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ARTICLES

PARENT AND CHILD IN CONFLICT: BETWEEN LIBERTY AND RESPONSIBILITY

MELINDA A. ROBERTS*

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again. . . . It is the [child's] judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights . . . .

I. INTRODUCTION

Through no particular fault of the parent, parent and child sometimes find their interests regarding the most fundamental of matters in conflict. A child has lived, for one reason or another, with an adult, perhaps a nonparent, for a period of years, perhaps since birth; and the adult has successfully taken on the role of "parent." The child is no more inclined to leave the custody of this particular adult than are children raised in the most traditional of homes, biological parents on site, contentedly married and so on, inclined to leave the custody of their parents. But then it happens that one or both of the child's parents, typically the biological parents and perhaps now strangers to the child, demand custody of the child. Depending on the circumstances of the case and the state in which the conflict arises, and assuming the parent fit, courts have sometimes taken the view

* Assistant Professor of Philosophy, Trenton State College. The author thanks Gerald Barnes and Alan McMichael, as well as the editors of this Journal, for their valuable comments on earlier drafts of this article; Phyllis Warren, Assistant Deputy Law Guardian for the State of New Jersey (Mercer County), for enlightening discussions regarding children and the state's obligations to them; the staff of the Roscoe L. West Library, particularly Dean Mary Biggs, who provided invaluable support to me in completing this project; and Trenton State College, for the research grant that made the completion of this article possible.

that current law requires them to resolve the conflict between parent and child in favor of the parent. This is so, even when the reclamation of the child by his or her "real" parents predictably imposes on the child the mental anguish of being torn from those whom he or she regards as "parents." Thus absolutist doctrines of parental and custodial rights are sometimes used to protect the parent's interests to the exclusion of the child's, in cases of conflict regarding fundamental matters. But it seems a flaw in these doctrines that the parent should always win. Fairness would seem rather to require that family law concern itself with the interests of each member of the family, not just the interests of adult members of the family.

In this article, I first consider the views of certain contemporary theorists whose work commonly identifies the flaw in current family law as an excessive reliance on liberal theory. I then examine some of these theorists' specific proposals, each of which takes issue with some essential tenet of liberal theory. I argue that none of these specific proposals are wholly satisfactory. I then consider anew the deficiency, from the child's point of view, of liberalism. For this purpose, I discuss the liberal theorists Locke and Mill. I then sketch a natural and logical extension of liberal theory to children. On the extension I suggest, children have rights of liberty so long as our recognition of those rights is consistent with the various responsibilities and duties we as a community have to protect the well-being of children and to promote their interests. Finally, I outline how such a theory might have served to protect the child's interests in the recent Illinois case involving the four-year-old "Baby Richard." In this case, the improper issuance of an adoption order led to a splintering of interests between child and parent. The Illinois
Supreme Court addressed the problem by severing the affiliation between the four-year-old child and his would-be adoptive parents and transferring the child to a biological father whom the child had never before seen. The court's solution deemed the child's interests identical with his father's and thus failed to take the child's actual interests into account. For this reason, on the view I sketch, the court's decision was defective.  

II. CONTEMPORARY APPROACHES TO A CHILD-CENTERED JURISPRUDENCE

Parents' constitutional rights with respect to their children are, at this juncture, deeply entrenched. In contrast, children's rights, constitutional or otherwise, to make choices that conflict with their parents' remain highly amorphous. Having "constitutionalized" parental rights under the Fourteenth Amendment but left children's interests to the state's general authority to preserve the health and welfare of its citizens, we have constructed a previously vacated the prior adoption order and reversed a trial court ruling that, since the biological father had failed to show a "reasonable degree of interest" in the child within the first thirty days of the child's life, his consent to adoption was, under the state statutory scheme, not necessary. In re Petition of Does, 638 N.E.2d 181 (Ill.), cert. denied, 513 U.S. — (1994). Between the two occasions on which the Baby Richard matter came before the Illinois court, legislation was put into place specifically designed to provide a custody hearing for the determination of the best interests of the child in cases in which, like Baby Richard's, a final order of adoption is subsequently vacated. See ILL. ANN. STAT. ch. 750, para. 50/20 (Smith-Hurd 1994). On grounds of separation of powers, the Illinois court found that the new legislation had no application to the Baby Richard matter. Kirchner, 649 N.E.2d at 324. The U.S. Supreme Court consistently refused to hear claims in the case. O'Connell v. Kirchner, 115 S. Ct. 891 (1995) (application for stay denied); O'Connell v. Kirchner, 115 S. Ct. 1084 (1995) (application for stay denied).

7. See infra notes 130-83 and accompanying text.

8. Wendy Anton Fitzgerald, among others, has recently made this point. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 20-21 (1994) [hereinafter Fitzgerald, Maturity]. See also infra note 16 (noting parents' rights generally with respect to their children); and notes 149-69 and accompanying text (noting parents' rights of custody and control with respect to their children). See generally Fitzgerald, Maturity, supra, at 22-84, and Homer H. Clark, Jr., Children and the Constitution, 1992 U. ILL. L. Rev. 1 [hereinafter cited as Clark, Children and the Constitution].

9. See infra notes 10 and 16 and accompanying text. Would-be adoptive parents, foster parents and in some instances relatives may, like children, have interests that conflict with the constitutionally protected interests of parents. For a discussion of the plight of the adoptive parent, see, e.g., ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993). In this paper, I focus exclusively on children and whether their rights should in some instances defeat those of their parents.
system in which the most serious conflicts between parent and child are virtually always resolved in favor of the parent.\(^\text{10}\) Thus

10. \("[O]\)nce the law recognizes the parent's claim as constitutional in nature, a child's only refuge lies in the assertion of a vague state interest deriving, like the parent's, from a singularly adult perspective." Fitzgerald, *Maturity*, supra note 8, at 38. See generally id. at 22-84. Fitzgerald refers particularly to Mary Ann Glendon’s analysis of the "constitutionalization" of family law. *Id.* at 34, n.150 (citing *MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 134 (1991), [hereinafter GLENDON, RIGHTS TALK]).

In general, statutes restrictive of parents’ rights to the custody, care and control of their children survive constitutional scrutiny only if they have been "narrowly drawn" to meet a "compelling state interest" — a standard of strict scrutiny applied in, among others, the case of *Roe v. Wade*, 410 U.S. 113 (1973). This most stringent level of constitutional scrutiny has been characterized as "strict in law, fatal in fact," and in general application of it leaves the state with little authority to protect its children in cases of conflict between parent and child. *But see* *Adarand Constructors v. Pena*, 115 S.Ct. 2097, 2117 (1995) (strict scrutiny of a given statute does not necessarily yield the result that the statute is constitutionally infirm).

Fitzgerald describes a number of particularly disturbing cases to make her point that children suffer badly under the existing constitutional scheme. Thus, she analyzes cases involving child abuse, including *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), in which a four-year-old boy was left severely retarded as a result of beatings by his father, who, the Court noted, would likely have had a constitutional claim under the fourteenth amendment against state agents had any actually effected a rescue of the child from his father; Fitzgerald, *Maturity*, supra note 8, at 26-28; cases of child support, in which noncustodial parents, defending against state efforts to require them to support their children at a level greater than that "sufficient to keep the child off welfare rolls and from burdening state taxpayers," argue that they have a constitutional right, under the takings clause and "perhaps guarantees against involuntary servitude as well," to choose for themselves how much money they should spend on their own children, *id.* at 34-51; and cases of child custody and parental rights, in which the child’s and the would-be adoptive parents’ statutory claims must bow to the biological parents’ constitutional rights to the care and custody of their own child, including the "Baby Jessica" matter. *DeBoer v. Schmidt*, 502 N.W.2d 649, 652 (Mich. 1993), Fitzgerald, *Maturity*, supra note 8, at 51-84 and especially 77 (comparing the result in that case to the *Dred Scott* decision).

Fitzgerald’s focus is traditional family law. But other law as well seems to weight the constitutional balance against children. Notable is the developing body of doctrine relating to rights of “procreative liberty” in the context of the new reproductive technologies, including commercial surrogacy, in vitro fertilization and human cloning. For a discussion of this issue, see *JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 22-42 (1994). To the extent that infertile couples’ rights are constitutionalized and their children’s rights are not, as in the area of traditional family law, conflicts are likely to be resolved against the child. Since in my view some of the new technologies would seem to place the offspring they help to produce at risk, I am troubled by this result. See Melinda A. Roberts, *Human Cloning: A Case of No Harm Done?*, J. OF MEDICINE AND PHILOSOPHY (forthcoming); Melinda A. Roberts, *Present Duties and Future Persons: When Are

Also notable is the relationship between efforts to rectify existing inequalities between the sexes on the one hand and to protect children’s interests on the other. For a discussion of the respects in which existing family law treats the sexes differently, see Janet L. Dolgin, Just a Gene: Judicial Assumptions About Parenthood, 40 UCLA L. Rev. 637, 642-63 (1993) (argues that existing law allows men to choose whether to parent, by choosing to have a certain sort of relationship with the mother, whereas for women, biology alone translates to parenthood); and Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. Rev. 1415, 1416 (1991) [hereinafter Czapanskiy, Volunteers] (argues that laws regarding child support, custody and visitation, while facially neutral, in fact burden women by discrediting the sorts of contributions they are more likely to make to family and children). Although it seems clear to me that as a general matter sexual equality, once achieved, will be enormously beneficial to children, it is equally obvious that equality per se will not guarantee the protection of children’s interests. Suppose, for instance, that sexual equality is achieved by way of increasing the level of autonomy women have in relation to their children to the level of autonomy currently experienced by men. In this vein, Marjorie Maguire Shultz has argued for an intent-based theory of parenthood as one that would further the goal of equality between the sexes. Marjorie Maguire Shultz, Reproductive Technologies and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 372-95 (1990). But the legalization of practices like commercial surrogacy may jeopardize the interests of the offspring of surrogacy, for example by denying them the benefit of the “best interests” analysis that is generally used, in the case of nonsurrogacy offspring, to decide custody disputes between two biological parents. See Roberts, Good Intentions, supra, at 300-01. Barbara Bennett Woodhouse notes, more generally, that “tensions...remain between women’s autonomy and children’s interest.” Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 Cardozo L. Rev. 1747, 1824-26 (1993) [hereinafter Woodhouse, Hatching the Egg]. An alternative approach to achieving sexual equality would be to reduce the autonomy that men enjoy in relation to their children. Thus Czapanskiy proposes an “ungendered responsibility to provide a child with all the support of which a parent is capable.” Czapanskiy, Volunteers, supra, at 1416.

It goes without saying that injustice to children within our society is not strictly limited to constitutional injustice. See, e.g., Martha Minow’s description of the “societal neglect” children experience in this country, despite “occasional outpourings of rage over particular problems confronting them.” Martha Minow, A Feminist Approach to Children’s Rights, 9 Harv. Women’s L. J. 1, 6-7 (1986) [hereinafter Minow, A Feminist Approach]. At the same time, it would be difficult to argue that the injustices perpetrated on children by their parents and other adults, by their communities, by state and federal governments and by other social organizations and institutions are entirely independent of constitutional injustice. Any such argument must, among other things, defeat the thesis compellingly stated by Mary Ann Glendon, to the effect that law has a constitutive function with respect to the community and is not merely a passive reflection of community norms. See Mary Ann Glendon, Abortion and
the system has effectively muted the voices of children and lent support to the fiction that children's interests must be whatever their parents' interests in fact are.\textsuperscript{11}

\section*{A. Listening to Children: Children's “Difference” and Children's Perspectives}

Wendy Fitzgerald has recently argued that the source of this constitutional imbalance is the “propound[ing]” of a certain “liberal theory of constitutional interpretation” by a “generation of legal scholars.”\textsuperscript{12} Elucidating this liberal model, she writes:

The text of the Constitution itself and its historical origins in the Age of Enlightenment, these scholars explain, manifest a certain description of the individual and of the individual's relationship to the state. That individual is preeminently “rational” and “autonomous,” and the function of law is to accord such individuals “dignity.” As a rational individual, each person is capable of choosing his or her own “conception of the good” in such matters as religion or morality, occupation, or any of life's purposes. Respecting the dignity of individuals thus requires that the state respect the autonomous individual's choices and decision making. Originating in these principles, our Constitution thus describes a constrained state, and our Bill of Rights a shield for individuals to raise against potential state interference with autonomous choice.\textsuperscript{13}

\textsuperscript{11} Divorce in Western Law 1-9, 62, 111, 138-42 (1987), [hereinafter Glendon, Abortion and Divorce].

\textsuperscript{12} According to Fitzgerald, “[t]o the extent any child's claim diverges from adult purposes . . . the law refuses to entertain it.” Fitzgerald, Maturity, supra note 8, at 17. “Our jurisprudence and family law now disable children . . . from voicing their perspectives and relating their experiences.” Id. at 18.

\textsuperscript{13} Id. at 23.

\textsuperscript{14} Id. (citing John Rawls, A Theory of Justice 11, 28, 142-50, 407-16, 433-46, 513-20 (1971)).

