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The Age of Autonomy: Legal Reconceptualizations of Childhood

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THE AGE OF AUTONOMY: LEGAL RECONCEPTUALIZATIONS OF CHILDHOOD

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I. INTRODUCTION

American society and law are confused about the scope of childhood and about the status of children. Society safeguards old images of childhood, but at the same time, constructs new, conflicting images. Within the last few decades, images of childhood have shifted dramatically. Associated almost exclusively in the first half of the twentieth century with home and "mother," and understood as innocent, fragile, and precious,[1] children are now also described as "the vanguard of a new, decultured generation, isolated from family and neighborhood, shrugged at by parents, [and] dominated by peers."[2] In short, old truths about children and childhood compete with, and are transformed by, new ones.

Reflecting the larger society, American law has begun, though with significant hesitation and concern, to reconstruct images of childhood, and thus, to reconsider its treatment of children. As the law struggles to preserve traditional understandings of childhood generally and of

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1. The description is of a pervasive social *image* of childhood. In fact, class has been a crucial determinant of any *particular* child's having been understood to reflect or not to reflect the cultural ideal. For the most part, the image of childhood constructed during the nineteenth century and elaborated during the twentieth century referred implicitly to middle-class (and richer) children but not to poor children. This implicit exclusion of poor children from increasingly romanticized images of childhood led to the development—also implicit—within family law of two sets of rules. One set regulated middle-class and rich families. The second set regulated poor families. *See* JACOBUS TENBROEK, FAMILY LAW AND THE POOR 145-212 (Joel F. Handler ed., 1964) (describing the development in California of separate system of family law for the poor).

2. Kay S. Hymowitz, *Kids Today Are Growing Up Way Too Fast*, WALL ST. J., Oct. 28, 1998, at A22.

children in familial contexts in particular, it redefines certain children, for certain purposes, as virtually indistinguishable from adults. Consequently, the law spawns and struggles to harmonize, contradictory definitions of childhood and conflicting rules for regulating children's behavior.

The law has redefined children as autonomous individuals, hardly different from their adult counterparts, within two quite different contexts—a domestic context and a criminal context. Within the last few decades, the law has dramatically altered its response to children within certain dysfunctional families and within the juvenile justice system. The law's efforts in each context are startling.

In general, as American law has broadly redefined adults within families, it has refrained from treating children similarly. Widely, courts and legislatures have tempered the implications of changes in family law affecting adults by re-affirming the law's traditional understandings of children. Thus, the law's willingness to treat certain children within familial contexts in a most untraditional fashion demands explanation.

Equally surprising as the law's readiness to reconceptualize children within certain families, is its even greater readiness to reconceptualize juvenile offenders, and in doing so, to dismantle a juvenile justice system constructed about a century ago. Understood, at least in theory, through most of the twentieth century as vulnerable and in need of protection and redirection rather than of punishment, juvenile offenders, especially those associated with serious crimes, are now widely viewed as essentially incorrigible. Increasingly, the law abandons familial metaphors in understanding and dealing with such children and defines them as autonomous individuals. As a result, the justification for treating children who commit crimes differently from adults who commit crimes erodes. The redefinition of children within this context is as startling as that of children within dysfunctional families. The very children who seem most in need of adult help are being denied even the pretense of such help.

This Article aims to explain the peculiarity involved in the law's redefining children in two contexts in which such redefinitions seem least felicitous. Toward this effort, Part II, following this introductory section, outlines the developing preference within society and within the law for individualism within American families, especially insofar as adults are concerned. Part III considers the depth of social ambivalence about that preference with regard to understandings of children and

childhood. Part IV details and compares concrete legal responses to children in dysfunctional families and to children within the juvenile justice system. Part V focuses on the implications of defining children as autonomous individuals. First, this Part illustrates the phenomenon by describing social images, including media images, of children responsible for serious crimes. This Part then considers some broad social implications of redefining certain children as virtually indistinguishable from adults.

II. SHIFTING VISIONS OF FAMILY

A vision of family, constructed in the early years of the Industrial Revolution, and widely institutionalized in the succeeding century and a half, blurs.[3] For almost two centuries, the American family, understood as a holistic, hierarchical social unit, grounded in enduring truth, was understood to provide a complement to, and sanctuary from, the marketplace. Children, central to the family, were seen as affectionate, vulnerable and ultimately precious. During the last several decades, the family has been expressly and dramatically transformed from a holistic social unit, to a more amorphous collection of autonomous individuals, understood to relate to each other as family members only insofar as they choose to do so. This process of transformation has been slower and less certain with regard to children in families than with regard to adults but, nonetheless, has begun to occur.

From at least the start of the nineteenth century until the middle decades of the twentieth century, Americans broadly viewed the family as a domain of life largely separate from the autonomous individuality central to the world of the marketplace. The traditional family represented a world of status—hierarchically structured and conceived as a whole—that contrasted almost completely with the universe of the

3. Within the culture broadly, alternative visions of family always existed alongside the so-called "traditional family." This article uses the term "traditional family" to refer to the form of family that was constructed in the early years of the Industrial Revolution and that, at least as an ideological matter, was preserved and glorified through the middle decades of the twentieth century. *See infra* notes 4-22 and accompanying text. To some extent, alternative visions of the traditional family co-existed, and could be correlated with differences in class and ethnicity. *See, e.g.*, STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 67-80, 83-105 (1988) (describing Afro-American family and working class family). Thus, the term "traditional family" is used here broadly to refer to certain cultural dimensions of mainstream American families from the early years of the nineteenth century until the last several decades of the twentieth century.

marketplace, with which it co-existed.[4] In the traditional family, relationships were understood as particularistic, enduring, and grounded in firm biological truths (e.g., of "blood" and "genes").[5] Within families, status dictated the scope of roles. So, for instance, wives were subservient to their husbands, and children to their parents and elders. These patterns were understood to reflect natural and biological truth, not unanchored social preferences. Thus, parents were expected to love and care for their children, and children to obey and respect their parents, not because either party *chose* to do so, but because of each party's position within the hierarchy of family status.

The American anthropologist, David M. Schneider, writing at the middle of the twentieth century, just before the strength and consistency of far-reaching transformations in the family became apparent in the last three decades of the century, portrayed the American family as a unit of love and loyalty and of "diffuse, enduring solidarity,"[6] conclusively differentiated from the world of work and money. Schneider wrote:

> [T]he contrast between home and work brings out aspects which complete the picture of the distinctive features of kinship in American culture. This can best be understood in terms of the contrast between love and money which stand for home and work. Indeed, what one does at home, it is said, one does for love, not for money, while what one does at work one does strictly for money, not for love. Money is material, it is power, it is impersonal and universalistic, unqualified by considerations of sentiment and morality. Relations of work and money are temporary, transient, contingent. Love on the other hand is highly personal and particularistic, and beset with

4. *See* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE 24-28 (1998) (describing traditional family as universe of status relations).

5. This description is of an ideology of family and does not presume the truth or falsity of that ideology's components. By ideology this article means the underlying assumptions in and through which people in a culture understand themselves and their world. It does not mean a set of political beliefs. The use is in harmony with that of the French anthropologist Louis Dumont. Dumont wrote:

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

LOUIS DUMONT, FROM MANDEVILLE TO MARX 22 (1977).

6. DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 50 (1968).

> considerations of sentiment and morality. Where love is spiritual, money is material.[7]

As Schneider suggests, the ideology of the traditional family was largely constructed in relation to its perceived social contrary. Relations at home were understood as contrasting completely with relations at work. The marketplace, populated by putatively equal, autonomous individuals was identified with men. The domestic arena was associated with women, who were expected to nurture their children and provide sanctuary to their husbands. Woman was separated from work and defined as nurturer and protector of sacred values.[8] She was privileged or relegated, depending on perspective, to serve hearth and home, to provide for her husband, and to shape her children's souls and futures.[9]

Children, central to the traditional family, were conceptualized as the treasures around which the home was organized and whose interests it was meant to serve. The "economically 'worthless' but emotionally 'priceless' child" of the nineteenth- and twentieth-centuries, was understood as essentially innocent.[10] Carl Degler described the differentiation of childhood from adulthood as the most important alteration in the evolution of the nineteenth century family. Degler wrote:

> [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

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7. David M. Schneider, *Kinship, Nationality and Religion in American Culture*, *in* FORMS OF SYMBOLIC ACTION: PROCEEDINGS OF THE 1969 ANNUAL SPRING MEETING ON THE AMERICAN ETHNOLOGICAL SOCIETY 119 (Robert F. Spencer ed., 1969).

