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INTRODUCTION

The gay and lesbian community’s response to California’s Proposition 8 was strong and quick. Within days of the 2008 election, opponents of the measure had targeted its proponents, in particular the Mormon Church, as subjects for scorn. Singling out the Mormon Church on this issue was particularly ironic because to the extent that members of the Mormon Church were responsible for the success of Proposition 8, they simply did to the gay community what courts of the United States consistently did to their forebears: defined away their right to marry. In striking down individuals’ rights to enter into polygamous marriages, courts said that polygamy was not marriage and that monogamy was marriage, but they expended little energy explaining why. This article does not condone either the forceful effort to pass Proposition 8 or the counter-response from the gay community, but it will argue that part of the problem that same-sex marriage
"SSM") advocates encounter stems from the failure of courts to explain what marriage is. It is very hard to talk about a right to marry without a common understanding of why states license marriage.

In the end, this article will offer a definition of marriage which suggests that marriage can be beneficial to the state, beneficial to the couple, and integrated into the rich social history of marriage without necessarily being gendered. In order to understand why this proffered story is important, the article first evaluates the marriage narratives that have been told to date in the SSM debate and shows how those stories have fared as constitutional claims.

During the course of the last fifteen years, proponents of SSM have proffered several different constitutional arguments in favor of their cause. Most of these arguments have been rooted in either fundamental rights or equality theory. Both of these theories have prevailed in some places. The Supreme Court of Hawaii originally ruled that restricting marriage to opposite-sex couples was gender discrimination, in violation of the State's Equal Rights Amendment. The Supreme Courts of Vermont and New Jersey found that gays and lesbians had a right, grounded in equality doctrine, to the same legal treatment as married people, though they did not have a right to have their relationship termed "marriage." New Jersey explicitly found that gays and lesbians did not have a fundamental right to marry. The Vermont court did not address that question.

The Supreme Judicial Court of Massachusetts found that the fundamental rights and equality arguments were inextricably intertwined and that gays and lesbians were entitled to get married, but not because they had a fundamental or equal right to do so. Instead, the Massachusetts court found that there was no rational basis for restricting marriage to opposite-sex couples. Recently, the California, Connecticut and Iowa Supreme Courts have found that gays and lesbians have an equality right to marry because restricting marriage to opposite-sex couples discriminates on the basis of sexual orientation. California also found

preceeded the anti-polygamist movement. Polygamy became the target, but the original fear was of moral diversity and difference. See Sarah Barringer Gordon, "Our National Hearthstone": Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America, 8 YALE J.L. & HUMAN. 295, 297 (1996).

8 Lewis, 908 A.2d at 211.
10 Id. at 961.
11 See In re Marriage Cases, 183 P.3d 384, 440-41 (Cal. 2008); Kerrigan v. Comm’r, 957 A.2d 407, 262-63 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009). The holding in the California case was overturned by Proposition 8, see In re Marriage Cases, 183 P.3d at 452-53, and the California Supreme Court accepted Proposition 8’s ability to restrict marriage to opposite-sex couples in Strauss v. Horton, 207 P.3d 48, 122, 93 Cal. Rptr. 3d 591 (Cal. 2009). After Strauss, gay men and lesbians in California have neither equality nor a fundamental right to marry, though they do have both an equality and a fundamental right to “public recognition [of their] relationship as a family.” Id. at 70-71.
that gays and lesbians had a fundamental right to marry each other. Connecticut and Iowa did not reach that argument.

There has been a good deal of ink spilled over how best to conceptualize the legal claim to SSM. Because most unenumerated fundamental rights arguments are controversial, courts and commentators often prefer equality arguments. Moreover, to some, the fundamental rights argument seems tautological because it assumes a contested definition of marriage. Presumably, before one says that there is a fundamental right to marriage, one has to define what marriage is. Pro-SSM advocates would define marriage in a way that can include same-sex couples. Anti-SSM marriage advocates would define marriage as between a man and a woman. Thus, saying that there is a fundamental right to marriage does not say anything unless there is a common definition of marriage. Equality arguments, it was thought, avoided that tautological conundrum. But, equality doctrine cannot always do all the work that proponents of SSM claim. At least equality doctrine cannot do this work on its own; it needs a story of marriage to go with it. Ultimately, every argument requires a story about why marriage is important, with a definition of what marriage is.

This article will explore six different stories of marriage. These are not the only stories told about marriage, nor are they mutually exclusive. Indeed, one can believe many of these stories simultaneously. But, different narratives tend to emerge as dominant in different arguments. Part II examines the stories of marriage told by advocates of SSM and explains how those stories fare under both fundamental rights and equal protection analyses. Part III explains the stories told by critics of SSM. These stories suggest that contrary to what the Massachusetts Supreme Judicial Court found in Goodridge v. Department of Public Health, restricting marriage to opposite-sex couples almost certainly passes rational basis review; and, despite the racial analogies used by the courts in California, Connecticut and Iowa, racial equality doctrine may not be the most appropriate precedent.

The critical problem with the equality argument for SSM is that marriage, as it currently operates in our culture, is deeply gendered. It is gendered not only in the sense that, in most states, opposite-sex couples have the exclusive right to enter into marriage, it is gendered because of the way in which marriage facilitates, produces, and legitimates gender roles. If the predominant story of marriage is one of an institution that exists to foster differentiated gender role development, then the equality theory rings hollow because same-sex couples and opposite-sex couples are not similarly situated in their ability to reify gender roles in marriage.

12 In re Marriage Cases, 183 P.3d at 448.
13 See Andrew Koppelman, Grading the California Same-Sex Marriage Opinion, BALKINIZATION (2008), http://balkin.blogspot.com/2008/05/grading-california-same-sex-marriage.html (“It won’t do to just define marriage as ‘the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own.’ That’s just a bald conclusion masquerading as an argument.”).
Many people will scoff at this understanding of marriage as a purposefully gendered institution. How can that be a legitimate definition in an era of gender equality? Perhaps it is not a legitimate definition of marriage, but it is an accurate description of contemporary marriage. Empirical data verifies what critics of SSM celebrate: marriage is a “gender factory.” Part IV explores the social science data showing how marriage makes gender.

At a doctrinal level, the fact that marriage is a gender factory may be constitutionally irrelevant. After all, those who believe that marriage is and should be gendered appear to believe in “the very stereotype the law condemns.” What makes the gendered story relevant to legal discussions of SSM is its accurate reflection of the current state of heterosexual marriage and its ability to explain why and how marriage may be so important to people. As the end of Part IV suggests, for many people, the ability to live into the stereotypes the law (at times) condemns is enormously important to their personal identity. The fulfillment of those socially prescribed gender roles could be so important to a person’s personal and intimate life that the right to enter an institution that reifies those roles triggers constitutional protection. In other words, the gendered story of marriage reveals an inherent tension between that which may make marriage a fundamental right and the gender equality doctrine that may mandate SSM.

A further problem with the equality argument for SSM is that an examination of the law of gender equality, like an examination of the way marriage actually functions in people’s lives, reveals ambivalence about the legitimacy of gender roles. Part V shows how confused the law of sex equality is. Despite the constitutional doctrine suggesting that gender roles, particularly gender roles in the household, are constitutionally suspect, other areas of the law seem to

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14 This term was coined by Sarah Fenstermaker Berk in Sarah Fenstermaker Berk, The Gender Factory: The Apportionment of Work in American Households 3-10 (Plenum Press 1985).

15 The phrase originally comes from Powers v. Ohio, 499 U.S. 400, 410 (1991), but is also cited in J.E.B. v. Alabama, 511 U.S. 127, 138 (1994) and used by Mary Anne Case to elaborate on how and when the constitution condemns gender stereotypes, see Mary Anne Case, “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 Cornell L. Rev. 1447, 1452 (2000).


17 See generally Case, supra note 15, at 1464 (suggesting that the Supreme Court strikes down any sex differentiation that relies on a gender stereotype unless the stereotype is a perfect proxy for sex difference); Wendy W. Williams, The Equality Crisis: Some
accommodate gender roles. Indeed, in both the employment and the marital context, the more pronounced the gender roles and traits, the more the law feels compelled to accommodate them. And, even in the constitutional context, sometimes the law accommodates gender and sex differences.

If enough people believe in or somehow know the gendered story of marriage to be true, equality arguments for SSM, whether rooted in gender or racial analogies, prove difficult. The gender equality doctrine may be willing to accommodate the gendered roles that gendered marriage celebrates, and the racial discrimination analogy may seem inapt in the face of an institution that gets its social and personal import from its ability to reify gender. That is why it is important for proponents of SSM to tell a non-gendered story of marriage. But, it has to be a story of marriage that explains how marriage can retain the symbolic and constitutive potential that gender roles have traditionally provided for it without gender being a part of the story. To paraphrase Gertrude Stein, SSM advocates must tell a story of marriage that suggests there is a “there there” after one takes the gender out of marriage.18

Part VI of this essay will offer one such story. It is an understanding of marriage as an institution in which dependencies develop, roles are assumed and, for a variety of reasons stemming from the emotional and sexual connections involved, the general rules of property and contract do not work well. A narrative like this degenders marriage, but it also celebrates the lack of autonomy, substantial interdependence and role assumption that mark many marriages. It is not a narrative that extols the values—individual expression, freedom from social constraint, personal liberty—that the Constitution is often prized for protecting. When forced to confront this alternative marriage narrative, many people may not feel like celebrating. In that case, we need to ask why we have state-sponsored marriage at all. If we are to have state-sponsored marriage that includes same-sex couples, we need a story of marriage that explains what marriage is after the gender is gone.

I. ONE SET OF STORIES

To date, there have been three main stories told by SSM advocates about what marriage is and why gays and lesbians should be entitled to it. In the first story, marriage is a bundle of rights and obligations pertaining to how each member of the couple must treat each other and how outsiders must treat the couple. These rights and obligations usually include, inter alia, the right to receive a portion of a spouse’s estate if she dies intestate, the right to bring a wrongful death action, the right to access spousal health, disability and accident insurance plans, the right to

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Reflections on Culture, Courts and Feminism, 14 Women’s Rts. L. Rep. 151, 154 (1992) (noting how the Supreme Court has been particularly vigilant about striking down legal presumptions rooted in the breadwinner-homemaker stereotypes).

18 Gertrude Stein, Everybody’s Autobiography, Ch. 4 (1937) (describing Oakland, California as a place for which “there is no there there.”).
assert evidentiary privileges, the right to hospital visitation and other incidents relevant to medical treatment of a family member, and the entitlements and responsibilities pertaining to spousal maintenance and marital property at separation.19

These rights and obligations can often result in significant financial savings and security for couples. The state provides these incidents of marriage to couples because these incidents afford couples the freedom to divide labor and develop interdependencies that promote stability and protect against dependency on the state. States value stability for a whole host of reasons20 and almost always prefer that dependents’ needs are met in private, thereby relieving any responsibility that might fall to the state.

This narrative of marriage suggests that states create and sanction marriage because they benefit from it. It is a narrative that is particularly susceptible to equality arguments for SSM because opponents of SSM have difficulty explaining why gay and lesbian couples need to be denied the concrete benefits of marriage, or how the state could possibly be hurt by providing these stabilizing benefits to gay and lesbian couples.21

The problem with this story of marriage is that while it often forces the state to provide all of the legal rights and obligations of marriage, it does not compel the state to provide the symbolic benefits of marriage. Thus, the Supreme Courts of Vermont and New Jersey found that gays and lesbians were entitled to Civil Union status, but not marital status.22 If the bundle of rights and obligations that accompanies marital status is what marriage is, then gays and lesbians are treated equally once they become entitled to that bundle of rights and obligations. The term “marriage” is a peripheral issue in the first narrative of marriage because the first narrative of marriage defines marriage as the legal rights and obligations that accompany it, not the symbolism in the term itself.

The second story of marriage is the one that has been told most prominently by the U.S. Supreme Court, and it focuses much less on the concrete benefits of marriage and much more on the symbolic benefits of marriage—most particularly, its emotional and expressive benefits. Although not precisely clear about why or when this right exists, the Court has ruled that states cannot deny the right to marry

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19 For a more complete list of the legal rights and obligations of marriage, see Anita Bernstein, *For and Against Marriage: A Revision*, 102 Mich. L. Rev. 129, 149-52 (2003).

20 A stable social system is likely to be better poised to accumulate wealth, less prone to violence, and better able to organize in times of peril than an unstable social system.

21 The Supreme Courts of Vermont and New Jersey relied on this kind of equality reasoning in ruling that the respective states must provide Civil Union status to gay and lesbian couples. See Baker v. Vermont, 744 A.2d 864, 886-89; (Vt. 1999); Lewis v. Harris, 908 A.2d 196 213-17. (N.J. 2006).

22 *Baker*, 744 A.2d at 888-89; *Lewis*, 908 A.2d at 423. After Proposition 8 passed, the California Supreme Court reached essentially the same conclusion. See *Strauss v. Horton*, 207 P.3d 48, at 70-71. (Cal. 2009).
to poor people\textsuperscript{23} or to prisoners.\textsuperscript{24} The Court has suggested that the right to enter into marriage is grounded in privacy doctrine because of the critical role that families play in our private lives,\textsuperscript{25} but it has also emphasized the public aspect of marriage. Thus, marriage can be both “the most important relation in life” and “the foundation of society.”\textsuperscript{26} It “affects personal rights of the deepest significance . . . [but] . . . [i]t also touches basic interests of society.”\textsuperscript{27}

In \textit{Turner v. Safley}, the Court wrote that marriage is “an expression of emotional support and public commitment . . . [and] an expression of personal dedication.”\textsuperscript{28} Plaintiffs in New Jersey picked up on this expressive element of marriage: it is the “ultimate expression of love, commitment and honor that you can give another human being.”\textsuperscript{29} “[O]thers know immediately that you have taken steps to create something special.”\textsuperscript{30} This story of marriage corresponds with what Peggy Cooper Davis has described as the nineteenth century human rights ideology that supported the recently enslaved’s right to marry. She describes this ideology as grounded in the “conviction that . . . [there is a] . . . human capacity to make life-defining choices, and [a] human drive to do so, . . . such that every person has an inalienable entitlement to construct a life on chosen terms . . . .”\textsuperscript{31}

The decision to marry is a decision about who one wants to be. This understanding of marriage suggests that the decision to enter into marriage is a personal one because it involves critical issues of self-determination, but it is also a public one

\textsuperscript{23} Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (striking down Wisconsin law that denied marriage licenses to people who could not show that they would not be in arrears on their child support payments).


\textsuperscript{25} \textit{Zablocki}, 434 U.S. at 386. In explaining why the right to marry is fundamental, the Court cited almost every constitutional case having anything to do with parenting, procreation, marriage or other family relationships. \textit{Id}.

\textsuperscript{26} Maynard v. Hill, 125 U.S. 190, 205 (1888).


\textsuperscript{28} \textit{Turner}, 482 U.S. at 95.

\textsuperscript{29} Lewis v. Harris, 908 A.2d 196, 225-26 (Poritz, C.J., concurring and dissenting) (quoting plaintiffs’ briefs).

\textsuperscript{30} \textit{Id}.

\textsuperscript{31} Peggy Cooper Davis & Carol Gilligan, \textit{Reconstructing Law and Marriage}, 11 \textit{The Good Society} 57, 58 (2002), \textit{available at} http://muse.jhu.edu/journals/good_society/v011/11.3davis.html. Given how strongly gendered most marital lives are, it may seem odd to think of the decision to marry as a decision to construct life on terms of one’s choosing. If marriage gives one little opportunity to avoid gender roles, then choosing to marry hardly seems like a decision to construct one’s own terms, unless marriage offers a unique opportunity to live life in a particularly gendered way. I make use of story #6 to suggest this view. \textit{See infra} notes 87-98 and accompanying text.
because marriage serves as a form of public expression. Expressing one’s commitment to another helps one become the self one wants to be.

Not surprisingly, this story of marriage as expression and self-determination fits quite squarely into fundamental rights analysis. It is a right to express who one is by making a public commitment to another. The right to make this simultaneously personal and public declaration is very important to human development and happiness, and therefore, the state must be very careful not to interfere with it. It is worth noting though, how distinct this theory of entitlement is from the first one. The first story sees marriage as a legal construct, a state-created bundle of rights and obligations. The second story sees marriage as an institution—like religion, perhaps—that serves human interests and values and with which the state should not interfere.

The problem with this second story of marriage is that what gives marriage its expressive potential and symbolic meaning is its social and historical context. Getting married makes a statement because of what people understand marriage to mean. Marriage has been a part of our social and political structure for a very long time. Marriage and the family that it instantly creates is still an organizing principle for many people’s lives. But marriage to someone of the same sex might not be. What “others know immediately” about the statement one makes when one gets married depends on what others understand marriage to mean. I do not have, and no one would realistically maintain that I have, a fundamental right to marry my dog. It would be ludicrous for me to maintain such a right because no

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32 Cass Sunstein has suggested that the right to marry counts as fundamental “because of the expressive benefits that come from official state-licensed marriage.” Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2096 (2005).

33 In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Court declared that marriage was “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,” (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *Maynard v. Hill*, 125 U.S. 190 (1888)). *Loving* involved an anti-miscegenation statute, which the court struck down as unconstitutional, but it did so without giving any explanation as to why marriage was a fundamental right. The cases it cited, *Skinner* and *Maynard*, involved, respectively, a law requiring the sterilization of certain criminals and an action for divorce. Thus the Court declared that marriage was a fundamental right in *Loving*, but it made no attempt, as it did in *Zablocki* and *Turner*, to explain why.

34 The relationship between state-sponsored marriage and religion is a long and still extant one. In the Anglo-American tradition, secular authorities began to wrest control over marriage from ecclesiastical authorities starting somewhere around the 16th century, but the state was never too eager to unmoor marriage from its ecclesiastical roots. Hence, the basic understanding of what marriage was (a lifelong union of a man and a woman, for which consent was necessary and one of the primary purposes of which was the rearing of children) did not change significantly when the state began to assert control. Indeed, even today, the degree to which the state cedes control over marriage to religious authorities is striking given the Constitutional commandment to separate church and state. See Katharine K. Baker & Katharine B. Silbaugh, *Family Law* 6-7, 11-12 (Aspen Publishers 2009).

35 See Lewis v. Harris, 908 A.2d at 196 (N.J. 2006).
one would know what it means (sharing a home with my dog? Sharing material
goods? A sexual relationship?). Because the expressive value of marriage is
dependent on marriage’s social meaning and because that social meaning is
contested, the right to marry depends, as critics of the theory have maintained, on a
common definition of marriage.36

A third story of marriage was told by the California Supreme Court in the In
re Marriage Cases.37 This story understands marriage to be a state-conferred title,
a blessing of sorts, pursuant to which a couple secures status from the state. With
this state-conferred status comes the respect and dignity of others. In this version
of marriage, the state-conferred benefits of marriage are inextricably intertwined
with the emotional benefits of marriage because one helps determine the other. The
personal well-being that comes from marriage comes in part from the respect and
dignity that is afforded marital status. The California Court wrote that the “core
substantive rights [of marriage] include . . . the opportunity of an individual to
establish . . . an officially recognized and protected family . . . [that is] . . . entitled
to the same respect and dignity as marriage.”38 The California Court found this
narrative of marriage to be susceptible to both fundamental rights and equality
arguments, but the court’s reasoning is a little odd.

In California, when the Court decided In re Marriage Cases, the legislature
had already provided gays and lesbians with the full panoply of rights and
obligations that marriage brings (story #1). Domestic Partnership (as it was called
in California) was not enough, the court said, because Domestic Partnership did
not command the same respect and dignity as marriage. For people who believe
that SSM will be disruptive to some of the most important social relations in
society, this must just sound strange. As a fundamental rights argument, the court’s
story of marriage proves too much.

The California court found that it is not just respect and equal treatment from
the state that matters for the right to marry, it is respect and dignity from the
public.39 But what if someone has no respect for the institution of SSM and does
not want to dignify it with her blessing? As a private citizen, surely she has the
right to think whatever she wants about SSM. The California Supreme Court may
think that a state license means that a married gay couple will be respected in the
same way as a straight couple, but given the sizable number of people who oppose
SSM, it is not at all clear why the court thinks that respect and dignity from others
will automatically follow. Indeed, given the success of Proposition 8, one might be
able to say that the California Supreme Court was simply wrong. The respect and

36 See Koppelman, supra note 13 (“The fact that you really, really, want to get
married can’t be the basis for a constitutional right. Otherwise, the incest and polygamy
laws would be in trouble too.”).
37 In re Marriage Cases, 193 P.2d 384 (Cal. 2008).
38 Id. at 399.
39 Id. at 444 (“[O]ne of the core elements embodied in the state constitutional right to
marry is the right of an individual and a couple to have their own official family
relationship accorded respect and dignity.” A couple is “constitutionally entitled” to
“respect and dignity.”).
dignity of others does not follow the state’s conferral of marriage, yet it was the respect and dignity from others that the Court said was a key part of the fundamental right to marry.40

The California Court’s marriage narrative seems much less odd in the context of equality theory. The state cannot grant domestic partnerships for gay people and marriage for straight people even if they are identical legal statuses because, as virtually everyone who has ever had a Civics class in this country knows, separate is not equal. The cite here is to Brown v. Board of Education of Topeka,41 in which the Supreme Court famously held that African-American children had an equal right to the same education as white children. The Supreme Court did not hold that African-American children had a fundamental right to a decent education.42 Brown was only an equality case. The maintenance of white and non-white regimes, wrote the Court, “generates a feeling of inferiority . . . and may affect [African-American children’s] hearts and minds,” because “the policy of separating the races is usually interpreted as demonstrating the inferiority of the negro group.”43 According to the California Supreme Court, the maintenance of two marital regimes runs a comparable risk of creating “second class citizenship”44 for Domestic Partnerships.

The Supreme Court of Connecticut, in Kerrigan v. Commissioner, augmented this equality analysis somewhat by pointing out that “private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”45 Just because some people may not afford SSM respect and dignity does not mean that the law can formally acknowledge that lack of respect. The cite here was to Palmore v. Sidoti,46 a case in which the U.S. Supreme Court ruled that courts could

40 To the extent that the Court was trying to say members of the public should give same-sex couples respect and dignity, it was expressing an aspiration, not explaining the content of a fundamental right. To the extent that it was saying that the state must encourage members of the public to afford same-sex couples respect and dignity because the state encourages members of the public to do the same for married couples, then it is making an equality argument. See infra notes 41-46.
42 Id.
43 Id. at 494 (quoting district court in Kansas).
44 In re Marriage Cases, 183 P.3d at 442.
45 Kerrigan v. Comm’r, 957 A.2d 407, 479 (Conn. 2008) (citing Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984)). The Connecticut Legislature, like the California Legislature, had already instituted full Civil Union status when Kerrigan was decided. Id. The Court in Kerrigan suggested that it was using sex equality doctrine, not race equality doctrine to reach its result, see Kerrigan, 957 A.2d at 476 (citing United States v. Virginia, 518 U.S. 515 (1996)), but its dismissal of Civil Unions as inherently unequal relies on and reads much more like Brown v. Board of Education than United States v. Virginia. See Kerrigan, 957 A.2d at 418-419 (citing Brown and In Re Marriage Cases, but no sex discrimination cases for the proposition that separate is not equal). For a discussion of the critical differences between Brown and United States v. Virginia, see infra notes 205-225 and text accompanying.
not take into account the fact that a white child raised in a mixed race household might suffer hardship in a way that she would not if she was raised in an all white household because to do so would legitimize racist biases. Together, say the courts of California and Connecticut, *Brown* and *Palmore* demonstrate how parallel marital regimes for same-sex couples violate basic principles of equality because of the way those different regimes will be valued socially, and therefore, gays and lesbians must be entitled to marriage itself.

The Supreme Court of Iowa took a different path to gay marriage. Unlike California and Connecticut, Iowa did not provide either Civil Unions or Domestic Partnership benefits for gay and lesbian couples so the Iowa court was not deciding whether separate could be equal.\(^{47}\) It was deciding whether a “mini-DOMA,”\(^ {48}\) passed by the Iowa legislature in 1998, could define marriage as between a man and a woman. The Iowa Court adopted a story of marriage much like story #1. Relying on an earlier loss of consortium case, the court defined marriage as “rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.”\(^ {49}\) But, it also found that gays and lesbian were a suspect class and any classification that singled them out for different treatment deserved heightened scrutiny.\(^ {50}\)

The mini-DOMA probably made the Iowa court’s discrimination analysis easier. Prior to 1993, when *Baehr* was decided in Hawaii, few states had even bothered to restrict marriage to opposite-sex couples. The opposite-sex definition was assumed. Legislative enactments that did so after *Baehr* were clearly designed to prohibit same-sex couples from marrying. As the Iowa Supreme Court wrote, “[b]y purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation.”\(^ {51}\) This kind of “animus toward the class that it affects”\(^ {52}\) is much more transparent in the mini-DOMAs of the 1990s than in the myriad of marriage statutes that pre-dated them.

By focusing on the 1998 statute, not the historical and almost universal understanding of marriage as between a man and a woman, it was easier for the Iowa court to say that an opposite-sex requirement was discrimination against gays and lesbians. The court never reached the question of whether a comparable status, like civil unions or domestic partnerships, that provide “an institutional basis for


\(^{48}\) Mini-DOMA is the phrase used to refer to the multiple state statutes passed in the wake of *Baehr v. Lewin*, 852 P.2d at 44, 44 (Haw. 1993), and in the wake of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2006), which defined marriage as between a man and a woman.

\(^{49}\) *Varnum*, 763 N.W.2d at, 883 (citing *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983)).

\(^{50}\) Id.

\(^{51}\) Id. at 885.

\(^{52}\) Id. (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)).
defining the fundamental relational rights and responsibilities of persons in organized society,” could be equal.\textsuperscript{53}

Thus, the equality arguments for SSM have relied mostly on racial equality doctrine and have focused on gays and lesbians as a class, not on the question of what marriage is. California, Connecticut and Iowa all found that gays and lesbians were a suspect class. California and Connecticut then went on to rule that the alternative marriage regimes for gays and lesbians violated the racial equality principle that separate is not equal. Iowa found that the state statute defining marriage as between a man and a woman was designed to discriminate against gays and lesbians.\textsuperscript{54} Initially, then, it seems that equality arguments more easily avoid the problem of defining marriage. But as the rest of the article will suggest, the strength of equality arguments depends on a genderless conception of marriage.

II. THE OTHER SET OF STORIES

Critics of SSM have their own stories of marriage. The first of these stories has to do with marriage as a procreative institution. This story of marriage has probably received the most attention,\textsuperscript{55} but it is also, I will suggest, the weakest. The second story has to do with marriage as an institution for child-rearing. The third story has to do with marriage as an institution for gender reification. The second and third of these stories have considerable significance for SSM arguments. For consistency sake, I will refer to the critics’ narratives as Stories 4, 5 and 6 and the proponents’ narratives as Stories 1, 2, and 3.

Story #4 suggests that marriage is an institution designed for procreation. For years, the only legal way to engage in the conduct that led to procreation was to do so within the institution of marriage. Recently, a group of Catholic theologians, known to some as the New Natural Law Theorists,\textsuperscript{56} have gone so far as to suggest that marriage can be restricted to opposite-sex couples because married heterosexual sex is an inherent good in a way that no other form of sexual expression is.\textsuperscript{57} Others have done much to refute this latter point about the inherent superiority of married heterosexual sex.\textsuperscript{58} It is, as the authors of the view concede,

\textsuperscript{53} Id. at 883.
\textsuperscript{54} Massachusetts, which had neither an alternative marriage regime nor a mini-DOMA to evaluate, did not apply any heightened scrutiny and simply found that restricting marriage to opposite-sex couples was irrational. See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
\textsuperscript{55} See Varnum, 763 N.W.2d at 901-02.
\textsuperscript{56} See KOPPELMAN, supra note 16, at 79.
a viewpoint that one either implicitly understands or one does not.\textsuperscript{59} As one who does not, it makes little sense for me to comment on it here.

Regardless of one’s view on the superiority of married heterosexual intercourse, any student of literature or history is well aware that marriage has never been particularly good at policing sexuality. One of the purposes of marriage may have been to channel sexuality into marital relationships, but sex has happened outside of marriage throughout history.\textsuperscript{60} If marriage’s primary purpose had been to restrict sexual activity to marriage, marriage would have broken down as an institution. It simply is not up to the defined task. Policing extra-marital sexual activity is and always has been extraordinarily difficult. The activity takes place in private. There are no non-culpable witnesses, and unless the participants are willing to implicate themselves, the activity is virtually impossible to prove. Until very recently, the only way to know whether sex happened was if a pregnancy resulted, but as long as the woman who got pregnant was married to someone, there was no way of proving that the sex was extra-marital.\textsuperscript{61}

What marriage has been much better at is providing an institution for child-rearing. Marriage is not about making babies (Story #4), but about taking care of them. This is the fifth story of marriage—marriage as an institution designed to ensure optimal child-rearing. A child born to a marriage (regardless of the actual origins of his or her genetic material) has a mother and a father whose responsibility it is to provide materially, emotionally, physically and spiritually. William Blackstone understood and endorsed this view. He wrote “[t]he main end and design of marriage . . . [is] to ascertain and fix upon some certain person to whom the care, the protection, the maintenance and the education of the children should belong . . . .”\textsuperscript{62} The marital presumption of paternity, which until quite recently was practically irrebuttable,\textsuperscript{63} is the strongest indicator of the law’s allegiance to the story of marriage as an institution for child-rearing.

\textsuperscript{59} George & Bradley, supra note 57, at 307 (“In the end, we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, noninstrumental value, or something blocks that understanding and one does not perceive correctly.”).

\textsuperscript{60} See generally LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800 (1977) (documenting extra marital sexual activity); Harold T. Christensen & Christina F. Gregg, Changing Sex Norms in America and Scandinavia, 32 J. MARRIAGE & FAM. 616, 616-27 (1970) (summarizing studies of premarital sex); 2 Samuel 11:1-5 (Bathsheba and King David).

\textsuperscript{61} Genetic testing now allows us to test whether there has been an exchange of bodily fluids and to identify the source of those fluids. DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 19-1.4 (1997).

\textsuperscript{62} 1 WILLIAM BLACKSTONE, COMMENTARIES *443, *455.

\textsuperscript{63} See generally Katharine K. Baker, Bargaining or Biology: The History and Future of Paternity Law and Parental Status, 14 CORNELL J.L. & PUB. POL’Y 1, 22-25 (2004) (explaining how, without genetic testing, proving paternity was so difficult that litigants could not overcome the marital presumption).
The problem with this narrative of marriage, for opponents of SSM, is that gays and lesbians can rear children within marriage too. Indeed, the reason that many gays and lesbians want to get married is because they want to raise children. To foreclose that option, opponents of SSM have to add an addendum to Story #5 indicating that the best way to rear children is to provide them with both of their biological parents. Thus, the full version of Story #5 is that marriage is for child-rearing and because child-rearing is done best by biological parents, marriage is for two people who, together, can be biological parents.64

The addendum about biological parents may or may not be true. Reliable evaluations about what matters most for optimal child-rearing are very difficult to produce. The studies that scholars do have access to are varied, rarely longitudinal, and wildly disparate in result.65 There are no reliable studies suggesting that bi-gendered role modeling really matters; nor are there studies proving that it does not matter, and many people think that a parent of each gender is good for children.66

To be reliable, studies of child welfare must have a sufficient number of subjects and sufficient heterogeneity, yet control for class, culture and a host of other differences.67 After reviewing the existing studies of gay parenting, the Iowa Supreme Court expressed doubt that children need a mother and a father, but the court did not mention the substantial body of evidence suggesting that children raised by their biological parents perform better on a host of measures.68 Probably most significantly, for the SSM issue, recent studies strongly indicate that children growing up in blended families have more trouble than children growing up in biological nuclear families.69 Among most demographers and social scientists who study family structure and child well-being, it is now common wisdom that, on

64 The one exception to this is adoption, which opponents concede deprives children of their biological parents and provides non-biological parents with children, but adoptions are approved only when in the best interest of the child. See Monte Neil Stewart, Genderless Marriage, Institutional Realities and Judicial Elision, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 15-18 (2006).
66 See Margaret Somerville, What About the Children?, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT 63, 67 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter “DIVORCING MARRIAGE”] (“Those who believe that children need and have a right to both a mother and a father, preferably their own biological parents, oppose same-sex marriage because . . . it would mean that marriage could not continue to institutionalize and symbolize the inherently procreative capacity between the partners . . . ”).
67 See Meezan & Rauch, supra note 65.
69 Id.
average, children raised by their own married, biological parents have an easier time than children raised in other circumstances.70

Nonetheless, the majority of children in this country are raised in other circumstances.71 The environments in which children are raised are simply too varied for legislators or other policy makers to make reliable categorical rules about optimal child-raising.72 That is probably why we allow adoption even though there is strong evidence that adoption is often taxing on children.73 It is why many states allow single parents to adopt even though most people agree that two parents are better than one.74 It may be why we countenance step-families even though many children seem to fare worse in step-families than in single-parent families.75

Most of the studies of gay families with children suggest that the children are not harmed by the same gender of their parents.76 Perhaps, for reasons we have yet to identify, a child raised by a biological mother and her non-biologically related

70 Lisa Gennetian, One or Two Parent? Half or Step Siblings? The Effect of Family Structure on Young Children’s Achievement, 18 J. POPULATION ECON. 415, 415-36 (2005) (for educational outcomes, children reared in traditional nuclear families do much better than those reared in other family structures); Donna K. Ginther & Robert A. Pollak, Family Structure and Children’s Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions, 41 DEMOGRAPHY 671, 676 (2004); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1 (1994) (children raised by both biological parents do substantially better along several metrics than children raised by single parent or biological parent and step-parent).

71 See McLanahan & Sandefur, supra note 70, at 2-3 (“Well over half of the children born in 1992 will spend all or some of their childhood apart from one of their parents.”).

72 Shelly Lundberg & Robert A. Pollak, The American Family and Family Economics, 21 J. ECON. PERSPECTIVES 3, 19 (2007) (“Because family structure is intertwined with other parental characteristics that affect children, a causal relationship between family structure and child outcomes is difficult to establish.”).


74 JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 118 (Columbia Univ. Press 2000) (Describing as “irrefutable” the evidence that, “all else being equal, two parents are better than one,” but noting considerable disagreement about what makes “all else equal.”).

75 See Wax, supra note 68, at 403; Gennetian, supra note 70, at 431 for outcomes of step-families.

76 Judith Stacey & Timothy J. Biblorze, (How) Does the Sexual Orientation of Parents Matter?, 66 AM. SOC. REV. 159, 162-64 (2001) (most current research indicates that there is no difference in development between children that live with heterosexual parents and children who live with same-sex parents); Katrien Vanfraussen et al., Family Functioning in Donor Families Created by Donor Insemination 73 AM. J. ORTHOPSychIATRY, 78, 78-90 (2003) (no differences in how parents and children in gay and straight families perceived the quality of their relationships); Raymond Chan et al., Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers, 69 CHILD. DEVELOPMENT 443, 443-57 (sexual orientation of parents had no significant impact on psychological well-being of their children.).
husband struggles more than a child raised by a biological mother and her female partner or a biological father and his male partner. Perhaps children that would be raised in a household with two gay parents if a state allows SSM will otherwise be raised in a household with only one parent if the state prohibits SSM. Perhaps having only one parent would be worse. But we do not know. Our predictive power when it comes to optimizing child outcomes given the situations children find themselves in is woefully deficient.

One fact is certain. Children in gay households are not going to be raised in the one family structure that social science has so far identified as being the most likely to be good for children. That fact is hardly dispositive, however. Most children in this country are probably not raised in that optimal family structure. And, there may be other family structures that are comparably good for children, but we have yet to identify them.

The Supreme Courts of Vermont, Massachusetts and New Jersey made much of the fact that their state legislatures had already enacted various protections for gay adoption, and that therefore it made no sense for the legislatures to preference straight over gay parenting. But, adoptive parents are always treated differently than other parents. A single person is allowed to adopt and parent a child on his or her own, even though we do not give a single person the exclusive right to parent a child born as a result of heterosexual intercourse. Allowing gay men and women to enter into second-parent adoptions says that the legislature thinks a child is better off with two parents than with one. It does not necessarily mean that the legislature thinks there is no difference between two parents of the same sex and two parents of the opposite sex.

Most important, all potential adopters have to be screened. No one is allowed to adopt domestically unless they have passed the licensing requirements for parenthood. Non-adoptive parents do not have to get licensed. They get parental

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77 One potentially important factor might be when the non-biological parent joined the family unit. Children living in a “blended” family may do just as well as children living in traditional nuclear family if those children never knew any other family structure or any other parent. This kind of non-biological-parent-there-from-the-start arrangement is probably more common in gay and lesbian households.


79 Both the child and the other genetic contributor have the right to establish parentage in the genetic father. See UNIF. PARENTAGE ACT, § 602, ULA PARENTAGE § 602 (2002).

80 “Second parent adoptions” refers to the practice of allowing a second same-sex parent to adopt a child who only has one legal parent. See LESLIE HARRIS ET AL., FAMILY LAW 927, n.10 (3d ed. 2005).

81 States investigate all potential adoptive parents before approving an adoption. See, e.g., Uniform Adoption Act, §2-203 (1994) (detailing the requirements for investigating a potential adopters home including determining “whether the individual is suited to be an adoptive parent.”).

82 See Uniform Parentage Act, supra note 79, at § 201 (detailing when men and women are presumed to be fathers and mothers of a child).
status by virtue of genetics or marriage. In allowing gay adoptions, legislatures could be saying that gays and lesbians can be parents only if they are genetically related to the child or if they are licensed as a parent. That is very different than what marriage has traditionally done which is to assign parental status to a spouse, regardless of genetic connection or parenting skills.

The ambiguity of the evidence regarding what matters in child-rearing explains why the constitutionality of the SSM issue is so important. Given the inconclusive data, a legislature that thinks that marriage is an institution designed primarily for the rearing of children may rationally reject gay marriage. Legislators may not want to channel adults into families that will deprive children born into that family of any chance of being raised by their biological parents. Infertile couples or couples who do not want children may be allowed to marry because no children are born into those marriages. States cannot prove that more children will be worse off if we further sanction non-biological parenting, but neither can proponents of SSM prove that biological connection makes no difference. The burden of proof becomes critical.

If marriage is a fundamental right, or if gays and lesbians have a constitutionally protected equality right to get married, the burden is on the state to prove that having both a mother and a father is critical. This the state cannot do.

83 The Supreme Judicial Court of Massachusetts disagreed with this conclusion, finding that there was no rational reason to prevent gays and lesbians from marrying and therefore the strength of either a fundamental right or an equality argument was unimportant. The Court wrote that denying same-sex couples the right to marry would not in any way ensure that more children would be born into marital families because gays and lesbians would just have children outside of marriage, and then the children would not be able to enjoy the benefits of marriage. Goodridge, 798 N.E.2d at 963 (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriage in order to have and raise children.”). The state may not have offered this evidence, but it hardly seems necessary. I know of no one who disputes a strong history of people who may have been inclined to enter into relationships with people of their own sex, but who nevertheless got married to people of the opposite sex and had children. One of the purposes of state sponsored marriage is to channel adults into certain kinds of relationships. See Carl E. Schneider, The Channeling Function in Family Law, 20 Hofstra L. Rev. 495, 497 (1992). That is what family law does. Binary, monogamous lifelong relationships are hardly artifacts of nature. The law may not succeed in channeling everyone into what it sees as the ideal relationships, but it does not need to be 100% successful (or even narrowly tailored) in order to be considered rational. It would seem fully rational for a legislature to conclude that if there is no SSM, people who might enter into a SSM, will choose instead to enter into an opposite-sex marriage to raise children.

84 If those couples “have” children, they adopt them and that is only done if in the best interest of the children. See, e.g., Uniform Adoption Act, supra note 81 § 3-703 (“The Court shall grant a petition for adoption if it determines that the adoption will be in the best interest of the minor . . . .”).

85 Varnum v. Brien, 763 N.W.2d 862, 899, n.26. (Iowa 2009). The Iowa Supreme Court reasoned that because gays and lesbians were a protected class, the opposite-sex
But if there is neither a fundamental right nor an equality right to marry, the burden is on SSM advocates to show that a policy favoring one parent of each gender is irrational. This, proponents of SSM probably cannot do. As a matter of policy, it might be extraordinarily wrong-headed to preclude two committed people of the same sex who very much want to parent with each other from doing so, but, given the evidence of what situations are better and worse for children, a reasonable legislator might conclude otherwise.86

This leads us then to the sixth marriage narrative, marriage as a promoter and producer of gender roles. This story of marriage will probably be jarring to some. Perhaps because it can be so jarring, courts have not engaged it significantly, except to dismiss it categorically and without discussion.87 One finds this discourse of inherently gendered marriage mostly in the academic writings by opponents of SSM. The story goes something like this:

Marriage is the primary institution through which gender is produced and realized. By acting as such, marriage serves as a critical source of identity for both men and women. Marriage creates a home environment marked by complementary, separate but equal gender roles. When men and women fulfill those roles they become more productive, responsible and happy citizens.

This understanding of marriage is gleaned from many different descriptions of marriage. For instance, one scholar claims that marriage is “the central cultural site of male-female relations.”88 It is “an institution that interacts with a unique social-sexual ecology in human life. It bridges the male-female divide.”89 Another author comments that marriage has “universal features” that include being “supported by

Footnotes:

86 Proponents of SSM often also point out that many opposite-sex couples get married without any intention of child-rearing. That fact does not render irrational legislative efforts to try to use marriage to ensure that children are raised by their biological parents. It just shows that marriage restrictions are underinclusive if the purpose is to use marriage to make sure that children are raised by their biological parents. But if stricter scrutiny is not triggered, than that underinclusiveness does not render SSM restrictions unconstitutional.

87 Both the California and Massachusetts Supreme Courts simply stated that SSM would not fundamentally change the institution of marriage. See Goodridge, 798 N.E.2d at 965 n.28 (dismissing dissent’s claim that the majority was changing the institution of marriage itself because the dissent’s argument hewed too close to the idea that men and women are different); In re Marriage Cases, 183 P.3d 384, 421 (Cal. 2008) (stating that SSM would not “change, modify or . . . deinstitutionalize the existing institution of marriage.”).

88 Daniel Cere, War of the Ring, in DIVORCING MARRIAGE, supra note 66, at 9, 14.

89 Id. at 11 (citing the work of evolutionary psychologists Margo Wilson and Martin Daly).
authority and incentives” and the “interdependence of men and women.”

According to these commentators, bringing men and women together has been “the massive cultural effort of every human society at all times and in all places.” Other scholars write that “[t]he status bestowed by marriage is that of ‘wife’ and ‘husband’ and the relation between husband and wife is the form of life that marriage alone creates ….”

Marriage creates the “social identities” of husband and wife and those social identities (which are formed by social norms and expectations) are very different than the social identity of “partner.” “[B]oth spouses gain from . . . the benefits that come from faithfully fulfilling one’s chosen duties as . . . husband or wife.” Marriage “sustains a complex form of social interdependency between men and women.” “Norms of trust, fidelity, sacrifice and providership . . . give [married] men clear directions about how they should act . . . [and] . . . [m]ost men seek to maintain their social status by abiding by society’s norms.” “Norms of adult maturity associated with marriage encourage adults to spend and save in a more responsible fashion . . . . [F]or many men, marriage is a right of passage that introduces them fully into an adult world of responsibility and self-control.”

With an extensive set of cultural norms and expectations about what it means to be married, i.e., to be a husband and wife, marriage channels men and women into gender roles that allow each to identify with and achieve the cultural ideals of masculine and feminine. If we allow people of the same sex to marry, we alter the essentially gendered nature of marriage and we put at risk the separate but equal masculine and feminine roles that marriage has traditionally reified. Having people live into and fulfill those roles has proven to be immensely beneficial for both

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90 Katharine Young & Paul Nathanson, The Future of an Experiment, in DIVORCING MARRIAGE, supra note 66, at 41, 45.
91 Id. at 43.
93 Stewart, supra note 64, at 19.
96 WITHERSPOON, supra note 94, at 21.
97 Id. at 20. As these last few quotes indicate, much of the argument against SSM suggests that it is the benefits that married men receive individually and provide to the social whole that makes marriage so valuable. Married men measure significantly higher for psychological and physical health than do single men. Married women measure higher than single women, but not as much higher as men. See infra note 98. Non-married adult men are less happy, more violent, less responsible and less integrated into their communities. See STEVEN NOCK, MARRIAGE IN MEN’S LIVES 6-8 (Oxford Univ. Press, Inc. 1998).
society as a whole and individuals in particular.\textsuperscript{98} As Steven Nock writes, “It is in the intimacy of married life that men and women define themselves as persons rather than employees, students, voters, faithful believers or any number of other public identities. One of the most important dimensions of personal identity is gender.”\textsuperscript{99}

One response to this story may be that SSM will not destroy gendered marriage; it will just allow for an alternative. If heterosexual people still want to live gendered lives, SSM will not prevent them from doing so. The rejoinder to this argument is subtle, but not necessarily weak. By unmooring marriage from its gendering effects, SSM puts in jeopardy the way in which most married people have learned to express themselves as spouses, the way in which they have learned to live in a loving sexual relationship, and the way in which they have come to understand who they are as participating, responsible members of society. What allows marriage to do this is the rich set of norms, many of them gendered, which define how married people are to behave. The strong social pressure to conform to these norms restricts people’s freedoms but allows them to live into responsible masculinity and femininity.\textsuperscript{100} Adhering to the social norms of marriage and accepting the responsibilities of marital roles allows for a kind of self-expression and self-development that is both confining and ennobling.\textsuperscript{101} Those social norms

\textsuperscript{98} There is fairly consistent evidence that marriage makes both men and women happier, healthier and wealthier. Steven Nock writes “The many beneficial effects of marriage are well-known. Married people are generally healthier; they live longer, earn more, have better health and better sex lives, and are happier than their unmarried counterparts. . . . Some disagreement may exist about the magnitude of such effects, but they are almost certainly the result of marriage, rather than self-selection.” See Nock, supra note 97, at 3 (citing numerous studies). For a more recent study, see Alois Stutzer & Bruno S. Frey, Does Marriage Make People Happy or do Happy People get Married?, 35 J. SOCIO-ECON. 326, 327-34 (2006) (finding that marriage continues to be highly correlated with happiness for both men and women and that “[i]t is unlikely that . . . selection effects can explain the entire difference in well-being between singles and married people.”); see also Walter R. Gove et al., Does Marriage Have Positive Effects on the Psychological Well-Being of the Individual?, 24 J. HEALTH & SOC. BEHAV. 122, 125 (1983) (marital status is the most powerful predictor of mental health for both men and women).

\textsuperscript{99} Nock, supra note 97, at 42.

\textsuperscript{100} Bruce Hafen writes about the restrictions of family life this way, “the same relationships . . . that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up.” Bruce C. Hafen, Individualism and Autonomy in Family Law: The Waning of Belonging, 1991 BYU L. REV. 1, 41 (1991).

\textsuperscript{101} For more on how accepting the roles in marriage is both an expressive and constitutive act, see Milton C. Regan, Jr., Spousal Privilege and the Meanings of Marriage, 81 VA. L. REV 2045, 2088-89 (1995). Regan’s work builds on Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 HARV. L. REV. 959, 959-1001 (1992) (articulating and analyzing the constitutive responsibility paradigm) and it is similar to how Katharine Bartlett has described parenthood. See Katharine T. Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293, 301 (1988) (citing the work of Nel Noddings, Caring: A Feminine Approach to Ethics and Moral Education 14 (Univ. of Cali. 1984), and
will change if, for instance, husband will not necessarily mean “provider” and wife will not necessarily mean “caretaker.”

Admittedly, some couples already alter aspects of these roles. But few couples abandon them completely. The more marriage’s gendered conventions are challenged, the less stable they become and the less likely they are to be reinforced by broad social consensus. Without that broad social understanding of marriage as gendered, the gendered norms that go with it will die and so will the roles through which many people have found meaning in their lives.

For those who find this understanding of marriage somewhat alienating or just alien, it is important to recognize two distinct but important points. First, the gendered narrative fits very easily into much of the pre-existing constitutional discourse on marriage. One can see how marriage could be “the foundation of society,” “the most important relation in life,” and “fundamental to the very existence and survival of the race” because of the way in which it reifies gender, serving both the states interest in stability and protection against dependence (Story #1) and individuals’ interests in expression and self-determination (Story #2). What may make marriage so important to people is the sense of belonging and purpose that comes from accepting the restrictions and accolades that accompany marital gender roles. These restrictions and accolades have an enormous effect on one’s sense of self. They help one understand who one is. They are, as Stephen Nock suggested, a critical part of one’s identity.

suggesting that accepting the responsibilities of parenthood is a means of adults striving to realize their “ennobled selves.”

The argument made by opponents of SSM here is akin to those highlighted by Jorge Aseff and Hector Chade, in an article addressing the problem of identity externalities. One’s ability to get value out of a given institution may depend on who else is part of that institution and thereby giving it an identity. See Jorge Aseff & Hector Chade, An Optimal Auction with Identity-Dependent Externalities, 39 RAND J. ECON. 731, 731-32 (2008).

One study famously found that though the percentage of unpaid work that a wife does in the home decreases as she earns more money relative to her husband, in those couples where the wife actually earns more than her husband, the wives begin to do a greater share of the housework. The authors attribute this phenomenon to the greater importance of conforming to gendered roles with regard to unpaid work if the couple is not conforming to those roles with regard to paid work. See Theodore N. Greenstein, Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension, 62 J. MARRIAGE & FAM. 322, 333 (2000).


Our sense of self comes, in part, from how others define us and most people use some sense of social norms to guide their judgment. Think, for instance, about how good it may feel to be called a “good husband” or a “good mother.” Or consider how bad it feels to be called a “bad husband” or “bad mother.”

See Nock, supra note 97, at 42 (“one of the most important dimensions of personal identity is gender”).
Thus, marriage’s ability to channel people into gender roles works at both a private and public level. The identity that comes from being married feels like the “intimate and personal” realm that is “central to the liberty protected by the Fourteenth Amendment.” But, the norms that shape that identity are social. Part of what it means to be married is to accept roles defined by others. That is how we know what it means to “be a good wife” or “be a good husband”—because these terms have social meaning. And that social meaning is gendered. According to Story #6, the identity benefits from marriage stem from accepting assigned roles, not creating new ones.

The second, and potentially more important, observation that flows from Story #6 is that a great deal of social science data confirms what this gendered story of marriage celebrates. The next Part explores more fully what the social science data indicates about the tendency of marriage to reinforce gender.

III. THE GENDER FACTORY

As Story #1 suggested, one of the advantages of marriage is that it allows for a division of labor and an allocation of roles within households. This role division provides stability for the household, for the individuals within it and for society as a whole. In the vast majority of households, this role division is also gendered. As Sarah Berk showed in her classic book, The Gender Factory, standard economic explanations for how and why unpaid work might be divided in a household cannot explain the social reality of how work is divided in households. Gender can. Gender predicts who does what, how much each married partner does and why husbands and wives do not negotiate more over who does what or how much. Couples do not fight over what jobs they will do because the allocation is so patterned into who they are as gendered selves. And the more those gendered work patterns are replicated, the more entrenched gender roles become. Thus, the home and the marriages that define it not only reflect gender, they create it. “[G]ender both affects and is perhaps effected through the division of household labor. It is around household work that gender relations are produced and reproduced on a daily basis.”

109 See Berk, supra note 14, at 165 (“[W]ith respect to the apportionment of household tasks . . . men and women may share a work environment, but do not share much of its work.”).
110 See supra text accompanying note 20.
111 See Berk, supra note 14, at 162-65.
112 Id. at 191 (“[H]ow people interact about who does what is as stable a phenomenon as the division of the work itself.”).
113 Id. at 165.
Marriage increases the amount of domestic work that women do and decreases the amount that men do. Married women, regardless of whether they also work outside the home, do much more household work than their husbands. Studies find that even in the most egalitarian households, women perform 59% of the domestic work.

Marriage, particularly marriages with children, decrease women’s commitment to paid work and increase their commitment to unpaid work. A strong majority of married mothers work outside the home, but in the most recent exhaustive study of time allocation in households with children, Suzanne Bianchi and her colleagues found that mothers average 67% of the unpaid work in a household, while fathers average 64% of the paid hours for a household. Mothers do twice as much child care as fathers.

Mothers may be able to do more child care because they do less paid work than fathers. Married women often leave the labor force for a short or long period. Between 1983 and 1998, 50% of women, but only 16% of men, reported being out of the labor force for one full year. Thirty percent of women, but only 5% percent of men reported more than four years of zero earnings. Women with the strongest commitment to paid labor, i.e., those who reported earnings for every year of their prime earning years (ages 26-59), still reported working almost 500 fewer hours per year than men. Some women may work less than the standard work week or standard work year; others may forego overtime opportunities when men do not.

These differing work patterns are starkly reflected in the gender wage gap. Most wage gap measures usually only account for workers who work full time on an annual basis (thus excluding part-time or part-year workers, most of them

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116 Greenstein, supra note 103, at 333.
118 SUZANNE M. BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 91 (Douglas L. Anderton et al. eds., 2006).
119 Id.
121 Id.
122 Id.
women). When one includes those part-time and part-year workers and looks at just prime earning years, women earn 38 cents for every dollar men earn.123

Most women who currently make the choice to do less paid work were raised during what might be described as a time of maximum gender equality, with all the benefits that Title VII, Title IX, and constitutional gender equality doctrine afforded them.124 Yet almost half of all married mothers with children under the age of one leave the labor force.125 One study found that mothers born after 1965 in households earning more than $120,000 a year, were more likely than not to be at home full-time.126 Another study found that “[e]ven wives with graduate and professional degrees do not usually work full time if their husband’s income exceed[s] $75,000.”127

Marriage affords many women the opportunity to not work, or to work less. It does not appear to afford men the same choice. The labor supply curve for married women is very elastic, yet it is starkly inelastic for married men.128 If anything, marriage increases men’s commitment to the paid labor force because if their wives choose not to do paid work or do less of it, married men do more of it.129

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123 Id. at 131.


125 Claudia Wallis, The Case for Staying Home, TIME, Mar. 22, 2004, at 52. The number of working married mothers with children under age one “fell from 59% in 1997 to 53% in 2000” and stayed “roughly the same in 2002.” That drop was most pronounced among white well-educated women over thirty. Although six percentage points may not seem like a huge drop in the number of working women, economists suggest that it is significant. Id.

126 Id. Women of the same income level, raised without the benefits of legally recognized gender equality, i.e., those born between 1946 and 1964 or baby-boomers, are significantly less likely to be home full-time (51% of post-baby-boomer mothers are home full-time versus 33% of baby-boomer mothers).

127 Ira Mark Ellman, Marital Roles and Declining Marriage Rates, 41 FAM. L.Q. 455, 474 (2007). This finding is based on data from the 1997 Current Population Survey. Ellman also found that “as economic pressures decline, married American mothers increasingly choose to work part time rather than full time, regardless of their educational level,” Id. at 475.


129 Men with non-wage-earning spouses work more than men whose wives earn wages, though they also earn considerably more per hour. One study found that men with non-working spouses work 4% more than men with working spouses, but that they earn 20% more than their peers with working spouses. Tamar Lewin, Men Whose Wives Work Earn Less, Studies Show, N.Y. TIMES, Oct. 12 1994, at A1; see also Joy A. Schneer & Frieda Reitman, Effects of Alternate Family Structures on Managerial Career Paths, 36 ACAD. MGMT. J. 830, 840 (1993) (what was once thought to be a marital bonus paid to married men is more accurately seen as a “traditional family bonus.” Men whose wives are home full-time earn more per hour than men whose wives work.).
Thus, marriage propels men into the paid labor force, even as it offers women a path out of it.  

Neither men nor women seem particularly upset by this differential response to marriage. Despite their spending significantly different amounts of time on paid and unpaid work, married mothers and fathers report “feeling very successful in balancing work and family life.” Married fathers are more likely than married mothers to report making sacrifices in family time for the sake of their job, but they are also slightly more likely to report making sacrifices in their job for the sake of the family. It is unmarried mothers who are by far the most likely to report making sacrifices in both job and family for the sake of the other. Married mothers, who work the fewest paid hours, are the most content with their role balance.

The gendered differential in time allocation and married parents’ satisfaction with it does not conform particularly well with what parents say they believe about a gendered division of work. Of people born between 1965 and 1981, 82% believe that “both parents should be equally involved in care giving.” Putting those beliefs together with the data on actual hours devoted to caretaking, it is striking that more parents are not dissatisfied with their role allocation. Also interesting, is the correlation between belief in gender egalitarianism and gendered work patterns. Education level is highly correlated with belief in gender equality, as is income level. Yet, the more wealth a married couple has, the more profound

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130 Whether the total number of hours that men and women work is equal seems to depend on how completely they specialize along gender lines. In households where women perform no paid labor, men, on average, work more hours than women. In households in which women work outside the home (and do the bulk of unpaid labor), it is the women who work more hours. Bianchi et al., supra note 118, at 56.

131 Bianchi et al., supra note 118, at 139 (50% of married fathers and 52% of married mothers report feeling very successful in achieving work/family balance); see also Alan J. Hawkins et al., The Orientation Toward Domestic Labor Questionnaire: Exploring Dual-Earner Wives’ Sense of Fairness About Family Work, 12 J. Fam. Psychol. 244, 244 (1998) (“although dual-earner wives [in the United States] do two to three times the amount of domestic work their husbands do, less than one third of wives report the division of daily family work as unfair.”).

132 Bianchi et al., supra note 118, at 139 (20% of married men report sacrificing family time for career, versus only 14% of married women. 32% of married men report sacrificing job for family, versus 30% for married women.).

133 Id.

134 Id. at 128 fig.7.2.

135 See Richard J. Harris & Juanita M. Firestone, Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis, 38 Sex Roles 239, 240 (1998) (linking commitment to gender equality and education); Dep’t of Health and Human Services, Cohabitation, Marriage, Divorce, and Remarriage in the United States 4 (2002), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf (linking marriage rate to education stating, “[i]n addition to race and employment status, other characteristics of individuals that have been found to be related to a higher probability of getting married include higher education and earnings.”). Education may teach people to believe in gender
their gender specialization tends to be. What can account for a feeling of success if one’s behavior so clearly deviates from one’s beliefs about gender equity?

One answer may be capaciousness in the term “equality.” It is not precisely clear what people mean when they say that both parents should share equally. Perhaps people mean that the investment in caretaking should be comparable, or equal-on-major-decision-making, or at least close. Any of those understandings of equality, though, may muddle claims for SSM. Civil Unions are comparable and close to marriage. Is that enough?

Another reason people may not be concerned about deviating from their reported beliefs about gender roles is that they underestimate the importance of gender in their own lives. Women may feel like they have successfully negotiated a paid/unpaid balance even though they do twice as much unpaid work as their spouses because norms of motherhood encourage them to do so much unpaid work. Interviews with mothers who have left or significantly diminished their paid work suggest as much. “I have more of a link [to my children] than my husband does.” “You can’t get away from the fact that women bear children.” “The day-to-day stuff is harder for men.” “He doesn’t have the same guilt that I have. He doesn’t worry that it’s going to hurt them.”

Men may feel comfortable doing so much less unpaid work in the home because masculinity norms strongly encourage them to participate in the workforce. Participating in the workforce allows men to compete, usually with other men, and competition is a hallmark of masculinity. Earning the bulk of the family’s money also allows men to define themselves as breadwinners and providers. As numerous scholars of fatherhood and masculinity have concluded, “the breadwinner role is socially defined as men’s primary family role.”

equality, but it also enables them to make more money and the more money a couple makes, the more likely they are to lead gendered lives. See infra note 136.

In addition to the figures cited above regarding women who can afford to be at home full-time, see Wallis, supra note 125, at 53; Ellman, supra note 127, at 459-60, consider these figures: 22% of women with professional degrees do not work at all so that they can stay home with their children, see Wallis, supra note 125, at 53, and only 41% of married mothers with post-graduate education work full-time. Bianchi, supra note 118, at 58. Only 33% of women with post-graduate education and at least one child under age six work full-time. Id. It is possible that all of these women with professional degrees are living off of their part-time salaries or accumulated wealth, but it is probably much more likely that the primary source of income to their household comes from a husband.

All of these quotes are taken from women interviewed by Mary Blair-Loy in her book on women executives. See MARY BLAIR-LOY, COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 83-84 (Harvard Univ. Press 2003).


“[B]readwinning has remained the great unifying element in fathers’ lives. Its obligations . . . shape their sense of self, manhood and gender.”

In accounts of why and how many well-educated, formerly egalitarian couples divided roles along gender lines, participants report that paid work is simply more psychologically important to fathers than mothers. As Steven Nock writes in his study of how marriage functions in men’s lives, “[a husband] in his role as primary provider for the family, has committed himself to instrumental tasks that contribute to his gender identity as a man.”

“[S]ome amount of differentiation (or inequality) in marriage contributes to what it means to ‘be’ a husband, and . . . what it means to conform to cultural ideals of masculinity.” If that inequality within marriage is essential to how marriage provides identity for its participants, will gay and lesbian couples be able to access comparable notions of identity through marriage?

The importance of gender roles is evident in the incidence of marriage as well. Data collected on those who do not marry suggests that marital gender roles are more robust than marriage itself. Women who are likely to earn equal to or more than their husbands are much less likely to marry. This phenomenon is most profound at either end of the income scale. Studies of unmarried poor women indicate that though many of these women want to marry and have turned down marriage proposals from men, they remain single because they cannot find a suitable spouse. A suitable spouse, for them, would be one who would remain faithful, stay employed, and provide for the family. An unemployed spouse or a spouse who could not be relied upon, was not worthy of marriage. These women continue to believe in marriage, but marriage for them is an institution that requires men to assume certain roles.

High-earning women have a related problem. One study found that for women between the ages of forty and forty-four, the percentage who have never

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141 BLAIR-LOY, supra note 137, at 68, 72, 84 (“[M]y husband loves his work. For him to make a change would be change of such magnitude, such importance to him personally . . . . “I’m much more apt to be thinking about my kids than I am about work and I think that’s the difference . . . He’s just more distracted by work . . . .” “He would find it very difficult [to be the primary parent] . . . He’d be very antsy to get back to work.”); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 25-31 (Oxford Univ. Press 2000) (describing how women assume the burden of unpaid work because it is so important for their spouses to keep working long hours in paid work).
142 NOCK, supra note 97, at 62.
143 Id. at 132.
144 Ellman, supra note 127, at 458-59.
145 KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 130 (Univ. of Cal. Press 2005).
146 Id. at 126, 130.
married increases with education for every year beyond one year of college. This may be because, like poor women, high-earning women seek men who can perform the traditional provider role and the more women provide for themselves, the higher the standard they will set for their prospective spouses. Alternatively, it may be that men do not want to relinquish the traditional marital role and, therefore, prefer not to marry women who might earn as much as them. It may be both. Regardless, the patterns suggest that gender roles continue to play a prominent role in people’s understanding of what marriage is.

The prevalence of gendered marital roles is often thought to be beyond the law’s reach. The law—and many people—view the marital relationship as a private one, entitled to a norm of non-interference. An individual couple’s decision to specialize along gender lines probably feels personal to them and a function of their unique attributes as a couple, even though if an employer or the government specialized in that same way it would raise serious equality concerns. Legal attempts to interfere with a couple’s allocation of marital roles would probably strike many as impermissibly invasive.

Yet the gender patterns that continue to reproduce themselves in these seemingly private relationships have indisputable social force. They shape our understanding of what it means to be a mother and wife or a husband and father. This is precisely the point that critics of SSM make: by facilitating gender differentiation, the social institution of marriage helps reify gender roles. Marriage affords men and women the opportunity to live into separate gender roles in which both find satisfaction, and through which gender roles are perpetuated.

Even if one thinks that the prevalence of gender roles simply represents revealed preferences in a situation in which the law is neutral, the current restrictions on SSM keep marriage gendered. If the expressive and constitutive benefits of marriage are inexplicably intertwined with the gendered nature of marriage, and if allowing same-sex couples to marry will undermine that gendered nature of marriage, then the state’s role cannot be considered neutral with regard to gender roles. By licensing marriage and restricting it to straight couples, the state reifies gender. But the state reifies gender precisely because the expressive and constitutive benefits of marriage are so important to people. In other words, that which makes marriage a fundamental right may, in and of itself, create a gender equality problem.

Given that background of what marriage is and how it operates, it is appropriate to ask what same-sex couples are asking for when they ask for SSM. Are they claiming that marriage must not be gendered—that the law must interfere

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148 This norm of non-interference has pedigree in both the common law, see McGuire v. McGuire, 59 N.W.2d 336, 345 (Neb. 1953) (court will not assume jurisdiction over parties’ distribution of resources within an ongoing marriage), and the Constitution, see Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (state cannot interfere with sanctity of marital decision-making about contraception).
to prevent the reproduction of traditional gender? Or, are they asking for a right to enter into an institution that will allow each to assume a gendered role, albeit a gender role that, for at least one-half of each couple, will not map onto his or her biological sex? As Part V will show, gender equality doctrine has often been reticent to eradicate gender roles altogether, particularly when they manifest themselves in private settings, and it has been quite ambivalent about allowing people to be alternatively gendered (i.e., to assume a role that does not map onto his or her biological sex).

IV. EQUALITY DOCTRINE

This Part reviews the law of gender equality in three different contexts: employment cases involving dress codes, employment cases involving privacy and sexual preferences, and constitutional cases involving gender discrimination. As a doctrinal matter, only the constitutional doctrine is relevant. Sanctioning and licensing some marriages and not others involves quintessential state action. And, as a constitutional matter, the argument that the state cannot mandate certain gender roles within marriage seems quite strong. But, just as Part IV suggested that there was cultural ambivalence about what gender equality might mean and require, the doctrine explored here suggests that there is legal ambivalence over what gender equality may mean or require.

A. The Grooming Cases

The law of gender equality is most routinely tested and created under Title VII of the Civil Rights Act of 1964, the federal statute that prohibits discrimination in employment on the basis of sex. Within this field, in a set of cases known as the “dress” or “grooming” cases, employers are allowed to establish separate but equal rules on the basis of gender and they are allowed to take into account private biases, i.e., community norms, when hiring and retaining workers. Admittedly, the permitted accommodation of gender roles is bounded. Employers are not allowed to segregate job categories (employers cannot channel women into traditionally female jobs and men into traditionally male jobs); nor are they allowed to exaggerate gender roles in ways that may be detrimental to one sex. But, they

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149 See supra notes 15-16 and accompanying text; infra notes 190-193.
151 Though employers are not required to adjust pay across categories if employees’ personal preferences are such that women choose to work in some of the less lucrative, non-commissioned fields (selling apparel and cosmetics) and men choose to work in the more lucrative, commissioned fields (selling major items like appliances and furnaces). EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 320-21 (7th Cir. 1988).
152 Magnuson v. Peak Technical Services Inc. 808 F. Supp. 500, 506 (E.D. Va., 1992) (denying summary judgment to employer who told employee to wear high heels because her legs were sexy); Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi., 604 F.2d 1028,
are allowed to impose separate hair length requirements on men and women.\(^{153}\) They can require women, but not men, to wear skirts,\(^{154}\) and men, but not women, to wear neckties.\(^{155}\) Men are not necessarily entitled to wear effeminate clothing,\(^{156}\) and men can be prohibited from wearing jewelry.\(^{157}\)

One of the most recent “grooming” cases involved a bartender who complained about a company policy that made her wear make-up and cut her hair in a certain style.\(^{158}\) Her male co-workers were not required to wear make-up or wear their hair in that style.\(^{159}\) Sitting en banc, the Ninth Circuit wrote, “[t]he material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an unequal burden for [her] gender.”\(^{160}\) In other words, difference itself does not constitute inequality. Separate can be equal as long as it is not unduly burdensome.

In a well-publicized grooming case involving a broadcast journalist who was fired because of declining audience approval numbers attributable to her appearance, the court wrote that different specific appearance criteria for women and men “do not implicate the primary thrust of Title VII, which is to prompt employers to ‘discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.’”\(^{161}\) The District Court had made clear that there was nothing wrong with tailoring grooming requirements to conform to “community standards.”\(^{162}\) In other words, private biases can matter and it is only outmoded stereotypes that must go.

The grooming cases’ blatant rejection of equality principles that seem core in the racial context has, not surprisingly, generated a fair amount of commentary. Some writers feel strongly that the accommodation of gender roles, no matter how understandable, is pernicious and ultimately undermines what should be the thrust of equality doctrine. To this group, the manifestation of gender is the problem; gender distinction and sex discrimination are one in the same thing.\(^{163}\) Mary Anne

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1032-33 (7th Cir. 1979) (striking down employer policy that required women to wear sexually revealing uniform when men could wear street clothes).
159 Id.
160 Id. at 1110.
161 Craft v. Metromedia, 766 F.2d 1205, 1215 (8th Cir. 1985) (quoting Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1251 (8th Cir. 1975)).
Case argues that “the world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well.” 164 Taylor Flynn suggests that employer bans on male employees wearing earrings are nothing more than penalties on men for failing to conform “to the masculine gender role expectation that men do not accessorize.” 165 Katherine Franke suggests that “Title VII should recognize the primacy of gender norms as the root of . . . sex discrimination, and . . . prohibit all forms of normative gender stereotyping . . . .” 166

Others have taken a more accommodating approach. Katharine Bartlett uses the grooming cases to point out the indeterminacy of the term equality. She writes “[t]here can be no abstract all-purpose definition of equality that fits all times and places.” 167 Instead she says the focus of equality doctrine should be on whether gender classifications further gender-based disadvantages and this, she argues, requires more, not less, attention to community norms (i.e., private biases). 168 Robert Post writes that

[it] is . . . implausible to read Title VII as mandating that gender conventions be obliterated . . . [We should not be required] to imagine a world of sexless individuals, but . . . [should] instead . . . explore the precise ways in which Title VII should alter the norms by which sex is given social meaning. 169

Kimberly Yuracko suggests that courts use a “power-access approach” that “makes actionable those, and only those, types of sex-specific trait discrimination that arise out of gender norms and gender scripts that reinforce sex hierarchy in the workplace.” 170 She goes on to argue that if courts were to prohibit all forms of gender role distinction and force a convergence “toward an androgynous mean,”

(“We are in danger of substituting for prohibited sex discrimination a still acceptable gender discrimination . . . .”).

164 Id. at 7-8.
168 Id. at 2545 (“Because what constitutes disadvantage, as well as what it takes to reduce that disadvantage and even what reducing that disadvantage means, can only be determined in context . . . I conclude that the evaluation of equality claims under Title VII requires more, not less, attention to community norms.”).
women would likely be disadvantaged because they would be forced into a male norm that would inhibit their freedom without materially increasing anyone else’s.  

Gendered dress codes serve no other purpose than to accommodate social norms, that is, private biases, and thereby reify and reproduce gender. If, as the current law and numerous commentators seem to suggest, dress codes do not necessarily offend equality principles, some institutional reification of gender must be permissible. Perhaps marriage serves a comparable purpose.

To be sure, there is Title VII jurisprudence that seems to cabin the grooming cases. In Price Waterhouse v. Hopkins, the Supreme Court suggested that Title VII prohibited all sex stereotyping by employers. The plaintiff in that case, Mary Ann Hopkins, was denied partnership at a prestigious accounting firm because, the trial court found, partners at the firm disapproved of her masculine behavior.

It seems unlikely that in protecting Mary Ann Hopkins’ right to mimic the aggressive style of the men who had made partner at Price-Waterhouse, the Supreme Court meant to rid the workplace of all manifestations of gender conformity. The Ninth Circuit, in Jesperson v. Harrah, found reasonable

173 “We are beyond the day when an employer can evaluate employees by assuming or insisting they match the stereotypes associated with their group.” Price Waterhouse, 490 U.S. at 251. 

174 For a more detailed description of the Price Waterhouse case, see Yuracko, supra note 170, at 180. 
175 Id. at 171, 188-202 (suggesting that Price Waterhouse is better thought of “as an articulation of a trait equality requirement” and going on to explore the problems with a trait equality approach). 
176 Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006). For a discussion of this case, see supra text accompanying notes 158-160.
gendered grooming requirements to be consistent with Price-Waterhouse.\textsuperscript{177} The problem in Price-Waterhouse, according to the Ninth Circuit, was that gender conformity would have undermined Mary Ann Hopkins’ attempt to make partner.\textsuperscript{178} In contrast, wearing make-up would not have interfered with Darlene Jesperson’s ability to bartend.\textsuperscript{179}

The Sixth Circuit in Smith v. City of Salem,\textsuperscript{180} a case involving a male-to-female transsexual, seems to have reasoned differently, stating “discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from discrimination directed against Mary Ann Hopkins.”\textsuperscript{181} The full meaning of Smith is indeterminate though. Smith’s superiors attempted to fire him only after they learned of his intention to complete a male to female physical transformation. It may have been his intention to actually become a woman, not stay a man who tended to act in a feminine manner, that triggered the employment action.\textsuperscript{182} And there is something deeply ironic about prohibiting employers from demanding some conformity to gender stereotypes in the name of protecting a plaintiff who desperately wanted to conform to a gender stereotype—albeit one different than the one society had originally assigned to him.

As scholar Anna Kirkland observes after discussing these cases “gender stereotyping as a legal idea lives quite comfortably with inconsistency.”\textsuperscript{183} The simple point to be emphasized in the SSM context is that anti-discrimination law, as articulated in Title VII jurisprudence, sends mixed messages about the extent to which the law is willing to condone gender stereotypes and mandatory gender conformity.

\textbf{B. Privacy and Sex}

The other contexts in which Title VII condones gender distinctions have to do with customer preferences that are explicitly linked to customer privacy concerns or sexual preferences. Thus, nursing homes, hospital delivery room nursing staff, and agencies that hire nursing aides or others who are likely to have physical contact with clients (or see them nude), can discriminate on the basis of sex.\textsuperscript{184} In

\begin{itemize}
\item \textsuperscript{177} Id. at 1109-11.
\item \textsuperscript{178} Id. at 1110.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004).
\item \textsuperscript{181} Id. at 575.
\item \textsuperscript{182} Management may have simply been prejudiced against transsexuals. Id. at 569.
\item \textsuperscript{183} Anna Kirkland, Fat Rights: Dilemmas of Difference and Personhood 89 (N.Y. Univ. Press 2008).
\item \textsuperscript{184} See, e.g., Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996) (permitting sex to be a bona fide occupational qualification (BFOQ) for psychiatric hospital staff treating emotionally disturbed and sexually abused children and adolescents, noting that because “[c]hild patients often [had to be] accompanied to the bathroom, and sometimes . . . bathed”); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 935 (S.D. Miss.
explaining these cases, Robert Post suggests that courts may take sex into consideration, especially in some contexts, because “[g]ender is highly salient in matters of privacy. The sex of the person by whom we are seen or touched normally matters very much to us.” Whatever our commitments to gender equality, they do not necessarily trump the values we place on protecting personal privacy preferences.

Commentators and courts have also suggested that jobs can be segregated on the basis of sex when sexual titillation goes to the essence of the service provided, be it burlesque, lap dancing or Playboy Bunny service. Courts are less willing to suspend equality principles in the sexual titillation context than in the privacy context, but the more explicitly sexual the business, the more acceptable the sex discrimination. Most commentators concede that being a woman is a bona fide occupational qualification (BFOQ) for working in a strip club, at least one that caters to men.

Two things are worth noting about the privacy and sexual titillation cases. First, in neither context would the racial preferences of consumers be allowed to trump. No one suggests that an obstetric patient could request a white nurse over an African-American nurse, even though she can request a female nurse over a

185 Post, supra note 169, at 26.
186 Although, Kimberly Yuracko points out that allowing privacy concerns to trump equality principles in the privacy cases in not likely to have a disparate impact on one particular sex. Kimberly A. Yuracko, Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination, 92 CAL. L. REV. 147, 181 (2004). “[W]hile women may be denied certain jobs to protect men’s privacy, men will be denied the same range of jobs to protect women’s privacy.” Id.
male one. Comparably, the Hefner organization would not be allowed to discriminate on the basis of race in hiring Playboy Bunnies. Second, recall that this is an article about marriage. Whatever else marriage is, it is an institution that people strongly associate with privacy and sex, yet those are areas in which the doctrine suggests that equality interests may be trumped.

C. Constitutional Gender Equality

As suggested above, notwithstanding the Title VII jurisprudence accommodating gender roles, the Supreme Court has repeatedly struck down as unconstitutional sex-based classifications that were rooted in provider/caretaker stereotypes. The armed services cannot assume that wives of service men are dependent on their spouses if they do not make the same assumption about husbands of service women.\textsuperscript{189} The Social Security Administration cannot differentiate between widows and widowers when awarding survivor benefits.\textsuperscript{190} All statutes authorizing courts to order alimony or spousal maintenance payments must be sex neutral.\textsuperscript{191} States cannot distinguish between male and female children’s entitlement to child support.\textsuperscript{192}

Not that long after these cases were decided, Professor Wendy Williams suggested that the Supreme Court struck down so many of these sex-based distinctions so quickly in the 1970s because it “recognize[d] that the real world outside the courtroom had already changed. Women were in fact no longer chiefly housewife-dependents. The family wage no longer existed . . . .”\textsuperscript{193} Williams was certainly right that the real world had changed by the early 1970s, but that change, to the extent it has continued, has not resulted in the elimination of gender roles. Women may not be as dependent on men as they were in 1965, but as a relative matter, most married women are still dependent on their husbands. The marital home may not produce the same gender roles as it did in 1965, but the sociological data strongly suggest that it still produces gender. And, importantly, many men and women are content with the way in which marriage does so.

If the Supreme Court were to look at the real world now and realize that gender roles have proved so remarkably resilient, would that be relevant constitutionally? Would marriage’s role in reifying gender roles require a degendering of marriage or an acceptance of its gendered nature? The constitutional jurisprudence regarding sex-based classifications in other areas does not necessarily render a clear answer.

\textsuperscript{192} Stanton v. Stanton, 421 U.S. 7, 8 (1975).
\textsuperscript{193} Williams, \textit{supra} note 17, at 155 (citing U.S. Dep’t of Labor, Bureau of Labor Statistics News 1 (Nov. 15, 1981)). (Williams’ article was published in 1992, but she started working on it in 1982, a date closer to when the sex discrimination cases were decided than to the present.).
First, the initial question that the Supreme Court asks when it is addressing questions of whether a certain statute or policy violates the Constitution’s prohibition on sex discrimination is whether men and women are similarly situated. The Equal Protection Clause requires that men and women be treated comparably only if they are similarly situated.\(^{194}\) Sometimes they are not. Rules that assign citizenship differently based on whether it is a foreign-born child’s mother or father who is a United States citizen do not violate the Equal Protection clause because mothers and fathers are not similarly situated with regard to parenthood of newborns.\(^{195}\) Comparably, states are allowed to have gendered rules with regard to relinquishing one’s parental rights (usually in the context of adoption) because, unless fathers have developed a relationship with their children, they are not similarly situated to mothers, who have a relationship by virtue of pregnancy.\(^{196}\) Thus, the constitutional question for SSM may be whether same-sex couples are similarly situated to opposite-sex couples. If one of the primary purposes of marriage is to help produce and reify gender identity, then same-sex couples are not similarly situated to opposite-sex couples with regard to marriage. Indeed, the existence of SSM may undermine the purpose of marriage by making gender role construction more a matter of personal choice than socially accepted norms.

In other contexts, the Supreme Court has suggested (as did some of the courts in the grooming cases) that gender discrimination is constitutional as long as it is not the result of rank, non-contemplative stereotyping. Thus, in \textit{Rostker v. Goldberg}, the Court upheld a compulsory draft registration system for men because “Congress did not act ‘unthinkingly’ or ‘reflexively’ . . . .”\(^{197}\) “[T]he decision to exempt women from registration was not the “accidental by-product of a traditional way of thinking about females.”\(^{198}\) “The question of registering women for the draft . . . received considerable national attention and was the subject of wide-ranging public debate . . . .”\(^{199}\) Comparably, whatever the origins of prohibitions on SSM (which may well have been reflexive and unthinking), gay

\(^{194}\) See \textit{Schlesinger v. Ballard}, 419 U.S. 498, 508 (1975) (longer periods for promotion acceptable for women because men and women were “not similarly situated with respect to opportunities for professional service.”).


\(^{196}\) \textit{Cf. Caban v. Mohammed}, 441 U.S. 380, 392 (1979) (biological father could block adoption of child by mother’s husband because biological father and mother had shared parenting duties once the children are born), \textit{with Lehr v. Robertson}, 463 U.S. 248, 250 (1983) (biological father of child could not block the adoption by mother’s husband because biological father had not developed a relationship with child).

\(^{197}\) \textit{Rostker v. Goldberg}, 453 U.S. 57, 72 (1981); \textit{see also Craft v. Metromedia}, 766 F.2d 1205, 1216 (8th Cir. 1985) (suggesting Title VII’s primary thrust was only to “discard outmoded sex stereotypes”) (emphasis added) (quoting Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1251 (8th Cir. 1975)).

\(^{198}\) \textit{Rostker}, 453 U.S. at 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)).