That the liberalism of John Locke historically inspired the drafting and ratification of the U.S. Constitution and that the same liberalism even today often influences how jurists interpret the Constitution are not theses unique to Fitzgerald. See, among others, Glendon, Abortion and Divorce, supra note 8, at 119-94 (focusing particularly on the influence of Thomas Hobbes, Locke and Mill on the development of Anglo-American law); and Glendon, Rights Talk, supra note 10, at 1-17. Thus Glendon faults Mill more than Hobbes or Locke with “a great expansion of the notion of rights in the Anglo-American world, which already had a long tradition of discourse about rights. For Hobbes only life itself, and for Locke only life, property, and a limited concept of liberty were rights, secure as such from the state. Then came Mill, claiming that a much larger area of human conduct and opinion should be free from governmental interference. . . . Introduced through Justices Holmes, Brandeis,
The same liberal model of personhood denies, according to Fitzgerald,

personhood to children. Children, as a group, simply are not autonomous. They are dependent physically, economically, and legally on adults. Moreover, at least upon first impression, children are incapable of what courts and many liberal scholars would recognize as "rational" decision making.  

Thus the liberal model considers adults to have the right to make choices for themselves because they are both independent and rational. Lacking these distinctive characteristics, children are not considered, within the liberal model, rights-bearers.

Fitzgerald persuasively argues that interpreting the Constitution by reference to this liberal model leads ineluctably to a constitutional system that generally favors the parent's interests as against the child's. It is, after all, parents who have been accorded various rights of liberty and privacy with respect to their children's physical well-being, custody and economic status under the Fourteenth Amendment, even in cases in which the child's interests are more accurately represented by the state than by the parent.

and others, many of Mill's ideas grounded crucial steps in American law and entered popular culture, giving us the 'marketplace of ideas,' the 'clear and present danger' test, the notion of the consenting adult, and the right to be let alone, which Warren and Brandeis recast in their famous 1890 law review article as a right of privacy." Glendon, Abortion and Divorce, supra note 10, at 123-24.


15. Id. at 34-84.

16. Id. Thus parents have been considered to have the right under the Constitution to exert considerable control over their children's lives, in respect of such matters as education and religion and, of particular concern here, the custody and control of their children. See Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (regarding parents' rights with respect to their children's religious instruction); Meyer v. Nebraska, 262 U.S. 390 (1923) (regarding parents' rights with respect to their children's education); see also infra notes 149-69 and accompanying text (regarding parents' rights with respect to custody and control of their children).

Children, in contrast, have generally not been recognized for constitutional purposes to have interests that conflict with their parents. The
Fitzgerald gives a typical answer to the question why, if traditional liberal theory has protected parents’ rights with such success, we should not simply extend liberalism to children rather than abandon it altogether. Why not simply give to children the rights of liberty we have already given their parents? In Fitzgerald’s view, liberalism at best serves adults, in respect of whom rationality and independence plausibly may be claimed.17 But children are neither rational nor independent.18 “If we treat children the same as adults constitutionally and accord them the respect due autonomous individuals capable of decision making,
then we may abandon them, bereft of adult guidance, to foolish choices regretted in later life." In view of the critical differences between parents and their children, any extension of liberal theory to children would be bound — at least from the child's point of view — to fail.

Thus Fitzgerald suggests that the setting aside of traditional liberal theory is necessary to improve the legal and constitutional status of children. More particularly, in her view, if our aim is to afford children greater justice, we must set aside the idea that parents have fundamental rights, as against the state, to the care, custody and control of their children and, along with it, the corollary that parents hold powerful Dworkinian "trump cards"

19. *Id.* at 33. While Fitzgerald would in the end propose a mechanism to protect children, see infra notes 22-28 and accompanying text, she expressly disclaims the suggestion that children protect their interests "by asserting their equality and demanding equal treatment" — that is, I take it, by claiming that they should share in the liberal rights that have, to their detriment, so benefitted their parents. Fitzgerald, *Maturity*, supra note 8, at 18 and n.42 (citing GLENDON, RIGHTS TALK, supra note 10, and noting that Glendon's "observations [regarding the respects in which a focus on individual rights 'disserves family, community, and other human relations'] bear forcefully upon children, for whom individual empowerment is at least impractical and potentially destructive.").

It should also be noted in this context that, while adult liberalism offers two varieties of protection for children, neither can be said to promote their interests in any clear way. The two varieties are as follows: (1) "If you were able to care for yourself in this world and not so completely and utterly dependent on any number of adults, we would leave you to plan and live your life according to your own autonomous choice"; and (2) "Since one day we will leave you to care for yourself, we will provide you now with the skills and other sustenance necessary to bring it about that you will then be capable of making good choices." The former approach suggests a kind of equal protection approach that has no concrete consequences for children; it just says that the basis for the adverse decision is the child's status as child and not that the claim of liberty is made by one child rather than some other. The latter approach is suggested by Charles Lockhart and Gregg Franzwa, in *Liberalism and the Rights of Children*, 4:2 PUB. AFF. Q. 159 (1990). Richards explores a like notion of children's rights. Richards, *The Individual*, supra note 13, at 23. But as Fitzgerald suggests such a view can be turned on its head and used to bolster potent doctrines of parental and governmental rights of control over children, on the grounds that we need to produce maximally rational adult decision-makers. Fitzgerald, *Maturity*, supra note 8, at 30-34.

20. Fitzgerald, *Maturity*, supra note 8, at 21-22, 102-09. According to Fitzgerald, "we can begin to transform our jurisprudence from one constrained by individualism to a jurisprudence responsive to families . . . . Upon transforming our model of legal personhood to include children and family belonging, we can begin candidly to adjudicate the claims of family bonds and fears of loss that real children and parents experience in support and custody cases. I do not foresee, therefore, a new generation of rights-bearing children asserting claims of autonomy from their families." *Id.* at 21-22.
that they may play at will, even against the state that expressly
defends, as its own, the claims and interests of its children.\textsuperscript{21}

Fitzgerald proposes a reform of the legal system that she believes would protect children by taking steps to insure that "courts can no longer avoid listening to the experiences of real children and hearing real children's perspectives."\textsuperscript{22} Briefly stated, her proposal is to accord children standing in custody and support disputes, and thereby insure the recognition of their dif-

\textsuperscript{21} The account of rights in terms of principles protective of the needs and interests of the individual against the state is suggested by \textsc{Ronald Dworkin, Taking Rights Seriously} xi and generally 184-205 [hereinafter \textsc{Dworkin, Taking Rights Seriously}] ("Individual rights are political trumps held by individuals").

Others who, like Fitzgerald, have identified respects in which traditional liberal theory, with its emphasis on individual rather than collective rights and on rights rather than responsibilities, places families and children at risk include \textsc{Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law} (1990) [hereinafter \textsc{Minow, Making All the Difference}]; \textsc{Woodhouse, Hatching the Egg, supra note 10, at 1841-44}; \textsc{Glendon, Rights Talk, supra note 10, at 121-44} (discussing generally respects in which our acceptance of a powerful rhetoric of individual rights, in everyday discourse as well as in the law, has impeded our ability as a nation to address a variety of social ills, including the declining emotional and economic status of children, in part by depriving the citizenry of a lesson in the common good that a more "well-developed language of responsibility" might provide). \textit{Id.} at 144; \textsc{Glendon, Abortion and Divorce, supra note 10, 63-91, 104-11} ("What Chambers dismisses as nostalgia — the notion that fathers have a duty of support toward their children and that governments should enforce such a duty — "is precisely what Geertz tells us is an important function of law — that of interpreting our culture to ourselves, of summing up our ideals while at the same time reinforcing them. If law has an interpretive and constitutive function, then changing the law so as to eliminate a duty where one has long existed cannot help but have some effect on behavior and attitudes." "). \textit{Id.} at 111; and \textsc{Sandel, Liberalism, supra note 17, at 183} ("Liberalism teaches respect for the distance of self and ends, and when this distance is lost, we are submerged in a circumstance that ceases to be ours. But by seeking to secure this distance too completely, liberalism undermines its own insight.").

I cannot avoid the temptation here of quoting Alan Ryan, according to whom many prominent members of the liberal community have had little personal regard for protecting the interests of children, with the possible exception of John Dewey:

\textsc{Dewey was unusual among educational theorists in liking children so much . . . Locke was unmarried and childless, Rousseau sent his five children to the foundling hospital, where they almost certainly died in infancy, Mill was childless and unkind to his siblings, Russell's advice to parents was that they should take care what sorts of servants they hired to look after their children, and Mme. Montessori had an illegitimate child she had to place for adoption.}\textsc{Alan Ryan, John Dewey and the High Tide of American Liberalism} \textsc{338} (1995).

\textsuperscript{22} Fitzgerald, \textit{Maturity, supra note 8, at 103}.\textsuperscript{22}
ferent voices and different perspectives. Standing alone may not, however, adequately protect the child's legitimate interests, since under the current constitutional scheme the parent is given priority over the child. Thus, as a second step, Fitzgerald would deny standing to the state and thus eliminate the state's interest in matters of custody and support. The elimination of the state's interests would effect the elimination of the parent's constitutional claim, thereby achieving something like parity between the parent's and child's claims.

Thus, Fitzgerald "envision[s] courts weighing the relative strengths of and threats to family bonds as matters of fact gleaned from the evidence, the perspectives and stories heard." "If the law encouraged parents to cast their legal arguments from their perspectives as parents and children to cast theirs from their perspectives as children, the law could learn from family members themselves what interests to value in family law." Perhaps the law, over time, would particularly "recognize family bonds as the substantive touchstone for deciding family disputes." In any case, most importantly "[n]either parents' nor children's individual rights per se can direct a court" to a particular resolution.

Fitzgerald appears to rest, more or less content, with this prescription for reform. "[L]egal listening to children," she writes, "is legal respect, enabling the inclusion of children's differences in our jurisprudence of personhood." But this approach is not completely satisfying. Fitzgerald's aim is to improve the process for developing substantive legal principles of family law; she does not impose constraints on the substantive principles themselves. Thus, her view seems to leave open the possibility that the substantive legal principles that will emerge from the process she describes may represent, from the child's point of view, no improvement on the existing scheme.

23. Id. at 102-09.
24. Id. at 104.
25. Id. at 105.
26. Id. at 104.
27. Id. at 105.
28. Id. at 105.
29. Id. at 103.
30. I distinguish Fitzgerald's proposal that issues of support be determined in part by reference to children's property rights in a "family estate," id. at 99-102, from her broader suggestion that children be protected when disputes regarding custody and control arise by adopting devices that would insure children's opportunity to be heard. The granting of defined property rights to children seems a plausible response to claims by well-off noncustodial parents that, as a matter of constitutional law, they owe in support
judges, having listened to children's stories alongside their parents', will rule in a manner that is respectful of the child. Perhaps precedent will develop in a reasonable manner, once judges begin to see things from the child's point of view. But why count on it? Why accord children just the chance to tell their stories when what they need and are due is a set of substantive, fair principles that will balance their interests against the interests of others and enable them, on occasion, to win?

B. "Rights in Relationships": Recognizing the Child's Need for Affiliation

Fitzgerald's critique of traditional liberal theory has elements in common with Martha Minow's. Like Fitzgerald, Minow's objection to liberalism as a model for constitutional interpretation is in part based on her estimate of the risks liberalism poses for children. In Minow's view, liberalism perhaps protects parents' interests with respect to their children, by allowing parents to act in large part as they wish "[w]ithin a sphere cordoned off as 'private.'" But parents' liberty comes at the expense of helping

to shield from view the governmental refusal to see some kinds of power or abuse as warranting public restraint. It would be false to say that family relations were unregulated: they were regulated by the government's grant of financial, physical, and social privileges to the male head of household and refusal to hear any objections of any other family members. Moreover, like Fitzgerald, Minow appears to find implausible including children within the sweep of liberalism and according to them, as we do their parents, rights of liberty. "Conceptually and practically, children in our society are not autonomous persons but instead dependents who are linked legally and daily to adults entrusted with their care." Children are doubly dependent, both in respect of their need for adult care and supervision and as a result of the legal rules that create their

no more than an amount necessary to lift their children out of poverty. See supra note 10 (regarding Fitzgerald's discussion of noncustodial parents' claimed constitutional right to make minimal support payments).

31. MINOW, MAKING ALL THE DIFFERENCE, supra note 21, at 279. See generally id. at 277-83.

32. Id. at 279.

dependence. This double dependency situates children outside the sphere of rights-bearing persons in a system that makes independence a premise for the grant of rights. Among other things, "freedom for the child's own choice-making may be unimaginable or impossible in many situations facing children."