8. This pattern developed only after the start of the Industrial Revolution. During the colonial period, work largely occurred in or near to the home. Colonial fathers were patriarchal, but men, women, and older children all participated in the unified world of work and home. *See* BARBARA EHRENREICH & DEIDRE ENGLISH, FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN 5-10 (1978).

9. A popular nineteenth century women's magazine described wives and mothers as "forming the future patriot, statesman, or enemy of his country, [but] more than this, she is sowing the seeds of virtue or vice which will fit him for Heaven or for eternal misery." MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 52-53 (1994) (citing MAXINE MARGOLIS, MOTHERS AND SUCH: VIEWS OF AMERICAN WOMEN AND WHY THEY CHANGED 38 (1984)).

10. VIVANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 3 (1985). During the nineteenth century, working-class children continued to play a central role in providing cheap labor in the new industrial enterprise. Only by the start of the twentieth century, with the advent of child labor legislation and universal compulsory education, did working-class children become part of the "nonproductive world of childhood." *Id.* at 5-6.

> children were being seen for the first time [by the end of the eighteenth century] as special, the family, reason for being, its justification as it were, was increasingly related to the proper rearing of children.[11]

At the same time, society began to extend the limits of childhood with the elaboration of an adolescent stage.[12]

Changes in family law after the start of the nineteenth century reflected social images of nurturing, self-sacrificing mothers and of protected, coddled children, both differentiated from men, work, and the world of autonomous individuality. Even in the first decades of the nineteenth century, courts in the United States began to overturn a long-standing pattern of assuming fathers the natural custodians of their children.[13] By mid-century, American courts looked explicitly to the interests of children in resolving parental disputes over custody. More and more often, children's interests were associated with protections afforded by maternal nurture and love. During the nineteenth century, the "best-interest standard" developed hand-in-hand with a preference for maternal custody.[14] The maternal preference doctrine[15] reflected a growing desire that women and children remain separate from work, money, and the world of the marketplace.

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

12. *See* PHILLIP ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., 1962). Aries chronicles the construction of a modern notion of childhood, beginning in the sixteenth and seventeenth centuries. *See id.* at 33-59. In the feudal world, childhood ended with infancy at about age seven. The extension occurred earlier for boys than for girls, who, until the end of the seventeenth century, were expected to marry by about age 12. *See id.* at 331-32. Aries described Wagner's Siegfried as the "first typical adolescent of modern times." *Id.* at 30.

13. *See* MICHAEL GROSSBERG, GOVERING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235-37 (1985). In the colonial period, fathers had an "unlimited right to the custody of their minor legitimate children," who were considered assets of their fathers' estates. *Id.* at 235.

In fact, divorce was uncommon before the nineteenth century. For instance, the first divorce in South Carolina was not ordered until 1868. *See* MASON, *supra* note 9, at 15. Even more, custody disputes were rare. Mary Ann Mason reports anecdotal evidence that even where divorce was available, some women may have avoided divorce, fearing the loss of their children. *See id.* at 17. Other women involved in divorce may not have requested custody, certain that the request would be denied. *See id.*

14. *See, e.g.*, Mercein v. People *ex rel.* Barry, 25 Wend. 64, 101 (N.Y. 1840) (granting custody to mother, declaring "the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in equal degree"). Not coincidentally, at about the same time, children became unimportant to economic productivity. *See* ZELIZER, *supra* note 10, at 5-6.

15. *See* GROSSBERG, *supra* note 13, at 248-54.

The image of family around which nineteenth century custody law developed remained central to the culture for well over the next century and a half. Only in the last several decades of the twentieth century did alternative images gain widespread social and legal acceptance.[16] Challenges to the traditional family during the nineteenth and early twentieth centuries occurred, but were contained.[17] Ironically, the traditional family, constructed in the 150 years following the start of the Industrial Revolution, seemed most securely entrenched in the decade and a half following World War II, just before it began visibly to collapse as the single standard against which Americans judged the moral worth of domestic matters.

Essential to the alteration of the family in the last part of the twentieth century was a widespread redefinition of family members. First, and most definitively, was the redefinition of adults within families as autonomous individuals connected insofar as they chose to be, but no further.[18] When the law responded to this new understanding of family members, it did so with remarkable speed and unanimity. For instance, within a decade and a half, as part of the so-called "divorce revolution" of the 1970s, every state altered its divorce law to provide for some form of no-fault divorce.[19] As a result, divorce was, in large part, transformed from a moral matter to a contractual matter.

This change reflected a transformation in understandings of spouses from a holistic unit to one composed of two separate autonomous individuals.[20] Moreover, beginning in the early 1970s, state

16. *See, e.g.*, Elaine Tyler May, *Myths and Realities of the American Family*, *in* 5 A HISTORY OF PRIVATE LIFE 539 (Antoine Prost & Gerard Vincent eds. & Arthur Goldhammer trans., 1991) (defining 1960s as watershed in demography of American family).

17. Sometimes attempts to contain alterations in family matters were draconian. Arguably, the fury of the response indicated the strength of the challenge. So, for instance, in the second half of the nineteenth century, laws were enacted widely that defined abortion and contraception as crimes. Abortion was prohibited as early as 1820; contraception was widely criminalized in the 1870s. *See* GROSSBERG, *supra* note 13, at 175-78.

18. *See generally* Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994) (analyzing differences between Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972), as reflecting increasing readiness of society and law to predicate family relations on autonomy of individual actors within family settings rather than on holism of familial units).

19. Before the divorce revolution, grounds for divorce included such behavior as adultery, desertion, and absence long enough to constitute a presumption of death. *See* LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW 204-07 (2d ed. 1985).

20. That change is indicated transparently in *Eisenstadt* where the Court declared

courts began to recognize and enforce antenuptial agreements in contemplation of divorce. Previously, such agreements were dismissed by courts as violative of public policy.[21] Family law, in its increasing willingness to enforce cohabitation agreements between parties choosing not to marry, further indicated that the spousal relationship was no longer defined exclusively through a set of status-based rights and obligations.[22]

Thus, family law has widely replaced rules formulated in the nineteenth century with new rules that recognize adults within families as autonomous individuals, free to design the terms of their relationships. In this, family law reflects society.

III. TRANSFORMED UNDERSTANDINGS OF CHILDREN AND CHILDHOOD

Images of childhood, basic to understandings of the traditional family, also begin to dim. In part, this follows from the transformation

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unconstitutional a Massachusetts birth control statute that prohibited the distribution of contraception to unmarried people. *See Eisenstadt*, 405 U.S. at 446-55. Seven years earlier in *Griswold* the Court invalidated a birth control law that prohibited the distribution of contraception to married couples. *See Griswold*, 381 U.S. at 485-86. In *Eisenstadt*, the Court firmly concluded that the right at stake attached to individuals as such and not to people within a marital relationship. The Court wrote:

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

Eisenstadt, 405 U.S. at 453.

21. *See, e.g.*, Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970) (taking judicial notice of increase in ratio of marriage to divorce in recognizing antenuptial agreement); Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982); Wilcox v. Trautz, 693 N.E.2d 141 (1998). Even more, in enforcing antenuptial agreements courts rely on standard contract law principles. *See* Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 511 (1988). States generally enforce antenuptial agreements if they (1) are free from fraud and overreaching, (2) reflect a full and fair disclosure by and between the parties of their respective assets, and in some states, (3) are not unconscionable as to property division or spousal support. *See id.* at 512-16.

22. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (enforcing non-meretricious contract between domestic partners); Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) (upholding express contract between unmarried cohabitants). Legislatures have been similarly willing to accept cohabitation agreements. *See, e.g.*, MINN. STAT. ANN. § 513.075 (West 1990) (Cohabitation: Property and Financial Agreements).

of families that has accompanied the reconceptualization of adults within families as autonomous individuals. As families have become more variable, and more transient, it has become harder to sustain an image of childhood that assumes that children should remain dependent and indulged for almost two decades. In part, other forces within the culture, only indirectly connected to the transformation of family, have affected social understandings of childhood.[23]

A. From Treasured Children to Adult-Child

Throughout most of American history, children's welfare was closely identified with the welfare of families.[24] For the most part, protecting children meant protecting families as social units within which children were understood as subservient to, and as obligated to respect and obey, their parents.[25] As relations between adults within families have become more malleable and more transient, the traditional model becomes harder to sustain. Thus, increasingly society and the law seek to protect children outside, as well as inside, of families. At the same time, childhood itself is reconstructed increasingly to provide for autonomous, independent children.

Neil Postman describes a broad amalgamation of childhood and adulthood.[26] Children, separated from adults throughout most of

23. Childhood has been dramatically altered, for instance, in response to electronic media. Even before the age of the Internet, Neil Postman suggested that television eroded the barriers that separated the world of children from that of adults. *See* NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (1982). "Television . . . is the consummate egalitarian medium of communication, surpassing oral language itself. . . . The most obvious and general effect of this situation is to eliminate one of the principal differences between childhood and adulthood." *Id.* at 84.

24. The law's interest in families and in children's welfare has been distinct since the late nineteenth century. *See* GROSSBERG, *supra* note 13, at 301 (noting appearance of child welfare legislation in late nineteenth century as distinct from legislation regulating families). However, the two continue to be correlated closely by analysts.

25. Non-mainstream families—for example, single-parent families, families with homosexual or lesbian partners, and multi-generational families—have frequently been criticized precisely on the ground that these families do not serve children as adequately as do mainstream families. At present, such families, no longer statistically deviant, continue to be criticized by those anxious to stem the transformation of the traditional family. A recent illustration of this sort of criticism is PATRICK F. FAGAN, THE BREAKDOWN OF THE FAMILY: THE CONSEQUENCES FOR CHILDREN AND AMERICAN SOCIETY (1998). Fagan identifies divorce and children born outside marriage as the two "widespread patterns" weakening the American family. Alienation attendant to divorce, he asserts, "weakens both . . . children's ability to value commitment to the family and (even more so) their ability to commit themselves to others." *Id.*

26. *See* POSTMAN, *supra* note 23, at 99.

American history, in dress, in leisure activities, in social predilections and sophistication, and in spheres of knowledge, are increasingly privy to the secrets of adult life, and are increasingly indistinguishable from adults in the clothes they wear, the games they play, and the entertainment they prefer. Thus, little children and their parents wear identical shoes and clothing. And children's games, once enjoyed without spectators and exacting rules, have become organized, competitive sports. This pattern is especially evident in advertising and on television. Postman describes an advertisement for Ivory Soap that appeared widely a number of years ago:

> [W]e are shown two women identified as a mother and daughter. The viewers are then challenged to guess which is the mother, which the daughter, both of whom appear to be in their late twenties and more or less interchangeable. I take this commercial to be an uncommonly explicit piece of evidence supporting the view that the differences between adults and children are disappearing.[27]

Postman suggests that in the age of television, the stages of life have been reduced to three: infancy, adult-child, and senility.[28]

How completely childhood, and children with it, will disappear remains unclear. But, it is clear that the period of adolescence has expanded during the last three or four decades. A stage that included thirteen through eighteen or nineteen-year olds at the middle of the twentieth century, now includes people as young as nine or ten and people well into their twenties. Young children date, organize and attend school dances, compete ferociously in athletics and in scholastics, and, through television and the Internet, are fully conversant with the world of adult "secrets."[29] At the other end, people remain dependent on parental support well into their twenties; they attend school longer and live at home longer in a dependent state. As a result, they are segregated from adult jobs and responsibilities.[30] Even more, people

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27. *Id.*

28. *See id.*

29. *See* Hymowitz, *supra* note 2, at A22 (describing increasing sexuality, drug use, suicide and criminal behavior among children in elementary school); *see also* POSTMAN, *supra* note 23, at 83-85 (considering role of television in presenting world of adult secrets to children); Peter Applebome, *No Room for Children in a World of Little Adults*, N.Y. TIMES., May 10, 1998, § 4, at 1 (noting competitiveness of children's contemporary games).

30. *See* STEPHANIE COONTZ, THE WAY WE REALLY ARE 13 (1997).

older than thirty delight in activities once considered appropriate for children alone.[31]

B. The Law's Response: Change and Ambivalence

The law, reflecting the society, is confused about the scope and meaning of childhood and of the parent-child relationship. Within the last several decades, the law has effectively redefined children in a number of contexts as autonomous individuals. In other cases, however, the law preserves more traditional understandings of children and of childhood.

This confusion is reflected in a series of Supreme Court decisions implicating the parameters of childhood and of the parent-child relationship, as well as in a variety of family law cases decided by state courts, and in the law's response to juvenile offenders. These responses reflect the existence of three distinct, even contradictory, models through which to consider the status and rights of children. These can be referred to as the Traditional Model, the Mediating Model, and the Individualist Model.[32]

Much like the larger society, the Supreme Court has been anxious to preserve childhood as a distinct status and to preserve traditional understandings of the parent-child bond. But, it has also been willing, in at least some contexts, to reconceptualize children as autonomous individuals. For the most part, this willingness has not suggested a broad rejection of traditional understandings of children in familial contexts. Rather, it acknowledges changes in the American family that necessitate granting increased autonomy to some children.[33]

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31. Adults attend camp and return to school. Beyond this, adults of virtually all ages resort to drugs and cosmetics to help themselves look and act younger. One article, featured on the front page of a Sunday *New York Times* edition of the *Week in Review* explained:

> Children stave off adulthood by staying in school longer or coming home to live with parents. Boomers go to fantasy baseball camps and chatter about what they'll do when they grow up. Men in their 50's turn back the clock with Propecia or Viagra, and senior citizens expect a life of vigor and engagement that defies conventional notions of old age.

Applebome, *supra* note 29, at 1.

32. These models are explored in much greater depth in Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1997).

33. I am grateful to Professor Martin Guggenheim of the New York University School of Law for suggesting that the Court's jurisprudence involving children in the 1970s was primarily instrumental, and had little express significance for the status of

Assumptions behind the Traditional Model undergird two cases decided in the 1920s. Both involved disputes between parents and the state about the limits of the state's right to control the character of public schooling.[34] This model assumes a domestic arena within which parents exercise almost complete control over their children.[35] In this model, children are dependent, immature, and voiceless.[36]

Fifty years later, in three cases decided in the 1970s, the Court reaffirmed much of the rhetoric, if not the essential message, of the Traditional Model, but now with significant hesitation.[37] The Court, in effect, attributed its hesitation in the 1970s to concerns about the consequences of the transformation of the traditional family for the character of the parent-child relationship and for the meaning of

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children. I also thank Professor Guggenheim for referring me to Robert Burt's article analyzing that jurisprudence. *See* Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329 (1979). Clearly, Professor Burt was correct in suggesting that the Court was largely concerned with exercising social control over children. Whatever the Court's express aims, however, its jurisprudence in cases such as *In re Gault*, 387 U.S. 1 (1967), and *Bellotti v. Baird*, 443 U.S. 622 (1979), did redefine children or, more accurately, reflected (and thus encouraged) a wider tendency within the society to redefine children. That tendency created additional questions and concerns about society's ability to "control" children.

Historically, society and law have not necessarily refrained from trying to establish social control over members of a group, defined, in theory, as autonomous. Clearly, such efforts are self-contradictory. *Lochner v. New York*, 198 U.S. 45 (1905), illustrates such an effort. In *Lochner*, the Court stressed the autonomy of workers vis-à-vis their employers precisely in order to ensure the continued ability of employers to control workers. *See infra* note 104 (considering implications of *Lochner*).

34. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (declaring unconstitutional Oregon statute requiring *public*, as opposed to private or parochial, schooling); Meyer v. Nebraska, 262 U.S. 390 (1923) (declaring unconstitutional Nebraska statute prohibiting use of any language except English in elementary education); .

35. *See Pierce*, 268 U.S. at 534-35 (describing children as under parental control); *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 . . . ."); *see also* Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

36. *See* Woodhouse, *supra* note 35, at 1001 (describing the reverse side of family privacy and parental control as the "child's voicelessness, objectification, and isolation from the community").

37. *See generally* Bellotti v. Baird 443 US. 622 (1979) (invalidating Massachusetts statute that required pregnant minors seeking to abort to seek parental permission); Parham v. J.R., 442 U.S. 584 (1979) (upholding Georgia statute that allowed parents to have their unwilling children committed to state mental hospitals); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating conviction of Amish parents under Wisconsin compulsory school-attendance law and holding law unconstitutional at least in reference to Amish high school children).

childhood.[38] Taken as a group, these three cases illustrate a distinct model of childhood (the Mediating Model). This model, because internally contradictory, appears inherently fragile.[39]

The assumptions informing two of the three cases, *Wisconsin* and *Parham*, are closer to the assumptions of the Traditional Model than to those of the Individualist Model. The assumptions of the third, *Bellotti*, are closer to those of the Individualist Model. However, each decision acknowledges the conflicting assumptions undergirding the others, and thus, as a group, these cases delineate a set of contradictory assumptions and uncertainties within society and law about the scope of childhood and of the parent-child relationship.[40] These cases reaffirm the presumption on which the Court's familial decisions rested in the 1920s,[41] that childhood is special and that children are best served through preservation of strong parental authority.[42] However, in the 1970s another, inconsistent message appeared as well. *Bellotti* and *Parham*, at least in theory, recognize certain liberty interests to which children are entitled under the Constitution.[43] Even more, in *Bellotti*, the Court declared that the preservation of parental authority does not always serve children's welfare.[44] Thus, an understanding of childhood, firmly embedded in constitutional jurisprudence during the 1920s began, by the 1970s, to founder, though not completely to disappear.

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38. *See, e.g.*, *Bellotti*, 443 U.S. at 638 (noting, without comment, competing theories about most effective way to educate children); *Parham*, 442 U.S. at 602 (1979) (noting parents sometimes act against best interests of their children).

39. In fact, the Mediating Model has now been significant to society and to the law for well over two decades. Arguably, the apparent stability of this model reflects only the continuing transformation of the American family away from a single ("traditional") model of domestic life.

40. For instance, *Bellotti* acknowledges the right of pregnant girls, anxious to terminate their pregnancies, to constitutional protection from parental veto. However, the decision also notes the fragility and vulnerability of children and the duty of parents to educate and socialize their children. *See Bellotti*, 443 U.S. at 637-38. *Parham* upholds a Georgia statute allowing parents to arrange a "voluntary commitment" of a child to a state mental institution, but notes that children have substantial liberty interests. *Parham*, 442 U.S. at 600-02. In a dissenting opinion in *Yoder*, Justice Douglas notes the contradiction between recognizing parental power over children's education and recognizing the rights of children as "persons" under the Constitution. *Yoder*, 406 U.S. at 243 (Douglas, J., dissenting).

41. *See generally* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

42. *See Bellotti*, 443 U.S. at 638 (proclaiming that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .").

43. *See id.* at 643; *Parham*, 442 U.S. at 600 (recognizing child's "substantial liberty interest in not being confined unnecessarily").

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

In yet other cases, not directly implicating the dimensions of the parent-child relationship, the Court assumed an Individualist Model of childhood in defining children as autonomous individuals, entitled to constitutional rights previously precluded to children by their status.[45] In 1967, the Court, in *In re Gault*, extended constitutional protection to children involved in delinquency proceedings.[46] The Court's clearly stated intention was to protect children,[47] not to conceptualize them anew. In fact, however, the language of *In re Gault* is the language of individuality and freedom,[48] and to that extent, cases such as *In re Gault* and *In re Winship*,[49] which followed, three years later, prepared the way for contemporary changes in the juvenile justice system.

Three decades after *In re Gault*, Congress began to consider seriously a response to juvenile crime already familiar within state legislatures.[50] In 1997, the House passed a bill, and the Senate Judiciary Committee reported favorably on a similar bill, that proposed holding many juvenile offenders responsible for their behavior much as the law holds adults responsible for theirs.[51] These bills *assumed* a reconceptualization of childhood for at least some children.

Similarly, state courts deciding family law issues have recognized

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45. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (involving First Amendment claim of high school students); *In re* Gault, 387 U.S. 1 (1967).

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

47. *See id.* at 17-21.

48. *See id.* at 20. "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *Id.*

49. 397 U.S. 358 (1970) (holding 12-year-old child entitled to proof beyond a reasonable doubt before being confined on charge of stealing).

50. *See, e.g.*, MO. ANN. STAT. § 211.071.1 (West 1996) (lowering age at which child may be subjected to waiver hearing from 14 to 12 with regard to any crime, and doing away with minimum age altogether with regard to child charged with one of seven especially serious crimes, including, for example, murder, rape and assault); WASH. REV. CODE ANN. § 13.40.010(2) (West 1993) (asserting that youth should "be held accountable for their offenses").

51. Juvenile Crime Control Act of 1997, H.R. 3, 105th Cong. (1997). The bill was passed in May 1997. It provided that most juveniles over 14 and some under that age be prosecuted as adults if alleged to have committed a crime which, if committed by an adult, would be a serious violent felony or a drug offense. *See id.* § 101(b)(1). The Senate Judiciary Committee approved a similar bill two months later. Violent and Repeat Juvenile Offender Act of 1997, S. 10, 105th Cong. (1997). Neither bill became law during the tenure of the 105th Congress, but each bill reflects an important trend within society regarding the proposed treatment and understanding of juvenile offenders.

children's autonomy in particular cases in recent years. In custody cases, children's voices are routinely respected, though usually, in theory, as part of the court's parens patriae concern with children's "best interests."[52] But beyond this, a few courts have granted children unprecedented power as autonomous individuals to define the terms of their custody or parentage.[53]

Thus, a curiosity appears. The law and society are most ready to treat children as autonomous individuals both in cases directly implicating the contours of the domestic arena and in cases involving children "in trouble." The first type of case might appear to be the last social domain within which express redefinitions of childhood would occur, and the second type of case involves children, apparently least ready to assume responsibilities associated with autonomous individuality in that these are children most seriously in need of adult help and guidance.

IV. ADULT-CHILDREN: IN FAMILIES AND IN PRISONS

Both types of cases (those giving children the astonishing right to design the terms of their own parentage and those of juvenile offenders, less and less often distinguished from their adult counterparts) entail images of children that conflict markedly with traditional images of indulged children, secure in nurturing, protective families. Moreover, the law's willingness to redefine both groups of children as autonomous individuals reflects vast changes that have largely redesigned the parameters of familial relationships within the last few decades.

Beyond these similarities, however, there are crucial differences in the two types of cases. Within the familial context, the extension of autonomy to children within troubled families has largely been aimed at *preserving* the possibility of family, even if not particular families. In marked contrast, recent redefinitions of children within the system of criminal justice assume the absence of family and the incorrigibility of

52. Some state statutes require judges presiding at custody cases to consider the child's preference. *See, e.g.*, CAL. PROB. CODE § 1510, 1514 (West 1991 & Supp.) (giving children 12 and older right to select own guardians).

53. *See, e.g.*, Gregory K. v. Ralph K., No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992) (granting young boy standing to challenge his biological mother's legal maternity), *rev'd sub nom.* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993); Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993) (granting adolescent girl right to pursue parental termination petition on her own behalf). These cases are considered more fully *infra* in notes 55-59 and accompanying text.

the children involved. Moreover, public images of juvenile offenders stress their absolute separation from family and, even more, from virtually all other forms of community.[54]

A. Autonomy Within Dysfunctional Families

In recent years, family law courts, while generally reluctant to abandon traditional understandings of children and of childhood, have begun to view children as autonomous individuals having independent rights and choices. A few courts, entertaining cases in which adolescents or younger children petitioned for changes in their parentage or custody, have recognized the children involved as autonomous individuals. For example, in the early 1990s, two Florida courts granted children (one a teenager, one even younger) standing to challenge their parentage.