\(^{199}\) \textit{Id.} at 72.
marriage has now been the subject of wide-ranging political dialogue. Few states that continue to ban SSM are doing so as an “accidental by-product of traditional ways” of thinking about marriage. They are doing so in the midst of a vigorous debate about what marriage means. 200 Most of the states that prohibit SSM have had recent referenda on the issue. 201 If the social meaning of marriage is contested in an open and deliberative way, then a discrimination doctrine aimed at prohibiting reflexive stereotypes may not require that marriage be defined in one way or another.

Ironically, while those states that have had referenda on SSM may shield themselves from claims of non-contemplative stereotyping, they open themselves up to claims of animus against gays and lesbians. The recent attempts to codify marriage as heterosexual were born in a movement in which open antipathy to gays and lesbians was commonplace. 202

A finding of animus makes the analogy to race more salient, thus bolstering the claim that separate cannot be equal and the level of scrutiny a court is likely to use in evaluating marriage statutes. Still, given how scholarship has argued that discrimination against gays and lesbians is sex discrimination, 203 and given the lack of animus in Story #6, one would expect courts to exert more effort in explaining why race and not sex discrimination doctrine should control. As Professor Stephen Clark has succinctly summarized, “classifications based on sex are not inherently suspect . . . .” 204 Classifications based on race are. To the extent that the Supreme Courts in Iowa, Connecticut and California are saying that classifications based on sexual orientation are inherently suspect, one would think they would need to explain why discrimination on the basis of sexual orientation is more like race discrimination than sex discrimination.

The strongest and most helpful gender discrimination case for SSM advocates is United States v. Virginia 205 (“VMI”). In that case, the Supreme Court ruled that the Virginia Military Institute’s interest in keeping an environment in which “[p]hysical rigor, mental stress, absolute equality of treatment, [and] absence of privacy . . .” were stressed—an environment that was much easier to maintain with an all-male population—could not justify excluding women. 206 The Court ruled

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200 See Human Rights Campaign, Statewide Marriage Prohibitions, http://www.hrc.org/documents/marriage_prohibitions.pdf (last visited Nov. 17, 2008) (map of the U.S. showing which states have a constitutional amendment, or a state law limiting marriage to one man and one woman).

201 See id.

202 See supra notes 50-52 and accompanying text.

203 See supra note 16 (articles suggesting that discrimination on the basis of sexual orientation is sex discrimination).

204 Stephen Clark, Same-Sex but Equal: Reformulating the Miscegenation Analogy, 34 Rutgers L.J. 107, 165 (2002).


206 Id. at 522.
that the state must proffer an “exceedingly persuasive justification” for excluding women from this bastion of masculinity.\textsuperscript{207} Virginia could not meet this burden.

Under one reading of VMI, the Supreme Court held that the Equal Protection Clause ensured women access to state-sponsored environments that promote and reify masculinity. Under this reading, same-sex couples should be entitled to enter into the institution of marriage because those couples have a right to access state-sponsored environments that promote gender roles even if those roles do not map onto a particular person’s biological sex. What this account fails to consider though is how readily the Supreme Court conceded that equality principles required nothing more than separate but equal accommodations.

The acceptance of separate but equal standards is most obvious in the discussion that occupied most of the VMI Court’s opinion, to wit, whether the alternative program that Virginia had made available to women interested in a military-like education provided equal opportunity. In response to early losses in the litigation, Virginia had developed a program—Virginia Women’s Institute for Leadership (“VWIL”)—at Mary Baldwin College, which offered an all-female option for women who wanted a militaristic experience.

Justice Ginsburg’s opinion details how VWIL did not offer anywhere near as rigorous military training as VMI did. The women students did not need to “live together . . . eat meals together . . .,” or experience the “spartan living arrangements designed to foster an ‘egalitarian ethic’”\textsuperscript{208} Moreover, Mary Baldwin College had vastly inferior sports facilities, a faculty that held “significantly fewer Ph.D.s, and receive[d] substantially lower salaries,” and “no courses in engineering or . . . advanced math and physics . . ..”\textsuperscript{209} In short, the Court readily found that separate was not equal because the separate schools were funded and supported at completely different levels.\textsuperscript{210}

The Court’s discussion in VMI is distinctively different than the Court’s discussion forty-two years earlier in \textit{Brown v. Board of Education}. In \textit{Brown} the Court wrote “there are findings below that the Negro and white schools involved have been equalized, or are being equalized with respect to . . . ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors . . . .”\textsuperscript{211} Instead, the court focused on the “hearts and minds” of the African-American children and on the psychological harm they were likely to suffer because “[t]o separate them . . . solely because of their race generates a feeling of inferiority.”\textsuperscript{212}

Separating genders is not usually so interpreted. Unisex bathrooms are rarer than gendered ones. Neither women nor men walk through a department store

\textsuperscript{207} \textit{Id.} at 524.

\textsuperscript{208} \textit{Id.} at 548 (quoting United States v. Commonwealth, 766 F. Supp. 1407, 1424 (W.D. Va. 1991)).

\textsuperscript{209} \textit{Id.} at 551-52.

\textsuperscript{210} \textit{Id.}


\textsuperscript{212} \textit{Id.}
feeling inferior because women’s clothes are in one place and the men’s clothes in another. In VMI, the Supreme Court gave no indication that the VWIL option was inherently unequal because it was separate. If a fully funded, adequately staffed Mary Baldwin College facility would have passed constitutional muster, then VMI cannot be read to hold that women are necessarily entitled to be alternatively gendered.

There are further indications of slippery notions of equality in VMI. When explaining that VMI was obligated to open its programs to women the Court dropped a curious footnote: “admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other in living arrangements, and to adjust aspects of physical training programs.” Why would equality doctrine undoubtedly require this? Shouldn’t equality doctrine prevent such an accommodation? Is this another example of privacy trumping equality? Presumably, the Court was concerned about women’s safety, but that concern leads one to conclude that equality requires protecting women from violent masculinity even as equality entitles women to it.

The degree of outrage stemming from gender distinction appears to be contextual. Many people are upset when children’s toy stores segregate toys on the basis of gender even if they are not upset by the segregation of adult apparel. Perhaps this is because people recognize that adult women and adult men have “real” physical differences that necessitate different clothing styles, while boy and girl children are thought to have fewer “real” differences. But undoubtedly, the difference in style between men and women’s clothing vastly exceeds any “real” difference in body type and many, many parents watch in amazement as boy and girl children seem to demonstrate “real” differences.

See Clark, supra note 204, at 166-67 (“[S]ex equality law has no analogue to Brown v. Board of Education or any parallel proposition that merely drawing a sex-based line is inherently unequal or necessarily stamps one sex or the other with a badge of inferiority.”).

Chief Justice Rehnquist concurred separately to show his support for single-sex education and to demonstrate that Virginia could solve the dilemma by providing a fully comparable facility for women. See United States v. Virginia, 518 U.S. at 564-66 (Rehnquist, C.J., concurring). Apparently, Chief Judge Rehnquist was unsure whether the majority would ever accept a separate but equal facility. But the majority spends most of its analysis demonstrating how the separate facility is inferior, not explaining—as the Brown court did—why a separate facility must be inferior.

The level of sexual assault and harassment at some military academies has proven to be astounding. See Vojdik, supra note 171, at 101-02.

It is worth noting that the masculinity usually reified at military academies is very different than the masculinity that marriage is supposed to produce. Indeed, believers in the inherently gendered nature of marriage might argue that marriage is necessary precisely because it provides for men a much more caring, cooperative and responsible masculine template. Military academies are infamous for their misogynistic norms. Pursuant to those norms, women are seen as weak; if men are to interact with them at all it is to abuse or rape them. See Vojdik, supra note 171, at 68-69.

Modern marriage suggests something very different about male and female interactions. According to the gender norms of marriage, men and women are different but
A rich conception of gender equality can reconcile the apparent contradiction of women being entitled to both protection from and access to masculinity norms. Arguably, women must be granted entrance to those institutions that have afforded men power precisely because men have gained that power at women’s expense. The process of integration into those institutions will be dangerous and difficult. Therefore, women must be protected from private individuals who will seek to thwart their access to power. Women’s access to power is what equality doctrine protects.

This richer conception of equality is not necessarily applicable in the SSM context. What is it that equality doctrine will protect for same-sex couples? Is it the right to be alternatively gendered or the right to degender marriage? The benefits that opposite-sex couples gain in marriage have not necessarily come at same-sex couples’ expense. For sure, as the California Supreme Court recognized, there is a respect and dignity that accompanies most opposite-sex marriages and same-sex couples have been denied that respect and dignity, but so has everyone who does not get married. Many marriage critics have argued that the respect and dignity that accompanies married people has come mostly at the expense of single people.219

The accolades that accompany marriage may also be a function of the social praise that accompanies living into one’s socially programmed gender identity. Marriage is much more about the absence of choice than the exercise of it. The purpose of opposite-sex marriage may be to make good men and women, with responsible masculine and feminine characteristics. This is only possible (according to Story #6) if the individuals are not free to choose their own gender identity. Entering marriage is seen as a rite of passage because it involves accepting the more restrictive world of roles. Living within those roles is celebrated as a sign of maturity.

that difference is to be respected. One’s job is to love the other, not denigrate it. One’s responsibility is to care for and nurture the other and to let the other care for and nurture you. In historical context, or in the context of a broad understanding of how gender reflects power, gendered marriage may just be misogyny more pleasingly dressed up as a separate-but-equal regime, but many people would reject the idea of gendered marriage as misogynistic, even while accepting that the masculinity of the military academies is misogynistic. Those social understandings of gender roles and how they operate may matter in political and legal discussions of who is entitled to marriage and why. For many, gendered marriage offers a non-misogynistic alternative for masculine identity and therefore gendered marriage has tremendous social value. And, equality doctrine (sometimes) suggests that as long as gender norms are benign, they are acceptable.

In his very thoughtful explication of the miscegenation analogy in the SSM context, Stephen Clark argues that because Brown has no analogue in sex discrimination doctrine, the determination of whether SSM restrictions are sex discrimination must be based on pre-Brown discrimination doctrine, particularly Sweatt v. Painter, from which the majority quoted liberally in VMI. The operative question that emerges from the pre-Brown era is whether a classification affords different groups “substantially equal” opportunities. Clark concludes that SSM bans and even civil union options do not afford gay individuals substantially equal opportunities.

Critical to Clark’s analysis is his observation that equal protection rights are “personal rights” that ensure that individuals must be entitled to opportunities that are substantially equal to the opportunities that other individuals (of different races or sexes) enjoy. But in the marriage context, they are individual rights to a legal status that gets much of its import and significance, and therefore, much of its constitutional stature, from social norms. If, given the gendered nature of modern marriage, marriages between same-sex partners will not be experienced as substantially equal or the same as marriages between opposite-sex partners, does that mean that same-sex couples do not have a right to them? Are same-sex couples even asking for a right to the same institution? Once again, the legal analysis of the SSM question depends on the story one tells about marriage.

Whether consciously or not, the reason the courts of California, Connecticut and Iowa may have latched onto race, not sex, discrimination doctrine is that there is much less ambivalence about the meaning of equality in the race context. Separate is not equal when it comes to race and the law does not accommodate racist biases. If prohibiting SSM is discrimination against gays and lesbians because they are gays and lesbians, and sexual orientation is a suspect classification like race, then courts can avoid the ambivalent nature of sex equality doctrine and at least elide the hard task of defining marriage. Still, given the well-known argument that sexual orientation discrimination is sex discrimination given how central gender has always been to marriage, and given how a gendered understanding of marriage undermines the applicability of the racial analogy, it is a bit surprising that the predominant analogy has been to race. At a minimum, one would expect courts to explain why the more accommodating approach to gender discrimination should not be adopted in equality discussions of SSM.

220 See Clark, supra note 204, at 165 (“[c]lassifications based on sex are not inherently suspect.”).
222 Clark, supra note 204, at 173-74.
223 Id. at 174.
224 Clark, supra note 204, at 178-79 (citing Shelley v. Kramer, 334 U.S. 1, 22 (1948)).
225 See sources cited, supra note 16.
D. The Law of Marriage

Finally, a note on the irony of using equality doctrine to secure rights to marriage. Much of the law of marriage, and particularly the law of marriage dissolution exists because gender roles exist. Arguably, the reason marital property regimes assume that all income and property earned during the marriage should be split equally, and the reason spousal maintenance regimes require one spouse to support the other after the marriage is over, is because of the strong likelihood that spouses will be dissimilarly situated. The law of marital dissolution is designed to treat “unalikes alike.”226 The more similarly situated the spouses are, the less we need a law of marital dissolution.

Few people advocate dispensing with marital property or maintenance rules. Treating unalikes as comparably entitled at the end of a marriage strikes most people as justified, necessary, and fair, but it has little to do with traditional equality doctrine.227 This does not preclude plaintiffs from making equality claims to enter the institution,228 but it does shed light on how and why equality arguments may seem inapt.

What is it that SSM couples are being deprived of if the purpose of marriage is to make sure that women get compensated for the unpaid work that they do, and that men retain responsibilities for the dependencies they have enabled? Won’t most same-sex couples look much more similarly situated than most husbands and wives, and might that realization undermine the family law rules that have protected women because they are not similarly situated? The modern trend—even in non-community property states—to distribute property equally at divorce and the modern defense of spousal maintenance almost always makes explicit reference to the need to protect women.229 Will the arguments for joint property and spousal maintenance seem as compelling if the dependent role is chosen in

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226 Aristotle famously described equality as treating likes alike and unalikes unalike. See ARISTOTLE, ETHICA NICOMACHEA v. 3 1121a-1131b, 113 (J.L. Ackrill & J.O. Urmson eds & W. Ross trans., 1980) (“this is the origin of quarrels and complaints – when either equals have and are awarded unequal shares, or unequals equal shares.”) For more discussion of Aristotle’s influence on the law of gender equality, see CATHARINE MACKINNON, SEX EQUALITY 4-10 (2001).


228 Loving v. Virginia, 388 U.S. 1, 2 (1967), the case in which the Supreme Court struck down miscegenation laws is an example of when an equality claim could be made in a way that would have no bearing on the law of marital dissolution.

229 See sources cited, supra note 227.
defiance of social norms instead of in compliance with them? Will we need more proof from gay couples than we do from straight ones that their marital roles were explicitly negotiated such that one person promised to provide and the other promised to do more unpaid work? Or, will we assume that it is marriage, not gender, that leads to role specialization? Why, after all, should the law condone marital roles given their tendency to leave so many people so vulnerable?

Infusing equality principles into the law of marriage leads to a host of these disruptive questions. People eager to understand what marriage is, how it functions, and whether it is worth the acclaim it receives may welcome these questions, but proponents of SSM cannot realistically assert that the questions are not disruptive. Sorting through the answers to these questions might well change marriage as we know it.

V. ANOTHER STORY

Story #6 accurately describes the way marriage functions in many married people’s lives. But it need not represent a marital ideal and its descriptive accuracy does not preclude people from believing that the essence of marriage is about something other than its gendering function. Marriage may be a gender factory, but it does not have to be. And, if a competing story of marriage can emerge as dominant, the descriptive accuracy of Story #6 becomes less important.

In this last Part, I offer another story of marriage, one that incorporates aspects of many of the previous marriage narratives, one that can be reconciled with the doctrine that suggests that marriage is a fundamental right, yet one that would compel states to license SSM. However, it is a discourse that challenges many modern understandings of what marriage should be.

A. Story #7

Marriage marks the creation of a legal family. That family serves as a critical source of identity for its members. The law assumes and facilitates both material and emotional interdependence within that family in order to make it more stable and efficient. Material interdependence arises from the roles that are assumed when the parties specialize in different kinds of marital contributions, and from the reliance that develops over time in a relationship marked by sharing. Emotional interdependence—which usually includes a sexual relationship—arises from the sense of connection that leads the parties to want to marry. One of the main purposes of marriage is to raise children.

1. Marriage as a Fundamental Right and an Equality Right

If Story #7 describes marriage, gays and lesbians should have a right to it both because marriage is a fundamental right and because gays and lesbians are similarly situated to straight couples with regard to marriage. Just as Story #1 suggested, the state has an interest in defining and maintaining the legal institution
of marriage because of the way in which legal marriage promotes stability and efficiency. The state facilitates marital interdependence by providing the rights and obligations that bind the parties to each other and enable marital role development. As various courts and legislatures have found, there is no good reason to deny same-sex couples access to these rights and obligations.230

As Story #2 suggested, because of the role marriage plays in shaping peoples’ identities and because of the expressive and constitutive benefits that flow from marriage, marriage cannot be viewed as only this bundle of rights and obligations. It is a lasting social institution, accompanied by a rich set of norms and expectations that both restrict and enrich its participants. These restrictions and expectations have traditionally included, but need not include gender role conformity. The enrichment that marriage provides does not need to come from living into a responsible masculinity or femininity (Story #6), but can come from living into a responsible role as spouse.

As with the traditional masculine and feminine roles, the role of spouse requires a relinquishment of self, a doing for others, and a conformity with external norms that involves subjugating autonomy and self-interest. 231 But also, as with the traditional masculine and feminine roles, fulfilling the role of spouse allows for transcendence of self and a realization of a new identity.232 Thus, marriage involves a kind of self-realization that stems from connection, not gender.233 Through this connection, which is re-inforced by both social and legal norms, married people become something new. If the state is to deny people the ability to tap into this rich set of norms in order to express and constitute themselves through


231 See Regan, supra note 101, at 2088-89, and Bartlett, supra note 101, at 301 (discussing the ways in which accepting the responsibility of certain roles can be a sign of growth and ennoblement.).


233 Objections relations theory has long taught us that human beings have very strong desires for strong emotional attachments. “People are constructed in such a fashion that they are inevitably and powerfully drawn together . . . wired for intense and persistent involvements with one another.” STEPHEN A. MITCHELL, RELATIONAL CONCEPTS IN PSYCHOANALYSIS: AN INTEGRATION 21 (Harvard Univ. Press 1988).
marriage, it must have a very good reason. This is why marriage is a fundamental right.

The legal rights and obligations that accompany marriage facilitate interdependence and commitment, but they do not define the social meaning of spouse. That social meaning comes from the social norms that accompany state-sponsored marriage. Civil Unions or Domestic Partnership may not trigger the same set of norms and, thus, they may not demand of their participants the same kinds of commitments. The problem is not that separate or different cannot be equal, but that alternative marriage forms are likely to be materially different because of the different social norms that will accompany them. It is those social norms that make marriage a fundamental right because they are what give marriage its expressive and constitutive qualities.

In order for same-sex couples to be entitled to that fundamental right, the social meaning of marriage must have more to do with being a spouse, than being a husband or wife. If marriage is about making two spouses, not making a husband and wife, same-sex and straight couples are similarly situated with regard to their ability to achieve that spousal status. Therefore, same-sex couples have an equality right to marriage.

2. Marriage and Children

Marriage also often produces children. It can produce them by having one of the spouse’s get pregnant; it can produce them by adopting them; it can produce them by entering into some form of reproductive technology contract. My use of the impersonal pronoun here is deliberate. The law used to think of marriage itself as producing children. Custody jurisdiction at divorce extended to “children of the marriage.” Courts in intestacy proceedings routinely referred to “children of the marriage.” Today, we tend to think of parents and spouses separately. Individuals produce children; marriages do not. But marriage retains more importance as an institution when the law gives it credit for producing children and same-sex parents have much to gain in giving that credit to marriage.

The opponents of SSM are surely right in Stories #4 and #5 when they say that children have something to do with marriage. For many people, the desire for children probably motivates the decision to marry. And that makes sense. It may

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236 *See* Cary v. Buxton, 1793 WL 256, 5 (Va. 1793) (“father’s intention to provide for all the children of the marriage . . . .”); Peyton v. Hallett, 1 Cai. R. 363, n.(a) (interests of “children of the marriage” not affected.).
be for children’s sake that we channel adults into the restrictive institution of marriage.

Critics to the left of the SSM movement have mocked the use of children in the SSM litigation as a transparent attempt to make same-sex couples look “normal.”237 This same criticism of marriage dismisses it as inherently boring, sexually stifling, and autonomy-denying.238 Proponents of SSM may need to concede that marriage is all those things. But so is parenthood. For those who question why straight adults burden themselves with the restrictions of marriage, and why so many gay adults are expending so many resources so that they have the opportunity to burden themselves with the restrictions of marriage, it helps to remember children. The limited reliable data that we have on child-rearing suggests that children probably benefit from their parents’ boredom and lack of autonomy, from the cabined sexuality, and from the stability and interdependence that marks marriage.239

Embracing the link between marriage and children is particularly important for many same-sex families. As discussed in Part III, traditionally, marriage determined parenthood, especially for fathers.240 Opponents of SSM are wrong when they suggest that traditional marriage ensures that children are raised by their biological parents. As Blackstone said, traditional marriage ensures that children have legal parents.241 Marriage was never able to make the biological link secure. Instead, the person married to the woman who gave birth was the father.

The marital presumption has waned in importance as genetic science has made it increasingly easy to determine genetic parenthood. This has led to a wave of cases involving non-genetic parenthood. A divorcing woman can now reliably inform her soon-to-be-ex-husband that he is not the genetic father of “their” child, and then argue that he should be denied custody.242 Divorcing men find out they

237 See Franke, supra note 219, at 239-40 (noting “the deployment of children as props that attest to our normalcy . . .”).
238 Id. (“It’s a tired argument by now that the problem with these staged spectacles [of gay couples looking ‘normal’] . . . is that they are boring, though of course they are.”); see also MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE, 87-95 (Harvard Univ. Press 1999) (discussing how supporting SSM ignores the best principles of Stonewall, which included, “diversity in sexual and intimate relations” and “resistance to state sanctioned legitimacy of consensual sex.”).
239 See Gennetian, et al., supra note 70, at 417; Ginther & Pollack, supra note 70, at 691; McLanahan & Sandefur, supra note 70, at 134.
240 See Baker, supra note 63, at 22-23 (“For most of western history, marriage, not blood, determined fatherhood. . . . A child born out of wedlock was fillius nullius, or child of nobody.”).
241 See Blackstone, supra note 62, at 443 (“the main end and design of marriage [is] to ascertain [parenthood]”).
242 See, e.g., Matter of Marriage of Sleeper, 929 P.2d 1028, 1030 (Or. Ct. App. 1996) (mother estopped from denying husband’s paternity); In re Marriage of Roberts, 649 N.E.2d 1344, 1346 (Ill. 1995) (biological mother estopped from denying husband’s paternity of the child when she represented to him that he was the father and, relying on that representation, he developed a relationship with the child.).
are not the genetic fathers and argue that they should not have to pay child support.  

These cases have bred new doctrines involving equitable parenthood, de facto parenthood, and much more expansive visitation options for non-legal parents, but defining parenthood through marriage would render many of these doctrines unnecessary. Gay parents have benefited from these doctrines to a certain extent, but they would find much more protection in the traditional link between marriage and parenthood. If marriage defined parenthood, courts would not have to struggle nearly so much with these equitable and ill-defined doctrines. Courts would not need to look for parenting contracts or implicit intent to share parental rights between gay partners. More important, non-biological gay parents would have access to what non-biological straight parents have always been awarded—custody, not just visitation. Custodial rights and child support responsibilities would be part of the rights and obligation of marriage because children are a part of the definition of marriage.

A strong link between marriage and parenthood could also protect gay parents from the potential dangers involved in the increasingly strong call to make genetic parenthood more relevant. The United States is one of the few major industrialized countries that still allows anonymous gamete donation. Canada, the UK, and Sweden all require that children born through artificial insemination be given access to information that allows them to find their donor parents. This means

243 See, e.g., Markov v. Markov, 758 A.2d 75, 76 (Md. 2000) (husband who found out he was not the biological father still responsible for child support if biological father cannot be found); M.H.B. v. H.T.B., 498 A.2d 775, 777 (N.J. 1985) (husband who found out he was not the father of third child of the marriage still responsible for child support).

244 See, e.g., In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995) (husband could seek custody of child even though he had found out he was not the genetic father); In re Marriage of Roberts, 694 NE2d at 1346 (same).

245 See Baker, supra note 63, at 31-35 (describing the variety of contexts in which courts have used equitable parent doctrines to provide visitation rights); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(b)-(c) (2002) (recommending the adoption of the terms equitable parent and de facto parent).

246 There is often vigorous debate over the applicability of these doctrines. See the dissents in Markov, 758 A.2d at 84 (citing the dissent in Knill v. Knill, 510 A.2d 546, 552); MHB, 498 A.2d at 781, and Gallagher, 539 N.W.2d at 483.


248 Cf. E.N.O., 711 N.E.2d at 891, and J.A.L., 682 A.2d at 1317 with the husband whose wife is estopped from denying biological fatherhood, thus allowing the husband to petition for custody, not just visitation.


250 Id.
that, in many gay families, there are clearly identifiable alternative parent figures.\footnote{Id. at 714 (suggesting that the movement to identify genetic parents may lead to a more fluid understanding of parenthood, one in which the traditional two-parent model gives way to a model involving more parents. This new model would necessarily weaken the parental rights of the traditional parents).} If a gay couple is divorcing, and perhaps even if they are not, that alternative parent figure may be able to secure some sort of parental rights. Allowing a sperm donor or surrogate mother to secure rights dissipates the rights of the gay parents. A strong link between marriage and parenthood diminishes the relative importance of genetics to parenthood and strengthens gay parental rights.

3. Summary

Story #7 incorporates many of the previously offered stories of marriage. It explains why the state confers marital rights and obligations, why marriage has meaning beyond those rights and obligations, and why children should be relevant to discussions of marriage. What Story #7 rejects is Story #6. Marriage is not a forum for gender production. Marriage makes spouses, not husbands and wives. Becoming a spouse has social meaning that gives marriage its constitutive and expressive qualities, which, in turn, make marriage a fundamental right. Gay couples are just as able to become spouses as are straight couples. Gay couples do not have an equality right to degender the gender factory, but if marriage is not inherently gendered, then gay couples have an equality right to the institution.

B. Some Implications

Social conservatives often assume that the SSM movement is the inevitable outgrowth of the loosening of marriage and gender norms that started with the divorce reform movement in the 1960s.\footnote{See Witherspoon, supra note 94, at 9 ("[I]n the last forty years, marriage and family have come under increasing pressure from the modern state, modern economy, and modern culture.").} Story #7 reflects liberalized gender norms—it rejects the role of marriage in producing gender at all—but it does not reflect the ideology of the divorce reform movement of the 1960s and 1970s. Indeed, as the following discussion suggests, the story of marriage offered here rejects much of what is considered the modern ideology of marriage.

1. Spousal Maintenance

First, the divorce revolution’s theory of divorce involved both “end[ing], as far as possible, all personal and economic ties between the spouses” and emphasizing that “both spouses should become equal and independent social and economic actors after divorce and that neither spouse should be especially burdened by the divorce decree.”\footnote{HARRIS ET AL., supra note 80, at 389.}
coming to be viewed as equally able to earn money, and because personal growth and individual autonomy came to be valued more highly than they once were,254 the law’s willingness to bind two divorced people together dissipated. “Neither spouse] should be shackled by the unnecessary burdens of an unhappy marriage.”255 The ideal of letting the couple go their separate ways was consistent with the emerging understanding of marriage as a relationship between autonomous equals, either of whom could choose to leave if he or she was unhappy. Virtually every state amended their spousal maintenance statutes to encourage more limited alimony awards as a way of minimizing long-term entanglement between ex-spouses.

Few people today quarrel with the idea that marriage is a relationship between equals, and few more argue for a return to fault-based divorce.256 But, it did not take long for courts or commentators to realize that divorce reform’s vision of the parties being able to completely separate after divorce simply would not work. In marriages of significant duration or with differentiated roles, both members of the couple usually cease being autonomous. The primary wage earner depends on the non-wage earner for unpaid, familial labor—most of which usually benefits the parties’ children—and the primary caretaker depends on the primary wage earner for financial well-being. Those dependencies cannot be addressed adequately with a simple edict that directs the parties to go their separate ways.

When men’s marital contributions are primarily monetary and women’s marital contributions are primarily nonmonetary, ending all personal and economic ties between the parties leaves ex-wives extraordinarily vulnerable. Even if a wife does make monetary contributions to the marriage, if they are less than her husband’s (which, as part IV shows, they usually are), encouraging the two parties to go their separate ways can leave a woman in economic circumstances far less desirable than those she enjoyed while married. Some judges realized this after the initial divorce reforms were adopted. They began rejecting limited-term maintenance because they recognized the hardship it imposed on women.257 Recent

256 See generally Ira Mark Ellman & Sharon Lohr, Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce, 1997 U. Ill. L. Rev. 719, passim (1997) (some states have re-introduced fault based divorce with the idea of covenant marriage, but the idea has not spread very far). See generally Steven L. Nock et al., Covenant Marriage: The Movement to Reclaim Tradition in America passim (2008).
reform work also acknowledges the failure of the divorce revolution in this regard, making clear that in marriages of sufficient duration or with significant role division, the clean break theory of divorce should not apply.\textsuperscript{258}

The movement away from a more individualistic view of marriage, and back toward a recognition that marriage creates lasting interdependencies can be seen by some as a step in the wrong direction. People eager to see women assume equally prominent roles in the public sphere resist this step backwards because awarding maintenance to women who opt out of competition in the public sphere may encourage them to opt out. People concerned about maximizing women’s presence in prominent and powerful public positions may think that marriage should not encourage traditional gender roles in any way.

The story of marriage offered here encourages traditional gender roles because it acknowledges the efficiency and stability that can stem from marital roles. It rewards the spouse who assumes the traditionally female role. In doing so, it gives same-sex couples the right to marry, but at the cost of celebrating the roles that lead to such a glaring gender wage gap. It accepts marriage as a union of equals—it understands marital roles as rooted in marriage, not gender—but, it suggests that one of the main reasons for marriage is to allow for the creation of a separate but equal regime.

In the long term, SSM may help reduce the correlation between gender roles and marital roles. If enough same-sex couples assume marital roles that are inconsistent with their socially defined gender roles, the gender roles themselves may be destabilized. This is the fear of opponents of SSM.\textsuperscript{259} If enough men become primary caretakers and enough women become primary wage earners, then the likelihood that straight couples will fall into traditional gender roles may dissipate. Marriage will still facilitate roles, just not sex-based gender roles. This will take time, however. In the interim, the acceptance of roles is likely to enable or encourage married women to continue to commit less time to the paid labor force and more time to unpaid work.

\begin{enumerate}
\item \textit{Premarital Agreements}
\end{enumerate}

Second, the idealization of emotional interdependence in marriage undermines modern trends to rely more on contract doctrine in marriage. Acknowledging the emotional interdependence of marriage is critical to explaining why marriage should be viewed as a fundamental right because it is the emotional interdependence that gives marriage its expressive and constitutive qualities. But the emotional connection between the parties undermines the ability of traditional contract law to order affairs between them. Thus, Story #7 casts doubt on some courts’ willingness to enforce premarital agreements.

\begin{footnotes}
\item See \textit{generally} \textsc{American Law Institute, supra} note 245, at §§ 5.01-.14 (suggesting that maintenance should be awarded based on the length of marriage and the degree to which the couple adopted marital roles).
\item See \textit{supra} notes 99-101 and accompanying text.
\end{footnotes}
Many states still require a finding of procedural fairness before enforcing premarital agreements, but most states have dispensed with any substantive review of premarital contract terms. As long as there was a full disclosure of assets prior to execution, and as long as the parties had a chance to secure independent legal representation, courts will enforce the contracts.

If part of what we celebrate in marriage is its ability to alter the individuals who enter the institution, its ability to make two into one, it is not clear that we should honor a contract made between the two. It is not, as the traditional non-enforcement policy presumed, that such an agreement is made in contemplation of divorce and therefore against public policy. Rather, it is that the self one is acting on behalf of when one signs a prenuptial agreement is supposed to be changed by marriage. If one acts to protect the premarital self, one is undermining the emotional transformation that marriage is supposed to enable and encourage. The purpose of marriage is to change its participants, to make them less autonomous, more duty-bound, and more defined by others. A premarital agreement protecting the premarital self enables one to avoid the emotional and material work of marriage. If one avoids that work, one should not be entitled to the respect and dignity that accompanies marriage.

For some this may be too harsh a response to premarital agreements, many of which are entered into by older couples seeking to protect their offspring’s inheritance. These seemingly sensible and non-problematic estate planning devices protect for the decedent’s children the share of her estate that otherwise would go to her spouse at her death. Because the marriages involved in these agreements often do not last that long, perhaps the emotional transformation that marriage is supposed to produce need not bar the agreements’ enforcement. Or perhaps courts should be allowed to enforce the agreements, but review them carefully for substantive fairness. A very strong endorsement of the argument above suggests that marital contracts cannot be enforced at all.

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260 See Harris et al., supra note 80, at 728.
261 Id. (There may be reason to doubt how willing courts really are to enforce any procedurally fair prenuptial agreement. Most of the people using these contracts have great wealth and much, though not half, of it ends up being shared. Even parties that are not wealthy usually draft the agreements understanding the background rules of maintenance and property division. Though lawyers may secure for the more advantaged party a better percentage of marital property or a lesser maintenance obligation, they virtually never draft agreements that relieve their clients of any substantial financial obligation at divorce. If lawyers thought that prenuptial agreements were enforced as readily as some commentators and courts have suggested, presumably many more people would push the envelope to explore how little actually had to be shared (though parties may be concerned about signaling stinginess and therefore resist pushing the envelope)).
262 See Brian Bix, Domestic Agreements, 35 Hofstra L. Rev. 1753, 1764 (2007) (premarital agreements thought to encourage divorce).
A more moderate (and realistic) endorsement of the argument above suggests that courts should simply return to a comprehensive substantive review of the agreements, to ensure that the contract reflects the background norms of marriage, including sharing and sacrifice. If the state licenses marriage because it wants to encourage sharing and sacrifice, it is not clear that people who want to avoid sharing and sacrifice should be able to marry. Some contracting, or baseline-setting, could still be allowed, but the wealthier party would need to be prepared to show that the agreement was substantively fair.264

3. Less Autonomy

At a more abstract level, the story of marriage offered here simply rejects an individualistic, more casual approach to marriage. Story #7 sounds more in the language of Griswold v. Connecticut, marriage is “intimate to the degree of being sacred . . . an association that promotes a way of life . . . a harmony in living . . . an association for as noble a purpose as any,”265 than Eisenstadt v. Baird, “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.”266 Case law subsequent to Eisenstadt suggests that the right protected in that case, for single people to receive contraceptives, can be found in an individual’s liberty interest in reproductive decision-making.267 Thus, the marriage narrative offered here does not reject the holding of Eisenstadt, only its dicta suggesting that marriage is nothing more than an association of two individuals.268

Nor does Story #7 suggest that we should return to the days of fault-based divorce because marriages must be permanent and harder to exit. The ideal of marriage presented here is just that, an ideal. What is celebrated in marriage is the potential to live into that changed life, to experience the difference of two becoming one. For sure, many married people will not experience that. They will divorce too early or they will live a married life marked by much more autonomy and independence than merger. The state cannot compel the emotional interdependence that is reified in marriage; it can only endorse and encourage it.

By explicitly encouraging that emotional interdependence, Story #7 goes further than most other stories of marriage in explaining why polyandrous arrangements are not entitled to constitutional protection. The state courts granting same-sex couples the right to marry have been notably weak in their explanation of

264 This would permit wealthy individuals to continue to use pre-nuptial agreements as they often do now. Pre-nuptial agreements usually limit what an ex-spouse will receive but still afford them substantial amounts of wealth.
268 See Eisenstadt, 405 U.S. at 453 (finding the right to privacy violated by state restrictions on the distribution of contraceptives to non-married people).
why marriage need not be extended to multiple spouse arrangements. The Massachusetts Court dropped a footnote noting that no party had suggested that the rules barring polygamy would be implicated if the Court legalized SSM.\textsuperscript{269} Presumably though, if the Court could find no rational reason for restricting marriage to a man and a woman despite the numerous studies suggesting that children tend to do best in a married household with both of their biological parents,\textsuperscript{270} it would want some evidence suggesting that the restriction on multi-party marriage was necessary before dismissing a right to polyandrous marriage.

Comparably, in a footnote and without evidence, the California Court dismissed any potential arguments about polyandry noting the "potentially detrimental effect on a sound family environment."\textsuperscript{271} Why the Court thought that more than one spouse would have obviously detrimental effects on the family environment went completely undiscussed. For a Court that so adamantly declared the constitutionality of the right to marry, the Court’s willingness to summarily dismiss the right to a different kind of marriage—one that is probably the most widely practiced form of marriage in the world—is quite remarkable.

The reason why polyandrous relationships should not command the same constitutional respect is because it is extraordinarily difficult for three or four, or five or six to become one. Relationships of more than two people are so much less likely to achieve the kind of transcendence and intimacy that is celebrated in marriage that the state should not endorse those relationships. It is the emotionally interdependent connection that creates the separate marital entity as a unity. It is that unity that serves the interests of both individuals and the state.

There is plenty to criticize in this ideal of marriage. Many people reject it because they reject the idea of state-sponsored marriage.\textsuperscript{272} Many people may believe that people would be better off if the state chose to treat everyone as an individual and nothing as a unity. Others probably reject Story #7 as too hopelessly rooted in a patriarchal past, one in which the “we” really represents nothing other than the “I” of the husband.\textsuperscript{273} Still others can dismiss this ideal as fanciful. If so

\textsuperscript{270} See Gennetian, supra note 70, at 419; Wax, supra note 68, at 388-90.
\textsuperscript{271} In re Marriage Cases, 183 P.3d at 434 n.52. (Cal. 2008).
\textsuperscript{272} See Franke, supra note 219, at 239 (“the rights-bearing subject of the lesbigay right movement has now become ‘the couple.’”); Moran, supra note 219, passim (celebrating the advantages of non-married life, particularly for women); Rosenbury, supra note 219, at 212 (criticizing the way the law privileges family relationships, particularly marriage, over friendships).
\textsuperscript{273} Emma Goldman, Marriage and Love, in RED EMMA SPEAKS 158, 164-65 (Alix Kates Shulman ed., 1972) (“The institution of marriage makes a parasite of woman.”); Nancy Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 VA. L. REV. 1535, 1536 (1993) (the role division in marriage is “inherently problematic”); see also Lee Teitelbaum, Family History and Family Law, 1985 WIS. L. REV. 1135, 1173-74 (questioning idea of treating family as a unit, a “we,” because “the practical consequence . . . [is to] confer or ratify the power of one family member over others.”).
many marriages end in divorce, the ideal is so rarely realized, that it is pointless to reify it. 274

All of these criticisms may be valid, but all of them also leave one struggling to answer why marriage is a fundamental right or why gays and lesbians may have an equality right to the institution. If marriage does not serve expressive and constitutive functions, then why aren’t states free to deny it to prisoners275 and to men too poor to pay child support?276 If there is no legal ideal of marriage, why can’t four people get married? Alternatively, if the problem with Story #7 is that it is a fanciful ideal, not a real description of marriage, then supporters of SSM are left to argue that what they are fighting for is real marriage. But real marriage, as Part IV shows, is a gender factory. It is an institution that promotes stability and interdependence and self-fulfillment by enabling and reproducing gender roles. If that is what SSM advocates are fighting for, they cannot have an equality right to it because they are not similarly situated with regard to the ability to reify those gender roles.

CONCLUSION

The stories of marriage offered in this article do not constitute an exhaustive list. State-sponsored marriage may mean many other things to other people. But words and social institutions do have common meanings informed by common norms. Nobody thinks I have a right to marry my pet. Everybody understands what it means when a prisoner claims a right to get married. There is commonality in the midst of all the debate over SSM.

The stories that get told about marriage affect that common understanding of marriage as do the practices of people who marry. At present, the practices of married people strongly support the gendered story of marriage. This story posits that what makes marriage so beneficial to its participants and to society is its ability to promote and reproduce gender. This story of marriage proves resilient in the face of both fundamental right and equality challenges because it suggests that same-sex couples are unlikely to achieve or enjoy the marital benefits that come from conforming to gender roles, and they are not similarly situated to straight couples with regard to their ability to reify those gender roles. Proponents of SSM need another story to tell about marriage.

274 The oft-quoted statistic that 50% of all marriages end in divorce is misleading. The most recent demographic data suggests that the divorce rate, as measured by number of marriages that actually end in divorce, has never been higher than 41%. See Dan Hurley, Divorce Rate: It’s Not as High as You Think, N.Y. TIMES, Apr. 19, 2005, at F7. Moreover, many of those are not first time marriages. The number of first time marriages that end in divorce is lower. Id.


276 Zablocki v. Redhail, 434 U.S. 374, 387 (1978) (finding the Wisconsin law unconstitutional that hinged the right to marry on paying child support).
Fundamental rights arguments require an articulation of why marriage is more than a bundle of legal rights and obligations, and how it can be that something more without incorporating gender norms. Equality arguments require an explanation of why same-sex couples should be entitled to marriage, not just civil unions. The seemingly cogent maxim offered by courts and commentators, that separate is not equal, reflects neither real world sensibilities with regard to gender nor the totality of the law of gender discrimination. Private biases with regard to gender roles play an important part in courts’ acceptance of gender difference and, in many contexts, courts accept separately gendered regimes.

To make those private biases less salient in the context of marriage, SSM proponents must start telling a story of marriage as an institution that is ennobling and restricting, demanding and edifying, without being gendered. It must be a story that explains why the state should encourage both the emotional and material interdependence of marriage. The story offered here is one such story. It is a story that may make marriage unattractive to many, but a right for same-sex couples.
WHY DO WE NEED A LAWYER?: AN EMPIRICAL STUDY OF DIVORCE CASES

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I. INTRODUCTION

There is a quiet revolution going on in divorce courts throughout America: many divorce litigants are foregoing lawyers and handling their divorces by themselves. This trend creates certain problems for a legal system that has been largely structured on the assumption that cases will be resolved at a trial—or in pre-trial negotiations—in which lawyers are the vehicles for advancing the interests of the litigants. Judges, practicing lawyers and legal scholars have addressed how best to handle what appears to be ever-increasing numbers of pro se divorce litigants and various approaches are being implemented in many states. Special forms and information packets are offered to divorcing couples, online services are available, and judges devote a lot of time and energy trying to help floundering divorce litigants without losing the impartiality that is required from the bench. Practicing lawyers may lament the potential loss of clients, although lawyers also may conclude that the exodus from their offices is really the result of poor people opting for self-representation. This characterization of the phenomenon allows lawyers to rationalize the loss of business as the loss of unprofitable business they did not really want.

Here is the story as many lawyers tell it: people who have little income and few assets may conclude that a do-it-yourself divorce is a good option. These folks may be disadvantaged in custody situations, but this cannot be helped. Custody problems can be resolved in court-based mediation without the couple having separate attorneys anyway. However, divorcing couples with decent incomes, significant amounts of property or minor children whose custody might be disputed will gravitate towards lawyers. While a few people of means will opt to proceed with their divorces pro se, it is generally agreed that this is not a good

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1 See, e.g., Welcome to the Wisconsin Court System Self-Help Family Web Site, https://prosefamily.wicourts.gov/pages/welcome.html;jsessionid=FDDA7A67AF147170A D60246D7C4DC00A (last visited Sept. 23, 2009) (a Wisconsin court’s link that allows divorcing couples to access divorce materials from their counties of residence); see also Carolyn D. Schwarz, Student Note, Pro se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel, 42 Fam. Ct. Rev. 655 passim (2004).
idea. In other words, conventional wisdom in the legal profession says that divorce litigants are better off with lawyers and significantly disadvantaged without lawyers. Since relatively poor people are perceived as having less to lose, their financial inability to obtain lawyers is tolerated by the system. Is this version accurate?

There has been some study of self-representation by litigants in various contexts, including divorce, and we have some knowledge about levels of self-representation and the reasons behind it. We know, for example, that many divorce cases involve at least one pro se litigant. We also know that divorce litigants choose self-representation for non-financial as well as financial reasons. We know that many people who work in the court system, including lawyers and judges, are troubled by the large influx of pro se litigants. There is, however, much about the pro se explosion in divorce cases that is not well understood. We do not know whether or not the increase in pro se divorce litigants is a good thing or a bad thing from the client’s perspective. Lawyers tend to theorize that pro se divorce litigants would be better off if they had legal counsel, but there has been little research on that point.

Why do people choose to represent themselves in a divorce? Is it purely a question of economics, or do people avoid lawyers for other reasons (as has been suggested by some research)? What about the perception of the legal profession that self-represented divorce litigants are at a disadvantage? Are divorce litigants better off when they are represented by legal counsel?

This article attempts to address some of these issues by drawing on empirical data. We set out to examine divorcing couples within a wide range of incomes, and who are living in a county with urban, suburban and rural communities. Thus, we selected Waukesha County, Wisconsin; a county adjacent to Milwaukee, Wisconsin. We believe that by studying a specific population with such diverse levels of income and living arrangements we have taken a snapshot of how choices about lawyer representation during the divorce process are affecting average Americans. We examined a random sample of 567 divorce cases initiated in 2005. In an attempt to identify possible reasons for a decision to proceed pro se, we

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2 See, e.g., AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT (A.B.A. Ass’n 1994) [hereinafter ABA 1994 REPORT]. By the early 1990s, a majority of parties were self-represented in some jurisdictions. Id. at 5-7. The ABA 1994 REPORT noted that persons were more likely to self-represent if they earned less than $50,000 per year and if the case was “simple,” such as when there were no children involved. Id. at 9-10.

3 Id. at 6-8.

4 See, e.g., id. at 9 (“[More] than 20% of the pro se litigants studied said they could afford a lawyer.”).

5 See generally Schwarz, supra note 1 (describing how the judicial system erects barriers to helping self-represented litigants: for example, judges can’t give too much help lest they lose their impartiality, and court staff are prohibited from giving legal advice).
examined the relationship between various factors (such as age, income level or gender) and pro se status. We also attempted to examine the question of whether pro se litigants are worse off than those represented by legal counsel. The difficulty of defining success in the context of divorce litigation makes it especially hard to assess the impact of having attorney representation as opposed to proceeding pro se. For reasons discussed in detail later, we looked at two factors: the correlation between representation status and the likelihood of maintenance awards, and the correlation between representation status and the length of the divorce case.

Our data confirms the conventional wisdom that many individuals seeking a divorce elect to proceed without a lawyer: in our sample 43.9% of husbands and 37.7% of the wives chose to represent themselves in their divorce cases. Our data also showed that both husbands and wives tended to employ attorneys when certain factors, such as minor children, a longer marriage, or higher husband’s income, made the divorce more complex. This suggests that divorce litigants have good, common sense notions about when self-representation is feasible and when it is not. It also suggests that pro se divorce litigants may not be as disadvantaged as sometimes is feared, because they may indeed be perfectly capable of handling the mechanics of relatively “simple” divorces, even though they may need professional help when more complicated legal issues are involved.

Our attempts to measure the effect of lawyers on divorce litigants who had them yielded mixed results. Our data showed that divorces tended to take longer when the litigants were represented by lawyers. This extra time is likely partly or mostly due to the greater complexity of issues in cases where lawyers were employed, but it is also possible that lawyers increase the length of the process either deliberately or by virtue of their characteristic methods of practice. Similarly, we found that spousal support and family support were more frequently awarded in divorces where either the wife, or both parties, had legal counsel. We also found, as would be expected under the laws of Wisconsin and elsewhere, that maintenance awards were strongly associated with higher husband income, and longer marriages. Since higher income and longer marriages were also associated with the hiring of divorce counsel, we cannot say for sure whether lawyers make maintenance more likely or whether clients who are likely maintenance payers or receivers are more likely to seek and hire lawyers.

Ultimately, we believe our data suggests that lawyers are most utilized to deal with the more complex aspects of divorce, and may be less necessary for the routine procedural matters that many clients handle themselves. It may also be the case, although our research could not measure this, that lawyers serve a primary role that is more psychological than mechanical, at least for some clients. This may have important repercussions for lawyer training, as well as for the construction of user-friendly family court systems.

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6 See infra tbl.1, app. A.
7 See infra Part III.B.
Before describing our methodology and data, Part II of this article discusses the history of lawyer involvement in divorce cases in the United States, and describes previous research that has been performed on pro se litigants, particularly in the context of divorce. Part III of the article discusses the methodology and findings of our review of 567 divorce cases filed in Waukesha County, Wisconsin in 2005. Part IV discusses some of the possible implications of our findings, particularly for lawyer training and practice.

II. THE HISTORY OF LAWYER INVOLVEMENT IN DIVORCE

For much of American history, divorce was rare and available only to a wealthy few. In *A History of American Law*, Lawrence Friedman recounts that the American colonies initially followed the tradition of England, which was essentially a “divorceless society” where ordinary, unhappy couples were only able to obtain a legal separation or, in rare cases, a legislative bill of divorce. After Independence, Northern states were quicker to adopt divorce laws than Southern states, with general divorce laws replacing private divorce laws by the end of the 19th century. Friedman suggests that the change was driven not only by changes in the nature of marriage, but also by the need of the growing American middle class to clearly establish who owned family property. This movement to easier divorce laws had its opponents, however, with many devout people opposing it as a symptom of moral decay in society. Thus, according to Friedman, these early “[d]ivorce laws were a kind of compromise. In general, the law never recognized full, free consensual divorce. It became simpler to get a divorce than in the past; but divorce was not routine or automatic.”

Once private bills of divorce were extinct, the state laws that evolved made divorce available only to “innocent” parties who could prove fault on the part of the other spouse. Arguments claiming “fault” and defenses thereto were based on complex doctrines, and the claims had to be proven by specific evidence. Typical fault-based grounds for divorce included adultery, cruelty, and desertion.

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9 *Id.*
10 *Id.* at 142-44.
11 *Id.* at 144-45.
12 *Id.* at 144.
13 *Id.* at 145.
14 The fault-based system is an adversarial model, where the husband and wife sue each other in court. “[D]ivorces could not be consensual and a divorce could be defended and defeated because of the conduct of the plaintiff (the moving or petitioning party).” Sanford N. Katz, *Family Law in America* 78 (Oxford Univ. Press 2003).
Connivance,\textsuperscript{16} collusion,\textsuperscript{17} and condonation\textsuperscript{18} were typical defenses. If both spouses were deemed to be at fault, the doctrine of recrimination stated that they could not obtain a divorce at all, since there was no innocent party deserving of a remedy.\textsuperscript{19} These defenses supported the old English adages: “one must do equity to receive equity” and “one must come into court with clean hands.”\textsuperscript{20}

The esoteric and complex nature of the necessary claims made it almost a necessity to hire a lawyer to provide guidance through the process. Unfortunately, the confining nature of the fault system created a system where a lawyer’s expertise was frequently employed to get around the divorce laws. Although the law refused to recognize divorce by mutual agreement, by the end of the 19th century, “the vast majority of divorce cases were empty charades. Both parties wanted the divorce; or were at least willing to concede it to the other party. Even in states with rigid statutes, collusion was a way of life in divorce court.”\textsuperscript{21} Lawyers helped clients seek divorces in jurisdictions with more liberal laws, or helped the couple collude to manufacture evidence necessary to establish grounds for divorce, such as cruelty, desertion or adultery.\textsuperscript{22}

A system of exclusively fault-based divorce laws remained in effect in the United States until the late 1960s, despite the fact that collusive divorce had been

Most divorces in fact were collusive. The wife filed a lawsuit, told her sad story of abuse, neglect, desertion, or philandering; and the husband said nothing, did nothing, filed no papers, made no defense. The judge then granted the divorce, by default. In most states, the sad story was about cruelty or desertion. In New York, the sad story had to be a story about adultery. Here a cottage industry of imitation adultery sprang up. There were women who made a living pretending to be “the other woman.” A man checked into a hotel, and went to his room. The woman appeared. The two of them got partly or totally undressed. Suddenly, and miraculously, a photographer appeared, and took their picture. The man then handed over cash to the woman; she thanked him and left. The damning photograph somehow found its way into court, as “evidence” of adultery. The judges, of course, were not fools. They knew what was going on. They rarely bothered to ask how a photographer just happened to barge into the love nest and take pictures. Usually, they said nothing and did nothing. The title of a magazine article from 1934 tells the story in a nutshell: “I Was the Unknown Blonde in 100 New York Divorces.”

\textsuperscript{16} KATZ, \textit{supra} note 14, at 78 (“[C]onsenting to or being involved with the ground for divorce, particularly adultery . . . .”).
\textsuperscript{17} \textit{Id.} (“[A]greement by the couple to commit the act, which will support the ground for divorce.”).
\textsuperscript{18} \textit{Id.} (“[F]orgiveness for the wrong.”).
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} FRIEDMAN, \textit{supra} note 8, at 380.
\textsuperscript{22} \textit{Id.} at 380-81, 577-78.

\textit{Id.} (magazine article identified in Note, \textit{Collusive and Consensual Divorce and the New York Anomaly}, 36 COLUM. L. REV. 1121, 1131 (1936)).
pervasive since the late 19th century. Until that time, the corrupt and largely sham fault-based system represented an uneasy compromise between the rising demand for divorce, and the concerns of pious people to preserve what they perceived as a moral and tradition-based society.

In 1969, California became the first state to adopt a no-fault divorce statute, and by 2001 all fifty American states had added no-fault provisions to their divorce laws. In the majority of states, no-fault and fault divorce continue to coexist as options. Perhaps the key feature of no-fault divorce is that it makes it possible for one spouse to obtain a divorce, even without the consent or cooperation of the other spouse.

As no-fault divorce became more widely available, attitudes towards divorce changed as well. Divorce rates began to soar at about the same time divorces became easier to obtain; although whether one of these realities caused the other has been the subject of considerable debate. Some scholars argue that no-fault divorce laws were a key factor in the increase in the American divorce rate. For example, economist Leora Friedberg examined data in all fifty states, and compared the trends in each state both before and after the adoption of unilateral divorce laws. She concluded that the laws themselves resulted in a significant increase in divorces. Similarly, Margaret F. Brinig and F.H. Buckley have claimed that divorce rates are higher in states with no-fault laws because divorce under a fault-based system penalizes fault, and thus deters people from seeking divorce.

[N]o-fault went way beyond the old dream of reformers—the dream of legalizing consensual divorce. No-fault was unilateral divorce. It meant that either party, whatever the other one felt, could get out of the marriage. People talked about marriage as a partnership. Partnership implies cooperation, mutuality, and sharing, which is what good marriages are. But under a no-fault system, there is no partnership at the end of a marriage. Each partner, in an intensely personal way, chooses to stay in the marriage or go. The other partner has no veto power, not even a power to delay.


Margaret F. Brinig & F.H. Buckley, No-Fault Laws and At-Fault People, 18 INT’L REV. L. & ECON. 325, 326 (1998). It should be noted, as Brinig and Buckley point out, that some of these results depend on the definition of “no-fault divorce” that is used, with some researchers defining it to mean that fault is irrelevant to the grant of divorce, and other
Other scholars, like Ira Mark Ellman and Sharon Lohr, argue that the rise in the divorce rate began before the advent of no-fault divorce laws, although data suggests that states may have experienced a short-term increase in the divorce rate immediately after the adoption of no-fault.\footnote{Ira Mark Ellman, \textit{Divorce in the United States}, in \textit{Cross Currents: Family Law and Policy in the US and England} 342, 352 (Sanford N. Katz et al. eds., Oxford Univ. Press 2000).} Ellman points out that “nationally, divorce rates have been stable or declining since 1981 [which] is very difficult to reconcile with any claim that no-fault caused any important increase in divorce rates.”\footnote{Id. at 326-28.} Many scholars believe that the rise in divorce rates throughout the 1960s and 1970s was mainly due to significant social and cultural changes such as increasing mobility of American families and increasing rates of employment of wives.\footnote{See, e.g., id. at 351-61.}

Sometime after the divorce rate rose, courts began to experience another phenomenon: a steady increase in the number of \textit{pro se} divorce litigants. In a 1994 publication, the American Bar Association Standing Committee on the Delivery of Legal Services cited several studies documenting a steady and significant increase in \textit{pro se} divorce cases from the mid-1970s through the mid-1990s.\footnote{ABA 1994 Report, supra note 2, at 5-8.} Their report noted that both poor and moderate income persons had unmet family law needs, and that many people with moderate incomes were increasingly “turning to self-representation as a method of gaining access to the divorce court.”\footnote{Id. at 1.} A research project sponsored by the Standing Committee in 1991 in Maricopa County, Arizona, identified some of the elements that influenced the decision whether to proceed \textit{pro se}. \textit{Pro se} litigants tended to be fairly well-educated, and were on average younger and earned less than their lawyer-represented counterparts.\footnote{Id. at 8-10.} Litigants were more likely to self-represent if they regarded their cases as relatively “simple.”\footnote{Id. at 12.} Thus, litigants with no minor children, litigants with no real estate or substantial personal property, and litigants married less than ten years were more likely to represent themselves.\footnote{Id. at 9-10.} In addition, the report found that parties who had previously represented themselves were more likely to proceed \textit{pro se} if divorcing again.\footnote{Id. at 10.}

The report noted some limitations of \textit{pro se} divorces, including the observation that \textit{pro se} litigants were less likely to get help with forms, marital counseling, dispute resolution services, or tax advice; and were less likely to
request maintenance. However, the report also noted a bright side to pro se divorces: there was a high satisfaction level on the part of pro se litigants, both with the terms of the eventual divorce decrees and with the legal process. Although one might deduce from the list of limitations of pro se divorces that litigants were disadvantaged by representing themselves, the report did not draw that conclusion. The report did not evaluate the desirability of pro se divorces, but rather accepted them as a given, and advocated for reducing the complexity of the divorce process and offering more resources and assistance to self-represented divorce litigants.

In the ten-plus years that have elapsed since the 1994 ABA report, there has been little hard data about the continuing impact of pro se status on divorce litigants, and a paucity of data about whether self-represented divorce litigants are disadvantaged by proceeding without lawyers.

There has, however, been some discussion in both popular and legal literature about whether pro se clients in non-divorce contexts are disadvantaged by representing themselves. Well-known criminal defendants such as Dr. Jack Kevorkian, Colin Ferguson and Zacharias Moussaoui famously represented themselves “with seemingly disastrous (and highly publicized) consequences.”43 “The media frenzies surrounding these cases, combined with the ludicrous courtroom behavior of at least some of these defendants, has led to a perception that defendants who represent themselves are foolish at best and mentally ill at worst.”44

In the context of criminal defendants, the United States Supreme Court recently held in Indiana v. Edwards45 that states can constitutionally insist upon representation by counsel, even for defendants competent enough to stand trial under the incompetency standard identified in Dusky v. United States.46 In Indiana, the Court found that despite competence to stand trial, a defendant may “be unable to carry out the basic tasks needed to present his own defense without the help of

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40 Id. at 11-12.
41 Id. at 10-11. Notably, the report indicated similar levels of satisfaction on the part of litigants who had been represented by lawyers.
42 See generally id. at 12-44 (recommending specific procedural and informational services which could be offered to help self-represented divorce litigants succeed in court).
44 Id. at 426.
46 “Dusky defines the competency standard as including both (1) ‘whether’ the defendant has ‘a rational as well as factual understanding of the proceedings against him’ and (2) whether the defendant ‘has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.’” Id. (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).
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counsel.” The Court noted the usefulness of lawyers in protecting the mentally ill defendant from humiliation resulting from self-representation at trial.

Although the unfair disadvantage suffered by a mentally ill, self-represented defendant may seem obvious, until recently there was a paucity of empirical data either supporting or debunking the idea that litigants who represent themselves are at a significant disadvantage. Measuring the relative advantages or disadvantages of self-representation would be most straightforward in cases where success is easily defined and only one party has the option of proceeding pro se, such as criminal prosecutions, but even here there has been a paucity of research. However, recent empirical research has begun to address the question of whether pro se representation disadvantages the litigants who choose it.

In Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, Erica J. Hashimoto challenged the “[c]onventional wisdom” that criminal defendants who represent themselves are self-destructive and unsuccessful. After examining three databases, Hashimoto concluded that pro se defendants do not necessarily have worse outcomes than defendants who are represented by counsel. Moreover, contrary to the widely held theory that criminal defendants who represent themselves are either mentally ill or proceeding from illegitimate motives, Hashimoto’s research suggests that pro se criminal

47 Id. at 2386.
48 Id. at 2387.
49 See id. The Indiana Supreme Court noted: “An amicus brief reports one psychiatrist’s reaction to having observed a patient (a patient who had satisfied Dusky) try to conduct his own defense: ‘[H]ow in the world can our legal system allow an insane man to defend himself?’ Brief for Ohio et al. as Amici Curiae 24 (internal quotation marks omitted).” Id.
50 See Hashimoto, supra note 43, at 425 (citing Martinez v. Court of Appeal, 528 U.S. 152, 164 (2000) (Breyer, J., concurring)). In the criminal context, the U.S. Supreme Court noted the paucity of evidence on this point in 2000, stating that there was at that time “no empirical research . . . that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guarantee of fairness.” Id.
51 As of 2001, the only study of pro se criminal defendants was written by two psychologists. See Douglas Mossman & Neal W. Dunseith, Jr., “A Fool for a Client”: Print Portrayals of 49 Pro se Criminal Defendants, 29 J. AM. ACAD. PSYCHIATRY L. 408 (2001), available at http://www.jaapl.org/cgi/content/abstract/29/4/408. Hashimoto’s article was the first empirical study of pro se criminal defendants to be published in the legal literature. Hashimoto, supra note 43, at n.62.
52 Hashimoto, supra note 43, at 425.
53 Id. at 438-41 (Federal Court Database, State Court Database, and Federal Docketing Database).
54 Hashimoto counted complete acquittals and dismissals to compute the comparative overall success rates of represented defendants with those of pro se defendants. While “recognizing the limitations of the databases,” she concluded that the overall success rate was similar between the two groups across all three databases, and in some instances, better for pro se defendants. Id. at 450, 447-54.
defendants choose to self-represent “because of dissatisfaction with [court-appointed] counsel.”

In criminal cases, the State necessarily proceeds with a lawyer. Only the defendant has the option of obtaining representation or not. Tax cases are similarly straightforward in the sense that one party, the IRS, is always represented by counsel, and only the taxpayer has the option of self-representation. In addition, taxpayers would likely agree that total success would release them from the obligation to pay any disputed taxes or penalties, while partial success would be a reduction in the required payments.

In *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers’ Effects on Tax Court Litigation Outcomes*, Professor Leandra Lederman and Senior Financial Economic Analyst Warren B. Hrung examined a random sample of Tax Court cases to discern whether representation by counsel affected either the financial outcome of the case or the length of time to either trial or settlement. Their study found that attorney representation “significantly” improved the financial outcome in cases that went to trial. The presence of an attorney was not associated with better outcomes in settled cases, however. “The results also suggest that taxpayers’ attorneys do not affect the amount of time Tax Court cases take to settle or go to trial.” The study thus found no support for the idea that attorneys delay case resolutions where they are paid by the hour. Attorneys did not close cases any faster than unrepresented litigants did, either. The authors suggest that a lawyer’s expertise may lead to better results in a trial (as opposed to a settlement) because a lawyer’s contributions are most valuable “where the party to be persuaded is a judge rather than a government attorney—and where procedural expertise carries its greatest importance.”

The research on criminal defendants and tax litigants suggests that self-represented litigants have, on average, a level of common sense and self-interest that seems to lead them to make rational decisions about when they can represent themselves without disadvantage, and when they need lawyers. The 1994 ABA report on the needs of self-represented divorce litigants suggested on the one hand that the high satisfaction levels of *pro se* litigants might indicate that they were as well off as their lawyer-represented counterparts. On the other hand, the identified limitations of *pro se* divorces, such as less help with forms and lower likelihood of requesting maintenance, might indicate that *pro se* divorce litigants were at a distinct disadvantage compared to attorney-represented divorce litigants. We wondered: in light of developments in law and procedure since the early 1990s, are

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55 *Id.* at 454-85.
57 *Id.* at 1239.
58 *Id.*
59 *Id.*
60 *Id.* at 1282.
61 *Id.* at 1281.
today’s divorce litigants better off if they are represented by lawyers, or are *pro se* divorce litigants equally successful?

Measuring the effect of lawyers in the divorce context presents some unique problems. Since no entity of the State is a party in divorce proceedings, either party can choose between a lawyer and self-representation. So we are not only measuring the impact of a lawyer against a *pro se* litigant, we must also consider the situation where two self-represented clients proceed against each other. In a world without complete gender equity, it might matter whether it is the husband or the wife who proceeds *pro se* if only one party has counsel.

We set out to compare the relative success of *pro se* and lawyer-represented divorce litigants in as objective a manner as possible. Success in the criminal or tax contexts is fairly easy to define: reduction or avoidance of penalties or taxes. “Success” is a far more slippery concept in the context of divorce. While merely obtaining a divorce decree was a form of success back in the days of fault-based systems where divorces were sometimes denied, this is no longer the case. Adoption of the no-fault divorce model led to virtually automatic grants of divorce to any couple requesting one; although, ironically, the no-fault concept was originally billed as having the exact opposite effect.

If we cannot define success in divorce litigation as obtaining the decree, then we must look at the terms of the decree to measure success. This too is problematic, and infinitely idiosyncratic. We could, for example, define success as obtaining a larger share of marital assets than the other spouse obtains. But some clients will not be satisfied with more than the other spouse; they want much more or all of the property. Other clients will want to get less than their spouse, possibly because of guilt over failure of the marriage. Moreover, the actual dollar amount may not be the real issue—certain items have symbolic or sentimental value, and despite a low market value, such property may be the subject of a ferocious dispute between the divorcing spouses. Even if we steadfastly maintain that “more” is

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62 See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664 (1984) [hereinafter Friedman, *Rights of Passage*]. One disgruntled spouse can certainly obtain a divorce by asserting that the marriage is broken, even over the other spouse’s objections. Id.

63 The Report of the Governor’s Commission on the Family (issued in 1966 as part of the discussion leading to California’s adoption of a no-fault divorce statute) opined that the no-fault system would “require [. . .] the Court to inquire into the whole picture of the marriage.” *Id.* at 667 (citing CALIFORNIA GOVERNOR’S COMMISSION ON THE FAMILY, REPORT OF THE GOVERNOR’S COMMISSION ON THE FAMILY 28-29 (1966)). The implication was a court might decline to grant a divorce if the court looked at the whole picture and decided that there was still hope for the marriage, but in fact the opposite occurred. See generally id.

64 Disputes over the custody of pets illustrate this phenomenon. The family dog may have little market value, and American law traditionally treats pets as property. However, divorcing spouses may dispute Fido’s custody as vigorously as if he were a child. See Jane Porter, *Custody Battles Over Pets Look Like a Dogfight*, CHI. TRIB., Oct. 1, 2006, at Q-3; see also Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL LAW. 1 (2006).
always a better result, we are faced with the reality that some divorcing spouses illegally hide assets, so an examination of the property distribution in a divorce may not show the real picture. Finally, obtaining data about financial settlements is extremely difficult as it is likely not part of the public record.

Measuring success in custody is even more difficult. For one thing, many parents would define custody success as having more contact time with the children, but some parents would surely define success as having less time with the kids. For another thing, the standard for custody decisions is, at least in theory, not based on the parents’ interests at all, but rather on the best interests of the child. So a divorce lawyer’s zealous advocacy for a client’s desired outcome might not be expected to yield the same sort of result that might occur where the standard does not depend on the unique characteristics of another person (the child) who is not a party to the litigation. Finally, emphasis on custody mediation and settlement between the parties could be expected to yield a multitude of idiosyncratic custody outcomes which cannot be compared in terms of success or failure. Indeed, a preliminary examination of randomly selected divorce files from our sample revealed a range of custody solutions so diverse that they could not be categorized. It appears that every divorcing family addresses custody in its own way.

Even more problematic from our perspective was the fact that evaluation of success in terms of the property division or custody arrangement would best be accomplished by a survey or interview of the satisfaction levels of the now divorced individuals, but surveys and interviews discern subjective satisfaction levels. We hoped to find a more objective method of comparison. One such potential measure of success in the divorce context: is the award of spousal maintenance, or family support, in appropriate circumstances.

Generally, spousal maintenance is awarded in the court’s discretion in divorce cases where one spouse has significant need and the other spouse has the ability to pay. It may sometimes be awarded in lieu of a property distribution. Payment of maintenance has never been the norm, and it is certainly awarded in only a minority of cases. However, Wisconsin is a state that has clear judicial doctrines about the cases in which maintenance awards are appropriate.

Which clients are legally eligible to receive maintenance under Wisconsin law? The Wisconsin Supreme Court has stated that a court should consider the potential recipient’s need for support, as well as the fairness of requiring the potential payer to provide some of that support. In general, maintenance could be reasonably awarded in situations where there is a relatively long marriage, a disparity in spousal incomes, and where one spouse is not capable of self-support.

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65 In re Marriage of LaRoque, 406 N.W. 2d 736, 741 (Wis. 1987).

66 We can find no authoritative definition of a “long” marriage in the cases or statutes, as judges routinely exercise their discretion to find that marriages of different lengths are long enough to justify an award of alimony. The average length of a first marriage ending in divorce is eight years. See http://www.divorcereform.org/rates.html. Thus, any marriage lasting over eight years is arguably relatively long. Later in the paper, we use fifteen years, or nearly twice the eight-year average, as a somewhat arbitrary round figure to denote a long marriage.
at the standard of living enjoyed during the later years of the marriage. Normally, any maintenance would be awarded for the length of time required for the lower-earning spouse to become self-supporting at an acceptable standard; permanent maintenance could be awarded in cases where that is not likely to ever happen.

Like the complex no-fault rules of yore, the maintenance doctrines are more likely to be known and understood by lawyers. If lawyers have a positive impact on divorce outcomes, one would expect that divorce litigants who fit the profile of “appropriate maintenance recipients” would be more likely to obtain maintenance if their cases are handled by lawyers. If pro se status is indeed a disadvantage and represented status is an advantage, we would expect that appropriate maintenance recipients would be most likely to receive maintenance if they are represented by counsel but their spouses are not, and least likely to receive maintenance if they are self-represented and their spouses have counsel. We would also expect few maintenance awards where neither party is represented by counsel. Where both parties are represented by counsel, we might expect a somewhat larger number of maintenance awards, because lawyers may tend to encourage their clients to settle for something within the range of what a court is likely to order. However, it may be impossible to measure attorney effect on the maintenance issue where both parties are represented by counsel because we have no adequate means by which to assess the relative quality of the different lawyers.

Another measure of attorney effect can be found in the length of time the divorce case takes from the filing of the petition to the granting of the divorce judgment. Divorce is a painful process for most couples, and it seems reasonable to assume that most clients would prefer to get through it as quickly as possible. Where lawyers are involved, a longer process could also be a more expensive process, at least if delays are due to additional attorney time spent on the case. We are cognizant of the fact that a longer time from filing of the petition to final judgment may also reflect factors such as the complexity of the case, the thoroughness of the lawyers, and the indecisiveness of the parties. Nonetheless, we believe that the impact lawyers have on the length of the divorce process is something of interest.

Ultimately, all objective measures of lawyer effectiveness may be inadequate because it is possible that the benefits of having a lawyer are largely intangible. If this is the case, it would be worth knowing because it should have an impact on how we train lawyers to work with divorcing clients.

67 See generally In re Marriage of LaRoque, 406 N.W. 2d at 736 (The Court found that the circuit court had abused its discretion in awarding the wife in a twenty-five-year-long marriage maintenance of $1,500 per month for five months and $1,000 per month for thirteen months. The Court remanded the case to the circuit court, instructing it to consider whether the ex-wife could reasonably be expected, within eighteen months of divorce, to earn enough to support herself at the marital standard of living, which the court defined as the standard of living enjoyed in the latter years of the marriage. Id. at 741-44.).

68 Id. at 741.
III. METHODOLOGY AND FINDINGS

A. Description of Information Gathered

Our research endeavors to answer two very general questions: (1) Why do pro se divorce litigants choose to represent themselves? and (2) Are lawyer-represented divorce litigants better off than self-represented divorce litigants? Since there is no data that would directly answer these queries, we have asked seven specific questions whose answers will provide us with important clues about our general questions. In order to discern the reasons for self-representation in a divorce, we asked the following questions: (1) What percentage of divorce litigants opts to proceed pro se? and (2) What are the characteristics of individuals who elect to represent themselves in a divorce? Examination of how pro se status correlates with gender, age, length of marriage, income, and presence or absence of children of the marriage may give us some clues as to why some spouses elect to represent themselves in the divorce process, and whether the decision to self-represent is sensible under the circumstances.

In order to examine the possible effects of having attorney representation, we asked another set of questions: (1) What is the average length of time between the filing of a divorce petition and the final judgment of divorce? (2) Does lawyer representation affect the length of the divorce process? (3) In what percentage of divorce cases is maintenance awarded? (4) What are the characteristics of the divorce litigants in cases where maintenance is awarded? and (5) Does lawyer representation affect whether maintenance is granted or not? Comparing the length of time a divorce takes with attorney representation and without representation can provide clues about one possible effect of having legal counsel. Examination of the characteristics of divorce litigants in cases where maintenance is granted will help us to assess what percentage of persons who, under Wisconsin law, are reasonable recipients of maintenance are in fact receiving it. Then we will better address the question of lawyer effect: if lawyer representation does not correlate with maintenance awards generally, it could be because none of the divorcing parties are likely candidates for maintenance, and may not be a reflection of the lawyer’s impact on the outcome. On the other hand, if likely candidates for maintenance are no more likely to receive it despite being represented by counsel, there is a legitimate question about what the lawyer’s impact on the case outcome is.

Our case sample was taken from Waukesha County, Wisconsin; a county with a total population of 360,767 as of the 2000 census, and a 2008 estimated population of 380,629. Waukesha County is adjacent to Milwaukee County, and includes residences that could be considered suburban, urban and rural. The

median family income in 1999 was $71,773\textsuperscript{71} and the 2007 median household income was $72,432.\textsuperscript{72} We selected Waukesha County because although its residents represent a range of living situations and incomes, the median household income is considerably above both the median income for the state of Wisconsin and for the United States as a whole. If there is a significant pro se movement in the divorces of such an affluent county, we believe that it would suggest something other than sticker shock is involved in the rejection of lawyer representation by divorce litigants. In addition, since maintenance is rarely if ever awarded in cases where the parties have extremely low income, we wanted to examine a population where the median income makes maintenance a possibility for a noticeable percentage of divorce litigants.

B. Summary of Data Collected

As described above, we first asked questions designed to give us straightforward descriptions of what was happening in the Waukesha County Family Court in 2005 in terms of the incidence of pro se litigants in different identified groups. We specifically addressed the following questions: (1) what percentage of divorce litigants opts to proceed pro se? and (2) What are the characteristics of individuals who elect to represent themselves in a divorce?

Our research showed that 43.9% of the husbands and 37.7% of the wives chose to proceed pro se.\textsuperscript{73} Thus, the majority of husbands (56.1%) and wives (62.3%) had legal counsel.\textsuperscript{74} Moreover, we concluded that the relationship between the husband’s use of counsel and the wife’s use of counsel was statistically significant.\textsuperscript{75} In 46.4% of the divorce cases both the husband and wife had counsel and in 27.7% of the cases both individuals were pro se. It was relatively unusual for one spouse to have counsel and the other spouse to proceed pro se. In 9.7% of the cases the husband had counsel and the wife did not. In 15.9% of the cases the wife had counsel and the husband did not.

Our research also gave us important information about the characteristics of divorce litigants who represented themselves as compared to those who chose to hire lawyers. We first examined the characteristics of the wives who chose to have representation compared to those who proceeded pro se. To do this, we compared the two groups of women for: their husband’s reported gross monthly income, their own gross monthly income, the length of their marriage (computed from date of

\textsuperscript{71} U.S. Census Bureau, Census 2000 Demographics Profile Highlights, supra note 69.
\textsuperscript{72} U.S. Census Bureau, State & County QuickFacts, supra note 70.
\textsuperscript{73} See infra tbl.1, app. A (showing 43.9% (n=249) of the husbands and 37.7% (n=214) of the wives chose to represent themselves).
\textsuperscript{74} Id.
\textsuperscript{75} In other words, it was an association unlikely to occur by chance. A chi square test of independence examining the relationship between husband and wife having counsel was significant (χ² (1, N = 567) = 128.83, p < .0001), indicating that there was a statistically significant association between the spouses’ decisions to obtain counsel or not.
marriage to date of divorce filing), and their age at divorce using independent t-tests. Our data showed that women with legal counsel, compared to those without counsel, had husbands who earned significantly more money. However, there was no statistically significant difference in their own monthly income between the women with counsel and those without counsel. The data also revealed that women with counsel were married longer than were women without counsel, and that women with counsel were older at the time they filed for divorce than were those without counsel.

Having minor children was also statistically associated with women having counsel. Of the 311 women who had minor children, 67.2% had counsel and 32.8% were pro se. In contrast, of the 253 women who did not have children, 56.5% had counsel and 43.5% were pro se. In other words, women with children were 1.58 times more likely to have a lawyer (rather than proceed pro se) than were women without children. Our data showed that while having children increased the likelihood of a woman having legal counsel, it did not seem to matter how many children a woman has.

We found similar results when we compared men who had legal counsel to men who proceeded pro se. Compared to those without counsel, men with counsel

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76 An independent sample t-test is an inferential statistical test that compares the means of two groups (e.g., women with lawyers compared to women without lawyers). The test determines if the means are, or are not, statistically equivalent to each other. A “statistically significant test” indicates that the group means are different. An independent t-test is computed to compare the two groups for each outcome variables of interest (i.e., income, length of marriage, etc). See FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES 260 (6th ed., Wadsworth Publishing 2008).

77 For women with counsel, $M = $5,194.41, $SD = $4,800.70$. For women without counsel, $M = $3,813.19, $SD = $2,563.23$, $t(324) = 3.03, p < .01$. It should be noted that the sample size for this analysis is smaller than for the other analyses because some litigants elected not to report their incomes in the publicly available portion of the divorce file.

78 Women with counsel: $M = $3,166.67, $SD = $2,050.19$, women without counsel: $M = $2,948.79, $SD = $2,680.82$, $t(316) = .82, p = .41$. $M = 161.76$ months, $SD = 111.53$ for women with counsel, and $M = 111.09$ months, $SD = 88.44$ for women without counsel, $t(552) = 5.54, p < .001$.

79 For women with counsel, $M = 40.94$ years, $SD = 9.15$, and for women without counsel, $M = 35.24$ years, $SD = 9.17$, $t(560) = 7.16, p < .001$.

80 The number of minor children did not differ between women with counsel ($M = 1.86, SD = .81$) and without counsel ($M = 1.78, SD = .77$), $t(314) = .87, p = .39$. So, having minor children, but not necessarily the number of children appears to be associated with increased likelihood of women having counsel representation during the divorce.
had a higher reported gross monthly income and were married longer. Men with counsel were also older at the time they filed for divorce than were those without counsel. The median income of the wives was similar between the group of men that hired counsel and the group that did not, indicating that the income of the wives did not seem to affect the decision whether to hire a lawyer.

Having minor children was associated with men having legal counsel, just as it was associated with women having counsel. Of the 311 men who had minor children, 61.7% had counsel and 38.3% were pro se. In contrast, of the 253 men who did not have children, 49.4% had counsel and 50.6% were pro se. In other words, men with children were 1.65 times more likely to have a lawyer (rather than proceed pro se) than were men without children. As with the wives, having minor children, but not necessarily the number of children appeared to be associated with increased likelihood of husbands having attorney representation during the divorce.

These results are generally consistent with the ABA Working Group data from the early 1990s. For both men and women, those who represented themselves tended to be younger, tended not to have minor children, and were exiting relatively shorter-term marriages. Our data showed something slightly different from the 1994 ABA report in terms of the effect of litigants’ income, however. While the Working Group stated that pro se litigants earned less on average than their lawyer-represented counterparts, our research indicated that it is the husbands’ income that correlates with representation status for both spouses, while the wives’ income is not so correlated.

Next, we turned our attention to an examination of factors that might indicate whether hiring a lawyer noticeably affects either the process or the outcome of a

\[ t(324) = 3.68, p < .01. \]

\[ t(552) = 3.68, p < .001. \]

\[ t(560) = 4.17, p < .001. \]

\[ t(316) = .73, p = .47. \]

\[ \chi^2 (1, N = 564) = 8.62, p < .01. \]

\[ t(192). \]

\[ t(119). \]

\[ t(125). \]

\[ t(128). \]

\[ t(314) = .14, p = .89. \]

\[ \text{See supra Part II.} \]

\[ \text{See id.} \]

\[ \text{See supra Part III.B.} \]
divorce. As described above, we first investigated whether lawyer representation affects the length of the divorce process.

Of the 567 divorce petitions examined 476, or 84%, resulted in a final judgment of divorce. Of the cases that did not result in a divorce final judgment, eighty-four were dismissed, two resulted in legal separation, and three were annulled. The mean length of time between filing a divorce petition and final judgment was 6.64 months, with a standard deviation of 3.10 months. The median length of time to final judgment was 6.0 months. Thus, most cases reached a final judgment within three to nine months, with the average length of six months.