Minow does not, however, abandon rights talk altogether. She believes that appeals to rights can provide effective tools for calling attention to the claims that need to be made on behalf of children. "Children are, all too often, the unnamed victims. . . . The image of rights as damaging and weighty instruments that should be reserved for adults must be challenged in light of the damage suffered by children who have been denied them." And again: "There is something too valuable in the aspiration of rights . . . to abandon the rhetoric of rights. That is why I join in the effort to reclaim and reinvent rights." But the rights she urges recognition for are the rights that, according to traditional liberal theory, accrue in principled fashion to individuals as a

34. Minow, A Feminist Approach, supra note 10, at 18.
35. Id.
36. Id. at 20. See generally Minow, Making All the Difference, supra note 21, at 283-89, 299-306. Minow suggests that treating children as though they were autonomous adults — as though they were as free to work in factories, not attend school, have sex, as we are — represents a failure of compassion toward children. The Progressive movement of the late nineteenth and early twentieth centuries began to rectify this failure. During this period, children achieved a certain "protected" status that entitled them to rely on, and required that they be governed by, a different, more paternalistic, set of rules. See generally Minow, A Feminist Approach, supra note 10, at 8-14 (discussing the Progressive and the "Independence" movements). But children's plight today does not, in her view, derive from any inherent flaw in Progressive theory, but, rather, from a failure to take the movement to its logical conclusion. Id. at 22 ("the juvenile court experiment borrowed only some features of the rights to care, connection, and indeed custody. . . . [T]he court has not taken as its task the articulation or promotion of rights of care and connection or rights to affiliative relationships — or the preconditions for such relationships"). Doctrines that would give children the right to make choices that they are not emotionally or intellectually equipped to make would hardly improve, and may compromise, their present level of well-being.

In contrast to Fitzgerald's postulate of children's "difference," Minow's view does not take it that children's dependency marks a clear difference between children and their parents. In certain respects, she writes, "children's rights are no more problematic than adults' rights, because all rights claims imply relationships among mutually dependent members of a community." Minow, Making All the Difference, supra note 21, at 302-03. And again: "children lack the autonomy presumed under one version of what rights mean. But so do adults." Minow, A Feminist Approach, supra note 10, at 24.
37. Minow, Making All the Difference, supra note 21, at 303-04.
38. Id. at 307.

34. Minow, A Feminist Approach, supra note 10, at 18.
35. Id.
36. Id. at 20. See generally Minow, Making All the Difference, supra note 21, at 283-89, 299-306. Minow suggests that treating children as though they were autonomous adults — as though they were as free to work in factories, not attend school, have sex, as we are — represents a failure of compassion toward children. The Progressive movement of the late nineteenth and early twentieth centuries began to rectify this failure. During this period, children achieved a certain "protected" status that entitled them to rely on, and required that they be governed by, a different, more paternalistic, set of rules. See generally Minow, A Feminist Approach, supra note 10, at 8-14 (discussing the Progressive and the "Independence" movements). But children's plight today does not, in her view, derive from any inherent flaw in Progressive theory, but, rather, from a failure to take the movement to its logical conclusion. Id. at 22 ("the juvenile court experiment borrowed only some features of the rights to care, connection, and indeed custody. . . . [T]he court has not taken as its task the articulation or promotion of rights of care and connection or rights to affiliative relationships — or the preconditions for such relationships"). Doctrines that would give children the right to make choices that they are not emotionally or intellectually equipped to make would hardly improve, and may compromise, their present level of well-being.

In contrast to Fitzgerald's postulate of children's "difference," Minow's view does not take it that children's dependency marks a clear difference between children and their parents. In certain respects, she writes, "children's rights are no more problematic than adults' rights, because all rights claims imply relationships among mutually dependent members of a community." Minow, Making All the Difference, supra note 21, at 302-03. And again: "children lack the autonomy presumed under one version of what rights mean. But so do adults." Minow, A Feminist Approach, supra note 10, at 24.
37. Minow, Making All the Difference, supra note 21, at 303-04.
38. Id. at 307.
function of the ability to reason and to act independently. Like language, Minowian rights are socially constructed and have "meanings" that are subject to revision within the community. Moreover, the scheme of rights she proposes does not presuppose that children and adults comprise a set of "autonomous rights-bearing individual[s]." Rather, Minowian rights are particularly designed to protect children in their need for "affiliative relationships." We must, she believes, "view children's rights through the relational frame." She urges a "reconstruction" of rights "as features of relationships" for children that would, among other things, "promote [children’s] abilities to form relationships of trust, meaning, and affection with people in their daily lives and their broader communities." To the extent that the rights she would reconstruct are constitutional, she rejects the common and deeply entrenched view that the Constitution parcels out only "negative," never "positive," rights.

Although Minow conceives of rights as "features of important, communal relationships," she clearly does not intend to suggest an unhappy subordination of the interests of the child and/or parent as individual to the goal of preserving the relationship. Rather, the relationships she would protect hold not just between child and parent but also between child and state. Thus, where there exists no "working relationship" between parent and child, it would be the first goal of the state to take steps to repair the child-parent relationship. Where no repair is possi-

39. Thus, Minow's conception of rights "rejects the tinge of legal positivism or objectivity often associated with rights — the implication of an authoritative basis and content beyond historically contingent human choices. . . . Rights in [Minow's] sense are not 'trumps' but the language we use to try to persuade others to let us win this round. [Rights'] origins and their future viability depend upon a continuing, communal process of communication." MINOW, MAKING ALL THE DIFFERENCE, supra note 21, at 295-96. Minowian rights, thus, belong to a different metaphysical category from Lockean natural rights and from Millian utilitarian based rights. See generally id. at 289-311, and infra notes 65-97 and accompanying text.

40. MINOW, MAKING ALL THE DIFFERENCE, supra note 21, at 300.

41. Minow, A Feminist Approach, supra note 10, at 22. Here Minow departs from Fitzgerald, who merely predicts, but not presuppose, that the court will "recognize family bonds as the substantive touchstone for deciding family disputes." Fitzgerald, Maturity, supra note 8, at 105.


43. Id. at 24, and MINOW, MAKING ALL THE DIFFERENCE, supra note 21, at 291, 309.

44. Thus, she suggests a reform of the juvenile system of justice that would authorize juvenile court officials to "commandeer resources" necessary to "promote the preconditions for relationships" between children and adults and children and the state. Minow, A Feminist Approach, supra note 10, at 23.

45. MINOW, MAKING ALL THE DIFFERENCE, supra note 21, at 283.
ble, the relationship between child and state would, in her view, form the basis of the child's claim of freedom from an abusive parent.46 Among other things, recognition of the child's claim of freedom would enable the child to begin the process of establishing new and healthier affiliations, affiliations not subject to disruption by the abusive parent, with other adults.

Minow seems clearly right that children need affiliative relationships. They need the care of adults and loving connections with adults and in certain cases they need the help of the state to ensure that their relationships with adults are in order. What seems less clear is Minow's insistence that relationships, rather than the individuals who participate in them, are what is important and what we are to work to protect. Suppose, for example, that we try to explain why relationships between children and their schools, religious institutions, grandparents, teddy bears are not of particular importance. Or why it is that the caring custodial relationship between parent and child should be promoted rather than, say, an abusive relationship or a neglectful relationship. It seems that our answers to these questions will be unavoidably couched in terms of what is good for the child — what is in the interests of the child as individual, not the child as one member of a particular relationship.

If this is correct, then it seems an obfuscation to phrase the theory in terms of the relationship, when what we really care about and should aim to protect is the individual. But if what is good for the child is ultimately the aim and the key to the analysis of the concept of "rights in relationships," then as an analytic matter we ought first sort out the child's needs and interests with respect to the infinite collection of relationships that we could, in theory, elect to protect. Proceeding the other way around, we might find ourselves protecting the wrong class of relationships.47


47. Another way of putting this point is that talk of relationships — at best inert, insentient things whether one takes a realist, or a skeptical view of their ontological status — as rights-bearing entities is most sensibly understood as talk of individuals having rights to enter into or maintain certain relationships.

Minow conceives of the rights she would protect as language-like, with meanings that are subject to revision within the community. Minow, MAKING ALL THE DIFFERENCE, supra note 21, at 295-96. Consequently, perhaps her answer to my rhetorical questions would simply be that the class of "important" relationships — the ones we are to work to promote — may change over time and from one community to another. In other words, she perhaps would accept the possibility of the dominant rhetoric of rights producing, at a certain time and place, the result that the unique relationship to be promoted between child and parent is one of, say, complete subservience. But relativism of this
Minow, very likely correctly, takes the view that we are who we are largely because of our relationships with others:

[The] notion of the autonomous rights-bearing individual presupposes a community — a community willing to recognize and enforce individual rights; hence, even this usual conception of rights, premised on autonomy, relies on a social and communal construction of boundaries between people. Autonomy, even as an aspiration, is the invention of a cultural and linguistic community. 48

But surely this self, once produced, and even while evolving, requires solicitude. In other words, even if our identity is significantly or wholly determined by our personal and communal relationships, it hardly follows that our first object of concern is the individual’s relationships and not the individual. Justice Blackmun wrote that “[w]e protect [rights relating to the family] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.” 49 On this point, whether one causal account of the origin and development of the individual’s identity or some other is correct has no bearing. The claim that the relationships we attend to are causally constitutive of the individual is entirely consistent with the notion that the reason we attend to the relationships is because we care about the individual.

Perhaps one reason Minow considers the child’s rights as participant in affiliative relationships prior in some sense to the child’s rights as individual is that she believes that any protection we might accord the child as individual inevitably leads back to a traditional liberalism that is in fact adverse to the child. 50 If we want rights, and eschew individual rights as merely encoding a

sort does not seem to be the whole of her position. She also fairly clearly aims to produce a theory that serves the good of the child — a good that, she at least suggests, will not vary depending on what political fashions and confabulations are in ascendance at a particular time and place. Thus she writes that “children are a striking group whose ‘difference’ has excluded them from rights but whose relationships may offer a point of entry to a new conception of rights in relationship . . . ,” thus implying that her conception of rights in relationship is in fact one that will buttress the position of children and at the same time that the prevailing discourse pertaining to them is inadequate. Id. at 283.

48. Id. at 300. See also Sandel, Liberalism, supra note 17, at 59-65 (suggesting that it is a mistake to understate, as he believed Rawls did, the extent to which the identity of the individual is determined by the individual’s relations with others).


50. I understand Minow to be suggesting this line of thought in Minow, Making All the Difference, supra note 21, at 299-300.
system that burdens children with the weighty protection it affords (some) adults, then the Minowian doctrine of "rights in relationships" may provide a suitable alternative. But I am not yet convinced that we cannot protect children as individuals without abandoning them to a form of "rugged individualism" that we all agree will not serve their interests.

C. A "Generist" Perspective: Putting Children First

Like Fitzgerald and Minow, Barbara Bennett Woodhouse suggests that traditional liberal theory gives too much weight to parents' needs and interests. In her view,

[parental rights are closely linked with an historic legacy of viewing the child as the family patriarch's private property, which, like other economic rights, is secured from state expropriation, confiscation, or regulatory taking. The parental rights of control and custody, constitutionalized by the Supreme Court in cases like . . . Stanley v. Illinois, confer a strange liberty that consists in the right to control not one's self or one's goods, but another human being. Echoing the rationalizations used to support male dominance over women and masters' control of slaves, parents' rights are justified by assuming unity of interest between powerful and weak. These rationalizations are bolstered by exaggerating children's dependence, incompetence, and inability to know or describe their own minds or their own experiences.]

And, like Fitzgerald and Minow, Woodhouse objects to the idea that children should be assigned rights of liberty. "Liberal theories of individual rights invoke images of autonomous rights bearers exercising free will in choosing among an array of rights and asserting potentially contradictory claims." It will not work, she believes, to "simply substitute children for adults as autonomous rights-bearers in an adversarial system . . . Children do not start out as autonomous beings; they grow into autonomy."

Thus Woodhouse proposes that "[a]dult rights of control and custody [should] yield to the less adversarial notions of obligations to provide nurturing . . ." Her "generist" perspective

52. Id. at 326.
53. Woodhouse, Hatching the Egg, supra note 10, at 1756. See generally id. at 1809-14, 1842-43.
would “place children, not adults, firmly at the center and take as its central values not adult individualism, possession, and autonomy,” but rather would “value most highly concrete service to the needs of the next generation . . . ”.\textsuperscript{55} Finally, she suggests that parenthood not be viewed as an “individual liberty,” but “rather [as] a role within a family system.”\textsuperscript{56} Thus in conceiving parenthood she would emphasize not “possessive individualism” or rights, but rather “obligation and earned authority.”\textsuperscript{57}

In place of the “possessive individualism” of traditional liberal theory, Woodhouse proposes a doctrine of “children’s need-based rights” to identity and continuity.\textsuperscript{58} In her view, it is the child’s need for identity and continuity in their relationships that should be our focus.\textsuperscript{59} Thus, Woodhouse would have us derive parents’ rights and responsibilities from their children’s needs, and forego the notion that our ability to protect children is limited by an array of property-like interests that parents have in their children.

