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.\textsuperscript{457}

\textit{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.\textsuperscript{458} But these cases rest as well on traditional notions of childhood and of children.\textsuperscript{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 \textit{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.

\textit{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,

\textsuperscript{457} Id. at 75.
\textsuperscript{458} See \textit{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).
\textsuperscript{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.\textsuperscript{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 Model\textsuperscript{461} of children; one from the Individualist Model;\textsuperscript{462} and most of the others from the Transforming Traditional Model.\textsuperscript{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.\textsuperscript{464} Second, and in complete contrast, so-

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{463} See supra notes 227-354 and accompanying text (discussing the Transforming Traditional Model).

\textsuperscript{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. 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; divorce is easily obtained and common; children, more often than not, are raised for at least some period within more than one constellation of family members; mothers work; and the contractual metaphors of the marketplace have become almost equally familiar within the domestic sphere.

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

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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. 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. 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. 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. . . .

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. 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-

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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.
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. 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.”

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. 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. 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.

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

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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.\textsuperscript{481}

2. Responses of the Transforming Traditional Model

\textit{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 \textit{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,\textsuperscript{482} but also recognizing that parental guidance may fail to serve children in families beset by discord and fractionalization,\textsuperscript{483} established state authority as a substitute for parental authority.\textsuperscript{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.\textsuperscript{485}

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

\textsuperscript{482} \textit{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).

\textsuperscript{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).

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

\textsuperscript{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, \textit{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.

\textit{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. To some extent Bellotti II and the other abortion cases involving minors are of this sort. 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. 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. 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. Among other things, the bill would require that juveniles' criminal records, now sealed under confidentiality laws, be opened to public review.

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 "rejection 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[ting] violent youth crime and increas[ing] accountability for juvenile criminal offenses." Id. pmlb. 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).
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).
505 See ARIÈS, supra note 502, at 30 (discussing traits of adolescents which make them heroes).
507 See, e.g., Hafen, supra note 192, at 644-50 (distinguishing between rights of protection and rights of choice).
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.

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. 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

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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.


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.