One possible outcome of having legal counsel is that the divorce process might take longer than it would if a case were handled pro se. To examine this issue, we compared the differences in length of divorce time for four situations: when both husband and wife had counsel, when both were pro se, when only the husband had counsel, and when only the wife had counsel. Our analysis showed that the divorce process was significantly longer in cases where both the husband and wife had counsel, as compared to situations where only one spouse had counsel or neither had counsel. Interestingly, the mean divorce length when both husband and wife were pro se was statistically shorter than all other situations. However, there was no statistically significant difference in length of divorce between situations when only the husband had counsel or when only the wife had counsel. In sum, when both individuals have counsel the divorce length was statistically the longest process. However, when neither individual has counsel the divorce length was statistically the shortest process. On average, the divorce length when both have counsel was approximately 3.75 months longer than when both were pro se.

Next, we examined the possible effect that lawyer representation might have on awards of spousal support. In Wisconsin, either maintenance or family support can be awarded in divorce case decisions. As explained previously, family support includes both maintenance and child support and, as such, provides a stream of

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100 This mean length of time excludes the dismissed cases.
101 (n = 238).
102 (n = 135).
103 (n = 42).
104 (n = 65).
105 An analysis of variance was statistically significant (F(3, 476) = 61.19, p < .001), and Tukey HSD post hoc tests (p < .05) indicated that when both husband and wife have counsel (M = 8.16 months) the divorce time was significantly longer than when only the wife has counsel (M = 5.69), only the husband has counsel (M = 6.71) or when neither have counsel (M = 4.41). An analysis of variance (ANOVA) tests whether the means for two or more groups are equivalent. A significant ANOVA indicates there is more variance between the group means than is expected due to chance, thus not all means are equivalent. Follow-up post hoc statistical tests are then used to make all possible comparisons to determine specifically which means are different from each other. See Gravetter & Wallnau, supra note 76, at 336.
income that may be used by the recipient spouse personally, as well as for child-
related expenses. We began by examining support awards that could be used
personally by the recipient spouse, and hence originally considered family support
and maintenance together. Overall, in 11.3% of the cases one spouse was
awarded either family support or maintenance. In 8.6% of the cases maintenance
was awarded, in 12.5% of the cases maintenance was left open, in one case
the decision of maintenance was still pending arbitration, and maintenance was not
awarded in 78.1% of the cases. Family support was awarded in 2.6% of the
cases, left open in 0.7% of the cases, and was not awarded in 96.1% of the
cases. In no case did someone receive both maintenance and family support;
however, in seven cases where family support was awarded, maintenance decisions
were left open.

C. Characteristics of the Maintenance and Family Support Awards

We found that the husband was the payor of maintenance and family support
in all but two of the cases. Fifty-eight percent of the award decisions were for
a set number of months, with the mean length of the awards being 60.69 months,
and the median length of awards being fifty-one months. The mean monthly
payment in these cases was $1,767.80. There was a great deal of variation in the
duration of the support awards. Seventeen percent of the awards were for permanent
maintenance or family support. Eight percent of the awards were tied to the
fulfillment of certain conditions, and were payable until events such as until
finishing a college degree, obtaining full-time employment, retiring or selling the
family home. Another 15.6% of the awards had a payment that was variable over
time, and one person had a fixed, one-time payment award.

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106 \((n = 64)\).
107 \((n = 49)\).
108 \((n = 71)\).
109 \((n = 443)\).
110 \((n = 15)\).
111 \((n = 4)\).
112 \((n = 545)\).
113 \textit{See infra} tbl.2 (summarizing the characteristics of the maintenance and family
support decisions).
114 \((n = 37)\).
115 \(SD = 38.91\).
116 \((n = 11)\).
117 \((n = 5)\).
118 \((n = 10)\).
119 It is highly unusual to characterize a one time payment as support rather than
property division, and we can only speculate as to why this was done, although we suspect
that the choice may have been made for tax reasons.
To investigate the characteristics of divorce litigants in cases where pure maintenance was awarded, we conducted a series of analysis of variance to compare three groups (those where maintenance had been awarded, those where maintenance was not awarded, and those where maintenance had been left open) for differences in husbands’ gross monthly income, wives’ gross monthly income, length of marriage, length of divorce, age of husband, and age of wife.

We found that maintenance awards were associated with husbands earning a higher gross income, but were not associated with variations in the wives’ incomes. We also found that length of marriage significantly differed across the three groups. The couples in cases where maintenance was not awarded were married significantly less time than were the couples in the cases where maintenance was awarded or the decision was left open.

Age of the litigants was also significantly different across the three groups. Husbands were significantly older in cases where maintenance was awarded than when it was not awarded, however the husbands’ age in cases where maintenance was left open did not differ from the other two groups. Likewise, the wives’ age differed across the three groups such that wives were significantly older in cases where maintenance was awarded than in cases where maintenance was not awarded, and the age of wives in cases left open did not differ from the other two groups. The data showed that the length of the divorce process was significantly shorter for cases where maintenance was not awarded than the length of time for both cases where maintenance was awarded and left open.

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120 As opposed to family support which could properly be used for the support of either the spouse or the children.

121 Tukey HSD post hoc tests ($p < .05$ criteria) were used to determine specific group differences. Table 3 provides descriptive means. See infra tbl.3.

The analyses with husbands and wives income have smaller sample sizes due to missing data for the reports of income, and thus these analyses should be interpreted with caution. For the analysis with husbands’ income, there were thirty-seven cases with reported income where maintenance was left open, and there were 255 cases with reported income where no maintenance was awarded. For the analysis with wives’ income, there were twenty-eight cases with reported income where maintenance was awarded, 250 cases with reported income where maintenance was not awarded, and thirty-nine cases with reported income where the maintenance decision was left open.

122 See infra tbl.3. We found that husbands made significantly more money in cases where maintenance was granted ($M = $6,961.30) than in cases where they were not granted ($M = $4,313.91).

123 ($F(2, 468) = 26.71, p < .001$) and Tukey HSD post hoc tests indicated that couples had been married significantly longer in cases where maintenance was awarded than when it was denied or left open.

124 Id.

125 ($F(2, 476) = 10.21, p < .001$). Tukey HSD post hoc ($p < .05$) used.

126 ($F(2, 476) = 12.71, p < .001$). Tukey HSD post hoc ($p < .05$) used.

127 Computed as the time between filing a petition and judgment dates.

128 ($F(2, 476) = 13.63, p < .001$).
Finally, although the presence of minor children of the marriage did not make
the award of maintenance more likely, it appears that cases were more likely to
have maintenance decisions left open when minor children were involved.\textsuperscript{129}

To investigate the characteristics of divorce litigants in cases where family
support was awarded we conducted a similar series of analysis to compare those
cases where family support had been awarded to those where family support was
not awarded. Only three cases had decisions on support left open and so those
cases were not included in the following analyses due to the small sample size.
Table 4 provides a summary of the descriptive means and test statistics.\textsuperscript{130}

The findings indicate that the husband’s average gross monthly income was
noticeably higher in cases where family support was awarded than when it was not
awarded.\textsuperscript{131} We found that the length of the marriage was significantly longer in
cases where family support was awarded than when it was not awarded.\textsuperscript{132}
Furthermore, the length of time for the divorce was significantly longer when
family support was awarded than in cases where family support was not
awarded.\textsuperscript{133} There were no statistically significant differences between the groups
for age of wife, age of husband, or wife’s gross monthly income.

As expected (given the fact that family support is defined as a combination of
spousal and child support), there was an association between having minor
children and being awarded family support.\textsuperscript{134} Specifically, in all of the fifteen
cases where family support was awarded, there were minor children in the
marriage. In the cases with minor children, 6\% were awarded family support,\textsuperscript{135}
and 94\% of the cases\textsuperscript{136} were not awarded family support.\textsuperscript{137}

\textsuperscript{129} A chi square test of independence also indicates that maintenance awards were
associated with there being minor children in the marriage ($\chi^2 (2, N = 480) = 8.60, p < .05$).
Of cases with minor children ($n = 254$), 10.2\% ($n = 26$) were awarded maintenance, 19.3\% ($n = 49$) had maintenance decisions left open, and 70.5\% ($n = 179$) were not awarded
maintenance. However, for couples without minor children ($n = 226$), 10.2\% ($n = 23$) were
awarded maintenance, 9.7\% ($n = 22$) were left open, and 80\% ($n = 181$) were not awarded
maintenance.

\textsuperscript{130} See infra tbl.4.

\textsuperscript{131} The husband’s average gross monthly income was $9,994.68 in the fifteen cases
where family support was awarded compared to an average gross monthly income of
$4,451.15 cases where family support was not awarded.

\textsuperscript{132} An average marriage length of 205.20 months in cases where family support was
awarded compared to an average marriage length of 138.77 months in cases where family
support was not awarded.

\textsuperscript{133} The average length of the divorce process was 8.40 months in cases where family
support was awarded compared to an average divorce process time of 6.58 months in cases
where family support was not awarded.

\textsuperscript{134} ($\chi^2 (1, N = 477) = 13.94, p < .001$).

\textsuperscript{135} ($n = 15$).

\textsuperscript{136} ($n = 236$).

\textsuperscript{137} Family support was never awarded in cases where there were no minor children,
which is consistent with the definition of family support as being a combination of spousal
and child support.
Next, we examined how lawyer representation was associated with maintenance awards by computing a chi square test of independence between the four types of cases (both have counsel, only husband has counsel, only wife has counsel, and both spouses were pro se) and maintenance decisions (maintenance awarded, maintenance not awarded, decision left open). We found an association between lawyer status and maintenance award outcomes. Specifically, both husband and wife had counsel in 77.6% of those cases where maintenance was awarded. In 12.2% of the cases awarding maintenance only the wife had counsel, and in 10.2% of the cases awarding maintenance, neither had counsel. Maintenance was never awarded in the cases where only the husband had counsel. We found a similar pattern in the seventy-one cases where maintenance decisions were left open. In 69.0% of those cases both husband and wife had counsel, in 14.1% of the cases only the wife had counsel, in 12.7% of the cases neither had counsel, and in 4.2% of the cases where maintenance was left open, only the husband had counsel.

In contrast, both husband and wife had counsel in 41.9% of those cases where maintenance was not awarded. In 13.6% of the cases not awarding maintenance, only the wife had counsel, in 33.6% of those cases neither had counsel, and in 10.8% of those cases only the husband had counsel. Based on these findings it appears that maintenance was most likely to be awarded in cases where both husband and wife had representation.

Due to the small number of cases where family support was awarded, similar chi-square analyses could not be accurately computed. Of the fifteen cases where family support was awarded, both the husband and the wife had counsel in twelve cases. In one case, neither spouse had counsel. In one case, only the wife had counsel.

138 A chi square test of independence tests whether there is an association between two variables. See GRAVETTER & WALLNAU, supra note 76, at 483. This chi square test was statistically significant indicating an association between lawyer status and maintenance award decisions ($\chi^2 (6, N = 480) = 40.66, p < .001$). Table 5 presents the percent of cases within the maintenance decisions that fell into the four types of representation categories. See infra tbl.5.

139 In other words, maintenance was awarded in thirty-eight out of the forty-nine cases where both the husband and the wife had counsel.

140 ($n = 6$).

141 ($n = 5$).

142 ($n = 49$).

143 ($n = 10$).

144 ($n = 9$).

145 ($n = 3$).

146 In other words, both the husband and the wife had counsel in 151 of the 360 cases where maintenance was not awarded.

147 See infra tbl.5.

148 In other words, both the husband and the wife had counsel in 80% of the cases where family support was ordered, and neither had counsel in 13.3% of the cases.
A final question that remains unanswered is whether clients who are legally eligible to receive maintenance under Wisconsin law are helped or harmed by having counsel or proceeding pro se. As discussed above, Wisconsin law envisions maintenance in cases where, after a relatively long marriage one spouse needs additional income to continue at the marital standard of living, and the other spouse can afford to pay some income for that purpose. Since we cannot directly assess the marital standard of living, we have limited ourselves to the pre-divorce family income. Specifically, we were interested in the cases in our sample of couples who were divorcing after fifteen or more years of marriage and who had a disparity of income. Of the forty-nine cases where maintenance was awarded, 55.1% of the couples had been married for fifteen years or more. We also found that the earning disparity between spouses was significantly larger in cases where maintenance was awarded ($M = 4,035.81$) than when maintenance was not awarded ($M = 1,250.55$).

Due to the small sample size of maintenance cases we could not compute a chi square test of association between counsel and maintenance decisions. However, in 77.8% of the cases where maintenance was awarded, both husband and wife had counsel. In 11.1% of the cases only the wife had counsel, and in 11.1% of the cases, neither had counsel. There was no case in which maintenance was awarded when only the husband had counsel.

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149 See *In re Marriage of LaRoque*, 406 N.W. 2d 736 (Wis. 1987).

150 It should be noted that divorce litigants are not required to disclose their incomes in the part of the file that is a public record. Many report it in the public part of the file anyway, and our analysis on this point is based on the income numbers for couples who chose to publicly report.

Obviously, family income is only a rough approximation of the standard of living enjoyed by the couple, since wealthy couples could live frugally and poor couples could live beyond their means.

151 ($n = 143$ couples).

152 ($n = 27$).

153 To examine the relationship between earning disparity and maintenance awards for this sample of couples who had been married at least fifteen years, a disparity of income variable was computed as the difference between the husband and wife’s reported income (higher numbers indicate how much more the husband makes than the wife). An independent $t$-test was computed to compare the earning disparity between the cases where maintenance was awarded and cases where maintenance was not awarded, $t(68) = 3.13, p < .001$. Missing data is again an issue with these analyses. There are thirteen cases in the maintenance group and fifty-seven cases in the no maintenance group that reported income, so these analyses should be interpreted with caution.

154 ($n = 22$).

155 For cases where only the wife had counsel, $n = 3$, and in cases where neither had counsel, $n = 3$. 
IV. DISCUSSION OF IMPLICATIONS OF FINDING

Our data provides us with important clues about the reasons for self-representation in divorce, as well as clues about the effects of having lawyer representation. Although our research data cannot answer all questions, it does suggest that lawyers and law schools may need to approach education about divorce practice in new ways in order to best serve divorce litigants.

A. Why do Divorce Litigants Represent Themselves?

Our data supported the popular notion that the decision about whether or not to hire divorce counsel is often based on financial considerations, since both husbands and wives were more likely to have counsel as the husbands’ income increased. Increases in the wives’ income did not seem to impact the decision of whether or not to hire a lawyer, however, there are probably factors involved in the decision other than whether there was enough money to pay an attorney fee and whether or not there was any property to divide. We can only speculate, but one possibility is that both husbands and wives feel a strong sense of entitlement to the husband’s income, perhaps because of social traditions of the husband being the primary breadwinner. Husbands may feel a stronger need to protect their ownership of their own incomes, but may not feel as entitled to pursue their wives’ earnings. Wives may feel a greater need to have income from the husband in order to maintain the marital standard of living, and they may feel entitled to some sort of stipend based on whatever child-rearing or homemaking services they have provided during the marriage. Whatever the reason, the litigants appeared more motivated to hire counsel as the husbands’ gross income increased.

There were also non-monetary factors associated with the decision to hire counsel. Both men and women who hired counsel were older and had been married longer at the time the divorce was filed than were men and women who proceeded pro se. Again, we can only speculate, but a couple of possibilities are apparent. Age and length of marriage both suggest higher levels of education, either formal or through life experience. Greater experience might make a person more receptive to the sort of expert advice provided by a lawyer, and it might make a person more aware of the sorts of complications that might make such advice

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156 See supra Part III.B.
157 Since property valuations are in the part of the file that is not public record, we have no data on whether or not there was significant property to divide in any of these cases. We mean to suggest only that accumulation of property can result from either the husband or the wife’s income, and the fact that the husband’s income is associated with lawyer representation status, but the wife’s income is not suggests that other factors are at play.
158 We were not able to gather data on the levels of formal education attained by the litigants.
People who have been married longer may feel that they have more invested in the relationship, and hence might seek help in order to leave the relationship as advantageously as possible. People who are older or have been married longer might also feel that they have more to lose, such as accumulated property, and may be more willing to invest in a lawyer in order to protect whatever property they share with their spouses.

We also found that both men and women were more likely to have legal counsel when there were minor children in the marriage. This pattern may reflect a consciousness that there are important interests at stake, such as time with the children or preservation of decision-making authority with respect to the children. Hiring counsel may reflect a desire to protect those interests, and a willingness to make a financial sacrifice in order to achieve that protection. Parents of minor children may also hire lawyers in the hopes of having a smoother process with better results that will protect their children from losing important relationships or economic benefits that have been enjoyed during the marriage.

It should be noted that factors such as higher husband income, longer marriage and minor children are all factors that complicate resolution of legal issues in a divorce, and may make self-representation inadvisable. On the other hand, litigants with lower incomes, shorter marriages and no minor children may indeed be able to adequately handle their cases pro se. It appears, therefore, that many litigants have realistic ideas about when they need lawyers and when they do not, and that these litigants act accordingly.

B. Do Lawyers Make a Difference?

Our data showed that the divorce process was longest when both parties were represented by legal counsel and shortest when both parties were pro se. Since longer cases generally cost more, it is possible that lawyers deliberately extend the process so as to collect higher fees. However, as described above, the divorce litigants who are most likely to hire counsel are the litigants with complicating factors such as higher husband income, longer marriage and minor children. Since the issues raised by these factors typically take time to resolve, it is likely that lawyers are not causing the delays, even though the methods of resolution employed by lawyers do take more time.

It is difficult to assess the impact of lawyers in relation to maintenance awards. We found that maintenance was most likely to be awarded when both the husband and the wife had legal counsel, although approximately 10% of the maintenance awards were in cases where neither party had counsel. One
possibility is that the presence of lawyers makes a maintenance award more likely, because lawyers understand when a judge might award maintenance under Wisconsin law, and encourage their clients to settle for something that would be reasonable under the law. It is also possible that litigants have a basic instinct about when maintenance is a reasonable likelihood, and that those litigants are more likely to hire lawyers to negotiate more favorable terms for the maintenance. Under this theory, the lawyers would not make it more likely that clients would get or pay maintenance, rather, the lawyers would have input into the terms of the maintenance agreement.

We are cognizant of the fact that we did not measure all possible lawyer effects on the divorce process. It is possible, for example, that persons who are represented by counsel have different satisfaction levels with the divorce process than do people who represent themselves. We considered, but decided against, the collection of data about one objective method for assessing post-divorce satisfaction; namely, the number of post-judgment actions initiated by the divorced parties. Presumably, people who are satisfied with their divorce outcomes would carry on their post-divorce lives without revisiting and re-litigating past grievances, while dissatisfied people would attempt to re-litigate in the hopes of obtaining a more favorable outcome the second time around. The structure of current Wisconsin divorce law, however, largely prevents extensive post-judgment actions, except in limited circumstances involving child custody. Specifically, property distributions and waivers and denials of maintenance are final. Custody orders cannot be reopened until at least two years have passed since the initial custody order, except in cases where the child is at serious risk of significant harm. While the family court decisions are appealable (like those of any trial court), in fact only a small percentage of litigants appeal portions of their divorce orders, and the number who do so without lawyers is likely to be so small that no useful data could be gleaned.

Subjective satisfaction with divorce outcomes could also be measured by interviews or surveys. In this study, we tried to limit ourselves to objective rather than subjective data, such as the sort of oral or written surveys of divorced persons that might discern their satisfaction levels after their divorces. The data reported by the ABA Working Group in the early 1990s suggested that many pro se litigants have high levels of satisfaction. A fruitful area for future research might be the examination of satisfaction levels at this point in time, after developments in court processes, divorce law and society.

CONCLUSION

The widespread phenomenon of pro se divorce litigation is undoubtedly here to stay, and that may not be a bad thing for many litigants. It appears that many

165 ABA 1994 REPORT, supra note 2, at 10-11.
divorcing couples are accurate in their assessment of whether they need lawyers or not. Lawyers are increasingly being relegated to more complex cases involving long-term marriages, significant property, higher income, and minor children. To the extent that lawyers handle “simple” divorces, their role as buffers from the conflict may be more important than their legal expertise. Law school curriculums may need to adjust to the changing needs of divorce clients by providing more education on conflict resolution and client counseling on the one hand, and more detailed instruction on the kinds of property and custody disputes that are likely to result in lawyer involvement on the other hand. Thus, legal education should prepare lawyers to help their clients psychologically by reducing stress and conflict during the divorce process, as well as by providing the sophisticated analysis and handling of the complex legal issues for which a lawyer’s expertise is most often sought.
**Appendix A**

Table 1. Percent and number of husbands and wives who have legal counsel or proceed *pro se*.

<table>
<thead>
<tr>
<th>Husband had counsel</th>
<th>Wife had counsel</th>
<th>Husband <em>pro se</em></th>
<th>Wife <em>pro se</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>n = 318 (56.1%)</td>
<td>n = 353 (62.3%)</td>
<td>n = 263 (46.4%)</td>
<td>n = 55 (9.7%)</td>
</tr>
<tr>
<td>n = 249 (43.9%)</td>
<td>n = 214 (37.7%)</td>
<td>n = 90 (15.9%)</td>
<td>n = 159 (27.7%)</td>
</tr>
</tbody>
</table>

Table 2. Characteristics of awards.

<table>
<thead>
<tr>
<th>Type of payment*</th>
<th>Frequency</th>
<th>Percent**</th>
<th>Length of payment in months</th>
<th>Amount of monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent</td>
<td>11</td>
<td>17.2</td>
<td>Indefinitely</td>
<td>Mean = $1,260.73</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>SD = $1,035.85</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Median = $1,500</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Range $200 to $3,500</td>
</tr>
<tr>
<td>Set # months</td>
<td>37</td>
<td>57.8</td>
<td>Mean = 60.69</td>
<td>Mean = $1,767.80</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>SD = 38.58</td>
<td>SD = $2,084.75</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Median = 51</td>
<td>Median = $1,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Range 7 to 156</td>
<td>Range $140 - $7,500</td>
</tr>
<tr>
<td>Conditional</td>
<td>5</td>
<td>7.8</td>
<td>15.9%</td>
<td>Mean = $2,614.80</td>
</tr>
<tr>
<td>***</td>
<td></td>
<td></td>
<td></td>
<td>SD = $2,170.22</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Median = $2,674.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Range $250 to $6,000</td>
</tr>
<tr>
<td>Variable payment****</td>
<td>10</td>
<td>15.6</td>
<td>136.90</td>
<td>Weighted mean = $2,349.20</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>SD = 106.28</td>
<td>SD = $2,159.81</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Median = 89.50</td>
<td>Median = $2,411.50</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Range 34 to 339</td>
<td>Range = $509 to $5,718</td>
</tr>
</tbody>
</table>
Table Notes

* One person received a one-time payout of $14,000. This payment was not included in any of the calculations for mean payments or length of award.

** This percent is of the number of people who received either a maintenance or family support award (n = 64).

*** Conditional awards were monthly payments until some specified event, such as bachelor’s degree completion, full-time employment, retirement, or sale of a home. Thus, length of payment was not computable.

**** Variable payments changed, generally decreasing in value, overtime. To compute the mean monthly payment, the monthly payments were weighted by the number of months to allow for the computation of weighted values. Thus, this reflects the average monthly award, recognizing that some months had higher payments and some months have lower payments than this weighted mean.

Table 3.

<table>
<thead>
<tr>
<th></th>
<th>Maintenance awarded</th>
<th>Maintenance left open</th>
<th>Maintenance not awarded</th>
<th>F-statistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Husband’s gross monthly income</td>
<td>$6,961.30</td>
<td>$4,793.88</td>
<td>$4,313.91</td>
<td>F(2, 320) = 5.98, p &lt; .01</td>
</tr>
<tr>
<td>Wives’ gross monthly income</td>
<td>$2,683.30</td>
<td>$2,540.97</td>
<td>$3,211.20</td>
<td>F(2, 314) = 1.86, p = .16</td>
</tr>
<tr>
<td>Length of marriage (in months)</td>
<td>225.43</td>
<td>172.97</td>
<td>121.99</td>
<td>F(2, 468) = 26.71, p &lt; .001</td>
</tr>
<tr>
<td>Age of wife (in years)</td>
<td>43.63</td>
<td>41.16</td>
<td>37.41</td>
<td>F(2, 476) = 12.71, p &lt; .001</td>
</tr>
<tr>
<td>Age of husband (in years)</td>
<td>46.06</td>
<td>42.74</td>
<td>39.71</td>
<td>F(2, 476) = 10.21, p &lt; .001</td>
</tr>
<tr>
<td>Length of divorce (in months)</td>
<td>8.02</td>
<td>7.77</td>
<td>6.22</td>
<td>F(2, 476) = 13.63, p &lt; .001</td>
</tr>
</tbody>
</table>

Note. Degrees of freedom for gross monthly income vary from total sample size due to missing data in Table 3.
Table 4.

<table>
<thead>
<tr>
<th></th>
<th>Family Support awarded</th>
<th>Family Support not awarded</th>
<th>F-statistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Husband’s gross monthly income</td>
<td>$9,994.68</td>
<td>$4,451.15</td>
<td>$F(1, 319) = 18.53, $p &lt; .01$</td>
</tr>
<tr>
<td>Wives’ gross monthly income</td>
<td>$2,152.61</td>
<td>$3,099.39</td>
<td>$F(1, 313) = .97, $p = .33$</td>
</tr>
<tr>
<td>Length of marriage (in months)</td>
<td>205.20</td>
<td>138.77</td>
<td>$F(1, 466) = 5.64, $p &lt; .05$</td>
</tr>
<tr>
<td>Age of wife (in years)</td>
<td>41.71</td>
<td>38.56</td>
<td>$F(1, 474) = 1.48, $p = .22$</td>
</tr>
<tr>
<td>Age of husband (in years)</td>
<td>44.29</td>
<td>40.71</td>
<td>$F(1, 474) = 1.65, $p = .20$</td>
</tr>
<tr>
<td>Length of divorce (in months)</td>
<td>8.40</td>
<td>6.58</td>
<td>$F(1, 474) = 5.05, $p &lt; .05$</td>
</tr>
</tbody>
</table>

Note. Degrees of freedom for gross monthly income vary from total sample size due to missing data. Due to the small sample size of cases being awarded family support (and missing data for monthly income), these findings should be interpreted with caution.

Table 5. Percentage of cases within each maintenance award decision that fell into each legal representation category.

<table>
<thead>
<tr>
<th></th>
<th>Both have counsel (n = 238)</th>
<th>Wife only has counsel (n = 65)</th>
<th>Husband only has counsel (n = 42)</th>
<th>Neither have counsel (n = 135)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maintenance awarded (n = 49)</td>
<td>77.6% n = 38</td>
<td>12.2% n = 6</td>
<td>0% n = 0</td>
<td>10.2% n = 5</td>
</tr>
<tr>
<td>Maintenance not award (n = 360)</td>
<td>41.9% n = 151</td>
<td>13.6% n = 49</td>
<td>10.8% n = 39</td>
<td>33.6% n = 121</td>
</tr>
<tr>
<td>Decision left open (n = 71)</td>
<td>69.0% n = 49</td>
<td>14.1% n = 10</td>
<td>4.2% n = 3</td>
<td>12.7% n = 9</td>
</tr>
</tbody>
</table>

Note. Cases where family support was awarded are not included in this table.
THE HUCK FINN SYNDROME IN HISTORY AND THEORY: THE ORIGINS OF FAMILY PRIVACY

Steven J. Macias*

Abstract

This article is concerned with understanding the historical and theoretical origins of the concepts of "parents’ rights" and "family privacy." Neither is explicitly mentioned in the Constitution, but both concepts were among the earliest substantive due process rights recognized by the Supreme Court in the 1920s. Unlike other substantive due process rights that originated in the Lochner era, such as the right to contract or the right to an occupation, parental and family rights survived well past the New Deal era to the present day. But, as Barbara Bennett Woodhouse recognized seventeen years ago, the originating cases of Meyer and Pierce had darker sides to them than previously recognized. Since Woodhouse published her article, we have had more detailed studies of the Progressive Era, out of which emerged the laws struck down as interfering with parents’ rights. More importantly, a heretofore-unpublished memoir of one of Justice McReynolds’s law clerks has been made available. McReynolds authored both Meyer and Pierce, and thus the memoir serves as a unique insight into his views on family life and privacy rights. These new sources confirm Woodhouse’s earlier findings that “parents’ rights” and “family privacy” originated as reactionary and elitist doctrines.

Following the historical examination above (and because the constitutional origins are so troubling), this article then examines family privacy from a theoretical perspective to understand whether such a concept can be squared with our liberal and democratic traditions. Specifically, the theories of Hobbes and Locke permit us to fully examine parent-state conflicts with one eye toward the consequences for democracy, and the other directed at the consequences for individual rights. This article ends with some thoughts about the future of the Supreme Court’s unfortunate parents’-rights jurisprudence and how abandonment of it might better serve both democracy and liberty.

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Next day he was drunk, and he went to Judge Thatcher’s and bullyragged him and tried to make him give up the money, but he couldn’t, and then he swore he’d make the law force him.

The judge and widow went to law to get the court to take me away from him and let one of them be my guardian; but it was a new judge that had just come, and he didn’t know the old man; so he said courts mustn’t interfere and separate families if they could help it; said he’d druther not take a child away from its father. So Judge Thatcher and the widow had to quit on the business.¹

Thereafter, Huck Finn was returned to his father shortly before he ran away and began his well-known “Adventures.” As one author shrewdly remarks, “[a]s a result of the judge misapplying the law . . . the law now forces Huck to take the law into his own hands.”²

Twain intended to highlight the disjunction between what was legal and what was just. As one Twain scholar writes, “The new judge’s strict adherence to the rule as he knew it, rather than the facts as he could have found them, led to an unjust result.”³ Another commentator refers to the actions of the “new judge” as “an imprudent general reluctance to separate children from their natural parents, and partly . . . a foolish effluence of compassion toward pap.”⁴ However, rather than the new judge’s adherence to the law, the bulk of the blame for the unjust result lies with the presumptions underlying the rules themselves. Ideally, the “new judge” should not have had to “know the old man” in order to determine that Huck’s best interests lay elsewhere. The real problem with the legal proceeding was that the default rule failed Huck, and more importantly, failed society, in favor of the static principle of family preservation. Of course, family preservation, in a great many cases, is coeval with both the child’s and society’s overall wellbeing—but not always, as in Huck’s case. The important lesson to draw from Twain is that the new judge began with the incorrect motivation—family preservation over social utility—and thus his resolution contravened our instinctual sense of justice. Fortunately for Huck, his sense of social justice was stronger than that of the legal system and we are left with a happy ending. Unfortunately, not every child’s life story ends up as romantically satisfying as Huck’s. Nor can every adolescent boy

¹ MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN 26 (Univ. of Cal. Press 2001) (1885).
² Teresa Godwin Phelps, The Story of the Law, in Huckleberry Finn, 39 MERCER L. REV. 889, 896 (1988). Phelps further notes how the “civil law . . . played a catalytic role in forcing the plot to unfold.” Id. See also Alvin Waggoner, A Calendar of Mark Twain’s Celebrated Causes, 13 TENN. L. REV. 211, 212 (1935) (listing this incident among the many legal cases that appear throughout Twain’s works).
view the world through the wit of Mark Twain’s critical eye. Nevertheless, many courts, including the United States Supreme Court, continue to hold formalist 19th century notions of family life, not the least of which is that “courts mustn’t interfere and separate families if they [can] help it.”

INTRODUCTION

While the origins of the modern substantive-due-process right to privacy are most frequently located in Justice William O. Douglas’s 1965 pronouncement for the Supreme Court in *Griswold v. Connecticut*, the true starting points are the 1920s cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*—cases that Justice Douglas himself used as precedent and that the Court cited in *Roe v. Wade*, and most recently in *Lawrence v. Texas*. But upon close examination of the historical sources, it appears that the true motivation for the *Meyer and Pierce* decisions was not a charitable concern for the preservation of a pluralistic society, but rather an anti-progressive philosophy grounded in social Darwinian ideology.

What follows is a reexamination of the constitutional origins of the right to family privacy, succeeded by a discussion of family privacy through the lens of classical liberalism. Part II sets out the seeming paradox in early 20th century Supreme Court historiography, and seeks to unify the concededly anti-progressive child-labor decisions and the supposedly progressive family privacy opinions. Part III focuses on the author of *Meyer and Pierce*, Justice James McReynolds, and explains how his extremely conservative social and political outlooks came to bear on the family privacy decisions. Part IV raises some modern concerns about the application of family privacy in today’s world, and emphasizes the troubling existence of the old McReynolds-style conservatism, which can still be seen in action. Part V then exposes the theoretical unsoundness of excessive family privacy by examining the classical theories of Hobbes and Locke. Finally, Part VI closes by looking ahead to a future project in which the historical and philosophical lessons of this article can be applied more generally to current parent-child-state controversies, especially those that intersect with gay rights.

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5 *MARK TWAIN*, supra note 1, at 26.
10 *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (“There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary* and *Meyer v. Nebraska*.”).
I. THE PARADOX OF SUPREME COURT HISTORIOGRAPHY: BENEVOLENT FOUNDERS OF FAMILY PRIVACY AND HEARTLESS DEFENDERS OF CHILD EXPLOITATION

Reformers of the Progressive Era ushered-forth new legislation during the first three decades of the 20th century that had the potential to greatly affect the way in which children were treated by the state as well as their parents. Legislative successes occurred at both the state and national levels. Among the Progressives’ noteworthy local successes were compulsory common schools and the establishment of juvenile courts. The most prominent progressive reform, several times enacted by Congress, was the regulation of child labor.\(^{11}\) Each of the three reform efforts increased the reach of the law in an attempt to save the nation’s children from ignorance, crime and vice, and capitalistic exploitation. In one sense, the new legislative agendas favored the power of the state over the power of the parents in mandating schooling, prohibiting the use of children as sources of family income, and in removing unruly children from the custody of their parents. In another sense, the new policies had a distinct leveling quality to them by assuring that all children went to school, stayed out of factories, and received the same moral upbringing regardless of socioeconomic familial background. Through the proponents’ eyes, the reforms simply assured all children an equal opportunity as they started out life. To certain opponents, however, the measures seemed to have a socialistic, egalitarian quality of the type a communist regime might have enacted. Chief among these opponents were a majority of the members of the United States Supreme Court.\(^ {12}\) Unfortunately for reformers, these were the final arbiters of the question whether or not the laws would remain standing.

To understand how the Supreme Court reacted to these various child-centered reforms, it is necessary to understand fully the major cases handed down during this era, especially those focusing on schooling and child labor. Understanding of the Court’s actions will require us to move beyond a simple consideration of the legal decisions in order to get at the personal and social views of this elite group regarding family life. Thus, the everyday reactions to educational laws and child labor laws as set out in political tracts and public opinion journals are essential to comprehending how the Court viewed the motivations for these laws. Moreover,


\(^{12}\) For a challenge to this standard view, see Barry Cushman, The Secret Lives of the Four Horsemen, 83 VA. L. REV. 559 (1997).
an understanding of the justices’ personal views on family life, such as those garnered through private correspondence and personal memoirs, helps to illuminate ways in which they might have viewed these legal cases at the decisional stage. Through the use of these sources, seemingly irreconcilable cases concerning the wellbeing of children begin to coalesce into a coherent view of not only the parent-child relationship, but the family-state relationship as well.

However the pre-New Deal Court is characterized—conservative, laissez-faire, a group of “Nine Old Men,” or the *Lochner* Court— it is generally remembered for promoting business interests and eventually hampering FDR’s economic revitalization efforts. The Court is famous for the “Four Horsemen,” the group of justices so hostile to the New Deal that they drove Roosevelt to undertake his court-packing plan. During much of the first third of the 20th century, however, the Court was also renowned for the membership of Justice Oliver Wendell Holmes, Jr., who was later joined by Louis Brandeis. These two great progressives frequently found themselves in the minority, criticizing the Court for imposing its economic and social views on the nation, rather than limiting itself to its proper judicial role. Thus, it may seem odd to anyone familiar with this traditional history of the Court when one learns that this conservative group of judges was also the first to articulate a theory of personal and familial privacy contained in the due process clause of the Fourteenth Amendment—a doctrine later used to support constitutional rights to contraception and abortion.

The theory of personal and familial privacy is found in two cases decided in the 1920s, both written by Justice James C. McReynolds. Traditionally, students are taught that the cases hold that a fundamental right of privacy exists which encompasses the right to raise one’s own children, including how to best educate them, and upon which the state cannot infringe. That traditional understanding, no doubt aided by the Warren Court’s subsequent decisions, simply cannot be maintained. This is not only the result of a rereading of the cases in their historical and legal contexts, but especially by placing them back into the elitist and racist views of the author of those opinions. Moreover, I will further argue that decisions

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14 Named after the famous decision *Lochner v. New York*, 198 U.S. 45 (1905), *overruled* by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court struck down the first of many hours regulations on the basis of freedom of contract, founded in the due process clause of the Fourteenth Amendment.
15 The four members were Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler. They frequently managed to garner at least a fifth vote to invalidate New Deal legislation.
16 Whether or not Holmes was a political progressive is beside the point. He was progressive in the sense of abandoning old jurisprudential foundations. *See Louis Menand, The Metaphysical Club: A Story of Ideas in America* 3–69 (Farrer, Straus, and Giroux 2002).
striking down child labor laws were in perfect keeping with the justices’ views of
children and family life and social relations more generally.

A. The Foundation of Fundamental Rights: The Privacy Doctrine of Meyer and Pierce

Open any textbook on constitutional law, turn to the section on implied
fundamental rights, and immediately preceding lengthy discussions of Griswold v.
Connecticut and Roe v. Wade, one will come across two cases decided in the
1920s usually relegated to an introductory paragraph or even a footnote stating that
they are the basis for modern privacy decisions. The first case, decided on June 4,
1923, is Meyer v. Nebraska, in which the Court struck down a state law
forbidding grade schools from teaching subjects in any language other than
English. The second case, handed down just two years later on June 1, 1925, is
known as Pierce v. Society of Sisters. In Pierce, the Court struck down another
state law, this time one that mandated that all children attend public grade schools.
The basis for those decisions, according to child law scholars, is recognition of the
constitutional status of parental rights in disputes with governmental authority. A
leading hornbook describes the opinions as holding that the invalidated laws
“restricted individual freedom without any relation to a valid public interest.” The
same authors thought “freedom of choice regarding an individual’s personal
life was recognized as constitutionally protected.” “If nothing else,” the authors
continue, “they show a historical recognition of a right to private decision-making
regarding family matters as inherent in the concept of liberty.” According to this
interpretation, the Court that decided Meyer and Pierce must have been very

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18 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the Constitution
creates a “zone of privacy,” which provides a fundamental right to contraception for
married persons).
19 Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that the due process clause of the
Fourteenth Amendment prohibits certain criminal abortion statutes).
20 See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING:
CASES AND MATERIALS 1340 (5th ed., Aspen Pub. 2006); JESSE H. CHOPER ET AL.,
CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 361 n.b (9th ed., West Group
2001).
21 See Meyer, 262 U.S. at 390.
22 Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510
(1925).
23 See DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW:
DOCTRINE, POLICY, AND PRACTICE 21 (2d ed., West Group 2003); SAMUEL M. DAVIS ET
the cases as constitutionalizing “the authority of parents to rear their children as they see fit.”).
24 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 796 (5th ed.,
West Group 1995).
25 Id.
26 Id.
progressive indeed, recognizing some rather modern civil liberties some four
decades before the Warren Court would again take up that task.

The case of Meyer v. Nebraska arose out of a law approved by the Nebraska
legislature on April 9, 1919. The pertinent provision declared: “No person,
individually or as a teacher, shall, in any private, denominational, parochial or
public school, teach any subject to any person in any language other than the
English language.”27 The statute applied only to students who had not yet passed
the 8th grade. Furthermore, it provided a punishment of a fine ranging from $25–
100 or confinement to thirty days in jail for anyone violating its prohibitions. In the
case at hand, Robert T. Meyer, a 5th grade teacher at Zion’s South School, a
German-American Lutheran school, was indicted for teaching out of a German-
language Bible. Meyer was convicted and fined $25.00. The Supreme Court of
Nebraska affirmed his conviction, ruling that the language law was a valid exercise
of the state’s police power, i.e., its power to legislate for the health, welfare, and
morals of its citizenry.28

Meyer brought his case to the United States Supreme Court in 1922. There he
argued that the law violated the liberty guaranteed to him by the Fourteenth
Amendment to engage in his chosen calling, namely, that of a foreign language
teacher.29 While the Court agreed with him that the legislation worked a violation
of his due process right, it did not stop there. Instead the Court proceeded in broad
language, beginning with the observation that “liberty,” as used in the due process
clause, meant more than “freedom from bodily restraint,” it also included “the right
of the individual to contract, to engage in any of the common occupations of life,
to acquire useful knowledge, to marry, establish a home and bring up children, to
worship God according to the dictates of his own conscience, and generally to
enjoy those privileges long recognized at common law as essential to the orderly
pursuits of happiness by free men.”30 With this in mind, the Court then addressed
the cause for hypothetical parents whose wishes might be stymied by the law. In a
tone evocative of modern-day tolerance, the Court disagreed with the law and said,
“The protection of the Constitution extends to all, to those who speak other
languages as well as to those born with English on the tongue.”31 The supposed
implication of this language was that foreign parents had every right to have their
children educated just as native English speakers did. If the dissenting opinion of
Justice Holmes gets any mention in modern legal texts, it is simply to note that it
existed.

According to one Meyer scholar, “the magisterial prose” employed by Justice
McReynolds in the Meyer opinion left no room for doubt that his primary concerns

28 See Meyer v. State, 187 N.W. 100, 100-04 (Neb. 1922), rev’d by Meyer v.
Nebraska, 262 U.S. 390 (1923).
29 See Meyer, 262 U.S. at 392 (argument for plaintiff in error).
30 Id. at 399.
31 Id. at 401.
in the case were the “rights of parents and students.” In attempting to downplay the fact that the main party in interest, Meyer, had won his case on the grounds of unjust economic deprivation, the same author wrote that Meyer was the first time the Court had acknowledged constitutional protection for “civil liberties against infringements by states involving matters other than racial discrimination and the enactment of economic regulations.” The most troubling aspect of this type of conclusion is that it accepts at face value only one interpretation of a broadly worded public pronouncement. Little analysis is put in to uncovering what might underlie Justice McReynolds’s “magisterial prose.” As Robert Post has noted, the libertarian strain of the decision “suggests that Meyer can be read as extending ‘fundamental rights’ to the kinds of cultural practices deemed necessary to sustain the individuality presupposed by democracy.” Most interpretations of Meyer ignore the reality that presuppositions about cultural practices change over time, and that modern, and even 1960s assumptions, about essential values are radically different from Justice McReynolds’s own cultural practices. Perhaps personal motivations are not of immediate concern to a legal interpretation of a judicial ruling. However, any fair historical interpretation must at least recognize and attempt to explain how the public writing comports with the judge’s personal beliefs on the subject matter at issue. While separating an especially unsavory author from his words—words that have become sacrosanct—might be comforting to modern sensibilities; it can greatly hamper an accurate historical understanding. This same separation has occurred with the second case of concern.

**Pierce v. Society of Sisters of the Holy Names of Jesus and Mary** was the result of a referendum adopted by Oregon voters on November 7, 1922. The law provided that any custodian of a child between ages eight and sixteen “who shall fail or neglect or refuse to send such child to a public school . . . shall be guilty of a misdemeanor and each day’s failure . . . shall constitute a separate offense.” Punishment for noncompliance ranged from a fine of $5–100 to jail time of two to thirty days. In this case, the complainants were two organizations that operated private schools in the state of Oregon. One was a Roman Catholic organization, the Society of Sisters, and the other was Hill Military Academy, a military training academy.

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35 This is the particularly troubling sentiment of one scholar who wishes to ignore the reactionary and patriarchal nature of the opinions. See Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 1009 n.258 (1996) (“Whatever may have been the private views of Justice McReynolds, his opinions for the Court adopt a parental theory, not a patriarchal one.”).

school for boys. Both sought preliminary injunctions, claiming destruction of their businesses if the law was permitted to take effect. A three-judge federal district court issued the injunctions, ruling that the law not only deprived the schools of their property without due process of law, but the law also deprived parents (again hypothetically) of their liberty to direct the education of their children. The Supreme Court agreed with this ruling.

As in the foreign language case, the Pierce Court embraced broad language of parental rights even though parents were not parties to the case: “Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.” This time, however, the Court’s language was framed in even more emotional rhetoric: “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.” In true parents’ rights language, the Court continued, “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.” Thus the Court disposed of Oregon’s argument in fewer than eight pages of the United States Reports. The presumed motivation for the opinion, according to one Pierce scholar, was a sophisticated rejection of “the old unconscious conservatism.” “Fundamentalists in politics and religion” as well as “racists who deplored the ‘mongrelization’ of the American people” met their foes in the nine members of the Court. That is also where the usual narrative leaves off. This version of the story was popularized by no less than the Supreme Court itself, during its “liberal” era under the leadership of Chief Justice Earl Warren (1953–1969).

The Supreme Court of the 1960s often found itself as the sole defender of civil liberties, frequently holding at bay wayward state legislation infringing upon the rights of minorities. One of the most celebrated cases from this era is the

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37 See id. at 531-33.
38 Soc’y of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 F. 928, 932 (D. Or. 1924) (“the field of inquiry . . . pertains, not only to whether the complainants’ constitutional rights are affected adversely by the act in controversy, but to whether the constitutional rights of the parents and guardians are also adversely affected”).
39 Pierce, 268 U.S. at 534–35.
40 Id. at 535.
41 Id.
43 Id. at 98; see also DAVIS ET AL., supra note 23, at 8 (describing Meyer and Pierce as protecting “ethnic, racial and cultural subgroups” that might be “vulnerable to majoritarian politics”); Cushman, supra note 12, at 581 (describing Meyer and Pierce as a “stealthy jurisprudence of multiculturalism”).
1965 opinion in *Griswold v. Connecticut*. In *Griswold*, Justice William O. Douglas held that “the zone of privacy created by several fundamental constitutional guarantees,” proscribed the state of Connecticut from outlawing the use of drugs to prevent conception. The major analytical barrier for Justice Douglas was the fact that he could point to no specific language in the Constitution prohibiting the actions of Connecticut. Thus he turned to two familiar cases from which he drew the following:

The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, the right to educate one’s children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

Thus a particular reading of *Meyer* and *Pierce* was given the imprimatur of the highest court in the land.

Less than a decade later, the 1973 ruling in *Roe v. Wade* would compound this interpretation. The Court in *Roe*, per Justice Blackmun, invalidated a Texas

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46 *Id.* at 485.
47 *Id.* at 482–83.
48 See *Belknap*, supra note 44, at 204 (discussing the difficulties Douglas faced in crafting a convincing opinion, the first draft of which rested solely on the First Amendment). It is interesting to point out that Justice McReynolds made absolutely no mention of First Amendment concepts in either *Meyer* or *Pierce*. This is especially noteworthy since counsel in both cases argued the point. See Transcript of Oral Argument at 13, 15, *Meyer v. Nebraska*, 262 U.S. 390 (1923), in 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 774, 776 (Philip B. Kurland & Gerhard Casper eds., Univ. Pub. of America 1975) [hereinafter 21 LANDMARK BRIEFS] (claiming that the Fourteenth Amendment incorporated free speech and free exercise of religion).
statute that made it a crime to “procure an abortion.” Again the rationale was based on a right of privacy: “The Constitution does not explicitly mention any right of privacy. In a long line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” Justice Blackmun then cited \textit{Griswold}, \textit{Meyer}, and \textit{Pierce} as beginning that line of decisions. It was also clear that by then, the specific location of the “right” was not important. Until recently, few have been willing to question the correctness of the \textit{Griswold} understanding of \textit{Meyer} and \textit{Pierce}. Much more ink has been spent on defending the rationale of the privacy cases, than inquiring into the anomaly that James C. McReynolds, William O. Douglas, and Harry A. Blackmun could all have shared the same view of the Constitution regarding individual rights. One need only consider the child labor cases to see that McReynolds, and the New Dealer, Douglas, could not have been further apart when it came to the extent the state could go in legislating for its future citizenry, and against the wishes of parents.

\textbf{B. The Bane of Progressives: The Child Labor Decisions}

In 1916, Congress passed an act prohibiting the shipment in interstate commerce of any product of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment, in which children had been employed “within thirty days prior to the removal of such product.” Children were those under the age of sixteen with certain modifications permitted for older children. Clearly, Congress was reacting to the increasing strength of the progressive movement and its child saving efforts. Not all were pleased with Congress’s efforts, most notably factory owners and poverty-stricken families who depended upon the labor of their own children to make ends meet. Ultimately, the two teamed up to challenge the Keating-Owen Act, as the legislation came to be called.

A father of two children encompassed by the Act, who were employed at a cotton mill in Charlotte, North Carolina, brought suit to enjoin the Act’s enforcement. Urged and financially supported by southern mill owners, Dagenhart, the father of the children, based his claim on two grounds. First, he argued that enforcement of the Keating-Owen Act would deprive him of his vested right to the labor of his children. Second, since he was a man of meager means, the support received from his children’s labor was essential to the subsistence of his family. However, as is often the case with high profile litigation, “counsel and bench abandoned the pretense that the suit concerned the private rights of the Dagenharts,” and instead tacitly resolved to adjudicate the facial constitutional

\begin{itemize}
  \item \textit{Id.} at 117.
  \item \textit{Id.} at 152–53.
  \item Keating-Owen Act, ch. 432, 39 Stat. 675 (1916).
  \item \textit{Id.}
  \item \textit{Id.}
\end{itemize}
challenge to the Act.\textsuperscript{56} In other words, Dagenhart’s legal benefactors got their day in court, and argued that the law exceeded the commerce-clause authority of Congress, rather than arguing that Dagenhart himself was deprived of his property without due process of law. Nevertheless, the fact that it could and should have been conceived solely as a father’s, Dagenhart’s, claim is essential to understanding the link to the Meyer and Pierce outcomes.

The case of \textit{Hammer v. Dagenhart}\textsuperscript{57} reached the Supreme Court during its 1917 term. There it was argued that the Act exceeded Congress’s commerce power because rather than regulating commerce, Congress was forbidding commerce from moving.\textsuperscript{58} Five members of the Court accepted that reasoning, including Justice McReynolds.\textsuperscript{59} A good deal of the Court’s opinion was spent distinguishing “commerce” from that which Congress attempted to regulate.\textsuperscript{60} The ultimate conclusion was that prohibition of transportation was not the same thing as regulation of commerce in this case.\textsuperscript{61} Moreover, the Court thought Congress’s real attempt was to regulate child labor, not commerce.\textsuperscript{62} That subject, the majority believed, was for the states alone to tinker with: “In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority.”\textsuperscript{63} Thus one avenue of national regulation—the commerce clause—was closed to Congress, but there was at least one other, so it first appeared.\textsuperscript{64}

To compensate for the invalidation of the Keating-Owen child labor law, Congress passed the Child Labor Tax Acts of 1919.\textsuperscript{65} This time the law required that anyone operating a mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment in which children were employed past certain maximum hours, “shall pay . . . an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year” from the sale of its products.\textsuperscript{66} For its new enactment, Congress rested its authority on the taxing power.\textsuperscript{67} The

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\textsuperscript{56} Id. at 96-97, 102.
\textsuperscript{57} Hammer v. Dagenhart, 247 U.S. 251 (1918).
\textsuperscript{58} Id. at 270.
\textsuperscript{59} Id. at passim.
\textsuperscript{60} Id. at 271-77.
\textsuperscript{61} See id. at 271 (explaining that this case is different from constitutional laws that prohibit the transportation of women for immoral purposes and the transportation of alcohol).
\textsuperscript{62} See id. at 271-72 (“The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states.”).
\textsuperscript{63} Id. at 276.
\textsuperscript{64} WOOD, supra note 55, at 28-31.
\textsuperscript{66} Id.
\textsuperscript{67} U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes.”).
\end{flushright}
Drexel Furniture Company, an entity assessed a tax under the 1919 law, challenged the statute as exceeding Congress’s constitutional power, similar to the way it had exceeded its commerce power in the Dagenhart case.68

*Bailey v. Drexel Furniture Co.* reached the Supreme Court in 1922. On May 15, of that year, by a vote of 8-1, the Court agreed with Drexel that Congress had again overstepped its constitutional boundary.69 Chief Justice Taft thought the legislation so blatantly unconstitutional, and Congress’s attitude so cavalier, that he took to chastising Congress in his opinion: “[A] court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others see and understand this. How can we properly shut our minds to it?”70 The Chief Justice then became more serious and somber in his tone: “The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards.”71

What about a national regulation of child labor threatened the “ark of our covenant”? To answer that question, we first have to speculate as to just what the covenant is. One possible answer is that the covenant is federalism, the agreed-upon relationship between the state and federal governments, which was breached in this case by the attempted federal regulation of a matter of state concern. However, there is clearly more to the ark than pure political science. By limiting realms of government to certain spheres, individuals and families are free to live unencumbered by legal restrictions. The real breach comes from the attempted interference with a realm of personal and family life. The language of the opinion is clear: the Court was not striking down an improper tax; it was striking down a regulation of child labor—an interference with the covenant that permits families to operate within their own sphere. It is enough to note that this concept was not obvious to contemporaries of either of the child labor decisions.72

Progressive publications and law professors could not see past the Court’s rhetoric. Legal critics argued with the Court’s logic in expounding the commerce

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69 See id. at 44.
70 Id. at 37.
71 Id.
72 Before Taft was appointed to the Court, he wrote an introduction to an essay by Herbert Spencer in which he criticized paternalistic legislation: “Laws which are adapted to an ideal people, moved only by the highest moral considerations and governed by every proper self-restraint are ill adapted to people as we know them.” William Howard Taft, *Herbert Spencer’s “The Duty of the State,”* 56 FORUM 240, 242 (1916). Thus, in an ideal world, where there was no jar between morality and legality, children would not be permitted to work, but instead they would be schooled and well looked-after by their parents. But in the reality that was early 20th century America, to suggest that children be kept out of factories was simply asking too much of ordinary Americans.
and taxing clauses. Lay critics appealed to readers’ humanity to expose the plight of child laborers. Both criticized the Court as incompetent and heartless, and both likely suspected a tacit sympathy towards factory owners and managers. Neither was able to perceive and acknowledge the fundamentally different assumptions and values regarding family and social life inherent on each side of the debate. Law Professor Thomas Reed Powell thought the Court was engaged in a “nimble metamorphosis” and was using language “in some Pickwickian sense.” He thought it “difficult to accept such a theory of the impotence of national authority” and was confused by the “vacuum in legislative power” created by the Court’s decision. Members of the Court even received hate mail mirroring what they read in the media. McReynolds had a postcard addressed to him: “Just-Ice J.C. McReynolds.” Another citizen wrote, “Some people never learn anything—human or real—. You old Crab are one of them. If you had some heart, some sense, some regard for the rights of the poor the Lord would not now have left you like Cardinal Wolsey.” As will become clear below, McReynolds did have a heart, as undoubtedly did all of the other Justices. That, however, was not the crucial matter in the child labor cases or in the school cases. What truly mattered was the extent to which the state permitted social relations to continue along their natural path, unobstructed by artificial legislation. This meant that parents had to be left free to their own devices, whether it was sending their child to Catholic school, or to a factory to support the family—only through this natural means could the downtrodden be sifted out of the mainstream of the society, thereby permitting progress to take place.

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73 See Henry Wolf Biklé, The Commerce Power and Hammer v. Dagenhart, 67 U. PA. L. REV. 21, 21 (1919) (“instead of clarifying the scope of the commerce power” Dagenhart “seems to perpetuate old doubts, if not indeed to create new ones”); see also Thurlow M. Gordon, The Child Labor Law Case, 32 HARV. L. REV. 45, 57 (1918) (suggesting that the focus on congressional intent of what was otherwise clearly commercial regulation was an “entirely new” doctrine). For a contemporaneous suggestion that Dagenhart was wrongly decided, but that Drexel Furniture was correctly decided, see William A. Sutherland, The Child Labor Cases and the Constitution, 8 CORNELL L.Q. 338, 343, 351-52 (1923) (arguing that the commerce power permitted regulation for the general welfare, but that the taxing power could only be used for raising revenue, not for regulating private activity).


75 Id.


77 Id.
II. RECONSIDERING MEYER AND PIERCE: THE WORLDVIEW OF MR. JUSTICE MCREYNOLDS

In reviewing the existing writing on Meyer and Pierce, it is quite astonishing how little attention is actually devoted to the fact that both opinions were written by Justice James C. McReynolds. McReynolds is usually remembered, if at all, for two things: these two cases, and his nasty, racist, anti-Semitic temperament. One of the interesting questions raised by the gap in the existing literature is why these two facts have never been considered together. Certainly there is nothing to suggest that McReynolds was able to distance his personal beliefs from any of his other legal work. Thus, those personal beliefs would appear to be central to a complete understanding of how the Court handled the treatment of children, and especially how the Court viewed the role of family in society at large.

In attempting to integrate McReynolds, the man, with his judicial opinions, it will be necessary to consider all that McReynolds himself knew about the subject matter on which he was passing judgment. Thus, I will begin this section with a brief overview of the intellectual climate of the times, explaining what political ideologies were available to those participating in policy debates. Next, I will focus particularly on what transpired in the state of Oregon with respect to the compulsory school law approved by the voters. Then, I will consider McReynolds’s personal views on the particular social issues raised during the Oregon debate. Finally, I will reconsider the Meyer and Pierce opinions with this fresh perspective in mind.

A. The Sociopolitical Climate: Progressives vs. Social Darwinists

Revisionist legal historians and political scientists have recently been engaged in propping up the stature of the pre-New Deal Court, mostly by suggesting that its members were actually principled jurists simply carrying out a juridical tradition that eventually wore itself out in the public mind. These scholars are especially critical of the Holmesian interpretation and that of the contemporaneous legal realists, which stated that the Court majority was rendering decisions based upon economic and political motivations, especially laissez-faire and social Darwinism. As to the rationales of Meyer and Pierce, however, I believe that the

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78 See Pearson & Allen, supra note 13, at 222–23 (“The Supreme Court’s greatest human tragedy is James Clark McReynolds.” Furthermore, they note of McReynolds’s attitude toward his Jewish colleague, Justice Brandeis, “no other member treated him with more disdain.”).

79 See Stephen A. Siegel, The Revision Thickens, 20 LAW & HIST. REV. 631, 632 (2002) (describing the new historiographical orthodoxy on public law in the Gilded Age as not “promot[ing] the economic interests of the Gilded Age’s emergent corporate plutocracy,” but rather “reflect[ing] the application of principles opposed to laws favoring any class of citizens, principles that had a respectable heritage in antebellum, and, some say, even Founding era, America”). See also Howard Gillman, The Constitution
evidence is overwhelming that the older and contemporaneous criticisms of the Court are sound. The education legislation in both Nebraska and Oregon was supported by progressives and opposed by mainstream conservatives. Moreover, the most lucid arguments made against the laws by counsel in the Supreme Court were distinctly reactionary and anti-socialistic.

As Gregory Claeys has explained, “By 1900 . . . Social Darwinist ideas of ‘struggle,’ ‘fitness,’ and ‘survival,’ of the eternal Hobbesian war of all against all . . . had become virtually omnipresent and definitive of the most important modern trends in European and American thought.” The Meyer Court of 1923, therefore, was composed of judges who had been born into this intellectual milieu. The Social Darwinian ideology of “survival of the fittest” actually dates back to an 1852 article by Herbert Spencer. Darwin, however, provided the vocabulary that would be co-opted by the social theorists and thus gets most of the credit (or blame) for it. However, Spencer’s role in popularizing the ideas of individualistic Social Darwinism cannot be understated when it comes to scrutinizing the thought of early 20th century American elites.

Spencer’s work, which Holmes accused the Court of adopting on one occasion, was written in reaction to Jeremy Bentham’s theories of legislation. Richard Hofstadter described Spencer’s famous 1850 work, Social Statics, as “an attempt to strengthen laissez-faire with the imperatives of biology.” What Spencer hoped to show was that legislation interfered with the natural workings of the economic and social worlds. Legislation only slowed down and hampered the inevitable perfection of the human race. This is why Spencer was so strongly opposed to poor laws. With regard to the poor, he said, “the whole effort of nature is to get rid of such, to clear the world of them, and make room for the better.” Spencer was also opposed to state-supported education and sanitary supervision. He considered any state aid socialistic and argued against it “because it would

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81 See id. at 227.

82 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.”).

83 RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 40 (Beacon Press 1992) (1944). We can contrast Spencer’s thinking with Bentham’s—as Hofstadter suggests—by understanding that Bentham’s efforts to do away with the common law in favor of codification were based on the assumption that all individuals were more or less the same biologically, and thus could all be acted upon equally by uniform legislation. Hence, “[t]he whole community’s social system, no less than the whole of its legal system, was to be located analytically within the province of legislation.” See also DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 286 (Cambridge Univ. Press 1989).

84 HOFSTADTER, supra note 83, at 41 (quoting Spencer).
penalize superior citizens and their offspring in favor of the inferior, and a society adopting such practices would be outstripped by others.”

Spencer’s major contribution to social thought was his 1872–1873 publication of The Study of Sociology, first printed in serial form in Popular Science Monthly. The goal of this work was to show the futility of trying to control societal evolution. It argued against quick social transformations and the artificial preservation of the weak of the species. As Hofstadter notes, this line of thought was a major force in the last quarter of the 19th century. Thus it is not surprising that those growing up during this period and forming their first impressions of the world around them were deeply influenced by Spencer and Darwin. So popular was Spencer with the generation that grew up with his thought that a collection of his individualistic essays was reprinted from 1915–1916 in The Forum. The reprints were accompanied by commentary from Republican Party leaders—including two future Chief Justices of the United States—in which they made clear that the project was undertaken as a manifesto against Woodrow Wilson’s domestic agenda.

The ideas of Herbert Spencer and Social Darwinism were diametrically opposed to the proposals of the Progressives of the early 20th century. In 1924, The Nation reprinted some responses to a contest in which contestants were asked to define progressivism. The journal’s subheading for one response was “With Apologies to Herbert Spencer.” The respondent who provoked that subheading answered as follows: “Progressivism is an integration of humanity and a dissipation of riches, during which the people rise from an indefinite incoherent heterogeneity to a definite coherent homogeneity and during which the retained capital undergoes a parallel transformation.” A more descriptive contemporaneous metaphor for the homogeneity described by the author of that definition was the “melting pot.” And for early 20th century progressives, unlike early twenty-first century progressives, an assimilative melting pot was a positive good.

Recalling the context of the early 20th century, the United States was experiencing a wave of immigration that not only bewildered, but also frightened...
and threatened, many Americans. Unlike the conservatives, however, the progressives believed that education was the solution to the immigrant problem. That is, progressives assumed, first, that education was a social good, and second, that everyone should be and was capable of being educated. Progressives began conceiving of the family as the primary social training ground, which was failing because of the poor state in which immigrants found themselves upon their arrival. Thus, socialization was now squarely the domain of the public schools. John Dewey epitomized this progressive hope for the schools by describing them as not just “instrument[s] of morality and citizenship,” but “democratic and participatory” as well. Critics of both Dewey and his likeminded progressive brethren pointed out a paradox of their philosophy: they wanted democratic education, but not diversity. Or, as historian Paula Fass has written, the progressives were arguing for a democracy of a “common point of view.”

B. Fast Forward to Oregon—McReynolds Did

First, an explanation is in order as to why the background of the Meyer case detains us less than the Pierce case. Among the several reasons is the fact that the language law at issue in Meyer was enacted by the Nebraska legislature, and thus the political debate was not as rich as that in Oregon, where the law was a public referendum. Also, the Oregon law was a more extreme version of the Nebraska law—all of the issues regarding state control over education versus parental control, raised in Nebraska, applied with extra force in Oregon. But perhaps the strongest rationale is that Justice McReynolds himself had the Oregon case in mind as early as the oral argument stage of Meyer v. Nebraska.

As mentioned above, the sole issue in Meyer was the constitutionality of the foreign language prohibition as enforced against a 5th grade teacher. However, that clearly was not the sole issue in Justice McReynolds’ mind. During the presentation by Arthur F. Mullen, the lawyer for Meyer at oral argument, Justice McReynolds posed the question of whether a state could mandate that children attend public schools only. Mullen responded in a very lengthy reply reciting the history of schooling in America and noting the recent vintage of the public school system. As Barbara Bennett Woodhouse has pointed out, William Guthrie, a prominent Catholic lawyer who would eventually be counsel of record for the Society of Sisters in Pierce, briefed the impending Oregon law by appearing as amicus curiae in Meyer. By virtue of Guthrie’s reminder of events transpiring in

94 Id.
Oregon, McReynolds and the rest of the Court were well aware how their decision could be precedent for the upcoming case. Since the author of *Meyer* was so keenly and prematurely interested in the issues concerning the Oregon school law, it is sensible to immediately proceed to it.

**C. Badgering Crusaders: Politics in the Beaver State**

Since the compulsory school act was put before the voters of Oregon for their approval, all aspects of direct democracy were at work in 1922, including heavy pamphleteering and editorializing. While certain groups, most notably the Catholic Church and the Ku Klux Klan, quickly drew unambiguous lines in the sand, support for and opposition to the ballot measure was not as black and white as some have suggested.98 In fact, the most recent and thorough study of Progressive Era Portland, Oregon suggests that the Klan’s involvement has been “likely overrated” by previous historians.99 The supporters of the act also counted among their numbers those whose political rhetoric sounded in populist and egalitarian tones. In fact, it is difficult to find much that was overtly racist, anti-Catholic, or anti-immigrant—the traditionally assumed KKK philosophy. Any such interpretations must necessarily be the result of reading between the lines. The opponents’ rhetoric, however, rather than responding directly to the proponents’ points, takes the tack of appealing to fundamental rights and natural law. Thus was the scene of 1922 Oregon.

According to Richard Hofstadter, the Ku Klux Klan of the 1920s appealed to the “unprosperous and uncultivated native white Protestants who had in them a vein of misty but often quite sincere idealism.”100 Indeed, it would be hard to imagine a better description of the Klan’s principal publication in support of the Oregon law—*The Old Cedar School* appeals to just such a crowd. Published as a fictional tale recounting the inevitable and dire consequences of failing to pass the school law, *The Old Cedar School* tells of the decline and eventual destruction of a one-room schoolhouse in rural Troutdale, Oregon, caused by the mass exodus of

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98 *See generally* Tyack, supra note 42 (arguing that the Oregon law was primarily a reactionary Klan proposal intended to target Catholics).

99 ROBERT D. JOHNSTON, THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON 243 (Princeton Univ. Press 2003). The failure to appreciate Johnston’s work is apparent in the writings of Paula Abrams, who has recently taken up the study of *Pierce* in a new article and book, the latter of which was published just as this article was going to press: Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 OR. L. REV. 1025, 1041 (2008) (Abrams says that the Klan “became the most powerful political force in the state.” But it is unclear what the basis of that statement is.); PAULA ABRAMS, CROSS PURPOSES: *PIERCE V. SOCIETY OF SISTERS* AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION (Univ. of Michigan Press 2009). Abrams is, however, to be complimented on exposing the dangers of the initiative process.

children to divisive sectarian schools. Its author, lawyer George Estes, crafted his story like a children’s book, complete with illustrations.\textsuperscript{101}

The narrator of \textit{The Old Cedar School} is a backwoods grandfather talking to one of his sons, trying to urge him not to send the grandchildren to a private school, but instead to the old Cedar School. Apparently all of the older children had moved away and married spouses of different faiths and sent the grandchildren to religious schools.\textsuperscript{102} The narrator sees his son Jim’s children as the last opportunity to maintain a link to the old public schoolhouse, the embodiment of an idealistic past.\textsuperscript{103} Throughout the narrative, the grandfather speaks in an uncultivated manner, while Jim’s language is rather refined: “Well, Jim, Mam an’ me both went to the old Cedar School mor’n sixty years ago an’ I tell you there wasn’t many places here in Oregon where you could get any book learnin’ them times.”\textsuperscript{104} The grandfather’s concerns are practical and nostalgic while Jim’s concerns immediately turn to high-minded concepts like those of the lawyer who is going around saying that “if folks want to send their children to big high-priced schools it’s Unconstitutional not to let ’em, an’ it’s religious persecution to boot.”\textsuperscript{105}

On its face, the tract is full of statements of religious tolerance. According to his father, the reason Jim is considering not sending the grandchildren to the old Cedar School is because he “got a ’Piscopalyun wife, she don’t want your children started in that there old Cedar School on the ridge there—No! She wants ’em sent away to that wonderful big place they call Oxford Towers where there’s a hull lot of big bishops.”\textsuperscript{106} However, actually being a “Piscopalyun’ is good as any far’s I know.”\textsuperscript{107} As for Jim’s sister, Sally: “She married a Seventh Day Adventist which was all right with me, ’cause I think any o’ them religions is good if a feller actually believes in ’em an’ they ain’t run for show an’ to make places for a lot o’ grub eaters.”\textsuperscript{108} Jim’s other sister, Ryar, “married a Methodist, an’ he ’pears to be a purty good feller. He don’t seem so darned sot as some o’ them others.”\textsuperscript{109} Finally there was Jim’s brother:

\textquoteright{}An’ then there’s John, he married a Roman Catholic. I kinda winced when he told me he was goin’ to an’ then I said to myself, “Dad uster say that all kinds o’ religions was the same.” He said you might put some of each kind in a sack naked an’ you couldn’t tell one from tother when they was shook out. I guess that’s all true enuff but after they are shook out they don’t all act the same. Some of ’em will shake hands with

\begin{thebibliography}{10}
\bibitem{101}GEORGE ESTES, THE OLD CEDAR SCHOOL (George Estes ed., 1922).
\bibitem{102}See infra notes 106–10.
\bibitem{103}See infra notes 104–05.
\bibitem{104}ESTES, supra note 101, at 11.
\bibitem{105}Id. at 13.
\bibitem{106}Id. at 16.
\bibitem{107}Id. at 13.
\bibitem{108}Id. at 17.
\bibitem{109}Id.
\end{thebibliography}
each other an’ make the best of it, but not the Catholic. He’ll go off an’ herd to himself.”

As a result of Sally’s and Ryar’s husbands and John’s wife, all of the grandchildren thus far had been sent to fancy private schools.

If any anti-Catholic hostility is present in the above quote, it is directly related to perceived self-isolation of the Catholics. Progressive supporters of the school law, and other proponents of the melting-pot theory, characterized that isolation as elitism. The Klan’s strongholds were rural cities in the West and Midwest, usually set up in reaction against northeastern urban centers. Those urban centers were draining away population from the farming communities. Rather than trying to rally the dwindling communities together, the Catholics and other religious sects seemed to be splitting them farther apart, an especially troubling sentiment after the recent war. Nor would the Catholics deny their separatist efforts. During oral argument in *Pierce*, counsel for Oregon cited the Canon law stating that “Catholic children must not attend non-Catholic, neutral or mixed schools; that is, such as are open to non-Catholics.” In their tracts, the Church argued for the special religious needs of Catholic parents and their children. The KKK, as much as it was involved in the debate, was not the official sponsor of the bill; that distinction belonged to the Scottish Rite Masons. David Tyack seems to suggest that the Klan had underground political connections in Oregon that may have been responsible for it. One thing is unmistakable, however, the Klan and Church were mutually in each other’s bull’s-eye: “The Klan . . . [c]hallenges Rome to submit our difference to democratic education in a Public School System as an educated electorate, and is willing to wait the required generation to impanel the jury.”

110 Id. at 24.

111 In criticizing both Catholic separatism and the Protestant-centric nature of the public schools, one author lamented that “a wholesome civilization cannot be predicated upon the basis of Catholic parochialism and Protestant hypocrisy.” Instead, the author called for an educational system that stressed the “unity of mankind,” and which was “devoted consciously to furthering social progress.” David Henry Pierce, *May Catholics Teach School?*, THE NATION, Apr. 29, 1925, at 485, 486.

112 See HOFSTADTER, supra note 83, at 291–95.


114 See JOHNSTON, supra note 99, at 228.

115 See Tyack, supra note 42, at 78; see also ABRAMS, supra note 99, at 52–56. But see JOHNSTON, supra note 99, at 221–53 (arguing that the primary motivation behind the bill was class-based, and that the Klan’s nativist sentiments simply coincided with the more populist nature of this particular issue).

Unlike the amateurish organization of the Klan, the Catholic Church was extremely prepared for its self-appointed task of fighting the Oregon school bill. The National Catholic Welfare Council’s Bureau of Education printed a series of at least ten “Educational Bulletins.” Although all are apparently dated “February, 1923,” perhaps suggesting that they were issued more for the post-election court battle, at least one was written before the election, The Truth About the So-Called Compulsory Education Law. The author of this piece argues that the proposed law would work a deprivation of three natural rights of man based on the Declaration of Independence: (1) parental authority, (2) religious liberty, and (3) freedom in education.

Of course, arguments based on natural rights were in vogue at the Supreme Court during this time, further suggesting that a Catholic lawyer, more politically astute than the Klan’s Estes, may have been behind the pamphlets. “Nature is opposed to the Bolshevist doctrine that the child is to be treated as a ward of the state,” the tract stated, “and it is well to remember that it is impossible to violate a law of nature with impunity.” Those readers curious about the exact penalty for a violation of a law of nature were naturally left in suspense. Nevertheless, the Church’s pamphlet goes on to state an argument that very much resembled the eventual language of Pierce. By virtue of the law of nature, “parents, not the state, have the authority and the responsibility for the proper care of their children, for feeding, clothing, housing, yes, and also for educating them.” While the state’s interest in its future citizens is not lost on the author, in his opinion, the natural rights of parents necessarily limit it.

The Church completely separated the issue of “parental authority” from any religious overtones. Instead, what the pamphlet provided was language akin to the 19th century parent-child contractual conception. If parents were responsible for “feeding, clothing, and housing” their children, then the least they could expect was something in return. Or as the Church’s brief argued, “In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear their children to be worthy of them.” Perhaps the public debate between the Catholic Church and the Ku Klux Klan was not explicitly framed in terms of “parental ownership” versus “state as super parent,” but the terms Bolshevist,

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117 NAT’L CATHOLIC WELFARE COUNCIL, EDUCATIONAL BULLETIN NO. 2: THE TRUTH ABOUT THE SO-CALLED COMPULSORY EDUCATION LAW (Nat’l Catholic Welfare Council 1923) (My assumption that this work was written before the election is based upon its argumentative style indicating that the question had not yet come up for a vote.).
118 Id. at 4-5.
119 Id. at 5.
120 Id.
121 See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 106–07 (Columbia Univ. Press 1994); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 153 (The Univ. of N.C. Press 1985).
communist, and socialist were tossed about with abandon. It was clear that whichever side could paint the other the reddest would be victorious.123

Undoubtedly, the Church’s greatest asset in accomplishing its victory was lawyer and Columbia University law professor, William D. Guthrie.124 As mentioned above, he submitted an amicus brief in Meyer alerting the Court that Pierce was on the horizon. More importantly, however, the Church managed to retain Guthrie to argue the Pierce case for its side in the Supreme Court in 1925. Evidence abounds that more than Guthrie’s legal acumen carried the day; his inside connections to the 1920s Court are rather startling. Though I am unaware of any detailed study of Guthrie’s direct influence on the Court, in a footnote Woodhouse lists his known social and professional connections which include: McReynolds’s succession to Guthrie’s position in a Wall Street law firm, Guthrie’s home address and phone number in McReynolds’s personal address book, prior professional collaboration with Justice George Sutherland, and a letter from Sutherland to Guthrie one month before Meyer was handed down.125 Personal connections aside, Guthrie’s public and academic writings suggest that he was an ideological fit with the conservative wing of the Court.

In 1916, several of Guthrie’s major speeches were collected and published by his home institution of Columbia University.126 Much of his writing is a vigorous defense of the Lochner-style decisions so heavily criticized by the emerging legal realists within legal academia. When not speaking directly on a legal issue, Guthrie was discussing morality and religion and its importance to family and civic life. Given that he had the ear of at least several members of the Court, the ideas espoused in those speeches and subsequently published were most certainly of interest to the Court in Meyer and Pierce.

Some ten years before Guthrie defended religious schools in the Supreme Court, he was doing so on Long Island.127 At a 1915 dedication ceremony for a new school, Guthrie gave a speech entitled Catholic Parochial Schools in which he stated his case for the religious and moral training of children. For Guthrie, the importance of a Catholic school was to “publicly emphasize[ ] the religious character of the educational work to be undertaken” there.128 From the very beginning of his speech it was clear that the religious elements of Catholic schools

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123 See, e.g., JOHNSTON, supra note 99, at 243 (Johnston quotes the appellee’s oral argument in Pierce: “[W]hy should Oregon and the Soviet Union be the only governments ‘to have a monopoly of education, to put it in a straitjacket, by the fixing of unalterable standards and thereby to bring their people and their citizens to one common level?’”).

124 Guthrie’s centrality to both the Meyer and Pierce cases is well stated in Woodhouse, supra note 97, at 1070–80 (Though I have examined Guthrie’s writings myself, many peripheral details come from Woodhouse.).

125 Id. at 1071 n.396 (It should be noted that Sutherland dissented in Meyer, thus, not ultimately agreeing with Guthrie in the case.).

126 WILLIAM DAMERON GUTHRIE, MAGNA CARTA AND OTHER ADDRESSES (Columbia Univ. Press 1916) [hereinafter MAGNA CARTA].

127 See WILLIAM DAMERON GUTHRIE, Catholic Parochial Schools, in id. at 247 n.1.

128 Id. at 247.
were not incidental to the educational program. If most Catholic schools were similarly touted as being overt expressions of difference and isolation, then perhaps Klan opposition becomes more understandable. Guthrie rebutted charges that Catholics were opposed to the public school system and that they were unpatriotic. He also developed several creative arguments for why the Catholic system of education was superior to other forms and why that was good for democracy.\textsuperscript{129}

Borrowing from Lord Bryce, Guthrie asserted that the more democratic a nation becomes, and the more its citizens realize their power, the greater its need develops for sources of reverence and methods of self-control.\textsuperscript{130} For Catholics, those sources “are to be found in religion.”\textsuperscript{131} According to Guthrie, the Church benefited society as a whole. “In teaching morality the churches are rendering a patriotic service and promoting the best interests and the highest policy of the state.”\textsuperscript{132} Naturally, the state benefited most if this inculcation occurred “while the mind and character of the child are plastic.”\textsuperscript{133} The Catholic argument did not end there, however. Guthrie thought that the Church should be compensated for its services to the public; “they should be allotted a reasonable part of the public educational fund raised from general taxation, measured by and limited to the actual saving to that fund, provided also that a required standard of education be maintained.”\textsuperscript{134} This part of Guthrie’s speech appeared somewhat antagonistic to all but Catholics. First, he stated that only a Catholic education benefited the public and that he hoped “the day will come when the people of all denominations” appreciated the service the Catholics provided. Then, he called for public reimbursement for that service, almost contradicting his earlier assertion that Catholics supported free public schools. Given Guthrie’s assertions of the Church’s position, perhaps it is not difficult to see where some of the Klan’s charges came from. At the same time, it is also easy to perceive a conservative slant to Guthrie’s argument—if government was not needed for services better provided by the private sector, then why should taxpayers have to support excessive spending?

\textsuperscript{129} See infra notes 130-34.
\textsuperscript{130} See 1 VISCOUNT JAMES BRYCE, THE AMERICAN COMMONWEALTH 474, 479 (3d ed., Liberty Fund, Inc. 1995) (1888) (Especially relevant is chapter thirty-nine, “Direct Legislation by the People.”) Therein Bryce asks, “What are the practical advantages of the plan of direct legislation by the people in it various forms?” He thought, “Its demerits are obvious.” With specific regard to Oregon and other western states, he noticed that “the risk of careless and even reckless measures is undeniable.”); see also 2 VISCOUNT JAMES BRYCE, THE AMERICAN COMMONWEALTH (3d ed., Liberty Fund, Inc. 1995) (1888) (Part four is devoted to the topic of “Public Opinion.”). The extent to which Guthrie’s arguments were faithful to Bryce’s ideas is beyond the scope of this present study.
\textsuperscript{131} Catholic Parochial Schools, supra note 127, at 252.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 253.
\textsuperscript{134} Id. at 256.
Other proponents, besides the Ku Klux Klan, abounded in the 1922 Oregon political scene, namely progressive politicians and public school teachers. Politicians argued that private schools were divisive and created “cliques, cults, and factions, each striving, not for the good of the whole, but for the supremacy of themselves.” Schools for the rich also cultivate snobbery and encouraged class distinction. Educational experts, like Dean Ellwood P. Cubberley of the Stanford University School of Education and I.N. Edwards of the University of Chicago, thought that the goal of assimilating foreigners was one of the major difficulties facing schools and that localities should be left to deal with the matter themselves. If America was to be a melting pot, the argument went, then the schools might as well be the kettles simmering in anticipation of this ideal phenomenon. Siding with the proponents, the voters of Oregon approved the measure by a vote of 115,506 to 103,685.

The stage was set for the Supreme Court to enter and weigh-in upon the matter. Before arriving at that significant event, however, it is necessary to more fully understand Justice McReynolds and how he viewed the world.