Woodhouse’s generism requires that we are to put children first.\textsuperscript{60} But two questions arise. One is a question of fairness. Is the view that in case of conflict the child’s needs and interests always trump the parent’s fair? Among other things, we might worry that on this view entrenched sexual inequalities may lead courts routinely to award custody of infants born to unwed mothers to their fathers. After all, (i) the fathers’ incomes will likely be higher than the mothers’ and their prospects superior, and (ii) fathers are far more likely than mothers to be able to demonstrate that they have thoroughly fit, ready and willing stay-at-home spouses or, even, mothers to care for their babies. It

\textsuperscript{55.} Woodhouse, \textit{Hatching the Egg, supra} note 10, at 1815. See generally \textit{id.} at 1814-27. “Generism” refers to her theory regarding “justice across generations.” \textit{id.} at 1814.

\textsuperscript{56.} \textit{Id.} at 1811 (emphasis added).

\textsuperscript{57.} \textit{Id.}


\textsuperscript{59.} Generists, she writes, “must do more than listen to children.” Woodhouse, \textit{Hatching the Egg, supra} note 10, at 1838. Thus among other devices for satisfying children’s needs she suggests a “primary caretaker presumption.” “This way of approaching custody decisions looks retrospectively at the rhythms of the child’s day-to-day life, and presumes that the person who has routinely cared for the child . . . is likely to be the child’s most trusted and stable resource. This approach has the advantage of preserving the child’s continuity . . . .” \textit{Id.} at 1849.

\textsuperscript{60.} Thus, the perspective she proposes recognizes that “meeting the needs of children is the primary concern of family law,” \textit{id.} at 1814. And, again, it would “place children, not adults, firmly at the center . . . .” \textit{id.} at 1815. See generally \textit{id.} at 1814-20.
seems to me that if a woman's infant is taken from her under these circumstances and for these reasons, her cry of injustice cannot be disregarded as egotistical selfishness. Our phenomenological focus on the children we gestate as "our own," if not as owned by us, seems a stable fact; and it is, I think, a concept we are loathe to abandon.

Woodhouse doubts that the notion that the children we produce are ours is a concept generism requires us to abandon. In her view a "primary caretaker presumption" would apply to give the gestational parent custody of the newborn, in the absence of evidence that such an award of custody is against the newborn's interest. But it is very difficult to square this presumption with the more basic tenets of her theory. A newborn, after all, needs the conscientious and steadfast devotion of some adult or another. But the claim that the newborn needs it to be the gestational parent who provides that devotion assumes a nonobvious connection between woman and fetus that may or may not obtain.

61. The mother, according to Woodhouse, is "surely the primary parent during gestation . . . ." Id. at 1850. For a description of the presupposition, see supra note 59.

62. James G. Dwyer's proposal that children rather than their parents' be accorded rights, and that parents' rights give way to a "child-rearing privilege," is in some ways similar to Woodhouse's proposal. James Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 CAL. L. REV. 1371 (1994) [hereinafter Dwyer, Parents' Religion and Children's Welfare]. Thus Dwyer writes that under his approach a community seeking to restrict parents' child-rearing freedom or authority would not need to argue that the interests of the child and of the rest of society outweigh the rights of the parents in a given case. Rather, the State would need only to argue that the harm to the child that non-intervention would allow is greater than the harm to the child that intervention would cause.

Id. at 1377. Limited to a religious context, this principle appears unproblematic. But Dwyer proposes that the principle be generalized. See e.g., id. at 1447. And the generalized form of the principle is troubling, since it is difficult to discern in Dwyer's proposal any reasoned basis why it is not constitutionally permissible, and perhaps ethically mandatory, to shift parental rearing responsibilities of babies from young, poor, uneducated parents to mature, middle class, educated couples, or, in situations of divorce or separation, from poor mothers to relatively well-off fathers. See generally id. at 1439-42, 1439, n.281. Where the parents are neither so poor nor so uneducated that they cannot decently care for their children, taking their children from them would seem grossly unfair. Clarifying the sweep of his proposal, Dwyer writes that the "poverty of the parents generally does not by itself make removal the best option for the child." Id. at 1439, n.281. But it would seem a myth that children of poor, uneducated, young parents would not in our society usually be better off with an equally loving but more affluent and better educated family. There is, of course, no reason why the state cannot in this context protect a
The second question regarding Woodhouse's proposal that we put children first is whether improving the plight of children in fact requires that we privilege children as a class. Like Fitzgerald, Woodhouse presents a strong case that judicial concern about the actual needs and interests of children has been virtually suspended at the same time that their parents' choices with respect to them have been lacquered with constitutional protection. If this is so, then treating children fairly, and acknowledging that their needs and interests must be protected alongside their parents', may be enough to remedy the wrongs imposed on children by our current system. Perhaps, at least, we should see what can be said in favor of the equality approach before we reject it.

Indeed, if liberal theory has anything to recommend it, it would seem to be its espousal of some notion of equality. Perhaps we need to lay aside principles of equality in order to remedy the plight of children — our attention, historically, having been devoted to our own needs rather than theirs, and their needs being in certain respects greater than ours. If this is correct, then, as Woodhouse suggests, we should, for a time at least, put children first. And perhaps liberalism's focus on the individual, while correct analytically, from a practical point of view means that the Constitution protects only those individuals who have the wherewithal to articulate and assert their needs and interests. If this is correct, then we should, as Minow suggests, adopt a relational, rather than an individualistic, view of rights. Finally, perhaps liberalism has too much faith in one version of the rule of law, which presumes written law not to be entirely indeterminate with respect to meaning. Perhaps the decisions that courts hand down are never, or rarely, based on law that a judge has merely interpreted and applied but rather on law that a judge has simply made up under one rationalization or another. If this is correct, then very likely the only chance for children is, as Fitzgerald suggests, allowing them to tell their tales loudly and clearly — maybe someone will take pity.

maximum set of legal and moral rights of both child and parent, by providing a good education to all individuals and guaranteeing income, goods and services to parents adequate to meet their children's needs.


64. For a discussion of contemporary rule-skepticism, see generally Roberto Unger, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).
At the same time, before we conclude that our commitment to children requires us to reject some basic liberal tenet or another — equality, or the priority of the individual over the community, or at least one version of the rule of law — it is worth revisiting the question whether liberalism can be extended to children in such a way that it protects, rather than jeopardizes, their interests. A main purpose of this article is to sketch a proposal for extending a right of liberty to children. The proposal I sketch derives from some of the views of John Stuart Mill; and thus I turn to Mill in what follows. But there is a second reason as well to examine at this point liberalism's roots in the history of philosophy. Before we reject or accept whole cloth traditional liberal theory, and certainly before we modify the theory for the purpose of applying it to children, we need to understand how and why it treats children and adults differently. We need to understand the rationale for treating children and their parents differently in order to see whether and to what extent we can tenably treat them the same. And since, among liberal theorists, John Locke, along with Mill, has most clearly influenced contemporary views regarding the circumstances under which a liberty interest has constitutional protection, it is logical to begin with an examination of their theories.

III. TRADITIONAL LIBERAL THEORY: LOCKE AND MILL

A. Locke's Liberal Theory

Fitzgerald, among others, blames the current plight of children in part on Enlightenment-era, rights-based liberalism. This theory, she argues, has been adopted by a "generation of legal scholars" as a means of interpreting constitutional text. At the same time, the Constitution, so interpreted, has wreaked havoc in the lives of children. I do not challenge any of these assertions. Instead, my aim here is to determine just where traditional liberal theory goes wrong and whether it is susceptible to repair.

The exclusion of children from the scheme of liberty is a basic tenet of Locke's Second Treatise, perhaps the most important

65. See supra notes 12-16 and accompanying text.
66. See supra note 6 and accompanying text.
and influential statement of traditional liberal theory.\textsuperscript{68} In Locke’s view, parents have a

sort of Rule and Jurisdiction over [children] when they come into the World, and for some time after, but ‘tis but a temporary one. The Bonds of this Subjection are like the Swadling Cloths they are wrapt up in, and supported by, in the weakness of their Infancy. Age and Reason as they grow up, loosen them till at length they drop quite off, and leave a Man at his own free Disposal.\textsuperscript{69}

And again:

The Freedom then of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrain’d Liberty, before he has Reason to guide him, is not the allowing him the priviledge of his Nature to be free; but to thrust him out amongst Brutes, and abandon him to a state as wretched, and as much beneath that of a Man, as theirs. This is that which puts the Authority into the Parents hands to govern the Minority of their Children.\textsuperscript{70}

In contrast to the circumstance of children, “men” are “by Nature all free, equal, and independent.”\textsuperscript{71} At a certain historical juncture, they — self-interestedly, rationally, by exercise of reason — “consent[ed]” to the subjection of their own natural authority, and have “[put] on the bonds of Civil Society.”\textsuperscript{72}

It is of critical importance for Locke that the subjection to these “bonds” is not complete or unconditional. In Locke’s view the state may legitimately act to protect life, liberty and property against those who would disrupt the tranquility of the presocietal “state of nature” and against foreign powers. However, under the terms of the initial grant of authority, the state is not authorized to act beyond the “mutual Preservation of their Lives, Liberties, and Estates, which I call by the general Name, Property.”\textsuperscript{73}

But though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the

\textsuperscript{68} JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1964) (1689) [hereinafter LOCKE, SECOND TREATISE].

\textsuperscript{69} Id. § 55 (emphasis deleted).

\textsuperscript{70} Id. § 63.

\textsuperscript{71} Id. § 95.

\textsuperscript{72} Id. § 95. See generally id. §§ 95-122.

\textsuperscript{73} Id. § 123.
State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of Society, or Legislative constituted by them, can never be suppos'd to extend farther than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned, that made the State of Nature so unsafe and un easie.\textsuperscript{74}

Thus, in Locke's view individuals have the right to retain a substantial right of liberty even subsequent to the point at which they transfer to the state their naturally arising "executive power" over their own conduct. The state that acts to restrict the liberty of the individual beyond what is necessary to protect "lives, liberties, and estates" exceeds its authority by violating the initial terms of the transfer and swelling beyond its original reason to be.

The function of the state, in Locke's view, is to make it possible for individuals freely to have and raise their children, to work their land and buy and sell goods within the marketplace, in each case without the interference of discordant elements (kidnappers, trespassers and thieves) and, by implication, in each case without the interference of the state.\textsuperscript{75} State action that is "Arbitrary over the Lives and Fortunes of the People" — that is, that does not serve the intended function of the state — is illegitimate.\textsuperscript{76} Thus, any arbitrary taking of one's liberty, one's goods or one's land would constitute, on Locke's view, a violation of a right never ceded by the consensual formation of a political society.\textsuperscript{77} By implication, the state's arbitrary taking of one's children would count, in Locke's view, as illegitimate state action.

The language of Locke clearly resonates in contemporary readings of the Constitution that accord a high degree of protection to individual rights of liberty and privacy, including parental rights.\textsuperscript{78} As Fitzgerald puts it, "[r]especting the dignity of individuals . . . requires that the state respect the autonomous indi-

\textsuperscript{74} Id. \textsection 131.
\textsuperscript{75} What sense, Locke asks, does it make to cede authority to a state that causes precisely the sort of damage that the state was created to avoid? Id. at IX, \textsection 131.
\textsuperscript{76} Id. at XI, \textsection 135.
\textsuperscript{77} See id. \textsection\textsection 134-42; see generally id. chs. XVIII-XIX.
\textsuperscript{78} So Fitzgerald and others have suggested. See supra notes 12-13 and accompanying text.
individual’s choices and decision making. Originating in these principles, our Constitution thus describes a constrained state, and our Bill of Rights a shield for individuals to raise against potential state interference with autonomous choice.”

The problem liberalism poses for children, then, is that it disables the state from regulating the relationship between parent and child. Taking the farmer’s cow violates the farmer’s right of property; telling men and women generally how to raise their children violates their right of liberty. And the state is not legitimately in the business of violating rights but rather preserving them. Thus, while Locke exhorts parents to raise their children well, and to pay particular attention to their children’s education, it is not at all clear that contemporary theorists stray far from Locke when they argue that fundamental decisions regarding the custody and control of children should be, in general, the parents’ rather than the state’s.

But children enjoy no comparable rights of liberty, in Locke’s view. For Locke, the right of liberty accrues with the ability to reason: the child, who lacks “reason to guide him,” thus lacks the right of liberty. Contemporary theorists tend to agree with Locke on this point as well.

The close connection between the right of liberty on the one hand and reason on the other that Locke insists on may seem quite obvious, as it does to Fitzgerald and Minow. Isn’t it just common sense, after all, that for practical purposes to grant children liberty is to abandon them as “Brutes” and thus something we morally ought not do? But “common sense,” in the absence of any normative theory, from a philosophical point of view counts for very little. When we press further as to why the right of liberty should be accorded only to those individuals who have the ability to reason in the sense described, the sole

79. Fitzgerald, Maturity, supra note 8, at 11, 23.
80. See supra note 16 (regarding parents’ rights of control with respect to their children). With contemporary constitutional scholars, Locke rejects the idea that parents’ authority over their children is absolute; presumably in some instances, in Locke’s view, the state may properly act to sever the relationship between parent and child. The parent’s power, Locke writes, “so little belongs to the Father by any peculiar right of Nature, but only as he is Guardian of his Children, that when he quits his Care of them, he loses his power over them, which goes along with their Nourishment and Education . . . [s]o little power does the bare act of begetting give a Man over his Issue, if all his Care ends there, and this be all the Title he hath to the Name and Authority of a Father.” Locke, Second Treatise, supra note 68, § 65.
81. Id. § 63.
82. See supra note 16 (regarding cases in which children are not recognized to have claims independent of their parents against the state).
83. Locke, Second Treatise, supra note 68, at VI, § 63.
response Locke provides himself with is simply "nature." But, again, from a philosophical point of view "it just is" will not do. For this reason, we turn to Mill.