In the first case, a Florida trial court granted standing to eleven-year old Gregory Kingsley to challenge his biological mother's maternity and to request that his foster parents be named his legal parents in the biological mother's stead.[55] Judge Kirk, writing for the trial court, recognized Gregory's autonomy and proclaimed: "[T]he 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."[56]

In the second case, a Florida trial court allowed Kimberly Mays, then a young teenager, to challenge a stipulation regarding her parentage.[57] Although the decision was not overruled, the unusual facts

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54. *See infra* notes 92-98 and accompanying text.

55. Gregory K. v. Ralph K., No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992), *overruled by* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). The trial court decision, which was widely publicized and debated, changed the scope of public considerations about the inevitability of a child's parentage from the child's own perspective. Gregory Kingsley's story became the subject of a made-for-television movie, and the boy appeared on talk shows in the years surrounding his legal battle. *See* Andrew L. Shapiro, *Children in Court—The New Crusade*, NATION, Sept. 27, 1993, at 301.

56. *Gregory K.*, 1992 WL 551488, at *1 (citing *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989)). *See, e.g.*, Susan Campbell, DES MOINES REG., Oct. 17, 1993, at 3 (describing Gregory's lawsuit as one "to divorce his biological parents"); *What They Said*, ST. PETERSBURG TIMES (Fla.), Sept. 30, 1993, at 2 (asking whether child should have right to "divorce" parents); Pat Wingert et al., *Irreconcilable Differences*, NEWSWEEK, Sept. 21, 1992, at 84.

57. *See* Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624, at *1 (Fla. Cir. Ct.

of the case[58] lessen its precedential value. Incidentally, Kimberly's legal battle, like Gregory's, received intense public attention.[59]

In *Peregood v. Cosmides*,[60] a Florida appeals court permitted a young boy to challenge his own adoption.[61] Similarly, in *In re Pima County Juvenile Action No. S-113432*,[62] an Arizona appellate court granted four children the right to petition for termination of their father's parental rights.[63] The latter decision expressly recognized the law's inconsistency in viewing children as autonomous for some purposes and as dependent and incapable in other contexts.[64] The court proclaimed:

> Children may not marry, drive a car, join the armed services or consent to surgery without the consent of a parent or guardian because the legislature has determined these acts require a certain level of maturity and capacity. The same cannot be said of a severance proceeding. Maturity has nothing to do with a child's interest in the substance of such a proceeding.[65]

In effect, the court dissociated a child's maturity from the child's

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Aug. 18, 1993). The case involved a complicated and sad story that commenced when two baby girls were switched at birth. *See id.* at *2. One girl (raised by Ernest and Regina Twigg, Kimberly's biological parents) died during childhood. *See* Mays v. Twigg, 543 So. 2d 241, 242 (Fla. Ct. App. 1989). The Twiggs discovered during the child's final illness that she was not their biological child. *See id.* Hospital records revealed that Kimberly was the "only other white female in occupancy at Hardee Memorial Hospital at the time of Arlena's [the dead child's] birth." *Id.* at 242. They then attempted to gain custody of Kimberly. *See Twigg*, 1993 WL 330624, at *1. A stipulation was reached that allowed Robert Mays to retain custody of the child he had raised and that granted visitation to the Twiggs. *See id.* Later, relationships among the parties deteriorated, and Kimberly asked to end all legal bonds between herself and her biological parents. *See id.* at *2. The court then allowed Kimberly to seek termination of any connection with the Twiggs. *See id.* at *3.

58. *See* Mays, 543 So. 2d at 242.

59. Kimberly's story quickly became the subject of a made-for-television movie and of a book. *See* Eric Harrison, *Court Will Not Force Girl to See Birth Parents*, L.A. TIMES, Aug. 19, 1993, at A1.

60. 663 So. 2d 665 (Fla. Dist. Ct. App. 1995).

61. *See id.* at 666. The court concluded that the adoption, arranged by the boy's unmarried mother and father, did not serve the child's best interests. *See id.* at 669. The precedential value of the case is limited due to what the court described as the "unusual and unique facts." *Id.* at 668.

62. 872 P.2d 1240 (Ariz. Ct. App. 1993).

63. The court, concluding that there was no difference between a child's being party to a severance petition brought by someone else (such as the other parent) and a child's initiating such a petition, granted the children's petition to terminate their father's parental rights. *See id.* at 1245-46.

64. *See id.* at 1243.

65. *Id.*

right (and, thus, at least by implication, capacity) to challenge his or her parentage. *In re Pima County* is especially remarkable in that the children's mother was available to commence the action. In fact, she later joined the proceedings.[66] *In re Pima County* acknowledged the collapse of a traditional familial morality, defined through hierarchical relationships grounded in natural truth, quite as much as it acknowledged the autonomy of the four children involved in the case.

The 1994 guidelines of the American Academy of Matrimonial Lawyers (AAML)[67] suggest a more widespread willingness to treat children older than eleven as capable of directing their own representation in custody cases occasioned by parental divorce. The AAML Standards presume that children below twelve are "impaired," and, thus, are incapable of directing their own representation, but that children twelve and older are "unimpaired."[68] In establishing this difference, the AAML relied expressly on Supreme Court precedents that granted constitutional rights to "children as young as twelve."[69]

In short, decisions that grant children standing to effect their own choices, such as *In re Pima County*, *Gregory K.*, *Mays*, and *Peregood*, suggest a redefinition of childhood that has followed from the erosion of the moral universe once associated with traditional family life. However, each of these redefinitions was made so that the child involved could redesign his or her familial relationships and, thereby, create a more loving, successful familial constellation than the one from which the child sought to escape. In this regard, the implications of these decisions are deeply contradictory. The courts redefined a notion of childhood, central to understandings of the traditional family, so as to safeguard the possibility that particular children would have more loving and stable families.

B. Autonomous Children Within the Criminal Sphere

In sharp contrast, recent changes and proposed changes in the

66. *See In re Pima County*, 872 P.2d at 1243.

67. *See generally Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) [hereinafter *AAML Standards*].

68. The term "impaired" was taken from the Model Rules of Professional Conduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1994).

69. *AAML Standards*, *supra* note 67, Rule 2.2 cmt. (citing Ohio v. Akron Reprod. Health Ctr., 497 U.S. 502 (1990); Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Serv. Int'l, 421 U.S. 678 (1977); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)).

response of the law to juvenile offenders make no pretense of protecting children or of safeguarding life within families. These changes have dismantled a model for understanding and treating juvenile offenders instituted about a century ago. That earlier model assumed that juvenile offenders should be protected and rehabilitated, rather than punished by the law.[70] The system was constructed around familial metaphors and was aimed, at least in theory, at protecting and rehabilitating young offenders. Howard Snyder of the National Center for Juvenile Justice in Pittsburgh summarized the intent of a separate juvenile justice system: "Juvenile courts are not just dealing with kids and crime; they are dealing with families and communities.... Adult courts are there to punish; juvenile courts are there to be parents to the kids, and that includes all the things parents do."[71] The recent trend of treating young offenders as adults redefines juveniles. In consequence, familial metaphors become inappropriate, or simply irrelevant.