D. Making Sense of Pussywillow: The Private Life of James C. McReynolds

A great aid in my research has been the recent publication of a memoir written by a former McReynolds law clerk, John Knox. Knox was an intense diarist since high school and continued his daily writings throughout his clerkship year with McReynolds. Nearly two decades after his yearlong stint on the Court, Knox decided to compose a memoir based upon his diaries and memory. Unfortunately for Knox, he never managed publication of the work during his lifetime. Since Knox clerked during the 1936–1937 term, most of the interest in his writing will undoubtedly be centered on the Court’s reaction to FDR’s court-packing plan. However, Knox’s knack for relating personal and intimate details of

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135 It is important to appreciate the history of Catholic education within the context of Progressivism, and progressive educational reforms in particular. Doing so helps us understand how the Church could draw opponents as diverse and the Klan and Progressives. As Paula Fass tells us, “the Catholic schools have throughout most of the twentieth century resisted the implications . . . of ‘progressive’ education.” Fass, supra note 93, at 192.


138 Woodhouse, supra note 97, at 1016.

139 KNOX, supra note 76, at 35 (Pussywillow was the nickname McReynolds’ servants gave him so that they might talk about him openly without his knowledge.).

140 Id. passim.

141 See Dennis J. Hutchinson & David J. Garrow, Forward to KNOX, supra note 76, at vii.
his daily existence with McReynolds proves invaluable for my purposes—it exposes McReynolds in a way otherwise unknowable.

James Clark McReynolds was born in Elkton, Kentucky, on February 3, 1862. His childhood household was typically southern, that is, aristocratic, patriarchal, and sympathetic to the Confederacy. His father was a physician with a strong independent streak who opposed public schools. McReynolds attended Vanderbilt University where he studied science and graduated in three years as valedictorian in 1882. He then abandoned science after one year of postgraduate work and entered the University of Virginia Law School, which he completed in only fourteen months. In 1896, he waged an unsuccessful campaign for Congress as a Gold Democrat. He served as Assistant Attorney General beginning in 1903 in the Roosevelt Administration where he excelled as a trustbuster. President Woodrow Wilson appointed McReynolds as Attorney General in 1913 but soon came to regret his cabinet choice as McReynolds alienated a number of legislators with his abrasive mannerisms. With a vacancy on the Supreme Court having been created by a death in 1912, Wilson found an easy way to dispose of the McReynolds problem and in 1914 elevated him to that bench.

Justice James C. McReynolds served on the Supreme Court for twenty-seven years (1914–1941). While presumably little changed for McReynolds over that period, two things definitely remained constant: he was a lifelong bachelor and employed a black servant, Harry Parker, who was always at his side. He worked out of his thirteen-room apartment, which included an office for his clerk, and traveled to the Court building only on days the Court was in session. An anti-Semite, he refused to associate with his two Jewish colleagues, Justices Louis Brandeis and Benjamin Cardozo. He explained to his colleague, Justice Holmes, “that for four thousand years the Lord tried to make something out of Hebrews, 

143 Burner, *supra* note 142, at 2024.
144 Id.
145 Id. at 2024-25.
146 Id. at 2025.
147 Id.
148 Id. at 2025-26.
149 Id. at 2026.
150 Id.
151 Id.
152 See Knox, *supra* note 76, at 3 (mention of McReynolds’s bachelorhood); id. at passim (mention of McReynolds’s black servant Harry).
153 Id.
154 See Hutchinson & Garrow, *supra* note 141, at xix (“He detested Justices Brandeis and Cardozo.”).
then gave up as impossible and turned them out to prey on mankind in general—like fleas on the dog for example.”\textsuperscript{155} At times, he questioned the competence of his other colleagues as well. Justice Holmes once privately observed: “Poor McReynolds [sic] is, I think, a man of feeling and of more secret kindliness than he would get the credit for. But as is so common with Southerners, his own personality governs him without much thought of others when an impulse comes, and I think without sufficient regard for the proprieties of the Court.”\textsuperscript{156} Although appointed as a Democrat by Woodrow Wilson, McReynolds felt that FDR had betrayed the party in 1933 by turning socialistic. He would oppose the New Deal more strenuously than any other member of the Court.

Justice McReynolds had a strong distaste for both communism and foreigners. He was convinced that Professor Felix Frankfurter of the Harvard Law School was a socialist who was influencing the Roosevelt Administration to break its platform promises of 1932.\textsuperscript{157} FDR’s first sin was in recognizing Soviet Russia. Astonished with the president, McReynolds told Knox, “Imagine restoring diplomatic relations with that country! Justice Van Devanter was over there last year, and he saw even pregnant women working on the railroads in section gangs.”\textsuperscript{158} In almost paranoid fashion he continued, “And yet the Communists propose to infiltrate their ideas throughout the world. And Roosevelt recognizes them and installs the Soviets in the old embassy of the Czars right here on Sixteenth Street!”\textsuperscript{159} He was convinced that Roosevelt had put the nation “on the road to Socialism and the destruction of states’ rights.”\textsuperscript{160} McReynolds would not, however, be a yielding victim to this disturbing trend. Instead, he saw the Court as a bulwark against FDR’s destructive plan: “[W]ere it not for the Court, this country would go too far down the road to socialism ever to return.”\textsuperscript{161}

This hostility towards foreign communists came out in public display in 1921 when the Court received a case involving German socialist defendants. In 1918, several defendants, some German born and some of “German extraction,” were charged with violating the Espionage Act by distributing socialist propaganda.\textsuperscript{162} The trial judge had remarked, “One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty.”\textsuperscript{163} The judge’s refusal to recuse himself because of those

\textsuperscript{155} Woodhouse, supra note 97, at 1082 (quoting letter from McReynolds to Holmes, 1920).


\textsuperscript{157} See Knox, supra note 76, at 70–71.

\textsuperscript{158} Id. at 71.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 71–72.

\textsuperscript{162} Berger v. United States, 255 U.S. 22, 28 (1921).

\textsuperscript{163} Id.
and other prejudicial remarks was the issue before the Supreme Court. By a vote of 7-3, the majority of the Court thought that the judge’s prejudice was sufficient to disqualify him from presiding over the original trial.164

Justice McReynolds was one of the three dissenters in the Berger case and delivered his own dissent. The Justice “was unable to follow the reasoning approved by the majority.”165 McReynolds thought, “A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place.”166 In further praise of the magistrate he said, “And while ‘An overspeaking judge is no well tuned symbol’ neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power.”167 Even Holmes could not help but note that McReynolds’s dissent was “improper in its rhetoric.”168

McReynolds was a southerner in most all of his mannerisms, especially those concerning interpersonal race relations. In his view, the world was composed of a distinct racial hierarchy. However, using the term “racist” to describe McReynolds is largely unproductive. Arguably, no one was closer to McReynolds than his black servant, Harry.169 Members of the Court even referred to Harry as the Justice’s alter ego, behind his back, of course. On the other hand, while Harry may have been indispensable, he was by no means an equal. Rather than making use of a hunting dog during duck season, McReynolds would make Harry fetch the kill out of ice-cold water waist deep.170 When McReynolds thought his secretary, John Knox, was becoming too friendly with Harry and his maid, Mary, he chastised Knox. Knox recalled the conversation:

I realize you are a Northerner who has never been educated or reared in the South, but I want you to know that you are becoming much too friendly with Harry. You seem to forget that he is a negro and you are a graduate of the Harvard Law School. And yet for days now, it has

164 Id. at 36.
165 Id. at 42 (7-3 decision) (McReynolds, J., dissenting).
166 Id. at 43.
167 Id. It is unclear from the opinion who McReynolds was quoting.
169 Although there is no suggestion that McReynolds was associated with the Klan, his attitudes mirror some of their ideology and reveal to us how ideas that might seem incoherent today, were rationalized back then. For example, the Klan justified its anti-Semitism, anti-Catholicism, and anti-foreigner attitudes, but at the same time claimed, “We harbor no race prejudices. The Negro never had and has not today a better friend than the Ku Klux Klan. The law-abiding Negro who knows his place has nothing to fear from us.” Albert De Silver, The Ku Klux Klan—“Soul of Chivalry,” THE NATION, Sept. 14, 1921, at 285 (quoting an Imperial Wizard).
170 See KNOX, supra note 76, at 24.
been obvious to me that you are, well, treating Harry and Mary like equals. Really, a law clerk to a Justice of the Supreme Court of the United States should have some feelings about his position and not wish to associate with colored servants the way you are doing.171

McReynolds ended his thoughts with the entreaty, “I do wish you would think of my wishes in this matter in your future relations with darkies.”172

The Justice’s race consciousness was extreme. While dictating a letter to an African-American, he insisted that Knox put “colored” in the salutation.173 Moreover, his use of the word “darkey” was a frequent occurrence throughout his Court career.174 However, the incidents are somewhat toned-down versions of his earlier public expressions at Vanderbilt. In the school newspaper, he referred to blacks as “‘ignorant, superstitious, immoral, . . . improvident, lazy,’ ‘unfit’ for politics, and ‘unworthy’ of equality.”175

His hierarchical view of social relations, however, undoubtedly extended beyond race. It is this social hierarchy that is essential for understanding Meyer and Pierce. Although McReynolds never had children, he took a special interest in youth, yet not all young people were equal in his eyes. He once asked, “Harry, what are you going to do with those sons of yours?” When Harry responded that he hoped to send them to college, McReynolds was aghast, “College! Do you mean to say they are going to college? Why don’t you train them to be handymen like yourself? There’s no need for them to go to college!” Harry gave a typically American response that he wanted his children to do better than he did. Justice McReynolds did not see any sense in that, however, pointing out, “One of your sons has a good job in the Supreme Court cloakroom. Why doesn’t he plan to stay there?”176 At the very least, this exchange exhibits McReynolds’s racial elitism. However, it also demonstrates his commitment to a static social system, one in which social differentiation was predetermined and unrelated to merit. McReynolds did not question the mental capacities of Harry’s sons, nor did he display any racial hostility. Instead, he merely believed that certain people should not go to college and should perpetually be handymen.

For certain children, however, the Justice’s “kindliness” that Holmes had detected shone through. For example, in one instance McReynolds and Knox came upon a woman and her infant sitting on a public bench.177 McReynolds’s change of demeanor was sudden according to Knox: “he became so gracious and gallant that

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171 Id. at 51.
172 Id.
173 Id. at 160.
174 Id. at 51 n.1, 123.
175 Woodhouse, supra note 97, at 1081 n.464 (quoting Vanderbilt Observer, May 1883).
176 KNOX, supra note 76, at 20. Cf. Silver, supra note 169 (quoting a Klansman to the effect that a respectable Negro needs to “know his place” in society).
177 See KNOX, supra note 76, at 27–28.
I was almost transported back to the days of chivalry.” Approaching the woman, McReynolds asked, “Madam, you and your child would make a most charming picture. Would you mind if my secretary took a photograph of you holding the baby?” Knox took the woman’s address and eventually sent her prints of the photographs upon the Justice’s instructions. McReynolds was also quick to mail off autographs upon request, especially to children. His most benevolent act, though, was the 1941 adoption of thirty-three British children who were the victims of the Nazi blitzkrieg. Not only was he financially supporting them, but he also corresponded with each and every one. Knox reported that some newspapers ran cartoons caricaturing McReynolds as “a crusty old bachelor who resembled the ‘old woman who lived in a shoe.’”

Perhaps McReynolds’s lack of his own family instilled in him an idealistic notion of family life. Certainly there is evidence to suggest that he was not happy with his marital status. In giving advice to Knox, he implored him not to be a bachelor. “I think a lawyer can be more successful as a general rule if he has a wife and family to work for.” One can assume, however, that McReynolds’s ideal family would have been highly patriarchal. One reason Knox performed both legal and secretarial functions was because McReynolds refused to hire women. After several attempts, he ceased employing them because they always tried to control things. According to another account, when women lawyers appeared in the courtroom, McReynolds would exclaim, “I see the female is here again.”

Though he had a soft spot for others’ children, it is likely that had he had his own, he would have been a strict disciplinarian. He disliked the way his nephews were turning out, and let his brother know this. He thought his younger brother, Robert, was not being stern enough with them. “Boys are like pups.” McReynolds told Robert, “There comes a time when a firm hand and a sharp command is the only thing.” For the Justice, patriarchal control was essential for every family to be successful.

One need not be a legal realist to accept the fact that McReynolds’s worldviews were strongly shaped by his southern upbringing and his lack of

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178 Id. at 27.
179 Id. at 28.
180 See id. at 29.
181 See id. at 50.
182 See id. at 262.
183 See id.
184 Id.
185 Id. at 73.
186 See id. at 17.
187 See id. (“I have had women working for me in the past and have always had to discharge them. They became very possessive and wished to run the whole show.”).
188 Burner, supra note 142, at 1007.
189 Woodhouse, supra note 97, at 1083 n.473.
190 Id.
191 Id.
family life. If the 1936 Supreme Court term that Knox detailed was anything like the 1922 and 1924 terms, then those views were transferred over to his opinion writing as well. With this in mind, Meyer and Pierce can be reconsidered with an eye constantly towards their author.

E. Rereading Meyer and Pierce

Since McReynolds wrote Meyer looking ahead to Pierce, it is not surprising that the earlier decision is richer in content, in terms of laying out a foundational view of the parent-child and family-state relationships. As the Court’s first exposition of this area of law, it is also not surprising that the Justices did not unanimously agree upon the disposition of the case. Two members of the Court dissented—Justice Holmes and Justice George Sutherland, Holmes writing for both.192

1. McReynolds’s Conservatism

I have thus far suggested that public debate over these school laws focused on which side was more akin to soviet Russia, i.e., which side’s policies were more susceptible to the socialist label. While grappling with the Nebraska law, McReynolds made two comparisons that let the reader know communism was not far from his mind. After the frequently quoted material described above, extolling the virtues of liberty and freedom and tending to show that Meyer was solely concerned with civil liberties, McReynolds, again almost from nowhere, stated: “For his Ideal Commonwealth, Plato suggested a law which should provide….”193 Plato? If anyone on the Court understood Plato it was surely not McReynolds, but more likely Holmes. Nonetheless, McReynolds described the platonic law that he saw mirrored in the Nebraska—and likely, the soon-to-be Oregon—law:

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

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192 Id. See also KNOX, supra note 76, at 74 (describing the Justice’s falling out with one of his nephews over the playing of jazz music).
193 Meyer v. Nebraska, 262 U.S. 390, 412 (1923) (Holmes, J., dissenting). The location of Holmes’s dissent is somewhat confusing. At the end of Meyer, all we are told is, “Mr. Justice Holmes and Mr. Justice Sutherland, dissent.” Id. at 403. However, attached to the end of a second language case, decided the same day, and located immediately after Meyer in the United States Reports, is Holmes’s dissent on the Nebraska law. See Bartels v. Iowa, 262 U.S. 404, 412 (1923). For purposes of convention and clarity, I use the case name of Meyer when referring to Holmes’s dissent.
inferior, or of the better when they change to be deformed, will be put away in some mysterious, unknown place, as they should be.\footnote{Meyer, 262 U.S. at 401.}

Additionally, McReynolds considered the “ideal citizens” of Sparta, where males were put into barracks and educated and trained by guardians. “Although such measures have been deliberately approved by men of great genius[,] their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest . . . .”\footnote{\textit{Id.} at 402.}

Several images from McReynolds’s citations stand out. First, is the condemnation of parent-child separation. As John Knox described in his memoir, McReynolds seemed to have a wistful sense about being without a wife and children. This particular sensitivity likely produced those lines. The second, and more important, point to note is the anti-standardization sentiment. In both of McReynolds’s examples—Plato and the Spartans—the state determines who is superior and who is inferior. In McReynolds’s own life, it was social custom that dictated that determination. Imagine the shock to the Justice’s sensibilities if little black children were forcibly schooled and trained with little white children. As David Tyack has noted, this would have been the effect of the Oregon law.\footnote{Tyack, supra note 42, at 80.}

Of course, McReynolds did not pull Plato and the Spartans out of the history books himself. His aid in that feat was none other than William Guthrie via his amicus brief in \textit{Meyer}.\footnote{See Woodhouse, supra note 97, at 1077.} But that brief was not the first time Guthrie has used those allusions. On a Thanksgiving Day speech in 1915, honoring the Pilgrims, Guthrie used Plato’s ideas as examples of tried and rejected communist theories of government. Guthrie’s interpretation of history is quite useful for understanding the motivation of \textit{Meyer}. He told his audience, “The Pilgrims began government under the Mayflower Compact with a system of communism or common property. The experiment almost wrecked the colony.”\footnote{William Dameron Guthrie, \textit{The Mayflower Compact}, in \textit{Magna Carta}, \textit{supra} note 126, at 27, 37. This address was delivered on November 23, 1915.} The Pilgrims had a lesson to teach the 20th century progressives:
All who now urge communism in one form or another, often in disguise, might profitably study the experience of Plymouth, which followed a similarly unfortunate disaster in Virginia. History often teaches men in vain. Governor Bradford’s account of this early experiment in communism in his annals of “Plimoth Plantation” is extremely interesting.199

Bradford proceeds as follows:

The experience that was had in this comone course and condition, tried sundrie years, and that amongst godly and sober men, may well evince the vanitie of that conceite of Platos & other ancients, applauded by some of later times;—that ye taking away of propertie, and bringing in comunitie into a comone wealth, would make them happy and flourishing; as if they were wiser then God.200

Guthrie further explained how church and state had never really been separated at Plymouth and how that was its strength.201 This historical interpretation conveniently supported his belief that Catholicism was doing the state a public service in educating children.202 Moreover, the Bradford quote supported Rome’s opposition to communism as being unnatural or ungodly. One final hint that Guthrie was extraordinarily prepared for Pierce was his observation that the recent “fad” of “the referendum” was a menace to the subsequent Plymouth republic.203 All McReynolds had to do was pick up Guthrie’s brief, or any one of his relevant writings, and explain that only communists would make the child a “mere creature of the state.”204 Just how much this type of rhetoric was determinative of the outcome in Meyer is evident by constant references to Plato and communism in Guthrie’s Pierce brief.205

Recall the earlier discussion above of the argument between progressives and social Darwinists and it will soon become clear why conservatives viewed the Oregon school law as a threat to the natural order of things.206 In order to

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199 Id. at 37-38.
200 Id. at 38.
201 Modern historians who have studied Plymouth would certainly disagree. See, e.g., JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 162 (2d ed., Oxford Univ. Press 2000) (1970) (discussing how marriage was “a civil ceremony, not a religious rite.”).
202 See supra text accompanying notes 132-33.
203 The Mayflower Compact, supra note 198.
206 See supra notes 93-94, discussing the progressive and conservative ideologies regarding immigration and education.
understand why conservatives like Guthrie reacted so hostilely to the law, we need only look to the arguments put forth by its proponents. The affirmative argument printed in the official voter pamphlet was quite coherent and persuasive, and difficult to rebut.207

The authors of the argument addressed the problems of immigration in a way that appeared thoughtful and deliberate and decidedly non-reactionary. Appealing to voters’ patriotic instincts, the proponents contended: “The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.”208 The explicit goal of assimilating foreign-born citizens, while clearly indicating a nativist tendency, did not extend to hostility towards immigrants. That is to say, the law’s supporters obviously preferred American ways, but not at the expense of foreign exclusion.209 Instead, they further explained their assimilationist plan: “We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.”210 A preference for assimilation and a prohibition on self-isolation was their recipe for Americanization: “Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.”211 These lines of argument were progressive because they included a place in the American family for immigrants. Compare that thought to the more conservative strains, which argued for exclusionary laws on the grounds that immigrants were unassimilable. There simply was no organized group contending that America should celebrate pluralism and diversity of culture, before or after the war.212 Supporters of the Oregon law made one final call for national unity when they claimed: “Our

207 See Brief of Appellee, supra note 205, at 96.
208 Id. at 97.
210 Brief of Appellee, supra note 205, at 97.
211 Id.
212 To be sure, there were individual voices calling for cosmopolitanism and pluralism. See Horace M. Kallen, Democracy Versus the Melting-Pot (pts. 1 & 2), THE NATION, Feb. 18, 1915, at 190, THE NATION, Feb. 25, 1915, at 217; Randolph S. Bourne, Trans-national America, ATLANTIC MONTHLY, July 1916, available at http://www.theatlantic.com/issues/16jul/bourne.htm (criticizing “Americanism” and asking “whether perhaps the time has not come to assert a higher ideal than the ‘melting-pot’”); see also DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 11–12, 92–98 (10th anniv. ed., Basic Books 2005) (arguing that Kallen and Bourne were both precursors to modern-day multiculturalism).
children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught.”

The argument of the school law proponents looks even more progressive when contrasted against the arguments made by conservative William Guthrie.

In his brief for the Catholic school run by the Society of Sisters of the Holy Names of Jesus and Mary, Guthrie claimed that the “whole notion [of ‘proponents’] is founded upon a misconception of the situation.” So as not to further that “misconception” in the Supreme Court, Guthrie explicitly stated, “The public school is not a ‘melting pot.” What Guthrie was really arguing was that the whole notion of a melting pot itself was fanciful. He said: “No legislation can proscribe social discrimination . . . and no force thus far vouchsafed to man has ever been equal to the destruction or elimination of social distinctions.” This is precisely the language of social Darwinism. For social Darwinists, social distinctions within the human population were as natural as the flowers and the trees, and no amount of human legislation could alter that fact. Rather, man’s attempt to fool with Mother Nature usually resulted in human regress instead of the natural progress that occurred as the socially superior took their place in a well and naturally ordered society. In other words, the citizens of Oregon who voted for assimilation and against the idea of “antagonistic groups” were voting against nature itself. For conservatives like Guthrie, distinction based upon “money, creed or social status” were no mere “pretexts” that could be untaught—they were very real differences based upon men’s natural abilities.

This philosophy of the human condition led to a very clear view of the relationship between children, their parents, and the rest of society. The parent-child relationship was very much one of ownership: “For them parents struggle and amass property and put forth their greatest efforts and strive for an honored name. In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear their children to be worthy of them.” The language of contract and the quid pro quo inherent in this description must not be overlooked. However, neither must we take the contract analogy too far. The children, of course, never freely consented to their parents’ dominion, but for conservatives that was irrelevant. What mattered was the natural fact of procreation and childbirth and the belief that the institution of the family into which a child was born was as natural as those social distinctions that differentiated classes, religions, and nationalities. If it were otherwise—if children

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213 Brief of Appellee, supra note 205, at 97.
214 Id. at 60.
215 Id.
216 Id. at 63.
217 Id. at 66.
218 Conservative critics of Woodhouse claim that “there is no such suggestion” that the Court was “treating the children as their parents’ property.” Stephen L. Carter, Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later, 27 SETON HALL L. REV. 1194, 1203, n.28 (1997). But the ideological context of Pierce suggests just the opposite.
were not the property of their parents—"gone would be the most potent reason for women to be chaste and men to be continent."\textsuperscript{219} How this natural law, social Darwinian, view of social differentiation and parental ownership fit together becomes clearer as Guthrie’s fears are explicated through his understanding of Plato and communism, which as we have seen were liberally used by McReynolds in his opinion for the Court. Even though Plato described an “ideal commonwealth” in great detail, his Republic was entirely antithetical to the American Republic, or so conservatives contended.

2. Holmes’s Pragmatism

Justice Holmes, in his usual impatient tone, refused to give credence to the majority’s fears. Limiting his consideration to the Nebraska language law, he observed: “We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.”\textsuperscript{220} Holmes was not prepared to hold that the student who only heard a foreign language at home was prevented by the Constitution from being taught only English in school. “I think I appreciate the objection to the law,” he said, “but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.”\textsuperscript{221} It was clear to one of Holmes’s longtime correspondents that presented the opportunity for Holmes to say much more.\textsuperscript{222}

Privately, Holmes “didn’t think the dissent on teaching languages worth sending” to his friend.\textsuperscript{223} He simply reiterated that he thought it was legitimate “to try to make the young citizens speak English.”\textsuperscript{224} For Holmes, if citizens wanted to legislate away their freedoms, that was all part of the democratic process. Holmes could have used his dissent to once again berate the majority for substituting its views of family life upon a disagreeable electorate, but instead he held his pen. The majority’s actions frequently tried Holmes’s patience, and McReynolds was usually his ideological foe. Referring to one of McReynolds’s opinions in 1929, which could just as easily have been Meyer or Pierce, Holmes remarked, “McReynolds has the popular side—but to my mind it is another case of treating the XIV Amendment as prohibiting what 5 out of 9 old gentlemen don’t think

\textsuperscript{219} Brief of Appellee, supra note 205, at 66.
\textsuperscript{220} Meyer v. Nebraska, 262 U.S. 390, 412 (1923) (Holmes, J., dissenting).
\textsuperscript{221} Id.
\textsuperscript{222} Letter from Harold J. Laski to Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court (June 6, 1923), in 1 Holmes-Laski Letters, supra note 168, at 507 (“I wait eagerly to see your dissent in the Nebraska language case.”).
\textsuperscript{223} Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (June 24, 1923), in 1 Holmes-Laski Letters, supra note 168, at 500.
\textsuperscript{224} Id.
Holmes understood better than any of his contemporaries that that was all the disagreement was ever about. Technical, clause-by-clause interpretation was only the craft by which the majority would assert its view of “right”—in the school cases that was an unobstructed socially static world; it most certainly was not protection for freedom of thought or for religious or foreign minorities.

The *Hammer v. Dagenhart*226 child labor case presented the same problem for Holmes, only with a different constitutional clause. Referring to the majority’s opinion, he said, “I should have thought that if we were to introduce our own moral conceptions where [in] my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.”227 What were those moral conceptions of McReynolds and the other four on the popular side? Again it was laissez-faire—a hands off policy regarding parental expectation of his child’s economic contribution informed by a Darwinian understanding of social relations. Recognizing the Court’s hypocrisy in sustaining other congressional commercial prohibitions, Holmes pointed out, “It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.”228 To demonstrate the correctness of Holmes’s observation we need only consider McReynolds’s personal views of right: McReynolds hated alcohol and anyone who drank.229 Similarly, he thought children should work hard and not exhibit laziness as his nephew was beginning to do.230 So why, then, did Holmes join the majority in *Pierce*, the second schooling case, and *Bailey*, the second child labor case? That answer is also simple. Holmes had a great deal of respect for precedent, and saw that each case was a mirror image of its predecessor. Holmes’s respect for precedent is again privately recorded as a being counter to McReynolds. Holmes wrote that McReynolds had been the “mouthpiece for . . . the overruling of a number of decisions written by me—without, so far as I can see, any more convincing argument than that he had a majority behind him.”231 For Holmes, popularity was not a sufficient reason for voting against existing case law.

One final case, which best demonstrates the two differing thought processes of Holmes and the majority, is one Holmes wrote, *Buck v. Bell*.232 The commonwealth of Virginia had enacted a law providing for the sterilization of institutionalized inmates with hereditary imbecility in order to facilitate their

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225 Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (Dec. 18, 1929), in 2 HOLMES-LASKI LETTERS, supra note 156, at 1209.
227 *Id.* at 280.
228 *Id.*
229 *See* Burner, supra note 142, at 2024.
230 *See* Woodhouse, supra note 97, at 1083 n.473 (quoting McReynolds telling his nephew that he should “shut up and go to work”).
231 Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (Oct. 24, 1930), in 2 HOLMES-LASKI LETTERS, supra note 156, at 1291.
release. Carrie Buck was a “feeble minded white woman,” who was “the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child.” Justice Holmes, writing for seven other members, including McReynolds, held that the substance of the law did not offend some unenumerated right protected by the due process clause. Holmes thought:

> It would be strange if [the public] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Holmes thought very highly of his opinion and was quite proud of the result. Despite the fact that Holmes’s “lad” informed him that the “religious are astir” over the case, he was grateful for having been assigned it. Upon delivering the opinion in open court, Holmes wrote that he “felt that [he] was getting near to the first principle of real reform,” noting a move away from natural law and first principles. The reform to which Holmes referred, of course, was a rejection of a Fourteenth Amendment due process argument, the same argument used to strike down laws in *Meyer* and *Pierce*. So, how does one explain the concurrence of those defenders of civil liberties, such as the *Meyer* majority? Of course, one cannot, unless the notion of McReynolds and his fellow conservative brethren as civil libertarians is abandoned.

For McReynolds, sterilization of imbeciles likely provoked not even a second thought. Carrie Buck, “a feeble minded white woman,” was probably not much above, perhaps even below, Harry’s college-bound sons on McReynolds social hierarchy. If McReynolds heard Catholic cries of religious persecution in *Meyer* and *Pierce*, they certainly did not faze him in *Buck*. If McReynolds valued social

\[233\text{ Id. at } 205.\]

\[234\text{ Id. at } 207 \text{ (citation omitted).}\]

\[235\text{ Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (Apr. 25, 1927), in 2 HOLMES-LASKI LETTERS, supra note 156, at 938.}\]

\[236\text{ Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (May 12, 1927), in 2 HOLMES-LASKI LETTERS, supra note 156, at 942; see also id. at 938 (“The Chief has given me a pretty interesting lot of cases this term—and I have enjoyed writing them.” He was specifically referring to *Buck v. Bell*.)}\]

\[237\text{ See *Buck*, 247 U.S. at 208. Only Justice Pierce Butler dissented, and did so without opinion. Butler, one of the four horsemen, was the only Catholic on the Court. On the religious affiliations of the members of the Court, see Religious Affiliation of the U.S. Supreme Court, http://www.adherents.com/adh_sc.html (last visited Dec. 4, 2009) (None of the other twelve Catholics listed served with Butler in 1927.).}\]
diversity—religious, linguistic, and ethnic—then he drew the line at mental
diversity (imbeciles). But if, in fact, McReynolds was concerned not about civil
liberties, but instead about socialistic interference with his idealized, white,
patriarchal family, then Carrie Buck had no chance at ever receiving a sympathetic
ear from him. Her family was not the kind McReynolds recognized.

In a very recent, full-length treatment of Buck, Paul Lombardo attempts to
explain Holmes’s opinion, as well as the other justices’ reactions to it.238 He
characterizes Justice McReynolds’s vote as “predictable,” but Justice Brandeis’s as
“seem[ingly] an anomaly.”239 He further states that McReynolds “rarely voted to
strike down state enactments.”240 Obviously, Meyer and Pierce were not in his
sights. In explaining Holmes’s letter to Laski, in which Holmes says Buck was
“‘getting near the first principle of real reform,’” Lombardo attempts to equate
“reform,” with eugenics rather than with judicial minimalism.241

Lombardo’s interpretation is quite unfortunate because it mischaracterizes
Holmes’s fundamental legal holding, which was judicial non-interference with the
struggle for survival—the very same reasons which led him to dissent in Lochner
and other similar cases. While I agree with Lombardo that McReynolds’s vote was
“predictable” because of his inability to separate his general social outlook from
his legal decisions, Brandeis’s vote was almost as predictable as Holmes’s for just
the opposite reason. If the legal principle of Buck was to serve as precedent, then
gone were Lochner, Meyer, and all other opinions that interfered with democratic
majorities codifying into law their reasonable disagreements—that was the “real
reform.” To be sure, Holmes reveled in being called a “monster” by religious
“cranks” and in being told he should expect the “judgment of an outraged God.”242
But those were merely the fringe benefits of a legal job well done.

238 PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE
239 Id. at 172-73.
240 Id. at 172.
241 Id. at 173 (quoting Holmes to Laski, May 12, 1927, Howe, Holmes-Laski Letters,
vol. 2, 941-42). It is true that Holmes thought people generally put too high a value on
human life. Or as he once said, in mocking pacifism, “this hyperaethereal respect for
human life seems perhaps the silliest [-ism] of all.” Yet, unlike the majority of his
colleagues, which included McReynolds, Holmes voted to grant a pacifist citizenship
despite her “silly” beliefs. Steven J. Macias, Rorty, Pragmatism, and Gaylaw: A Eulogy, a
Celebration, and a Triumph, 77 UMKC L. REV. 85, 89 (2008) (quoting Holmes’s private
correspondence in Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme
Court to Harold J. Laski (Apr. 13, 1929), in 2 HOLMES-LASKI LETTERS, supra note 156, at
1146, regarding the pacifist’s case, United States v. Schwimmer, 279 U.S. 644 (1929)). The
point is, that while Holmes did not have any principled objection to eugenics (which is
quite different from embracing it), neither did he view the judicial province as one in which
judges imposed their philosophical or policy preferences upon the public. But cf. Mary L.
Dudziak, Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of
Constitutional Law, 71 IOWA L. REV. 833, 855–59 (1986) (arguing that the rhetorical style
of Buck somehow indicates that Holmes was promoting eugenics).
242 LOMBARDO, supra note 238, at 173.
It has not been the task of these two sections to undermine the legal foundations of the privacy doctrine, or of *Griswold* or *Roe*. The sole purpose behind these sections was to show how the Supreme Court, during a brief time in the early 20th century, was not as progressive with regard to its treatment of children and families as other scholars have argued. Whatever reasons Justices Douglas and Blackmun had for their rulings some forty and fifty years after *Meyer* and *Pierce*, those are for others to explain. I only mention them because of their profound influence on subsequent Supreme Court historians in interpreting the earlier Court.

Much more could be written about the colorful James C. McReynolds. Though perhaps not a household name like his colleague Oliver Wendell Holmes, Jr., McReynolds was instrumental in shaping the pre-New Deal Court. A southern gentleman with dashed political aspirations and with no family to comfort him, he set out to create and maintain an American society as he saw fit. His vision was of a stable, male-headed household, independent of any governmental assistance. The children were obedient, worked for their families, and were schooled at their parents’ direction. A firm believer in capitalism, McReynolds eschewed any attempt to socialize this country, including taking children’s labor and control away from the rightful owners. By 1941, when McReynolds retired from the Court, he was the last of the conservative lot to depart. By then, the country and the Court had finally put to rest the ideal southern society and turned their backs on McReynolds’s social views. Somehow, his words began to take on new meaning, eventually to a point that would surely have made him aghast. A true appreciation of the history of families before the Supreme Court bar requires that McReynolds’s decisions be returned to their original context.

### III. Modern Parental Liberty

Thanks largely to the legacies of *Meyer* and *Pierce*, when a child is born today, its parents—however defined\(^{243}\)—acquire some set of legal rights, as parents, to the care, custody, and control of that child.\(^{244}\) In modern parlance, one would say that a parent has a fundamental legal right to raise his or her child without excessive governmental interference. Most non-lawyers, moreover, would also say that parents have some sort of natural or moral right to raise their children as they see fit. This is so well accepted that everyone has probably heard some indignant parent, in public or at least on television, tell another individual, “Don’t tell me how to raise my kid!” Even children themselves accept their role as the

\(^{243}\) That is, however defined for legal purposes, and thus could include adoptive parents, presumptive parents, etc. See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that a state may create a legal presumption of parentage in someone other than a biological parent, such as a husband whose wife has a child).

\(^{244}\) *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer* and *Pierce* for the proposition that “... the interest of parents in the care, custody, and control of their children[...]” is “perhaps the oldest of the fundamental liberty interests recognized by this Court.”).
children of their parents. Anyone who has ever been around a poorly mannered child may have heard, “You’re not my mom; you can’t tell me what to do!” The rights of parents—both moral and legal—thus permeate our culture. But is this a good thing? Is the parent-child relationship best seen—in both legal and moral terms—as an individualistic relationship permeable by outsiders? Should non-parents always been seen as outsiders, as strangers, in relation to any particular child? The extent to which this social conception manifests itself in daily intercourse is wide-ranging to say the least. The examples I consider below are all drawn from legal controversies concerning religious parents’ rights in the education and custody realms. It will be my suggestion that we reconsider the whole parent-child relationship in order to discover what is actually occurring under the cover of parental rights.

The approach I will take is more jurisprudential than doctrinal. The following two sections will be highly critical of arguments made by lawyers and judges that have refused to consider the implications behind their citations to precedent. I am especially troubled by the poorly-reasoned, philosophically-weak opinions delivered by courts that purport to be basing their decisions on policy implications. The most egregious example of this judicial failing was the Troxel case “decided” by Supreme Court in 2000. Since then, Troxel has been cited for contradictory purposes, and has even been used by opposing amici who, in the Troxel case itself, were on the same side of the issue. All of this confusion, I will suggest, has arisen because we refuse to consider the moral implications of the parent-child relationship within the legal realm, even though legal opinions have perhaps the greatest effect on this aspect of our social being. Lawyers and judges cannot close their eyes to the moral implications of their decisions or pass them off as solely the concern of the legislatures. This responsibility is especially heavy when the legal decision decides the fate of a child—a future citizen who will be a participant in the very democracy courts so oftentimes trump in these cases. The fact that children are not yet full members of the body politic, however, should cause any judge pause in resting a decision upon a rights-based regime, weighted

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245 This is not to suggest that the political philosophy I discuss below, or moral philosophy or any other rigorous theory, should be determinative in judicial opinions. What I am suggesting, however, is that courts use something other than precedential notions of parents’ rights that apparently rest on no modern rationale. The alternative would be opinions rendered because the judges have some reason to believe they will advance social utility.

246 “Mangled” might be a better word than “decided” because all they gave us was a plurality opinion, two inconsistent concurrences, and three inconsistent dissents. See Troxel, 530 U.S. at 57.

247 Thus, evangelical Christians and the ACLU, groups that were both on the same side in Troxel, have since used that opinion in their favor in subsequent cases in which they have been on opposing sides. See infra Part VI.B.
down with individualistic assumptions that frequently ignore the unique role a child fills (and will fill) in his society.248

A. The Stakes Involved

This issue is especially timely as this country currently finds itself embroiled in a “culture war” over gay marriage where some opponents’ main line of argument is that sanctioning such marriages will harm children.249 At the same time, six states have actually made gay marriages legal and some constitutional scholars argue that it follows that other states will be required to give recognition to those marriages. Some even argue that the Court’s recent decision in Lawrence v. Texas renders discriminatory marriage laws unconstitutional.250 Whatever eventually happens on the gay marriage front, one thing is clear: the battle lines will be drawn using children as pawns in adults’ self-serving efforts to promote inward-looking agendas.251

But the culture wars extend to more than just marriage, and frequently invade the classroom as well. Consider the recent dispute over the Pledge of Allegiance where a father argued that recitation of the words “under God” in a public school violated the Establishment Clause.252 Rather than addressing his argument, the Court found that the father lacked standing to pursue the claim as a matter of family law.253 However, not all liberal democracies take such a parent-centered view of childrearing. The U.S.’s neighbor to the north, Canada, is one such example that will provide us with a comparison.

It will be my contention in what follows, that whatever the virtues of family autonomy, a strong form of parental rights, such as exists in the United States, is inconsistent with protecting the liberty of future generations. I will proceed by

248 Cf. Anne C. Dailey, Developing Citizens, 91 IOWA L. REV. 431, 435 (2006) (arguing that we need “to undertake a close empirical examination of the family’s contribution to children’s development as citizens . . . .”). I sympathize with Dailey’s project so long as the social science findings are but one aspect of our evaluation of citizenship preparation.

249 See, e.g., ProtectMarriage.com, Yes on 8 TV Ad: It’s Already Happened, available at http://www.youtube.com/watch?v=0PjgcqFYP4 (last visited Dec. 5, 2009) (arguing that gay marriage will be taught in public schools if it is legalized).


251 See Nancy D. Polikoff, For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark, 8 N.Y. CITY L. REV. 573 passim (2005) (critiquing both opponents and proponents of marriage equality for using child-welfare arguments instead of arguments based on equality and overall social welfare).


253 Id. at 17-18.
setting out some court decisions that illustrate the dangers to liberalism posed by excessive deference to parental choices. After a critique of those decisions, I will turn to various theories of liberty and freedom, namely those of Hobbes and Locke, to get a sense of the foundations of modern statehood and some of the tensions inherent in liberal polities. Then I will return to the cases initially presented and apply the foundational frameworks to their facts to demonstrate how more thoughtful solutions might have been achieved. Simply put, I hope to show that assertions of parental rights have the potential to negatively impact a liberal polity by disrupting the training ground of the concerned child—and future citizen—thereby undermining the shared values of the community.

B. Case Studies in Conflict: (Religious) Parents against the State

The following examples all have the common theme of parents claiming that some inviolable liberty of theirs, as parents with rights over their children, has been breached. The parents did not win every case, but the claims presented show how strongly the culture of rights has extended to the parent-child relationship. As we analyze the facts of the cases presented below, we should keep in mind several key questions that will help to guide our later inquiries into the application of political theory. First, what was the nature of the decision made on behalf of the children involved in the dispute? By clarifying the nature of the decision, we can better assess to what extent the case bears on liberal ideals. Cases whose nature affects how a child acquires ideas seem to strike at the heart of the maintenance of a liberal society. Whereas cases that concerned with ordinary child custody disputes might cause us less concern where no larger issue is involved. Second, who made the decision, and who was contending for the competing right to decide otherwise? We are interested in the child’s decision-maker primarily to recognize a parent-state conflict when we see one. Once it is clear who that party is, then we can make more use of the answer to our last query, what was the basis for the decision actually made, and what is the basis for the competing decision of the complaining party? Fundamentally, we want to know if the basis of the decision was a liberal one. Suppose we have a case that concerns what new ideas a child is to learn. Two possibilities might present themselves in the form of a conflict: one party wants to restrict the child’s knowledge base, while the other is fighting for exposure. If the state is involved, and it considers itself a liberal state, then almost certainly it will be on the side of more, not less, idea exposure. As I will argue below, there can be no legitimate liberal perspective that urges limited exposure under the guise of parental rights.

The first case we will consider is Mozert v. Hawkins County Board of Education,254 decided by the United States Court of Appeals for the Sixth Circuit in 1987. The case caused quite a stir in the legal journals shortly after it was

254 Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
handed down.\textsuperscript{255} In \textit{Mozert}, a group of “born again Christian” parents sued the Tennessee school district where their children were enrolled because they objected to the mandatory Holt reader series utilized in classrooms district-wide.\textsuperscript{256} The parents felt the children’s exposure to the readers violated their (the parents’ and the students’) free exercise rights protected by the First Amendment. A unanimous panel of the Sixth Circuit rejected the plaintiff-parents’ claims, but the extreme nature of those claims is what calls our attention to the case.

The religious parents specifically objected to stories in the readers that they felt portrayed “evolution, and ‘secular humanism’ . . . [as well] as ‘futuristic supernaturalism,’ pacifism, magic and false views of death.”\textsuperscript{257} Assurances from the school district that the children were not required or taught to subscribe to any particular belief did not satisfy the parents.\textsuperscript{258} Even with a teacher “not[ing] on the student worksheets that the student was not required to believe the stories” was not enough for these plaintiffs.\textsuperscript{259} Instead, plaintiff parents “objected to passages . . . that contradict[ed] the plaintiff’s religious views without a statement that the other views are incorrect and that the plaintiffs’ views are the correct ones.”\textsuperscript{260} As one parent testified:

it would be acceptable for the schools to teach her children about other philosophies and religions, but if the practices of other religions were described in detail, or if the philosophy was “profound” in that it expressed a world view that deeply undermined her religious beliefs, then her children “would have to be instructed to [the] error [of the other philosophy].”\textsuperscript{261}

The nature of the decision in the \textit{Mozert} case regards the range of ideas thought necessary by the community to communicate to its young through the public schools. Simply put, the heart of this case was exposure to ideas, some of which the parents found objectionable. If we look at the claims more closely, however, we can also detect a desire by the complainants for the state to reaffirm their view of the world. In the testimony quoted above, one parent explicitly

\begin{itemize}
\item \textsuperscript{256} \textit{Mozert}, 827 F.2d at 1060.
\item \textsuperscript{257} \textit{Id.} at 1062.
\item \textsuperscript{258} \textit{Id.} at 1060.
\item \textsuperscript{259} \textit{Id.}
\item \textsuperscript{260} \textit{Id.} at 1062.
\item \textsuperscript{261} \textit{Id.} at 1064.
\end{itemize}
demanded that the school pass judgment on all philosophies, and affirm only hers. Thus, the plaintiffs in Mozert were asking that their children not be permitted to form any critical faculties that might undermine the parents’ religious views.

The competing decision-makers here were the elected school board and the complaining parents. The school board had decided upon a certain curriculum that required exposure to a range of existing ideas. The parents wanted the children to read less provocative material. The competing bases of the decision-makers are the more interesting questions in this case. The school board presumably based its initial decision on adoption of the Holt reading series on the quality of the books to promoting reading skills to the youngsters in its charge. There was no evidence, not even a suggestion from the plaintiffs, that the decision was based on hostility to religious groups, nor was there evidence that the board knew in advance that some religious peoples would be offended by the contents. The apparent basis of the parents’ objections was a concern for their children’s spiritual well being. Because of the religious views of the parents, they felt that unless their views were reinforced and unchallenged in the schools, then permitting their children to read to the textbooks undermined their own religious rights. We will analyze the implications of these circumstances below.

The other case we will consider involving a dispute over the role of religion in childrearing is Young v. Young, decided by the Supreme Court of Canada. The question in Young was whether a divorced father, who did not have custody but only visitation rights, could be required by court order not to discuss his religion with his children because it was not in their best interest. The father had recently converted to the Jehovah’s Witness religion, and that apparently was one of the main reasons for the divorce from his wife. In making the order providing for visitation and access to his children, the trial court added the following conditions on the father: he could not discuss his religion with his children nor take them to religious activities without the consent of their mother, he could not prevent blood transfusions should the need arise, and he could not make disparaging remarks about the mother’s religious beliefs or lack thereof. The father challenged the access order as a violation of his right to freedom of religion, thought, and association under the Canadian Charter of Rights and Freedoms.

The Canadian Supreme Court held that the statutory basis of the trial court’s decision—the best interest of the child—did not violate the father’s Charter

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262 See id. at 1060 (explaining that Hawkins County schools taught “critical reading” designed to ensure that children become “effective participants in modern society.”).
263 See id. at 1059–60 (describing the school district’s reading program).
264 Id. at 1060.
265 Young v. Young, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117 (Can.) [for sake of convenience, future references will be to paragraph numbers].
266 Id. at ¶ 1.
267 Id. at ¶ 3.
268 Id. at ¶ 5.
269 Id. at ¶ 9.
rights. 270 “The reason is that the guarantees of religious freedom and expressive freedom in the Charter do not protect conduct which violates the best interest of the child test,” the Court explained. 271 The Court further elucidated why a parent’s religious claim could not trump the best interest standard: “The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour [sic] of the exercise of the alleged parental right, but in favour [sic] of the interests of the child.” 272 This analysis, however, also led to a reversal of the access order because it vested too much of a parental right in the mother to decide what ideas her children were exposed to. In reversing the order, the majority explained:

The trial judge’s undue emphasis on the “rights” of the custodial parent, coupled with her failure to consider the benefits to be gained from unrestricted contact with the access parent or whether those benefits were offset by a greater risk of harm to the children, may have clouded her appreciation of what was in their best interests. 273

The nature of the decision in Young was idea exposure, just as in the Mozert case described above. The fact that the contested ideas here were those of a father and those in Mozert were contained in a school textbook is of no consequence to the nature of the childrearing decision. The competing decision-makers in this case were the mother, the father, and the courts. The mother desired a veto over what ideas the children’s father could explore with them. The father wanted to discuss his beliefs and question his children about religion. The Supreme Court, however, held that it would decide what ideas were and were not in the children’s best interest, with both parents’ preference only of secondary concern. 274 The bases of the various decisions were all quite different. The father certainly wanted to provide his children spiritual guidance, but he also was concerned with his own exercise of religion, which involved spreading his beliefs to others. 275 The mother expressed concern that her children suffered stress at having to listen to their father’s religious messages, but because this was part of a divorce proceeding, there was some vengeance in her decision as well, especially since the religious issue was a cause of the divorce. 276 The Court’s basis for its decision was the statutorily required “best interest of the child” standard. That basis was taken quite seriously by the Court and applied as objectively as possible.

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270 Id. at ¶ 30.
271 Id. at ¶ 28.
272 Id. at ¶ 33.
273 Id. at ¶ 45.
274 Id. ¶ 48 (noting that “the notions of custody and access unite in a common purpose of promoting the child’s best interests” and thus neither the custodial nor non-custodial parent’s right was paramount).
275 Id. ¶ 257 (describing children’s reactions to their father’s proselytizing).
276 Id. ¶ 96 (explaining that the husband had been involved in the Jehovah’s Witness faith for two years without telling his wife).
Mozert and Young both provide examples of parental claims of the right to control the ideas exposed to their children. When we return to consider the consequences of such claims of right, we will want to remember what position the children would have been in had their parents’ claims succeeded.

C. The Problems Raised by Parental Rights

In this section, I will briefly sketch out some problems I see caused by claims of parental rights. Let me begin by taking the abstract claim that there is a moral right conferred by natural parenthood that the state is required to respect by not infringing too deeply into the childrearing realm. The most basic problem this claim presents is that it ignores the fact that the child will one day be an independent, reasoning being, who will have to interact with a diverse community. Allowing too great an amount of unrestricted liberty in the parents has the tendency to isolate the child from points of view due to parental parochialism. It might seem as though I am suggesting that recognizing the state’s power to act as parens patriae will result in a greater respect for pluralism and that this is a good thing. On that point, however, my position is agnostic. Not only does excessive deference to parental rights result in limited idea exposure for the children, it also exacerbates the number of different points of view within a society because of the privatization of families. As a result of family privacy, we are left with an increase in parochialism and an increase in diversity of views—a sure recipe for social, cultural, and political strife as children become full citizens, expected to interact with others to govern a society foreign to them because of their narrow upbringing.

Consider the Mozert case again. Admittedly, this case is the easiest to criticize because the claims made by the religious parents were so extreme and troubling to those who believe in the centrality of a humanistic education for civic success. Perhaps the easiest way of explaining the problems with the plaintiffs’ views is to consider the arguments of an academic defender of the parents. Nomi Maya Stolzenberg claimed that there was a paradox in the idea of a liberal education that did not respect the values of fundamentalist Christians, who find the liberal values of “tolerance and evenhandedness” offensive. She asserted that exposing the children to a diversity of viewpoints was interference per se with the free exercise of the parents’ religion. I have no difficulty conceding the point that many religious parents do indeed feel that in practicing their religion they must transfer their beliefs onto their children. What I object to, however, is the assertion that such control over a third-party, even a child, is in any way consistent with liberal individualism. In other words, molding a child’s plastic mind to unquestioningly accepting a particular worldview seems to be the farthest thing from liberal education as possible.

Stolzenberg tries to play the role of liberal sympathizer with the evangelical parents. A better description of her endeavor might be that of an anthropologist, objectively observing a lost tribal culture, doing her best to make non-judgmental

Stolzenberg, supra note 255, at 591.
assessments. This leads her to make the following claim regarding the appellate court’s failure to see things her way:

Chief Judge Lively's incomprehension reflects no purely personal intellectual failing, however. The fundamentalists’ argument against exposure is truly difficult for one raised in the liberal tradition to grasp, because it relies on a dizzying subversion of the contrast between the objective and inculcative methods of education. The contrast is denied in the plaintiffs’ charge that exposure has an indoctrinating effect, and, again, in the proposition that the legitimate alternative to the state inculcating values . . . is not mere exposure but rather “opting out” to allow the parents to inculcate the appropriate values. Such a viewpoint challenges the conventional wisdom that critical reflection, rational thought, and individual choice are the antithesis of, and the best safeguards against, indoctrination.278

At this point, one wishes Stolzenberg had applied some critical reflection and rational thought of her own. The fact that we are dealing with a child—a future citizen—seems to have been lost on her entirely. No liberal would deny anyone from holding whatever view he desires, even if that includes turning his back on rationality and adopting the Bible as his literal truth. What a liberal can, and it seems to me must, deny is that an illiberal parent can retard a child’s intellectual growth in the face of opposition from a liberal democratic state.279

Stolzenberg tries to acknowledge the existence of the child by asserting that the real problem is locating the locus of child belonging, whether in the state, the parents, or both. She claims the primary locus of belonging is with the parents, and thus they should have the right to rear their children through indoctrination. This tension, however, is more imaginary that real; it is entirely irrelevant to the intellectual development of the child. Regardless of family or national origin, there is a transcendent characteristic of children, namely, they are all capable of acquiring knowledge. Moreover, all children will one day cease being children and

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278 Id. at 613.

279 Apparently, Stolzenberg would also disagree with my characterization of liberalism. In a rather non-historical essay she claims that “Fundamentalism . . . is not the enemy of reason, but rather its truest defender. . . . By the same token, it is not antagonistic to liberalism; it is rather liberalism’s truest defender.” Nomi Maya Stolzenberg, Liberalism in a Romantic State, 5 LAW, CULTURE & HUMAN. 194, 210 (2009). Although I do not claim to speak for “true” liberalism, I can say, on behalf of historical liberalism, that Stolzenberg’s list of “most exponents of liberal political philosophy” omits an entire strain of negative liberty theorists beginning with Hobbes, continuing with Bentham and Mill, and, in the 20th century, Isaiah Berlin. Id. at 197. But see infra Section V.A & note 295 (discussing Hobbes as a liberal theorist). I do think that Stolzenberg accurately portrays a tension between negative and positive conceptions of liberty, and between Lockean liberalism and what she calls “romantic” liberalism. I simply object to the historical claim, which she then uses to make the valuation about “true” liberalism.
will “belong” not to their parents, but to their community. It is quite ridiculous to worry that if the children of evangelical parents are exposed to profound ideas, then the survival of evangelical religion is under threat. It is feared by many of these religious sects that if their children are provided with a more philosophical education they will turn their backs on their faith, thus diminishing its numbers. But we can trace historically the rise of particular religions, and know from that that all religions had their origins in the free choice of the original founders. The fact that a smaller number of educated citizens would choose to follow the fundamentalist religions would not be the result of liberalism per se, but the result of education. It is an odd type of liberal who advocates keeping a segment of its society mentally enslaved from exercising the free and rational choice that becomes available to one educated in a liberal polity.

IV. THEORIES OF LIBERTY AND THE PATERNAL ROLE

Now we will consider various theories of liberty within an organized state with the goal of understanding how to best conceive the parental role consistent with a liberal polity. While the main concern here is to explore to what extent a denial of parental rights is inconsistent with the liberty of parents qua parents, other values must also be kept in mind as we proceed. In addition to parents’ liberty, we will also consider the eventual liberty of the children to lead autonomous lives as adults, the implications for a community dedicated to pluralism, and the role of democracy in preparing children for civic life. As

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280 See Stephen L. Carter, Religious Freedom as if Family Matters, 78 U. DET. MERCY L. REV. 1, 12 (2000) (arguing that a decision like Mozert allows the state “to decide which religions should be allowed to survive and in what forms.”).

281 In a fascinating article about the tension between freedom of contract and the “environmental model of child development” in 19th century England, Sarah Abramowicz discusses how “Religion, in particular, caused judges to struggle most directly with their recognition that adults are indelibly formed by childhood experiences they did not choose.” Sarah Abramowicz, Childhood and the Limits of Contract, 21 YALE J.L. & HUMAN. 37, 85 (2009). Abramowicz suggests that judges rejected the idea that children could choose religion after the age of majority, recognizing that it had to be implanted “before the child developed the capacity for rational thought.” Id. But, of course, the judges never explained how religion came about in the first place, if not from the rational thought of someone, at some earlier point in time.

282 See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 156 (Harvard Univ. Press 2003). As Judge Posner correctly notes, “in contemporary American political discourse ‘democracy’ is an all-purpose term of approbation, virtually empty of meaning.” Id. Posner distinguishes what he calls “Concept 1” and “Concept 2” democracy, the former being “[i]dealistic, [d]eliberative, and Deweyan,” the latter being “[e]lite, [p]ragmatic, and Schumpeterian.” Id. at 131, 143. When I say that we should worry about preparing children for democracy, I mean something like aspiring to the unattainable Millian and Dewyean type of democracy, while making full use of the more elitist pragmatic type that Posner thinks actually describes American democracy in action. Thus we would teach a child to spread Mill’s harm principle by example and through discussion, but also teach him that
Francis Edward Devine has noted, the theories of Hobbes and Locke form the basis for competing ideologies of “absolute democracy” and “indefeasible right” in modern society. It is the goal here to explore how parental power fits into these foundational philosophies. Even if one is skeptical about Devine’s thesis, Hobbes and Locke both provide sophisticated theories of liberty that we can use to evaluate our two case studies of Mozert and Young. Moreover, it should not be surprising that both 17th century philosophers had something to say about the basis of the family structure, especially since they were abstractly interested in general power structures and forms of governance. Thus the metaphor of the family as a miniature government serves their purposes well in analyzing notions of sovereignty and subjection. Perhaps, that very fact should caution us against taking their writings on family structures too seriously as theories of domestic relations. I will argue, however, that their writings are important, and should be taken seriously, as statements about what is required of subjects or citizens in securing their liberty, and a fortiori what every child must learn to be a successful and productive member of his political community.

A. Hobbes on Liberty

In understanding Hobbes’s *Leviathan*, it is important to appreciate his concept of nature and the natural state of man as opposed the artificial state of man, which is carried out under the auspices of the civil state. In Hobbes’s state of nature, everybody enjoys complete liberty, but this includes the liberty to interfere with others’ peaceful existence. As such, man is in constant competition and conflict, a perpetual state of war. Through the use of reason, man comes to realize that peace and security and self-preservation all justify the imposition of sovereign rule by a single artificial man—the state. Hence, those subsequently subject to the state are constrained by artificial chains called laws. The laws are entirely the creation of the sovereign without question. It is important to emphasize, however, that the artificial shackles of the laws do not infringe man’s natural liberty. Hobbes understands the agreement to enter into civil society to be the result of conscious deliberation, and that one is always at liberty not to follow the laws of society.

recourse to the courts or to special interest groups might be a more realistic way of achieving tolerance.


284 See generally Abramowicz, *supra* note 281, passim (discussing the importance of John Locke, John Stuart Mill, and Henry Sumner Maine throughout). As Abramowicz explains, liberal theory was central to modern Anglo-American conceptions of the parent-child relationship. *Id.* at 40-47.


286 For further refinement on Hobbes’s distinction between “the natural” and “the artificial,” see QUENTIN SKINNER, *Hobbes on the Proper Signification of Liberty*, in 3
Of course, the result of one’s failure to obey may be physical confinement or death, but it is a free choice nonetheless—a Hobbesian choice.

This same sort of reasoning is extended to the domestic realm when Hobbes discusses the rule of parents over children as “[d]ominion by [g]eneration.”\textsuperscript{287} What Hobbes concludes is that such dominion is acquired in the same way a people acquire a government, through rational choice. As Hobbes explains, this paternal dominion, “is not so derived from the Generation, as if therefore the Parent had Dominion over his Child because he begat him; but from the Childs [sic] Consent, either expresse, [sic] or by other sufficient arguments declared.”\textsuperscript{288} We will turn to the “other sufficient arguments” shortly, but we should note that Hobbes also seems to be acknowledging that a child of vocalizing age is not only capable of expressing consent to governance by his parents, but that such words of an infant are to have some moral effect. This must then presume that the child is aware, that without such guardianship, he is likely to face the perils of the state of nature. Perhaps the ability to vocalize is not even necessary to imply consent, and the child’s clinging to a parent would suffice for acceptance of his subjection.

Absent the ability to express consent, we turn to other sufficient arguments that justify parental dominion over children. As a preliminary matter, it must be settled that only one parent can have true dominion over his children, “for no man can obey two Masters.”\textsuperscript{289} Here, Hobbes seems to be reinforcing the point that sovereignty must be absolute and indivisible. But, it should be noted that such a definition of sovereignty is entirely for the benefit of the subject, so that he knows exactly of what his artificial duties consist. Once it is established that a child can have only one dominant parent, we learn that the only reason it is usually the father by law, is because men have been the ones who have established the artificial states and thus the artificial laws. Not so in nature.

“In the condition of meer [sic] Nature”\textsuperscript{290} it is the mother who is dominant. Hobbes explains this role reversal: “seeing the Infant is first in the power of the Mother, so as she may either nourish, or expose it; if she nourish it, it oweth its life to the Mother; and is therefore obliged to obey her, rather than any other; and by consequence the Dominion over it is hers.”\textsuperscript{291} It thus follows that “if she expose it, and another find, and nourish it, the Dominion is in him that nourisheth it.”\textsuperscript{292} But surely it is the case, even in an artificial state of government, that the mother almost always nourishes her children, regardless of an artificial law providing for

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\textsuperscript{287} Hobbes, supra note 285, at 139. For an interesting overview of Hobbes on domestic relations, see Peter O. King, Thomas Hobbes’s Children, in The Philosopher’s Child: Critical Essays in the Western Tradition 65-83 (Susan M. Turner & Gareth B. Matthews eds., 1998) [hereinafter The Philosopher’s Child].

\textsuperscript{288} Id.

\textsuperscript{289} Id.

\textsuperscript{290} Id. at 140.

\textsuperscript{291} Id.

\textsuperscript{292} Id.
the dominion in the father. Thus there must be something more than mere sustenance of life that leads to a dominant-subjective relationship. Hobbes has one final thought on this matter that might help to clarify this confusion. Regarding the child, he says, “it ought to obey him by whom it is preserved; because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him.” The key lies in unpacking what Hobbes means by preservation of life.

In one sense, of course, the child’s life is preserved when it receives nourishment from its mother. In another sense, a more removed sense, but also a higher sense, the artificial laws regarding domestic relations preserve the child. In other words, by law, the father is responsible for the maintenance of a child born into wedlock, and also for the maintenance of his wife. In turn, the civil law provides for the peaceful coexistence of various families in society, so that no man may lawfully take from another that property necessary to maintain his wife and children. Ultimately, the child owes its preservation to one supreme sovereign lawgiver, who has made the laws that allow for its family’s peaceful existence. The hierarchy of subjection thus goes from child to mother to father to sovereign. “For he that hath Dominion over the person of a man, hath Dominion over all that is his; without which, Dominion were but a Title, without the effect.” For Hobbes, the sovereign has absolute dominion over the children of all its subjects; how it exercises that dominion is entirely the sovereign’s prerogative. Lest that sound ominously despotic, it must be emphasized that the sovereign retains this absolute power only so long as the subjects restrain their natural liberty because they calculate the advantages provided by subjection worthwhile. I suppose we could add that acceptance of the sovereign’s rule can be either express or implicit, such as in the subjects’ act of clinging to civilized society.

The final point we need to make about Hobbes’s theory of liberty returns us to the distinction between the artificial and the natural. Hobbes is generally regarded as the progenitor of the modern doctrine of negative liberty. He begins his chapter dedicated to the “[l]iberty of [s]ubjects” with a definition: “LIBERTY, or FREEDOME, [sic] signifieth (properly) the absence of Opposition . . . .” This idea of negative liberty is entirely centered on the individual, and only concerns itself with whether the person in question has been prevented from taking action by some particular impediment. To understand Hobbes, however, we must distinguish between natural liberty and artificial liberty, or the “liberty of subjects”; otherwise, we might fall into the trap of believing falsely that the creation of the state

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293 Id.
294 Id. at 141.
295 By “negative liberty” I mean to adopt the same notion developed by Bentham and then Berlin, that the greatest amount of artificial freedom (to use Hobbes’s term) is achieved by the absence of artificial law. To read more on the concept of “negative liberty,” see ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 118, 171-72 (Henry Hardy ed., Oxford Univ. Press 2002) (1958).
296 HOBBES, supra note 285, at 145.
somehow impinges our natural liberty. But as Hobbes explicitly tells us, “the Consent of a Subject to Soveraign [sic] Power” results in “no restriction at all, of his own former naturall [sic] Liberty . . . .”

Matthew Kramer has criticized this formulation of negative liberty as devoting too much attention to the freedom to do a particular act, and not enough attention to the result laws have on overall freedom. Take, for example, a law that forbade the beating of one’s children and provided for a year’s confinement if convicted of disobeying the law. Kramer understands Hobbes to be saying that regardless of the existence of the law, a man is free to beat his son because he is able and nothing is physically preventing him from doing so. Kramer then asks us to consider the consequences of this hypothetical child beater: he would be confined for a year and unfree to do a whole number of things he would otherwise have been free to do but for his violation of the law. Thus Kramer concludes, the Hobbesian view of freedom is short-sighted and ignores the long-term effects of liberty-restricting laws.

Kramer is correct, however, only in a very superficial sense. Hobbes would not deny that the liberty of subjects is curtailed by the existence of laws in society. So in this sense he is in agreement with Kramer that law itself is liberty-restricting. He goes so far as to say, “The Greatest Liberty of Subjects, dependeth on the Silence of the Law.” But Hobbes’s denial that natural liberty is restricted is really meant to emphasize the contractual nature of the sovereign-subject relationship. To understand why the restriction of artificial liberty is consistent with the exercise of natural liberty, we must carry our analysis out a little further.

Let us return to our law prohibiting child abuse. The subject of a sovereign who has enacted such a law is not at liberty to abuse his offspring. Under this regime, a parent may be at liberty to conduct himself any number of ways with regard to his children; so long as there is no law expressing what he must do or refrain from doing. Thus a subject parent potentially retains a great deal of sovereignty over his children, despite the explicit limitations. Contrast this, however, to a natural parent—a mother—who has absolute sovereignty over the infant she preserves by nourishing it. The natural parent is at liberty to strike the child as much as she pleases. It should be obvious that the subject parent and natural parent can be one in the same person, differing only on which state he chooses to place himself in. If this parent obeys the commands of the sovereign, then he retains all the advantages of civil society; however, should the parent freely choose to disobey the sovereign, and abuse his child, then he has returned himself to a state of nature and potentially put himself at war with others. In this case the main “other” he has to be concerned with is the artificial man, known as the civil

297 Id. at 151.
298 See MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 38–40 (Oxford Univ. Press 2003). Kramer explains that “overall freedom” is “reduced pro tanto by a well-enforced legal directive that proscribes the doing of A,” where, in my example above, A was child abuse. Id. at 40.
299 HOBBS, supra note 285, at 152.
state, who will exercise its natural liberty to invade and confine the natural liberty of the parent who returned himself to nature. It is, of course, possible that this natural parent may evade and outsmart the artificial man by avoiding capture, again, exercising his natural liberty all the meanwhile.

In a sense, all I have done here is detail the choice every individual must make for himself: obey the laws of the artificial state, or exercise one’s natural liberty to the contrary and accept the consequences. The main questions left unanswered for our purpose is where that leaves children in the grand scheme of things. We have established that a child is no less a subject of the sovereign than its parents because all owe their preservation to the state. Within civil society, Hobbes also seems to be implying that there is no special relationship between a parent and her child, as would be the case in nature. Take, for example, the rules of any modern sovereign where a parent has no option to expose her child, and thus really has no life or death power over her child once it is born, as she would in the state of nature. From every subject’s earliest and most vulnerable moments on earth, it owes its life to the sovereign’s protection. The fact that most sovereigns require a child’s parents to nourish and maintain it is really of no significance to the child. The child would be as well preserved if the sovereign took it at the moment of birth and distributed it to another person to maintain or kept it in a state-run facility to be looked after by common nurses. The point here is that any relationship created by nature between parent and child is inoperative in the artificial state of civil society.

Hobbes is notably quiet on anything further in which we might be interested; such as, what makes for a good subject or what sort of sovereign is most compatible with expansive liberty of the subject. For these answers we will have to turn to others.

B. Parental Rights in Hobbes’s State of Nature

Let us now consider how our case studies would play out in Hobbes’s state of nature. Recall that Hobbes understood sovereignty over children to reside in whoever had a life and death power over them, but preserved their lives nonetheless. Usually it was the mother who was sovereign over her children because she fed and cared for them. In the state of nature, the mothers could instruct their children as to any philosophy or religion they chose and could keep their children from visiting with anyone to whom they objected. The problem, of course, is that anyone—a cult leader, a grandparent, a disgruntled father—might exercise his liberty to take a child by force, feed and preserve it, and demand obedience from it. In other words, anarchy would ensue.

C. Reconciling Parental Rights with a Hobbesian Peace

Because every subject of a Hobbesian sovereign owes absolute obedience to the laws, any right of parents over their offspring would only exist within the interstices of the existing sovereign commands. In the Mozert case, the parents
would not have been heard to complain that a governmental decision regarding the
school curriculum violated some right of theirs. The only right the parents could
have exercised would have been in the area where the law was silent. In that case,
the only option would have been for the parents to send their children to a private
school of their choosing, or to home school their children. All things considered,
the liberty of the Mozert parents was actually quite great. The sovereign in the
shape of the state of Tennessee did not exercise the limit of its authority over the
education and rearing of children. The parents were not prohibited from
conducting religious teachings at home, including instructing their offspring as to
the error of the teaching of the state schools if that is what they desired. The
parents were not even prevented from keeping their children out of the state
schools altogether. They had the right to send their children to a private religious
school, where the truth of scripture was taught. If we are counting the number of
freedoms given to parents in the state of Tennessee, even by Kramer’s tallying they
have to be quite substantial.

Despite the fact that the artificial (legal) liberties of the parents were great in
Mozert, the sovereign command was the only voice of liberalism in the dispute.
The only reason the parents had the freedom they did was because a state
committed to liberty permitted it. If liberty is valued, and its continuance as a
political and moral principle is desired, then the sovereign must be permitted to
carry out its prerogative that its future citizens (and futures sovereigns where a
democracy is concerned) are reared in a liberal tradition. It would be a perverse
result if parents were able to thwart future liberty by the exercise of their current
liberty.

In Young, it appears as though a Hobbesian court was at work. The Supreme
Court of Canada refused to acknowledge either parent in the dispute to have what
amounted to sovereignty over the children. Instead, the Court reserved the absolute
sovereignty of the state over its own children. Such a strong and unequivocal
pronouncement indicates that liberty is quite secure in Canada for future
generations to enjoy.

D. Locke on Liberty

Locke’s state of nature shares with Hobbes’s a state of complete liberty or
perfect freedom. Their notions of liberty, however, differ to some extent; Locke
places more restrictions on what it means to be free:

For Liberty is to be free from restraint and violence from others
which cannot be, where there is no Law: But Freedom is not, as we are
told, A Liberty for every Man to do what he lists: (For who could be free,
when every other Man’s Humour might domineer over him?). 300

300 JOHN LOCKE, SECOND TREATISE, in TWO TREATISES OF GOVERNMENT § 57, ll. 20–
24, at 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter SECOND
TREATISE].
Men form civil society so that violence might be restrained and individuals’ natural liberty can flourish. Locke is similar to Hobbes only to the extent that they both believed civil society was instituted to prevent war among persons, which would otherwise occur without sovereign pronouncements regulating men’s actions. The main disagreement occurs over the extent of sovereign authority. For Hobbes the sovereign’s power was absolute, whereas for Locke the power of government only extends to whatever is necessary to guard natural liberty from oppression. Locke takes a very non-rational turn when he speaks of natural liberty. In a sense, Locke tries to mix Hobbes’s natural and artificial states by having the latter protect the supposed benefits of the former. Let us see how a Lockean interpretation of paternal power fits into civil society and whether retaining the notion of natural liberty within state government poses a problem for such analysis.

According to Locke, “all Parents were, by the Law of Nature, under an obligation to preserve, nourish, and educate the Children, they had begotten, not as their own Workmanship, but the Workmanship of their own Maker, the Almighty, to whom they were to be accountable for them.” Nature dictates these parental obligations because children, unlike adults, are not yet subject to the Law of Reason. Locke explains: “For Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law.” Since children are not yet free and intelligent agents, they must receive direction as to what is in their own interest. “To inform the Mind, and govern the Actions of their yet ignorant Nonage, till Reason shall take its place, and ease them of that Trouble, is what the Children want, and the Parents are bound to.” However, once children become subjects to the law of reason, the parental authority ceases. The natural duty to preserve offspring “will scarce amount to an instance or proof of Parents Regal Authority.” “And thus we see how natural Freedom and Subjection to Parents may consist together, and are both founded on the same Principle.”

In discussing the parent-child relationship, Locke refers to two sets of laws—the Law of Nature and the Law of Reason. As we saw, he says parents are under a natural duty to care for their children, but only until they attain the age of

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301 See id. § 138, at 360–61 (explaining that government could not take property from any individual “without his own consent”). For Locke, “property” meant people’s “Lives, Liberties, and Estates.” Id. § 123, l. 16, at 350.

302 Id. § 56, ll. 10–13, at 305. For analyses of Locke’s attitude toward children, see David Archard, John Locke’s Children, in THE PHILOSOPHER’S CHILD, supra note 287, at 85; Margaret J. M. Ezell, John Locke’s Images of Childhood, 17 EIGHTEENTH-CENTURY STUD. 139, passim (1983).

303 SECOND TREATISE, supra note 300, § 57, ll. 10–13, at 305.

304 Id. § 58, ll. 3–6, at 306.

305 Id. § 60, ll. 19–20, at 308.

306 Id. § 61, ll. 3–5, at 308.

307 See id. §§ 56–57, at 305–06.
This leads to the question what is the Law of Nature and how do parents know they are bound by it? Recall Hobbes’s state of nature had no laws, only perfect liberty, and that was the whole problem. For Hobbes, it was reason that led men to prefer and form civil society. But for Locke, the process is reversed; it is only through reason that man can discover the law of nature. The best sources for definitions of these terms are Locke’s earlier essays on the law of nature. There he specifically tells us that lex naturae can be described as “ordinatio voluntatis divinae lumine naturae cognoscibilis.” And the lumen he has in mind is reason.

Lex naturae is know to us “lumine quod natura nobis insitum est.” Locke deliberately rejects a rationalist definition of reason, in favor of one that is consistent with acceptance of natural law: “Per rationem autem hic non intelligendum puto illam intellectus facultatem quae discursus format et argumenta deducit, sed certa quaedam practica principia e quibus emanant omnium virtutum fontes et quicquid necessarium sit ad mores bene effermandos.” Thus, a child attains the age of reason, not when he can argue like a philosopher or perform mathematical calculations, but when he can distinguish virtue from vice, good morals from ill.

It is important to remember how Locke’s discussion is also a metaphor for the relation of the sovereign to its subjects. Locke wants us to keep in mind that natural freedom and subjection to the sovereign are consistent, because they are founded on the same principle of protection, not restraint, of liberty. The same way children need guidance until they develop their rational faculties, subjects need guidance in the exercise of their own freedom. Moreover, in the same way that a parent’s authority is limited to preparing the child for the “general Good,” the sovereign’s power is also limited to promoting the general good. As Locke reminds us, the power exercised by parents, “to speak properly … is rather the Priviledge [sic] of Children, and Duty of Parents, than any Prerogative of Paternal Power.” To thus speak properly of the state’s power, we would have to conclude that it is rather the privilege of its citizens, and duty of the state, than any prerogative of the sovereign.

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308 See id. § 55, at 304.
309 See supra text accompanying notes 285–86.
310 See infra note 312.
311 JOHN LOCKE, ESSAYS ON THE LAWS OF NATURE AND ASSOCIATED WRITINGS 110 (W. von Leyden ed., Oxford Univ. Press 1954) (1664). The law of nature is “an ordinance of divine will known by the light of nature.”
312 Id. The law of nature is known to us “by the light that nature has instilled in us.”
313 Id. “However, by reason, I think is not meant that made intelligible through the intellectual faculty which forms discursions and deduces arguments, but that practical principle out of which the founts of all virtue emanate and whatever is necessary for forming good morals.”
314 SECOND TREATISE, supra note 300, § 67, ll. 11–13, at 312.
E. Parental Rights in Locke’s State of Nature

As we learned above, Locke considered parental power more appropriately termed parental duties imposed by the law of nature. Moreover, the law of nature required that parents exercise no more power than is necessary to allow their offspring to develop their own reason, so that they might then know the laws of nature for themselves. Thus, unlike in Hobbes’s state of nature, we do not inquire who the child’s sovereign is, and then end our inquiry. Instead, we must ask whether the claimed parental right is in accord with a parent’s natural duty to his children.

Thus in Mozert we must ask whether withholding exposure to the fictional stories in the reading textbook accorded with the natural duty of parents to prepare their children to exercise liberty. The answer must be that it did not; that is, the religious parents were not helping their children to develop their own reason, but were in fact attempting to stunt it. We do not even need to know what the laws of the state of Tennessee were regarding education, because even if they were silent about how a parent was to educate his child, Locke would say that natural law requires that they do not hamper the infant’s development. The only sort of negative duty a parent could have in the educational realm would be to shield his children from patently harmful information that warped his moral development, for example, teaching that promoted cruelty to other humans would have to been shunted by a dutiful parent.

Young is more difficult to analyze because there was no obvious interference with moral development by either competing parent. Certainly, the father thought his children needed religion to be moral adults, but there is no suggestion that either childrearing method would have been positively detrimental to the children’s development in society. By employing the “best interest of the child” test, it seems the Court struck a good Lockean balance. Locke is not interested in any parental or sovereign “right.” And indeed, the Court openly disavowed any parental right. Moreover, the “best interest” standard can fairly be equated with the parental duty to lead his children to reason. While it is true that earlier I counted the Court’s action as one of a Hobbesian sovereign, I do not think the two interpretations are mutually exclusive. For we can understand the Canadian Supreme Court to have exercised a sovereign duty, rather than a right in casting the decision it did.

By making use of the frameworks of liberty set out by Hobbes and Locke, we can better analyze contemporary parent-state conflicts. Hobbes can be deployed to assure that illiberal decisions are not made on behalf of a child and against the interest of the liberal nation to which he belongs. Locke can be called into action to assure that parents do not prevent their children from acquiring right reason, even in the absence of contrary sovereign declarations. As we saw in the realms of education and parental visitation, parents can and do ignore the interests of their children in favor of their own supposed claim right to their offspring. In their own distinct ways, Hobbesian and Lockean analyses assure that “parental rights” play no part in the decisional outcome.
V. LOOKING AHEAD

A. Grandparent Visitation—The New Menace to Constitutional Liberty?

In 2000, the Supreme Court heard the case of Troxel v. Granville, in which a single mother challenged the constitutionality of a Washington law that permitted her children’s paternal grandparents to petition a court for visitation rights over her objection. In a sign that the Court should not have taken the case in the first place, no majority was able to articulate a rationale for siding with Tommie Granville, the mother of the children involved, and upholding her challenge to the law. What resulted was an opinion by four members of the Court, led by Justice O’Connor, which expressed that since Granville was a fit parent, no court could constitutionally second guess her child-rearing decisions regarding with whom her children could visit. The plurality did not strike down the statute, but only held it unconstitutional as applied to Granville. Justices Souter and Thomas would each have affirmed the Supreme Court of Washington’s facial invalidation of the law. Justices Stevens, Scalia, and Kennedy, each filed very distinct dissenting opinions, further undermining any sense of coherence in this area of family constitutional law.

The state of Washington, along with forty-nine other states, provided for some form of grandparent visitation. Washington’s law that was challenged by Granville read as follows: “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” Based on those words, the Troxels, whose son and father of their grandchildren had committed suicide, petitioned the superior court for “two weekends of overnight visitation per month and two weeks of visitation each summer.” For her part, Granville was willing to concede one day of visitation per month. The superior court compromised and ordered “one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents’ birthdays.” But, according to Justice O’Connor, because this case involved “nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests,” the trial court’s application of the law

316 Justice O’Connor was joined in the plurality opinion by the Chief Justice and Justices Ginsburg and Breyer.
317 Id. at 75 (Souter, J., concurring in the judgment); id. at 80 (Thomas, J., concurring in the judgment).
318 Id. at 73 (citing statutes of all fifty states relating to grandparent visitation).
319 Id. at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).
320 Id.
321 Id. at 61.
322 Id. at 71.
violated Granville’s fundamental right to “the care, custody, and control” of her children.  

A democratic theory of child-rearing would of course disagree with Justice O’Connor’s new trio of parental rights—the 3-C’s (care, custody, and control). But more fundamentally, democratic theory as applied to this case requires that much more attention be paid to the Troxel children—little Isabelle and Natalie—and less to the disruption caused to Tommie Granville’s weekend or summer plans. As the plurality saw things, a superior court judge was no better qualified than Tommie Granville to make a “best interest” determination for the children, and when and if those two determinations diverge, then under the Washington law “the judge’s view necessarily prevails.” It was this sort of “mere disagreement” that had occurred in this case, concluded O’Connor. That may be, but there is every reason for the Court to permit the state of Washington, in its democratic capacity, to determine that it is in the best interest of its future citizens if they are exposed to a variety of people in their formative years. The people of Washington may very well have concluded that family isolation is not in keeping with its value system, and that children whose parents shield them from society at large have been deprived of a civic and social education. As Justice Stevens noted, “even a fit parent is capable of treating a child like a mere possession.” And in pointing out the plurality’s obsessive focus on the 3-C’s, Justice Stevens reminded us that “there is at minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.” I stress “at minimum” because only Justice Stevens planted the seeds for recognizing that Isabelle and Natalie Troxel are one day going to have to interact with more folks than just their mother, and that the society they enter should have an even stronger claim on their upbringing than Tommie Granville.