B. Mill's Liberalism

John Stuart Mill, writing some two hundred years after Locke, provides a far different, and more complete, explanation of his extension of a right of liberty to adults but not children.

1. Mill's Theory

Mill's liberalism, more clearly than Locke's, is shaped by its ethical underpinnings. For Mill the ultimate justification for our right as adults to please ourselves in the case of conduct that affects only ourselves (conduct that is, in Mill's words, purely "self-regarding") is found in the doctrine of utilitarianism. Thus Mill writes, "I regard utility as the ultimate appeal on all ethical questions . . ." Morality requires that we maximize happiness. And our best chance of maximizing happiness, in Mill's view, is to leave individuals free to choose for themselves whether or not to perform acts whose consequences affect only themselves.

The choices Mill is concerned to leave to the individual thus include, but are not limited to, the choices that we today consider protected under, among others, the First and the Fourteenth amendments to the U.S. Constitution. Whom we marry,

84. The foundation for these rights of freedom, equality, and independence is just, Locke writes, the "law of nature, i.e., . . . the will of God." Id. at XI, § 135; see generally id. at II, §§ 4-15.

85. JOHN STUART MILL, ON LIBERTY 10 (Elizabeth Rapaport ed., 1978) [hereinafter MILL, ON LIBERTY]. Where Locke's right of liberty hinges on the natural right of each reasonable individual to life, liberty and property, Mill "forego[s] any advantage which could be derived . . . from the idea of abstract right as a thing independent of utility." Id. Rather, in Mill's view the moral evaluation of conduct is determined by the relative utilities of the alternative courses of conduct open to an agent at a given time. And utility is defined in terms of the aggregate amounts of happiness and unhappiness experienced, by the agent and by others, over the long-run, as a result of the performance of the conduct. See JOHN STUART MILL, UTILITARIANISM 17-30 (Samuel Gorovitz ed., 1971) [hereinafter MILL, UTILITARIANISM]. Mill's utilitarianism has, of course, been much criticized. But plausible defenses of consequentialism generally have also been mounted. See, e.g., Fred Feldman, Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice, 55 PHIL. & PHENOMENOLOGICAL RES. 567 (1995); see also FRED FELDMAN, CONFRONTATIONS WITH THE REAPER: A PHILOSOPHICAL STUDY OF THE NATURE AND VALUE OF DEATH 185 (1992).

The collection of Mill's writings contains much beyond ON LIBERTY and UTILITARIANISM that bears on children's lives. However, for my purposes here, it is enough to consider these two works.

86. See generally MILL, ON LIBERTY, supra note 85 at 9-14, 73-91.
whether we have children, what books we read and what thoughts we think will deeply affect the kinds of lives we lead and the kinds of people we will become. But these same choices matter little — if at all — to anyone other than ourselves. Moreover, these decisions affect us in ways that it is difficult for the community to predict.87 There are few clear one-to-one correlations between the intimate personal choices that we might make and specific quantities of happiness; one person derives happiness from reading Plato, another from reading Sara Paretsky. Finally, the community is less likely to treat choices that are important to us with the gravity we think our choices deserve.88 The community may not be as concerned with our doing what is best for us as we are; inattention or carelessness, stubbornness or bias, may cause them to overlook or disregard critical aspects of our particular case. Thus, in Mill's view we, rather than the community, should make such choices ourselves. We both know best, he believes, what will make us happy and care most that we achieve happiness.

At the same time the liberty that Mill would accord a right of is strictly delimited. For utilitarianism, the foundation of Mill's theory of liberty, always takes into account the consequences of acts for others as well as for the agent. Thus, conduct that imposes "definite damage, or a definite risk of damage, either to an individual or to the public," or "perceptible hurt,"89 or "direct harm,"90 on someone other than the agent can be, with perfect moral legitimacy, regulated by the state. Such conduct (which Mill refers to as "other regarding") falls outside the sphere of autonomy Mill would preserve, and includes any conduct the consequences of which spill over beyond the agent's own happiness or unhappiness to affect in some unavoidable way the well-being of another.91

87. Id. at 81.
88. Id. at 74.
89. Id. at 80.
90. Id. at 78.
91. Of course, even the most private of acts — birth control, perhaps sex and certain associations or affiliations — will bother others a great deal if these others happen to have knowledge of them. But Mill believes that the fact that conduct may cause mere offense does not imply that the conduct is other-regarding and therefore subject to regulation. Such offense is, rather, a "merely contingent or, as it may be called, constructive injury which a person causes to society by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself...." Id. at 80. The "inconvenience [occasioned by constructive injury] is one which society can afford to bear, for the sake of the greater good of human freedom." Id. In fact, what Mill refers to as "constructive injury" is generally the kind of harm that would have been avoided, had the offended
2. Comparison with Locke

Mill, like Locke, advocates a constrained state and, for the individual, a zone of liberty. But Mill's rationale for the constrained state differs from Locke's. Thus Mill avoids a range of nettling uncertainties that afflict Locke's theory.

As noted, Locke's rationale for according individuals a right of liberty against the state is that individuals who possess reason are naturally in possession of such a right, some part of which is relinquished to the state by those individuals at a particular historical moment. At this moment, according to Locke, these individuals freely effected a transfer of some of their natural authority to make decisions for themselves to the political society. And thus the state's own authority to act is limited by the terms of this initial consensual transfer of authority.

I will assume for purposes here the plausibility of Locke's description of the pivotal historical moment at which subjected individuals willingly consented to the authority of the state. Even so, two troubling questions arise regarding the terms and validity of the consent to governance. For one thing, Locke leaves us to ponder the intended scope of the transfer. Did the transfer include a consent to taxation? Conscription? General regulation for the public weal? The short-term "taking" of property to benefit the long-term protection of life and health? To benefit those not yet born or, more generally, to benefit anyone other than themselves? Locke supplies no good answer to these questions. The consent that legitimates state authority is, in his view, a contingent event; it is ungoverned by any clear guiding principle that we can uncover in reason or experience.

A related question arises as well. It is that Locke nowhere dispels the possibility that individuals emerging from the state of persons kept their minds on their own business. In other words: as between A's adjusting A's own emotional response to B's offensive personal act, and B's refraining from performing this act that is of enormous importance to B, the former alternative has the greater utility.

92. See supra notes 69-74 and accompanying text.

93. Locke insists that at some historical juncture individuals did in fact consent to governance. The consent of members of subsequent generations is implied, Locke argues, by their failure to emigrate from the political society. LOCKE, SECOND TREATISE, supra note 68, §§ 101-112.

94. At times Locke suggests that the authority granted the state is a broad authority — "he authorizes the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require . . . ." Id. at § 89. But at other points he suggests a narrower view: the state, whose reason to be is to protect property, may never take property without consent of the owner thereof, it being irrational for one individual to "change his condition with an intention to be worse." Id. at § 131.
nature had widely varying intentions and expectations with respect to the terms of the consent to governance. If Locke's historical thesis has any basis, it is very likely true that some individuals intended to consent to a skeletal government that would do no more than establish law and order while others intended the state to have a broader authority. In the absence of a normative theory — a theory that spells out the extent to which the state should be limited, and the extent to which individuals should be accorded a right of liberty against this state — Lockean rights talk is just talk; as to meaning, it is hopelessly indeterminate.

In striking contrast, Mill's utilitarianism enables him to draw lines. Thus he writes that “society is not founded on a contract, and . . . no good purpose is answered by inventing a contract in order to deduce social obligations from it . . . .”

It is Mill's utilitarianism that informs his view that, for example, the sphere of liberty we should protect includes those acts that are likely to cause their agents great happiness or unhappiness but have few consequences for anyone else, and excludes those acts the performance of which will impose definite damage on others. Issues remain of course. On Mill's view, can the state permissibly regulate drug use? The sale of one's own kidney? The sale of oneself into slavery? Suicide? But with Mill the mists of liberalism begin at least to fade.

3. Exclusion of Children

The connection that Mill makes between his liberalism and utilitarianism explains why he, like Locke, takes the view that children are not properly accorded a right of liberty. “It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. . . . Those who are still in a state to require being taken care of by others must be protected against their own actions as well as

95. Rawls' theory of justice, with roots in Locke's social contract view, avoids the claim that the formation of a social contract constitutes an actual historical event. But his theory has been criticized for making the assumption that individuals in the original position would choose to avoid similar kinds of risks and to accept certain basic principles. See Minow, Making All the Difference, supra note 21, at 154-56 (citing Alan Ryan, John Rawls, in The Return of Grand Theory in the Human Sciences 101, 110 (Quentin Skinner ed., 1985)). See generally Joshua Cohen, A More Democratic Liberalism, 92 Mich. L. Rev. 1505 (1994), and Michael J. Sandel, Political Liberalism, 107 Harv. L. Rev. 1765 (1994) (both are reviews of John Rawls' book Political Liberalism).

96. Mill, On Liberty, supra note 85, at 73.

against external injury.\textsuperscript{98} Lacking the maturity and experience of adults, children are less likely than adults to make choices, splendidly autonomous though these choices may be, that do in fact promote their happiness.\textsuperscript{99} Thus for Mill to do good for children, to make them happy, is to make their decisions for them.

Locke’s view supposes that the connection between the child’s inability to reason and the denial to the child of the right of liberty just is and is therefore unassailable. In contrast, Mill’s spelling out of the connection he perceives between the child’s relative immaturity and lack of experience on the one hand and, on the other, the denial to the child of the right of liberty allows us to identify a weakness in Mill’s own view and, as well, to chart how a Millian liberalism might plausibly be extended to children.

Mill is surely correct that granting children an unrestricted right of liberty would be wrong. Still, we might observe that there are plenty of cases in which a child would, as expertly as any adult, wield a given right of liberty — plenty of cases in which the child would choose, as well as any adult, \textit{precisely} in his or her own best short- and long-term interests.\textsuperscript{100}

Consider, for instance, the case of four-year-old Baby Richard. Had the State of Illinois allowed it, this child would presumably have opted to remain with his would-be adoptive parents who had cared for him since birth, rather than be transferred to the custody and control of a biological father whom he had never before seen. It seems likely that the child’s own interests would have been furthered had the state recognized and given effect to his wishes.\textsuperscript{101} Instead, the state first officially blessed (at


\textsuperscript{99} Mill thus is no libertarian; choices \textit{per se}, denuded of their consequences, are valueless.

\textsuperscript{100} My aim is to suggest that Millian liberalism requires the extension of liberty rights of a certain sort to children. Glendon has likewise found Mill more sympathetic than many liberals to children’s interests. Thus she has argued that Mill’s philosophy, though best understood to promote familial obligations and responsibilities, has in fact been distorted by interpretations of his work according to which the state should be barred altogether from paternalistic intervention. See Glendon, \textit{Abortion and Divorce}, supra note 10, at 121-23. However, Glendon’s argument rests on Mill’s express comments regarding the family. “It is now quite forgotten,” Glendon writes, “that Mill himself took a stern position with respect to the responsibilities of parents toward children.” \textit{Id.} at 122. In contrast, my argument depends on the utilitarian principles that ground his liberalism.

\textsuperscript{101} It is possible that the child’s interests would not have been better served had he been allowed to remain with his would-be adoptive parents; no hearing to determine Baby Richard’s best interest ever took place. However,
the trial court level) the affiliation between Baby Richard and his adoptive parents.\textsuperscript{102} And then, several years later and even more officially (by action of the state supreme court), the state severed this affiliation, forcing the four-year-old child into the custody of a man who was a perfect stranger to him.\textsuperscript{103}

If in a particular case giving effect to the child's choice would benefit the child, it would seem arbitrary not to protect the child's choice on the grounds that the child's choice will not benefit the child. With respect to this class of cases, we cannot coherently assert that we should not let the child choose because the child will not choose well. \textit{Ex hypothesi}, the child \textit{will} make the correct choice. There is a deep illogic to the argument that it will harm the child to extend to him or her a principle that by its terms is applicable only if its application, in fact, benefits the child — and to the view that paternalism, with respect to children, licenses us to disregard the harm that our actions impose on them. Thus, in the next part I sketch and defend a view according to which we extend to children a modified right of liberty, a right that operates just when the child's choice in fact serves his or her own best interests.