Shifts in social understandings of children, reflected in cases decided several decades ago, such as *Bellotti v. Baird*,[72] in the family law context, and *In re Gault*,[73] in the criminal context, facilitated, but did not presage such recent shifts in understandings of juvenile offenders. *In re Gault* and its progeny have been widely interpreted—and in significant part, accurately—to suggest little beyond a need to correct inadequacies in the juvenile court system.[74] In *In re Gault*, the Court extended constitutional protection to children in delinquency proceedings. Neither that case nor the related cases that followed, jettisoned the juvenile court system. In *McKeiver v. Pennsylvania*,[75]

70. Beginning in Cook County, Illinois, in 1899, a separate court system for juveniles was constructed throughout the United States. *See* Jacqueline Cuncannan, Note, *Only When They're Bad: The Rights and Responsibilities of Our Children*, 51 WASH. U. J. URB. & CONTEMP. L. 273, 279 n.30 (1997) (citing Committee on Child Psychiatry, Group for the Advancement of Psychiatry, How Old is Old Enough?, The Ages of Rights and Responsibilities 39 (1989)); *see also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

71. *Quoted in* T.R. Goldman, *Senate's Juvenile Crime Bill Gets Bashed from All Sides*, TEX. LAW., Mar. 9, 1998, at 4.

72. 443 U.S. 622 (1979). *See supra* notes 33-44 and accompanying text.

73. 387 U.S. 1 (1967).

74. Bruce C. Hafen interpreted *In re Gault* and the cases that followed it, including *In re Winship*, 397 U.S. 358 (1970), to have preserved a traditional conception of childhood. *See* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 633-34 (1976). Hafen wrote in 1976: "In the juvenile justice context, then, the Court has evidently not rejected the validity of a legal minority status, although it is willing to provide constitutional protection against the abuse of that status." *Id.* at 635.

75. 403 U.S. 528 (1971).

decided in 1971, the Court refused to recognize a right to a jury trial for juvenile offenders, and expressly reaffirmed the value of a special juvenile court system.[76] Moreover, the Court in *In re Gault* did not expressly redefine children as adults, nor did it explicitly favor that end. In contrast, the message underlying more recent proposals and amendments that would, or do, treat large categories of juvenile offenders (based on age or on the seriousness of the offenses involved) as adult criminals differ qualitatively from the message underlying cases such as *In re Gault* and *Winship*.

However, *In re Gault did*, in fact, redefine certain children for certain purposes as autonomous individuals, and, at least to that extent, *In re Gault* is among the Supreme Court decisions, rendered in the 1960s and 1970s, that foreshadowed profound shifts at the end of the twentieth century in the law's understanding of children, in delinquency, and in other contexts.[77] Thus, recent changes in the law, and suggestions by lawmakers, regarding the law's treatment of juvenile offenders, depend on, though they do not follow inevitably from, the express attribution by society and law of autonomous individuality to certain children, in cases such as *In re Gault*. Only because children are no longer widely and clearly distinguished morally and psychologically from adults, have society and the law become willing to entertain proposals to hold some children fully responsible for their conduct.

For example, many states have amended their laws in recent years so that more and more juvenile offenders are being handled by the adult criminal justice system.[78] Since the first half of the twentieth century, state laws permitted juvenile offenders to be transferred to adult criminal courts as the result of waiver hearings,[79] which occurred on a case-by-case basis. Increasingly waiver (or "transfer") of juveniles to adult court has become automatic for various groups of children.[80] In addition, the age at which children can be transferred to adult court has been consistently lowered by state legislatures in recent years.[81]

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76. *See id.* at 534.

77. *See* Hafen, *supra* note 74, at 633-34.

78. *See* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 85 (1995); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 713-16.

79. *See* SNYDER & SICKMUND, *supra* note 78, at 85.

80. *See* Redding, *supra* note 78, at 715; SNYDER & SICKMUND, *supra* note 78, at 85.

81. *See, e.g.*, MO. REV. STAT. § 211.071.1 (1996); *see also* Cuncannan, *supra* note 70, at 273-74 (analyzing alterations in Missouri law on juvenile waiver hearings). The

Both the Juvenile Crime Control Act of 1997,[82] passed by the House, and the Violent and Repeat Juvenile Offender Act of 1997,[83] reported out of committee, but stalled in the Senate, represent a similar trend. Neither bill became law,[84] but both suggest a startling readiness to reform the law's treatment of children involved in crime. Both bills proposed reducing the age at which juveniles should be treated as adults in federal prosecutions.[85] In addition, these bills proposed establishing incentive grants to the states to use for improving their juvenile justice systems. Receipt of these grants would depend on the state's meeting a number of conditions, including trying certain juveniles as adults and treating juvenile offenders' records more like the records of adult offenders.[86] The intent and substance of both bills conflict transparently with a system of juvenile justice, imagined through familial metaphors, and aimed, at least in theory, at protecting and rehabilitating young offenders.

C. Comparing Categories of Autonomous Children

Both the law's willingness to grant broad autonomy to children within dysfunctional families, and recent redefinitions (and proposed redefinitions) of juvenile offenders as largely indistinguishable from their adult counterparts, have been facilitated by more far-reaching cultural shifts in the scope of childhood. That shift, in turn, is part of a broad social transformation in the meaning of familial relationships. Increasingly, relations among family members have become open to

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1996 Missouri statute changed the age at which a child could be subject to a waiver hearing for any crime from 14 to 12. *See id.* at 274 n.7. The new law also makes waiver hearings mandatory with regard to a number of especially serious crimes such as murder, rape, and assault. *See id.*

A few states do not limit transfer at all by age or by type of crime. *See, e.g.*, ALASKA STAT. § 47.10.060 (Michie 1995); WYO. STAT. ANN. § 14-6-237 (Michie 1996); *see also* Cuncannan, *supra* note 70, at 274-75.

82. H.R. 3, 105th Cong. (1997).

83. S. 10, 105th Cong. (1997).

84. Either bill, or a version thereof, could be re-introduced in the 106th Congress when it convenes in 1999.

85. *See, e.g.*, H.R. 3, 105th Cong. § 101(b)(1) (providing, with limited exception, that "a juvenile [over 14 years old] shall be prosecuted as an adult . . . if the juvenile is alleged to have committed an act . . . which if committed by an adult would be a serious violent felony or a serious drug offense").

86. *See* Tom Begich, Commentary, *Congressional Bills on Juvenile Crime Would Trample States' Rights*, WASH. TIMES, Dec. 31, 1997, at A16 (arguing imposition of such conditions would interfere with states' rights).

choice and negotiation and have, thereby, begun to resemble relations within the marketplace.

As a result, the law is less and less firmly committed to traditional visions of childhood. Yet, the response of society and the law to children such as Gregory K. and Kimberly May[87] differ dramatically from social and legal responses to children who commit crimes. In the first set of cases,[88] the law's response acknowledges the transformation of the traditional family, in general, but it does so to fashion nurturant families for particular children. With regard to juvenile offenders, in contrast, recent social and legal proposals to treat such children as adults presume that the traditional family has largely eroded, or at the least, that it has eroded with regard to the children involved. Thus, in the first situation, the law's response aims to reconstruct particular families in order to provide children with loving parents. In these cases, the law recognizes autonomy in order to preserve community. In its response to juvenile offenders, however, the law no longer aims to preserve even the illusion of inexorable, supportive bonds of a familial sort. Rather, its response reflects the conclusion that such children are irremediably unconnected to any form of community.

Thus, both the response of law to children within dysfunctional families, and its response to children within the juvenile justice system, depend on remarkable shifts in social understandings of childhood. Old images of childhood survive, but new, conflicting images appear. Children can now be understood as dependent and loving, or as autonomous and unconnected, or as both at once. Beyond this, however, an essential difference distinguishes the two responses. The first defines children as autonomous in the effort to preserve traditional moral categories and to safeguard familial bonds. The second defines children as autonomous in the essentially desperate conclusion that, with regard to the children in question at least, traditional moral categories have little, or no, continuing relevance.

V. IMAGES OF YOUNG OFFENDERS: DIMENSIONS OF AUTONOMY

During most of the twentieth century, juvenile offenders were

87. Both Gregory and Kimberly asked courts for the right to select their own parentage. *See supra* notes 53-59 and accompanying text (summarizing Gregory K. v. Ralph K., No. CI92-5157, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992), *rev'd sub nom.* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) *and* Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993)).

88. *See supra* Part III.A.

widely depicted as a product of disordered moral categories, but not as a product of an essentially amoral universe.[89] For instance, juvenile crime was long attributed to the "breakdown" of the traditional family.[90] However, since the late nineteenth century, the juvenile justice system has reflected the assumption that children, even if deprived of adequate parental protection, could be protected by state, and other, custodians. That assumption wanes.