B. Evangelicals and Homosexuals—Agreeing on the Wrong Front

This case created strange bedfellows. On the side of Washington was a slough of state attorneys general—no surprise given that their states’ laws would be negatively impacted by an adverse decision. But, on the side of Tommie Granville were a motley crew of amici curiae. They ranged from groups like the American Civil Liberties Union and Lambda Legal Defense and Education Fund, to the Center for the Original Intent of the Constitution, the Christian Legal Society and the National Association of Evangelicals, and the Coalition for the Restoration of Parental Rights. Several themes running through the briefs of

323 Id. at 65, 71, 75.
324 Id. at 67.
325 Id. at 67–68.
326 Id. at 86 (Stevens, J., dissenting).
327 Id. (emphasis added).
328 Id. at 59 n.* (listing the state attorneys general who signed on to an amicus brief for Washington).
329 Id. (listing “amici curiae urging affirmance”).
Tommie Granville’s amici include the following claims: the special interests and peculiarities of adults should be permitted free range, the state is the enemy to family integrity, children are the property of their parents, and other members of society have no interests in how its future members are educated and socialized.330

Throughout the briefs is an intense sentiment for privatization of the family. Thus, it is common when referring to children that they are discussed as “mere possession[s]” and as “so much chattel.”331 In the proprietorian vein, the Christians criticize Washington for permitting an individual to claim a welfare interest in “someone else’s child.”332 And most colorfully, they claim that the indoctrination of children is “for many parents . . . their most lasting and important statement.”333 I suppose under that theory, far from an independent being, the child is a mere medium for the expression of the parent’s free speech rights—indeed the First Amendment is precisely what they cite as authority for such a claim.334 Surely the Court rejected this proposition in *Prince v. Massachusetts*, when it stated that “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.”335

In urging the Washington law struck down, the ACLU distinguished the visitation law from compulsory education laws by stating: “The state has no comparable interest in interfering with a fit parent’s decisions about what adults will have a familial relationship with her child, and what forms those relationships will take.”336 From this it follows that “the ‘best interest of the child’ standard will never give proper deference to the sanctity of the parent-child relationship and will always hold those seeking visitation to a lower threshold than is constitutionally permissible.”337 Indeed, once the 3-C’s are deemed fundamental, the best interest of the child necessarily takes a back seat to constitutional principle. Rather than concluding that the Washington law must fall, I would conclude that the 3-C’s are what should go. How can stubborn principle rationally be permitted to trump the best interest of any child and future citizen?

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330 See infra notes 331–44.
331 *Troxel*, 530 U.S. at 86, 89 (Stevens, J., dissenting).
333 *Id.* at 8.
334 *Id.* (“And this ‘speech,’ this ‘expressive association,’ is protected by the First Amendment.”). Putting quotation marks around “speech” to describe the rearing of children does not make the claim anymore palatable.
336 Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Washington in Support of Respondent at 18 n.15, *Troxel*, 530 U.S. 57 (No. 99-138). Later their brief claims that unlike compulsory vaccination laws, “the state simply has no interest of comparable weight in acting on behalf of a third party to veto a fit parent’s judgment concerning with whom her children should spend time.” *Id.* at 20.
337 *Id.* at 21 n.16.
Lambda Legal Defense took a similar tack in arguing that the state had little to no interest in children’s contacts with presumably anyone other than the one or two parents. They worried that under the Washington law, petitions would be brought by “persons with no unique relationship meriting the state’s interest.”

According to the brief, there are “few relationships that warrant the concern of the states.” Under this reasoning, there would be little to no room for the state to make a best interest determination contrary to that of the parents. One could imagine paranoid parents not letting their children out of the house, even home schooling them to keep them completely isolated from society. Yet, according to Lambda, “parents should not be inappropriately chilled in exercising their liberty interest in caring for and socializing their children.” It is unclear whether Lambda would add to that principle: “or not socializing them.” Clearly this is not a recipe for rearing future citizens of a democracy.

Being too much of a legal realist to accept the fact that both Lambda Legal—a gay and lesbian advocacy group—and the evangelical Christian groups—avowed opponents of gay and lesbian family formation and stability—share common legal goals, I am skeptical that either organization fully comprehended what was at stake in the *Troxel* case, or in the very concept of “family privacy.” To demonstrate just how far apart these organizations are, one need only examine their political statements and activities. The Christian Legal Society and the National Association of Evangelicals both openly proclaim opposition to marriage equality for same-sex couples. The Lambda Legal Marriage Project, on the other hand, “work[s] toward the goal of marriage equality,” and the ACLU has filed a number of briefs on behalf of gay couples seeking to marry in various states. Clearly, the right to marry implicates issues of child-rearing, which must now implicate the 3-
C’s of parental rights. So, just what are the practical implications of family privacy for evangelical Christians and gays and lesbians?

The clash between gay rights groups and evangelical Christians came to a head in the 2008 case of *Parker v. Hurley*—a case in which the disputed meaning of *Troxel* was front and center. The facts of *Parker* were similar to those of *Mozert*, except that the controversial books in question did not teach evolution or secular humanism, but instead taught about families with same-sex parents. The plaintiffs, evangelical parents, claimed that by not allowing them to opt their children out of such lessons, the Massachusetts school district was engaged in “an intentional attempt to wipe [their] faith away altogether.” The plaintiff-parents heavily relied on *Troxel*, arguing, “*Troxel* is the Supreme Court’s most recent ‘parental rights’ decision. Therein, the Court reiterated that parents have a fundamental liberty interest to ‘direct the upbringing and education of children under their control.’ Moreover, because this right is vested in the Due Process Clause of the Fourteenth Amendment, it ‘provides heightened protection against government interference.’” Indeed, this is a fair reading of the *Troxel* plurality. But where did this leave the groups who wanted to do nothing more than teach tolerance in the public schools by normalizing the existence of gay and lesbian families? They were left arguing that *Troxel* really did not mean all that.

The ACLU asserted, “the proposition that mere exposure of students to ideas offensive to a parent for religious or moral reasons does not violate the constitutional rights of parental control over the upbringing of a child or of religious freedom.” Undoubtedly, this is the preferred legal option, and the one that ultimately prevailed in *Parker*. But there is nothing logically compelling about such a conclusion, especially given the broad parental right to “care, custody, and control” that the Supreme Court announced in *Troxel*. Instead, O’Connor would have been wiser to follow the advice of Barbara Bennett Woodhouse, someone who had studied the motivations and origins of constitutional family privacy. In her amicus brief in *Troxel*, Woodhouse “urge[d] the Court to proceed with caution.” She argued that the “Court should avoid sharpening the battle of rights

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345 Parker v. Hurley, 514 F.3d 87, 101 (1st Cir. 2008) (“*Troxel* is not so broad as plaintiffs assert.”).
346 See supra notes 254-61 (discussing the facts of *Mozert*).
348 Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 7, *Parker*, 474 F. Supp. 2d at 261 (citations omitted).
349 Memorandum Amicus Curiae of the American Civil Liberties Union of Massachusetts et al. in Support of Defendants’ Motion to Dismiss at 6, *Parker*, 474 F. Supp. 2d at 261.
350 See Woodhouse, supra note 97, at 1085-87.
over children by delineating a fixed scheme of constitutional priorities. Most importantly, Woodhouse asked the Court to emphasize the relationship between “family autonomy” and “democratic society.” Instead of heeding that advice, the Court gave us an inward looking decision that failed to recognize that every family is part of a larger community.

C. The Final Lesson: Mutual Respect

The Meyer–Pierce–Troxel line of cases will continue to have relevance especially at the intersection of family law and gay rights. The history of Justice McReynolds’s 1920s decisions in Meyer and Pierce show us how “family privacy” and “parents’ rights” can serve as weapons in a reactionary’s arsenal. McReynolds believed in a socially static landscape, one in which the state should not artificially save and prolong the unfit children of immigrants and the poor by schooling them with the better-off and teaching them English. In a similar way, conservative parents, especially evangelical Christians, believe that the public schools should not artificially promote homosexuality, and that if the schools do not discuss or “teach” it, then it will go away. As I have argued, the better lessons to follow are those of the early 20th century progressives, and the classical liberal theorists, all of which teach us to put our individual desires into the larger context of our social nature. The progressive legacy I wish to reinvigorate is not one that mandates a common point of view. Rather, I wish to recapture the original hopes for the common school expressed by Horace Mann in the antebellum era and echoed by the progressives at the turn of the century. This vision is “tremendously impressed with the diversity of the American people,” but at the same time fears “that conflicts of value might rip them apart and render them powerless.” In order to channel America’s diversity into mind-opening experiences and away from the reckless deluge it might otherwise become, some common value system is necessary to act as the floodwall. This value system must be mutual respect.

Without a social commitment to mutual respect, over and above privacy, especially family privacy, then individuals will soon forget why individuality and privacy are important concepts at all. Without mutual respect, the social (and perhaps physical) space in which to exercise one’s privacy will increasingly diminish.

352 Id. at 2.
353 Id. at 10–11.
355 See Gutmann, supra note 255, at 562 (explaining why the concept of “mutual respect” is central to the maintenance of a liberal polity, and thus should trump strong claims of parents’ rights).
VALUING HAVING CHILDREN

Carter Dillard

Abstract

Are there objective values on which to base the claim of a right to procreate? Can we articulate reasons for having children so powerful that they justify our doing so, as a matter of right, even where it would conflict with the interests and values of others? This Article systematically and critically examines many of the values that, before now, courts and commentators have simply presumed and relied upon when making the claim that there is and ought to be a fundamental right to have children. This Article first develops a methodology for examining the values and interests on which fundamental moral, and eventually legal, rights might be based. It then applies this methodology to three categories of values specific to procreation: autonomy and relational values, as well as self-regarding values, such as the value of creating genetic lineage. This Article critiques each category as a basis for a right to procreate, rejecting autonomy and relational values, and ending with what might be a surprising conclusion about the final category: that self-regarding values, and the right that would flow from them, are sated when one has a child.

INTRODUCTION

If there is a universal norm it may be that against taking the life of another, at least absent considerations about who might benefit from the killing or what the person to be killed may have done. And, since some norms are based on values as well as disvalues, it may be that this norm exists because most humans disvalue the act.

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1 See E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 286 (First Harvard Univ. Press ed. 1954) (“Homicide with the society is, under one set of conditions of another, legally prohibited everywhere.”).

2 See, e.g., Donald H. Regan. Authority and Value: Reflections on Raz’s Morality of Freedom, 62 S. CAL. L. REV. 995, 1074 (1989) (“[A]ctions may have intrinsic value or disvalue, which must be taken into account in deciding how to act. . . . More specifically, actions have their intrinsic value or disvalue largely in virtue of the moral attitudes which they manifest.”) (footnote omitted); RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT
If there is universal or objective disvalue in, as well as norms against, the taking of life, are there objective values and norms for the act of giving life? If prospective parents wish to have a child so that they can benefit from her labor, or to prove their virility, or to have an infant to dote upon, or because they want a child of a certain gender, or because they want the numbers of their race to grow, can we say that these are reasons or values on which to base a universal norm against interfering with life-giving? And, would that norm justify making procreation deserving of protection as a fundamental human right? If not, are there reasons or underlying values that would justify protecting it as such?

This Article is concerned with these questions, and provides a critical look at many of the values courts and commentators have always presumed are sufficient to support a fundamental right to procreate. It provides a novel perspective from which to question why we value having children, one that demands objectively good reasons to procreate, beyond mere preference satisfaction.

Market-minded readers may immediately think that the way to inquire into the value of procreation would be to create a market of tradable procreation entitlements, as has recently been suggested by David de la Croix and Axel Gosseries. However, while allocating entitlements may indicate relative preferences in a market, it reveals little about intrinsic or objective value. Theorists like Joseph Raz, Thomas Nagel, and Joseph Singer distinguish between objective values and subjective preferences. This Article will be concerned with the former, which tells us things the latter cannot. If we ask someone what the value of a right to have a child is, her response from a market perspective might be: “I would pay $5,000 for the right.” This might suggest the right’s weight relative to other things she might want to do and for which she would pay more or less; but we still know nothing about why she values procreating, and whether her reasons for doing so

ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 78, 79 (Vintage Books 1993) (Dworkin implies that actions can have value and disvalue, and he provides the example of the disvalue we find in the act of deliberately destroying a work of art, irrespective of the fact that it happens to result in the loss of art).


4 See JOSEPH RAZ, PRACTICAL REASONS AND NORMS 34 (Oxford Univ. Press 1999) (distinguishing between subjective values, or what he calls “desires and interests,” and objective values); THOMAS NAGEL, THE VIEW FROM NOWHERE 163 (Oxford Univ. Press 1986) (“The opposition between objective reasons and subjective inclinations may be severe, and may require us to change our lives.”); Joseph William Singer, Critical Normativity 1-3 (Harvard Pub. Law Working Paper No. 08-46, 2009), available at http://ssrn.com/abstract=1278154 (“I want to argue that values are not the same as mere preferences. . . . [C]laims are different from preferences because they constitute moral demands directed to others. . . . [A] demand directed to others as well as to ourselves about the appropriate contours of conduct for human beings in society.”). Singer argues that critical thinking does not undermine normativity but supports it—that is, we can reason our way towards moral objective truths. Id. at 4.
justify protecting her having children as a matter of right. Quantifying everything along a simple metric gives us a blinkered view of the matter, and of values that may be unique and incommensurable. Moreover, it tells us absolutely nothing about why other participants in the entitlement market will think that some other person ought not to have entitlements (like a person who is merely hoarding or is using them to obtain child laborers), or why we feel that some things simply cannot be purchased.

Another way to look into the matter would be to examine what courts and other legal authorities have explicitly or implicitly said about the values underlying legal rights to procreate. I also reject this method, at least as a starting point. I do so primarily because it would make it difficult to sort out the underlying moral values from the legal principles that protect them, that is, difficult to avoid simply jumping ahead to the legal rights in lieu of looking at the values that justify them.

This Article takes a very different and novel route. It looks directly at the moral values and interests on which we might eventually build a norm protecting the act of life-giving, or a fundamental right to procreate. It thus moves from our values in the direction of moral rights, and eventually legal rights. This approach tends toward rejecting our subjectivist zeitgeist, which views the choice to have a child as a private matter, and instead asks whether there are objectively good reasons to have children, reasons that others can accept enough to respect that behavior as a right, despite competing interests.

Part I is methodological. It describes a method for ascertaining why we might value procreating as a moral, and eventually legal, right. It also accounts for how legal authorities faced with the same question might actually look at moral values prior to looking at sources of law. Part I begins by placing theoretical claims of rights before judicial authorities, and then narrows the scope of their inquiry, focusing upon a particular view of objective values and rights in general. This method could be called weakly descriptive in that it seems intuitive that actual authorities try to take the step of searching for moral value in the conduct that a claimed right is supposed to protect. The method is also prescriptive, in that it seems desirable to get at foundational moral values without our thinking being infected early on by legal principles and inherently authoritative legal proclamations about moral values. But the method is still jurisprudential because we are looking at moral values in order to determine whether to eventually base a legal right on them.

Part II applies this methodology to many of the values we associate with procreation. It first categorizes those values, breaking them into the following loose groupings: theories that base the right on the value of autonomy itself, and, theories that actually explain (or give reasons for) why we would value procreation as an act, including relational reasons (derived from the new relationships

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5 For a description of how conflating law and morality can make inquiries into morals difficult, see Liam Murphy, Better to See Law This Way, 83 N.Y.U. L. REV. 1088, 1096-99 (2008) (“They say it is law, and so it probably is, which means that, because of the way law and morality are mixed, it cannot be too bad.”).
procreation creates), and self-regarding values, or values from the perspective of the procreator, such as perpetuating/creating a genetic lineage. It then presents some conclusions about how each category of values might serve as the basis for a right to procreate. The Article ends with what might be a surprising conclusion about one category of values or interests: that they, and the right that would flow from them, are satiable.

I. PUTTING THE QUESTION OF WHAT VALUES WOULD SUPPORT A RIGHT TO PROCREATE IN CONTEXT

It will be vital to keep in mind throughout the article a working definition of the concept of procreation. For the purposes of this article, an act of procreation refers to any voluntary act taken by an individual that is either one of the two most proximate causes of the conception of a future person or persons, with such person or persons eventually being born. In other words, this conception of procreation centers on creating another person or persons. And, as is discussed in Part II.B.3, procreation so understood may be valuable to us because the act of creating another human life, which as such is uniquely comparable to our own life, ensures some continuity of living when we die. Note that this definition may not require traditional coital procreation, or, even require that the procreator and resulting child be genetically related. In theory, a person that clones him or herself will have procreated. The necessary and sufficient condition is the creation of a person that did not exist before.6

With that definition in mind, we can begin to put the question of what values might support a right to procreate into a legal context. A common way for lawyers to examine the values underlying a legal right is to first examine judicial opinions and other sources of law for articulations of moral values. They then might use those values to argue for a particular description or interpretation of the legal right.7 However, that method has some drawbacks. For example, it would be

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6 Throughout this article, I refer to a particular value or interest I call self-replication, or self-replacement. The terms can be thought of as place-holders—I do not think they do the concept they refer to justice. I use these terms interchangeably. As will become clearer in Part II.C, these terms mean the same thing, though procreation (or even cloning that perfectly replicates one’s genotype and phenotype) is not self-replication or self-replacement, strictly speaking. See Frances M. Kamm, Cloning and Harm to Offspring, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 65, 66 (2000) (“But we all know that, strictly speaking, the clone will not be you: ‘numerical nonidentity’ dictates that there are two different beings.”).

7 Ronald Dworkin and John Robertson use this method in part, specifically looking at United States Supreme Court precedent, to support or arrive at their respective principles of procreative autonomy and procreative liberty. See RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 102 (Harvard Univ. Press 1996) (arguing that the principle is integral to a line of Supreme Court precedent); John A. Robertson, Liberalism and the Limits of Procreative Liberty: A Response to My Critics, 52 WASH. & LEE L. REV. 233, 236 (1995) (“I am drawing on widespread notions about the
difficult to isolate the moral matters from the legal matters. The U.S. Supreme Court in *Eisenstadt v. Baird* stated that if “the right of privacy means anything it is the right of the individual, married or not, to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Is the Court indicating something about the moral value of procreative freedom, apart from describing the legal right? How would we know? Moreover, if we want to decide whether this is a claim based on moral values underlying the legal right to procreate, does it matter that the Court said these words in a case finding unconstitutional a ban on contraceptives, i.e., a case protecting the right not to procreate?

Moreover, how is the Court making a claim about moral values if it is interpreting a constitutional provision, or prior case precedent? Worse yet, if the Court is saying something simply about the law, are we nonetheless likely to also take it as an authoritative claim about the morals merely because of the Court’s authority—such that our thinking about the moral values that might underlie a moral and eventually legal right to procreate is permanently infected with legal principles? To help understand the values underlying a moral right to procreate, one which might be made into a legal right, starting with the “law” presents problems, or at least some of the inevitable pitfalls Julie Dickson identifies in all descriptive, as well as evaluative, jurisprudence.9

A better method for identifying the values on which we might build moral and eventually legal rights would be to simply presume, for the sake of argument: (1) that there is a gap in a particular area of rights law, and (2) that a court or other authority has been called upon to fill the gap, i.e., to create law for application where no existing law could be applied. The authority would then be considering a range of potential values on which to build a moral, and eventually legal, right. This method would permit us to reach the moral values upon which we might build the right while avoiding legal principles infecting our thinking early on. It would allow us to identify and critique the values that might justify a right, without confusing those values with other matters (economic, social, political, etc.) that

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8 *Dworkin, supra* note 7, at 102 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).


10 *See* Peter Sankoff, *The Search for a Better Understanding of Discretionary Power in Evidence Law*, 32 QUEEN'S L.J. 487, 502 (2007) (“In brief, Hart contended that when a judge deciding a case found a legal rule to be uncertain or unclear—in what Hart called the ‘penumbra’—the judge would be forced to exercise discretion by making a policy choice as a means of filling the gap between the established law and the result needed.”).
might have led courts and legislatures to talk about the right in a certain way. This method would avoid many of the inevitable criticisms from both positivists and interpretivists that arise when one argues for a particular interpretation of sources of law based on the values expressed by the law, 11 e.g., that a case recognizes such—and—such a value or interest underlying a right to procreate. At the same time the method is jurisprudential because it looks at moral values from the perspective of determining whether to eventually base a legal right on them.

As I see it, the method is neither positivist (describing the law) nor interpretivist (interpreting the law in a particular light) because the authority in question would not have yet reached the point of looking at sources or principles of law at all. Though, at the same time, we might be able to assume that positivists acknowledge some judicial discretion in cases where gaps in the law exist, and that in order to fill this gap it is permissible, if not expected, that one consider the relevant values. 12 We might also be able to assume, for the sake of some interpretivists, that such a step would be consistent with eventually positioning oneself to justify state coercion, i.e., with the eventual determination of the legal right. Finally, we might assume that if we move from moral values, taking them as a given, toward norms or legal rights, we are not committing what has been called the naturalistic fallacy, 13 such that the whole endeavor goes down in flames.

Thus, the following method and discussion accepts the positivists’ sources or separation thesis (stated crudely, that law and morality are separate), 14 then takes the first step a court might take in exercising pre-interpretive discretion, specifically relying on Joseph Raz’s view of moral rights. As discussed above, the method could be called weakly descriptive in that we are dealing with fictitious cases, but it seems that actual authorities could take the step of searching for moral value in the conduct that a claimed right is supposed to protect. The method could also be called weakly prescriptive in that it seems desirable to avoid our thinking being infected early on by inherently authoritative legal proclamations about moral values, if we are examining the values in isolation.

11 In 1992, Dean Rodney Smolla wrote an article based on a fictitious Supreme Court opinion written in 2023 which upholds as constitutional a federal law limiting the size of families in the United States to two children, with some exceptions. See Rodney A. Smolla, Limitations on Family Size: Potential Pressures on the Rights of Privacy and Procreation, 1 WM. & MARY BILL RTS. J. 47, 62 (1992). This article takes a different, but related, approach.

12 This might, however, be beyond the judicial discretion that Hart envisioned as a result of the open texture of law in that it is not using existing law at all. See H. L. A. HART, THE CONCEPT OF LAW 272 (2d ed., Oxford Univ. Press 1994) (discussing judicial gap filling).

13 “There is nothing in the arguments referred to [by the naturalistic fallacy objection and others] which suggests that given a certain set of values it is impossible to use them to justify the validity of derivative values or of rules or other reasons for action.” Raz, supra note 4, at 12.

14 See generally Dickson, supra note 9 (providing an overview of positivism and interpretivism).
Our goal then is first to create a plausible description of the various moral values which legal authorities might consider when faced with having to fill a gap in the law. Our second goal is to evaluate those values as bases for a right to procreate, determining which can and cannot lead to a defensible right. But first we have to introduce our authorities, define the scope of their inquiry, and analyze how they view rights, values, and how the two relate.

A. Our Authorities

Let us assume that both the U.S. Supreme Court and the United Nations Human Rights Committee have before them a similar appeal and individual complaint, respectively. The appellant before the Court asserts that a state court probation order that prohibits him from having a child until he can demonstrate adequate means of supporting his existing children violates his right to procreate, which he claims is protected under the U.S. Constitution.\(^\text{15}\) The claimant before the Committee is a national of the People’s Republic of China (PRC) who asserts that his having been forced to pay a social compensation fee for having a third child, pursuant to state family planning policies, violates his right to procreate,\(^\text{16}\) which he claims is protected under Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR).\(^\text{17}\) Here we are assuming that China has ratified the ICCPR and is a party to the First Optional Protocol.\(^\text{18}\)

\(^{15}\) This claim is based on the case of David Oakley, who fathered nine children with four different women but intentionally refused to pay child support and was behind in payments in excess of $25,000. See State v. Oakley, 629 N.W.2d 200 (Wis. 2001), cert. denied, 537 U.S. 813 (2002) (upholding as constitutional a probation condition prohibiting defendant from having children until he could demonstrate adequate means of support).

\(^{16}\) This claim is based loosely on the successful application for asylum in the United States of a PRC national who, despite state policy, had three children in an attempt to father a male child. See In re C-Y-Z, 21 I. & N. DEC. 915, 921-22 (B.I.A. 1997). For a description of recent changes to state family planning policy, see China: Human Rights Violations and Coercion in One Child Policy Enforcement: Hearing before the Committee on International Relations House of Representatives, 108th Cong. 83 (2004) (statement of Human Rights in China (“HRC”)). HRC testified that:

The Law on Population and Family Planning was passed . . . in an effort to address abuses by local family planning workers . . . . [t]he new law bans practices such as abandonment, infanticide, and the use of physical force or the confiscation of property as a means of enforcing the policy. The law also replaces the fines that had once been levied for out-of-plan births and implements instead a ‘social compensation fee.’ The fee and payment schedule for couples that have out-of-plan births is based on average county income levels. Id.

\(^{17}\) Article 23(2) states that “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.” International Covenant on Civil and Political Rights, Mar. 23, 1976, 21 U.N. GAOR Supp. No. 16, 999 U.N.T.S. 171art. 23(2),
Let us also assume, again for the sake of argument, that both the Court and the Committee (“our authorities”) are aware that there is a gap in positive law sources such that these will be truly hard cases (in fact that may actually be the case). While they are familiar enough with the relevant sources of law to know that there is a gap with regard to the cases before them, our authorities have not used those sources to form views about the morality or the legality of procreating. Rather, they are at one of the earliest stages of their decision, still adhering to the positivist conception of law, but preparing to fill the gap much the way a legislature might when faced with a novel problem.

B. The Scope of Inquiry

To define the scope of inquiry, we have to exclude certain issues that are not addressed by our authorities and will not be discussed.

First, we must remember that we are looking for values to eventually support a legal right to procreate, or to limit a state’s interference with the act of having children. This article is not proposing any specific policies or laws. In other words, while in Part II.C I argue that the value of self-replication or self-replacement is sated when a person has his or her first child, and that as such, a one-child quota may not violate a right to procreate, it does not follow that we ought to have one-child quotas. The PRC may have a legion of values (moral, conventional, available at http://www1.umn.edu/humanrts/instree/b3ccpr.htm; see also U.N. Human Rights Committee, General Comment No. 19, art. 23 (39th Sess. 1990), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcde12563ed004c3881?OpenDocument. The comment states that:

The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons. Id.


19 See, e.g., Carter J. Dillard, Rethinking the Procreative Right, 10 YALE HUM. RTS. & DEV. L.J. 1 (2007) (arguing that neither U.S. constitutional law nor sources of international law protect an absolute right to procreate, but citing a substantial number of commentators arguing the opposite); Carter J. Dillard, Child Welfare and Future Persons, 43 GA. L. REV. 367 (2009) (arguing that temporary no-procreation orders are consistent with any constitutional right to procreate, but citing a substantial number of commentators arguing the opposite).

But we need not look at them to understand the reasons a person has for claiming a right against those policies.

Second, we are not concerned with the right not to procreate, or the positive right one might have to financial or other assistance to procreate, but instead the Hohfeldian general negative liberty or privilege, claim-right, and immunity, or that combination of rights which create duties on all others, including the state, not to interfere with one’s having children. Although, my conclusions in Part II.B may very well support a positive right to assistance in procreating, I will not pursue that issue here.

Third, and perhaps most importantly, because our authorities are looking for some initial objective moral value in the procreative act, they will not yet be concerned with the potentially conflicting interests or values of others. These might include the welfare interests of the prospective child, or the environmental and other well-being interests of other persons (including future persons) in society. Procreation is distinct from any other behavior because it creates autonomous and active moral agents that immediately begin to have an impact upon the interests of others, and for that reason, it is hard to evaluate the act in isolation. The competing interests of others in society are so compelling that they often invade attempts to specify the right in isolation. We see this in the procreative right analyses of Onora O’Neill and David Archard. But, for that very reason, theorists have almost overlooked or presumed any objective values or interests considered exclusively from the perspective of the procreator. The Malthusian focus on apocalyptic overpopulation draws us away from considering whether there are objectively valuable reasons for having children, and whether our world might have been a much better place had we as a species limited ourselves to procreating when we had objectively valuable reasons to do so.

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21 See, e.g., ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES (Oxford Univ. Press 2001) (“Law is founded in social conventions.”).

22 Regarding the constituent elements of legal rights generally, see Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913), reprinted in FUNDAMENTAL LEGAL CONCEPTIONS 65 (1923).

23 See infra note 221 and accompanying text. Others accept a strong negative right while rejecting a positive right altogether. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 23 (Princeton Univ. Press 1994).

24 A parallel approach to the one taken in this article but based on competing values might look something like T.M. Scanlon’s contractualism. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER (Belknap Press of Harvard Univ. Press 1998), In that case we might ask how our prospective parent would negotiate with all of their possible future children regarding when they will have them, and how to divide the scarce resources among them.

25 See infra note 58 and accompanying text.

26 Thomas Malthus, A Summary View of the Principle of Population, in THREE ESSAYS ON POPULATION 55 (Mentor Books, 1960) (“The existence of a tendency in mankind to increase . . . must at once determine the question as to the natural right of the poor to full support in a state of society where the law of property is recognized.”).
Nor will we be concerned with the weight of the reasons or values underlying a right to procreate relative to the competing interests of others, that is, how they might stack up against any competing reasons not to procreate. It seems that whatever value people can attach to procreating, there are other values (like an interest in wilderness) which might outweigh the procreation value were the two to conflict. We must know what value we attach to procreating, and why, before we can put it on the scales against a competing value.

Lastly, because we are isolating the moral value of procreating from competing values, we need not be concerned with issues of when it might be appropriate to derogate from any right to procreate—which was Malthus’ real concern. Ideally, we should be able to define the content and scope of the right before ever getting to the question of whether it is appropriate to derogate.

The following discussion lays out the rights theory to be used. Because that theory relies on values, the section immediately following it lays out a theory of value.

C. Our Authorities’ View of Rights

The initial discussion above suggests that our authorities will be exhibiting a very particular view or theory of moral rights (again, not legal rights because this analysis occurs before the interpretation of any sources of law).

1. Value- or Interest-Based Rights

By focusing on what the claimants’ allege is their right to procreate, our authorities are seeking to understand and to appreciate the value the right-claimants attach to procreating. Specifically, our authorities would be viewing rights as based on values or interests, and as first deriving in some way from the status of the right-claimants as fellow humans. “The interests approach is thus primarily concerned to identify the social and biological prerequisites for human beings leading a minimally good life.”27

Our authorities would be looking for some objective, shared value underlying the claimed right that both they—the authorities, the rights-claimants, and presumably all humans—share in procreating, one that justifies making the moral right to procreate into a legal right, as our authorities fill the legal gap.28 Our


28 This is not inconsistent with positivism. See Hart, supra note 12, at 79 (“the concept of a right belongs to that branch of morality which is specifically concerned to
authorities will empathize with the rights-claimants in order to try to feel the same interests and values the claimants assert. This would be the kind of reasoning that Duncan Kennedy called “rights reasoning,” which “allows you to be right about your value judgments, rather than just stating ‘preferences’. . . .”

This view of moral rights grounds the right in the objective values and interests of the right-claimant, which is the same view of rights endorsed by Raz. For Raz, “[a]ssertions of rights are typically intermediate conclusions in arguments from ultimate values to duties.” They save the time we would otherwise spend debating ultimate values.

Raz distinguishes between core rights and their derivatives. If the right to procreate is a core right, something like one’s right to contract with a midwife would be a derivative right. He also distinguishes between intrinsic and instrumental values.

“Typically rights are established by arguments about the value of having them. . . . Thus the right that people who made promises to us shall keep them depends on the desirability, that is the value, of being able to create bonds of duty among people at will.”

According to Raz, a person may be said to have a right if and only if some aspect of her well-being (some interest of hers) is sufficiently important in itself to justify holding some other person or persons to be under a duty. Thus, when A is said to have a right to free speech, part of what is claimed is that her interest in speaking out freely is sufficiently important in itself from a moral point of view to justify holding other people, particularly the government, to have duties not to place her under any restrictions or penalties in this regard.

See Jeremy Waldron, Rights in Conflict, 99 ETHICS 503, 504 (1989) (footnote omitted). “Typically rights are established by arguments about the value of having them. . . . Thus the right that people who made promises to us shall keep them depends on the desirability, that is the value, of being able to create bonds of duty among people at will.”

Id. at 169 (“A right is based on the interest which figures essentially in the justification of the statement that the right exists. That interest relates directly to the core right and indirectly to its derivatives.”).

Id. at 168-70.

Id. at 177.

Id.
Finally, Raz identifies what he calls ultimate value, which is important for our discussion because “[a] right is a morally fundamental right if it is justified on the ground that it serves the right-holder’s interest in having that right inasmuch as that interest is considered to be of ultimate value. . . .” 37 Ultimate values for Raz are constitutive of the objective well-being of the right-holder—they are those values that “need not be explained or be justified by (their contribution to) other values.” 38 It seems that in Raz’s system of rights, a morally fundamental right must be based on at least one value that is both ultimate (in the sense of being constitutive of the well-being of the right-holder) and intrinsic (not deriving its value from its consequences).

For Raz, rights (beyond morally fundamental ones) can protect, and come into existence, based upon instrumental, intrinsic, and ultimate values, but “only those whose well-being is intrinsically valuable can have rights.” 39 It is important to be clear on this point: while it seems that we could create a right to procreate based on instrumental values, I am assuming here that only a right based on at least one objective, ultimate, and intrinsic value would be morally fundamental. And, to the extent that our authorities would need to limit unenumerated rights in the U.S. Constitution and the ICCPR (i.e., the right to have as many children as one wishes) to morally fundamental rights, they would then need to identify at least one ultimate and intrinsic value underlying the claims of a right to procreate.

Raz’s conception of rights will be helpful in our analysis below, but I do not believe Raz tells us how to definitively determine which specific interests or values merit rights protection. 40 And, while Raz does not “deny that there may be universal human rights which people have in virtue of their humanity alone,” 41 he does not generally derive underlying values and interests from the right-claimant’s humanity. Therefore, in looking for an objective value by empathizing with the right-claimants as fellow humans, our authorities may be using an approach which

37 Id. at 192.
38 Id. at 200. Raz also distinguishes between intrinsic values that are valuable irrespective of what else exists, and constituent values which are intrinsically valuable but also add value to other intrinsic values. Id. at 178, 200-01. Raz uses the example of works of art. Id. They are intrinsically valuable in that they can be appreciated (as opposed to being sold to get something else of value), but they also constitute part of a good life (an ultimate value), i.e., a life that in part involves appreciating art. Id.
39 Id. at 179-80.
40 Leslie Green, Three Themes From Raz, 25 OXFORD J. LEGAL STUD. 503, 520 (2005) (“How exactly do we know whether a certain interest warrants holding someone duty-bound? Raz's general account of rights does not say. . . . That does mean, of course, that we are not going to be able to ‘apply’ Raz's general theory of rights straight out of the box, but most general theories in jurisprudence are like that.”).
41 Raz, supra note 30, at 16.
differs slightly from Raz’s, perhaps more like that of Jeremy Waldron, for example.\footnote{For example (and stating it crudely for the sake of brevity), Jeremy Waldron appears to derive the general interest right to property from the interest all humans share in having it. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (Oxford Univ. Press 1988); see also FAGAN, supra note 27, at § 4 (regarding deriving human rights from our shared morality).}

Note too that this view rejects a relativist or subjectivist approach to determining rights. Under that approach it would be impossible to ground the right on some objective value because no such value exists. The view proposed here would also (at least at this initial stage in our authorities’ analysis) reject a consequentialist account of rights because our authorities begin by looking at how rights derive from the values humans share, rather than the consequences (good or bad) of having a particular right. A consequentialist approach to determining procreative rights would normally not begin with seeking some common moral value justifying the right itself.\footnote{Joel P. Trachtman, Conflict of Laws and Accuracy in the Allocation of Government Responsibility, 26 VAND. J. TRANSNAT’L L. 975, 1041 (1994) (“Put simply, consequentialist theories, like utilitarianism or law and economics, seek to maximize some defined utility. Deontological approaches, on the other hand, work from a notion of what is right—from a theoretical perspective—and apply this notion regardless of outcomes.”).}

2. Choice- or Liberty-Based Rights

By first looking for a common value or interest underlying the conduct the right-claimants seek to protect, our authorities would also be rejecting a choice-based view of rights. That view is espoused by H. L. A. Hart and Richard Tuck (and perhaps later refuted by both)\footnote{See WALDRON, supra note 42, at 100 (arguing that Hart eventually rejected much of his early choice theory); See also infra p.26-28 and note 47.} during their attack on the concept of natural rights. It holds that moral rights analysis begins with the “idea of the individual’s sovereignty within the relevant section of his moral world.”\footnote{Michael P. Zuckert, Do Natural Rights Derive From Natural Law, 20 HARV. J. L. & PUB. POL’Y 695, 699 (1997) (quoting RICHARD TUCK, NATURAL RIGHTS THEORIES 6-7 (1973)). Hart found that general rights to non-interference do not originate from “the character of the particular action” but is simply a “particular exemplification of the equal right to be free.” H. L. A. Hart, Are There Any Natural Rights?, in WALDRON, supra note 27, at 88. For Hart, the person interfering with the freedom of another has the obligation to morally justify the interference, and that interference is not typically justified based upon the character of the activities. Id. at 89. This seems to place the burden of production on the state in our fictitious cases.} Further, “[i]t will also tend as a consequence to stress the importance of the individual’s own capacity to make moral choices, that is to say, his liberty. If active [or choice-}
based] rights are paradigmatic, then to attribute rights to someone is to attribute some kind of liberty to them."46

Tuck and Hart are often lumped together as architects of choice-based rights theory,47 but this is not entirely accurate. While Hart’s theory of choice-based rights and Tuck’s initial liberty-centered view of rights were quite similar, in later years Tuck is highly critical of any rights theory, including, albeit indirectly, Hart’s.48 Hart’s theory of choice-based rights begins with a minimal moral account of rights: “[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.”49 That is the objective moral value on which all moral (again, not legal) rights are based. Under this account, rights are hollow—they have no intrinsic scope or limit.

The moral justification [for the right] does not arise from the character of the particular action to the performance of which the claimant has a right; what justifies the claim is simply—there being no special relation between him and those who are threatening to interfere to justify that interference—that this is a particular exemplification of the equal right to be free.50

Hence we skip Raz’s first step of looking for or finding any underlying interest in or value (what Hart calls character above) of the action. Presumably, for Hart, the initial burden would fall on the state to articulate its moral right to interfere with the procreator, which it would attempt to do based on the procreator’s interference with others’ freedom (through overcrowding and pollution, for example).

As indicated above, Tuck becomes critical of Hart’s theory. In particular, he criticizes the sovereignty approach and its “minimal” account of moral rights, which is historically centered on Hobbes’s subjectivist view of morality51 and the consequent singular right of self-preservation.52 Under this account, “the ascription of a right to someone does not require us to make any estimate about the person’s inner condition . . . [this] person’s inner life could be entirely inscrutable, but we have decided that in this particular area he is sovereign.”53 Tuck, on the other hand, looks for “the most detailed and confident account of the inner states” of

46 Zuckert, supra note 45, at 699. Zuckert, however, finds that the “Hart-Tuck theory does not, however, provide an adequate analysis of rights, even formally.” Id. at 700.
47 See, e.g., id. at 699.
49 Hart, supra note 45, at 77.
50 Id. at 87-88 (emphasis added).
51 Id. at 690.
52 Id. at 687-88.
53 Id. at 689-90.
individuals, and embraces utilitarianism. Later, Tuck appears to want to fill the hollow and largely procedural rights that make up the choice-based model.

Regardless of the merits of choice-based rights theories, it is clear that our authorities are not going down that path when they try to empathize with the right-claimants in search of a common, objective value in having a child. If they followed Hart’s and Tuck’s early proposals they would be looking to the state’s justification for interference with the rights-claimants’ presumed sphere of free-choice (which pushes the inquiry, not surprisingly, towards positive law). They might also begin there under Ronald Dworkin’s theory of rights which is based on limiting the reasons for which the state can act. But they would certainly not start their determination by sifting through the right-claimants’ reasons for wishing to have the particular behavior protected.

3. Choosing Interest-Based Rights

While we can critique the interest-based model of rights specifically, or even the use of rights as a mode of discourse more generally, we can also accept, per Raz and others discussed above, that the interest-based model is at least a

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54 Id. at 690-91.
55 Tuck, supra note 48, at 684 (Tuck’s critique of rights is unabashedly utilitarian. He argues that “unless certain special and unusual conditions are in place, a theory of natural or human rights is more likely to lead to a weakening of civil liberties embedded in the legal system of a society.”). Tuck uses the example of Britain’s suspending trial by jury in terrorism cases out of concerns for national security during a period of escalating violence by the Irish Republican Army. Id. at 691. He argues that this flowed from the natural or human (and perhaps really moral) rights perspective in which “the prime duty of a government is to secure the lives of its innocent citizens.” Id. According to Tuck:

It might well be argued from a utilitarian perspective that the long-run harm of abolishing trial by jury significantly outweighs the short-run benefit of preventing the deaths of some innocent people. This is an argument that is very difficult to make in the language of rights, as the harm caused to the public by the abandonment of trial by jury may be quite hard to express in the bold terms that rights discourse seems to require.

Id. But, is it really so hard to imagine how the modern human rights regime could be used to criticize suspending trial by jury? Would we really expect the best arguments to come from utilitarians? Tuck misses the point. Modern interest-based rights theorists (having moved beyond Hobbes’ minimalist account) need not make an attenuated argument based on unknowable calculations of harm because the defendants’ interest in fair process is itself knowable and valuable to all who can envision themselves being tried.

56 See Jeremy Waldron, *Pides on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301, 301 (2000) (“Dworkin’s theory of rights is based on a conception of limits on the kinds of reason that the state can appropriately invoke in order to justify its action. . . . ‘Rights as trumps’ does not . . . protect certain key interests against any demands made in the name of the general good.”).

defensible means of determining rights. More importantly, it is the more appropriate means for our authorities to use in this case for the following reasons.

First, as we shall see, it is a view of rights adhered to by many of the theorists who discuss the values underlying procreation, and who will serve as proxies for our fictitious rights-claimants. These theorists often appeal to specific values and interests that others ought to recognize as grounds for duties of noninterference. By skipping Raz’s first step of identifying an underlying interest or value (and thus carving out a hollow right, or sovereign territory of choice) we never examine the theorists, i.e., the rights-claimants’ arguments. We are never given a reason for why the conduct at issue must be protected.

Second, there would be something presumptuous in using a choice-based model in these cases. Because our authorities are gap-filling, they are going to make some moral assessments before looking at sources of law. Hart’s analytic jurisprudence approach might aptly describe property and contractual rights found in legal instruments (a right-holders choice regarding an extant legal duty). But, as he admitted, his analysis of rights does not necessarily extend to “the rights recognized in social and political morality.” If we have no prior legal duty on which to base the right, we have to first look for reasons to value and protect particular conduct.

John Oberdiek made a similar point in a recent article advocating for specific rights over general rights. He said that “[r]ights depend on reasons and it is those underlying reasons that are normatively fundamental. The more basic considerations upon which rights are based are the justifications for rights, and as such, rights are not themselves normative bedrock, rather, practical reasons are.” Rights are “only as strong as their underlying justifying reasons.” Similarly, David Archard and Onora O’Neill have pursued something like Oberdiek’s specificationism as a means of limiting the procreative right.

58 WALDRON, supra note 27, at 9 (“Hart has conceded, however, that this analysis does not offer an adequate account of all legal rights, let alone the rights recognized in social and political morality.”) (footnote omitted).


60 Id. Oberdiek notes that Nagel seems to reject this view of rights, but that Nagel’s view can in fact be reconciled with it (and with Raz’s interest-based view of rights): “Nagel seems implicitly to recognize that rights are justified by recourse to some more basic consideration and are not themselves normatively fundamental.” Id. at 133. Oberdiek moves from this point towards specificationism by arguing that “the general conception of rights refines rights, and erroneously invests special moral significance in an intermediate conclusion about what it is permissible to do instead of in the final conclusion about what it is permissible to do.” Id. at 134.

61 David Archard, Wrongful Life, 79 PHIL. 403, 415 (2004) (“An adult may exercise his or her reproductive powers to bring a child into being only if the child in question has the reasonable prospect of a minimally decent life.”); id. at 415-16 (“Onora O’Neill similarly argues that ‘the right to beget or rear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others. Persons who beget or bear without making any
Thus, contrary to the approach of the choice-theorists, at least when first determining whether there is a moral right that prevents interference with conduct (and thereby creates the protective freedom of a right), we should look for prior moral facts that justify the conduct as deserving of that protection. In this way, we do not end up basing freedom on freedom.

The approach I advocate seems to run headlong into Jeremy Waldron’s defense of a moral right to do wrong, which rejects the argument that only morally permissible actions can be the subject of moral rights. But there are three reasons why I think in the end my argument does not run afoul of Waldron’s points. If we identify an underlying value or interest in procreating that would justify a duty of non-interference, it does not follow that all acts of procreating so protected will be morally unobjectionable or even morally permissible. The right would spring from a morally valuable interest in a certain range of conduct, within which we might still find immoral behavior. For example, a person may choose to exercise a moral right to have a child based on the moral value of creating a new relation with someone he or she will love. This would ground the moral right. However, that person may have the child and exercise his or her right knowing that he or she will not be able to give the child all the attention it deserves. Even moral rights that spring from objective values leave room for behavior which we might agree is still wrong.

Moreover, to say that our claimants have a moral right to procreate is not to say the right itself is a reason to procreate, or that they must procreate. The right does not negate their choice not to procreate, much the way speech rights do not negate the choice not to speak. Finally, we might find that procreation is different from the matters of self-constitution where Waldron finds choice to be so integral, in that, as will be discussed below, creating another person is uniquely interpersonal or other-constitutional.

At this point, assuming that objective interests and values will be the foundation upon which our authorities will build any procreative right, we can inquire into what some have claimed about objective values and interests generally, and consider how our authorities might think about these matters.

D. Determining Objective Values

As stated above, this is a weak descriptive method: it is plausible for actual authorities to decide cases in this way, at least at the very first stages. For example, imagine that a judge is considering a case in which the plaintiff claims the local such plans cannot claim that they are exercising a right." (quoting Onora O'Neill, Begetting, Bearing, and Rearing, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 25-30 (Onora O'Neill & William Ruddick eds., Oxford Univ. Press 1979)).

62 See Jeremy Waldron, A Right to do Wrong, 92 ETHICS 21 (1981); but see id. at 33, n.13.

63 Id. at 34-35.

64 See infra notes 168-77 and accompanying text.
animal cruelty code (which is vaguely written and has never been interpreted by a court before) infringes on his right to torture animals. The judge’s first reaction, before ever thinking about sources of law, might be one of involuntarily empathizing with the plaintiff; or on some level the judge may automatically give consideration to the value that the plaintiff ascribes to torturing animals. Similarly, our authorities will begin by empathizing with the rights-claimants’ valuation of the desired conduct. In this way, our authorities can come to understand what it would feel like to be a claimant who wants to procreate, but who is subject to a legal limitation that prevents him or her from doing so.65

Our authorities will need to understand why procreation should be protected conduct. They will assume that the rights-claimants have reasons for the conduct and the protective right they propose,66 because our authorities believe that “morality requires that we justify our actions by reasons others can accept or cannot reasonably reject.”67 Following John Finnis and Joseph Raz, our authorities believe that “people reason according to what they find valuable.”68 Moreover, our authorities take the view that “basic values can only be grasped in intellectual acts in which one sees the point of doing something for its own sake.”69

In his article *Normative Methods for Lawyers*, Joseph Singer argues that lawyers (and presumably our rights-claimants) “have no alternative but to make arguments that elaborate fundamental human values,”70 which he calls evaluative assertions.71 “When we raise some interests to the level of fundamental values, we

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65 Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* 42-43 (N.Y.U. Public Law and Legal Theory Working Paper, Paper No. 98, 2008), available at http://lsr.nellco.org/nyu_plltwp/98 (Jeremy Waldron describes something similar in contrasting his methodology from that of Ronald Dworkin in interpreting standards of law prohibiting cruel, inhuman, and degrading treatment. Waldron refers to a “shared conscience” or “a more-or-less shared sense among us of how one person responds as a human to another human . . . ”). However, as may become clear in the discussion that follows, I believe the process I describe is closer to what Waldron calls “asking an objective moral question at the level of critical morality” (and which he has reservations about) than his “positive morality” or “common conscience” approach. Id. at 46.

66 “Raz argues that if you often cannot understand the reasons that cause you to believe or act, you cannot understand yourself—you lose the ability to control your life and, indeed, cease to be yourself.” Cheryl Misak, *Engaging Reason*, 51 U. TORONTO L.J. 63, 65 (2001).


69 Id. at 162 (discussing John Finnis’ method of practical reasoning). Batnitzky later compares this method to Raz’s practical reasoning. Id. at 166.

70 Singer, *supra* note 67, at 904.

71 Id. at 950.
should be able to provide justification.” And while the scope of the right can be narrowed both by the competing interests of others (depending on the relative weights of competing interests and their resulting priority) as well as by situations in which it is necessary to derogate from the right, the right first arises from the objective values it protects.

If they apply the methodology I suggest, our authorities will not simply substitute their own values and interests, or their subjective feelings, for those of the claimants. Rather, they will be looking for some objective, higher-level, or generalized value that exists between the authorities’ subjective view of the value of procreating, and that asserted by the claimants. Many, including Raz, have argued that there are objective values, distinguishable from subjective preferences or desires. Likewise, Ronald Dworkin has argued that moral claims can be objectively true.

How will our authorities know what the value of procreating is, or whether it is true that procreating in our rights-claimants’ circumstances ought to be a right? In *The View From Nowhere,* Thomas Nagel described a method of determining objective values, which would suffice in this case (though Nagel does not apply it to determine rights per se). “A view or form of thought is more objective than another if it relies less on the specifics of the individual’s makeup and position in the world, or on the character of the particular type of creature he is.” The thinker

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72 Id. at 929.
73 See Misak, supra note 66, at 71 (“[Raz’s] aim is to make it plausible that evaluative thought is objective.”); id. at 63 (“Raz thinks that value judgements [sic] are indeed objective or truth-apt; they are indeed judgements [sic] for which it is appropriate to give reasons.”); id. (“Values control reasons, in that I have a reason to do A only if doing A is likely to promote something I take to be good.”); see also RAZ, supra note 4, at 31 (referring to values as reasons underlying norms like “there is a reason to respect persons.”); id. at 34 (distinguishing between subjective values, or what he calls “desires and interests,” and objective values).
74 See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It,* 25 PHIL. & PUB. AFF. 87 (1996). That is, moral claims can be true regardless of whether anyone believes the claims to be true, which is much the way that 1 + 1 = 2 regardless of whether anyone believes that to be the case. We have considered how our authorities might look at the cases before them in terms of value but we can also frame the question in terms of truth. Thinking in this way our authorities could ask: Is it wrong to have children under certain circumstances? Or more appropriately for the case at hand, is it true that what the right-claimants want to do is not valuable, or not sufficiently valuable to be deemed a right?
75 NAGEL, supra note 4, at 138.
76 Raz has both explained and posed questions for Nagel’s approach. Joseph Raz, *Notes on Value and Objectivity,* in *OBJECTIVITY IN LAW AND MORALS* 206 (Brian Leiter ed., Cambridge Univ. Press 2001).
77 Another account which might be used is Andrei Marmor’s. Marmor defends the objectivity of values against subjectivist accounts though he avoids saying that values are metaphysically real. See MARMOR, supra note 21, at 160-83.
78 NAGEL, supra note 4, at 5.
must “step back” as Nagel often refers to it, and survey the matter outside of herself.\textsuperscript{79} But, at the same time, Nagel warns that a complete view of the world is also relative; it must also take into account the subjective perspective.\textsuperscript{80} It must include “oneself, and one’s former [subjective] conception, within its scope.”\textsuperscript{81} This method looks at value from a removed but inclusive perspective, such that the thinker sees her former valuations amid a world of other valuations. For example, parties negotiating a contract for the right to use each other’s property may at times begin to accede to each other’s wishes. This is not necessarily because of some bargained-for exchange. Rather, it may be that they have begun to see commonalities between what each one wants, and they genuinely and mutually appreciate the value of what the other wants.

The question for Nagel is: “‘What is their [sic] reason to do or want, considered from the impersonal standpoint?’”\textsuperscript{82} In order to identify such a reason, or “value,” within the objective framework, relevant data for consideration “include[s] the appearance of value to individuals with particular perspectives, including oneself.”\textsuperscript{83} This is a process—referred to by Nagel as “generalization”—of looking for commonalities among multiple subjective ascriptions of value, thereby enabling disparate views to become compatible.\textsuperscript{84} “[I]f I have a reason to take aspirin for a headache or to avoid hot stoves, it is not because of something specific about those pains but because they are examples of pain, suffering, or discomfort.”\textsuperscript{85} In other words, we step back to appreciate the values we share with others and generalize those values as objective values.

As an example of this method, Nagel uses T.M. Scanlon’s point that “we have more reason to help someone get enough to eat than to build a monument to his god—even if that person is willing to forgo [sic] the food for the monument . . . ”\textsuperscript{86} In ignoring that person’s preferences, “[w]e are thinking from no particular point of view about how to regard a world which contains points of view.”\textsuperscript{87} In other words, it is next to impossible to disclaim value whether subjective or objective, especially because internal values may become objective as we consider value that becomes assigned to them outside of ourselves.

Importantly, from the standpoint of our authorities and even more so of the rights-claimants, “[t]he opposition between objective reasons and subjective inclinations may be severe, and may require us to change our lives.”\textsuperscript{88} Thus, regarding procreation, it may be that the objective value of having children differs from the subjective value each of us attaches to the act, and that we will each have

\begin{itemize}
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id. at 7-8.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. at 140.
\item \textsuperscript{83} Id. at 147.
\item \textsuperscript{84} Id. at 150.
\item \textsuperscript{85} Id. at 158.
\item \textsuperscript{86} Id. at 172.
\item \textsuperscript{87} Id. at 161.
\item \textsuperscript{88} Id. at 163.
\end{itemize}
to amend our perspective when looking for the value on which to base a fundamental right.

One obvious difficulty is the question of how one chooses the level of generality at which to state the particular objective value that might underlie procreation. That decision will be driven by values. In this case, as will be discussed, our authorities will prioritize the value of certitude; they value being able to identify the relevant value, know it, and be certain of it. Laurence Tribe and Michael Dorf ask whether “the Court in Griswold v. Connecticut recognize[s] the narrow right to use contraception or the broader right to make a variety of procreative decisions?” Because they want to be certain of the value of non-interference in the particular act of procreation—as opposed to being free with regard to other reproduction-related behaviors, our authorities will choose the most specific (or narrowest) description of the value. If they had to defend their own desire to procreate, what reasons would they give that are unique to that act? The whole point of the inquiry is to understand that there is some conduct that must be protected: procreation, without interference. It cannot be the freedom to procreate or not procreate because that does not answer the question of what we value in procreating. It merely exemplifies what we value in freedom.

II. THE VALUES OF PROCREATING

There are many ways to describe those values that might underlie our right-claimants’ particular claims of a right to procreate, but they cannot be comprehensively discussed in this short article. However, the following discussion addresses many of the values one could recognize, or at least those that theorists inquiring into the nature of the procreative right have found, and suffices to set up our subsequent discussion. It must be noted at the outset that this categorization of theorists somewhat oversimplifies their views. Theorists may occupy multiple categories, but I have tried to divide them based upon the center of gravity of their views.

Before discussing these values, it will help to note a few aspects of some of the theorists’ approaches in general, which weaken their usefulness in applying the

89 See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1058 (1990); Nagel, supra note 4, at 152 (Nagel identifies this as an open question when thinking objectively, but he does not specify how to choose a particular level of generality.).

90 See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 63-75 (Oxford Univ. Press 1980) (Finnis argues that knowledge is a basic good, in that it is derived from nothing, cannot be demonstrated, but at the same time needs no demonstration). Anyone engaged in truly academic work would be demonstrating Finnis’ point just by doing what they are doing. Presumably, certitude is another way of describing the good of knowledge in that we want to be certain of what we know.

91 Tribe & Dorf, supra note 89, at 1058 (citation omitted).

92 Medical ethicists it seems, rather than lawyers, have done most of the rigorous and focused inquiring.
method discussed. Some of the values or interests described by several theorists derive almost empirically from the values that those theorists believe are held by a majority of society. For example, John Robertson argues that the value of procreative autonomy derives from “widespread notions about the importance of procreative decisions, generally, to individuals and their life plans.” But, in so doing he intertwines his moral account with his reading of constitutional precedent discussing the value of the right. This raises the possibility of the type of law-morals infection I warn against above. Also, many theorists conflate procreating with not procreating, treating the decision itself as the subject of the right (or what is often called an “option right”), while others focus on procreating as an act distinct from not procreating. Finally, almost all of the theorists work within the context of a debate about using Assisted Reproductive Technologies (ARTs). Unlike the matters before our authorities, ARTs have spawned most of the debates over reproductive freedom, though ARTs are used in a miniscule fraction of pregnancies worldwide.

Nevertheless, many of the claims made by these right–to–procreation theorists about values can assist our authorities. While some theorists may start by surveying the opinions of majorities (and perhaps just mirroring or parroting widespread cultural pro-natalism), they all eventually stray into (seemingly pure)

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93 Robertson, supra note 7, at 236.

94 But I am not offering a general moral or legal theory for determining which personally significant choices deserve special protection. Rather, I am drawing on widespread notions about the importance of procreative decisions generally to individuals and their life plans, which is reflected widely in our practices and considered intuitions, in order to show their implications for a variety of issues that had not previously been considered.

Id. (footnote omitted); see also Carson Strong, Ethics in Reproductive and Perinatal Medicine: A New Framework 16-17 (Yale Univ. Press 1997) (citing to empirical studies that show the desire to have genetic offspring runs deep and is widespread, however it can also be highly influenced by social conditioning and pressure to have children).

95 See Robertson, supra note 7 and accompanying text.

96 Robertson, supra note 23, at 23 (Robertson states “As a matter of Constitutional law, procreative liberty is a negative right against state interference with choices to procreate or to avoid procreation.”). Incidentally, while reproductive rights (in terms of the right to use contraception and abortion in order not to procreate) are largely seen as part of a social movement, their advent aligned simultaneously with a devastating explosion in world population. See, e.g., Paige Whaley Eager, Global Population Policy: From Population Control to Reproductive Rights (Ashgate Publishing Limited 2004) (studying the shift from population control to reproductive rights that occurred in the 1960s, as the dangers of population growth became known). What relative good it did, in terms of reducing the ills caused by overpopulation, remains to be seen.

97 See Strong, supra note 94, at 12 (differentiating between the two and analyzing the values underlying a right to each separately).
normative arguments about what objective values or reasons exist to support the right. Also, even those theorists who conflate having children with not having children believe that the values in question are sufficient to support a right of non-interference to protect only the act of procreating. Finally, it is not problematic that the debate spawns from the context of ARTs because, in general, theorists first establish those values that might support the right to procreate in the traditional way, and only then question whether ART-enabled procreation should or should not receive the same protection. For these reasons, we can use these theorists work to assist our authorities.

Theories that explain the values that might underlie a right to procreate can be loosely divided into those that (1) base the right on the value of autonomy itself, and (2) those that actually explain (or give reasons for) why we value procreation as an act, including (a) relational reasons (deriving from the new relationships procreation creates) and (b) self-regarding values, or values from the perspective of the procreator, such as the perpetuation of one’s genetic lineage.

A. Procreative Autonomy and Liberty

John Robertson, who is perhaps one of the earliest and most prolific writers championing a broad right to procreate, argued in his 1994 book *Children of Choice*, that “procreative liberty be given presumptive priority in all conflicts . . . procreative liberty deserves presumptive respect because of its central importance to individual meaning, dignity, and identity.” It is important to note that in this statement Robertson grounds the right in the liberty itself; liberty is what is important or valuable. In defending his work, he states:

I believe that reproductive decisions have such great significance for personal identity and happiness that an important area of freedom and human dignity would be lost if one lacked self-determination in

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98 For example, Robertson refers to his “strong normative commitment” to procreative liberty, ROBERTSON, supra note 23, at 18, and claims that liberty to procreate is “an important moral right” and a “prima facie moral right.” Id. at 30.
99 See, e.g., Emily Jackson, *Conception and the Irrelevance of the Welfare Principle*, 65 MOD. L. REV. 176, 182 (2002) (premising her argument on values that she views as supporting a broad coital procreative right, and that should extend to ART-based procreation).
100 ROBERTSON, supra note 23, at 16 (emphasis added); see also id. at 24. Robertson explicitly claims to be analyzing the values and interests that justify procreative freedom’s protection. Id. at 17. Robertson focuses on this centrality throughout the book. See Robertson, supra note 7, at 235 (“In the book I argue that procreative liberty deserves primacy because it is an important aspect of self-determination and well-being.”); id. at 236 (“I doubt very much that the commentators would find that most procreation—for example, coital reproduction by a married couple—is not prima facie important and deserving of special respect precisely because of its role in defining our identity, dignity, and humanity . . . .”).
procreation. Indeed, to deny the importance of procreative liberty would
be to grant the state repressive power over our intimate lives in a most
fundamental way, as recent experiences in China and Romania have
shown.\(^{101}\)

Much like Hart’s and Tuck’s early approaches, this is tantamount to carving out a
broad swath of sovereign territory, or a large category of possible actions that one
is free to take regardless of one’s underlying reasons. The importance of freedom
qua freedom grounds the specific right. Here, I take the concept of autonomy to be
materially indistinguishable from self-determination.

It is worth noting that, in addition to freedom generally, Robertson also
invokes specific reasons (discussed further below) for why procreating is valuable,
which he refers to as “procreative interests.”\(^{102}\)

For example, he speaks of procreation as an act by which one can “define”
one’self,\(^{103}\) and as “an experience that is central to individual identity and meaning
in life.”\(^{104}\) He has also stressed the value of birthing and rearing as “central to
reproductive meaning.”\(^{105}\) And in more recent work he has suggested that the right
to procreate might be internally constrained by one’s commitment to the well-
being of one’s future child.\(^{106}\) He has also argued that the desire to have a child is

\(^{101}\) Robertson, supra note 7, at 236.

\(^{102}\) ROBERTSON, supra note 23, at 30; see Gilbert Meilaender, Products of the Will:
finds that Robertson’s appeal to interests after prioritizing liberty is “a last-ditch attempt to
find limits to a freedom that no longer presupposes any natural substratum and fails to pour
meaning back into a concept that has become entirely the impoverished creature of human
will.”).

\(^{103}\) ROBERTSON, supra note 23, at 18.

\(^{104}\) Id. at 24.

(referring to a directive for posthumous reproduction he argues that “[n]or will it provide
the birthing and rearing experiences that are usually so central to reproductive meaning. . .
It is not enough to say that a person has an interest in acting autonomously; the dispositive
question is whether the particular autonomous act deserves protection.”); ROBERTSON,
supra note 23, at 73 (“A person who reproduces but has no contact with offspring may
have a lesser interest in reproduction than a person who reproduces with the intent to rear
children.”).

\(^{106}\) John A. Robertson, Procreative Liberty and Harm to Offspring in Assisted
Reproduction, 30 AM. J.L. & MED. 7, 21 (2004) (“One can ask whether parents who are
willing to use ARTs that risk leading to children with a greatly reduced quality of life are
pursuing reproductive needs as commonly valued and understood, thus qualifying them for
the special protection usually accorded to reproductive choice.”). Robertson refers to the
internal constraints on procreative liberty, rather than the conflicting rights of prospective
children, because he has consistently relied on a version (and in my opinion
misapplication) of Parfit’s nonidentity problem to discount the interests of prospective
children. Id. at 13-19; see also MAURA A. RYAN, ETHICS AND ECONOMICS OF ASSISTED
itself valuable, and though Marsha Garrison argues that he has been inconsistent on this point, I believe Robertson has consistently stressed immediate genetic lineage as a specific interest justifying the right. He states, that, "[q]uite simply, reproduction is an experience full of meaning and importance for the identity of an individual and her physical and social flourishing because it produces a new individual from her haploid chromosomes." But, regardless of his references to procreative interests to support his claim, Robertson is considered a leading proponent of procreative liberty or autonomy because of his claims about freedom and self-determination.

Nicolette Priaulx has looked in depth at the notion of reproductive autonomy, and finds that for proponents like Robertson and Emily Jackson, the value of reproductive autonomy “lies in its instrumentality in fostering basic human needs and one’s sense of self,” and that “all basic reproductive desires are central to one’s sense of self . . . ” Priaulx describes the reproductive autonomy claim as based on notions of the centrality of reproduction to our personhood, in that “our reproductive plans not only determine the shape of our lives but go to the heart of who we are.” She characterizes the reproductive autonomy claim in this way: “under a coherent account of reproductive autonomy all decisions to reproduce and

REPRODUCTION: THE COST OF LONGING 102-03 (Georgetown Univ. Press 2001).


Id.


Rather than adopt strict traditionalism that rejects almost all selection technologies or radical libertarianism that rejects none, I adopt a modern traditionalist approach, which looks closely at the reasons why choice about reproduction is so important for individuals. The more closely an application of genetic or reproductive technology serves the basic reproductive project of haploid gene transmission—or its avoidance—and the rearing experiences that usually follow, the more likely it is to fall within a coherent conception of procreative liberty deserving of special protection. At a certain point, however, answers to questions about the scope or outer limits of procreative liberty will depend upon socially constitutive choices of whether reprogenetic procedures are viewed as plausible ways to help individuals and couples transmit genes to and rear a new generation.

Id.; see also ROBERTSON, supra note 23, at 24 (while arguing for the priority of the right Robertson notes that “the transmission of one’s genes through reproduction is an animal or species urge closely linked to the sex drive.”).


Id. at 175.
avoid reproduction are of equal value given our recognition of its instrumental value to one’s selfhood[.][112] Judith Daar argues that:

As human beings, in the main we have a natural inclination to reproduce and to value the products of our reproductive efforts. Ask virtually any parent about the relative value of his or her life experiences and you will hear, ‘The most significant and meaningful thing I have done in my life is parent my child(ren).’ Because of the central importance of parenthood to the human experience, denial of the opportunity to procreate . . . strikes at the core of how one sees oneself and one's place in the world.[113]

Amartya Sen refers to the “importance that a family attaches to the decision about how many children to have”[114] or the “importance of reproductive rights” more generally, which he argues are themselves valuable.[115] For Sen, it is the choice, or freedom to make that choice, which is valuable. Similarly, Emily Jackson grounds a broad procreative right upon “reproductive autonomy,” which she views as allowing one to form one’s own values and to have them respected; it is the value of a self-authored life that grounds the right.[116] “I would argue that reproductive freedom is sufficiently integral to a satisfying life that it should be recognized as a critical ‘conviction about what helps to make a life good.’ ”[117]

Ronald Dworkin might also be read as endorsing a broad right to procreate, or the principle that he calls “the right of procreative autonomy.”[118] However, it would oversimplify Dworkin to say he simply endorses autonomy as the value underlying claims of a right to procreate. In his discussion on this point, he primarily targets state limitations on the use of contraceptives and abortion, which are based on the state’s view of the intrinsic value of life.[119] Dworkin considers this issue to be essentially religious, and therefore argues, it cannot serve as a legitimate basis for state coercion in the United States.[120] While his principle might prevent a state from limiting (or more to the point requiring) procreation on religious grounds, it may or may not prevent our authorities’ particular inquiry. The view that there might be some objective, intrinsic value underlying procreation

112 Id. at 178 (emphasis added).
115 Id. at 1041, 1051, 1061.
116 EMILY JACKSON, REGULATING REPRODUCTION: LAW, TECHNOLOGY AND AUTONOMY 6-7 (Hart Publishing 2001); see also CARL WELLMAN, MEDICAL LAW AND MORAL RIGHTS 135-38, 145-46 (Springer 2005).
117 JACKSON, supra note 116, at 7 (quoting DWORKIN, supra note 7, at 102).
118 DWORKIN, supra note 7, at 101.
119 Id. 101-10.
120 Id. at 103.
need not involve essentially religious beliefs about the sanctity of life.\textsuperscript{121} As an aside, Dworkin’s point certainly would not prevent secular limitations meant to serve the interests of, say, prospective children or society at large.

Dan Brock offers one of the most sophisticated defenses of the procreative right. Brock’s argument is consistent with Robertson’s procreative liberty approach,\textsuperscript{122} but is perhaps more contingent upon the circumstances of each case in which the right is claimed.\textsuperscript{123} Brock explicitly identifies three moral bases for reproductive freedom, which “are each widely accepted as of fundamental importance to individuals in constructing and securing for themselves a valuable life according to their own conception of such a life.”\textsuperscript{124} The first and most important is personal or individual autonomy, or persons’ “interest[s] in making significant decisions about their lives for themselves and according to their own values or conception[s] of a good life, carrying out those choices without interference from others, and being free to revise their plans of life or conception[s] of the good over time.”\textsuperscript{125} The second basis is individual well-being or good, and Brock argues that the decision to have children contributes to such well-being, whether it is defined in terms of conscious pleasure, preference satisfaction, or objective good.\textsuperscript{126} The third is equality, “in particular equality of opportunity and expectations between the sexes.”\textsuperscript{127}

In all, despite Robertson’s parallel reliance on specific interests and values inherent in the act of procreating, these theorists (and Brock, at least in his first

\begin{itemize}
\item \textsuperscript{121} In fact, I reject that sort of evaluation, see infra notes 176-88 and accompanying text, in favor of the secular value of self-replacement. See infra Parts II.A-B.
\item \textsuperscript{122} If we are to place high value on individual self-determination, as both liberalism and Robertson do, then the defining and deep impact on a person's life of the decision whether to procreate implies a strong presumption that that decision must be left to the individual in question and protected from interference by others.
\item \textsuperscript{124} It would be a mistake to think that the right to reproductive freedom is unitary in content or moral importance, a mistake that would lead to failure to balance appropriately particular aspects of reproductive freedom arising in specific contexts when they come into conflict with other broader societal interests in the nature of its citizenry.
\item \textsuperscript{125} Id. at 382.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} See id. at 382-83.
\item \textsuperscript{128} Id. at 383.
\end{itemize}
basis referring to the value of choice) tend to focus on choice itself, or liberty simpliciter, as the pedestal upon which the right is based. The freedom to make choices that relate to procreating is itself valuable to people, regardless of the reasons or values underlying the specific choices they actually make. Again, the metaphor of a hollow right is fitting: we identify a boundary by the fact that the acts in question relate to procreation, after which no inquiry is possible.

B. Relational Interests

In contrast to procreative autonomy theorists, Maura Ryan exemplifies what might be thought of as a second approach to valuing procreation. She rejects the autonomy-based analysis altogether, including the underlying value of self-replication, which she calls an “impoverished view of reproduction.” In Ryan’s model, “[i]ndividual rights, therefore, are relative (modified by commitments to the common life) and reciprocal (they arise in a social field involving correlative duties and counterclaims).” Rights are oriented towards the common good (tied to the collective well-being), and cannot be understood in isolation—especially when thinking about the act of creating another person.

For Ryan, “parenthood is not so much the undertaking of a project as it is the establishment of a relationship.” In this sense, ‘having children’ is phenomenologically equivalent to ‘being a parent,’ much as having true friends is experienced as being a friend, or having a lover involves loving.” Ryan argues, “Robertson’s account illustrates what is wrong with the liberal conception of reproductive rights.” “The concepts of right and entitlement used by Robertson correspond to the values preserved in traditional notions of patriarchal fathering—that is, proprietary control and ownership over wives and children—rather than those of care and responsibility associated with mothering.” At some point a constitutive notion of why reproduction is important has to inform the debate . . . . But that is exactly what is missing from Robertson’s account . . . .” For Ryan,

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128 See Maura A. Ryan, The Argument for Unlimited Procreative Liberty: A Feminist Critique, 20 HASTINGS CTR. REP. 6, 11 (1990) (“Interest in a genetically related children cannot be seen as an independent end, the value of which automatically discounts concerns . . . for the place of the experience of reproduction in our collective value system.”).
129 RYAN, supra note 106, at 96.
130 Id. at 109 (emphasis added).
131 Id.
132 Id.
133 Id. at 93.
134 Id. at 100.
135 Id. at 103 (Ryan is well aware that, in addition to liberty simpliciter, Robertson makes use of specific procreative interests and values throughout the body of his work.). However, she criticizes him for constantly shifting from one value to another, id. at 105, and would reject the genetic lineage basis altogether. Id. at 106.
the “constitutive notion” is partially that the value derives from the new relationships procreation creates, and from its inherently social nature.136

In Ryan’s account, “the promotion of individual procreative liberty can never be an abstract end,”137 rather, we “desire our children for their own sake.”138 “Reproduction is inherently relational, ‘other-regarding,’ not just in a physical sense but a moral sense.”139 This relational account of rights rejects an atomistic version of personal autonomy and bases the value of procreation in the relations it creates.

C. Self-regarding Values

A third category of theorists operates within a liberal or rights-based framework, but does not attempt to base the right on a pedestal of choice per se. Daniel Statman puts it this way: “But if there is a grain of truth in the idea of a universal right for parenthood, then—as with all human rights—there must be some core interest in parenthood shared by all human beings, regardless of the distinctive features of their culture.”140 For Statman, “[t]he interest we have is not in procreation itself, namely, in merely replicating our genes, but in rearing children that are genetically connected to us, or, at least, in rearing children with whom we can enjoy a significant relationship.”141 However, while he appears to be dealing with parenthood (and relational interests) and not procreation, Statman also focuses on the interests of the procreator. He includes as values underlying the procreative right: immortality through descendants, living vicariously through one’s children, getting a “second chance,” intimate relations with one’s offspring, satisfaction of the longing for a home or nest with close relations and belonging, and the interest of couples to found a family.142 Statman, however, argues that the right can be satisfied even when the genetic connection is not present.143

Robertson’s procreative interests, discussed above, are also part of this category. These include the value of defining oneself, the value of birthing and rearing, the value of commitment to the well-being of one’s future child, and the value of immediate genetic lineage.

136 See id. at 97, 106, 114; see also Leslie Cannold, Do We Need a Normative Account of the Decision to Parent? 19 (Center for Applied Philosophy and Public Ethics, Melbourne Working Paper, 2004), available at http://www.cappe.edu.au/docs/pdf/ResPublicavol102.pdf (endorsing the desire to nurture, or share with, or give to a child, as a good or value which would support the decision to procreate).
137 Ryan, supra note 128, at 11.
138 Ryan, supra note 106, at 104.
139 Id. at 111.
141 Id. at 225.
142 Id.
143 Id.
Are these values distinct from autonomy values? One could approach this issue by asking whether we can value these things in the absence of having chosen them or exercised our will to bring them about. 144 I would argue that, whether we decided or intended to procreate, or having children was unintentional, we still value it as an act that—in Robertson’s terms—defines ourselves, ensures our immediate genetic lineage, etc. Choice is not a necessary condition for us to value it once it has occurred.

Like Robertson in his discussion of procreative interests, David Archard concedes that “human beings do have a fundamental interest in the creation of their own offspring and that it is proper not to seek to frustrate the enjoyment of this basic interest.”145 However, he argues that interest is internally constrained in that a person has the right to procreate only if the prospective child has the reasonable prospect of a minimally decent life. 146 Archard’s approach is, in my view, more akin to Oberdiek’s specificationism than a full re-assessment of the value or interest underlying procreation. But note that Archard has specified an interest: the creation of offspring. Similarly, in distinguishing the reasons that one might choose to clone oneself from the reasons that one might procreate through traditional means, Frances Kamm discusses another type of interest that appears to be at least partially self-regarding. Kamm refers to this interest as “the desire for offspring that fuse genetic material (and phenotypic properties) of emotionally bonded people . . .”147 While Kamm’s interest is quite complex, a necessary condition for the value to obtain seems to be the creation of a person that did not exist before.

Mary Warnock argues:

But the most obvious basis for the longing to have children is, perhaps, a kind of insatiable curiosity: what will the random mixture of genes produce? What will be familiar, what unfamiliar? The amazing pleasure of each child is that he or she is new, a totally unique being that

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144 I am indebted to I. Glenn Cohen for this point.

145 Archard, supra note 61, at 418. In earlier work, however, Archard suggests that the interest in creation alone might not justify a right as such. Archard argues that “[m]oreover, the having of children need not serve interests which are obviously valuable,” but he is referring to bad reasons people actually have for having children (creating an object to dote upon, providing a soldier for the state, to prove it can be done, etc.), rather than good reasons that might be valuable. See David Archard, What’s Blood Got to Do with It? The Significance of Natural Parenthood, 1 RES PUBLICA 91, 97 (1995). Nonetheless, he finds that “[i]t is the wish to have a child that is important, not that the wish is actualized by biological means.” Id. at 98; see also id. at 106 (stating that the right to found a family is grounded in the right to rear rather than the right to procreate itself).

146 Archard, supra note 61, at 414.

147 Kamm, supra note 6, at 76.
has never existed in the world before, seeing things with his own eyes, saying things that are his own inventions.148

Warnock identifies the specific objective value underlying procreation. However, she makes clear that it is not compelling enough to justify a positive moral right to procreate—that is, enough to require assistance from others.149 “The judgement [sic] of what is or is not an intolerable way of life, the yardstick for the measurement of basic need, is manifestly a judgement [sic] about values, though one about which at any one time there is probably a good deal of agreement.”150 “It seems obvious, therefore, that procreation is not a basic need such as to generate an obligation to satisfy that need in the same way as nutrition.”151 Here, Warnock makes a crucial point: while there is an objective value in procreating, it does not rise to the compelling level of a need so as to create a moral right.152

Admittedly, Warnock is focused on the positive right to procreate, and she even suggests that there may well be a negative legal right in international human rights instruments.153 But, I would argue that her underlying argument says something vital about valuing procreation in general. It may well be more of a subjective desire or preference, than a compelling objective value that must be protected or promoted. Regardless, her statements distinguish her from our autonomy-minded theorists above.

Carson Strong may be the theorist who has focused most intensely on the reasons or values that justify regarding procreation as a right. His book, *Ethics in Reproductive and Perinatal Medicine*, develops an ethical framework for addressing a wide range of reproductive issues.154 Strong asks whether it is freedom in general we value or procreative freedom per se.155 He believes it is the latter, because we need to specify values in order to solve conflicts,156 and because procreation contributes to self-identity and self-fulfillment in very specific ways.157

It is important to note that Strong separates the value of procreating (which he defines as begetting, gestating, and rearing) from not procreating,158 and focuses on

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149 Id.
150 Id. at 25.
151 Id. at 27.
152 Id. at 27-29.
153 See id. at 28-29.
154 STRONG, supra note 94.
155 Id. at 3-4.
156 See id. at 4.
158 See STRONG, supra note 94, at 6, 12; Carson Strong, Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State, 27 J.L. MED. & ETHICS 347, 348 (1999) (“I have argued elsewhere that the term ‘procreation’ covers the following activities: begetting; gestating; and rearing a child one has begotten or gestated.”).
finding an objective moral value in procreating. Strong rejects bad reasons, which presumably the theorists who base the right on personal autonomy could not even begin to question, such as having children to demonstrate one’s virility, and to “save” a shaky marriage.159 “[I]n exploring whether it is reasonable to value begetting, the important issue is not whether people are conditioned to value it, but whether reasons can be given to justify valuing it.”160

There are at least six reasons that can be given to justify the reasonableness of a desire to procreate in the ordinary situation. Briefly, they are as follows: (1) procreation involves participation in the creation of a person; (2) it can be an affirmation of mutual love; (3) it can contribute to sexual intimacy; (4) it can provide a link to future persons; (5) it can involve experiences associated with pregnancy and childbirth; and (6) it can involve experiences of child rearing. . . . These reasons suggest that procreation can be valuable to an individual, in part because it can contribute to one’s self-identify.161

Strong elaborates that we value creating others because it involves participation in “the mystery of the creation of self-consciousness;”162 that children common to their parents affirm and strengthen the love between those parents;163 and that making love “in a manner that is open to procreation” heightens the intimacy of the act.164 Regarding the fourth reason, Strong downplays the value because he regards it as a modest link in that the lineage may be cut off, and because “by the fifth generation, only one-sixteenth of the originator’s genes remain, and in time the percentage becomes minute.”165 Finally, he argues that the experience of

159 STRONG, supra note 94, at 18.
160 Id. at 17; see also id. at 22 (“Also I do not mean to imply that one ought to desire genetic offspring, but only that the desire can be justified.”). Strong believes that there is a prima-facie moral right to procreate that can, and in some cases should, be overridden. Id. at 25-26, 103-05.
161 Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State, supra note 158, at 349. For a discussion of similar values underlying procreation, see Lori B. Andrews & Lisa Douglass, Alternative Reproduction, 65 S. CAL. L. REV. 623, 626-27 (1991) (referring to a sense of immortality, a sense that having a child is an expression of the procreators themselves or their love, the value of childbearing or childrearing as a life experience, the desire for the love of a child, and the desire to give love to a child); RUTH F. CHADWICK, ETHICS, REPRODUCTION, AND GENETIC CONTROL 3-43 (Ruth F. Chadwick ed., Routledge 1987) (also discussing whether such values, or “desires” as Chadwick calls them, are natural or socially induced); THOMAS H. MURRAY, THE WORTH OF A CHILD 1-11 (Univ. of California Press 1996).
162 STRONG, supra note 94, at 18.
163 Id. at 19.
164 Id.
165 Id. at 20 (Strong cites Plato as arguing that, in terms of creating immortality, having children pales in comparison to great deeds and authorship.).
pregnancy and childbirth is itself inherently valuable, as is rearing one’s genetic offspring. For Strong, “[t]hese considerations help to explain why freedom to procreate in the ordinary context should be valued; namely, because procreation can be important to persons in the ways identified, including contributing to self-fulfillment and self-identity.”