\section*{IV. Fitting Mill's Theory for Children}

On the view I suggest, children would be accorded a constitutional right of liberty, a right against the state to make certain kinds of choices for themselves. Millian liberalism, taken together with its utilitarian foundations, suggests two reasons why the right of liberty that we extend to children should not be unrestricted. First, according children an unrestricted right of liberty would represent a violation of our own moral obligations to protect the well-being of children and promote their interests. Second, according children an unrestricted right of liberty would defeat the underlying aim of a rule of liberty, that aim being, on Mill's view, to promote happiness. Thus, on the view I sketch children have a right of liberty, but their right of liberty functions

\begin{itemize}
  \item this possibility should not undermine the substance of my discussion. Of course, it might be contended that the child's only concern is that of reunification with his biological parents. Thus Fitzgerald takes note of and rejects the argument "that biological parents are always superior to adoptive parents because of the birthparents' genetic similarities to their children. . . . This argument, grounded in genetic determinism, enjoys little empirical support." Fitzgerald, \textit{Maturity, supra} note 8, at 75, n.443.
  \item 102. \textit{In re Kirchner}, 649 N.E.2d 324, 327 (Ill. 1995); see generally \textit{supra} note 6.
  \item 103. \textit{Kirchner}, 649 N.E.2d at 328; see generally \textit{supra} note 6 and \textit{infra} notes 130-48 and accompanying text.
\end{itemize}
only in those particular circumstances in which the child's choice in fact serves his or her own best interests.

I am not proposing that the child's right to choose be limited to those contexts in which it can be demonstrated that the child is sufficiently knowledgeable, reasonable, or mature enough, to choose.\textsuperscript{104} For one thing, the practical problems of determining whether a particular child is sufficiently mature to make a particular choice are quite overwhelming. More importantly, such a restriction would likely defeat any claim of liberty made on behalf of a very young child, who may have clear interests but may not be able to demonstrate any capacity for good decision-making. The adult's right of choice is not limited in this way. If the choice furthers the child's interests, it is unclear that there exists any reasonable basis for allowing the adult the right of choice but not the child. At the same time, my proposal, limited as it is by a principle of paternalism, would not extend even to the most experienced and mature ten- or twelve- or fourteen-year-old children the range of liberties to which adults are entitled. Rather, on my proposal, we acknowledge that children depend on the adults in their lives, and consequently that adults have manifold obligations to care for them and insure their well-being. Thus, on my proposal, maturity or capacity is neither necessary nor sufficient for according constitutional protection to the choices that children make.

Nonetheless, if our aim is to give effect to those choices that in fact serve the child's interests, we should keep in mind that the sorts of choices that children are particularly talented at making for themselves are just those as to which they possess all, or significantly all, of the pertinent information available to the adults in their lives. In contrast, when we as adults have information that is unavailable to them or that they cannot understand or interpret, it may happen that the child will choose one way and we will choose, for the child, another. In such cases, the child's choice should not be accorded constitutional protection. Thus, a child may badly want to remain in the custody of unfit parents rather than be placed in foster care with strangers. In such a case, we

\textsuperscript{104} Michael Wald, among others, discusses the advantages and disadvantages of according children a right of choice in some contexts — such as medical care, abortion, education and custody — against their parents. Michael S. Wald, \textit{Children's Rights: A Framework for Analysis}, 12 U.C. DAVIS L. REV. 255, 270 ff. (1979). He supposes, as I do not, that "[b]efore giving children a specific right it is necessary to determine whether children are likely to have the capacity to make the decision for themselves." \textit{Id.} at 273. Rodham as well suggests that capacity and the right of choice must be linked. See Rodham, \textit{Children Under the Law}, supra note 33, at 487 ff.
can see, where the child cannot, that giving effect to the child’s choice exposes him or her to unacceptable risks. In contrast, a child who has been in the custody of perfectly fit would-be adoptive parents for months or years, has developed a close relationship with these adults and has lost all meaningful connection with his or her biological parents, may opt to stay where he or she is. In such a case, we have little pertinent information that the child is not privy to and cannot understand and interpret as well as we can.  

The child’s “choice,” if restricted to those alternatives that in fact benefit the child, is (trivially) not one that will impose avoidable harm on the child. One might object, of course, that such a “choice” is not truly a choice. One might object, in other words, that recognizing and giving effect to children’s choices only if those choices are good ones is not properly categorized as a liberal scheme at all.

In a sense, perhaps, this point is unassailable. No one is suggesting that we allow children the unbridled right to choose in ways that are evidently contrary to their interests. Allowing children such a right would be like opening the door of an airplane at 10,000 feet and giving the child who has no parachute the choice whether to jump. And adopting such a view as constitutional doctrine could be construed to invalidate some of our best progressive legislation — child labor laws, compulsory education, state laws disabling children from entering into contracts and statutory rape laws. Thus, we should not give children a right of choice simpliciter. But it does not follow that children should not be given the right to have certain choices protected.

105. A similar analysis would have supported the Court’s decision in Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976) (unconstitutional to require consent of parent in case of minor’s abortion). The minor’s parent’s information is no better, and perhaps not as good as, the minor’s, and the child is no more likely than the adult, and perhaps less likely, to make a foolish choice.


107. We think, for example, that the scheme of laws that applies to us as adults is, generally, liberal in nature, one that accords to us various rights of speech and association and prerogatives to do as we choose in our private lives. We say this, even though our lives are at the same time subject to significant regulation, by authorities ranging from the federal Food and Drug Administration to the states that make it illegal to ride a motorcycle without a helmet. Thus we as adults have no constitutional right against the state to have
Even a restricted right of liberty would give children rights under the Constitution that they do not now enjoy. In the area of family law, prevailing constitutional interpretation deprives children, for the most part, of any constitutional protection of those interests — those wise choices — that are most fundamental to their well-being and that most deeply affect both their day-to-day lives and the kinds of lives they will lead and the people they will become over the long run. The Constitution is read to exclude, in other words, children’s actual interests from consideration whenever their interests conflict with their parents’ fundamental right to the care, custody and control of their children. Thus Baby Richard “lost” his case because his actual interests were deemed legally irrelevant to the war being waged over his body and mind. On my proposal, the fiction that children’s interests are just what their parents claim them to be would be unacceptable.

There is another sense, as well, in which it might be argued that the “choice” that a four- or six- or eight-year-old child may make is not a genuine choice. We do not think, I take it, that a four-year-old is actually capable of reasoned, judicious choice subsequent to an identification of alternative courses of action and assessment of their relative advantages and disadvantages. But there is no reason to think that choices must fit this particular notion in order to receive constitutional protection. Adults’ choices are protected or not, independently of whether they are judiciously made or mere whimsy.

our choice to use a certain drug — whether an illicit drug such as heroin or a drug as innocuous as a mild antibiotic — recognized and given effect. Our constitutional right of liberty against the state extends only to those interests that are constitutionally fundamental, and then only if no “compelling state interest” dictates a contrary result. Thus we already accept, in the case of adults, that it is necessary to restrict the wanton right of liberty by application of a rather modest paternalism. The paternalism we would employ in limiting the right of liberty in the case of children would simply be of a more stringent variety, and the liberalism we would extend would be restricted in a way that fits the circumstances of the child.

108. See supra note 16; see generally Fitzgerald, Maturity, supra note 8, at 22-84, and Clark, Children and the Constitution, supra note 8.

109. See supra note 16 and infra notes 149-69.

110. “While children have a due process liberty interest in their family life, that interest is not independent of the child’s natural parents’ interest absent a finding of unfitness” — a finding which must be proved under the stringent “clear and convincing” standard of evidence and which would legitimate termination of the natural parent’s status as “parent.” In re Kirchner, 649 N.E.2d 324, 339 (III. 1995). Thus is implied the doctrine that the child’s liberty interests are, for constitutional purposes, deemed identical to the actual interest of his or her biological parent.
Mill, among others, offers an alternative notion of choice, writing in Whitmanesque fashion about the value of individuality, originality, spontaneity, deviation, desires and impulses that are one's "own" as "leading essentials of well-being . . . " Thus Mill's view includes, alongside the more Lockean concept of judicious choice, a psychological, emotional concept of choice. In this sense, the child's wishes and inclinations are, like the adult's, choices, and to respect the wishes of the child is to respect the child's choice. Children do choose, at least in the sense that they want — just as their parents want, and at least as badly — things to come out a certain way.

On my proposal, only choices that are, from the child's point of view, in the child's own interests would be given constitutional protection. Thus it would not be enough, to guaranty protection, that the child thinks that a given choice reflects his or her interests. If the child is in error as to what his or her interests are, then the choice would not be protected.

At the same time, it is imperative that the child's interests not be defined in a way that allows a court to exercise its own uninformed or arbitrary discretion as to the proper rearing of children, or to exclude from consideration the child's own wishes and feelings. What a child wants may have a great deal to do with whether a given course of action is in a child's interests. For one thing, what the child wants itself may be evidence that one situation objectively serves the child's interests, or that another situation poses risks to the child. Such evidence, while clearly indirect, may be the only evidence available to the court other than a self-interested parent's own statement. A related point is that what the child wants may be an indication of what the child, emotionally, needs. Thus a child in a close, happy, healthy affiliative relationship with someone he or she regards as "parent" may have a certain emotional need to maintain this relationship; the choice that satisfies this emotional need thus may well be the one that, objectively, serves the child's interests. Finally, what the child wants is itself an indication that the severing of the critical relationship will produce both psychological

111. MILL, ON LIBERTY, supra note 85, at 54. Without individuality we are left only with a "collective mediocrity," masses whose "thinking is done for them by men much like themselves . . . ." and with a "tyranny of opinion." Id. at 63-64. Other philosophers as well as Mill have conceived reason as more than the ability to identify alternative courses of action and understand and evaluate the consequences of each. See, e.g., DAVID HUME, A TREATISE OF HUMAN NATURE Book I, Part III, § XVI (L.A. Selby-Bigge ed., 1978).

112. Thus the questions "Do you want to stay with this family?" and "Do you choose to stay with this family?" are, from both the child's perspective and Mill's fundamentally utilitarian perspective, functionally identical.
pain in the short run as well as the unhappy understanding gained over the long-term that one's own actual childhood interests simply did not, in crisis, count. 113

A court that fails to give proper weight to the child's own wants and desires might find, for example, that a child's interests require the unification of a four- or eight- or fifteen-year-old child with biological parents who are perfect strangers to him or her, or, more generally, that the child's own choice has no particular relevance to the scheme of restricted liberalism I suggest here. Nonetheless, it is, I take it, a matter of psychological fact rather than liberal theory that we cannot both do what is objectively best for the child and ignore his or her own wishes and choices.

The question arises how much weight we should accord what the child wants as we attempt to determine what is in the child's interests. I do not attempt to answer this question here. 114 It is clear, however, that the answer to this question may depend on the age of the child, the child's maturity and the nature of the particular conflict. A newborn baby perhaps will have no definitive wants, except to be cared for by someone or other. At a later stage, the child may, of course, express a very definite wish to be cared for by one adult, or pair of adults, rather than another, and his or her interests will in part be determined by that particular wish. 115

One might object that my notion of limiting a child's choices to those that serve the child's interests is contrary to the principles that sustain a pluralistic society. How can we, in other words, "objectively" determine what a child's interests are?

Notably, this objection is not open to any theorist who, for the good of child, would deny a right of liberty to the child, including particularly Mill. Moreover, while many judgments about what is good for the child are infected with great uncertainty (will it benefit the child, for example, to go to church with

113. See Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 YALE L.J. 1860, 1889 (1987) ("The adult who offers the child's view, unmediated, may advance an irrational or misguided position; the adult who supplies a preference other than the child's has no obvious tether and lands in the thicket of general uncertainty about what is good for the child.").


115. One array of suggestions for how we might go about assessing children's needs and interests appears in Woodhouse, Hatching the Egg, supra note 10, at 1827-44.
the Methodists rather than the Baptists, or is it better for the child to stay away from church altogether?), other judgments have stronger foundations. Woodhouse refers to Dr. Spock's adage that we know more about raising children than we think we know.\footnote{Id. at 1826. According to Woodhouse, "[w]e can (and, in some areas, already do) articulate norms that are especially responsive to children's experience, adopt presumptions about children's needs and adults' commitment and fitness that are not couched in terms of 'right,' and incorporate children's views into our deliberations." \textit{Id.} (citations omitted). More generally, "[t]he cure for the indeterminacy of the best interest standard is not to substitute the interests of the powerful (adults) but rather to take a closer look at the interests of the powerless (children)." \textit{Id.} at 1827 (citations omitted).}

If we don't know enough, I would add, then we should learn more. Thus, I do not see the argument for adopting a skeptical pose toward the issue of whether one option suits a child's interests better than another. I am not presupposing, after all, that we can manage to attain certainty regarding the ultimate nature of the \textit{summum bonum}. I am assuming, rather, that we are able to weigh the evidence and the psychological theory, and make sound judgments in some cases about what will produce, in a child, good physical and mental health — or I would prefer, following Mill, \textit{happiness}. Where we are not in a position to draw conclusions about whether the child's choice in fact serves his or her interests, on my view the choice would be outside any right of liberty. Thus, we may not be able to predict with any certainty that severing those firm and loving affiliative relationships that a four-year-old has come to depend on will generate an unhappy middle-aged man. But we can say with significant confidence that it is better for the child \textit{as child} to maintain those relationships.