A. Popular Images of Juvenile Offenders

The Senate Judiciary Committee Report, approving the Violent and Repeat Juvenile Offender Act, refers to "profound societal changes," including:

> an explosion in the number of single parent households, the prevalence of two wage-earners in two-parent households, and the pervasiveness of coarse and destructive sexual and violent material available in popular culture. The changes in society have been reflected in the changed nature of juvenile crime

89. Parental responsibility statutes are no exception. These statutes, which have existed for most of the twentieth century, in one form or another, hold parents responsible for the criminal offenses of their children. *See* Paul W. Schmidt, Note, *Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws*, 73 N.Y.U. L. REV. 667, 675-76 (1998). One variety of these statutes, common since the start of the twentieth century, holds parents responsible for endangering a child or for neglecting a child such that the child exhibits offensive misconduct. *See id.* at 676-77. Another variety, promulgated within the last decade, holds parents accountable for their children's bad acts. *See id.* at 677. This second variety of parental responsibility statute, in particular, assumes the breakdown of the nuclear family. *See id.* These statutes also assume the state is incapable of substituting satisfactorily for the neglectful parent(s). *See* Schmidt, *supra*. Thus, holding the parent(s) accountable serves to vindicate the state as much as to punish the parent(s). It does not serve to benefit the children involved. As Paul Schmidt explained, these laws, especially in their new guise, "combine an emphasis on risk management with a focus on controlling dangerous populations, where juveniles are the dangerous population and their crime rate is the risk." *Id.* at 683.

90. *See, e.g.*, Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2002 (1993) (noting costs for "the family justice system" of "[t]he dramatic transformation of family life during the last thirty years."); Mark Soler, *Interagency Services in Juvenile Justice Systems*, *in* JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENCY 134, 139-40 (Ira M. Schwartz ed., 1992) (noting importance of and describing program aimed at strengthening family ties within families of juvenile offenders); Mark R. Lipschutz, *Runaways in History*, *in* 3 CRIME AND JUSTICE IN AMERICAN HISTORY: DELINQUENCY AND DISORDERLY BEHAVIOR 34, 45 (Eric H. Monkkonen ed., 1991) (noting correlation in 1960s, as in earlier periods in American history, between "family discontinuity" and juvenile runaways, and noting numerous studies showing link between runaways and families with "deviations from the intact nuclear family") (footnote omitted).

and delinquency.[91]

The original name of the House bill that became the Juvenile Crime Control Act of 1997 reflects the intensity of the perception that juvenile offenders, in their very being, are almost entirely incompatible with communal association. That bill, when introduced by Representative William McCollum of Florida was called the Violent Youth *Predator* Act.[92]

A more dramatic example of the same perception of juvenile offenders as inherently, almost inescapably alone, is provided by public, and especially media, portraits of a series of children, apprehended in five unrelated episodes of shootings in American public schools in an eight month period in late 1997 and early 1998.[93] The children involved, all boys, most of them teenagers, were widely portrayed as unconnected to their communities or homes, even when those communities and homes seemed comfortable and inviting. The portraits are especially striking in the case of a few of the boys, who grew up in homes described as loving and in communities, marked in media presentations only by being unremarkable.[94] For example, fifteen-year-

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91. S. REP. NO. 105-108 (1997).

92. *See* Richard Lacayo, *Nation: Teen Crime Congress Wants to Crack Down on Juvenile Offenders. But is Throwing Teens into Adult Courts—and Adult Prisons—the Best Way?*, TIME, July 21, 1997, at 26. McCollum apparently changed the bill's title in response to claims that the term "predator" was dehumanizing. *See id.*

93. The five shootings occurred in southern and western towns. Public reaction was especially interesting insofar as several of the children held responsible were reported to have had caring parents and to have been raised in prototypic small, American towns. *See* Timothy Egan, *What Makes Kids Kill? Student Shootings Share Similar Threads*, ANCHORAGE DAILY NEWS, June 21, 1998, at F1. The five shootings occurred in Pearl, Mississippi, in October 1997, *see* Butch John & Mario Rossilli, *Prosecutors Hope to Try Boyette by Mid-August*, JACKSON-CLARION LEDGER, June 16, 1998 at 1, Paducah, Kentucky, in December 1997, *see* Tom Zucco, *Shooters in the School Yard*, ST. PETERSBURG TIMES, June 14, 1998, at 1F, Jonesboro, Arkansas, in March 1998, *see id.*, Edinboro, Pennsylvania, in April 1998, *see id.*, and in Springfield, Oregon, in May 1998, *see id.* Other, similar shootings occurred in preceding years. For instance, in February 1996, a 14-year-old shot a group of classmates at his middle-school in Alaska. *See* Egan, *supra.*

94. *Life Magazine*, reporting on the May 1998 shooting at Thurston High School in Springfield, Oregon, by one of the school's students, declared:

> It can happen here. Here in Springfield. Thirty-five states have a Springfield. The one in Oregon is an all-American town. A small town, a ranch house town, the town people choose to live in so their children can be safe. There are Welcome Wagons and prayer breakfasts. Parents teach their children the important things. To work hard. To pray hard. To be good sports.

Claudia Glenn Dowling, *High School Heroes in Springfield, Oregon, Teenagers Under*

old Kipland Kinkel, who murdered both his parents before killing or wounding two dozen schoolmates, was widely reported to have had loving parents.[95] The boy, however, was portrayed as incapable of participating in communal bonds because of some flaw deep within his own being. One popular news magazine explained that "to know" the boy's thoughts on the day of the murders "is surely to see the face of Satan."[96] Other media reported that the mother of the boy "wondered" whether he "has a conscience, like other people.'"[97]

In general, the violent acts of these boys were attributed by public media to something within the boys or to a marginal, perverted culture of anonymity and violence, shared by these boys and other children like them rather than to the neglect or abuse of their parents. The boys were portrayed as "bad seeds,"[98] infected by a "lethal virus,"[99] "fledgling

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Fire Do the Right Thing—and Do It With Amazing Grace, 21(8) LIFE MAG., July 1, 1998, at 52.

The article, focused around the heroic acts of several students who subdued the murderous student, mingles images of adolescent heroes with images of adolescent villains. After describing Springfield as prototypical, the article then explains that at least some adolescents in the town are largely separate from all the details and images that made the town an average community:

> But teenagers don't really live in Springfield. They inhabit an adolescent shadowland between childhood freedom and adult responsibility, between fantasy and reality. In this dreamscape they can play the roles of hero, villain, victim. The internal drama is so vivid they can hardly see through their eyes, even when gazing into the mirror. Teenagers have secret lives.

Id.

Similarly, President Clinton, commenting publicly on the same shooting proclaimed:

> Not to scare our people all across America or to trouble them, but everybody who has looked at you knows that this is a good community that they'd be proud to live in, and, therefore, *it could happen anywhere.* So what we have to try to do is to, all of us, learn more about the people with whom we live and the kinds of signals that are coming out.

The White House: Remarks by the President to the Families of Thurston High School Community, M2 Presswire, June 17, 1998, 1998 WL 12975267 (emphasis added).

95. *See, e.g.*, Diane Dietz et. al, *Kinkels Couldn't Block Son's Dark Side: Shooting Charges Read Against Oregon Teen*, SEATTLE POST-INTELLIGENCE, June 17, 1998, at A1 (describing Kipland's parents, Faith and Bill Kinkel as "master teachers" who "spent their lives in the company of teenagers," and who "gave every kid a chance"); Zucco, *supra* note 93 (reporting that Kipland's "caring" parents had "tried therapy and home schooling when their son kept getting in trouble").

96. John Cloud, *Of Arms and the Boys: All Kids Battle Demons: Why Did These Five Lose?*, TIME, July 6, 1998, at 58.

97. Diane Dietz et al., *News: Little About Kinkels' Upbringing Provides Clues to His Dark Side*, STAR-TRIBUNE, June 21, 1998, at 19A.