Unlike theorists who start from the point of freedom, Strong, Statman, and the others arrive at freedom having started at other specific reasons or objective moral values. This seems inevitable. Robertson and Brock value procreative liberty, but also seem to evaluate the value of procreating itself at times. Regardless, we now have at least three relatively distinct categories of values or interests that our authorities can use to understand why procreating is valuable, or why our rights-claimants are demanding it as a right.

D. Sifting Through the Values and Interests

Keep in mind that our authorities are in the very initial stages of determining the moral and eventually legal right to procreate. In sifting through all of the theorists’ values for something they can recognize, our authorities search for objective values—values that can be seen from Nagel’s “stepped-back” or generalized perspective (objectivity); basic values that, in Singer’s method of evaluative assertion, can be justified to others because others share them. This examination is not an intuitive sampling of extant social conventions, but a search for objective values that exist, as Dworkin says, regardless of whether others believe they exist. In Strong’s terms, the authorities will seek values for which reasons justify valuing them and not values that people are merely conditioned to value. Taking Raz’s view of rights, the values must be sufficient eventually to support duties of non-interference and hence a right to procreate.

1. Freedom as the Bedrock Value

Starting with the value of autonomy, as articulated by our theorists (and here, again, I take the concept of autonomy to be materially indistinguishable from self-determination), the essential question is whether the freedom to procreate has an objective value that can ground the right. There are at least three objections to finding that it does.

The first might be called a structural objection that, initially, could apply to all choice-based rights, but which especially applies to the notion of a moral right to procreate. Taking Raz’s conception of a fundamental moral right, we are looking

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166 Id. at 21.
167 Id. at 21–22. Archard also discusses this value. See Archard, supra note 145, at 100–01. He finds that shared heredity creates similarities in appearance, skill, and intelligence that facilitates self-identification and bonding, but in the end he downplays this value as largely conventional. Id.
168 Strong, supra note 158, at 349; see also STRONG, supra note 94, at 22.
169 See, e.g., supra notes 102–06; Brock, supra note 122 and accompanying text.
for some interest or “ultimate value” relative to the claimant’s well-being that is sufficiently important in itself to justify holding some other person to be under a duty. In other words, we are looking for an ultimate value upon which to base the freedom or autonomy that a duty of noninterference assures. But if we start with procreative liberty as the value, notice that we have skipped an entire step in the process. Rather than saying that “having a genetically related child is valuable, hence you ought to be under a duty to allow me to have that child, and thus I have a right to procreate,” the claim simply becomes “I value your duty of noninterference, irrespective of what I feel about procreating per se.”\textsuperscript{170} Much like a tradable procreation entitlement, we are never told why the claimant values it (or why we needed to give people entitlements at all), just that they do. They do because they do; freedom itself justifies non-interference.

This can be contrasted with the use of a specific reason for procreating, like Strong’s argument that it contributes to sexual intimacy, which explains why we value the act. We can make a fair analogy here. Using Nagel’s and Scanlon’s example of our being more likely to help a man find food than build a temple to his God, we can see autonomy-based claimants as asking for some room on which to either grow some food or build a temple, though we are not allowed to know which. It might be something that we can view from the stepped-back perspective of objectivity (like the need for food), or it might be something so subjective (comparable to the need for a religious temple) that others cannot appreciate it. It might be like the value of demonstrating one’s virility through having a large family, or of the chance to save a marriage gone bad, or of having an infant to dote upon (at least for a while), or of having a boy as opposed to a girl. For the autonomy-minded these matters are beside the point.

When Priaulx discusses the reproductive autonomy position, noting that “under a coherent account of reproductive autonomy all decisions to reproduce and avoid reproduction are of equal value given our recognition of its instrumental value to one’s selfhood,”\textsuperscript{171} the particular values that might underlie those decisions remain veiled from all those but the prospective parent because there are no objectively bad reasons. The autonomy-based approach places the word “reproductive” before the word “freedom” and thinks it has made something altogether new, something other than what one critic of procreative freedom per se called “the impoverished creature of human will.”\textsuperscript{172}

The second objection to these theories, and one which I think applies to all claims to a right to autonomy generally, is that freedom itself is not a sufficient value on which to base the right.\textsuperscript{173} Raz rejects what he terms the “presumption of liberty” or “the simple principle,” which is the presumption in favor of protecting,

\textsuperscript{170} Cf. Hart, supra note 45, at 87-88 (“The moral justification [for the right] does not arise from the character of the particular action to the performance of which the claimant has a right . . . .”) (emphasis added).

\textsuperscript{171} Priaulx, supra note 110, at 178 (emphasis added).

\textsuperscript{172} Meilaender, supra note 102, at 177.

\textsuperscript{173} This objection is based on Raz’s re-conception of autonomy in The Morality of Freedom.
under the guise of intrinsically valuable freedom, all conduct as equally valuable; that is, without regard to the specific value or disvalue we may find in the particular conduct at issue. He refuses to treat freedom or autonomy simpliciter as the thing itself (i.e., the freedom to vote, the freedom to kick children, the freedom to bear child laborers, etc.) on which to ground a fundamental right. Raz’s notion of autonomy is complex, but it is not simply the capacity to act on any given subjective value: “to the extent autonomy is important, what is important is achieved autonomy, not a mere capacity.”

And Raz says repeatedly (and correctly) that “[a]utonomy is valuable only if exercised in pursuit of the good.” Or, ‘autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships.’ . . . The whole spirit of Raz's work requires him to keep the claim that autonomy is valuable only in pursuit of the good.

If our autonomy-based theories fail to specify an objective underlying value, they must also fail in trying to base the right on freedom simpliciter—the freedom to procreate where doing so would not be an objectively acceptable and valuable project.

What we really value is not the capacity to decide whether to have children, but actually doing so or not doing so in a way that achieves autonomy. A father

174 RAZ, supra note 4, at 11-18.

The ultimate good is (or most often appears to be) individual well-being. The well-being of individuals is constituted in large measure by the success of their relationships and projects, but only of those relationships and projects which are actually valuable. The value of relationships and projects is not guaranteed simply by their being chosen by some agent.

Regan, supra note 2, at 998 (emphasis added) (footnote omitted).

175 RAZ, supra note 4, at 11-18.

The argument against fundamental rights to autonomy, which appears in Chapter Eight, can be summarized as follows: (1) genuine autonomy requires the existence of a wide range of social practices which define activities and relationships (such as being a doctor, being a concert violinist, marriage, friendship, and so on); (2) the existence of any such social practice is a collective good; (3) individuals do not have rights to the existence of such collective goods; therefore, (4) individuals do not have rights to the conditions of autonomy.

Regan, supra note 2, at 1000 (footnote omitted).

176 Regan, supra note 2, at 1076 (Regan refers to this point as Raz's most powerful argument against people who want to base moral or political theory on rights to autonomy).

177 Regan, supra note 2, at 1084.
having children that he cannot care for is having and exercising procreative liberty, but it is not an enhancement (or achievement) of his actual autonomy rather something that may retard it when he is faced with child-support obligations and the penalties of not fulfilling them. This example makes sense of Singer’s claim that, assuming there were laws discouraging teen pregnancy, “[w]e enlarge our liberty by laws that limit our liberty.”

The third and final objection is that while it might make sense to speak of voting, or writing, or praying, as autonomous acts, speaking about procreating in this way is problematic. The concept of reproductive autonomy is problematic because it is the act of creating another person. S.L. Floyd and D. Pomerantz have argued that one cannot base a right to have children on either autonomy or self-determination, because these concepts do not describe the act of bringing someone into existence. Procreation is instead primarily “other-determining.” If, as Sen and others claim, we must defer to the procreator because procreation is important or central to one’s identity, then we should defer to the interests of the prospective child, to whom it is all important.

In raising these objections I do not want to say that procreative autonomy or freedom, embodied as Raz’s “intermediate conclusion” which creates a duty on all others not to interfere with one’s having a child, is not objectively valuable. These objections are raised to say that we must go a step farther back and identify some objective intrinsic value or interest (not subjective, in that others like our authorities cannot see it) in procreating that “serves the right-holder’s interest in having that right inasmuch as that interest is considered to be of ultimate value,” or constitutive of the right-holder’s well-being. Autonomy fails because, as in the

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178 Singer, supra note 67, at 7.

179 Onora O’Neill’s recent observations about autonomy and reproduction might be recalled here. O’Neill observes that abortion concerns the avoidance of the birth of another; by contrast, in reproduction the creation of another is at stake. For this reason it would not be appropriate to construe the autonomy at stake in the latter context ‘primarily’ as a form of ‘self-expression’.


181 It might seem that we are straying into others’ interests here rather than sticking narrowly to the interests of the claimants. However, we need not now take into account any specific competing interests—we must only note that procreation will inevitably involve them.
critique of choice-based rights generally, we are never given a reason why our rights-claimants want to procreate, or how doing so will serve their interests. We are only told they value the free choice itself, i.e., the right. It bases freedom on freedom, not freedom on value.

2. The Value of New Relations, and of Life per se

Moving to our second category of underlying values, or the notion of relational-rights that Maura Ryan exemplifies, there is an obvious and immediate problem. Ryan’s whole project involves rejecting individualized and atomizing rights, and so it would not be fair to even try to base the type of traditional or conventional right our claimants are pursuing on the relational values that Ryan identifies. However, another objection remains if we construe their claims to be for a relational right to procreate, one in which we “desire our children for their own sake.”

This is not an obvious objection. Unlike the autonomy category, this approach seems to offer a fundamental value, namely the new relationship that will contribute or be of intrinsic constituent value to the ultimate value or well-being of the right-holder. In other words, life with the child will be better for the person that begets him or her. Moreover, if I am reading Ryan correctly, ideally it will (or perhaps must) also contribute, or be of intrinsic constituent value, to the ultimate value or well-being of whatever child is born. The value of the new relation goes both ways so to speak, and I see no reason why this would not be a valid thing or interest upon which to base a moral right. From a stepped-back perspective which nonetheless includes our subjective point of view, or looking at it “from no particular point of view about how to regard a world which contains points of view,” we ought to be able to appreciate the value of such relationships.

Thus, the objection is not that the relation is not sufficiently fundamental or objectively valuable to suffice. The objection is that this value would ground a right to parent, rather than a right to procreate. Parenting is a separate value, very little of which has to be based on the act of creating one’s children. Moreover, procreation is creating the person, but creating and enjoying the relationship with that person is altogether something else, something that requires a great deal more

182 RYAN, supra note 106, at 104.
183 NAGEL, supra note 4, at 161.
184 People may be parents even if no biological connection exists because the essential goods of parenthood do not include the biological component. . . . [t]he biological or genetic connections may be important to us because they constitute an important part of begetting and rearing a child, but the most important components of parenthood are its social, moral, and relational aspects.

time, skill, and effort. I would argue that procreation, as defined above, is neither a necessary nor a sufficient condition for having new, loving, and nurturing relations, even with children. A right to procreate could protect the instrumental value of creating the other person one needs in order to establish the relationship, but, at least in Raz’s formulation, this would not be a morally fundamental right.

To move from an ultimate value to a duty of noninterference that protects a certain behavior, we need a value that cannot be fully promoted by other behaviors. A right to establish loving relationships might not take our rights-claimants very far in this regard. If they want to parent, or otherwise nurture the needy, they need not have a right to procreate to do so.

If we are looking for the intrinsic value of an “other-regarding” relationship that constitutes part of our ultimate well-being, it might be even more other-regarding for us to build nurturing and loving relationships with those whom we did not create. If we limit our care-giving to those we create, we are largely missing the value or interest that I believe Ryan is asserting. The whole point of the relational value is to be other-regarding; making self-replication a necessary condition turns the act into something less other-regarding. Mother Teresa is perhaps a better model of other-regarding love and nurture than most parents. It seems that the value of the relations she created would be sufficient to ground a particular right and duty of noninterference on others, but it does not seem to ground a right to procreate.

A related value or interest that Ryan does not cover in her narrow critique of the individualized and autonomy-based approach, but one that our rights-claimants could propose, is the value of the creation of human life per se. Here, again, we have to return to Raz’s conception of rights, and of a morally fundamental right as that which serves the right-holder’s interest in having that right inasmuch as that interest is considered to be of ultimate value, that is, contributing to the well-being of the right-holder. In the case of the creation of human life per se, we are not contributing to the well-being of any particular right-holder or claimant. Rather, what is claimed is that the value should be promoted because it is valuable, not because it contributes to the well-being of the claimant. For that very reason it fails:

\[185\text{ See supra note 6 and accompanying text.}\]

\[186\text{ I do not take up here the utilitarians’ challenge that creating valuable relationships with existing persons, as opposed to one’s you create, misses an opportunity to increase total utility. See, e.g., Jesper Ryberg, The Repugnant Conclusion, Stanford Encyclopedia of Philosophy (2006), available at http://plato.stanford.edu/entries/repugnant-conclusion/.}\]

\[187\text{ It may be that procreation falls somewhere on a spectrum running from other-regarding to self-regarding values, and that a categorical distinction between the two is simply inaccurate. But insisting that the other person with whom you relate be a replication of yourself seems to move the act over the middle and into self-regarding side of the spectrum.}\]
For Raz, ‘life’ is not an intrinsic value. Life is not part of the good, but a precondition of the good. Raz points out that to speak of life as a good outside of society is to say that no social or personal context is required to grasp this good. Survival would be an impersonal value. But how could survival be impersonal?188

Ronald Dworkin criticizes the value of simply producing more human lives, from a different angle. In exploring the claim that human life is intrinsically valuable Dworkin asks: “Why does it not follow, for example, that there should be as much human life as possible? Most of us certainly do not believe that. On the contrary, it would be better, at least in many parts of the world, if there were less human life rather than more.”189 How is this possible if human life is intrinsically valuable? Dworkin finds that human life, while intrinsically valuable, is not incrementally valuable. While we might value knowledge as incrementally valuable in that we want more of it no matter how much we already have, we value human life non-incrementally: we value it once it exists, but do not value simply having more of it.190 Frances Kamm calls Dworkin’s concept intrinsic, non-incremental, objective value: value that is not a reason to produce more of it, but is a reason to treat what exists of it properly.191 The point here is simple: mere production of human life is not objectively valuable.

Moreover, another objection to the value of creating life per se, much like with our example of Mother Teresa, is that it is possible to take a view of creation that pertains to the ultimate value or well-being of others, but does not hinge on procreation per se. This is the creation value inherent in nurturing others, regardless of whether we bore them. In other words, “the adoptive couple can create a person even without the biological component, because the moral, social, and relational aspects of parenthood are essential to its creative value.”192 This is the nurturing aspect of parenting, but again like Ryan’s relational account of rights, it would ground a right to parent or nurture, rather than a right to procreate per se.

Rather than autonomy, new relations, or life itself, we need some objective value related or intrinsic to procreation, which our authorities can recognize as deserving of protection so as to ground the right our claimants seek. Our final category of interests or values relates specifically to procreation, and is not based on the relationship that procreation might create, or on the value of autonomy.

188 Batnitzky, supra note 68, at 171.
189 DWORKIN, supra note 2, at 70.
190 Id. at 73-74.
192 Austin, supra note 184, at 509.
3. The Value of Self-Replacement

Again, our authorities want to isolate the conduct of procreating and determine why it is valuable, and to understand why our claimants can justify their claim to it as a right, because that is the behavior which the laws—both the no-procreation order and the PRC’s family planning quotas—threaten. The laws do not prohibit parenting, nor do they prohibit not procreating through the use of contraceptives.

As described in detail above, our authorities have to assess the claimants’ and theorists’ procreation-specific interests or values to see whether they are of ultimate value, or constitutive of the claimants’ well-being. To do that, to realize shared or objective values, they engage in Nagel’s objectivity by relying “less on the specifics of the individual’s makeup and position in the world, or on the character of the particular type of creature he is,” and generalize to “value to individuals with particular perspectives, including oneself.” From this perspective the subjective pain of a pinprick becomes an example of pain generally; we can realize the value of food, but perhaps not of particular types of food. Among the various values or interests, what is the generalized value of procreating?

Kamm refers to “the desire for offspring that fuse genetic material (and phenotypic properties) of emotionally bonded people . . .” which suggests that at least part of what we value is the act of creating another. Robertson, when focusing on procreative interest as opposed to liberty, refers to the act as defining oneself, and full of meaning because it “produces a new individual from [one’s] haploid chromosomes.” Brock also focuses in his second moral basis of reproductive freedom on the act of having children per se as contributing to individual well-being. And, while Statman’s eventual focus on parenting might take him a bit out of the category, he also values interests like immortality, vicarious living, getting a “second chance,” and creating a family. Likewise, Archard finds that “human beings do have a fundamental interest in the creation of their own offspring,” and Warnock, while not viewing it as a need, finds that the “amazing pleasure of each child is that he or she is new, a totally unique being that has never existed in the world before.” Finally, while Strong includes

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193 Nagel, supra note 4, at 5.
194 Id. at 147.
195 Kamm, supra note 6, at 76.
196 Procreative Liberty in the Era of Genomics, supra note 109, at 450; but see Julian Savulescu, Should Doctors Intentionally Do Less Than the Best?, 25 J. MED. ETHICS 121, 124 (1999) (finding that “[w]hile genetic relatedness may have some instrumental value, it has very little intrinsic value.”).
197 See Brock, supra note 122, at 382-83.
198 Statman, supra note 140.
199 Archard, supra note 61, at 418.
200 Warnock, supra note 148, at 41.
“other” or separate intrinsic or instrumental objective values like mutual love and sexual intimacy between prospective parents, as well as the separate value of rearing children (and he shows these are separate values because he says procreation can contribute to them), his first unconditional value is the creation of a person.

Taking all of these theorists’ values into account, and generalizing from the subjective perspective to the objective, we might say that procreation is an example of the general value of self-replication or self-replacement, which is an intrinsic value and ultimate value constitutive of the well-being of the claimant, who feels deeply compelled—as members of any species often do—to replicate or replace him or herself before dying. The generalized value of procreating is the unique and incommensurable value we find in the very act of creating another person, whether the person we create is genetically related or not. The value is continuity, the constitutive aspect of our well-being that comes from defeating in some way the utter finality that death represents by creating a sufficiently comparable life. The value arises from “the very phenomenon of human existence,” and is an “existential choice” to continue the process of human living.

By procreating we will have passed to another and, therefore, continued what we value but cannot ourselves retain. The act is of intrinsic and ultimate value constitutive of the well-being of the right-holder because it allows him or her to replace what they uniquely value but are in the process of losing, their human life. The value of procreating is thus derived from the value we find in our own life, which will itself disappear but can be, to one degree or another, replaced. This value, so generalized, is not the subjective instrumental value of having children to labor on one’s farm, of having a fourth child in the hopes of having a boy, of

\[\text{201 STRONG, supra note 94, at 79-80. In his second through sixth values Strong qualifies each claim by noting that procreation “can” contribute to these other values. Id.}\]

\[\text{202 Id.}\]

\[\text{203 Strong rejects this characterization of the value in favor of describing the feature of procreation that “is a combination of participation in the creation of a person and having one’s body, or part of one body, play a causal role in the creation,” with such contribution occurring in a variety of way including contributing genes to the new person, or gestating, for example. E-mail from Carson M. Strong, Ph.D., Professor, Department of Human Values and Ethics, University of Tennessee College of Medicine, to author (Mar. 30, 2009 (on file with author)).}\]

\[\text{204 If my identical twin has a child my genes will have been replicated, but I will not have been the cause of another life. It would be hard to say in that case that I had procreated, or acted so as to create continuity of life from my being to another. Note that we could focus less on the child per se and more on the degree to which we put ourselves into that child, not just genetically but also in terms of phenotype. But even were we to create a genetic and phenotypic replica, “‘numerical nonidentity’ dictates that there are two different beings.” See Kamm, supra note 6, at 75-76.}\]


\[\text{206 Id.}\]
having something adorable to dote upon, or of demonstrating ones virility, but rather the objective value of engaging in the unique act of replicating before death. Counter to the command to “be fruitful and multiply” with which Robertson begins his book, we might compare procreation in this sense to God’s creation of Adam (though with some obvious differences). Procreation is not simply creation, it is self re-creation.

Having stepped back to Nagel’s partially impersonal perspective, our authorities might hear a generalized claim that the claimant must be allowed to procreate or he or she cannot otherwise contribute to the future in this uniquely valuable way. The claimant might die without having passed to another, and therefore continued, what he or she values but cannot retain. This claim would be built on the intrinsic and ultimate value of self-replacement, which would arguably be a sufficient value on which to ground the right our authorities seek.

E. Procreation as a Satiable Value

One issue arises immediately upon stating the value in this way: when, if at all, does the value of procreating become sated? “Satiable principles are marked by one feature: the demands the principles impose can be completely met. When they are completely met then whatever may happen and whatever might have happened the principles cannot be, nor could they have been, satisfied to a higher degree.” For example, well-being is “for Raz, a diminishing and satiable value.” This seems intuitive: we ordinarily can satisfy ourselves of the things we value. Ian Carter finds that a satiable good is “a good the conditions for the existence of which can be wholly satisfied. The most obvious examples are physiological needs, such as the relief of hunger.”

Note that when thinking about satiation, it would be easy to drift away from concern for the procreator’s interests and into the territory of conflicting interests. I believe that theorists like O’Neill, Archard, and to some degree Ryan, make procreation seem inherently satiable by defining the right as limited by duties to one’s offspring based on one’s finite resources—though what is really happening here is an outbalancing of the right by the child’s interests rather than satiation. Carl Wellman also seems to take this approach in arguing that “[o]ne’s liberty to procreate is not limited to some definite number of children, but one does have a duty not to produce more children than one can rear adequately.” But this is not the approach I want to take here. Rather, I want to suggest that as our authorities

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207 Robertson, supra note 23, at v.
208 Raz, supra note 31, at 235-36.
209 Regan, supra note 2, at 1045; id. at 1000 (“all the plausible candidates for fundamental goods are (a) ‘satiable’ and (b) ‘diminishing’—which is to say (a) that there comes a point, as an individual acquires more of the good, at which she has a full complement (for example, a person can be fully happy, in such a way that further successes in her projects do not make her happier)”).
211 See Wellman, supra note 116, at 125-35.
step back from subjective and instrumental values (like having many children to provide for one in one’s later years), towards the objective and intrinsic value of generalized self-replication, there may also be an objective point at which the value of procreating, from the perspective of the procreator, is satiated.

This is not a novel proposition.212 Sarah Conly argues that none of the values that might support a human right to procreate necessarily support a right to have as many children as one would like, and that those values—like the value of satisfying one’s hunger—are satiable.213 Even the more autonomy-focused theorists discussed above anticipate this.214 Robertson finds that “[n]or would already having reproduced negate a person’s interest in reproducing again, though at a certain point the marginal value to a person of additional offspring diminishes.”215 Robertson, however, makes clear that the low marginal value would not occur until the person has had “a large number of children.”216

Brock is more explicit about the matter:

Since for most parents this is a central, if not the central, project in their lives, the decision about whether to have children at all is of fundamental importance to them. On the other hand, whether to have, for example, 3 or 4 children typically is of less importance because it has less far reaching effects on their lives. This means that typically the component of whether to procreate at all has more moral importance than the component of how many children to have.217

I. Glenn Cohen has also addressed this issue, in the context of default rules for the use of preembryos where disagreement between the progenitors exists:

What about a now-infertile woman who already has one genetic child, such that loss of access to the preembryos means only that she cannot have others? . . . [D]o we think there is some idea of diminishing marginal utility of having genetic children? My own sense is that the balance of interests favors use when an individual has no genetic

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212 However, in general, the issue of satiation has been all but ignored by those studying the right to procreate.
213 Sarah Conly, The Right to Procreation: Merits and Limits, 42 AM. PHIL. Q. 105, 106 (2005) (referring to the psychological value of the “animal urge” to procreate as well as the value of having children as an expression of love, Conly finds that “having just one or two [children] might be sufficient”).
214 Though, as has been pointed out to me, if what is valued is the autonomy of the decision, subsequent decisions may be no less valuable than the first. If that is the case, when these theorists talk about diminishment they may be proceeding from values other than autonomy.
215 Robertson, supra note 23, at 31, 74.
216 Id. at 239, n.33.
217 Brock, supra note 122, at 380.
Statman also addresses this point, arguing that the fundamental interest in procreating can be satisfied. “In terms of any of the considerations just mentioned, two or three children should definitely suffice.” Others also refer to the right to procreate as distinct from the right to choose how many children to have, implying that the right is satiable.

While I agree that the underlying objective value of self-replication can be sated, these formulations of when it is sated may be morally arbitrary. Instead, I would argue that the objective intrinsic value of self-replication, of the continuity of human living that it represents, is met upon self-replication. That is, we change from a being who has not replicated to a being who has replicated, from a being who has not established continuity to one who has, upon procreating, and all other things being equal, we cannot achieve, meet, or satisfy that particular value again.

Replacement relates to, or corresponds to, the procreator as an individual being. The moment that being has self-replicated and established continuity and lineage, they have contributed to the future and (all other things being equal) left something of comparable substance behind. This is not mere associative thinking, i.e., relating from one being to another subsequent being. In thinking objectively about the intrinsic value of procreating, in stepping back to view it as an example of self-replication which is good, we might see it much the way we see food as good once we step back from the various types of food we subjectively do and do not like.

From that stepped-back perspective, we properly lose sight of other subjective and instrumental values procreating may simply relate to, like producing labor, ensuring a large family, having a child of a particular sex, bearing soldiers for the state, and demonstrating virility. We may instead see something altogether intrinsically valuable in the act itself, much the way all food is objectively good to humans even when certain types of food subjectively are not. What matters in this

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219 Statman, supra note 140, at 225-26.
220 See Note, Legal Analysis and Population Control: The Problem of Coercion, 84 HARV. L. REV. 1856, 1871, 1891, 1893 (1971). Ryan’s account of rights does not work with an account of individual satiable interests, see supra notes 128-39 and accompanying text, but she finds that “we can imagine a moral constraint on individual choices to reproduce under conditions, for example, where population pressures undermine social, economic, ad ecological stability or where reproduction for some can only be accompanied by denying others access to some basic good, such as health care.” RYAN, supra note 106, at 114. However, she has grave doubts about the state’s role in enforcing such constraints. Id. By basing the value of procreating in self-replication I may be falling prey to Ryan’s criticisms regarding inevitably reducing the resulting child to the status of property, id. at 96-101, though perhaps procreators are less likely to see their replacements as objects per se than children produced for other reasons.
uniquely valuable act is that we replicate, and create lineage, projecting something of our existence into the future. That is done, and the conditions for the existence of the good are satisfied, the moment we create a child, our “first born.” Numbers beyond lineage are subjective and instrumental, and in terms of the intrinsic moral value of procreating, arbitrary, because they correspond to no equivalent value.

Replacement and continuity—or someone having created another person—gives us a rational baseline, and is the only norm that, from the perspective of state policymaking (which will become more and more crucial as the legal right is formed), is neither inherently pro-natal nor anti-natal. It is rational because it is logically related to the procreator as an individual (“being to being” so to speak), and meets the objective value persons attach to being assured that they may contribute to the future. They are assured that they may leave something of unique substance behind: a human life like theirs, to replace and continue the valuable process of living.221

This point can be made in a different way. Recall Ronald Dworkin’s argument against the value of simply producing more human lives (incremental value), but in favor of the intrinsic value of human life, what Kamm calls non-incremental, objective value: value that is not a reason to produce more of it, but is a reason to treat what exists of it properly.222 If what we value is the life that already exists, that is, our own life, we will seek to replace or replicate that life, or to treat it properly by having another continue the valuable process of living, rather than to simply produce as much of it as we can. What we value is our individual life and its continuity through another, not the multiplication of lives per se.223

There is also an argument from a more consequentialist view of rights, that will not be fully addressed here, that satiable replacement ought to be the underlying value, and thus a hard internal limit on the scope of the right to procreate. This is based primarily on the simple and unavoidable fact that each human can provide only so many resources—material resources like food, 221 While this article has focused on the negative right to noninterference, if persons have such an interest in self-replacement, that interest may also justify some positive right to assistance from others to satisfy it.

This view of the grounding of the moral, and eventually legal, right raises several questions that are well beyond the scope of this article. One would need detailed information about the actual policies challenged to begin to apply the analyses. What if a person that has had a child wishes to procreate with someone that has not? What is the result of having twins, or triplets? The answer to these questions would eventually require our authorities to specify the legal right by deriving it from the objective value of self-replacement, if that is the ground they choose. But any policy that prohibited self-replacement would arguably run afoul of the moral right. 222 See supra notes 176-78 and accompanying text.

223 One can argue that Dworkin would reject this way of grounding an eventual rights claim. See Kamm, supra note 191, at 166 (noting that Dworkin suggests this type of value, or what he calls the sacred or inviolable, falls outside of the realm of moral and political rights). But I am not relying on Dworkin’s theory of rights here as much as I am relying on his theory of value.
clothing, and shelter, as well as time, affection, and instruction—for their offspring. Likewise, any given generation can only provide a certain level of resource for the next. Whatever the parent or generation can provide will be divided and diluted by the number of children born. Many benefits come and many costs are avoided from our simply not dividing and diluting the level of resource offered to succeeding generations.224

One could thus get at the value of replacement from a consequentialist approach to rights because reducing towards replacement level fertility can (and likely does) lead to economic and social development that eliminates poverty, illness, and environmental degradation.225 Even autonomy proponents like Sen laud the good “the drop from over-frequent childbirth” would bring, especially for the “hundreds of millions of women [that] have to lead lives of much drudgery and little freedom because of incessant child bearing and rearing.”226 Sen and many others would rely on restructuring various social and economic factors in order to allow people (and women in particular) to fulfill their apparent desire to voluntarily reduce the number of children they have.227

224 See, e.g., David E. Bloom et al., The Demographic Dividend: A New Perspective on the Economic Consequences of Population Change (RAND Corp. 2003) (arguing that reducing high fertility can create opportunities for economic growth when combined with specific educational, health, and labor-market policies). The dividend rests largely on the ratio of productive adults to dependent children, and depends on key variables such as education and public health.

225 Id. There is of course controversy as to whether reduced fertility rates lead to development or vice versa.

The relationship between population and economic development continues to be factious. Neo-Malthusians insist that fertility rates must be decreased before economic development can occur. Other theorists contend that development is the key to the reduction of fertility rates. This theoretical polarization in turn yields very different perspectives on population regulation. Programs designed primarily to reduce birth rates focus almost completely on contraception and sterilization, often without addressing the critical social and economic constructs which motivate people to have many children. By contrast, programs which incorporate family planning as part of comprehensive social and economic change seek to reduce the motivation to have large families. Proponents of both theories claim success.

Paula Abrams, Population Control and Sustainability: It's the Same Old Song but with a Different Meaning, 27 ENVTL. L. 1111, 1117 (1997) (footnotes omitted).

226 Sen, supra note 114, at 1051-52, 1060-61.

227 Id. at 1049, 1060-61.

High fertility rates can be seen, with much justice, as adverse to the quality of life, especially of young women, since recurrent bearing and rearing of children can be very detrimental to the well-being and freedom of the young mothers. Indeed, it is precisely this connection that makes the empowerment of
Still, the question remains that if, given the right economic and social conditions, prospective parents will voluntarily reduce fertility rates towards something like replacement, does this suggest that it might be the objective value underlying procreation? Outside of the People’s Republic of China, the dominant population-control policies which developed in the latter-half of the Twentieth Century were premised on the notion (echoed by Sen and others) that, given the right legal, social and economic conditions, persons would voluntarily choose to have less children than they were having, and approach something like the notion of replacement I have discussed here. If that is what people value about having children, then that is what the right should protect.

Alternatively, if procreative choice is merely a seesaw of subjective desire subject to preference shaping by external social and economic influences, why not enshrine replacement as the content of the right for the consequences that doing so would bring? Access to reproductive health services to prevent high fertility is only

women (through more outside employment, more school education and so on) so effective in reducing fertility rates, since young women have a strong reason for moderating birthrates, and their ability to influence family decisions increases with their empowerment.

AMARTYA SEN, DEVELOPMENT AS FREEDOM, 144-45 (1999).

In more recent years, social development theorists have championed a promising third approach that offers a refined analysis of the interplay between development and fertility. These theorists reject the view that economic development invariably reduces birth rates. Instead, they attempt to unravel the specific factors associated with development that lead to reduced fertility rates, so that policymakers can target those factors in particular. Under their analysis, two key determinants of low fertility rates are the educational level of women and their ability to participate in society outside of the home.

Douglas A. Kysar, Law, Environment, and Vision, 97 NW. U. L. REV. 675, 726 (2003) (footnote omitted); see also Virginia Deane Abernethy, Allowing Fertility to Decline: 200 Years After Malthus’s Essay on Population, 27 ENVTL. L. 1097, 1098 (1997) (proposing that “perception of expanding opportunity encourages people to raise their family size target and, pare passu, actual family size. Likewise, the economic opportunity model predicts that a sense of scarcity or contracting economic opportunity leads to marital and reproductive caution.”).

‘Free choice’ advocates emphasize the necessity and sufficiency of reforms aiming, in the short run, to reduce the number of unwanted children, and over a longer period, to reduce couples' calculation of an appropriate number of children. The factual premise of the voluntarist position is that the number of unwanted children constitutes a significant fraction of the difference between the current three-plus average family size and the two-plus replacement goal.


Id.
relevant if there are reasons, and perhaps objectively good and valuable reasons, to use those services.

But, as this article has argued, the better approach to rights (and perhaps a more permanent solution to the problems mentioned above) is deontological rather than consequentialist, and is achieved through thoroughly understanding what underlies the right—for the following reasons: Procreation is a form of human behavior. Human behavior, in any given society, is subject to limitation. The limitation of any particular behavior is itself constrained by the extent to which that behavior is protected as a matter of right. It follows then that before one should consider how to limit any particular behavior for the beneficial consequences such limits would bring, and regardless of what means of limitation the state chooses to use (from the subtle restructuring of social norms and economic incentives/disincentives, to more blatant physical coercion), the first order of business must be to understand why and how the particular behavior should be protected by a right—if at all. And it may be that the objective value our authorities find in the act of procreating—perceived from a perspective which transcends mere subjective desire—will itself be sufficient to lead citizens’ behavior as they too perceive it, obviating the need for any traditional means of limitation at all.

Our authorities can begin to define or understand the right to procreate from the rational baseline of self-replacement as an objective, intrinsic value. This would have the merit of giving reasons for or justifying what our rights-claimants wish to do, and coinciding with values that our authorities and others share and also wish to protect.

**CONCLUSION**

The purpose of this article has not been to determine how our authorities should eventually decide the cases before them, or even how they will determine the legal right to procreate once they begin to interpret sources of law. Rather, it has been to argue that they can approach the cases in a certain way (perhaps as authorities in the real world do), by first critically examining the moral values or interests that might underlie the claims of a right to procreate.

Of course, our discussion does suggest how the cases might eventually be disposed of: proceeding from autonomy might ensure that our rights-claimants eventually succeed, whereas a relational rights approach might go either way, though on the limited facts given, what our claimants want to do might not be sufficiently other-regarding. The final approach of looking at values specific to procreation might ensure that their claims are denied, at least if one takes the view that the underlying value is sated at self-replacement. That approach, may, at the very least, create the most stable right possible, one derived from an objective value that we all can appreciate and defend, albeit one that has limits.
A COMPREHENSIVE BLUEPRINT FOR A CRUCIAL SERVICE:  
FLORIDA’S NEW SUPERVISED VISITATION STRATEGY

Nat Stern* and Karen Oehme**

For nearly two decades, judges have increasingly sought ways to protect vulnerable family members in complex child custody litigation. Communities across the country have responded by developing supervised visitation programs to shield children and vulnerable parents in high-risk cases.1 Heightened attention to the need for these programs by public officials and other stakeholders2 has resulted in a surge of interest in the service, and an acknowledgment of the valuable role that programs play in reducing conflict and protecting vulnerable family members.3 Recent high-profile custody cases reported in the national media,

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1 See, e.g., Nancy Thoennes & Jessica Pearson, Supervised Visitation: A Profile of Providers, 37 FAM. & CONCILIATION CTS. REV. 460, 460 (1999) (reporting authors’ “[s]urveys of 94 administrators of supervised visitation programs, 51 family court judges, and 40 administrators of child protective services agencies” throughout the United States and parts of Canada to describe supervised visitation programs and delineate existing strengths and limitations); see also Laura Pappano, New Center Offers Neutral Territory for Parental Visits, BOSTON GLOBE, Mar. 6, 1994, at 1 (describing Framingham Massachusetts’ first center to serve as a neutral ground for parents to have supervised visitation with their children); Alexis Gines, Program Monitors Parent, Child Visits in Custody Cases, THE NEWS & REC., Oct. 14, 2005, at B3 (describing the opening of Harmony House); Laura Paul-Hatcher, Family House Provides Safe Haven for Children, POST-TRIB., Sept. 17, 1993, at B4 (describing the opening of the Family House Visitation Center in Indiana).

2 In this context, the term “stakeholders” refers to anyone in the community who has a stake in the safety of families, including judges, domestic violence advocates, and public agencies with relevant responsibilities.

3 See, e.g., Supervised Visitation Information: What is Supervised Visitation?, http://www.courtinfo.ca.gov/selfhelp/family/custody/visitation.htm#whatis (last visited on Nov. 18, 2008) (describing supervised visitation); Judges Discuss Visitation Service, STUART NEWS, Nov. 10, 1998, at C1 (announcing that Juvenile Circuit Judge Burton Conner and Family and Domestic Violence Judge Cynthia Cox would join the Department of Children and Families in hosting an informational session about plans to develop supervised visitation centers in Martin, St. Lucie, Indian River and Okeechobee counties); Dave Toplickar, Bill Seeks Neutral Zone in Divorces, LAWRENCE J.-WORLD & NEWS, Feb. 16, 1995, at 1 (describing Representative Barbara Ballard’s attempts, with over twenty legislative sponsors, to create visitation centers in Kansas); Vickie Wellborn, Safe Visitation Center to Open in Arcadia, THE SHREVEPORT TIMES, July 13, 2004, at 1B (describing how the Sheriff John Ballance welcomes the new visitation center).
including that of singer Britney Spears, have further increased visibility of the service, making supervised visitation a household term.

While interest in supervised visitation programs exists internationally, Florida in particular has consistently been at the forefront of the development of visitation services, and has steadily sought to increase their quality, consistency, and effectiveness. With over sixty supervised visitation programs throughout the state, Florida has an exceptionally strong interest in tracking these developments. Recently, an unprecedented statewide effort has been underway that has drawn from and advanced myriad local, state and federal conversations about supervised visitation. The result is a new comprehensive set of uniform state standards, accompanied by compliance measures, tracking forms, the first proposed certification process for supervised visitation programs, and advances in the discussion of immunity for providers and program access to the referring court.

This article traces these unparalleled developments. Part I provides an overview of the evolution and growth of supervised visitation nationally. Part II describes both the 2007 Florida legislative mandate for new standards to govern programs and the process by which they were written. Part III explains the guiding principles that provide a framework for these standards: safety, training, dignity, diversity, and community. Parts IV-VII address Florida’s Programs’ salient operational details under the standards, and offer direction to other jurisdictions seeking to use Florida’s comprehensive model as a template for their own policy development.

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4 See, e.g., Spears Gets Supervised Visits, NEWSDAY, Oct. 4, 2007, at A12; Spears Left with No Room for Error, CHI. TRIB., Oct. 5, 2007, at 27 (Spears was required to comply with a supervised visitation order. The judge in her case stated that “with regard to her supervised visitation rights with Sean Preston, 2, and Jayden James, 1, the monitor shall terminate visitation immediately if any conduct or action by [Spears] endangers the minor children.”).

5 See Bonnie S. Newton, Visitation Centers: A Solution Without Critics, 71-JAN. FLA. B.J. 54, 56 (1997); see generally Karen Oehme, Supervised Visitation in Florida: A Cause for Optimism, A Call for Caution, 71-FEB. FLA. B.J. 50, 50 (1997) (outlining the numerous visitation programs that Florida has developed).

6 For a decade now, the Florida Department of Children and Families has supported the technical assistance and training for supervised visitation programs. See the Clearinghouse on Supervised Visitation Website, http://familyvio.csw.fsu.edu/CHV.php (last visited Feb. 10, 2009).


I. AN OVERVIEW OF THE HISTORY OF SUPERVISED VISITATION

Supervised visitation is contact between a noncustodial parent and his or her “child overseen by a trained third party in a controlled environment. . . .”\(^9\) Supervised visitation programs were originally created for dependency cases: those in which children were removed from the parent’s home by a child protective agency because of alleged child abuse or neglect.\(^10\) The service allows children to safely maintain family attachments and reduces children’s’ sense of abandonment when they are removed from their parents’ care.\(^11\)

During the 1990s, courts began to expand the use of supervised visitation programs to help address a variety of other family dysfunctions found in many cases involving divorce or disputed custody. These frequently recurring problems include substance abuse, mental illness, threats of abduction, and domestic violence.\(^12\) Instead of prohibiting contact between parents accused of wrongdoing and their children, courts began to order families to use visitation programs to enhance family safety during contact,\(^13\) while other services were offered to reduce family problems.\(^14\) Individual judges also began to take an active role in

\(^9\) Id. at 16. The contact between the parent and the child is structured so that program personnel may actively encourage the parent-child relationship by providing age-appropriate activities, helping parents develop or enhance parenting skills when necessary, modeling appropriate interactions with the child, and discouraging inappropriate parental conduct. Id.; see also Mary L. Pulido & Janine M. Lacina, *Supervised Visitation: Meeting the Needs of Today’s Families, in The New York Society for Prevention of Cruelty to Children Professionals’ Handbook: Supervised Visitation Services for High-Risk Families* 12 (2008).

\(^10\) See, e.g., Daniel F. Perkins & Sylvia J. Ansay, *The Effectiveness of a Visitation Program in Fostering Visits with Noncustodial Parents*, 47 Fam. Rel. 253, 253 (1998) (contending that research has demonstrated the potential benefits of supervised visitation programs).


encouraging the formation and shaping of new visitation programs, especially in communities that did not offer the service. Large constituent groups, such as the National Center for State Courts, later hailed supervised visitation as an opportunity for continuity and safety for children “adjusting to changes in their life situation.”

While individual cities and towns began opening new visitation programs, the Family Violence Committee and Family Violence Department of The National Council of Juvenile and Family Court Judges (NCJFCJ) developed the Model Code on Domestic and Family Violence. Portions of the NCJFCJ Model Code, published in 1994, address the issue of visitation between perpetrators of domestic violence and their children. One provision states: “A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of violence is feasible.”

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15 See, e.g., Thomas C. Dudgeon, On-the-Spot Mediation and Supervised Visitation: A Pilot Project Comes to Courtroom 2003, in DCBA BRIEF (1999), http://www.dcba.org/brief/febissue/1999/art20299.htm (describing how members of the legal community actively help shape the local Illinois visitation program); Judge Donna M. Petre Wins 2006 Benjamin Aranda III Access to Justice Award, Release No. 82, (Nov. 2, 2006), http://www.courtinfo.ca.gov/presscenter/newsreleases/NR82-06.PDF (describing how Judge Donna M. Petre won an Access to Justice Award for, among other things, creating two supervised visitation programs); Nancy K. D. Lemon, The Legal System’s Response to Children Exposed to Domestic Violence, 9 DOMESTIC VIOLENCE & CHILD. 67, 70 (1999), available at http://www.futureofchildren.org/information2827/information_show.htm?doc_id=70509 (supervised visitation and visitation exchange centers are springing up around the country, often under the auspices of courts); Website for Re-election of Judge Joan Posner, http://www.joanposner.com/community.html (last visited Nov. 15, 2008) (announcing that Judge Joan Posner served on the Advisory Committee for the Supervised Visitation Program of Family Services, Inc.). In Florida, the website of the first visitation program states: “We opened in 1993 as the Family Visitation Center, the first of its kind in Florida. It was the brainchild of the Honorable Judge Dorothy Pate, who was moved to act after hearing frequent complaints from parents who were not being allowed to see their children who had been placed in foster care.” About the Family Nurturing Center of Florida, http://www.fncflorida.org/about (last visited Nov. 21, 2008).


17 See Robert B. Straus, Supervised Visitation and Family Violence, 29 FAM L.Q. 229, 233 (1995) (noting “a handful of programs in 1982” and “fifty-six known supervised programs operating in twenty-eight different states” in 1994 while cautioning that the statistics “represent about a third to one-half of the existing programs”).

domestic or family violence can be made.” Another describes the need to establish a secure setting for supervised visitation that would allow “court ordered visitation in a manner that protects the safety of all family members.” A comment to the section reads: “Visitation centers may reduce the opportunity for retributive violence by batterers, prevent parental abductions, safeguard endangered family members, and offer the batterer continued contact and an ongoing relationship with their children.”

Simultaneously, individual programs in many states began networking with one another, culminating in the formation of the Supervised Visitation Network (SVN). SVN began to create standards for addressing such issues as program safety protocols, staff qualifications and training, and administrative processes. The organization’s general membership adopted the standards in 1996. The SVN standards were created for member programs; however, no enforcement mechanism was developed by the group. Instead, members indicate on their membership applications whether they will comply with these standards. No state or agency has ever adopted the SVN standards in their entirety. But, by 2000, a few states—notably Kansas, California, and Florida—had launched the formal process of creating standards for the provision of supervised visitation services. In 2000, the federal government, through the Office on Violence Against Women (OVW), began to provide funds for visitation and exchange services specifically in domestic violence cases. In 2007, OVW published Guiding Principles for Safe
Havens: Supervised Visitation and Safe Exchange Programs, for grantees who received this funding under the federal Violence Against Women Act to provide supervised visitation. As the OVW Report to Congress describes, there have been Safe Haven grantees in many states. Because the Safe Havens program attempts to fund programs across the nation, and focuses only on those that provide services in domestic violence cases, OVW funding has not funded all of the supervised visitation programs in any one state in the United States.

II. THE FLORIDA MANDATE

The first supervised visitation program in Florida, the Family Nurturing Center of Jacksonville, opened in 1993. By 1996, there were fifteen programs in the state; by 2004, over sixty programs had opened. One commentator has called the need for such programs “compelling.” Another author declared that “[e]very community that has a public school should also have a center where safe supervised visitation, waiting, and transfer can be accomplished, if necessary, without the necessity for contact between conflicted parents.” Currently, every judicial circuit in Florida is home to at least one supervised visitation program.


30 Only five of Florida’s supervised visitation programs have been partially funded at some point by this grant. See Letter from Sharon Rogers, Director, Judge Ben Gordon Visitation Program, to Karen Oehme, Director, Institute for Family Violence Studies (Jan. 10, 2009) (on file with authors).

31 About the Family Nurturing Center of Florida, http://www.fncflorida.org/about/ (last visited Nov. 21, 2008).

32 The History of the Clearinghouse on Supervised Visitation http://familyvio.csw.fsu.edu/CHVH.php (last visited Oct. 19, 2009) (stating that the Clearinghouse on Supervised Visitation was created in 1996 when there were only fifteen programs); see also Karen Oehme & Sharon Maxwell, Florida’s Supervised Visitation Programs: The Next Phase, 78-JAN. FLA. B.J. 44, 44 (2004) (stating that at the time that the supervised visitation database was developed, forty-two programs existed in the state, up from fifteen programs in 1997).

33 Oehme & Maxwell, supra note 32, at 44.

34 Debra A. Clement, A Compelling Need for Mandated use of Supervised Visitation Programs, 36 FAM. & CONCILIATION CTS. REV. 294, 311 (1998) (concluding that “[t]here is no better service that state legislatures could perform for their most vulnerable children than to make supervised visitation programs available to every troubled family that can benefit from them.”).

Florida’s Supreme Court expressly endorses “the utilization of qualified programs for supervised visitation and/or monitored exchange” as an essential component of such courts. In 1998, the Florida Supreme Court’s Family Court Steering Committee developed a skeletal set of standards for supervised visitation and exchange programs to create uniformity in such areas as staff training, terminology, and basic practice norms. Chief Justice Major Harding endorsed the Florida Supreme Court’s Minimum Standards for Supervised Visitation Program Agreements and crafted an administrative order in 1999 mandating that the chief judges of each circuit enter into arrangements with local programs that agree to comply with the standards.

Chief Justice Harding, however, recognized the limited ability of the judicial system to create and enforce standards for programs. Writing to the Speaker of the Florida House of Representatives and the President of the Senate, Harding sought legislative support:

The lack of guidelines or standards for these Programs and lack of oversight of these [Supervised Visitation] Programs, particularly as to staff and visitor safety and staff training, is of great concern . . . . I urge the legislature to consider establishing a certification process, and designate an entity outside of the judicial branch to be responsible for oversight of Supervised Visitation Programs.

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37 In re Report of the Family Court Steering Comm., 794 So. 2d 518, 526-27 (Fla. 2001).
39 Florida Supreme Court Administrative Order, supra note 38.
Seven years later, the state legislature finally amended Chapter 753 of the Florida Statutes\(^{41}\) to provide for the development of new standards for Florida’s supervised visitation programs, as well as procedures for a certification process. FLA. STAT. §753.03, went into effect on July 1, 2007, and required the Clearinghouse on Supervised Visitation at Florida State University to create an advisory board to assist with the creation of those new standards and procedures.\(^{42}\) The advisory board members specifically included, among others, representatives from child protection, court administration, domestic violence, law enforcement, and supervised visitation agencies.\(^{43}\) These individuals became collectively known as the Supervised Visitation Standards Committee (“the Committee”).

The Committee met approximately four times per month\(^{44}\) to discuss standards and certification, and ultimately produced a formal Report to the Florida Legislature: Recommendations of the Supervised Visitation Standards Committee (“the Report”).\(^{45}\) As the group undertook this challenge, several cases arose that raised the Committee’s awareness of the unpredictability and dangers of supervised visitation dynamics. These cases also influenced the way that Committee members viewed and shaped the standards for supervised visitation. One such case involved a man using the alias Clark Rockefeller. Over a period of several weeks during the summer of 2008, the national news media frequently reported that “Rockefeller” had kidnapped his seven-year-old daughter during

\(^{41}\) FLA. STAT. ANN. §§ 753.01-.05 (West 2009) (Chapter 753 deals with supervised visitation and monitored exchange programs in Florida. The statute specifies that the Clearinghouse, in consultation with the advisory board, shall develop criteria and procedures for approving and rejecting certification applications for and monitoring compliance with the certification of a Supervised Visitation Program. The Clearinghouse shall recommend the process for phasing in the implementation of the standards and certification procedures, and the criteria for distributing funds to eligible Programs and designating the state entity that should certify and monitor the Supervised Visitation Programs.).

\(^{42}\) FLA. STAT. ANN. § 753.03. Applicable provisions read that: “the clearinghouse shall develop standards for supervised visitation programs in order to ensure the safety and quality of each program. Standards must be uniform for all the programs and must address the purposes, policies, standards of practice, program content, security measures, qualifications of providers, training standards, credentials and background screening requirements of staff, information to be provided to the court, and data collection for supervised visitation programs.” Id.


\(^{45}\) See generally RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8.
supervised visitation. Although the child was later found unharmed, police determined that Christian Gerhartsreiter—the man’s real name—was a “person of interest” in a double murder. This case raised serious issues concerning safety, as the Committee learned that this was not the first child kidnapped from a supervised visit by a parent. These cases influenced the Committee’s views on “off-site visitation,” and the new standards have more stringent rules to avoid a similar tragedy. Since previous rules were silent on the issue, the Committee crafted additional training, insurance, and court provisions to add layers of protection to the process.

In an even more shocking incident—this time in Florida—a sixteen-year-old was allegedly stabbed by his mother in the abdomen and neck during a supervised visit in the office of a mental health professional. The visit monitor was a nurse, who watched in horror as the boy’s mother took a decorative dagger and a drywall

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46 The Man Who Calls Himself ‘Clark Rockefeller’ is Indicted for Parental Kidnapping, BOSTON GLOBE, Sept. 26, 2008, available at http://www.boston.com/news/local/breaking_news/2008/09/the_man_who_cal.html. The visit supervisor was walking down the street accompanying the father-daughter pair, when a black SUV pulled up, and Mr. “Rockefeller” jumped in the car with his daughter. See Abduction Suspect Clark Rockefeller to be Extradited to Boston, FOX NEWS, Aug. 4, 2008, http://www.foxnews.com/story/0,2933,396788,00.html. The visit supervisor tried to stop the abduction, and was dragged a short way. Id. The driver of the car, Daryl Hopkins, said that he had been hired by Rockefeller before, and that this time he was to pick up the father and daughter and take them to Newport, Rhode Island for an “important meeting.” See Driver: Clark Rockefeller Said he was Running from Gay Friend, FOX NEWS, Aug. 13, 2008, http://www.foxnews.com/story/0,2933,402961,00.html. The national news reported the kidnapping. After his arrest on August 2 (when the child was found unharmed), the FBI and Boston police department confirmed the true identity of the man: Christian Karl Gerhartsreiter, an immigrant from West Germany. See ‘Rockefeller’ Kidnap Trial Underway, BOSTON NEWS, May 29, 2008, http://www.thethebostonchannel.com/news/19587900/detail.html.

47 The Man Who Calls Himself ‘Clark Rockefeller’ is Indicted for Parental Kidnapping, supra note 46.


49 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 47.

50 Id. at 50.

knife out of her purse and stabbed her son repeatedly. This case caused the Committee to add language prescribing a program’s duty to check parcels and packages if a parent brings such items to the visit. The new standards require that all programs have

[p]olicies and procedures addressing parcel/containers [sic] brought to the Program by participants. Programs may choose to create a mandatory prohibition or a mandatory inspection of all bags, parcels, purses, duffels, briefcases, backpacks and/or any other type of container in which items may be concealed. Programs should give participants a choice as to whether to leave items at home, or have them subject to inspection at the Program. These policies must reflect staff awareness of the dangers associated with weapons, substances, or other dangerous, illegal, or inappropriate items which may knowingly or unknowingly be brought into the visitation program by participants.

Another tragedy in Florida occurred when Harold Dunn allegedly shot and killed his estranged wife at a daycare center where their child was enrolled. Dunn’s wife had filed for divorce, and media accounts report that Dunn had supervised visitation with their two-year-old daughter in a relative’s home. Neither of these tragedies occurred at a Florida supervised visitation program. Still, the chilling facts troubled the Committee, which decided to send a strong cautionary message to judges regarding any type of visitation supervision, not only those cases sent to supervised visitation programs. The Committee felt that a two-tiered system that makes programs adhere to standards, but leaves all other court-ordered visits unprotected by security measures, poses grave but often unacknowledged hazards to families and children. Thus, the Committee created a new hierarchy that asks judges to use certified programs before resorting to other

52 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 43.
53 Id.
56 See, e.g., E-mail from Arlene Carey, Policy Analyst at Florida’s Department of Children and Families and Member of the Supervised Visitation Standards Committee to Karen Oehme, Director, Institute for Family Violence Studies (Feb. 10, 2009) (on file with the authors).
57 Id.
professionals or paraprofessionals in the community. In addition, the Committee recommended that judges require all agency staff to read the standards and training material before supervising visits.

The Report itself can serve as a training tool for administrators, staff, and volunteers. It may also have value for individuals and agencies interested in developing new supervised visitation programs. It has already been circulated to many other states, which have been tracking the status of the Committee’s work and have expressed interest in its recommendations.

III. THE FLORIDA STANDARDS

The Report describes a new mission statement for Florida’s supervised visitation and monitored exchange programs:

The mission of Florida’s Supervised Visitation and Monitored Exchange Programs is to use well-trained staff to provide safe and respectful Supervised Visitation and Monitored Exchange services and to coordinate these services within each community. Programs accomplish this mission by adhering to the following four principles involving safety, training, dignity and diversity, and community.

The Report then explains the four overarching principles—safety, training, dignity and diversity, and community—and the ensuing standards and highly specific compliance measures through which the four principles are implemented. These are summarized in the next sections.

58 See discussion infra Part VII.
59 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 22 (stating that “prior to being able to supervise any visits after October 1, 2009, all agency staff who supervise visits must complete a review of the online training . . . and certify to their own agencies that they have read and are familiar with these Principles.”).
60 See RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8.
61 E.g., California, New York, and Kansas. See E-mail from Shelly LaBotte, California Administrative Offices of the Courts, to Karen Oehme (Dec. 4, 2008); E-mail from Becky Heatherman, KNVP Project Coordinator to Karen Oehme (Dec. 8, 2008); E-mail from Michelle Ivory, New York Co-Chair, State Chapter of the Supervised Visitation Network State Chapter, to Karen Oehme (Dec. 4, 2008) (on file with the authors).
63 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 16.
64 The Florida Standards are inspired by and arranged similarly to the OVW Safe Havens Guidelines, but Florida’s internal structure is much more detailed.
A. Safety

Principle One, comprising the largest set of standards in the Report, emphasizes safety: “The unique safety needs of individuals are of paramount importance in supervised visitation and monitored exchange programs.”65 Recognizing that “each individual family member” in a case may have “unique needs with regard to safety,” the standards mandate that programs be “structured and administered” so as to identify and meet those needs. 66 In doing so, programs can serve an important role for families67 by offering a variety of services, including one-on-one supervision, group supervision, and monitored exchange services. This “[s]upervised visitation” has been called “a useful and concrete safety mechanism that can easily be included in a court order.”68 In addition, the principle acknowledges that case referrals may present distinctive risks to program staff and volunteers.69 Such risks are not uncommon in social services organizations.70

The standards within this principle range from provisions that track current law, to simple lists of policies that programs must develop to enhance child, adult, and site safety, to broad directives aimed at helping administrators consider the subtle issues that can be involved in making those policies. Standard XIV, for example, directly repeats the requirements of Florida’s Keeping Children Safe

65 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 26.
66 Id.
69 See RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 26.
70 See Agnieszka A. Kosny & Joan M. Eakin, The Hazards of Helping: Work, Mission and Risk in Non-Profit Social Service Organizations, 10 HEALTH, RISK & SOC’Y 149, 149 (2008) (Supervised visitation staff and volunteers, like their counterparts at other social services agencies, often face unpleasant and/or hazardous job conditions). “Despite some of the intrinsic rewards that work in non-profit organizations offers, jobs in these organizations can be characterized by high demands, long working hours, low pay and exposure to violence and infectious disease, conditions which may be deleterious to worker health.” Id.
Act,\(^\text{71}\) which calls for special conditions to be placed on those who supervise visits in child sexual abuse cases.\(^\text{72}\) Standards I, IX, and XII are all lists of policies and procedures that programs must develop: e.g., case acceptance, rejection, and discharge policies,\(^\text{73}\) documentation requirements for case files,\(^\text{74}\) and procedures for responding to critical incidents, suspected child abuse, and medical emergencies.\(^\text{75}\) Standard XV addresses a narrow concern: requiring programs to have “written gift policies.”\(^\text{76}\) However, the standard guides administrators to consider many issues when creating such a policy. Instead of creating a one-size-fits-all mandate, it asks rule makers to reflect on the “normal expectations” of children at birthdays and holidays, the potential for a parent to use gift-giving as a means to communicate with the other parent “through the child” contrary to court order, “and the fact that many caseworkers encourage parents to bring clothing, food, and gifts to their children at visits.”\(^\text{77}\) These all involve complex dynamics; calling on programs to consider them heightens awareness that families are different, each case is unique, and families deserve staff consideration of their needs at visits. Moreover, Principle One also includes the requirement of child orientation “in most cases.”\(^\text{78}\) This standard makes it clear that programs should familiarize children with the program in accordance with their age and maturity level, and help them to understand program protocols.\(^\text{79}\)

The new standards under Principle One also look to the future. For example, the Committee decided to anticipate the eventual existence of “stand alone” monitored exchange programs in Florida.\(^\text{80}\) Such programs are confined to offering a monitored site for a child to be transferred back and forth between parents who have unsupervised parenting time with that child. These programs would offer the exchange, but not a supervised visitation.\(^\text{81}\) No such programs exist yet in Florida,

\(^{71}\) FLA. STAT. § 39.0139 (2007).
\(^{72}\) See RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 27. Among other things, this Standard obliges supervised visitation program staff to have special training in child sexual abuse issues, to obtain background information about the case itself, and to prohibit certain types of behavior when a case referral involves child sexual abuse. Id.
\(^{73}\) Id.
\(^{74}\) Id. at 36.
\(^{75}\) Id. at 42.
\(^{76}\) Id. at 46.
\(^{77}\) Id. The issue of parcels/packages was discussed at several meetings. See, e.g., Supervised Visitation Standards Committee Meeting Minutes, Apr. 4, 2008, available at http://familyvio.cs.fsu.edu/phpBB3/viewtopic.php?f=15&t=123 (the language was “approved” at the April 17 meeting).
\(^{78}\) RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 36.
\(^{79}\) See id.
\(^{80}\) Id. at 50-53.
\(^{81}\) Id. at 25.
but they are commonly found in the Mid-Atlantic states, and the Committee decided to take a proactive approach by creating an entire set of standards for them.

**B. Training**

The second overarching principle, training, echoes the safety theme of Principle One. In fact, the issue of adequate training is inextricably linked to safety: one of the ways in which safety is enhanced in supervised visitation programs is through the training of staff and volunteers who have contact with families. Principle Two acknowledges the crucial nature of adequate training: “Supervised Visitation and Monitored Exchange Program staff and volunteers must have specific qualifications and skills as well as initial and ongoing training on the complex and often overlapping issues that bring families to their Programs.” Commentators and lawmakers have long noted the role of training in the effective provision of supervised visitation services, because “while untrained supervisors may be able to guard against blatant physical or sexual assault, they are poorly equipped to recognize and intervene when the perpetrator insidiously oversteps boundaries.”

The new standards and accompanying compliance measures provide unprecedented specificity in what staff needs to know and how administrators must verify that they know it. Thus, topics for training and descriptions of training hours

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84 See, e.g., Maureen Sheeran & Scott Hampton, Supervised Visitation in Cases of Domestic Violence, 50 JUV. & FAM. CT. J. 13, 18 (1999), available at devbheavpeds.onhsc.edu/assets/pdf/ac/handouts/203/sup%20Visitation%20in%20Cases%20of%20DV.pdf. “In order to develop a better understanding of domestic violence and to ensure that programs are rooted in that understanding, it is recommended that visitation providers receive significant training in domestic violence . . . .” Id.

85 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE Fla. LEG., supra note 8, at 64.

of all personnel who have contact with families are listed in an attempt to “raise
the level of professionalism of Programs . . . .”87 Before they have unaccompanied
access to families at the program, all staff, volunteers, and interns must have
twenty-four hours of training in a host of topics related to families in crisis; these
include child maltreatment, family violence, intervention to promote change, and
danger assessments.88 In addition, a new requirement of continuing education for
staff and volunteers after their first year of employment mandates that full-time
personnel participate in seven additional hours of training each year, and part-time
personnel receive three hours of additional training each year.89 This
requirement will ensure ongoing training for all those who have contact with
families. The standards contain a new Model Code of Conduct,90 as well as
specific directives embedded in compliance measures for ensuring that the training
requirements are met.91 Moreover, program directors are guided to seek specific
sources for training. A list of trainings that serve to meet the training requirements
includes those sponsored by the Florida Department of Children and Families or its
contracted agencies, the Florida Bar, the Office of the State Courts Administrator,
the Guardian ad Litem Program, and the Florida Council Against Sexual Assault,
among others.92

C. Dignity and Diversity

Florida is a large and diverse state. In 2008, its population was estimated at
over eighteen million.93 At the time of its 2000 census, 78% of the population was
White; 16.8% were “Hispanic or Latino (of any race),” and 14.6% were Black or
African American.94 The families referred to supervised visitation reflect diversity,
with White/Caucasian children making up approximately 63%, Black/African
American children making up approximately 21%, and Hispanic/Latino children

87 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO
THE FLA. LEG., supra note 8, at 64.
88 Id. at 71. Standard III(B) lists mandatory training topics such as child maltreatment,
domestic violence, substance abuse issues, professional boundaries, and conflict resolution.
Id.
89 Id. at 73.
90 Id. at 79.
91 Id. at 73. The compliance measures state that “[a]ll personnel files must reflect the
topics, source/media, and hours of continuing education for each person for each calendar
year.” Id.
92 Id.
94 Additionally, 1.7% were Asian, 0.1% Native Hawaiian and other Pacific Islander,
0.3% American Indian and Alaska Native, 3.0% “some other race”, and 2.4% “two or more
races.” U.S. Census Bureau, Profile of General Demographic Characteristics: 2000
making up approximately 13% of the children at these programs. Principle Three acknowledges both the diversity of clients and the importance of staff’s treating them with respect stating, “all clients who use Supervised Visitation and Monitored Exchange Programs are entitled to be treated in a fair and respectful manner that acknowledges their dignity and diversity.”

Treating clients with dignity is a cornerstone of ethical practice for many professionals. From start to finish, the new standards frequently guide visitation staff back to the concept of respect. For example, the mission statement of Florida’s supervised visitation and exchange programs calls for “safe and respectful . . . services . . . .” Principle One characterizes client intake as an opportunity for clients to be “respected participants in the process,” while Principle Two calls for monitors to provide “constructive feedback, correction, or redirection respectfully” to parents. Similarly, the Code of Conduct (required for all staff/volunteers) states that “participants” are “entitled to respectful, well-trained” program personnel. Specific direction is also provided to personnel regarding how to communicate respectfully. For example, Principle Three directs that when program policies are being communicated to participants, staff must emphasize that those policies “are not punitive in nature but instead rather are part of a broad program purpose of keeping families safe.” Moreover, the standards repeatedly link respect and safety. Standard One of Principle One, for example, observes that “[p]articipants who are knowledgeable and familiar with these procedures may be more likely to consider themselves as partners in the visitation process, making the process safer.”

96 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 75.
97 See, e.g., Allan Borowski, On Human Dignity and Social Work, 50 INT’L SOC. WORK 723 (2007), available at http://isw.sagepub.com/cgi/reprint/50/6/723 (“A concern with human dignity is integral to what social workers do on a day-to-day basis. In the course of their professional and caring relationships with poor and other clients, with associates and, indeed, with complete strangers, social workers are called upon to invest each and every human life that is touched by their activities with dignity.”). The National Association of Social Workers has specific standards addressing the importance of respect for all people as it pertains to social work practice. See National Association of Social Workers, NASW Standards for Cultural Competence in Social Work Practice (2001), available at http://www.socialworkers.org/practice/standards/NASWCulturalStandards.pdf.
98 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 16.
99 Id. at 34.
100 Id. at 74.
101 Id. at 75.
102 Id.
103 Id. at 27, 79.
Principle Three also emphasizes the need for supervised visitation programs to recognize the unique strengths, experiences, and values of their diverse clientele. Differences among racial and ethnic groups “may affect the helping process”\(^{104}\) with these clients; thus, when adjusting one’s efforts to assist people of other cultures, “acknowledging of differences are as important as highlighting similarities.”\(^{105}\) New compliance measures call for supervised visitation program administration to demonstrate diversity efforts in hiring staff, attracting volunteers, using interpreters, and creating policies.\(^{106}\) These mandates complement the requirements in Principle Two that include cultural issues as part of the required twenty-four hours of training for all staff, as well as the new requirement for at least one hour of staff and volunteer continuing education each year dedicated to issues of multiculturalism.\(^{107}\) The attainment of multicultural competence\(^{108}\) has been defined by some as an ethical imperative.\(^{109}\) Other groups of social service providers have formally installed the importance of cross-cultural knowledge in

\(^{104}\) Jerry V. Diller, Cultural Diversity: A Primer for the Human Services 15 (2d ed. 2004).

\(^{105}\) See id.

\(^{106}\) Recommendations of the Supervised Visitation Standards Comm., Rep. to the Fla. Leg., supra note 8, at 76-78. Standard II states that all programs must prioritize staff diversity and the use of interpreters for non-English speaking families; Standard IV states that all programs must be responsive to diverse views of family; and Standard V states that programs must undertake a periodic assessment of multiculturalism efforts. Id.

\(^{107}\) Recommendations of the Supervised Visitation Standards Comm., Rep. to the Fla. Leg., supra note 8, at 73.

\(^{108}\) One definition of multicultural competence includes “practice that is geared towards knowledge of and skills in working with cultural groups other than one's own.” Jill E. Korbin, Culture and Child Maltreatment: Cultural Competence and Beyond, 26 Child Abuse & Neglect 637, 638 (2002).

\(^{109}\) See Kevin W. Allison et al., Human Diversity and Professional Competence: Training in Clinical and Counseling Psychology Revisited, 49 Am. Psychologist 792, 795 (1994) (stating that those who deal with clients need to recognize the value of serving individuals of diverse groups); Vivian H. Jackson, Cultural Competency, 22 Behav. Health Mgmt. 20, 23 (2002) (stating that “if we are successful in negotiating the cross-cultural barrier, we can reduce other barriers to effective treatment utilization, facilitate the development of trust, enhance the individual’s investment and continued participation in treatment, and address the variable service delivery requirements of diverse consumers”); Robbie J. Steward et al., The Multicultural Responsive Versus the Multiculturally Reactive: A Study of Perceptions of Counselor Trainees, 26 J. Multicultural Counseling & Dev. 13, 13 (1998).
their practice standards, but commentators continue to decry the lack of cultural consciousness in services to high-risk families.

The need for foreign language interpreters is highlighted in Standard III of Principle Three, stating that all programs should provide interpreters for families whose primary language is not English. Florida’s entire court system has been grappling with the need for interpreters, as evidenced in the Florida Supreme Court’s 2008 Report on Perceptions of Fairness and Diversity in the Courts. According to the Report, the court system has failed to keep pace with the needs of the increased immigrant population in the state, resulting in an insufficient number of interpreters in the court system. In order to address this problem in the arena of supervised visitation, programs are required to collaborate with community agencies and groups to facilitate the availability of bilingual staff, volunteers, and interns. There is no requirement, however, that programs make interpreters available in every case. Thus, the Report acknowledges that “in any given community, there are potentially dozens of [different] languages spoken by [citizens], and it may not be possible for [programs] to provide staff who speak those languages.” The Report, therefore, urges programs to seek funding for interpreters, bilingual staff, and volunteers in every community that these programs serve.

D. Community

Recognizing that supervised visitation and monitored exchange services are often not the only services that can help families in crisis, Principle Four urges

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110 For example, The National Association of Social Workers has specific standards addressing issues of cultural competence and diversity in social work practice. See, e.g., National Association of Social Workers, supra note 97, at 4, 18 (e.g., “Standard 3. Cross-cultural knowledge- social workers shall have and continue to develop specialized knowledge and understanding about the history, traditions, values, family systems, and artistic expressions of major client groups that they serve.”).


112 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 76.


114 Id. at 61.

115 Id. at 65.

116 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 76.

117 Id.
programs to be an active part of the community’s network of social services.\footnote{118} “All Supervised Visitation and Monitored Exchange Programs shall operate within a coordinated community network of groups and agencies that seek to address common family problems.”\footnote{119} The Standards create an obligation on the part of program staff to affirmatively reach out to other programs: to create cross-training opportunities, to learn about the functions and services of other agencies, and to be prepared to link families to those other services appropriately.\footnote{120} Compliance measures in this section provide a list of common community agencies, including certified domestic violence centers, Guardian ad Litem programs, child advocacy centers, and rape crisis centers.\footnote{121} Program staff now have an obligation to be “knowledgeable” about those programs.\footnote{122} Records of solicitation and offers of cross-training must be kept in administrative files to fulfill this requirement.\footnote{123} In addition, collaboration with community groups such as homeless coalitions, family law advisory groups, and child-abuse prevention groups is required.\footnote{124} The emphasis on community is also linked to the paramount issue of safety: the discussion in Principle Four states that “the more knowledgeable staff is, the safer families will be.”\footnote{125} This link presumes that families who are connected to services that they need will be better off. The discussion for Principle Four acknowledges that not all of Florida’s sixty-seven counties offer the same services,\footnote{126} that services may differ in quality from place to place in the state,\footnote{127} and that families may not be compelled by program staff to receive or act upon

\footnote{118} This concept of a coordinated community has been described as a “competent community” in which the various component parts of the community are able to collaborate effectively in “identifying the problems and needs of its membership. In this sense, the positive functioning of both the community’s subsystems and the community as a whole is a sign of community competence. Moreover, the residents of a competent community are able to create and/or use the resources available to them to solve daily problems of living. In a competent community, individuals, families, other groups and organizations are able to identify with and find common cause with the community’s way of life in order that their energies may be used to meet the community’s needs.” PHILLIP FELLIN, THE COMMUNITY AND THE SOCIAL WORKER 70-71 (3d ed. 2001).

\footnote{119} RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 80.

\footnote{120} Id. at 80-84.

\footnote{121} Id. at 82-84.

\footnote{122} Id. at 80.

\footnote{123} Id. at 84.

\footnote{124} Id. at 85.

\footnote{125} Id. at 80.

\footnote{126} Id. (stating that services may not be offered uniformly throughout the state, and the quality of resources may differ widely).

\footnote{127} Id.
service referrals. Still programs are required to form part of the larger social services network in a “meaningful” way.

IV. CERTIFICATION PROCESS

The process for certifying supervised visitation programs requires that a program submit proof that it substantially adheres to the four principles and their compliance measures. The process is not a competitive one; any program that meets the standards can be certified. The process for demonstrating such compliance emphasizes the creation of a binder in which required documents are organized according to Principles I, II, III, and IV. In this way, a program has created a “paper trail” of its conformity with the standards. Most importantly, the certification process gives the courts and referring agencies some assurance of a program’s attention to safety training, the dignity and diversity of its clients, and its operation within a community of coordinated services.

The certification process represents a major advance in oversight of program performance. While programs in the past were required to submit an Annual Affidavit of Compliance to the local circuit’s chief judge, these affidavits included no verification process. The Florida Supreme Court specifically wanted to avoid placing any responsibility in the chief judge to ensure that the standards were being followed. A review of programs published in 2007 revealed that “most programs did not report that they had Annual Affidavits of Compliance,” and that not all programs had Letters of Agreement with the Court. This finding exposed a fundamental flaw in the previous standards. Now, once certification is implemented, the crucial component of oversight will improve the consistency with which programs are operated in the state. The certification process will surely be closely scrutinized, as Florida is the first state to enact such a process. In

128 Id. at 81.
129 Id. at 85 (the compliance measure for Principle Four, Standard III states that, “Minimal compliance also requires a meaningful participation in community groups.”).
130 See id. at 86.
131 Id. at 88.
132 Id. at 86.
134 RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 11.
135 Id. at 20.
136 A supervised visitation program’s ability to comply with the standards is made easier by the creation of an optional set of compliance forms designed to follow the mandatory provisions of each standard. See The Optional Compliance Tracking Forms for New SV Standards, available at http://familyvio.csw.fsu.edu/phpBB3/viewforum.php?f=15 (last visited Nov. 19, 2008).
addition, the Supervised Visitation Standards Committee will likely remain intact in order to refine the process of certification.\textsuperscript{137}

V. IMMUNITY FOR PROGRAM PERSONNEL

Recommendation VII of the Florida Report to the Legislature\textsuperscript{138} proposes that Florida Statutes Chapter 753 be amended to provide a presumption of good faith and immunity from liability for those providing services at Certified Visitation and Exchange Programs.\textsuperscript{139} This limited statutory immunity for certified program personnel, including staff and volunteers, would presumably be similar to that which provides immunity to Guardians ad Litem. The Report provides an example:

All persons responsible for providing services at a Certified Supervised Visitation or Monitored Exchange Program pursuant to a court order shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.\textsuperscript{140}

This new protection afforded to those who provide the essential components of child protection implicitly acknowledges that child custody litigation can be a “perpetual war zone”\textsuperscript{141} by providing some protection for those on whom judges depend to reduce conflict. Some states have already created statutory protection for a host of other professionals and paraprofessionals whose job it is to assist the family in crisis. Thus, states have crafted immunities from civil liability—as long as the action was in the good faith exercise of their duties—for mediators,\textsuperscript{142} child protective investigators,\textsuperscript{143} and Guardians ad Litem/Court Appointed Special Advocates.\textsuperscript{144}

\textsuperscript{137} RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 20.
\textsuperscript{138} Id. at 21.
\textsuperscript{139} Id.
\textsuperscript{140} Id.; For an extended discussion of the need for immunity for supervised visitation personnel, see Nat Stern & Karen Oehme, Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services, 92 Ky. L.J. 373, 418-37 (2004).
Funding is a chronic problem for supervised visitation programs, as it is for many social services programs charged with assisting troubled families. Since the beginning of development of this service, programs have struggled to find ways to support it, without charging parents the full amount of the fee of the service. A 2007 report concluded that “[w]hile the number of Florida programs has grown so significantly, directors annually report shrinking budgets, inadequate security systems, and trouble paying staff . . . .” Programs commonly do not charge victims for services, and even those that do charge both parents charge only a nominal fee. In addition, some funding sources, including the federal

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146 See In re Report of the Family Court Steering Comm., supra note 37, at 527 (The Florida Supreme Court noted in its opinion endorsing the recommendations of the Family Court Steering Committee and the elements of a Model Family Court, which includes supervised visitation: “the failure to adequately fund the necessary services ultimately will result in the failure of the model family court concept.”).

147 Many programs have developed sliding fee scales that are based on the income of the parents. See, e.g., Merrimack Valley HUB Community Service Directory Listing for Alternative House, Inc., http://www.mvhub.com/cgi-bin/guide/guide.pl?rm=show_program &program_id=505929 (last visited Dec. 1, 2008).

148 Wendy P. Crook et al., Florida’s Supervised Visitation Programs: A Report from the Clearinghouse on Supervised Visitation 24 (2007), available at http://familyvio.csw.fsu.edu/db/1_24_2007.pdf (stating that “funding remains unstable for supervised visitation programs, with programs relying on ever-diminishing funds that provide fractions of their budgets from a pastiche of funding sources.”).

149 See, e.g., Collier County Child Advocacy Council, Inc.’s Family Visitation Center, http://www.caccollier.org/pdfs/family_visitation.pdf at 2 (last visited Jan. 3, 2008); Scarlet
government, restrict the amount of fee charged to any individuals for the service.

Recommendation IX of the Report to the Florida Legislature is that the Florida legislature increase funding for programs. This request is tied to the need for onsite security at programs, and it acknowledges the severe budget crisis that the state is currently experiencing. Still, the call is made for new funds for “chronically-underfunded” programs and lays the “groundwork for future economic assistance to programs.” Recommendation X requests that any future funding by the state be statutorily restricted so that only programs certified under the standards are eligible for funding.


The Safe Havens: Supervised Visitation and Safe Exchange Grant Program of the Office on Violence Against Women provides the largest grant amount to individual programs (generally at least $150,000 per year); however, only five Florida programs have received these grants, as the Safe Havens funds are limited and fund many programs outside of Florida, including U.S. states, territories, and Indian communities. In addition, the Safe Havens grants are not intended for the long-term program administration and require sustainability plans. The Access and Visitation funds from the U.S. Office on Child Support Enforcement and administered by the Florida Department of Children and Families currently fund twenty-five of Florida’s programs at least partially. The grant amount ranges from $10,000 to about $40,000 per year for each funded program. See Email from Johana P. Hatcher, Prevention Manager, Department of Children and Families to Karen Oehme (Oct. 15, 2009) (on file with authors).

See, e.g., The Safe Havens: Supervised Visitation and Safe Exchange Grant Program 9 (2008), http://www.oww.usdoj.gov/docs/fy2008-safehavens.pdf. This Grant Program, which funds several visitation programs across the U.S. in domestic violence cases through the Office on Violence Against Women at the U.S. Dept. of Justice, requires that “any fees charged to individuals” must be based on family income. Id.

RECOMMENDATIONS OF THE SUPERVISED VISITATION STANDARDS COMM., REP. TO THE FLA. LEG., supra note 8, at 22.
VII. NEW HIERARCHY FOR VISITATION ORDERS

The Report recommends a new hierarchy for visitation referrals in order to have an impact beyond supervised visitation programs in Recommendation VIII of the Report.\(^{157}\) It is in this section that the Committee highlights the need for all of those who supervise visits pursuant to court or agency order to have proper training—not just supervised visitation program personnel. Recommendation VIII first asks that courts and child protective agencies prioritize referrals to supervised visitation, sending cases to programs that are certified under the standards whenever possible, before resorting to referrals to uncertified programs.\(^{158}\) If the court or agency cannot refer the case to a certified program,\(^{159}\) then the recommendation is that the court or agency require that the provider of the visitation services take the free, online training before monitoring visits.\(^{160}\) The Report recommends that all child protective agency staff who supervise visits be required to complete a review of the online training manual and certify to their own agencies that they have completed the training.\(^{161}\) Such an attempt to increase the training and knowledge base of child protective staff is not unprecedented; in 2007, the Keeping Children Safe Act\(^{162}\) mandated that all of those who supervise visits in certain child sexual abuse cases receive specific training in sexual abuse dynamics.\(^{163}\)

CONCLUSION

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\(^{164}\) Florida, long in the vanguard of refining supervised visitation, has pioneered visitation structures and strategies that other states are free to emulate. With its recent advancement of a comprehensive approach toward visitation programs, the state has taken an unprecedented step in serving both its own citizens and those of other states that can profit from Florida’s experimentation and experience. Supervised visitation

\(^{157}\) Id. at 21.