Mill did not intend, it seems, the state to protect \textit{every} self-regarding choice the adult might make. The Mormon's choice to practice polygamy is one Mill would protect.\footnote{Mill, \textit{On Liberty}, supra note 85, at 89-91.} But he would not consider the state's regulation of commercial agreements, for instance, impermissible or an infringement of the right of liberty.\footnote{Id. at 93-113. Thus, "liberty is often granted where it should be withheld, as well as withheld where it should be granted ... ." \textit{Id.} at 103. More specifically: \textit{[T]rade is a social act . . . . [I]t is not recognized . . . that both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free . . . . Restrictions on trade . . . are indeed restraints; and all restraint, \textit{qua} restraint, is an evil; but the restraints in question affect only that part of the conduct which society is competent to restrain, and are wrong}}

We should, similarly, distinguish a class of children's
choices for protection, leaving, with the usual restrictions, the parents the right to make all the rest on their children's behalf.

On the view I propose, among all those choices children make that demonstrably benefit them, the choices that would be protected as fundamental are those that involve interests that have, from the child's point of view, the gravity and weight of the kinds of interests considered fundamental for constitutional purposes when asserted by an adult. What precisely these interests are, in the case of children, is a difficult, but not impossible, question. We have no completely adequate answer to the question what adult's fundamental interests are. But we do not

solely because they do not really produce the results which it is desired to produce by them. As the principle of individual liberty is not involved in the doctrine of free trade, so neither is it in most of the questions which arise respecting the limits of that doctrine, as, for example . . . arrangements to protect workpeople employed in dangerous occupations . . . . Such questions involve considerations of liberty only in so far as leaving people to themselves is always better, caeteris paribus, than controlling them; but that they may be legitimately controlled for these ends is in principle undeniable."

Id. at 94.

119. According to the Illinois Supreme Court, strength of feeling is not of itself telling on the issue of whether an interest counts as fundamental. In re Kirchner, 649 N.E.2d 324, 339 (Ill. 1995) (citing Smith v. Organization of Foster Families, 431 U.S. 816, 858-59 (1977) (Stewart, J., concurring)) ("grievous losses, psychological, emotional and otherwise, that foster children might suffer upon removal to another family did not, in and of themselves, create a liberty interest in the continued maintenance of that relationship"). In some ways this point is obvious. Young children may just as emphatically protest being subjected to a very necessary medical procedure as being wrenched by state law enforcement agents from the arms of those whom they regard as family. Still, it seems that sustained "grievous loss" might be used as an important indicia of the child's fundamental interest. Thus "we protect the family because it contributes so powerfully to the happiness of individuals . . . ." Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). Generally, in the medical cases generally we do not expect that the child's misery will be sustained. There is a second way, as well, of distinguishing the constitutional claims on behalf of the child in the family case and the medical case. In one case the child's choice furthers the child's own interest, and in the other case it does not.

The controversy regarding the question of what constitutes a fundamental interest is disquieting. On the view of Justice Scalia, a critical issue is always whether the interest whose protection is sought is one that is "traditionally protected by our society." Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (unwed father's interest in maintaining a relationship with his daughter whose mother was married to another man "is not the stuff of which fundamental rights qualifying as liberty interests are made"). It is not enough, the Court held, that the interest be "fundamental (a concept hard to objectify)." Id. The "cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . . .'." Id. at 122-23 (citing Griswold v. Connecticut, 381 U.S. 479, 501 (1965)). The same
deny adults the protection of such rights on the grounds that a fully coherent and widely accepted account of what constitutes a fundamental interest has yet to be articulated. Thus we should not rule out protecting children's interests on the grounds that

analysis appears in *Bowers*. There, the Court refused to strike a Georgia statute that criminalized sodomy, in part on the grounds that "[p]roscriptions against that conduct have ancient roots," and fundamental liberties are limited to those that are "‘deeply rooted in this Nation's history and tradition . . . .'" *Bowers*, 478 U.S. at 192 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

There are three difficulties, one peculiar to children, with the view that protected interests must pass the "history and tradition" test. One is that the test itself is in many contexts indeterminate. Thus for instance one might well, using the same test, come to a conclusion opposite the majority's in *Bowers*. One might, that is, argue that the Georgia statute in fact implicates a protected interest, since it implicates privacy and privacy is an important value within the "history and tradition" of our society. A second problem with the "history and tradition" test, from the child's perspective, is that when it is determinate — as perhaps it is in the case of children's claims of liberty rights — there is no check on the foundation from which its result is produced. Thus for instance within our own history and tradition are many centuries in which parents have been perfectly free to treat their offspring as, more or less, chattel. See Fitzgerald, *Maturity*, supra note 8, at 35-40, especially n. 153 at 35 (citing WALTER O. WEYRAUCH & SANFORD N. Katz, AMERICAN FAMILY LAW IN TRANSITION 495-96 (1983)) ("paternal control also included in colonial Massachusetts the right of the father to kill his disobedient child"). Finally, the test is based on a clearly false principle. To see this, consider again the issue of children's rights of liberty. The issue is not limited to whether it is constitutional today to deny children a right of liberty. Rather, the issue involves whether denying children a right of liberty was, ab initio, constitutional. Phrasing the "history and tradition" test with this question in mind, we obtain the following principle: *if* ab initio the right was denied, *then* ab initio it was denied constitutionally. But this principle is clearly false, since it entails that any egregiously unjust course of conduct that we as a society undertake, even conduct that is prohibited on the face of the Constitution and in conflict with the Constitution's underlying principles, is in fact constitutional. Because we have done it, it was right.

Thus Justice Blackmun wrote:

Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. *Bowers*, 478 U.S. at 199 (Blackmun, J. dissenting) (citing Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

At times the Court has emphasized tests other than the "history and tradition" test. Thus, we might protect those interests that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or those interests which are such that "neither liberty nor justice would exist if [they] were sacrificed." *Id.* at 326 (citing *Twining v. New Jersey*, 211 U.S. 78 (1908)). Notably, the Court in *Bowers* rejects — as "facetious" — the claim that a right to engage in sodomy is "‘implicit in the concept of ordered liberty.’" *Bowers*, 478 U.S. at 194.
what counts as fundamental from their point of view is a difficult question.

There are, despite the controversy, some clear cases. Among others, it seems that a child’s interest in family would count as fundamental for constitutional purposes. The Supreme Court has given significant protection to parents’ rights to the custody and control of their children\textsuperscript{120}; what remains is to give similar protection to children’s interests with respect to those they regard as family. The deep need parents have for their children is equalled only by the deep need children have for those they take to be parents. All individuals, including children, would seem to have a “fundamental interest . . . in controlling the nature of their intimate associations with others.”\textsuperscript{121} The insult to the child when the state intercedes to breach the relationship between child and the individual the child perceives as “parent” is just as great as the insult to the parent.

In addition to an interest in family, an interest in education is one that, for the older child, should be considered fundamental. Thus according to Justice Douglas children themselves should be consulted to determine whether they wanted the parochial school education that their parents want them to have.\textsuperscript{122} An interest in religion, too, may be considered fundamental for the older child. Finally, the child’s interest in undergoing or avoiding various medical procedures or treatments at any age is surely, like the adult’s, fundamental. Thus the adolescent’s right to abortion should be protected.\textsuperscript{123} That the child’s choice does not conform to his or her parents’ own cultural or religious traditions would not seem to make a difference, where the choice is in respect to some fundamental matter. Thus suppose an adolescent is disinclined to undergo female genital mutilation. That the child’s parents, for cultural or religious reasons, want the child to undergo the procedure should not by itself decide the issue of whether the girl must submit to it. If she wants to avoid it, then given that it seems likely that it is in her best interest to avoid it, a court should not offer on grounds of freedom of reli-

\begin{itemize}
  \item \textsuperscript{120} See infra notes 149-69 and accompanying text (discussion of Stanley v. Illinois, 405 U.S. 645 (1972) and its progeny).
  \item \textsuperscript{121} Bowers, 478 U.S. at 206 (Blackmun, J., dissenting).
  \item \textsuperscript{122} Wisconsin v. Yoder, 406 U.S. 205, 242 (Douglas, J., dissenting) ("Where the child is mature enough to express [desires that potentially conflict with his or her parents'], it would be an invasion of the child's rights to permit such an imposition without canvassing his views.").
  \item \textsuperscript{123} This is one instance in which the Supreme Court has recognized the child's fourteenth amendment right to make choices that conflict with her parents'. Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976) (unconstitutional to require consent of parent in case of minor's abortion).
\end{itemize}
gion any exception to state laws that proscribe or penalize it nor uphold any statutory or common law scheme that would permit the parents to make the choice for the girl.

At the same time, some interests that we might consider fundamental with respect to adults and to older children are ones that we might not consider fundamental with respect to younger children. Newborns may have an interest in being cared for, by someone or another, but may not have any fundamental interest in remaining in the custody of any particular adult. Moreover, the very young child may have little interest, and certainly no fundamental interest, in attending one type of religious service or another.

It might be argued that extending a right of liberty to children is pointless in that children, unlike adults, lack the ability to achieve the good ends they have chosen for themselves. It is a problem for my proposal if all that it does is accord children rights of liberty that they lack the wherewithal to implement.

Two points are important here. One is that we badly misjudge things if we think that children are generally incapable of implementing their own choices. A good example here, again, is the case of Baby Richard. The four-year-old child was perfectly capable of remaining in the arms of his would-be adoptive mother, on the day scheduled for his transfer to his biological father. The only expense — that of raising a child — would have been to the adoptive parents themselves, and it was a cost they had already consented to bear. The second point is a point of clarification. The Constitution with some exceptions, notably the right of counsel in criminal matters, is generally understood to parcel out only “negative,” never “positive,” rights against the state. While there may be very good reasons to reject this understanding of the Constitution, my proposal does not require that we do so.

A final worry is that recognizing the child’s liberty right will lead to inefficiencies in the administration of the judicial system. But for two reasons this objection will not work. First, as a general matter, we do not deprive individuals of fundamental rights, like the right to a fair trial or the right to counsel in criminal matters, on the grounds of efficiency, and so it would be unfair to deny children their fundamental rights on such grounds. Second, in the end it is far from clear where the efficiencies lie. Indeed, it is tenable that greater respect for children, though possibly inconvenient in the short term, will maximize efficiencies — that is, utility — over the long term.
V. MILL'S INDIVIDUALISM AND CHILDREN'S RIGHTS

On the view of Fitzgerald, Minow and Woodhouse, the individualism of traditional liberal theory seems primarily a Lockean doctrine of individual autonomy — a doctrine that protects only the interests of those who are able to reason (that is, able to make good choices on their own) and independent (that is, able to implement on their own the choices they make). Certainly we see this doctrine in Mill as well. But, as a function of the utilitarianism on which it is based, Mill's individualism is also strongly egalitarian. His individualism, in other words, includes the notion that we must, in order to distinguish morally permissible courses of conduct from others, recognize each person, including each child, as an individual with his or her own distinct set of needs and interests.\textsuperscript{124} No grounds exist, on Mill's view, by which we might disregard, consistent with moral principle, the happiness or unhappiness experienced by any individual as a consequence of any action, course of conduct, rule or regulation. Thus, on Mill's view, the happiness of the child counts just as much as the happiness of the parent.\textsuperscript{125} An implication of this view is that resolutions of the deepest conflicts between parent and child in the end must take into account the interests of parent and child, rather than represent a triumph in every case of parent over child.\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{124} See generally Mill, Utilitarianism, supra note 85, at Chapter II.
\item\textsuperscript{125} Locke as well accepts a natural right of "equality of men" as well as liberty; thus he, like Mill, endorses a certain egalitarianism. Locke, Second Treatise, supra note 68, at chap. II, §§ 4-5. But the domain of individuals who possess the right of equality is, in his view, as limited as the domain of individuals who possess the right of liberty. Thus women, in his view, are not quite equal to and have, correspondingly, less liberty than men. Id. at VII, § 82.
\item In fact, some theorists have analyzed Mill's concept of liberty in terms of a more basic right of equality:
\begin{quote}
Mill saw independence as a further dimension of equality; he argued that an individual's independence is threatened, not simply by a political process that denies him equal voice, but by political decisions that deny him equal respect. Laws that recognize and protect common interests, like laws against violence and monopoly, offer no insult to any class or individual; but laws that constrain one man, on the sole ground that he is incompetent to decide what is right for himself, are profoundly insulting to him. They make him intellectually and morally subservient to the conformists who form the majority, and deny him the independence to which he is entitled.
\end{quote}
Dworkin, Taking Rights Seriously, supra note 21, at 263.
\item It goes without saying that the best practical means of protecting the interests of any particular collection of individuals is to protect and promote the relationships among them. Ordinarily, little is more important to us, as individuals, than our relationships.
\end{enumerate}
\end{footnotesize}
Thus Millian individualism would seem not to lead us, in Fitzgerald's words, to "abandon [children], bereft of adult guidance, to foolish choices regretted in later life." Minow argues that an "autonomous individualism" that "leaves each person 'free' to protect himself or herself in an indifferent or hostile world" will fail children. Of course she is right. But this doctrine of "rugged" individualism which she refers to here is at odds with Mill's egalitarian individualism, according to which the state is obliged not to prefer the interests of individuals occupying one class over the similar interests of individuals occupying another class. Assuming the state protects the interests of some individuals, other individuals with interests of equal weight should emphatically not be left, in Mill's view, unprotected in a "hostile" world.