98. Zucco, *supra* note 93.

99. Egan, *supra* note 93.

psychopaths,"[100] suffering from a "genetic susceptibility toward violence,"[101] or as having been imprisoned in, and obsessed with, a marginal, distorted culture of evil or potential evil such as satanic cults.[102] Thus, the boys, all children between the ages of eleven and seventeen, were imagined as absolutely autonomous. They were portrayed as independent, not only in their actions, but even more, in their very being, of all communal connections.

These boys were also associated by the media with a variety of social trends and affiliations, all of which prize autonomy-without-responsibility. One journalist explained:

> To varying degrees, each of the attackers seemed to have been obsessed by violent pop culture. . . . The killer who has confessed in Pearl, Miss., says he was a fan of violent fantasy video games and the nihilistic rock n' roll lyrics of Marilyn Manson, as was the boy charged in the Springfield, Ore., shootings last month. The Springfield youth was . . . enmeshed in violent television and Internet sites . . . .[103]

In short, the sort of autonomy associated by the media with children such as Kipland Kinkel[104] suggests an individualism so extreme that it virtually precludes *choosing* connection. The resulting portrait dramatically reenforces the law's growing conclusion that a juvenile justice system constructed around familial metaphors cannot serve such children. The reenforcement is especially powerful because it is based, not on proofs, but on images. Moreover, and of at least equal consequence, the resulting portrait suggests the potential plight of the autonomous child in a universe prepared to define childhood apart from moral categories.

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100. *Why Are Children Killing? More Firepower, Fewer Restraints*, FLA. TIMES-UNION, March 29, 1998, at A1.

101. *Id.*

102. The boy responsible for the shooting in Pearl, Mississippi, Luke Woodham, tried as an adult and sentenced to life in prison in June 1998, defended himself by arguing that he was under the control of a local satanic cult. *See* John and Rossilli, *supra* note 93.

103. Egan, *supra* note 93.

As the quote from Egan's article suggests, to some extent, the media did portray these children as products of culture, if not community. The cultural trends referred to, however, are marginal and deeply nihilistic.

104. *See supra* notes 95-97 and accompanying text.

B. The Implications of Autonomy

Decided in 1967, in an era of civil rights and women's rights, *In re Gault* reflects the law's broad concern at the time with guaranteeing people's autonomy in order to ensure their equality. In proclaiming the right of juvenile offenders to due process, the Court apparently hoped to protect children as individuals, but still on terms somewhat different from those available to adults.

Clearly, the apparent intent behind *In re Gault* differs starkly from that behind recent laws and proposed laws that treat juvenile offenders as adults. It is still possible, however, to ask whether these recent changes, though very different from *In re Gault*, represented its likely consequence from the start. Although that question cannot be definitively answered, a response can be found in the suggestion that the Court's agenda in *In re Gault* may have been unactualizable from the start.

Within the history of the West, the extension of autonomous individuality has been accompanied by the loss of holistic, hierarchically structured communities. For most people, the price of living in such communities was high, in today's view, unbearably high: the absence, generally even as pretension of equality and freedom. However, for children, or at least for many children, the price of autonomous individuality may also be high. That price seems to be the erosion of social responsibility for children's welfare, both within families and within institutions that support families. Insofar as children are not, in fact, capable of reasoning and behaving as adults do, defining them as autonomous individuals removes from them the protections, however paternalistic, that society affords those in a dependent status, but does not afford them the benefits of autonomy.[105]

105. This dilemma is not completely unique to children. The illusion of autonomous individuality has frequently served as a pretext for economic and social oppression by members of groups *assumed* responsible for their own plight. So, for instance, the marketplace in the years before the development of the welfare state presumed the owner and the worker equally autonomous, and thus equally responsible for the bargains they together effected. That assumption ignored the economic underpinnings of relationships in the marketplace and thereby served with significant effectiveness to disguise the social ground on which pervasive inequalities were sustained. *Lochner v. New York*, 198 U.S. 45 (1905), illustrates strikingly the implications of the assumption, central to nineteenth century liberalism, that freedom of contract belonged as much to the worker as to the owner. The Court, invalidating a state statute that limited the number of hours bakers could work, described the bakery owners and employees as equally "persons who are *sui juris*." *Id.* at 54. The state, the Court

Clearly, practical and theoretical implications of social and legal reconceptualizations of juvenile offenders are complicated. Such reconceptualizations stem from, and distort, more pervasive redefinitions of children and childhood. While society, though with less and less conviction, continues to value images of children as fragile, affectionate and precious, children responsible for serious crimes are imagined as absolutely and eternally separate from decent community. Such portraits of juvenile offenders justify a set of extreme responses. Once institutionalized, those responses may, in turn, justify further redefinitions of children within the society as a whole.

VI. CONCLUSION

Proposals to abandon a juvenile justice system, defined through familial metaphors, proliferate. These proposals are justified by striking images of autonomous and rapacious juveniles. Society, increasingly accustomed to viewing children as simply little adults, is ready to assimilate such images and the proposals for reform that the images engender, or at least justify.

In re Gault was revolutionary three decades ago in defining children, even for limited purposes, as comparable to adults in certain regards and, thus, as deserving constitutional protection. *In re Gault* aimed to preserve childhood *and* to respect children's individuality. Images of children connected with recent statutes and bills categorizing juvenile offenders as adults are of a different order. These laws and proposed laws signal a collapse of a vision of childhood that, in theory at least, compelled society to treat all children, even the most difficult, as deserving nurture, and to define them, accordingly, through familial metaphors. *In re Gault* assumed community, and with it a moral universe within which children, even if defined as autonomous for certain purposes, would continue to find protection and direction. Conversely, more recent statutes and bills aimed at treating wide categories of juvenile offenders as the law treats adult criminals, assume the collapse of a moral universe within which children, due to the very nature of childhood, deserve to be encompassed and protected by

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thus proclaimed, could not rightly deprive worker and owner, alike, of the right to determine the dimensions of their relationship. In that, the Court ignored the realities of power and, thus, eliding questions of social responsibility, made workers responsible for their own plight. Oppression within the marketplace was therefore rendered almost completely opaque.

community.

In short, redefinitions of juvenile offenders are part of a more extensive redefinition of childhood in American society which is, in turn, part of a vast upheaval in the scope and meaning of family and familial relationships. As relationships within families begin increasingly to resemble relationships within the marketplace, familial metaphors become less and less powerful as models for designing and justifying other social institutions.

Yet, at the same time society and the law struggle to preserve romanticized images of children *within* families. Family law, while increasingly amenable to the redefinition of adults within families as autonomous individuals, has been far more reluctant to redefine children similarly. A stark exception has begun to develop with regard to at least a few children in families perceived as dysfunctional.

Thus, the law, generally hesitant to abandon deeply entrenched notions of childhood and of children, has done exactly that with regard to two groups of children who seem especially needful of the sort of adult attendance and guidance associated almost automatically with traditional images of vulnerable, fragile children. In both contexts, the law responds to children who, while clearly vulnerable, are largely unprotected. Moreover, both groups of children are problematic for a society still committed, even though less and less consistently, to an understanding of children as precious, innocent, and frail, and committed as well, to an understanding of adults as obliged to protect such children.

Yet, the law's implicit aim with regard to children granted autonomy in the context of familial disputes differs almost completely from its aim in redefining juvenile offenders as adult criminals. The aim in the first instance is to recognize children's autonomy in order to safeguard the possibility of creating new families for the children involved, and thus presumably to enable these children to relinquish their autonomy and reassert their status as children. In contrast, the law, in viewing juvenile offenders as it views adult criminals, acknowledges the incorrigibility of the children involved.

The first response reflects hope. The second reflects desperation. Yet, in the end, the law's increasing readiness to redefine childhood, and therein to view children as the law views their adult counterparts, is likely to be of more significance than are the differences among particular expressions of that readiness. If such changes, still hesitant and localized in the law's approach to children, are elaborated and

generalized, then, in retrospect, the twentieth century's notion of childhood as a precious stage of prolonged innocence will have been an historic anomaly.