\(^{158}\) Id.

\(^{159}\) This might occur, for example, if there is no local certified program, or if the local programs cannot accept the referral.

\(^{160}\) Id.

\(^{161}\) Id.

\(^{162}\) FLA. STAT. § 39.0139 (2009).

\(^{163}\) Id.

\(^{164}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
has become an invaluable component of the effort to safeguard the welfare of children and other vulnerable members of troubled families. Florida’s ambitious undertaking promises to enhance and expand this vital tool within the state and, ultimately, across the nation.
NOTE
WHO’S MY DADDY?! A CALL FOR EXPEDITING CONTESTED ADOPTION CASES IN UTAH

Deborah Bulkeley*

INTRODUCTION

Sarah was born in Utah on March 4, 2006. Two days later, Sarah’s mother surrendered her for adoption. It did not matter that Sarah’s father had already filed a paternity petition in the Arizona county where he resided, because he failed to properly serve Sarah’s mother. Sarah’s father made another unsuccessful attempt at asserting his right to paternity in April 2006. By then, Sarah’s adoptive parents had filed a petition for “temporary custody and guardianship and a verified petition for adoption, asserting that ‘pursuant to Utah Code Ann. § 78-30-4.14, the consent of the natural mother is the only consent required in order for the Court to grant the instant petition.'”

Sarah’s father, legally a “putative father,” then filed a voluntary petition for order of paternity in the Superior Court of Arizona, which was signed by Sarah’s birth mother. The court, on August 2, 2006, found that the petition “resolved the paternity issue,” but said it lacked jurisdiction to determine custody or child support and transferred the matter to Utah. Not until April 17, 2007—shortly after Sarah’s first birthday—did a Utah district court grant the adoptive parents’ motion to dismiss. It would take nearly two more years for the appeal filed by Sarah’s father to work its way through the justice system. On February 10, 2009, shortly before Sarah’s third birthday, the Utah Supreme Court affirmed the district court’s decision. The ruling was based partially on the failure by Sarah’s father to

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1 The Utah Supreme Court, in H.U.F. v. W.P.W., 2009 UT 10, 203 P.3d 943, referred to the child whose adoption was contested as “Baby Girl Stine.” For purposes of this article, I have changed the name to Sarah.
3 Id.
4 Id. at ¶ 8.
5 Id. at ¶ 11.
6 Id. at ¶ 10.
7 A putative father is “the alleged biological father of a child born out of wedlock.” BLACK’S LAW DICTIONARY 641 (8th ed. 2004).
8 H.U.F., 2009 UT at ¶ 12.
9 Id.
10 Id. at ¶ 16.
comply with Utah’s law,\textsuperscript{11} which provides “a declaration of paternity may not be signed or filed after consent to, or relinquishment for, adoption has been signed.”\textsuperscript{12}

Cases such as this make raise the question of whether an unwed biological father in Utah has any real parental rights. By the time his appeal works its way through the system, an unwed father will have lost his right to witness his child’s first steps and to hear her first words. Meanwhile, the adoptive parents live in a cloud of worry and dread, not knowing if the child they have grown to love will still be in their lives when she starts grade school.

While Utah provides for a speedy court process in juvenile court shelter hearings and appeals from child welfare hearings,\textsuperscript{13} there are no such provisions for contested adoptions. As \textit{H.U.F. v. W.P.W.} illustrates, it can literally take years for a contested adoption case to work its way through the court system. Meanwhile, everyone involved—the biological father, the adoptive parents, and the child—faces an uncertain future.

While adoption is a vital way for children to find loving homes, the process of adoption should provide stability to children and fairness to the biological parents. This note examines Utah’s requirement that unwed fathers promptly assert their parental rights, in a way that strictly complies with the law, or lose them forever. The note then advocates for a speedier and clearer judicial process for unwed fathers who attempt to assert their parental rights.

The Utah Legislature should clarify the process by which a father must assert his parental rights and create a less burdensome process of doing so. In addition, an expedited hearing and appeals process should be in place so that a child can have stability earlier in life. This would reduce the chance of drawn out court battles over infants. It would also make it more likely that children placed with adoptive parents would actually need the homes in which they are placed.

Part I evaluates unmarried fathers’ rights under the U.S. Constitution and state law. Part II discusses the obstacles Utah’s law places on unmarried fathers’ ability to assert their parental rights and the predicament caused by the law’s lack of clarity regarding what fathers must do to assert those rights. Part III explores the interests of the child and the birth mother and concludes with an analysis on ways to protect the rights of all parties involved.

\section*{I. UNMARRIED FATHERS’ LEGAL RIGHTS}

The U.S. Supreme Court first recognized unmarried fathers’ rights in 1972, by holding that an unmarried father has a constitutional right to a hearing on his fitness before the state can remove his children.\textsuperscript{14} However, a father establishes a

\begin{thebibliography}{99}

\bibitem{11} Id. at ¶¶ 58-59.
\bibitem{12} Id. at ¶ 48 n.34 (citing Utah Code Ann. § 78B-15-302(8) (2008)).
\bibitem{13} Utah Code Ann. § 78A-6-306 (2009) requires a shelter hearing within three business days of a child’s removal. The appeals process for child welfare cases is expedited by Utah R. App. P. 52-60.
\bibitem{14} Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that due process required a hearing before removing children and that by denying such a hearing to just one class of
due process right to “personal contact” with his child, only if he meets a so-called “biology plus” standard by both acknowledging paternity and establishing a relationship with his child. 15 Biology merely offers an “opportunity . . . to develop a relationship.”16

If [a father] grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.17

The Supreme Court has not addressed the rights of an unmarried father when the child is a newborn.18 In most states, fathers may preserve their right to notice of any adoption proceeding involving their child by following “specific formal statutory criteria, such as signing a putative father registry or filing an intent to claim paternity” within a statutory time period.19 However, in order to acquire a right to veto the adoption, these fathers must meet the additional requirement of behaving in a parental way, such as by providing financial support or marrying the mother.20

Utah’s statutory requirements are particularly stringent. Many states, including Utah, require unwed biological fathers to register their paternity before their child is placed for adoption.21 Utah, however, places an added burden on unwed fathers by requiring them to file a statutorily outlined paternity action in court before the child is placed for adoption.22

Utah’s unwed fathers are considered on notice that a “pregnancy and adoption” may occur merely by engaging in a “sexual relationship.”23 As such, in Utah, neither notice nor consent are required by an unwed father unless he strictly complies with the requirements outlined by statute, before his child under the age

parent—unmarried fathers—the state also violated the equal protection clause of the Fourteenth Amendment).

16 Lehr, 463 U.S. at 262.
17 Id.
18 1-2 Joan Heifetz Hollinger, Adoption Law and Practice § 2.04[1][b] (Matthew Bender 2009).
19 Id. at §2.04[2].
20 Id.; see also 1 Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases § 3.11 (McGraw-Hill Companies 1983).
22 Utah Code Ann. § 78B-6-121(3) (2009).
of six months is relinquished for adoption or the mother consents to adoption. These steps include initiating proceedings in district court to establish paternity, and also file with the presiding court a sworn affidavit asserting that he is “fully able and willing to have full custody of the child,” “setting forth his plans for care of the child,” and “agreeing to a court order of child support and the payment of [pregnancy and child birth] expenses.” The law does not allow a mother to surrender a newborn infant for adoption until twenty-four hours after birth. Essentially, this means that an unwed father often has just twenty-four hours to assert his parental rights in court.

Even if a father meets Utah’s stringent deadline, his court challenge will not necessarily lead to his ability to be his child’s legal father. Once a father’s parental rights have been terminated, he is not likely to be granted visitation rights while his appeal of that termination is pending. However, if he maintains his parental rights through the appeals process (such as an interlocutory appeal), a court may decide based on the best interest of the child, whether it is appropriate to order that the father be allowed custody or visitation rights. Meanwhile, it can take years of court proceedings to determine whether or not he has properly complied with the statute.

Utah’s strict guidelines are reflected statutorily as advancing a “compelling interest in providing stable and permanent homes for adoptive children in a prompt manner” and in ensuring adopted children have “stable and permanent homes.” It follows that “the interests of the state, the mother, the child, and the adoptive parents described in this section outweigh the interest of an unmarried biological father who does not ‘timely grasp’ the opportunity to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter.”

By setting an unusually high hurdle for unmarried fathers, the Legislature is indicating its preference for two-parent households. This may be a reflection of the state’s predominant faith, The Church of Jesus Christ of Latter-day Saints (LDS), which encourages traditional families, in which children are raised by married mothers and fathers. Many of the state’s adoptions are facilitated by LDS Family Services, which states that unmarried mothers who place their child for adoption


\[25\] \textit{Utah Code Ann.} § 78B-6-121(3) (2009).


\[27\] It should be noted, however, that unwed fathers may also take these steps before their child’s birth. \textit{See Utah Code Ann.} § 78B-6-110(3)(d)(i) (2009).

\[28\] Telephone interview with Rick Smith, director of the Utah Office of Guardian ad Litem, Salt Lake City, Utah (Oct. 13, 2009).

\[29\] \textit{Id.}

\[30\] \textit{See, e.g., In re Adoption of Doe}, 2008 UT. App. 449, 199 P.3d 368 (final termination of biological father’s parental rights took place when his child was four years old).


“have provided a bright future for their child, one that includes a mom and a dad who cherish that child. And they, in return, have been able to face their own future with courage and hope.”

Regardless of its origin, the state’s complex statutory scheme sets an unusually high hurdle for unwed fathers and is an open invitation for litigation by those who are determined to assert their parental rights. Litigation is perhaps also motivated by regular revisions to Utah’s adoption code. Most recently, the statutes were recodified and many were revised in 2008. The potential for lengthy litigation seems contrary to the legislative purpose that unwed fathers promptly assert their rights of providing “stable and permanent homes for adoptive children,” and preventing disruption of adoptive placements. It is true that there needs to be a statutory time limit to protect children whose biological fathers have no interest in maintaining a parent-child relationship. However, the lengthy litigation that results from Utah’s law often fails to serve the best interest of the child.

II. THE NEED FOR MORE THAN A DESIRE TO BE A DAD

Nikolas was not notified that his baby, Bobby, was born prematurely on September 4, 2004. When Nikolas found out from a co-worker that his son had been born, he rushed to the hospital, only to find out that his baby was being placed for adoption. Worse, his girlfriend refused to see Nikolas, and would not allow him to see the couples’ newborn son. While the couple had considered adoption as an option, Nikolas was apparently under the impression that he and his girlfriend would raise the child together. They had been in a three-year relationship, and Nikolas had gone to most of his girlfriend’s doctor’s appointments, and he had also purchased “several outfits . . . a car seat, bassinet, crib, diaper bag, diapers, and some blankets.” The couple had also held a baby shower. Nikolas had even considered joining the military to provide a stable source of income and family insurance.

Nikolas learned over the Labor Day weekend that Bobby’s mother had relinquished Bobby for adoption the day after his birth. He immediately contacted...
a lawyer, who took steps to assert Nikolas’s parental rights. But, by the time the court opened on Tuesday, Bobby had already been placed for adoption by LDS Family Services. Still, Nikolas was determined to assert his rights. He fought for four years, through two appeals. First, he fought—and won—on the issue of whether he had met the strict deadline of asserting his parental rights before his son had been placed for adoption just a day after birth.

Because courts were closed when Bobby was born on a holiday weekend, Nikolas could not possibly have asserted his rights in court until the court opened on Tuesday. This impossibility led the Court to grant a father one business day after his child’s birth to assert his parental rights, finding “the addition of a single business day in which the father may file does not unduly burden the state’s compelling interest in prompt resolution of parental rights.” However, the ruling did not mean that Nikolas had successfully protected his parental rights. The Utah Supreme Court remanded, and the trial court found that even though Nikolas had asserted his rights in time, he hadn’t strictly complied with the law. Finally, on December 11, 2008, the Utah Court of Appeals affirmed the trial court’s denial of Nikolas’ petition to be Bobby’s father. The court noted that Nikolas had failed to “at least specify that he has a source of income and identify who will care for the child while he is working to earn that income.”

In a concurring opinion, Judge James Davis criticized what he saw as statutory vagueness in Utah’s requirement that a biological father file a plan to “care for the child” with the district court where he asserts his paternity. The affidavit requirement “seems illusory at best and, at worst, invites fabrication.” Judge Davis pointed out that “many, if not most, parents do not know their daily child care plans at the time their child is born,” and even if they do, “plans change.”

Severing an unmarried biological father’s rights because the substance of his sworn affidavit does not strictly comply with a vague and illusory statutory guideline promotes, in my opinion, “the unconditional respect for the relatively exclusive maternal decision-making about newborns, regardless of children’s best interests, of any

43 Id. at ¶ 15.
44 Id. at ¶ 16.
45 UTAH CODE ANN. § 78B-6-121(3) (2009).
46 Thurnwald, 2007 UT at ¶ 39.
47 Id.
48 In re Adoption of Doe, 2008 UT App 449, ¶ 6, 199 P.3d 368.
49 Id. at ¶ 5, n.2.
50 Id. at ¶ 11 (Davis, J., concurring) (citing UTAH CODE ANN. § 78B-6-121(3)(b)(ii) (2009)).
51 Id.
52 Id.
legal paternity interests, and of strong social policy favoring two parents for each child born as a result of consensual sex.\textsuperscript{53}

\textit{In re Adoption of Doe} illustrates several issues with Utah’s adoption policy. As Judge Davis illustrates, the statute requires \textit{strict compliance} but does not spell out what a father must do to strictly comply. Also, since all issues were not litigated at once, Nikolas’s rights remained in limbo for a prolonged period through two appeals, when all the issues could have been considered together. Considering whether Nikolas had strictly complied as a separate issue, added a year to the litigation.

Regardless of the outcome, it should not have taken more than four years to determine whether Bobby’s biological father had legal parental rights. By that time, even if Nikolas had initially asserted a “proper” legal claim, a court may have been reluctant to remove a walking, talking toddler from his adoptive parents—the only parents he had ever known. The length of time it can take to contest an adoption also frustrates the legislative intent to provide children “permanence and stability in adoptive placements”; and to protect adoptive parents’ “constitutionally protected liberty and privacy interest in retaining custody of an adopted child.”\textsuperscript{54}

Currently, Rule 31 of the Utah Rules of Appellate Procedure allows for a party to petition for an expedited appeals process, but only after filing all briefs.\textsuperscript{55} In order to qualify for an expedited decision, the case must involve at least one of the following enumerated conditions: “uncomplicated factual issues based primarily on documents; summary judgments; dismissals for failure to state a claim; dismissals for lack of personal or subject matter jurisdiction; [or] judgments or orders based on uncomplicated issues of law.”\textsuperscript{56} A putative father cannot expedite his appeal unless one of those conditions is met. The lack of a specific rule for expediting contested adoption cases means that appeals take years.

In a sample of six Utah cases decided since 1999, the average time was nearly three years from the mother’s relinquishment of an infant for adoption to the final ruling in the case.\textsuperscript{57} An earlier case dragged on for nearly six years through two appeals, during which time a father’s parental rights were re-instated and then later

\textsuperscript{53} Id. at ¶ 12 (Davis, J., concurring) (quoting Jeffrey A. Parness, \textit{Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws}, 42 VAL. U. L. REV. 81, 97 (2007)).

\textsuperscript{54} UTAH CODE ANN. § 78-30-4.2 (2006), repealed by UTAH CODE ANN. § 78B-6-102 (2008).

\textsuperscript{55} UTAH R. APP. P. 31.

\textsuperscript{56} Id.

terminated on fitness grounds. In cases where an infant is placed for adoption some time after birth, an unwed father is likely to find himself in the position of having a child he has loved and supported ripped from his life. In one such case, a North Carolina mother travelled to Utah where she relinquished her five-month-old child for adoption.

In contrast to Utah’s procedure for putative fathers to assert their rights, the state has an expedited court process for juvenile cases in which parental rights are on the line after a child has been removed from her home because of alleged abuse or neglect. In such cases, a shelter hearing is required within three business days. Additionally the Utah Rules of Appellate Procedure were modified in 2004 to step up the process of appeals in child welfare cases.

Parents challenged these rules saying the expedited process placed too great of a burden on them, in part by requiring parents to file a notice of appeal within fifteen days of termination of parental rights, and limiting extensions to ten days. The Utah Supreme Court upheld the expedited appeals process for child welfare cases, saying “those restrictions are consistent with the policy of providing children and parents with swifter resolution and permanency in their family relations.” The ruling was issued on November 7, 2006, just sixteen months after one challenger’s parental rights were terminated by court order on July 7, 2005; the other parent’s rights had been initially terminated on March 25, 2005. Some cases have worked their way through the system even more quickly. Fewer than one-in-ten of the 881 cases of termination and voluntary relinquishment cases in Utah’s juvenile court system from October 1, 2008 to September 30, 2009 were pending at the end of the year.

A similar expedited timeframe for contested adoption cases would better serve the best interests of the child, the father and the adoptive parents. If the interest of the state is in expediting petitions to make for more stable families, it would make sense to expedite contested adoptions. This would be slow enough to

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58 State in Interest of M.W.H. v. Aguilar, 794 P.2d 27, 29 (Utah Ct. App. 1990) (affirming termination of parental rights based on “objective abandonment” after biological father had failed to establish a bond with the child after his rights were reinstated).
59 Osborne v. Adoption Ctr. of Choice, 2003 UT 15, ¶ 6, 70 P.3d 58 (denying unwed father’s petition for extraordinary relief and upholding adoption nearly a year and a half after the five-month-old child was placed for adoption).
60 UTAH CODE ANN. § 78A-6-306(1) (2009) (requiring a shelter hearing in three business days after removal with an extension of up to two days allowed under certain circumstances).
61 UTAH R. APP. P. 52-59 (2009).
62 UTAH R. APP. P. 52(a) (2009).
63 State ex rel. B.A.P., 2006 UT 68 ¶ 20, 148 P.3d 934.
64 Id. at ¶ 3.
65 Id. at ¶ 2.
67 Data from the Utah State Courts (on file with the author).
give parents time to assert their rights, yet swift enough to establish stability in children’s lives. Given that Utah has stated an interest in quickly resolving unwed fathers’ contests to adoptions by requiring them to assert their rights in court before their child is placed, it would make sense to speed up the process once a father has gone to court. Expediting the process would foster stability because the child would be placed with permanency at an earlier phase in her bonding with either her biological father or adoptive parents.

Given the compelling liberty interests involved, it seems as though courts would want to conclude cases as quickly as possible. Perhaps Utah’s policy makers should take a lesson from the U.S. Supreme Court, which found that “allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State’s ability to order adoption in most cases.” Of course, the father is not the only interested party in these actions. Any policy that the legislature adopts should also consider the interests of the child and the mother.

III. THE INTERESTS OF THE CHILD

The need for expedited hearings is perhaps more important for the child than any adult involved. By age seven months (or earlier), an infant develops specific attachment to one individual, commonly her mother. During this stage of development, an infant develops a fear of strangers and shows distress when the person with whom she has bonded is absent. The child then begins to bond with other individuals, and by eighteen months will likely become attached to several familiar people. By this age, children develop a capacity for “empathy and sharing behaviors” which are needed to form relationships. However, if the child’s future is tied up in court, her biological father, who may or may not have visitation rights, has little chance of bonding with her. This influences a child’s ability to thrive as she grows. Whether a child develops a secure attachment to her parents in her first two years of life has been related to “heightened sociability, greater compliance, and more effective emotion regulation.” In other words, once a child has bonded with her adoptive parents—as parents—it may be detrimental to place her with her biological father.

While most people, including judges, are attuned to the importance of furthering a child’s best interest, there is “not a clear consensus about what is

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70 Id.
71 Id.
73 Jessica Vando et al., Examining the Link Between Infant Attachment and Child Conduct Problems in Grade 1, 17 J. Child & Fam. Stud. 615, 616 (2008).
specifically in children’s best interests.”74 In one study, participants recognized the “importance of the child's attachment with the adoptive parents . . . . [Study participants] seem to be aware that early attachment is important and that its disruption is harmful.”75

Beyond a general dislike for fragmenting the family structure, putative fathers also face the hurdle of violating the mother’s right to control her baby’s destiny. Women may have good reason for not involving the father, and they have a constitutional right to privacy in child rearing decisions.76 Unmarried mothers also have a compelling privacy interest. A Florida adoption law, which required the publication in newspapers of pending adoptions when the father or his location was not known, was overturned as violating a mother’s right to privacy, and was then repealed.77 Before its 2003 repeal, this law was harshly criticized as the “Scarlet Letter” law because it required unwed mothers to “suffer the public humiliation of putting their sexual history in the newspaper.”78

While mothers do have an important privacy interest, those fathers who affirmatively assert their paternity also have a constitutional liberty interest in maintaining parental rights. In order to preserve his constitutional right to fatherhood, an unwed father must show “a full commitment to the responsibilities of parenthood by ‘[coming] forward to participate in the rearing of his child.’”79 In recognizing a father’s due process rights, the Supreme Court also acknowledged “the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘[promoting] a way of life’ through the instruction of children . . . as well as from the fact of blood relationship.”80

One key purpose of Utah’s law is to “speedily” identify “fathers who will assume a parental role” and in holding them financially accountable.81 However, the lack of any expedited process means that those fathers who attempt to assert their parental rights often have no choice but to be disruptive. The process is too slow and complicated to provide due process to the putative father or his child. Rather than spending years deciding whether an unwed father has strictly complied with Utah’s law, the better approach would be to recognize the factors related to a

75 Id. at 143.
76 Id. at 128.
77 Alison S. Pally, Comment, Father by Newspaper Ad: The Impact of In Re the Adoption of a Minor Child on the Definition of Fatherhood, 13 COLUM. J. GENDER & L. 169, 170 (2004).
78 Id. at 191-92.
80 Id.
81 In re Adoption of B.V., 2001 UT App 290, ¶ 31, 33 P.3d 1083 (overturning termination of parental rights based on steps father took before and after child’s birth to provide financial support, establish a relationship, and comply with state law).
child’s well-being at the outset. By expediting the contested adoption process, a judge’s decision on custody could be based on the unwed father’s fitness and not on the fact that a child has spent years developing a bond with an adoptive family while her father has spent years waiting to find out if he has strictly complied with Utah’s law.

CONCLUSION

If the child welfare standard for speedy hearings and appeals were applied to contested adoptions, putative fathers who promptly asserted their rights under Utah law would be entitled to a prompt hearing. This process would allow a putative father, as the legislature intends, to “timely grasp” his parental rights. Further, if the father’s rights are terminated, he should be entitled to an expedited appeal in a process similar to that provided for child welfare cases. However, expediting the judicial process isn’t the only step toward ensuring unwed fathers’ constitutional rights are preserved. The legislature should clarify the law as far as what an unwed father must do in order to “strictly comply.” Laws should also require that, when feasible, all issues in a contested adoption be handled at the same time. Ultimately, this solution would give unmarried fathers a fairer chance of asserting their rights, while also maintaining Utah’s interest in providing children with stability in adoptive homes. Doing so would minimize the risk that the “bonding of adopted children, and the psychological security of adoptive parents will be subject to being torn asunder.”82

82 In re Adoption of Baby Boy Doe, 717 P.2d 686, 695 (Utah 1986) (Stewart, J., dissenting).
NOTE
PREVENTING CUSTODY RELINQUISHMENT FOR YOUTH WITH MENTAL HEALTH NEEDS: IMPLICATIONS FOR THE STATE OF UTAH

John A. Inglish*

INTRODUCTION

I told Mr. Erhardt that I did not like the form, and that he should come back after I had thought about it and talked to a lawyer. I told him I might want to add a stipulation or an addendum to the form. Mr. Erhardt seemed reluctant to leave, and I felt pressure from him to sign it right away. Mr. Erhardt then called me on December 20, December 23, and December 27. Each time I told him that I was not a neglectful mother and did not want to waive either my own rights or those of my child, as the form seemed to require. Mr. Erhardt told me that if I signed the form I could still take Jay home any time I wanted to. I didn’t think that is what the form said, and when I asked Mr. Erhardt to write that on the form he refused.¹

The above passage is taken from the affidavit of a parent who was a plaintiff in a class action lawsuit brought against the state of New York. She, like many others around the nation, have been forced to make an excruciatingly painful choice: either relinquish legal custody to the state to obtain needed services, or continue to struggle with the painful and devastating effects of the untreated mental illness of her child. For years, parents and guardians of youth with complex mental health needs have struggled to find adequate services. This problem is neither new, nor unrecognized. In 1999, the National Alliance for the Mentally Ill (NAMI) issued a report: Families on the Brink: The Impact of Ignoring Children with Serious Mental Illness.² This nationwide study found that 23% of all respondents were told that they must give up custody of their child in order to get needed mental health services, and that 20% actually went through with custody relinquishment.³ Several commentators have recently described this problem at the national level, identified the root causes, and discussed potential solutions. In fact,

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¹ © 2010 John A. Inglish, Senior Staff Member, Journal of Law & Family Studies; J.D. candidate 2010


³ Id. at 6.
the Journal of Law and Family Studies has within the last five years published two articles discussing this problem at the national level.\textsuperscript{4} This note will describe in more depth how the problem manifests itself in the state of Utah, and offer some specific proposals for solving the problem.

Part I briefly describes the nature of the custody relinquishment problem and uses a recent Washington Supreme Court case to illustrate some of the policy implications posed by this problem. Part II discusses the legal implications of custody relinquishment, framing it as a societal problem best addressed through a comprehensive and collaborative effort between advocates, service providers, and state agencies. Part III discusses a program the city of Milwaukee has piloted in an effort to combat the root causes of custody relinquishment. Part IV demonstrates the ways in which this problem is manifested here in the state of Utah, and describes some promising steps being taken by Salt Lake County’s Third District Court. Part V offers specific recommendations for moving toward an integrated system of youth mental health care that keeps families together and eliminates the need for custody relinquishment.

I. THE NATURE OF THE PROBLEM

This problem has been well described by other commentators,\textsuperscript{5} but a brief description is warranted. Why does custody relinquishment happen? There are two basic reasons. First, private health insurance plans often limit mental health benefits. Those plans that do offer mental health services are often woefully inadequate in meeting the needs of children with severe or complex conditions. Many of these plans don’t cover intensive home-based services or residential treatment at all.\textsuperscript{6} Second, state Medicaid programs cover only certain low income and medically needy children, leaving an enormous gap for the roughly forty-seven million uninsured in this country, many of whom are children. As a result, families in crisis seek services from state child welfare systems. Many of these systems—including Utah—enact policies that require children to become wards of the state in order to receive matching federal funds to pay for intensive mental health treatment. These policies are often based on an erroneous belief that states are

\textsuperscript{4} See Rebecca G. W. Random, Custody Relinquishment to Obtain Mental Health Services, 7 J.L. & FAM. STUD. 475 (2005); Tracy J. Simmons, Relinquishing Custody in Exchange for Mental Healthcare Services: Undermining the Adoption and Safe Families Act’s Promise of Reasonable Efforts Towards Family Preservation and Reunification, 10 J.L. & FAM. STUD. 377 (2008).

\textsuperscript{5} See, e.g., Random, supra note 4; Simmons, supra note 4; Gwen Goodman, Accessing Mental Health Care for Children: Relinquishing Custody to Save the Child, 67 ALB. L. REV. 301 (2003).

ineligible for federal matching funding unless the child is a ward of the state, which in turn, is related to Medicaid eligibility requirements. A significant percentage of parents have incomes too high to qualify for Medicaid, but not enough to fund the intensive mental health services their child needs. Placing the child in state custody is used as a way to eliminate the parental income as a factor in qualifying for Medicaid. Thus, a perverse outcome is created: parents who seek treatment for their children in order to keep their families intact are forced to do just the opposite in order to access critical services.

A. In re Dependency of Schermer: The Problem Illustrated

*In re Dependency of Schermer,* a recent Washington Supreme Court case, provides a powerful illustration of the custody relinquishment problem. *Schermer* seems paradoxical at first glance. While so much has been written about parents being forced to relinquish custody, this case dealt with an action brought by the parents to force the state of Washington to assume custody of their child. However, the underlying problem is the same: families with children who have serious mental health conditions have no way to access or pay for critical services without giving up custody. Thus, *Schermer* is not so important for its holding, but because it shows the critical need for children’s mental health services, and the devastating effect that inadequate services can have on families.

“Henry Schermer was born on February 7, 1990.” From an early age, he “had difficulty learning and socializing with other children.” In an effort to mitigate his difficulties, Henry’s “mother home-schooled him for a [period of] time.” Henry’s behaviors began to worsen with adolescence. “He began having night rages and bouts of weeping that lasted for hours,” and “suicidal thoughts.” He began cutting himself and reporting that he heard voices telling him to kill members of his family. Out of desperation, the Schermers placed Henry in a

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9 Goodman, supra note 5, at 306.

10 In re Dependency of Schermer, 169 P.3d 452 (Wash. 2007).

11 See id.

12 Id. at 454.

13 Id. at 455.

14 Id.

15 Id.

16 Id.

17 Id.
residential treatment facility located out of state, at their own cost. In January 2005, the Schermers contacted the Washington Department of Social and Health Services (DSHS) for assistance when they realized that their financial resources were becoming quickly exhausted and they would no longer be able to keep Henry at the residential treatment facility. When their request for help with funding was denied, the Schermers filed a dependency petition with the state. In September 2005, an evidentiary hearing was held. At the hearing, Henry’s father Stephen testified that he was two months behind on the bills to the treatment facility and that Henry’s discharge was imminent. He further testified that the family was “on the verge of bankruptcy,” and had spent $130,000 out-of-pocket to care for Henry since his psychiatric problems first arose. They paid these expenses, in part, by taking out home equity loans for the maximum amount allowable and borrowing $21,000 from a relative. Stephen testified that he was “unwilling to sell the family home because it did not make sense to him, given that at the end of six months Henry would still need intensive treatment and the family would be left without a home.”

The trial court found that Henry failed to qualify for dependency status because “there are resources in the family that could keep Henry where he is for another six months . . . .” The Washington Supreme Court disagreed, and went out of its way to address the underlying policy issues at hand:

The State points out that relinquishing parental custody in order to obtain mental health services for children is a problem that has preoccupied government officials and family advocates nationwide and is the focus of much critical commentary. A recent general accounting office (GAO) survey found that at least 12,700 children in 19 states were placed in foster care solely to obtain mental health services (citation omitted). There appears to be an emerging national consensus that forcing parents “to trade custody for care” is bad public policy (citation omitted). Foster care systems are often ill-equipped to meet the mental health needs of children and may result in greater harm than good. Thus, efforts are underway at the national level to provide block grants to states to provide greater access to mental health services for minors outside of the foster care system (citation omitted). There is no serious question, however, that a parent’s inability to adequately care for a child due to the child’s severe mental illness is an appropriate ground for a dependency

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18 Id.
19 Id. at 456.
20 Id.
21 Id.
22 Id. at 457.
23 Id.
24 Id.
25 Id. at 465.
26 Id. at 457.
finding. The question is whether adequate alternatives to dependency should be made available to families (citation omitted).\(^{27}\)

The court went on to allow further hearings on the dependency issue, but its comment on the policy implications resonate with what child advocates have been saying for years: this is a critical problem that must be addressed.

II. LEGAL REMEDIES

The case that most directly addresses the legal aspects of custody relinquishment is *Joyner v. Dumpson*,\(^ {28}\) quoted at the beginning of this note. This 1983 case involved a group of 5,000 children in need of out-of-home mental health services, whose parents could not afford such services.\(^ {29}\) The parents brought a class action lawsuit against the state of New York in U.S. District Court, arguing that a New York law requiring them to relinquish custody to obtain mental health services violated section 504 of the Rehabilitation Act of 1973, as well as their due process rights to family integrity and privacy as protected by the Fourteenth Amendment of the U.S. Constitution.\(^ {30}\) The Second Circuit disagreed on both counts. First, the court was unconvinced that the custody transfer agreement discriminated against handicapped children solely on the basis of their handicaps, and therefore found no 504 violation.\(^ {31}\) Second, the court reasoned that the parents had a choice—either relinquish custody or refuse services altogether—and therefore there was no facial violation of the Fourteenth Amendment.\(^ {32}\)

*Joyner* supports the notion that cases challenging custody relinquishment policies on constitutional grounds have generally been unsuccessful. The Bazelon Center for Mental Health Law notes, “cases filed under constitutional claims and allegations of discrimination based on disability have not been successful. However, few cases have tested these theories, and more favorable outcomes may be possible in different courts and with very different facts.”\(^ {33}\) Bazelon further stresses the “need for an entitlement to mental health services for children who do not meet current Medicaid standards and who need services that extend beyond the school day.”\(^ {34}\) Given the legal barriers, it makes sense to take action outside of the courtroom in addressing the root causes of this problem. The city of Milwaukee has been at the forefront in this regard, as discussed below.

\(^{27}\) *Id.* at 956-57 (emphasis added).

\(^{28}\) *Joyne by Lowry v. Dumpson*, 712 F.2d 770 (2d Cir. 1983).

\(^{29}\) *Id.* at 771.

\(^{30}\) *Id.* at 771–72.

\(^{31}\) *Id.* at 776–77.

\(^{32}\) *Id.* at 781-83. The court left open the question of whether the custody relinquishment policy was unconstitutional as applied. That remains an open legal question that is beyond the scope of this discussion.

\(^{33}\) *LITIGATION STRATEGIES*, *supra* note 8.

\(^{34}\) *Id.*
III. INTEGRATED COMMUNITY TREATMENT: WRAPAROUND MILWAUKEE

One of the most promising models for treating children with mental health issues can be found in Wisconsin. Wraparound Milwaukee was started in 1995 with grant money the city received from the Center for Mental Health Services in Washington, D.C. The purpose was to reduce the use of institutional-based care such as residential treatment centers and inpatient psychiatric hospitals by providing services in the child’s community and home environment. Instead of admitting children to hospitals or treatment centers, this model offers a broad spectrum of services including: in-home therapy, medication management, group home care, respite care, crisis home care, day treatment/alternative schooling, job development/placement, afterschool programming, and independent living support, among others.

In addition to these services, the program has developed a Mobile Urgent Treatment Team (MUTT). The MUTT team is staffed by psychologists, social workers, nurses, case managers, and a consulting physician. This team is available on a twenty-four hour basis to assist youth whose behavior threatens their removal from home or school, and also goes to the location and provides on-site assessment. It decides whether the child’s behavior constitutes a danger to him or others, and determines whether he can safely remain in the community or whether short-term placement in an alternative setting is warranted. The team also manages an eight-bed crisis/respite group home, which can serve as a more cost efficient alternative “cooling off” setting.

A. Wraparound: Clinical Outcomes

The results have been promising. Youth who completed the program showed significant improvement in functioning based upon standardized clinical scales. In 2008, 352 of the 389 children and youth who completed the program were in a permanent setting, defined as living at home with a parent or relative, being adopted, living under a subsidized guardianship, receiving sustaining care, or

36 Id. at 14-15.
37 Id. at 19.
39 Id.
40 Id.
41 Id.
42 Id.
living independently. Of the number who achieved permanency, 74% are living with their parents.

In addition, family satisfaction is high. The program seeks feedback from both youth and their families at the end of each fiscal year, using a one to five rating scale in which one is the lowest and five is the highest. The 2008 results revealed the average satisfaction score for youth completing the survey at 4.24, and adults/family members at 4.07. Thus, Wraparound has achieved not only positive clinical outcomes, but has done so in a manner that has produced high consumer satisfaction.

B. Wraparound: Cost Efficiency

In addition to clinical success and consumer satisfaction, Wraparound Milwaukee has demonstrated significant cost effectiveness. The program is funded through a creative cost-sharing structure referred to as “blended funding” which pools funds received by Medicaid, child welfare, and juvenile justice systems, and supplements these with private insurance and Supplemental Security Income payments. These funds are then pooled and decategorized, allowing the program flexibility to use them based on the individual needs of clients and their families. This model of blended funding is a progressive step forward. Prior to implementation, funding from the child welfare and juvenile justice systems were used entirely to fund more expensive residential treatment and care. In 2008, Wraparound served a total of 1,236 youth at an average monthly cost of $3,878 per child. Compare this to an average monthly cost for a group home placement at over $5,000 per month, residential center placement at nearly $7,000 per month, and inpatient psychiatric hospitalization at over $35,000 per month. Based on this data, the program is achieving fiscal efficiency as well as positive clinical outcomes.

C. Wraparound: Future Opportunities

Wraparound continues to innovate by focusing on proactive strategies focused on early intervention. The program recently unveiled a new project called REACH, aimed specifically at engaging youth in services before they become involved in the court system. This is a dramatic development, as the program historically was limited to serving youth who were either already under a court order, or

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44 Id. at 15.
45 Id.
46 Id. at 16.
47 Kamradt, supra note 35, at 18.
48 Id.
49 Id.
50 ANNUAL REPORT, supra note 43, at 17.
determined to be in need of child protective services. Referrals can be made by family members, school personnel, health care providers, and others. In 2008, the program served 179 youth in this category.\textsuperscript{52} In addition, Wraparound has entered into a collaborative agreement with local schools through a Safe Schools/Healthy Students grant project.\textsuperscript{53} This is yet another opportunity to intervene early with at-risk youth in providing preventive mental health services before they become involved in the juvenile justice system.

Wraparound is also embarking on a project aimed at promoting better information sharing between itself and the other two key agencies involved—child welfare and juvenile justice. Recognizing the need for accurate information sharing, the Wraparound Milwaukee program custom designed a program called \textit{Synthesis}.\textsuperscript{54} Currently, the program is integrating its database with that of the state juvenile court system so that case planning data can be shared and clinical outcomes can be tracked across agencies.\textsuperscript{55}

In September of 2009, Wraparound Milwaukee was awarded the Annie E. Casey Innovations Award in Children and Family System Reform by the Harvard School of Government.\textsuperscript{56} Stephen Goldsmith, director of the Innovations in American Government Program at Harvard stated:

\begin{quote}
Wraparound Milwaukee’s care model breaks through rigid program silos and delivers cost effective and higher quality health care that involves families from day one. . . . The program champions a unique approach to care where one size doesn’t fit all. In honoring Wraparound, we hope other states will learn from the program’s innovation and adopt similar practices to ensure improved care of at risk youth.\textsuperscript{57}
\end{quote}

Perhaps most importantly, Wraparound Milwaukee will receive additional grant funding to share its success with other programs.\textsuperscript{58} This presents an opportunity for policymakers in the state of Utah to build a successful integrative mental health program for youth in a cost efficient way.

\textsuperscript{52} \textit{Id.} at 8.
\textsuperscript{53} \textit{Id.} at 3.
\textsuperscript{54} \textit{Id.} at 19.
\textsuperscript{55} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
IV. MANIFESTATIONS OF THE CUSTODY RELINQUISHMENT PROBLEM IN UTAH

For years the Disability Law Center (DLC)\(^59\) has received reports from families who have experienced the custody relinquishment problem firsthand. In 2007, the DLC published a report discussing the nature of this problem within the state of Utah.\(^60\) This report serves as the first step in defining the nature of the problem in the state, and in generating a discussion on scope and potential remedies. The DLC interviewed representatives from the following entities:\(^61\)

- Utah State Medicaid Agency
- Allies with Families\(^62\)
- Third District Juvenile Mental Health Court Probation and Parole
- Utah Division of Child and Family Services (DCFS)
- Utah Division of Juvenile Justice Services (DJJS)
- ABLE Clinic\(^63\)
- An Assistant Attorney General who works with DCFS
- A State District Juvenile Court Judge

In addition, the DLC interviewed six parents who had been faced with custody relinquishment in order to gain mental health services for their children. Their personal experiences are highlighted throughout the report. The survey revealed that in Utah, there are currently two main “default” providers of mental health services for children in crisis: DCFS and DJJS.\(^64\) Because there is no standard infrastructure, services offered by these two agencies are often fragmented and incomplete, leading to wasteful spending and less than ideal outcomes for the children they are attempting to help. Some of the key findings from the report are summarized below.

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\(^59\) The Disability Law Center is the federally designated protection and advocacy agency for the state of Utah. Its mission is to enforce and strengthen laws that protect the opportunities, choices, and legal rights of people with disabilities in Utah.


\(^61\) Id. at 7.

\(^62\) Allies with Families is a local non-profit organization devoted to serving individuals with mental illness. See Allies with Families Homepage, http://www.allieswithfamilies.org/ (last visited Nov. 25, 2009).

\(^63\) The ABLE clinic is part of the Bureau of Children with Special Health Care Needs, a division of the Utah Department of Health. See ABLE Developmental Clinic, Inc. Homepage, http://www.ableclinic.ca/ (last visited Nov. 25, 2009).

\(^64\) DLC REPORT, supra note 60, at 11.
A. DCFS and DJJS

DCFS has a category called “no fault service dependency placements.”65 Director Duane Betournay estimates that in 2005, 470 children in DCFS custody (roughly 25% of all children in DCFS custody) were there based on service dependency.66 Almost half of these children were younger than the age of ten years old.67 Although the agency has not tracked the number of these children whose placements were based on mental health needs, “Betournay believes that the number is significant.”68

DJJS is another avenue for getting mental health treatment for children. When mental health issues of juveniles are left untreated, they often end up in juvenile court where judges can order treatment for juvenile offenders. The court will often send first time juvenile offenders to an Observation and Assessment unit run by DJJS.69 A child’s condition may continue to deteriorate in this foreign setting, often resulting in additional charges, and a possible transfer to a residential treatment setting. These are often out-of-home placements that last from six months to a year, at which point the youth is discharged back home.70 If additional community-based mental health services are not provided, the youth are prone to reoffending.71 As a result, probation officers have the option of petitioning the juvenile court on behalf of parents to voluntarily take custody, starting the cycle over again.72 Thus, the challenge for Utah and other states is to develop strategies for breaking this destructive pattern.

B. Next Steps

The DLC report offered several “next step” recommendations.73 Central to these was the idea that state agencies and mental health providers must work together to integrate services using a model based on early identification, preventive treatment, and community-based care.74 The remainder of this note will describe an innovative project currently underway in Utah’s Third District Juvenile Court, and discuss how that model can be developed and expanded by replicating strategies used in Milwaukee.

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65 Id. at 12.
66 Id.
67 Id.
68 Id.
69 Id. at 13.
70 Id.
71 Id.
72 Id.
73 DLC Report, supra note 60, at 15-16.
74 Id.
C. Coordination of Care Court

The Third District Juvenile Court in Salt Lake County has taken the lead in moving from a punitive model of juvenile justice to one that focuses on prevention and rehabilitation. The Coordination of Care Court (C3) was introduced in 2006. It is collaborative partnership between Valley Mental Health, the Division of Child and Family Services, Division of Juvenile Justice Services, Salt Lake County District Attorney’s Office, Salt Lake County Sheriff’s Office, Salt Lake County Division of Substance Abuse Services, Pappas and Associates, Jordan School District, and the National Alliance for the Mentally Ill-Utah Chapter (NAMI). C3’s mission is “providing youth offenders with supervision and a comprehensive integrated treatment plan that includes a coordination of community-based treatment services in full partnership with families and support networks.”

Youth who participate in the program must be diagnosed with a serious emotional disturbance (SED) that has resulted in significant impairment in the family, school, or community. Participation is voluntary.

Youth must progress through three levels in order to complete the program. Positive rewards are offered for success, while at the same time there are sanctions for noncompliance. In order to graduate, participants must meet the following criteria: 1) no new charges; 2) satisfaction of all court ordered obligations; 3) completion of the goals for each phase; and 4) demonstration of stabilized behavior—therapeutically, academically, and domestically. Those who meet these requirements are eligible to have their court supervision terminated.

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75 Utah Third District Court, Coordination of Care Court: Finding Creative Solutions Through Creative Partnerships (2007) (PowerPoint presentation transcript on file with author).
76 Id.
77 Pappas & Associates is a Salt Lake City, Utah defense firm which provides services to youth in the juvenile justice system.
78 Utah Third District Court, supra note 75.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
Although the number of youth served is small at this point, initial results have been promising:

- 64% of the participants had no additional criminal charges while in the program, while the remaining youth that did have charges were less severe than those upon program entry;
- 10% increase in school attendance and grade point average;
- One client graduated from high school, and one obtained a graduate equivalency diploma (GED).84

V. RECOMMENDATIONS

The Third District’s Coordination of Care program is very promising. Programs such as this can be strengthened even further by integrating strategies employed by the Milwaukee program. Below are some initial recommendations:

A. Purchase the Synthesis Database from Wraparound Milwaukee

The need for data sharing between mental health agencies, DCFS, and DJJS is critical, as described in the DLC’s report.85 Wraparound has pioneered a data sharing system, and has made it available to other municipalities. Utah should take advantage of this program.

B. Replicate the Blended Funding Model

Pooling resources across agencies can result in increased access to community care, and create added flexibility for programming that is proactive, community-based, and individually tailored to the needs of youth and their families.

C. Replicate the REACH Model

State policymakers should ally themselves with leaders from the Milwaukee program, and seek to replicate the REACH model here in Utah. By intervening prior to engagement with law enforcement, the State can both save money and prevent the collateral damage that often occurs when youth are placed in the juvenile justice system.

By using strategies from Wraparound Milwaukee, Utah can build upon the promising foundation being piloted by the Third District Court, and expand this model to other areas of the state. This can result in positive gains on two fronts. First, it can decrease the number of youth who become involved in the criminal justice system. Second, it will begin to eliminate the need for custody relinquishment by offering preventive care before families reach a crisis.

84 Id.
85 DLC REPORT, supra note 60, at 15.
CONCLUSION

Parents of children with serious mental health issues are being placed in untenable situations. As Schermer illustrates, families are forced to the brink of poverty in seeking the care their children need. Not only do parents risk impoverishment, but they are often forced to give up custody of their children to the state. This destabilizes families, and increases the likelihood that children with mental health needs will spiral further out of control, resulting in increased cost to society in the long term. This problem transcends the formal legal realm, calling for a solution that requires strong collaboration between the legal profession, advocates, service providers, and state and federal agencies. Salt Lake County is taking steps in the right direction with the Coordination of Care Court. Leaders should seek to build and expand upon this model throughout the state of Utah by collaborating with staff from the Wraparound Milwaukee program. As a state that prides itself on its commitment to family values, Utah has the opportunity to transform rhetoric into action and become a leader in creating better support systems for youth with mental health needs.
Domestic violence is an enormous problem in the United States. According to statistics:

- Two to six million women experience violence from their male partners each year;
- Twenty-five to thirty percent of women who seek emergency room treatment are there as a result of domestic violence;
- In 2004, over 1000 women were murdered by their husbands or boyfriends.

For decades, researchers, agencies, therapists, and scholars have been grappling with the issue of domestic violence, trying to understand the phenomenon in order to deal with it on a real world level. Some progress has been made in the courts with the recognition of the battered wife syndrome, and the implications of its effects in child custody cases. However, experts frequently disagree, claiming that research numbers are wrong and that studies on victims and abuse do not correlate with each other.

There are two ongoing debates. One is the gender debate. The predominantly feminist view of domestic violence is that it is patriarchal; the female is abused, dominated, and controlled by her male partner. The other side argues that women...
can be as violent as men, and men are battered as well. The stereotypical concept of female victimization results in laws and legal systems that focus on male domination and sex inequality to protect the female, thereby overlooking the substantive characteristics of violence.

The second debate concerns the numbers of female victims of domestic abuse. As indicated above, the estimated figures span a wide range—from two to six million—and depend on which particular parameters the researcher used to conduct the study. A Typology of Domestic Violence, by Michael P. Johnson, is the product of the author’s extensive examination of studies, statistics, and surveys, including his own research, which attempts to resolve the conflict between these two approaches. Johnson reconciles the research discrepancies for couple violence by providing an umbrella concept that legitimizes each of these polarized viewpoints. Still at issue, however, is the “battered husband” syndrome. First, this note will examine the assertions of Johnson’s book. Second, it will address the concept of female coercive control and dominance in a relationship, and look at statistics indicating that there is no myth to battered husbands. This approach highlights the current research while acknowledging that victimized men need legal protections just as much as women do in the context of domestic violence.

I. COERCIVE CONTROL

Johnson places the concept of “coercive control” at the center of his theory, believing that it is the key to reconciling the aforementioned debates. By reviewing the statistics and anecdotal research, he argues that patterns as to the extent of coercive control exerted by one (or both) partners in a relationship are evident. Coercive control is defined as an ongoing pattern of sexual mastery by which abusive partners (almost exclusively males) interweave repeated physical abuse with “three equally important tactics: intimidation, isolation, and control.”


Kelly & Johnson, supra note 3, at 480–81.

See generally Suzanne K. Steinmetz, The Battered Husband Syndrome, 2 Victimology 499 (1978) (discussing research supporting the idea that men can also be victims of domestic violence).


Johnson is a Professor Emeritus of Sociology, Women’s Studies, and African and African-American Studies at Pennsylvania State University.

Johnson, Typology of Domestic Violence, supra note 1, at 1–2.

Id.

Id. at 2–4.

Id.

Evan Stark, Coercive Control: How Men Entrap Women in Personal Life 5 (2007); see also Johnson, Typology of Domestic Violence, supra note 1, at 7 fig.2 (showing “The Power and Control Wheel,” which explains how abusers use coercion and threats, intimidation, emotional abuse, isolation, minimizing, denying, and blaming,...
Johnson’s theory is that intimate partner violence is not a unitary phenomenon, but manifests itself in several ways depending on the amount of coercive control exhibited by the abusive partner.\textsuperscript{16} It is as much about the level of control as it is about the violence, and each type of intimate partner violence is distinguished by different patterns of behavior and different levels of violence.\textsuperscript{17} Coercive control is not necessarily gender based.\textsuperscript{18} While Johnson was one of the first to recognize the differences in types of domestic violence, the theory that not all domestic violence is the same, and therefore should not be treated the same, has gained considerable acceptance.\textsuperscript{19}

**II. INTIMATE PARTNER VIOLENCE**

“Intimate Partner Violence” is an umbrella term that encompasses all the types of domestic violence recognized by Johnson.\textsuperscript{20} When violence plays a role in an intimate relationship, he claims, the relationship can be categorized by the amount of control exerted by one of the partners.\textsuperscript{21} By quantifying the extent of the control one partner manifests against the other, all domestic violence can be classified as one of four types:\textsuperscript{22}

- Intimate terrorism
- Violent resistance
- Situational couple violence
- Mutual violent resistance

In his syllabus for a Domestic Violence Seminar at Penn State, Johnson says that these “four major forms of domestic violence . . . have different causes, different developmental trajectories, and different effects [which] require different types of intervention.”\textsuperscript{23} He goes on to say that researchers must identify and

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\textsuperscript{16} JOHNSON, TYPOLOGY OF DOMESTIC VIOLENCE, supra note 1, at 5–6.

\textsuperscript{17} Id.

\textsuperscript{18} STARK, supra note 15, at 91.


\textsuperscript{21} JOHNSON, TYPOLOGY OF DOMESTIC VIOLENCE, supra note 1, at 6 fig.1.

\textsuperscript{22} Id.

separate these distinct types of abuse in the body of the current scientific understanding to be able to make an accurate assessment of domestic violence.  

A. Intimate Terrorism

Intimate terrorism is violence deployed to gain general control over one’s partner, and is different than violence that is not motivated by control. It is the type of intimate partner violence that is generally called “domestic violence.” As shown by the Power and Control Wheel diagram, the control tactics used by abusers include isolation, emotional abuse, using children as pawns, threats, and intimidation. The more such tactics are employed with regularity, the greater the control exerted, and the greater the likelihood of physical or sexual violence. The physical violence is not merely another way of exerting control, but becomes even more powerful than any individual tactic—it is a signal that the abusive partner will do anything to maintain control. This results in a typical scenario where the powerful male partner controls and abuses the female partner, and the cycle of violence repeats and escalates.

B. Violent Resistance

Violent resistance occurs when an abused partner has had enough and physically strikes back. Because of the typical size difference between men (generally the controller) and women, although women react in different ways, they often believe that killing the abusive partner is the only way to escape the abuse. The critical defining pattern of violent resistance is that the woman acts out violently, but there is no control exerted by her, and her abusive partner is both controlling and physically violent. Fortunately, this idea is recognized in many courts through the concept of battered woman syndrome, there is a legal movement to elevate the crime of domestic violence from a misdemeanor to a

24 Johnson, Typology of Domestic Violence, supra note 1, at 12–24 (discussing how to research partner violence by asking the right questions—and what to do if the researcher fails to ask the right questions).
25 Id. at 6; see also Kelly & Johnson, supra note 3, at 478–79.
26 D’Ambrosio, supra note 19, at 656.
27 See supra note 15.
28 Rachmilovitz, supra note 9, at 503–04.
29 Johnson, Typology of Domestic Violence, supra note 1, at 9.
30 Id. at 10–11.
32 Johnson, Typology of Domestic Violence, supra note 1, at 10.
33 See, e.g., Francis v. Miller, 557 F.3d 894, 900 (8th Cir. 2009) (explaining expert testimony on “Battered Woman Syndrome” is admissible because it “may show that a defendant had a reasonable belief that deadly force was required to protect her from serious harm at the hands of the victim”).
human rights violation,\textsuperscript{34} and there is growing recognition of the extent and effect of extreme mental and physical abuse by a controlling partner on a victim.\textsuperscript{35}

\textbf{C. Situational Couple Violence}

Situational Couple violence occurs when the domestic violence is provoked by a current situation but does not involve an attempt by either party to control the relationship in general.\textsuperscript{36} It arises out of normal conflicts occurring within any intimate relationship—either from a singular incident of a minor conflict which escalates, or a chronic issue where partners regularly resort to mild or severe physical violence.\textsuperscript{37} It is potentially no less dangerous than intimate terrorism or violent resistance, but the element of control is absent from the equation.\textsuperscript{38} The critical difference between these acts of violence and intimate terrorism relate to motive, not to the nature of the act.\textsuperscript{39} If the tactics of control are missing, that is if neither partner is attempting to control the other but rather is lashing out physically in anger or frustration, then Johnson views it as situational couple violence, not intimate terrorism.\textsuperscript{40}

\textbf{D. Mutual Violent Control}

This type of domestic violence occurs when \textit{both} parties employ coercive control tactics and attempt to control the relationship through physical violence.\textsuperscript{41} It is seen more often in same-sex relationships where it is more likely that the size and strength of the two individuals are equivalent, so the more-aggressive party can intimidate the other.\textsuperscript{42} Johnson believes that, in the past, research studies misinterpreted this type of violence by viewing it as either an act of intimate terrorism resulting in violent resistance from the abused partner, or situational couple violence.\textsuperscript{43}


\footnotesize{\textsuperscript{36} Johnson, \textit{Typology of Domestic Violence}, supra note 1, at 11–12.}

\footnotesize{\textsuperscript{37} Id.}

\footnotesize{\textsuperscript{38} Id.}

\footnotesize{\textsuperscript{39} Id.}

\footnotesize{\textsuperscript{40} Id.}

\footnotesize{\textsuperscript{41} Id. at 12.}

\footnotesize{\textsuperscript{42} Id.}

\footnotesize{\textsuperscript{43} Id.}
III. RECONCILING THE RESEARCH

In A Typology of Domestic Violence, Johnson reviews and reconciles data from numerous studies, thereby establishing the authenticity of previous research, and then he uses this data to support his typology theories. He divides acts of domestic violence into two categories. First, the perpetrator may act over an extended period of time to exert control, and physical violence may be a means of furthering that control. Second, the perpetrator may perform acts of violence where the motive is not control and domination, but anger or frustration.

In the past, data collected for research came from two distinct sources. The first category included data that came from large scale random surveys whereby family violence researchers gathered information on male perpetrators and female victims by interviewing husbands, wives and other family members. These researchers focused on “wife abuse” studies and data obtained from agencies, shelters, emergency rooms, and the court system, which largely limited the research pool to women who suffered from coercive control at the hands of their partners. The remaining information came from feminist writers who relied on reports from abuse victims. The two approaches provided very different results, and these differences in data provoked a tremendous gender debate regarding whether men were also victims of domestic violence. Some of the studies analyzed by Johnson were based on surveys that represented the two groups, like the “Pittsburgh Data,” a random survey of 272 women who were perceived as “battered.” He broke out the data into different categories, depending on the source, and came up with statistics that matched his projections based on coercive control violence versus situational couple violence. This supported his belief that the information could be interpreted in a different light—in its totality—by recognizing that there are two qualitatively different forms of partner violence.

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44 Id. at 23.
45 Id.
46 Id.
48 Id.; see also Dr. Reena Sommer, Address at the Women’s Freedom Network Conference: Controversy within Family Violence Research (Oct. 14, 1995).
49 Archer, supra note 47, at 651.
50 Id.
51 Irene Hanson Frieze & Angela Browne, Violence in Marriage, in 11 CRIME AND JUSTICE: FAMILY VIOLENCE, 163, 163–67 (Lloyd Ohlin & Michael Tory eds., 1989).
52 JOHNSON, TYPOLOGY OF DOMESTIC VIOLENCE, supra note 1, at 19–24.
53 Id.
control), parties would not be likely to respond to general surveys asking questions
about violence in the household, because of fear of reprisal or fear of exposing
themselves.55 Agency statistics, however, would only include those cases where
the battered partner had required help of some sort, either police, medical, or
shelter.56 The non-coercive acts of violence would rarely be reported.57 Hence,
Johnson suggests that two totally different populations exist: one almost entirely
consists of women in controlled relationships, and the other of non-gender skewed
partner violence in the general population, exclusive of what we recognize as
traditional domestic violence.58 There is new evidence however, that men as the
“battered” partner comprise a much larger percentage of intimate partner violence
than previously imagined.59

IV. WHEN THE WOMAN IS THE AGGRESSOR

Over thirty years ago, sociologist Suzanne Steinmetz said, “[t]he most
unreported crime is not wife beating—it’s husband beating.”60 According to the
Department of Justice’s report on its National Violence Against Women Survey,
more than 835,000 men are victims of intimate partner violence each year,
compared to 1.5 million women.61

An analysis of the data shows that the more physical the abuse, the more
gender specific it was likely to be.62 Men are four times more likely to be
threatened with a knife than a gun, and more likely to be bit, kicked, hit with an
object, or have something thrown at them.63 Conversely, men are more likely to
push, grab and shove, pull hair, choke, beat-up their partners, or threaten them with
a gun.64 Women, however, while only two or three times as likely to report the
more “minor” physical abuses such as pushing grabbing or shoving, are seven to

56 Johnson, Apples and Oranges, supra note 54, at 45–46.
57 Id.
58 Id.
59 Sommer, supra note 48.
63 TJADEN & THOENNIES, supra note 61, at 28.
64 Id.
fourteen times more likely to report being beaten, choked, or threatened with a weapon.\textsuperscript{65}

As with abuse toward women, the different types of studies make it difficult to determine the extent of abuse toward men. Family conflict studies without exception find equal rates of assault by men and women,\textsuperscript{66} while crime studies, also without exception, show higher rates of assaults by men.\textsuperscript{67} This bears out the National Violence Against Women Survey because women are so much more likely to consider any physical act an assault.\textsuperscript{68} Men are more likely either not to want to admit that they have suffered any physical abuse at the hands of a woman, or to regard the event as nothing more than part of a domestic squabble.\textsuperscript{69}

Murray Straus, co-director of the Family Research Lab at the University of New Hampshire, emphasizes that although both men and women are involved in physical aggression, the injury rates are not the same because “[t]he likelihood of an injury to a woman requiring medical attention is much greater. Men cause more damage.”\textsuperscript{70} Richard Gelles, dean of the University of Pennsylvania School of Social Work says the lifetime risk of a woman being struck by a male intimate partner is about twenty-eight percent and that a man’s lifetime risk of being struck by a woman is also about twenty-eight percent.\textsuperscript{71} This would indicate that the basic tendency for aggression is about the same between men and women, and that the statistics are skewed because the incidents of domestic violence counted tend to be those reported through the crime reports, incidents that result in physical injury and are therefore much more likely to be perpetrated by men.

\section*{V. Conclusion}

Just because men do not present their injuries after being abused does not mean that the idea of the “battered man syndrome” is a myth, as some propose. Women are just as capable of spinning the Power and Control Wheel as men, thereby perpetuating the cycle of intimate partner violence. Johnson has changed the posture the debate over unreconciled statistics to metaphoric situational violence, and then defused the situation which created the conflict. He validates both arguments, showing the accuracy and importance of each when viewed through the proper lens. Taken together, the interpretation of both sides provides a much more complete picture of domestic violence.

But in light of emerging data on dating and newlywed aggression, the debate may now shift to the woman’s role in all kinds of domestic violence. For example,

\begin{itemize}
  \item \textsuperscript{66} Archer, \textit{supra} note 47, at 651–58.
  \item \textsuperscript{67} Murray A. Strauss, \textit{Women’s Violence toward Men Is a Serious Social Problem, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE} 57 (2d ed. 2005).
  \item \textsuperscript{68} Peterson, \textit{supra} note 65, at B2.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id.
\end{itemize}
at the University of Iowa, Erika Lawrence’s study on newlyweds shows that one half of engaged or married women are aggressive, as are one third of the men.\footnote{Id.}

There is no question that women suffer many more significant injuries at the hands of men, but how many of those injuries occur as a defensive reaction to an abusive woman rather than from striking the first blow? A woman who is fed up with her partner’s behavior can strike out, throw something, bite, or brandish a knife. Her partner might defensively respond, causing injury, and a domestic violence report would be filed with the husband characterized as an abuser. Also, a man suffering abuse at the hands of his wife, if he even admitted to the abuse, might do nothing. Then, reaching his limit at some point, he might strike a blow in self-defense or frustration. Again, the result would be an injury, and a domestic violence report—with the husband characterized as the abuser.

According to Johnson, the different patterns of domestic violence that he has identified have “far reaching implications for court processes, treatment, educational programs for professionals, and for social and legal policy.”\footnote{Kelly & Johnson, supra note 3, at 477.} While the existing research is invaluable, and has aided in deconstructing domestic violence in general into specific typologies, a better understanding is required of the women’s role in initiating and perpetuating domestic abuse. Research needs to determine whether the concept of a female domestic abuser is a twenty-first century trend, or a dirty secret kept behind a locked front door.
CASE NOTE

*UNITED STATES V. JUVENILE MALE: EVALUATION OF THE RETROACTIVE APPLICATION OF SEX OFFENDER REGISTRATION LAWS TO FORMER JUVENILE OFFENDERS*

Tara L. Merrill*

INTRODUCTION

Six-year-old Amanda Wengert was kidnapped from her family’s home, sexually assaulted and murdered by her nineteen-year-old neighbor and family friend, Kevin Aquino.¹ When Kevin was 17, and still a juvenile under New Jersey law, he admitted to sexually molesting three young children and was sentenced to a year’s probation and counseling.² Like most juvenile court cases, the proceedings were private, and only Kevin’s family knew about his past offenses.³ This horrific event left everyone thinking that something had to change.⁴

For over a decade, every state in the United States has maintained some form of sex offender registration and notification law.⁵ The primary goal of sex offender registries is to track convicted sex offenders and make their personal information available to the public in order to prevent further victimization.⁶ Originally, juvenile sex offenders were subject to registration and notification requirements only if they were transferred out of the juvenile justice system and convicted as an adult.

More recently, however, there has been a movement to place all juveniles convicted of a sex offense on sex offender registries. At least thirty-two states have registration laws for juveniles under the age of eighteen.⁷ Twenty-two of those

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² Id.
³ Id.
⁴ Id.
states have community notification requirements for juveniles, and many allow for removal from the registry if the juvenile can demonstrate successful rehabilitation.\(^8\)

With the passage of the Adam Walsh Child Protection and Safety Act (AWA) in 2006, federal law now mandates that certain juvenile sex offenders be included with adult offenders in a national sex offender registry. The Sex Offender Registration and Notification Act (SORNA), a provision of the AWA, mandates that juveniles age fourteen or older adjudicated for certain sex-based offenses in juvenile court must register for a period of twenty-five years to life with a national sex offender registry.\(^9\) States that fail to comply with AWA, including the juvenile registration requirements, will forfeit federal funding.\(^10\) There was considerable debate in the Senate regarding whether SORNA should apply to juveniles at all, and if so, to what extent.\(^11\) The result appears to be a compromise.\(^12\)

Many sex offender registration laws, including SORNA, require retroactive registration by adults and juveniles who were convicted before the statute’s effective date. Retroactive registration requirements have been challenged as violating the United State Constitution’s Ex Post Facto Clause; however, as of 2003, the United States Supreme Court has held that laws requiring retroactive registration are constitutional.\(^13\) While the Court did not distinguish between adult and juvenile sex offenders, the statute was challenged by adults, and many of the justifications for the constitutionality of the statute included factors that are applicable to the adult criminal justice system. Recently, in a case of first impression, the Ninth Circuit held that retroactive application of SORNA’s juvenile registration provision was punitive, and thus violated the Ex Post Facto Clause.\(^14\)

The objective of this note is to analyze United States v. Juvenile Male, the recent Ninth Circuit case, and the constitutionality of retroactive application of sex offender registry laws covering individuals who were adjudicated as juveniles. Part II of this note identifies unique aspects of the juvenile adjudication system, including the federal statutory framework governing juvenile proceedings. Part III examines juvenile registration requirements under SORNA. Next, Part IV evaluates the United States Supreme Court jurisprudence on Ex Post Facto


\(^9\) 42 U.S.C. §16911(8) (2008) (stating that juveniles are only included in the registry “if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . .”).

\(^10\) Petteruti & Walsh, supra note 8, at 9 (history of sex offender registration laws).


\(^12\) Id.


\(^14\) Juvenile Male, 581 F.3d at 979.
violations. Part V discusses United States v. Juvenile Male and the constitutional implications of SORNA. Finally, Part VI summarizes practical solutions by proposing a case-by-case approach.

I. THE ROLE OF THE JUVENILE COURT SYSTEM

The United States legal system historically has had two distinctive systems of justice; one for adults and another for juveniles. The criminal justice system that applies to adults is public in nature. As the Supreme Court has explained, “[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.” In contrast, the juvenile system has historically taken place behind closed doors. Private proceedings fit with the juvenile court philosophy that juveniles who have committed criminal acts should not be punished, but rather treated and rehabilitated. The Tenth Circuit has stated that the juvenile system is designed “to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.”

Juveniles are treated differently than adults for a myriad of reasons. In 2005, the United States Supreme Court noted that there are “general differences between juveniles under 18 and adults . . .” Justice Kennedy, writing for the majority in Roper v. Simmons, recognized the lack of maturity and responsibility that prohibits those less than eighteen years of age from marrying without parental consent, serving on juries, or voting. The Court also recognized “that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and that their personality traits are “more transitory, less fixed.” Based on these differences between juveniles and adults, the Court declared “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

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16 Smith, 538 U.S. at 99.
17 See Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42 (1994) [hereinafter FJDA]; see also United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996) (noting that the purpose of the FJDA is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation).
18 See CORRIERRO, supra note 15, at 48-49.
20 Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen).
21 Id.
22 Id. at 569-70.
23 Id. at 570.
Based on the unique characteristics of juveniles, the Federal Juvenile Delinquency Act (FJDA), enacted in 1938, outlines a different set of procedures to govern federal juvenile adjudications.24 The FJDA’s underlying purpose is “to assist our youth in becoming productive members of our society” by focusing on rehabilitation, not punishment.25 Accordingly, the FJDA establishes a number of confidentiality provisions that are essential to the Act’s overarching rehabilitative purpose.26 Specifically, juvenile courts are prohibited from disclosing any information or records during juvenile delinquency proceedings to anyone other than counsel for the juvenile and the government.27 The FJDA also mandates that information about juvenile delinquency proceedings “be safeguarded from disclosure to unauthorized persons” after the adjudication process.28 This prohibits the juvenile record from being released when the information is related to an application for employment, license, bonding, or any civil right or privilege.29 More importantly, “[u]nless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.”30 As demonstrated below, these privacy safeguards often directly conflict with sex offender registry requirements.

II. JUVENILE SEX OFFENDERS AND SORNA

The number of sex offenses perpetrated by juveniles has been a growing concern in the United States over the past twenty years. It is currently estimated that juvenile offenders account for one-fifth of all rapes and almost one-half of all cases of child molestation committed each year.31 Adolescent males ages thirteen to seventeen make up the vast majority of juvenile offenders committing these rapes and child molestations.32 Policymakers have responded to these facts by requiring juveniles to register as sex offenders and making these registries available to the public in online databases.33

26 FDJA, 18 U.S.C. § 5038(a) (1994); see also United States v. Three Juveniles, 61 F.3d 86, 88 (1st Cir. 1995).
28 Id. at § 5038(a).
29 Id.
30 Id. at § 5038(e).
32 Id.
33 See Petteruti & Walsh, supra note 8.
While the number of juvenile sex offenders is alarming, there is a growing body of research demonstrating significant differences between juvenile offenders and their adult counterparts. The Coalition for Juvenile Justice, the Justice Policy Institute, and the National Juvenile Justice Network have compiled numerous studies demonstrating that juvenile sex offenders have much lower recidivism rates than adult offenders. Furthermore, juveniles are less predatory, less likely to engage in aggressive behaviors, and are more amenable to successful treatment. However, policies regarding the treatment of juvenile sex offenders often fail to take these differences into account. Currently, thirty-two states have registration laws for juveniles under the age of eighteen, seventeen states require community notification, and many allow for periodic re-assessments to determine whether the juvenile has been rehabilitated.

In 2006, Congress enacted SORNA, as part of the AWA, in response to “vicious attacks by violent predators,” and to “protect the public from sex offenders and offenders against children.” SORNA establishes a national registration of sex offenders, and requires anyone convicted of specified crimes to register with the national sex offender registry. SORNA mandates that juveniles ages fourteen or older who were adjudicated for certain sex offenses in juvenile court register for a period of twenty-five years to life. SORNA imposes additional burdens by requiring community notification and prohibiting any process that allows a state to eventually remove a rehabilitated youth from the registry.

Congress delegated to the United States Attorney General the decision whether SORNA should apply retroactively to sex offenders who were convicted before the statute became effective. The Attorney General created a regulation that renders SORNA applicable to “all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.” In doing so, it appears that the Attorney General neglected to consider

37 Adam Walsh Protection and Safety Act, supra note 6.
38 Id. at § 16911(4)(A)(i).
39 Id. at § 16911(8) (requiring that the offender be “14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in 18 U.S.C.A. § 2241), or was an attempt or conspiracy to commit such an offense.”).
40 Id. at § 16913(d).
41 United States v. Juvenile Male, 581 F.3d 977, 981 (9th Cir. 2009).
any of the special circumstances of juveniles who were adjudicated as delinquent under a different and largely confidential judicial system.42

III. RETROACTIVE REGISTRATION AND THE EX POST FACTO CLAUSE

There have been numerous cases challenging the constitutionality of sex offender registration laws; many of these cases specifically considered whether retroactive registration requirements violate the United States Constitution’s Ex Post Facto Clause.43 The Ex Post Facto Clause prohibits the government from enacting any statute or regulation that imposes retroactive punishment.44 In 2003, the United States Supreme Court decided Smith v. Doe, holding that the retroactive application of Alaska’s Sex Offender Registration Act did not have a punitive effect, and therefore did not violate the Ex Post Facto Clause.45

In considering whether a law constitutes retroactive punishment forbidden by the Ex Post Facto Clause, courts first ascertain “whether the legislature meant [the statute] to establish ‘civil proceedings.’”46 If the statute is criminal and intended to impose punishment, the court looks no further and the statute is held unconstitutional. Most sex offender registration statutes including the Alaska statute at issue in Smith v. Doe, are considered to be civil regulatory schemes.47 Courts further examine the statutory scheme in order to determine whether the statute is nevertheless punitive because “its effect is clearly shown to be punitive.”48 In Smith v. Doe, the Court determined that the purpose of the Alaskan statute was not to punish, but rather to create a civil scheme that will help protect public safety.49 When analyzing whether a statute is punitive in effect, courts use seven factors noted in Kennedy v. Mendoza-Martinez.50 Courts consider these factors to be helpful, but not dispositive in determining whether a statute has a punitive effect.51 The five factors most relevant to the Court in Smith v. Doe were whether, in its necessary operation, the statute: “has been regarded in our history

42 Id.
43 U.S. CONST. art. I § 9, cl. 3.; see also Collins v. Youngblood, 497 U.S. 37, 45-46 (1990) (“An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict. . ..”).
44 Lynce v. Mathis, 519 U.S. 433, 441 (1997) (“To fall within the ex post facto prohibition, a law must be retrospective”—that is, it must apply to events occurring before its enactment—and it must “[disadvantage] the offender affected by it, by [altering the definition of criminal conduct or] increasing the punishment for the crime . . .” (citations omitted)).
46 Id. (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).
47 Id. at 105.
48 Id. at 92-93.
49 Id. at 102-03.
and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose.\(^{52}\)

The Court concluded that the statute was not punitive in effect because: (1) regulatory schemes requiring community notification are relatively new and have not been historically regarded as punitive;\(^ {53}\) (2) the statute does not impose an affirmative disability or restraint, as it does not impose a physical restraint, and the periodic update requirements do not have to be made in person;\(^ {54}\) (3) the statute does not promote the traditional aims of punishment simply because it might deter future crimes;\(^ {55}\) (4) the Act has a rational connection to a legitimate, non-punitive purpose, public safety, which is advanced by alerting the public to the risk of sex offenders in their community;\(^ {56}\) and (5) the statute is not excessive with respect to the Act’s purpose.\(^ {57}\)

It should be noted that two adults challenged the statute, and many of the justifications for the constitutionality of the statute included factors that are applicable solely to the adult criminal justice system. To this end, the Court left open the question of whether a statute requiring the retroactive registration of a juvenile who was adjudicated in the juvenile system violates the Ex Post Facto Clause.

IV. \textit{UNITED STATES V. JUVENILE MALE} \(^{58}\)

The Ninth Circuit is the only circuit to address the issue of whether SORNA’s juvenile registration provision may be applied retroactively to individuals adjudicated in the juvenile system.\(^ {58}\) The court applied the same \textit{Mendoza-Martinez} factors as the Court in \textit{Doe v. Smith} and determined that the retroactive application of SORNA’s provisions to former juvenile offenders was punitive in effect and, therefore, unconstitutional.\(^ {59}\)

\textit{A. The Background of United States v. Juvenile Male} \(^ {60}\)

Starting at the age of thirteen, S.E., a juvenile male, committed non-consensual sexual acts with a ten-year-old child.\(^ {60}\) The sexual activity continued over the period of two years.\(^ {61}\) S.E. was adjudicated as a juvenile delinquent under the FJDA at the age of fifteen for these acts that, if committed by an adult, would

\(^{52}\) \textit{Id.}  
\(^{53}\) \textit{Id.} at 97-99.  
\(^{54}\) \textit{Id.} at 99-102.  
\(^{55}\) \textit{Id.} at 102.  
\(^{56}\) \textit{Id.} at 102-03.  
\(^{57}\) \textit{Id.} at 103-05.  
\(^{58}\) \textit{United States v. Juvenile Male}, 581 F.3d 977, 979 (9th Cir. 2009).  
\(^{59}\) \textit{Id.} at 993.  
\(^{60}\) \textit{Id.} at 979.  
\(^{61}\) \textit{Id.}
have constituted aggravated sexual abuse in violation of 18 U.S.C. § 2241(c). In 2005, one year before SORNA was adopted, S.E. was sentenced to a period of confinement of twenty-four months to be followed by supervised release until age twenty-one. In 2007, one year after SORNA was enacted, the district court revoked S.E.’s supervised release because S.E. failed to engage in a job search and abide by conditions of the pre-release center. S.E. was ordered to six more months of confinement and continued supervised release until his twenty-first birthday. The court also mandated that S.E. register as a sex offender under SORNA.

S.E. appealed this decision, arguing that the retroactive application of SORNA’s provision covering individuals who were adjudicated as juvenile delinquents violates the Ex Post Facto Clause of the United States Constitution. The Ninth Circuit decided that the retroactive application of SORNA’s provisions to former juvenile offenders was punitive in effect, and therefore unconstitutional.

B. An Abrogation of Smith v. Doe?

At first blush, it appears that the Ninth Circuit has not accorded Smith v. Doe its full precedential weight; the court used the same five Mendoza-Martinez factors used by the Supreme Court in Smith v. Doe, but reached the opposite conclusion. The court notes, however, that in light of the “two different systems of justice—one public and punitive, the other largely confidential and rehabilitative—the impact of sex offender registration and reporting upon former juvenile offenders and upon convicted adults differs in ways that we cannot ignore.”

When applying the first Mendoza-Martinez factor, the Ninth Circuit found that making juvenile adjudication information public has historically constituted punishment. Juvenile adjudications have traditionally been shielded from the public, unless the juvenile is transferred to adult criminal court for punitive purposes.

The Ninth Circuit found the second Mendoza-Martinez factor the most persuasive when making its final decision to strike down the SORNA provision. The court determined that SORNA’s juvenile registration provision “imposes an affirmative disability or restraint” in a way that the Alaskan statute did not. In Smith v. Doe, the Court determined that the retroactive registration requirement of

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62 Id. at 980.
63 Id.
64 Id.
65 Id.
66 Id. at 985.
67 Id. at 979.
68 Id. at 984.
69 Id. at 988.
70 Id. at 989.
71 Id.
the Alaskan statute did not impose a disability or restraint in part because the conviction was already a matter of public record.\(^{72}\) The Court compared the registration and notification provisions to “a visit to an official archive of criminal records . . . .”\(^{73}\) With juvenile proceedings, however, the opposite is true; information about federal juvenile delinquency adjudications is carefully protected.\(^{74}\) The Ninth Circuit recognized that registration would be severely damaging to former juvenile offenders because individuals who “pled true to acts of juvenile delinquency with the expectation that their adjudication would remain confidential—may decades later, be required to publicly expose that information to friends, family, colleagues, and neighbors.”\(^{75}\) In addition, the Alaskan statute at issue in \textit{Smith v. Doe} did not mandate in-person registration. SORNA, however, requires individuals to register in person four times a year for at least twenty-five years.\(^{76}\)

When applying the third \textit{Mendoza-Martinez} factor, the Ninth Circuit determined that the goal of SORNA was not only to protect public safety in the future, but also to revisit past crimes, making the statute retributive.\(^{77}\) Specifically, the Ninth Circuit took issue with SORNA’s legislative purpose: “in response to the vicious attacks by violent predators.”\(^{78}\) Because of this retributive aim, the Ninth Circuit held that SORNA promotes traditional aims of punishment.\(^{79}\)

The Ninth Circuit does not give much weight either way to the fourth and fifth factors in making their ultimate decision.\(^{80}\) The court notes that Congress debated whether SORNA should apply to juveniles at all and that the result appears to be a compromise.\(^{81}\) On the other hand, “given the low risk that former juvenile sex offenders pose to public safety and the lifetime confidentiality that most former juveniles would otherwise enjoy, retroactively applying SORNA’s juvenile registration provision is an exceptionally severe means of achieving the statute’s non-punitive goal.”\(^{82}\)

Ultimately, the Ninth Circuit found that the \textit{Mendoza-Martinez} factors taken together provide proof that SORNA’s registration requirements applied to individuals adjudicated in the juvenile system prior to the enactment of the statute have a punitive effect. As such, the court held SORNA’s juvenile retroactive registration requirement unconstitutional in violation of the Ex Post Facto Clause of the United States Constitution.\(^{83}\)

\(^{73}\) Id. at 99.
\(^{74}\) \textit{Juvenile Male}, 581 F.3d at 986.
\(^{75}\) Id. at 987.
\(^{76}\) Id.; see also SORNA, 42 U.S.C.A. § 169161(3) (2006).
\(^{77}\) \textit{Juvenile Male}, 581 F.3d at 990.
\(^{79}\) \textit{Juvenile Male}, 581 F.3d at 989.
\(^{80}\) Id. at 992-93.
\(^{81}\) Id. at 991.
\(^{82}\) Id.
\(^{83}\) Id. at 993.
C. Potential Problems with United States v. Juvenile Male

While the Ninth Circuit decision is constitutionally correct based on the differences between juveniles and adults, there are some potential policy problems. While many individuals who committed these crimes as juveniles may be productive law-abiding adults, there may be others who have not been fully rehabilitated and still pose a threat. Both Congress and the Attorney General went too far in one direction when they required juveniles to register retroactively without distinguishing between those who still pose a threat and those who are success stories of the juvenile justice system. Likewise, the Ninth Circuit’s decision goes too far in the opposite direction, potentially allowing for more horror stories like Amanda Wengert. The one-size-fits-all approach taken by both Congress and the Court is contradictory to the goals of the juvenile justice system.

V. THE NEED FOR A CASE-BY-CASE REVIEW BEFORE REQUIRING REGISTRATION

The best way to balance the competing concerns between the public’s interest in sex offender registration and the potential harm posed to those adjudicated as juveniles would be to review each individual on a case-by-case basis. This approach may at first seem to be costly and burdensome; however, it is important to note that the current regime is also costly and burdensome. Valuable law enforcement time is wasted maintaining registry information, tracking down and prosecuting individuals who fail to comply with registry requirements, enforcing residency restrictions, and checking-up on individuals who no longer pose a threat. It is more efficient to narrow the pool of potential repeat offenders as early as possible.

The SORNA provisions dealing with retroactive registration requirements of juveniles should be changed to require individual determinations, rather than summarily requiring every individual convicted as a juvenile to register. Factors that courts should consider include: (1) the age of the offender when the offense occurred; (2) what appeared to be the motivating factor behind the offense; (3) whether the offender successfully completed rehabilitation program and parole; and (4) whether there have been any subsequent charges or convictions against the offender.

In addition, this approach would not run afoul of the constitution because it is non-punitive and is truly aimed at protecting public safety. Specifically, the third, fourth and fifth Mendoza-Martinez factors would support this type of registry.

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85 Id.
CONCLUSION

Initially, sex offender registries were used largely to track adults who had been convicted of violent sex offenses. More recently, policymakers have expanded the scope of registries by including juveniles. Many of these new registries, such as SORNA, require individuals adjudicated in the juvenile system to register retroactively. As the Ninth Circuit noted, the vast majority of individuals affected by the SORNA’s retroactive registration requirements will no longer be juveniles, but rather adults who committed these offenses long ago, and have since built families, homes and careers without their juvenile proceedings being made public. However, the potential remains that some individuals adjudicated as juveniles remain a threat. A case-by-case approach aimed at re-assessing the individual to determine whether they continue to pose a threat to society should be implemented.
NOTE
H.B. 189: TEACHING CONTRACEPTION IN UTAH’S ABSTINENCE-ONLY PUBLIC SCHOOLS

Ian Atzet*

INTRODUCTION

Abstinence is 100% effective at preventing the spread of debilitating sexually transmitted diseases (STDs)\(^1\) and keeping the mothers of unwanted children out of abortion clinics. This conservative social slogan acts as the cornerstone of the sex education curricula of Utah public schools. Faced with increasing infection rates of gonorrhea and chlamydia among Utah adolescents, however, State Representative Lynn N. Hemingway introduced House Bill 189\(^2\) in part to increase the information about contraception included in public school curricula.\(^3\)

Public schools principally function to foster the knowledge necessary to contribute to society and inculcate the youth with the community’s values.\(^4\) Consistent with this function, H.R. 189 proposes allowing more information regarding sexual health while not undermining the values reflected in the current sex education program. Specifically, H.R. 189 proposes three changes to the current statute: first, it requires the inclusion of the Utah Department of Health in evaluating instructional materials;\(^5\) second, it statutorily codifies “medically


\(^1\) Abstinence does not totally prevent the spread of illnesses categorized as STDs. Transfer of bodily fluids such as blood transfusions may lead to infections. This paper does not address other methods of STD transfer.

\(^2\) H.R. 189, 58th Leg., 2009 Gen. Sess. ll. 79-84 (Utah 2009). For this paper all pincites will be made to the applicable line numbers on the amended bill available at the Utah State Legislature Homepage, http://le.utah.gov/~2009/bills/hbillamd/hb0189.pdf (last visited Dec. 18, 2009) [hereinafter H.R. 189].

\(^3\) Rep. Hemingway introduced H.R. 189 into the House Health and Human Services Standing Committee on February 25, 2009. Following a short debate, this committee amended the bill and recommended it be held to the House Rules Committee. To become law, a bill must be reviewed by the appropriate standing committee, after which the bill “is returned to the full house with a committee report.” See Utah State Legislature, How an Idea Becomes a Law, http://www.le.state.ut.us/documents/aboutthelegislature/billtolaw.htm (last visited Oct. 21, 2009).


\(^5\) H.R.189, supra note 2, at l. 47.
accurate” information;\(^6\) and finally, it provides succinct language allowing teachers to more completely address contraception, eliminating the prohibition on “the advocacy or encouragement of the use of contraceptive methods or devices. . . .”\(^7\)

Voting against H.R. 189 would likely result from the Utah Legislature mistakenly prioritizing the inculcation of community values above education that would reverse STD infection trends. To support this assertion, this paper analyzes the changes proposed by H.R. 189 and their potential impact. Section II outlines the current statute, § 53A-13-101 of the Utah Code, and the resulting curriculum; Section III presents potential problems with sex education curricula; Section IV discusses the changes H.R. 189 will statutorily impose; and Section V presents arguments in favor of enacting H.R. 189.

Generally, in sex education debates, parties either advocate no sex education in public school and abstinence-only programs (AOP), or comprehensive sex education programs.\(^8\) Throughout this paper, the underlying ideology of a source will only be addressed when it is particularly relevant.

I. THE CURRENT STATUTE AND RESULTING CURRICULUM

The Utah Constitution mandates the existence of public schools\(^9\) and authorizes the State Board of Education (Board) to assert “general control” and “supervision” over the schools.\(^10\) In exercising discretion, the Board is able to “[establish] minimum standards related to curriculum and instruction requirements . . .” and is granted the authority to “implement a core curriculum” through “consultation with local school boards, school superintendents, teachers, employers, and parents . . . .”\(^11\) There are, however, sections of the public school curriculum not subject to the full discretion of the Board.\(^12\) One of these subjects is sex education. The Utah Legislature provides a strict policy for the Board to follow when determining the sex education program.\(^13\) This limited discretion reflects the

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\(^6\) Id. at ll. 94-98. The definition is included infra Section III.

\(^7\) Id. at ll. 59-60 (removing the prohibition of contraceptive advocacy).

\(^8\) There is some variation in the definitions of these terms, but “Abstinence Only” is defined Congressionally (“abstinence education” is used) by the Social Security Act 42 U.S.C.A. §§ 710(b)(2)(A)–(H) (West 2003). The term “comprehensive sexual education” is defined academically as sexual education that “emphasizes the benefits of abstinence while also teaching about contraception and disease-prevention methods . . . .” See Naomi Starkman & Nicole Rajani, The Case for Comprehensive Sex Education, 16 AIDS PATIENT CARE & STDs 313, 313 (2002).

\(^9\) See Utah Const. art 10, § 1 (West 2009).

\(^10\) See Utah Const. art. 10, § 3.


\(^12\) See, e.g., Utah Code Ann. § 53A-13-201 (West 2009) (legislating requirements of driver’s education); § 53A-13-209.

\(^13\) See generally Utah Code Ann. § 53A-13-101 (West 2009) (establishing specific guidelines for items such as the adoption of instructional materials, appropriate subjects to be covered, and compliance with parental consent rules).
controversial nature of the relationship between human sexuality and numerous moral and social norms.¹⁴

Under § 53A-13-101, Utah public schools teach abstinence “before marriage” as a principal focus of the sex education curriculum.¹⁵ Each local school district may choose to either adopt the instructional materials recommended by the Board, and commented on by the State Instructional Materials Commission, or adopt more conservative materials as provided by state board rule.¹⁶ Before any classroom discussion, the school must send notice to parents outlining material containing sexual content, and obtain parental consent before adolescents may attend these classes.¹⁷

Specifically, under § 53A-13-101, one of the objectives is that students will be able to “[i]dentify common sexually transmitted diseases . . .” and “[r]ecognize symptoms, [and] modes of transmission . . .”¹⁸ The Board also lists as one of its objectives that students will “[u]nderstand . . . the challenges associated with teen and/or unintended pregnancies.”¹⁹ Throughout the Board-recommended core curriculum, the Board mentions the statutory prohibition of contraceptive advocacy²⁰ and reiterates the need to “[d]iscuss the advantages of abstinence over other methods in preventing sexually transmitted diseases.”²¹ However, the recommended core curriculum also has as one of its teaching objectives, “means of prevention of early and/or unintended pregnancy and sexually transmitted diseases . . .” including “contraception/condom use” as a means to prevent the transfer of STDs and unintended pregnancy.²²

¹⁴ See Peter J. Jenkins, Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities, 2008 BYU L. REV. 593, 601-02 (2008) (stating that “so long as majorities respect the constitutional rights of students and parents, they should be free to craft educational curricula in light of community values.”).
¹⁶ See UTAH CODE ANN. §§ 53A-13-101 ¶¶ 1(c) (i)−(iii) (West 2009); UTAH ADMIN. CODE r. 277-474-6 (2009). The option of “abstinence only” school districts discussed below is allowable under the code sections cited here.
¹⁷ See UTAH CODE ANN. § 53A-13-101 ¶ 3(a) (West 2009); see also UTAH CODE ANN. §§ 76-7-322 to -323 (West 2009) (requiring parental consent before any funds from the state or political subdivisions from the state can be used for providing contraceptive or abortion services to minor children).
¹⁹ Id. at 19.
²⁰ Id. at 12.
²¹ Id. at 18.
²² Id. at 18-19.
II. POTENTIAL PROBLEMS WITH SEX EDUCATION CURRICULA

Generally, two indicators reveal problems of public school curricula. The first is through statistical data (i.e., STD infection rates, teen pregnancy rates, teen abortion rates, etc) showing the ineffective results of programs. The second is through lawsuits challenging whether the statute conforms to the constitutional limitations imposed on public school curricula. Each is presented in more detail below.

A. Utah STD Infection Rates, Teen Pregnancy Rates, and Teen Abortion

One issue that arises in sex education debates is how to determine the effectiveness of sex education programs, particularly where “there does not appear to be a correlation between sexually transmitted disease infection rates in a state and that state’s requirement for sexually transmitted disease prevention education.”23 Utah’s gonorrhea and chlamydia infection data, teen pregnancy data, and teen abortion data are presented here because it is available, dependable, and relied upon by advocates both for and against H.R. 189.

Cases of chlamydia in Utah increased nearly 50% between 2003 and 2007.24 Averaged over this period, women ages fifteen to twenty-four accounted for 52% of all reported chlamydia cases; by 2007, the portion increased to 72%.25 In 2007, the districts with the highest rates26 of chlamydia infection were Salt Lake Valley Health District followed by Weber-Morgan Health District.27 The health districts with the lowest rates of infection were the Utah Health District and Central Health District.28

The cases of gonorrhea rose 99% in Utah between 2003 and 2007.29 Among females during this period, gonorrhea cases increased 125%.30 Of this increase,

24 UTAH DEPT. OF HEALTH & BUREAU OF COMMUNICABLE DISEASE CONTROL, CHLAMYDIA AND GONORRHEA EPIDEMIOLOGICAL PROFILE: UTAH 2003-2007, at 2 (2009), http://health.utah.gov/cdc/hivsurveillance/std%20docs/STD%20Epi%20Profile.pdf. It is important to note that “the increase of chlamydia cases in Utah . . . is partly due to increased testing.”
25 Id. at 9.
26 See id. at vii. A “case” is a single reported infection and a “rate” is the number of cases “per 100,000 persons” that are normalized by the population. Id.
27 Id. at 5. Salt Lake Valley also had the highest number of chlamydia infection cases with 3,239.
28 Id.
29 Id. at 16. As with chlamydia, better methods of testing and increased testing may have contributed to this increase.
30 Id. at 25.
64% were in women between the ages of fifteen to twenty-four.\textsuperscript{31} In 2007, the districts with the highest rates of gonorrhea infection were Salt Lake Valley Health District followed by Weber-Morgan Health District.\textsuperscript{32} The districts with the lowest infection rates were Tri-County Health District and Wasatch Health District, but 58% of all districts reported an infection rate of less than ten per 100,000 persons.\textsuperscript{33}

The teen birth rate in Utah has decreased 36% since 1991.\textsuperscript{34} However, there was a slight increase between 2005 and 2006.\textsuperscript{35} Even with the increase, the teen birth rate was below the national average.\textsuperscript{36} This positive result does not extend to Utah Hispanic populations where the teen birth rate was more than double the national average.\textsuperscript{37} In 2004, “the public cost of teen births in Utah was at least $63 million. . . .”\textsuperscript{38} Nonetheless, Utah’s success in decreasing the teen birth rate “saved an estimated $42 million dollars in 2004 alone.”\textsuperscript{39}

The final statistic examined is the teen abortion rate. Utah has the lowest teen abortion rate in the country.\textsuperscript{40} While the abortion rate in Utah has decreased by more than 50% from 1988 to 2000,\textsuperscript{41} 650 adolescents, nineteen and younger, still chose to have an abortion in 2000.\textsuperscript{42}

The recent rise in cases of chlamydia and gonorrhea amongst Utah teens together with the substantial number of teen births and abortions is evidence that the current school curriculum is not presenting enough information to prevent STD transfer and teen pregnancy.

\textbf{B. Legal Challenges to Curricula}

There have been relatively few legal challenges to sex education programs. From a broader perspective, however, challenges to public school curricula draw

\begin{itemize}
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id. at 20. Salt Lake Valley also had the highest number of gonorrhea cases with 552.
  \item \textsuperscript{33} Id. The districts with an infection rate of less than ten per every 100,000 persons included: Bear River, Central, Southeastern, Southwest, Tri-County, Utah, and Wasatch.
  \item \textsuperscript{34} See News Release, Utah Department of Health, Utah’s Teen Birth Rate Up Slightly 1 (May 6, 2008), http://health.utah.gov/pio.nr/2008/050608-TeenBirthRate.pdf.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id. at 1-2.
  \item \textsuperscript{38} \textsc{The National Campaign to Prevent Teen Pregnancy, by the Numbers: The Public Costs of Teen Childbearing in Utah} (2006), http://www.thenationalcampaign.org/costs/pdf/states/utah/onepager.pdf.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{41} Id. at 13, tbl.3.3.
  \item \textsuperscript{42} Id. at 12, tbl.3.2 (This number could be 640. After reviewing the data, the Institute may have made an addition or round-off error here).
\end{itemize}
on the following constitutional principles:\(^{43}\) (1) violation of the First Amendment Religion Clauses;\(^ {44}\) (2) constitutional challenges to the freedom of teacher expression;\(^ {45}\) and (3) challenges to a student’s right to speak or the “right to learn.”\(^ {46}\) Inherent in these conflicts is the balance between a state’s educational or political interests and individual rights.\(^ {47}\)

Relevant case law offers the following conclusive statements: (1) “The State may establish its curriculum either by law or by delegation of its authority to the local school boards and communities”;\(^ {48}\) (2) the free speech rights of teachers may be limited to the school curriculum;\(^ {49}\) (3) when the program in question is non-compulsory, parents have no legitimate cause of action against schools implementing that program because coercion is required for violation of the First Amendment Religion Clauses.\(^ {50}\) In conclusion, a statute with an opt-out provision and clear discernable limits on teacher expression created by the Board would prevail against common constitutional challenges.

III. THE CHANGES H.R. 189 WILL STATUTORILY IMPOSE

H.R. 189 includes proposals to modify three sections of the existing statute.

First, H.R. 189 requires involvement of the Department of Health in evaluating instructional materials.\(^ {51}\) Under § 53A-13-101, the legislature required the Board to consider evaluations by the State Instructional Materials Commission and the

\(^{43}\) See generally Jenkins, supra note 14, at 597-602 (discussing various “[c]onstitutional [c]onstraints” that limit actions that schools can take); Hunter, supra note 4, at 14-15 (mentioning some challenges to school curricula similar to the categories used here).


\(^{45}\) See Epperson v. Arkansas, 393 U.S. 97, 100 (1968); Mailloux v. Kiley, 323 F. Supp. 1387, 1390-93 (D. Mass. 1971) aff’d 448 F.2d 1243 (1st Cir. 1971) (finding teachers able to exercise some individual freedom in their teaching with regards to subject matter in the first case, and teaching manner in the latter).

\(^{46}\) See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (holding non-disruptive, “pure speech” by students is related to “primary First Amendment rights” and is constitutionally protected in public schools). The “right to hear” or “right to know” is discussed in Hunter, supra note 4, at 34 (citing inter alia First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) for judicial origins of this concept).

\(^{47}\) See Hunter, supra note 4, at 77-78. See, e.g., Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068-69 (6th Cir. 1987).


\(^{49}\) See, e.g., id.

\(^{50}\) See, e.g., Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. App. 3d 1, 22 (Cal. Ct. App. 1975) (finding no Establishment Clause violation because the parents could not meet the coercion requirement).

\(^{51}\) See H.R. 189, supra note 2, at l. 47.
Board could request input from the Department of Health. However, with the inclusion of more information concerning contraceptives, STDs, and pregnancy, this requirement ensures the accuracy of the information provided.

A second change proposed by H.R. 189 is to statutorily define “medically accurate” as:

mean[ing] verified or supported by research conducted in compliance with scientific methods and published in peer-reviewed journals, where appropriate, and recognized as accurate and objective by professional organizations and agencies with expertise in the relevant field, including the federal Centers for Disease Control and Prevention and the American College of Obstetricians and Gynecologists. This is a minor change because the Utah Administrative Code similarly defines “medically accurate.” Again, the change here is the inclusion of the “federal Centers for Disease Control and Prevention and the American College of Obstetricians and Gynecologists” rather than the “American Medical Association.” Similar to an evaluation by the Department of Health, these organizations would ensure accuracy of the sex education information.

The third, more significant, change proposed by H.R. 189 is to the required instructional materials. H.R. 189 removes the prohibition of teachers’ “advocacy or encouragement of the use of contraceptive[s].” Under H.R. 189, the required educational material:

(iv) provides information about the health benefits and side effects of all contraceptives and barrier methods as a means to prevent pregnancy, including accurate information about effectiveness; (v) provides information about the health benefits and side effects of all contraceptives and barrier methods as a means to reduce the risk of contracting sexually transmitted diseases, HIV/AIDS, and other diseases.

Despite the proposed modifications, H.R. 189 does not remove the opt-out provision, and does not create a dual system where parents are making the choice between “abstinence only” or “comprehensive” programs. Instead, the local school board will continue to determine the curriculum that will be taught, and

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53 H.R. 189, supra note 2, at ll. 94-98.
55 Id.
56 H.R. 189, supra note 2, at ll. 59-59(a).
57 Id. at ll. 79-84.
58 Cf. id. at ll. 102-04 with Utah Code Ann. §53A-13-101 ¶ 3(a)(ii) (West 2009) (these provisions are identical requiring parental notification and review).
base it on abstinence.59 What H.R. 189 does do, however, is allow schools to more comprehensively teach contraception as a preventative method for STDs and unintentional pregnancy.60

IV. ARGUMENTS FOR H.R. 189 ENACTMENT

H.R.189 improves the level of information provided to adolescents who participate in the sex education program and it clarifies the teacher requirements without tossing aside the conservative undertones of the entire statute. Specifically, H.R. 189 remedies potential legal issues stemming from ambiguous statutory language, and incomplete educational needs in Utah sex education programs without undermining the underlying traditional values.

A. Legal Issues: Removing Ambiguity while Maintaining Conservative Foundation

H.R. 189 clarifies proper teacher conduct, but retains the language that helps to forestall First Amendment Religious Clause lawsuits. Prior to H.R. 189, any teacher discipline61 resulting from violation of § 53A-13-101 by “the advocacy or encouragement of the use of contraceptive methods”62 would be legally challenged because of the ambiguity of this language and seemingly contradictory regulations that stem from it.

To illustrate, imagine a situation in which a teacher has described the symptoms of a STD, and then goes on to state that contraceptives may prevent an STD transfer. Is this advocating or encouraging contraceptive use? What if a teacher states that a condom is 87% effective at preventing the transfer of an STD, but Tetracycline (a common oral contraceptive) is not effective at preventing the STD? Is that advocating condom use? If a teacher was disciplined for either of the above discussions, a legal challenge would likely result.

However, there is no Utah case law directly challenging this ambiguous statutory language. In addition, there is no case law in which a teacher, disciplined for contraceptive advocacy, challenged the grounds of that discipline.

Regardless of the lack of case law, as a preemptive measure, the statute should clarify the contradictory direction. By eliminating the ambiguous language and specifying the limits of the contraceptive discussions, teachers are on notice of
what conduct is unacceptable, and Utah will avoid legal challenges following
disciplinary actions. Further, this specific language is likely to protect a teacher
from any wrongful accusations.

The second type of legal challenge to school curricula is that sex education is
a violation of the First Amendment Religion Clauses. Courts dismiss the majority
of these challenges due to the “opt-out” provisions and the lack of government
compulsion in the statute. H.R. 189 does not affect the opt-out provision of § 53-

B. H.R. 189 Presents a Compromised Approach

Taking a step back in this discussion, the entire premise of H.R. 189 is that §
53-101-13 inadequately educates Utah adolescents, and with more information
adolescents will make decisions that prevent STD transfer and/or unintended
pregnancy. Each part of this premise will be discussed separately.

1. A Complete Assessment of the Data Indicates Problems with Sex Education

Advocates of H.R. 189 present the statistics in Section III.A as evidence that
the current school curriculum is not presenting enough information to prevent STD
transfer and teen pregnancy. Opponents, however, interpret the statistics
differently. Opponents of H.R. 189 point to the low teen pregnancy rate and lower
abortion rate in Utah as evidence of success. Another interpretation relies on the
data showing that the school districts in which more conservative, abstinence-only
curricula are taught have the lowest instance of STDs. The argument, therefore, is
that the only change should be to implement a conservative, abstinence-only
curriculum throughout Utah.

63 Lisa Schencker, Debate Continues Over Utah Sex Ed Changes, SALT LAKE TRIB.,
teachers are allowed to talk about contraceptives, they’re not allowed to encourage their
use, leading many to avoid the topic out of fear of accidentally crossing the line, [Lynn]
Hemingway said.”

64 See, e.g., Medeiros et al., v. Kiyosaki et al., 478 P.2d 314, 316 (Haw. 1970).

65 See, e.g., id. at 318.

66 Cf. H.R. 189, supra note 2, at ll. 102-04 with UTAH CODE ANN. § 53A-13-
101(3)(a)(ii) (West 2009) (these provisions are similar in that they require parental
notification and review).

67 The audio recordings of the debates are located on the Utah State Legislature
hbillhtm/HB0189.htm (follow the “House Health and Human Services Committee 2/25”
link) (this argument was presented by Mary Ann Kirk, Utah PTA, speaking in opposition to
H.R. 189) [hereinafter Committee Debate].

68 See supra notes 26, 27, 31, 32 and accompanying text. The school districts that
teach “abstinence only” programs are Jordan, Provo, Nebo, and Alpine. Note however, the
Jordan school district is in Salt Lake County.

Although opponents to H.R. 189 correctly assessed the individual data sets, their conclusions remain incomplete. The problem is that these explanations fail to account for the STD infection rate data. That is, given that both pregnancy and STDs result from sexual activity, why would the rate of teen pregnancy be decreasing and the rate of STD infection increasing?

Increasing STD infection transfer can only indicate unprotected sexual activity. However, either abstinence, contraceptive use, or a combination of these factors could cause the decreases in pregnancy and abortion rates. This indicates a change in the method of contraception used by adolescents—an increase in the use of condoms, hormonal contraceptives (such as the “pill,” Norplant or Depo-Provera), or both—methods that protect against pregnancy, but not always STDs. The data indicates this exact trend. Between 1995 and 2002, adolescent use of oral hormonal contraceptives has increased approximately 10%, injectable hormonal contraceptive use more than doubled, and use of dual contraceptive methods (condom and a hormonal method) has increased from 8% to 20%.

Relying solely on the decrease in pregnancy and abortion rate as evidence of abstinence, while ignoring the contradicting data, is erroneous and irresponsible. “To date, however, no education program in this country focusing exclusively on abstinence has shown success in delaying sexual activity.” The Alan Guttmacher Institute states that 75% of the decline in U.S. teen pregnancy between 1988 and 1995 was due to contraceptive use and 25% was attributed to fewer teenagers engaging in sexual activity. Stemming from these studies, the conclusion is “some teens will respond to a message of abstinence while others will respond to improved access to contraception.”

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70 See supra text accompanying note 1 (stating that this note does not consider STD transfer through non-sexual means such as blood transfusions).
71 Kerry Franzetta et al., Child Trends Research Brief, Trends and Recent Estimates: Contraceptive Use Among U.S. Teens 2 (2006), http://www.childtrends.org/Files/ContraceptivesRB.pdf. As of the most recent study that analyzed the same information from 1982 until 1995 the results are mixed. While the use of oral and hormonal contraceptives remained constant and condom use increased substantially, pregnancy and STD trends were similar. The trends between 1982 and 1995 indicate the relationships are much more complex and can be broken down into sub-age and racial groups.
72 These are national statistics, but are used here to illustrate trends among adolescents.
73 See Franzetta et al., supra note 71, at 3.
74 Id. at 4.
75 Id. at 5.
76 Cynthia Dailard, Understanding ‘Abstinence’ Implications for Individuals Programs and Policies, 6 THE GUTTMACHER REPORT ON PUBLIC POLICY 4, 6 (2003).
77 Id. at 5.
2. More Information will Help Solve the Problem

The premise of H.R. 189, proposing that with proper education adolescents will make healthy decisions, remains under considerable debate.79 However, comprehensive sex education significantly reduces the rate of both teen pregnancy and the transfer of STDs.80 Analogously, information dissemination in homosexual communities following an increase of AIDS infection rates have shown the effectiveness of education to combat STD transfer.81

Further, the key to H.R. 189 is it allows the majority’s view to remain the central point of sex education while simply improving information dissemination that prevents health concerns. To illustrate, imagine five adolescents who will be referred to as A, B, C, D, and E. A’s parents strictly adhere to a religious philosophy and chose to educate their children in accordance with those beliefs at home and church. B’s parents pay lip service to the same religious doctrine but do not take active measures to instruct their children about sexual activity. C’s parents are totally distracted by other issues and do not have time to discuss sexual activity with their adolescent child. D’s parents are secular and would like the school to discuss contraceptives with their child but also intend to take their child to a medical professional to supplement classroom discussions. E’s parents are not educated enough to discuss contraception but are comfortable discussing the moral aspects of sexuality with their children.

H.R. 189 accommodates each of these adolescent’s situations. The opt-out provision allows for A’s and B’s parents to prevent any sex education at school. B is likely out of luck, but B is out of luck regardless of the content of sex education taught in school. The parents of C, D, and E may choose to allow health education for their children, including discussions of contraceptives. The school better informs the children about the medically accurate aspects of contraception without undermining the supplemental or possible lack of supplemental information from home. Enacting H.R. 189 presents a compromise. It respects the wishes of those opposed to public school sex education, allowing these students to opt-out of the program. It only improves the discussion already occurring with those students participating in the program.

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81 Deborah Milham, Comment, The Constitutional Issue Presented by the Communications Decency Act’s Application to HIV/AIDS Information on the Internet, 8 ALB. L.J. SCI. & TECH. 195, 215 (1997) (“Education has been an effective deterrent to the spread of AIDS as evidenced by the homosexual community’s successful educational programs in major metropolitan areas.” (citing David L. Chambers, Gay Men, AIDS and the Code of Condoms, 29 HARV. C.R.C.L. L. REV. 353, 356-57 (1994))).
However, opponents to H.R. 189 proffer three counter-arguments: (1) sex education should be kept within the family;\(^82\) (2) even with an opt-out provision for parents, students disseminate some contraceptive information outside the classroom;\(^83\) and (3) basing the program on abstinence while discussing contraception sends mixed messages.\(^84\) “It’s like saying, ‘[w]e want you to abstain, but we don’t believe you can.’”\(^85\)

Although these arguments reflect legitimate concerns, there are inherent problems. First, stating that sex education should remain in the home forces the questions: Why keep the existing program? Why aren’t advocates of this position calling for a repeal of this entire statute? This counter argument is not addressing the issue. It is like asking whether we can have chicken rather than steak for dinner and someone replying that she is a vegetarian so chicken is not an option.

Public Schools have incorporated health education to promote healthy habits in the community. Significant health concerns among adolescents are STDs and unintended pregnancy. Addressing the leading cause of these health concerns means addressing sexual activity.

Second, while information dissemination among students is unavoidable, at least under H.R. 189, the information discussed among the students will be accurate. Regardless, this concern does not outweigh the solutions H.R. 189 presents.

The third counter argument stated above disregards the diversity in the population and the specific recommendations cited above.\(^86\) Contrary to the “mix message” fear, a combination of abstinence and contraceptive education is the most effective method at reducing instance of teen pregnancy and STD infection given the fact that not all adolescents exercise abstinence.\(^87\) In addition, 46% of adolescents ages fifteen to nineteen in the nation have had sex at least once.\(^88\) The discussion of contraceptives should be included because any belief that adolescents will abstain from sexual activity is not grounded in fact.

**CONCLUSION**

Statistical evidence illustrates an alarming problem regarding adolescent sexual behavior. The changes proposed by H.R. 189 present a solution to that


\(^{83}\) See id. (statement of Galye Ruzicka, Utah Eagle Forum).


\(^{85}\) Id.

\(^{86}\) See Child Trends Research Brief, supra note 78, at 5.

\(^{87}\) Id.

\(^{88}\) GUTTMACHER INST., *Facts on American Teens’ Sexual and Reproductive Health* 1 (2006), http://www.guttmacher.org/pubs/fb_ATSRH.pdf. The age range complicates this number. For adolescents under the age of fifteen about 13% have had sex while about 70% of nineteen-year-olds have engaged in sexual intercourse.
problem through dissemination of information. Doing nothing, and ignoring the trends of STD infection rates, is not justifiable under the inculcation function of public schools because H.R. 189 does not undermine the social policies of the current sex education curricula. Further, H.R. 189 creates a more complete curriculum from which adolescents may make an informed decision.
STUDY NOTE
ADRENALINE JUNKIES: UTAH CHILDREN RISKING LIFE AND LIMB
AND THE PARENTS AND LAWMAKERS WHO LET THEM

Jacob L. Rice

INTRODUCTION

Utah’s unique and diverse landscapes are a dream come true for off-road enthusiasts. Riding motorcycles and all-terrain vehicles (“ATVs”)1 is a popular sport among riders of all ages and skill levels.2 For many Utahans, recreating with off-highway vehicles (“OHVs”)3 is a family affair. However, recent news of children dying in ATV and motorcycle accidents has divided public opinion regarding the extent to which children should be allowed to operate these machines and what restrictions should be in place. Between November 2008 and June 2009, at least three children under age nine died in Utah from ATV and motorcycle accidents.4 In fact, between 1984 and 2004, fifty-six children under the age of sixteen died in Utah from ATV accidents.5

In 1987, Utah legislators sought for the first time to combat the risks associated with OHVs by placing restrictions and requirements on a child’s ability to drive OHVs on public land. This Note considers why restrictions are needed, what the restrictions are in Utah and whether those restrictions are adequate. The

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1 As used in this note, ATV means “any motor vehicle 52 inches or less in width, having an unladen dry weight of 1,500 pounds or less, traveling on three or more low pressure tires, having a seat designed to be straddled by the operator, and designed for or capable of travel over unimproved terrain.” UTAH CODE ANN. § 41-22-2(2) (West 2009).
2 Recreating on Utah’s public land is so popular that federal and state agencies are encouraged by statute to open public land to responsible off-highway vehicle use. UTAH CODE ANN. § 41-22-12(1) (West 2009).
3 Utah law defines OHVs as “any snowmobile, all-terrain type I vehicle, all-terrain type II vehicle, or motorcycle.” UTAH CODE ANN. § 41-22-2(12) (West 2009). The statutes discussed in this Note apply equally to all OHVs. However, some statistical information and direct quotations pertain specifically to ATVs only. Thus, while this note speaks specifically about ATVs, the recommendations and conclusions contained herein may be applicable to all forms of OHVs.
Note then suggests amendments to remedy shortcomings in the current legislation, and concludes by emphasizing the importance of parental cooperation in following OHV rules.

I. “IMMINENTLY HAZARDOUS CONSUMER PRODUCTS”

There are two significant problems when children operate OHVs. First, OHVs are in and of themselves dangerous. Second, children are not physically and mentally prepared or developed to handle the complexities of operating complicated machinery while navigating unfamiliar terrain. The inherent dangers associated with OHVs combined with a child’s underdeveloped physiology and immature reasoning skills create accidents waiting to happen.

A. ATVs: The Dangers that Lurk Within

ATVs first began to sell in the United States during the 1970s, but it was during the 1980s when ATV use became increasingly popular. ATVs were marketed as “toys” suitable for use by the entire family. As ATV use increased, so did ATV related injuries and deaths. During the mid-1980s, the rise of ATV related injuries increased to such alarming rates that the Consumer Protection Safety Commission (“CPSC”) began to collect data on ATV-related injuries. After conducting studies regarding ATV safety, the CPSC and other public interest groups pursued civil actions seeking to have ATVs declared “imminently hazardous consumer product[s].” This resulted in a limited duration consent decree which “imposed voluntary standards on the [ATV] industry for marketing, safety training, warnings, and advertising.” The decree expired in 1998. Since the decree’s expiration ATV accidents have “skyrocketed,” most likely because manufacturers have greatly increased advertising campaigns and created more aggressive and powerful ATVs that appeal to younger riders.

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7 Id.


10 APPENDIX A, supra note 6, at 1.


12 Id.

13 Id.
ATVs have “fundamental design questions relating to the vehicle’s stability, handling, and control.”14 The horsepower, speed, and acceleration capabilities, along with a lightweight chassis, produce a high power-to-weight ratio.15 Many inexperienced riders find the power-to-weight ratio to be surprising.16

“[M]ost ATVs are dangerously unstable at any speed and on any terrain.”17 “The stability problem is compounded by the fact that the industry has built bigger, faster, more powerful ATVs since 1998 to attract thrill-seeking customers.”18 “Some of these machines provide no rider restraint or protection and can exceed 70 mph and accelerate to 45 mph in 6.5 seconds or less.”19

The dangers posed by ATVs are well known. In fact, “[l]osing control and flipping an ATV is a foreseeable and customary risk associated with the activity of driving or riding on an ATV.”20 The likelihood that these hazards may occur are so great that even OHV manufacturers warn consumers about the inherent dangers built into different types of OHVs.21

B. Child Riders: Under Developed, Overly Aggressive

In addition to the inherent dangers associated with an ATV’s design and performance capabilities, children also lack the physiological characteristics to safely operate and control OHVs. The American Academy of Pediatrics (“AAP”) recommends that children under the age of sixteen be prohibited from operating OHVs under all circumstances.22 Studies conducted by the AAP have concluded that immature judgment and risk-taking are significant factors contributing to children’s ATV injuries.23

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14 Id.
17 Setchell, supra note 11, at 38.
18 Id.
19 Id.
Whether children possess the necessary skills to safely operate OHVs is doubtful. Experts claim that children are “not at a stage cognitively where they’re capable of handling a machine with the sort of skill that’s required with regards to speed, depth perception, remembering rules, and operating the [OHV] at the same time . . . .” Furthermore, most OHVs have “too many factors and variables that . . . have to [be taken] into account” by young children “because they typically could only carry out one task at a time without becoming confused.” Children also fail to adequately scan their immediate environment; doing so is essential to safely operating OHVs.

Children are also at a higher risk than adults for traumatic brain injuries because a child’s brain is not fully developed. Similarly, OHV accidents pose a greater risk to children because any damage to growth plates, which is not a concern for older teens and adults, may have long-term negative consequences on a child’s growth and development. For example, “[b]one injuries that would result in sprains for adults could potentially be serious for children.”

The inherent risks associated with OHVs compounded with the increased risks faced by children did not go unnoticed in Utah. While the CPSC was busy lobbying Capitol Hill for protective legislation, Utah lawmakers were on the eve of creating the first protective OHV legislation designed to protect children.

II. “GIVE THESE KIDS A CHANCE”: THE DEVELOPMENT OF PROTECTIVE OHV LAWS IN UTAH

In the mid- to late-80s, Utah lawmakers became quite aware of the dangers associated with ATVs and other types of OHVs used by children. These lawmakers found that an “extremely alarming” number of young children had died

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25 Morales v. Am. Honda Motor Co., Inc., 151 F.3d 500, 508 (6th Cir. 1998) (testimony of expert witness psychologist during products liability action in which a nine-year-old child was injured while operating a motorcycle recommended by the manufacturer for ages seven and older).

26 Id.

27 Id.


29 Id.

30 Id.

in OHV accidents in 1985 and 1986. In 1987, while U.S. lawmakers were busy on Capitol Hill preparing legislation that ultimately banned the use of three-wheeled ATVs, Utah lawmakers were also debating protective OHV legislation that would become the first of its kind in the state.

A. The First Legislation: No Control—No Constraints

In 1987, faced with “a near-crisis problem” in the state, Utah lawmakers debated the first OHV legislation designed to protect children. Up to this point, Utah had “no control—no constraints” over OHV use. Exasperating the problem was fact that Utah ranked fifth or sixth in nation for OHV use. To alleviate growing concerns OHVs presented to children, Utah lawmakers were asked to pass Senate Bill 39 (“SB 39”). This bill, titled “Off-Highway Vehicle Operator Training and Funding,” was “designed to instill knowledge, attitudes, and skills necessary for the safe operation” of OHVs. By passing SB 39, Utah legislators adopted two new statutes aimed at curbing the dangers faced by children who operate OHVs.

First, SB 39 created Utah Code Ann. § 41-22-29—Operation by persons under eight years of age prohibited. As the title indicates, § 41-22-29 prohibited children under eight years of age from operating an OHV on any public land, and likewise prohibited OHV owners from giving permission to children under eight years of age permission to operate OHVs on public land. Setting a minimum age limit on OHV operators was certainly a step in the right direction in the quest to protecting children from the imminently hazardous products.

Next, and equally important, SB 39 created Utah Code Ann. § 41-22-30—Operation by persons eight years of age or older but under 16 years of age – Possess safety certificate – Penalty. This statute required children between the ages of eight and sixteen who operate OHVs on public lands to have in their possession a safety certificate issued by the Utah Division of Parks and Recreation. Requiring children to undergo a safety training course in order to operate OHVs on public land is in harmony with CPSC recommendations.
Passing SB 39 took some persuasion. Educating children about proper OHV use would now be required, an unpopular requirement with many Utah lawmakers. However, one Utah Representative who supported the SB 39 pleaded with other members of the House, saying “we’ve got to teach these kids—we’ve got to give them an edge on [these OHVs] so that they can stay alive.” Those who opposed SB 39’s training requirements said it’s the job of a parent to teach children how to ride OHVs. However, the supporters of SB 39 countered by asking how many parents are actually qualified to teach their children proper OHV use, and what happens when a child who was properly trained is run over and killed by another child whose parents did not properly train their child. The training requirement of SB 39 was designed to tilt the odds of OHV dangers in the favor of young children, even if it was “just a little bit.”

SB 39 created a balance between public safety concerns and the desires of families wanting to engage in OHV activities. Public safety advocates claimed SB 39 fell far short of adequately protecting the public. If these advocates had their way, children under the age of twelve would have been completely restricted from operating OHVs. On the other hand, supporters of SB 39 claimed the training provisions and age limitations would adequately address the concerns of Utah OHV accidents. Regardless, the bill passed and became law; unfortunately, the balance created by the bill would dangerously shift eleven years later.

B. The Amendment: Boys and Girls, START YOUR ENGINES!

In 1999, Utah Code Ann. §41-22-29 was amended by House Bill 140 (“HB 140”). The amendment changed the statute in such a way that even the bill sponsor, Representative Brent H. Goodfellow, informed his fellow lawmakers that the proposed amendments “may seem somewhat questioning.” HB 140 was

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43 Audio CD 1987, supra note 31.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id. The balance ultimately fell in favor of OHV users. This is probably because Utah lawmakers considered the fact that OHV users “have created the problem, but they have a solution,” and wanted to give them the opportunity to fix the problem with as little government-imposed restrictions as possible. Id.
intended to “open th[e] window just a little bit to allow someone under the age of eight to ride [OHVs] . . . under certain conditions . . . .”

The window was opened more than just a little bit. The amendment removed any age restrictions whatsoever for children wanting to practice and race in sanctioned events. This result is contrary to the original legislative intent in passing § 41-22-29. It is also contrary to the recommendations of the CPSC and the AAP.

The reasoning used by Representative Goodfellow during floor debates places business and economics over child safety. For example, in attempting to collect votes to pass HB 140, Representative Goodfellow noted that other surrounding states allow children to race in sanctioned events and twice mentioned the “good amount” of money parents spend on racing. He distinguished the occasional OHV rider from the “fanatics”—or those who race competitively. Not only does such a distinction fail to consider the vulnerable state of a young child’s physical and mental abilities, but it also overlooks the increased dangers posed by racing and the great lengths ‘fanatics’ will go to win.

For example, a father of a seven-year-old boy, who is now allowed to race under the 1999 amendment, “loosened” the boy’s motorcycle brakes so “he [wouldn’t] use them as much.” HB 140 has also made it possible for very young children to race OHVs. It is not uncommon for Utah children to begin racing motorcycles and ATVs as young as three years old.

SB 39 took a step in the right direction, even if only a small one. The evidence was undeniable; Utah children were being injured and killed in OHV accidents, and SB 39 attempted to provide protections for these young people. HB 140, on the other hand, replaced sound reasoning with dollars and cents. Because OHV accidents have been increasing since 1998, laws designed to protect children should not have been altered to “open the window” to increased child endangerment.

54 Id.
55 While the amendment removed the eight-year age requirement for practicing and racing in sanctioned events, it did require that (1) the child be under immediate supervision of an adult, (2) advanced life-support personnel be on the premises, and (3) ambulance service be on the premises. Id.
56 All-Terrain Vehicle Injury Prevention, supra note 22, at 1352.
57 Audio CD 1999, supra note 53. Representative Goodfellow also considered many non-economic reasons for allowing children younger than age eight to race OHVs in sanctioned events, such as channeling children into productive activities to avoid gang involvement and promoting family activities. Id. However, even the non-economic justifications do not outweigh the dangers posed to young children who ride OHVs.
58 Id.
60 Id. at 1.
III. If a Man Brandishing a Stick of Dynamite Has Something to Say, It’s a Good Idea to Listen: Comprehensive OHV Laws We Can All Live With

OHVs can be “unpredictable,” and the dangers associated with these vehicles may “strike suddenly and violently.” The OHV industry acknowledges these dangers and has attempted to improve rider safety through legislation and various rider education programs. If only parents and lawmakers would listen.

A. Attention: Calling All Legislators

The OHV industry has recommended standards designed to reduce the chance of serious injury or death. In fact, the industry has “made unprecedented and unified efforts to promote the safe and responsible use” of OHVs for over twenty-five years. These efforts have included training programs and public awareness campaigns to promote safe and responsible OHV use. Perhaps most significant is the industry’s recommended model legislation, which includes the following primary safety provisions:

1. Requires protective gear: All ATV riders are required to wear eye protection and an approved safety helmet.
2. Prohibits passengers: The carrying of passengers is not allowed in any circumstance.
3. Codifies operator age restrictions: No one under age sixteen may operate an adult-sized ATV (engine capacity greater than 90 cc) on public land. Youth-size ATVs (engine capacity 70 cc up to and including 90 cc) may be operated on public land only by those aged twelve and older.
4. Requires adult supervision: Persons under age sixteen must be under continuous adult supervision while operating an ATV on public land.
5. Promotes education: States must implement a comprehensive ATV safety education and training program, which provides for the hands-on training of ATV operators.
6. Establishes safety certification: All persons operating an ATV on public land must have a safety certificate.
7. Prohibits ATV operation on public roads.

Utah legislators have failed to adopt one of the most important provisions of the industry’s model legislation: operator age restrictions. Most children who die

61 U.S. Consumer Prod. Safety Comm’n, supra note 16.
62 Setchell, supra note 11, at 38.
65 SPECIALTY VEHICLE INST. OF AM., supra note 63, at 3.
or become injured in ATV accidents drive or ride on adult-sized ATVs.\textsuperscript{67} In fact, “[c]hildren younger than 16 are twice as likely to be injured on adult ATVs as compared to those riding youth ATVs.”\textsuperscript{68}

Similarly, Utah legislators should also increase the minimum age allowed to operate OHVs on public land from age eight to age twelve. The balance, strength, agility, and other cognitive factors needed to control ATVs are significantly more developed in twelve-year-olds than in eight-year-olds.\textsuperscript{69} Also, older children are able to appreciate the risks of their actions more, even if they still engage in risk-taking behaviors.\textsuperscript{70}

Finally, Utah legislators should also prohibit OHV riders from carrying passengers on vehicles designed for single person use. Most ATVs are designed to carry only one person.\textsuperscript{71} Moreover, “ATVs are designed for interactive riding — drivers must be able to shift their weight freely in all directions, depending on the situation and terrain.”\textsuperscript{72} Carrying passengers on ATVs designed for a single rider makes it difficult for drivers to control the vehicle.\textsuperscript{73}

Adopting all of the industry’s model legislation provisions would significantly increase child safety. For example, when New Jersey prohibited children younger than sixteen years old from operating ATVs over 90cc on public lands, fatalities involving riders under sixteen decreased from 29% of total ATV fatalities to 0%.\textsuperscript{74} Likewise, when Kentucky adopted a similar law, the percentage of total ATV fatalities involving riders under sixteen decreased from 55% to 22%.\textsuperscript{75}

Critics of the model legislation may claim that it is a parent’s responsibility to determine what size of ATV is appropriate for their child. Likewise, because children possess varying degrees of skill needed to ride and control OHVs, parents should determine at what age their child may ride OHVs. Additionally, because OHV recreation is a family-oriented activity, critics may also claim that prohibiting passengers on OHVs is overly restrictive on an individual’s right to choose how she raises her family. To answer the critics, the original intent of Utah lawmakers when they created the first protective OHV legislation of its kind should be revisited. In passing SB 39, Utah lawmakers doubted a parent’s ability to

\begin{footnotes}
\item[66] Current Utah laws in harmony with industry standards include: OHV riders under the age of eighteen and riding on public land must have completed a safety course, \textsc{Utah Code Ann.} § 41-22-30 (West 2009); riders younger than eighteen must wear safety helmets, \textsc{Utah Code Ann.} § 41-22-10.8 (West 2009); ATVs that are limited to on-highway use, \textsc{Utah Code Ann.} § 41-22-10.3 (West 2009); and, adult supervision required for children younger than eighteen, \textsc{Utah Code Ann.} § 41-22-30 (West 2009).
\item[67] \textsc{ATV Safety, supra} note 42.
\item[68] \textit{Id.}
\item[69] \textsc{Ingle, supra} note 24, at 101.
\item[70] \textit{Id.}
\item[71] \textsc{ATV Safety, supra} note 42.
\item[72] \textit{Id.}
\item[73] \textit{Id.}
\item[74] \textsc{Specialty Vehicle Inst. of Am., supra} note 63.
\item[75] \textit{Id.}
\end{footnotes}
properly teach and educate children on ATV safety.\textsuperscript{76} And, just because one parent is qualified to instruct and properly monitor the safety of their child does not mean parents of other OHV users are likewise qualified. By passing SB 39, Utah lawmakers sought to give children a better chance of staying alive—to place the odds “just a little bit in their favor.”\textsuperscript{77} Adopting all provisions of the industry’s model legislation would help to increase these odds.

\textbf{B. Attention: Calling all Parents}

Adopting all provisions of the industry’s recommended standards would not be a fix-all solution. These laws and recommendations only apply to riding OHVs on public land. This means parents and guardians of young children must be well-informed about proper OHV use and safety standards, and more importantly, parents must be willing to enforce the same standards that apply to public land in private settings. Any doubt regarding the need of parental cooperation in ensuring OHV safety is overshadowed by the fact that two of the last three OHV-related child deaths in Utah occurred on private property,\textsuperscript{78} and, also resulted from violations of Utah law or the industry’s recommendations.\textsuperscript{79} Research suggests that more than 92\% of all ATV crashes involve one or more user behaviors that are strongly and visibly “warned against” by the OHV industry.\textsuperscript{80}

Many parents who allow their children to ride ATVs and motorcycles claim that it is a family affair that strengthens family bonds.\textsuperscript{81} As the modified adage goes, “the family that rides together stays together.”\textsuperscript{82} No doubt parents enjoy well-established “constitutional rights to manage the ‘care, custody, and control of their children.’”\textsuperscript{83} Parents enjoy these rights, however, based on the presumption that they act in the best interest of their child.\textsuperscript{84} Parental discretion is supposed to protect children because of a child’s under-developed “maturity, experience, and capacity for judgment required for making life’s difficult decisions.”\textsuperscript{85}

\textsuperscript{76} Audio CD 1987, supra note 31.
\textsuperscript{77} Id.
\textsuperscript{78} See Boy, 8, Dies in Dirt Bike Accident, supra note 4; 4-Wheeler Accident Kills a Southern Utah Boy, supra note 4.
\textsuperscript{79} For example, in one incident, a six-year-old boy who was riding as a passenger was killed when the ATV, driven by a ten-year-old child, flipped over. Neither child was wearing a helmet. 4-Wheeler Accident Kills a Southern Utah Boy, supra note 4. In another incident, a seven-year-old boy was killed after his ATV collided with a dump truck on a dirt road. Draper Boy Killed in ATV Crash with Dump Truck, supra note 4.
\textsuperscript{80} SPECIALTY VEHICLE INST. OF AM., supra note 63.
\textsuperscript{81} Renzhofer & Turner, supra note 28 (“The [motocross] racing community brings families together. It brings a lot of people together.”).
\textsuperscript{82} See, e.g., Abbott, supra note 59, at 1 (“a family that races together stays together”).
\textsuperscript{83} In re Estate of S.T.T., 2006 UT 46, ¶ 13, 144 P.3d 1083, 1087 (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)).
\textsuperscript{84} Troxel v. Granville, 530 U.S. 57, 68 (2000).
\textsuperscript{85} Id. (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).
“The line between letting boys be boys and reckless parenting is elusive.”86 Utah’s largely conservative population is “supportive of parents running their own children and the right to choose . . . .”87 After all, even crossing the street is dangerous. In fact, Utah lawmakers felt justified in passing HB 140 because “we allow children to participate in little league football, and soccer, and baseball, and basketball, and all of these sports have some risk.”88 While there are certain risks involved in any activities children engage in, child health experts have a hard time believing children are safe while driving OHVs.89

Parents must take responsibility and become educated about OHV safety and enforce the same laws and recommendations that apply on public land even if their child is operating an OHV on private property. Of the three most recent OHV-related child deaths, one child died doing what he “loved doing the most.”90 Another child “loved to jump and go fast” and “ride with the older boys.”91 Despite a particular child’s passion or favorite activity, parents must heed the “tobacco-like warnings” found in owner’s manuals and labeled on newer OHV vehicles.92 Because parental discretion is supposed to protect children, all of the laws and OHV industry recommendations suggested in this Note must also be enforced by parents in private settings.

CONCLUSION

The OHV industry’s recommended model state legislation should be adopted in Utah in its entirety. OHVs have inherent design and operational features that can be overwhelming and dangerous to riders of all ages. However, OHVs pose a heightened risk to children who have immature cognitive skills and an underdeveloped physiology.

Utah lawmakers were aware of the heightened risks OHVs posed to children back in 1987 when SB 39 was passed. The Bill effectively increased the welfare and safety of children who ride OHV’s. Recently, however, Utah lawmakers seem to have placed economics over the welfare and safety of young children, yet OHVs continue to pose dangers to children and others on both public and private land. Because the OHV industry has acknowledged and attempted to remedy these dangers, it is suggested that both Utah lawmakers and parents alike take action to implement the industry’s recommendations as doing so would greatly decrease the instances of child fatalities caused by OHVs.

87 Id.
88 Audio CD 1999, supra note 53.
89 Renzhofer & Turner, supra note 28.
90 Draper Boy Killed in ATV Crash with Dump Truck, supra note 4.
91 Boy, 8, Dies in Dirt Bike Accident, supra note 4.
92 Setchell, supra note 11, at 36.
STATUTE NOTE
THE FLAWED LOGIC OF CONGRESS IN THE ECONOMIC STIMULUS
ACT OF 2008

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I. INTRODUCTION

On February 13, 2008, President Bush signed into law the Economic Stimulus Act of 2008. The bill was highly publicized, and sped through the legislative process in a mere seventeen days. This quick enactment was accomplished through tremendous bipartisan efforts and extensive cooperation between the legislative branch and the executive branch. While nearly every politician approved the bill, and lauded the great effect it would have on families and the economy, in reality it did little but cost the government (and taxpaying citizens) $152 billion.

The passage of this bill came in the midst of a struggling economy, and Congress intended it to stimulate the economy and avoid or mitigate a recession. As can be seen from the events that have occurred since the bill was signed into law, it has failed. This Note makes a painfully obvious observation that the bill never had a fighting chance to accomplish its desired objectives because of the flawed logic of Congress. This will be readily apparent by first looking at what the bill provided; second, looking at the purposes behind the provisions; and third, by pointing out the disconnect between the means Congress used and the desired ends. This Note concludes by suggesting that the best action for Congress in times of economic trouble is to do nothing.


II. SUMMARY OF HR 5140, ECONOMIC STIMULUS ACT OF 2008

Amidst nine pages of legal and statutory jargon, the Economic Stimulus Act of 2008 (hereinafter the “Act”) did three main things: (1) provide rebate checks to American families; 7 (2) provide incentives for businesses to invest in qualifying property; 8 and (3) increase the loan limits for Fannie Mae, Freddie Mac and the Federal Housing Administration (FHA). 9 Each of these will be discussed in greater detail below.

A. Rebate Checks

The rebate checks have been the most publicized aspect of the stimulus package. 10 The package provided most American families with a check from the federal government for an amount that varied depending on the taxpayer’s income and tax liability for 2007. 11 In general, low- and middle-income families received a refund in the greater amount of (1) their net income tax liability, not to exceed $600 ($1,200 for joint filers), or (2) $300 ($600 for joint filers) if they received earned income of at least $3,000, or if they did not have earned income of $3,000 but had net income tax liability of $1 and their gross income was greater than the sum of the basic standard deduction, plus exemptions ($8,950 for singles, $17,900 for joint filers). 12 In other words, if you paid tax in 2007, you received a refund up to $600 ($1,200 for joint filers), and if you did not pay tax but earned $3,000, then you received a refund of $300 ($600 for joint filers). In addition, families received $300 for each qualifying child. 13

There was a phase out clause included that denied the rebate checks to high income earning American individuals and families. 14 The phase out began at the

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8 See Economic Stimulus Act § 102-03; see also CCH TAX BRIEFING, supra note 4, at 5–6; JOIN COMMITTEE ON TAXATION, supra note 7, at 7–12.

9 See Economic Stimulus Act § 201-02; see also CCH TAX BRIEFING, supra note 4, at 7.

10 See Brinker, supra note 4, at 51.

11 See Economic Stimulus Act § 101; see also CCH TAX BRIEFING, supra note 4, at 1–4; JOIN COMMITTEE ON TAXATION, supra note 7, at 2–6.

12 See Economic Stimulus Act § 101(a); see also CCH TAX BRIEFING, supra note 4, at 1; JOIN COMMITTEE ON TAXATION, supra note 7, at 2–3.

13 See Economic Stimulus Act § 101(b)(1)(B); see also CCH TAX BRIEFING, supra note 4, at 3–4; JOIN COMMITTEE ON TAXATION, supra note 7, at 3.

14 See Economic Stimulus Act § 101(d); see also CCH TAX BRIEFING, supra note 4, at 3; JOIN COMMITTEE ON TAXATION, supra note 7, at 3.
$75,000 income range for individuals and $150,000 for joint filers.\textsuperscript{15} Once an individual reached this income limit, their rebate was reduced by 5% of the amount their income exceeded the income limit.\textsuperscript{16} For example, if an individual made $80,000, which equates to $5,000 above the $75,000 limit, then their refund was reduced by 5% of the $5,000, or $250. The refund completely phases out for individuals if their income is $87,000 and $174,000 for joint filers.

In summary, most low- and middle-income individuals and families received a rebate check, as long as they earned $3,000 of income. At the same time, the so-called rich, or high income individuals and families, did not receive a rebate. The law classified rich or high income individuals as individuals making $87,000 or greater, and joint filers making $174,000 or greater.\textsuperscript{17} This meant that some Americans who did not pay any tax in 2007 received a rebate of at least $300 and those who paid the most in taxes did not receive any rebate.

\section*{B. Business Incentives}

While receiving less publicity, business incentives are a substantial part of the Act.\textsuperscript{18} The act allowed for enhanced expensing as well as bonus depreciation.\textsuperscript{19} Typically, a business is able to write off up to $128,000 as a one-time expense deduction rather than taking the prescribed depreciation for qualifying depreciable property throughout the life of the asset.\textsuperscript{20} “[Q]ualifying property is defined as depreciable tangible personal property that is purchased for use in the active conduct of a trade or business.”\textsuperscript{21} This typically includes “[a]ll property, other than buildings and structural components,”\textsuperscript{22} up to $510,000 worth of qualified property, which is placed into service. Any amount above that ceiling is reduced by the amount over the limit, dollar for dollar.\textsuperscript{23} The Act increased the amount a business can expense as a deduction for qualifying property, almost twofold, to

\begin{itemize}
\item \textsuperscript{15} See Economic Stimulus Act § 101(d); see also CCH Tax Briefing, supra note 4, at 3; Joint Committee on Taxation, supra note 7, at 3.
\item \textsuperscript{16} See Economic Stimulus Act at § 101(d); see also CCH Tax Briefing, supra note 4, at 3; Joint Committee on Taxation, supra note 7, at 3.
\item \textsuperscript{17} See Economic Stimulus Act § 101(d); see also CCH Tax Briefing, supra note 4, at 3; Joint Committee on Taxation, supra note 7, at 3.
\item \textsuperscript{18} See Brinker, supra note 4, at 51 (explaining of the $152 billion, the business incentives and foreclosure assistance amount to over $45 billion).
\item \textsuperscript{19} See CCH Tax Briefing, supra note 4, at 5.
\item \textsuperscript{20} See CCH Tax Briefing, supra note 4, at 5.
\item \textsuperscript{21} Joint Committee on Taxation, supra note 7, at 7.
\item \textsuperscript{22} Brinker, supra note 4, at 52.
\item \textsuperscript{23} See Economic Stimulus Act of 2008, Pub. L. No. 110-185 § 102-03, 122 Stat. 613 (2008); see also CCH Tax Briefing, supra note 4, at 5; Joint Committee on Taxation, supra note 7, at 7–8.
\end{itemize}
$250,000, while at the same time raising the maximum placed in service amount from $510,000 up to $800,000.24

The sum of the business incentives and foreclosure assistance is around $45 billion.25 There are certain specifics, however, that a business owner(s) must have followed in order to take advantage of the incentives. The owner(s) must have made sure the property was qualified property, and they must have been sure the property was put into use in 2008.26 Thus, if a business owner(s) was organized and could act swiftly, they were able to capitalize on a substantial tax break offered by the new law.

C. Foreclosure Help

The third provision of the law helped to alleviate the mortgage crisis by increasing the maximum amount of principal for mortgages issued by Fannie Mae and Freddie Mac to 175% of their pre-legislation limits.27 It also increased the maximum principal mortgage amounts issued by the FHA to 175% of their pre-legislation limits.28 This meant that Fannie Mae, Freddie Mac, and the FHA could assume larger loans.

III. Desired Objectives

The main purpose of the law was to stimulate the economy.29 It obviously attempted to do this through the three ways discussed above, but looking at the legislative history of the Act brings greater insight into the objectives sought to be achieved by this law. Much of the legislative history focuses on these objectives. In fact, one telling document gives a glimpse of the purpose and desire of the legislation, and is found in the Statement of Administration Policy that the Office of the President sent to the Senate after the House had passed the bill. It states: “This legislation meets the criteria set out by the Administration that an economic growth package be large enough to make a difference, immediate in its impact, broad-based, temporary, and based on tax relief rather than government spending programs.”30 From this and the legislative history, four objectives seem to have

24 See Economic Stimulus Act § 102-03; see also CCH TAX BRIEFING, supra note 4, at 5; JOINT COMMITTEE ON TAXATION, supra note 7, at 7–8.
25 See Brinker, supra note 4, at 51.
26 See CCH TAX BRIEFING, supra note 4, at 5–6.
27 See Economic Stimulus Act § 201-02; see also CCH TAX BRIEFING, supra note 4, at 7.
28 See Economic Stimulus Act § 201-02; see also CCH TAX BRIEFING, supra note 4, at 7.
29 See Jones, supra note 5, at 447; see also CCH TAX BRIEFING, supra note 4, at 1; see generally 154 CONG. REC. H14,485–509 (daily ed. Jan. 29, 2008).
been advanced. They include (1) getting money into the hands of those who will spend it, (2) alleviating the financial burdens facing Americans, (3) fixing the struggling economy, and (4) solving the mortgage crisis. Below are excerpts from the legislative history emphasizing these four objectives.

A. Get Money into the Hands of Those Who Will Spend It

“Leaders from the business community, economists, leaders of industry, of labor, the academic community, [and] people representing workers in the diversity of our country” met in a bipartisan meeting held on December 7, 2007. During a debate of the bill that following this bipartisan meeting, the Speaker of the House of Representatives, Nancy Pelosi, explained that the action of the government would have to be timely. 31 It would have to put money into the pockets of the Americans who would immediately spend that money to meet their needs, and that it would need to inject demand into the economy to help create jobs. 32 Then, during a debate on the Senate floor about the economic stimulus package, the Majority Leader of the Senate, Harry Reid, said:

Americans will use [this] money to pay their bills, to buy books and clothing for their children, or perhaps to make a long overdue repair of homes or cars or pay a doctor bill. Democrats, Republicans, we all agree, if we give the American people the money, they will spend it. 33

Representative Rangel added they were targeting those who are struggling economically because “economists, conservative or liberal, agree that the assistance that we are giving has to be timely, fast. It has to be targeted to people that are going to have to spend the money.” 34 Thus, it is evident from the record that a major objective of the bill was to put money into the hands of those who would spend it.

B. Alleviate the Financial Burdens Facing Americans

The Congressional Record is peppered with Representatives and Senators discussing how this bill would provide needed help to the American people and their families. Representative James Clyburn said: “it will go a long way towards stimulating our economy while helping many Americans struggling to make ends meet.” 35 Representative Maxine Water said: “Individuals can look forward to up to $600 in tax relief, while married couples may get as much as $1,200 to meet their expenses, including skyrocketing costs of fueling their cars and heating their

32 Id.
homes." Representative Phillip English said: “working Americans will have access to extra cash to cushion increased costs in food and energy; families, in fear of losing their homes, will have new opportunity to refinance their mortgages and retain homeownership.” Senator Ted Kennedy said: “Our actions today are vital for the entire economy, but they are most critical for these struggling families. Our decisions will help determine whether they keep their homes, whether their teenagers stay in college, and whether their children go to bed hungry.” There is a clear intention that this piece of legislation would provide financial assistance to American families.

C. Fix the Struggling Economy

The main overarching objective of the bill clearly was to revive the economy. Representative McCrery stated during debate that this bill “[w]as extremely important for the economic health of the country.” He also said, “we hope that this will have the intended effect, which is to avert a recession, and to reduce the downturn that everybody agrees is underway right now.” Senator Sherwood Brown said: “We have an opportunity to both jump-start our economy and solve the problems staring us right in the face.”

D. Solve the Mortgage Crisis

As discussed above, there is a provision in the bill that increased the loan limits of Fannie Mae, Freddie Mac and the FHA. Many Senators and Representatives recognized that much of the economic downturn was caused by the subprime mortgage meltdown. Representative Bachus summarized the purpose of increasing the loan limits well by saying:

Greater availability of higher-cost mortgages and FHA-insured loans will help get prospective homebuyers off the sidelines and into the housing market . . . . This legislation will assist existing homeowners to refinance loans that they're struggling with. It will also allow those who want to buy and are on the sidelines now to begin making offers and to restore our housing market.

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39 See Jones, supra note 5, at 443 (“[t]he act is intended to help mitigate or forestall the recession); see also CCH Tax Briefing, supra note 4, at 1 (“[t]he Economic Stimulus Act of 2008 [is] designed to jumpstart the U.S. economy”); see generally 154 Cong. Rec. H14,485–509 (daily ed. Jan. 29, 2008).
Representative Kanjorski said, “this reform will temporarily increase the conforming loan limits of Fannie Mae and Freddie Mac to enhance the liquidity of several local mortgage markets.” Representative Frank explained how people would not invest in buying loans above the Fannie Mae, Freddie Mac and FHA limits if they were not provided with assurance from those entities, and that this was “a very important piece in trying to unlock the mortgage market and getting money flowing again.” Senator Kerry also stated this objective succinctly, “A strong economic stimulus package needs to address the root of the problem—the housing crisis.” The housing market is a major piece of the American economy; and so, Congress wanted to solve the mortgage crisis in an attempt to stimulate economy. The motives and desires expressed by Congress are noble. But, did the provided provisions equate to the accomplishment of these goals and desires?

IV. EXPOSING THE FLAWED LOGIC OF CONGRESS

In summary, Congress provided rebate checks to American families, provided expense deductions for businesses to invest in new equipment, and increased the maximum amount of principal for mortgages issued by Fannie Mae, Freddie Mac, and the FHA. It did this in hopes to put money into the hands of those who would spend it, alleviate the financial burdens facing American families, fix the struggling economy, and solve the mortgage crisis. Clearly, looking in hindsight with 20/20 vision, the desired objectives were not achieved. This section explores the flawed logic of Congress by looking at each of the objectives and spotlighting the disconnect between the means proscribed and its desired ends.

A. Would Recipients of the Rebate Spend the Money?

Of all the means and objectives discussed, there was certainly no disconnect between giving people money and hoping they would spend it. The intent was for the money to be put back into the economy immediately. Because of this, Congress approved rebate checks to low- and middle-income families. Legislators thought that many people would have to use this money to pay for everyday living expenses; and therefore, it would be spent quickly. According to a report by the

46 Id.
48 See 154 CONG. REC. S19,717 (daily ed. Feb. 6, 2008) (statement of Sen. Domenici) (explaining that it used to be common knowledge that you could not have a strong economy without a strong housing market).
49 By disconnect, I mean that there was no reasonable cause and effect relationship between the means and the ends.
by the Bureau of Economic Analysis, it seems that the rebates were put back into the economy. The report showed an increase in the gross domestic product (GDP) from the first quarter to the second quarter of 2008 by 2.8 percent. \(^51\) Mark Zandi, chief economist and co-founder of Moody’s Economy.com, said the rebates were “targeted to the right people, who [we]re more likely to spend them quickly.” Because most people who got checks were likely “to spend it on groceries, daily living expenses, [and] electric bills.” \(^52\) Although some congressmen did not agree with giving rebates to people who paid no taxes while not giving it to others who did as a form of wealth distribution, \(^53\) it did seem to accomplish the goal of putting the money into the hands of people who would pump it back into the economy. In that regard, the means of giving the money to those who needed it to pay everyday living expenses seemed to accomplish Congress’s desired end.

**B. Would the Financial Burdens Facing Americans be Relieved?**

Any time an individual (or family) receives more money, his assets, and thereby his net worth, is increased. While an increase in money and net worth is a good thing, it might also send the wrong message and create a moral hazard. \(^54\) It might cause people facing financial difficulty to look to the government to solve their problems as opposed to causing families to prepare for hard times so they could stay afloat, weather the storm, and pull themselves out of their difficulties.

The rebates were targeted to many who could not pay their bills, and would use their rebates to do so. \(^55\) This evidenced both the financial difficulties facing American families, and that a rebate check would not solve their financial problems. While the rebate did provide struggling families with money, it was a one-time issuance. If a family’s bills consistently amount to more than they earn, a one-time injection of money would not solve their problems. Representative Jeb Hensarling said:

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\(^54\) By moral hazard I mean the idea that an entity which is insulated from risk will behave differently than if it was fully exposed to risk.

This package, I fear, is more akin to helping [families] pay one month's worth of credit card bills . . . instead, what they really need to know is that their paycheck is preserved and that they have opportunities to even grow that paycheck . . . . Unfortunately those components are sadly lacking.56

Even the most self-reliant person will not say no to free money,57 but just giving people money does not solve the problems facing families that cannot make ends meet.

Economic downturns are not new—neither are government stimulus packages. The most recent downturn and stimulus legislation was in 2001, the Economic Growth & Tax Relief Reconciliation Act of 200158 (2001 Stimulus Act). Some say that this legislation did in fact help the economy recover; specifically, “Nicholas S. Souleles, finance professor at Wharton . . . conducted a study titled, Household Expenditure and the Income Tax Rebates of 2001 . . . [and concluded that the] 2001 stimulus package did indeed help the economy recover from recession.”59 However, there were differences in the 2001 Stimulus Act and the Economic Stimulus Act of 2008. One in particular was that the 2001 act provided a permanent tax cut, as opposed to a one-time tax rebate.60 Wharton finance professor Richard Marston expressed that the 2008 tax rebate would be less effective than the 2001 rebate because it lacks the permanent tax cut.61 A report by The Urban Institute, The Brookings Institution, and the Tax Policy Center, said: “The ability of individuals and societies to maintain or improve their living standards over time depends on their willingness to save.”62 In order to save, families must make more money than they expend. A one-time infusion of cash does not enable this, whereas actions that allow families to take home more of their earned money, such as a permanent tax cut, might.

In the 2008 Act, the means Congress pursued to achieve its objective of alleviating the financial burdens on Americans was to give them a one-time tax rebate. There is a disconnect in this logic. A one-time infusion of cash is a momentary short-term help, not a long-term solution to financial burdens. A permanent tax cut increases a family’s net income and enables continued savings, whereas a one-time tax rebate does not.

60 See id.
61 See id.
C. Would Troubled Economy and the Housing Crisis be Resolved?

The issues of the economy and housing crisis cannot be separated; you cannot talk about one without talking about the other. The downturn in the economy is in large part due to the subprime mortgage meltdown. Senator Kerry stated that the root of the economic downturn was the housing crisis, and Senator Baucus said: “[W]e are facing a time of slow growth, primarily due to the problems in the housing markets, the subprime problems.” In order to fix the economy, the housing crisis needs to be fixed, and the housing crisis was caused by the subprime mortgage meltdown.

Subprime mortgage loans are “loans with higher interest rates and fees that are made to borrowers with impaired or limited credit histories.” Over the past few years, lenders have loosened their lending standards. This relaxation got to the point where lenders were making stated-income loans, loans that required little documentation, and no down payments. Lenders were using a variety of loan products such as 2/28 ARM’s, 80/20 splits, and interest only loans as opposed to the traditional 30 year mortgage. Not only were the standards being loosened with regards to whom lenders would lend, but the relationship between the borrower and lender also was being weakened. The lender was no longer responsible for making sure that the borrower paid back the debt. Instead, after the lender made the loan, they sold it on the secondary market—many to Freddie Mac and Fannie Mae, which were backed by the United States Government. These mortgage backed securities were in high demand because of their perceived safety, and their good returns. This led to increasingly more relaxed lending, which prompted a significant rise in early payment defaults in the final quarter of 2006 and first quarter of 2007. In sum, lenders lent money to people who were not

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63 Paulo Guimaraes, Quarterly Outlook, BUS. & ECON. REV., July–Sep. 2008, at 25, 25 (“[t]he weak performance of the U.S. economy can mostly be blamed on the fallout from the ongoing crisis in the housing and credit markets.”); see also Thomas Zimmerman, The Great Subprime Meltdown of 2007, 13 J. STRUCTURED FIN., 7, 7 (2007) (discussing how the mortgage market can “shake the very foundations of the U.S. financial system”).


67 See Zimmerman, supra note 67, at 12.

68 See Krinsman, supra note 70, at 14–15.

69 See id.

70 See id. at 14.

71 See id.; see also Zimmerman, supra note 67, at 18.

72 See Krinsman, supra note 70, at 14.

73 See Zimmerman, supra note 67, at 12–14.

74 See Krinsman, supra note 70, at 16. An early payment default is one that is in default within the first three to four months after origination. See id.
credit-worthy or could not afford the amounts for which they were approved. Because of this, defaults on mortgages rose, and the meltdown ensued.

In order for the Economic Stimulus Act to save the economy, it had to provide a remedy to the cause of the problem. Representative John Campbell, in advancing this line-of-reasoning said:

First of all, [the Economic Stimulus Package] is not really going to be stimulative . . . . This is a credit problem and a capital problem. We got into this arguably because people borrowed and spent too much money. So what are we going to do? We are going to send people a check and say, spend it. Go buy a flat screen TV and save America. I just don't think that is the proper stimulus or the right way to go about this.75

In order to fix the economy and the mortgage crises, lenders need to go back to traditional lending, and only give mortgages to those who are credit-worthy and can afford them. If people cannot afford their homes, they should sell them. Just giving them a rebate check and allowing them to obtain larger loans is not going to fix the problem.

The means Congress pursued to accomplish its desired end of fixing the mortgage crisis was allowing Fannie Mae, Freddie Mac, and the FHA to assume larger loans.76 This enabled people to borrow more money, which is not what we needed to fix the problem. Instead, we need people not to borrow more than they can afford. The logic was flawed from inception, and looking at what has happened since the passage of the bill only supports the point that the Economic Stimulus Act did not fix the housing crisis or the economy. The government had to take over Fannie Mae and Freddie Mac,77 multiple banks have collapsed,78 and the market dropped 40% from where it was the previous year.79 Clearly, the Economic Stimulus Act did not alleviate the mortgage crisis or the stabilize the struggling economy.

V. A SUGGESTION FOR FUTURE GOVERNMENT ACTION—INACTION

This is not the first economic stimulus package pursued by the government, nor will it be the last. When considering such governmental actions, Congress needs to act logically and ensure that there is a causal relationship between the means it proscribes and its desired ends. In analyzing what actions to take, inaction is possibly the best recourse for Congress, and if any action is taken, it should be to limit government.

The New Deal under Franklin D. Roosevelt in the wake of the Great Depression “launched the most dramatic peacetime expansion of the federal government in U.S. history.”\(^{80}\) It produced extensive government involvement which created regulations, federal mandates, social insurance programs, and increased federal spending in an attempt to turn the tide on the Great Depression.\(^{81}\) However, such government involvement had the opposite effect; and instead, prolonged the depression.\(^{82}\) Most depressions last from one to three years, but the Great Depression in the United States lasted for more than a decade.\(^{83}\) The Great Depression was started by the stock market crash in October of 1929. Prior to the crash, on September 30, 1929, the Dow Jones Industrial Average was 381.\(^{84}\) After the crash, on October 29, 1929 it was 230.\(^{85}\) Approximately ten years later, in July of 1940, the market had collapsed to 121.\(^{86}\) “At the same time, federal spending as a percentage of the Gross Domestic Product soared at an unprecedented rate: from 2.5% in 1929, to 9% in 1936.”\(^{87}\) The unemployment rate also had not improved. In 1931 during the Hoover administration the unemployment rate was 17.4%.\(^{88}\) “Seven years later, after more than five years of FDR and literally hundreds of wildly ambitious new government programs that led to more than doubling federal spending, the national employment rate stood at 17.4%.”\(^{89}\) This huge expansion of government did not resolve the Great Depressions. In 1935, the Brookings institute

\(^{80}\) Price V. Fishback et al., Did New Deal Grant Programs Simulate Local Economies? A Study of Federal Grants and Retail Sales During The Great Depression, 65 J. ECON. HIST. 36, 36 (2005).

\(^{81}\) See id.


\(^{83}\) See Medved, supra note 87.


\(^{87}\) Medved, supra note 87.

\(^{88}\) See id.

\(^{89}\) Id.
wrote a nearly 1,000-page-report about the National Recovery Administration that was the centerpiece program of the New Deal, which concluded that it “on the whole retarded recovery.”

This idea that government should stay out of the marketplace is nothing new. America is a capitalistic country that operates best under a *laissez faire*, free market system. If government not stepped in during the great depression, it would not have lasted as long and the market would have corrected itself. Milton Friedman, who was awarded a Nobel Prize in Economics, believes that the instability observed in capitalism is wholly the fault of too much government. He wrote, “The fact is that the Great Depression, like most other periods of severe unemployment, was produced by government mismanagement rather than by an inherent instability of the private economy.”

It is likely that the struggling economy which led to the Economic Stimulus Act was a result of government interference in the free market system. Much of the cause of the struggling economy can be linked to the subprime mortgage meltdown, which was caused by government intermeddling in the market place. The University of Utah S.J. Quinney College of Law hosted a panel about the financial crisis in America on October 6, 2008. During the panel Professor Peterson stated that 8 million American families are at risk of losing their homes because of this crisis. Professor Mabey provided a short description of the crisis and how it came to be. During his comments, he stated,

The government-sponsored entities, Fannie Mae and Freddie Mac, were established to encourage home ownership. In recent years they had a mandate to encourage affordable housing. Between 2004 and 2007, they purchased a trillion dollars in subprime and alt A mortgages. The effect of having government-sponsored entities encouraged home ownership—by encouraging loans to persons whose credit-ratings were below usual standards, in other words, were subprime.

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91 BRADLEY R. SCHILLER, THE MACRO ECONOMY TODAY 13 (9th ed. 2003) (defining *laissez faire* as “the doctrine of ‘leave it alone,’ of nonintervention by government in the market mechanism.”).
92 See E.K. HUNT, HISTORY OF ECONOMIC THOUGHT 466 (2d ed. 2002).
93 Id.
95 Ralph Mabey, Professor, Univ. of Utah S.J. Quinney Coll. of Law, Comments at the Wall Street in Crisis Panel (Oct. 6, 2008), available at http://www.law.utah.edu/media/show-media.asp?MediaID=526&TypeID=4.
He went on to say, “Fannie Mae or Freddie Mac own or guarantee $5 trillion in mortgages in the United States, that’s about half of the value of all the home mortgages in the United States. Fannie Mae and Freddie Mac were the largest buyers of subprime and alt A mortgages.” It was because of these government sponsored-entities that there were so many subprime loans issued. These entities created a moral hazard which interrupted the free marketplace, causing it to act irrationally. There would never have been this many families struggling to pay their mortgages if loans were only given to those who met the usual standards. Further, lenders would not have invested in these subprime mortgages if the government did not guarantee them through Fannie Mae and Freddie Mac.

If the government did nothing, it would allow the marketplace self-correct. Companies that made bad decisions would suffer the consequences and, if need be, go out of business. This would enable new and well-managed companies to fill the void created from the failures. Allowing companies to fail enables the market to self-correct, as opposed to perpetuating the problem.

Although American families would be affected by government inaction, they should rely on family, friends, and charitable organizations. Government should not be the philanthropist to subsidize families in times of hardships. Families should first seek assistance from family members, and other sources, like charities or private philanthropists. Americans are tremendously generous. They gave an estimated $306,390,000,000 to charities in 2007, which was about 13% of the total receipts of the federal government for that year. If the government does not subsidize struggling families, private charities would fill the void.

If government action was limited, it is likely that people would not be taxed as much. The reverse is also true. For example, at the end of the Great Depression, the highest tax bracket was 88%. This basically forbade anyone from making over $200,000. If people were able to keep more of their money, it is likely they would donate more. While the highest tax bracket today is dramatically lower than it was during the Great Depression, the principle holds true: if people have more money, they will likely give more. Giving creates a remarkable feeling that promotes even more giving. Such a feeling is not created when the government takes money from individuals to fund its welfare programs. It essentially robs individuals from their opportunity to give. Inaction on the part of the government

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96 Id.
99 See Medved, supra note 87, (discussing how government spending on welfare relief caused private charities to decrease their spending).
would force struggling families to look to the proper places for help, and private charities will fill the void for families who have no other option.

Too much government intervention created the financial difficulties facing Americans—just as it was extensive government involvement that prolonged the Great Depression—and it will also be the case with future times of economic difficulty. Government needs to trust in market place and allow it to correct itself. When faced with the idea of future economic stimulus acts, Congress needs to remember that inaction is possibly the best action.

VI. Conclusion

The Economic Stimulus Act of 2008 seemed to be a fairytale bipartisan piece of legislation that would turn the tide on a possible recession. It received great publicity and sped through the legislative process. The legislative history contains numerous expressions of gratitude for members of opposing political parties because of their ability to come together in a time of crisis and act in a bipartisan manner to help the American people. The federal government stepped in to help by passing the Economic Stimulus Act. Unfortunately, the legislation has not satisfied its purposes. American families, while maybe a little richer because of the rebate checks, are not in a safer financial condition. The government had good motives, but ended up spending $152 billion dollars on a plan that has not succeeded.

The logic of Congress was flawed. The financial burdens facing American families cannot be alleviated by a minimal one-time cash infusion. Allowing Fannie Mae, Freddie Mac, and the FHA to assume larger loans is not going to solve the problem of the subprime mortgage crisis, which exists in the first place because people borrowed more money than they could afford. With the root of the recession not corrected, the recession will not be averted nor stopped. Because of this flawed logic, the Economic Stimulus Act of 2008 proved to be an expensive mistake for the United States of America and its hard working families. In the future, possibly the best action for Congress to take in times of financial hardships is inaction.

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