VI. CHILDREN'S FAMILY RIGHTS

A. The Baby Richard Matter

It is worth considering a specific case to see how Mill's liberalism, extended in a logical way, might help to protect the interests of children. The case I will focus on involves the child known as "Baby Richard."

127. Fitzgerald, Maturity, supra note 8, at 33.
128. MINOW, MAKING ALL THE DIFFERENCE, supra note 21, at 268.
129. Theorists sometimes focus on principles that are common to Lockean and Millian forms of liberalism rather than principles that distinguish the two theories. See Hampton, Retribution, supra note 13, at 135; and Cook, The Death of God, supra note 13, at 1456. Glendon carefully distinguishes Mill's view from the views of other liberals. See GLENDON, ABORTION AND DIVORCE, supra note 10, at 121-22. Nonetheless, Glendon, at times, suggests that liberalism, whether of the Millian or the Lockean variety, advises a political system in which individuals are allowed to accord priority to their own personal needs, to the exclusion of the needs of others, rather than a system whose aim is to secure the liberty under the law of each individual. See GLENDON, RIGHTS TALK, supra note 10, at 47-61. The former laissez-faire tenet has been frequently associated with liberal theory. But this tenet, which defines a minimalist government with few obligations toward its subjects, hardly defines Millian liberalism, which would seem to require considerable efforts, by an activist government, to insure that the rights of the few do not find themselves trampled by the rights of the many, or vice versa.

In any event, no doctrine of "rugged" individualism accurately describes the powerful right accorded to the parent-individual when contemporary jurisprudences bow to an absolutist theory of parental rights. In such circumstances parent-individuals have hardly been left free to protect themselves in an "indifferent" world. Rather, extreme deference and solicitude have been paid to them. Indeed, the better description is that the parent-individuals' interests have been protected, and protected mightily, to the exclusion of the interests of others — a tenet inconsistent with Millian individualism.
In this case, before the child was born the child's biological mother (Janikova) arranged a private adoption with the would-be adoptive couple (the Does). When the newborn was just four days old, Janikova signed a consent to adoption. The newborn was immediately transferred to the Does. Janikova was not married at the time she gave birth; and, during the latter portion of her pregnancy, she severed — temporarily, as things turned out — her relationship with the child's biological father (Kirchner). According to the court's majority opinion, Janikova failed to notify Kirchner of the birth and, along with the Does and their lawyer, participated in a scheme to deceive Kirchner into thinking that the baby had in fact been born dead. Moreover, the attorney for the Does, according to the majority, "falsely stated that the father 'upon due inquiry cannot be found so that process cannot be served upon defendant.'" In addition, the Does, according to the majority, "in their adoption petition filed with the circuit court ... falsely alleged under oath that the father was 'unknown.' " Fifty-seven days after the child's birth, according to the majority, Janikova revealed to Kirchner that the baby had in fact been born alive and placed in an adoptive home. The baby was born on March 16, 1991, and on June 6, 1991, Kirchner's lawyer "entered an appearance on [Kirchner's] behalf in the subject adoption proceeding."

The Illinois statutory scheme provides that if an unwed father fails to show "a reasonable degree of interest, concern or responsibility as to the welfare" of his child within the child's first thirty days, he may be deemed "unfit." The trial court found, pursuant to this statute, that Kirchner was unfit; that his consent to adoption was, therefore, unnecessary; and thus that his challenge to the adoption proceedings was without foundation. The appellate court upheld this ruling. The Illinois Supreme Court reversed, on the grounds that the trial court's finding that Kirchner had failed to show sufficient interest in the child during

130. *In re Kirchner*, 649 N.E.2d 324, 326 (Ill. 1995).
131. *Id.* at 340.
132. *Id.* at 326.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 327.
137. *Id.*
his first thirty days was not "supported by the evidence."

According to the court, the unwed father

made various attempts to locate the child, all of which were either frustrated or blocked by the actions of the mother. Further, the mother was aided by the attorney for the adoptive parents, who failed to make any effort to ascertain the name or address of the father despite the fact that the mother indicated she knew who he was. Under the circumstances, the father had no opportunity to discharge any familial duty.

Thus the supreme court vacated the adoption of the then three-year-old Baby Richard.

With the support of the governor of Illinois, the General Assembly of Illinois strove to rectify matters. This body reasoned that the supreme court's ruling, while settling the unwed father's claim of parental rights to Baby Richard, left open the question whether the biological father must necessarily be granted custody of the child. Legislation was promptly passed, and signed by the governor, requiring a best interests hearing for the purpose of determining custody in cases in which a judgment order for adoption is vacated. When the matter came before the supreme court a second time, in the form of a petition by Kirchner for a writ of habeas corpus, the court ruled that its earlier order vacating the adoption resulted in the "automatic reversion" of the right of custody and control of Baby Richard to Kirchner; that these rights had "vested"; and that the doctrine of separation of powers prohibited the legislative branch of the state government from annulling decisions rendered by the judicial branch. Moreover, according to the court, the unamended

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141. *In re Petition of Does*, 638 N.E.2d at 182.
142. *Id.*
143. The Adoption Act was amended by the following provision:
In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act.

The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings.

This amendatory Act of 1994 applies to cases pending on and after its effective date.

144. *In re Kirchner*, 649 N.E.2d 324, 337-38 (Ill. 1995). On the issue of separation of powers, the court wrote that
statutory scheme did not support the Does' position that the order vacating the adoption left the custody issue unresolved. Portions of that statutory scheme which could be read to suggest that non-parents have standing in certain circumstances to commence a custody proceeding, according to the court, had to be "narrowly construed to ensure the sanctity of the family and the reciprocal familial rights of parents and their children." In particular, the statutory scheme had to be interpreted in light of a certain federal *constitutional* principle, to wit:

[F]athers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship. To hold otherwise would be

the General Assembly is not a court of last resort and it may not attempt to retroactively apply new statutory language to annul a prior decision of this court. ... The Amendment to the Adoption Act cannot be constitutionally applied retroactively ... The legislative branch of Illinois' three-branch government cannot sit as a reviewing court over the decisions of the judicial branch which has adjudicated a suit at law and established and articulated the legal rights of the parties to the litigation. To hold otherwise would render the separation of powers doctrine a nullity and threaten the very fabric of our democracy.

*Id.* at 336-38. The question of the court's analysis of the doctrine of separation of powers will not be addressed here, other than just to note that the court does not explain why a statute that on its face appears to apply only upon the court's vacating an adoption order could be construed to annul such an order. *Id.* at 338.

145. *Id.* at 334. Section 601(b)(2) of the Marriage and Dissolution of Marriage Act provides for the commencement of a child custody proceeding by a non-parent, prior to termination of parental rights or a finding of unfitness; non-parents have standing to invoke this provision only if the child "is not in the physical custody of one of his parents. On the court's view, the fact that "physical possession is not the same as physical custody... defeats the Does' standing argument" under § 601(b)(2), since they, on the view of the court, have "possession" of the child but not "custody." *Id.* at 335. Physical custody is achieved, according to the court, only in contexts in which the parent has "voluntarily... relinquished" the child to the custody of another. *Id.* Until such time as the child has been voluntarily relinquished, the provisions of the Illinois Adoption Act prevail. This Act "provides that where the birth mother is not married to the father, his consent to the adoption is essential except where he has been found unfit by clear and convincing evidence." *Id.* at 333 (citing ILL. ANN. STAT. ch. 750, para. 50/8(a)(1) (Smith-Hurd 1994)). While the Adoption Act does not "explicitly address the rights of all the parties to a failed adoption... the procedural safeguards... militate that fathers be placed in the same legal position after the vacation of an invalid adoption as they were in prior to the invalid adoption's approval." *Id.* at 334.
to encourage and reward deceit similar to that which occurred in the instance case.\textsuperscript{146}

This constitutional principle rests, according to the court, on a line of decisions in which the U.S. Supreme Court, though not expressly discussing the unwed father's rights "when he seeks to raise his child but is prevented from doing so through deception," recognized the parental rights of unwed fathers under the due process clause of the Constitution.\textsuperscript{147}

Thus, in the late spring of 1995, the court ordered the four-year-old Baby Richard removed from the home of the only parents he had ever known and transferred to a biological father who was a perfect stranger to him.\textsuperscript{148} As much of the nation watched in horror, a pale and worried and finally weeping Baby Richard, his "finalized" adoption having been declared a nullity, was handed over, under threat of force, by the would-be adoptive mother, a woman who appeared already in mourning, to a man the child had never before seen.

B. Constitutional Law Background of Baby Richard Matter

1. \textit{Stanley} and its Progeny

In deciding the Baby Richard matter, the Illinois court makes reference to a line of cases, commencing with \textit{Stanley v. Illinois}, in which the Supreme Court held (among other things) that unwed fathers have a fundamental right to the care, custody and control of their own children under the Fourteenth Amendment.\textsuperscript{149} Under this line of cases, a state is generally prohibited

\textsuperscript{146} Id. at 333. The court states that its "decision [regarding the inapplicability of § 601(b)(2)] is based solely on Illinois law." \textit{Id.} At the same time, the court clearly implies that its construction of § 601(b)(2) is necessitated by the rights unwed fathers have been afforded by "our Federal Constitution." \textit{Id.} Thus, the "superior right of the natural parents to the care, custody and control of their child is the law of the land and is also embodied in Illinois statutory law." \textit{Id.} at 334.


\textsuperscript{148} \textit{In re Kirchner}, 649 N.E.2d 324, 340 (Ill. 1995).

\textsuperscript{149} \textit{Stanley}, 405 U.S. at 657-58 (termination of parental rights without showing of unfitness violates unwed father's right of due process); \textit{Caban}, 441 U.S. at 394 (requiring consent of mother but not unwed father violates right of equal protection); \textit{Lehr}, 463 U.S. at 262 (unwed father has due process right to notice to adoption and hearing only if child and father are linked by some "significant custodial, personal, or financial relationship") and at 248 (biological relationship alone insufficient to give unwed father a right of consent with respect to child's adoption). \textit{See also} Santosky v. Kramer, 455 U.S. 745, 768 (1982) (parental rights cannot be terminated in the absence of clear
from terminating such rights in the absence of the father's consent unless the state has established that the father is unfit or has abandoned the child.\textsuperscript{150} For purposes here, the most important exception to this rule applies, under \textit{Lehr v. Robertson}, when the unwed father has failed to "grasp" the opportunity to develop a "substantial relationship" with the child in question.\textsuperscript{151} In such cases, the Supreme Court has held that the unwed father has no constitutional rights of parenthood under the Fourteenth Amendment.\textsuperscript{152}

As the Illinois court noted, the U.S. Supreme Court has never expressly addressed the issue of the extent to which the Fourteenth Amendment protects the unwed father who is improperly prevented, by "deception" or otherwise, from establishing a substantial relationship with his child.\textsuperscript{153} Whether parental rights are recognized in such cases has enormous implications. Parents are permitted to determine what sort of education and religious training their children will have;\textsuperscript{154} and parents are particularly "privileged" to use force against a child.\textsuperscript{155} Critically, a parent has standing to claim physical, primary custody of a child, and the right to consent to the adoption

\begin{itemize}
  \item \textsuperscript{150} See \textit{Stanley}, 405 U.S. at 657-58; \textit{Caban}, 441 U.S. at 394.
  \item \textsuperscript{151} \textit{Lehr}, 463 U.S. at 262, 267. Expounding on \textit{Stanley}, the Supreme Court in \textit{Lehr} held that the biological link between father and child does not guarantee parental rights. Rather, the Court said, the biological link provides "an\textsuperscript{an} opportunity that no other male possesses to develop a relationship with his offspring." \textit{Id.} (emphasis added). The individual who fails to "grasp" that opportunity cannot subsequently assert that his parental rights were violated by an adoption to which he did not consent. Thus \textit{Lehr}\textsuperscript{suggests} without resolving the critical issue of Baby Richard: \textit{what if}\ the "opportunity" assumed in \textit{Lehr}\textsuperscript{to be extended to the unwed biological father is not as a matter of fact extended to him?}
  \item \textsuperscript{152} A second exception to the \textit{Stanley} rule, not pertinent to the Baby Richard case, applies when the child's mother is married at the time of the child's birth. Under this second exception, even where the unwed father has developed a substantial relationship with the child, the "marital presumption" — adopted by some states but not others, to the effect that a child is conclusively presumed a child of his or her mother's lawful husband — may bar his assertion of parental rights. \textit{Michael H.}, 491 U.S. at 124, 127.
  \item \textsuperscript{153} \textit{In re Kirchner}, 649 N.E.2d 324, 333 (Ill. 1995).
  \item \textsuperscript{155} Fitzgerald, \textit{Maturity}, supra note 8, at 36, n.156.
\end{itemize}
of his or her child by any "nonparent." Moreover, since the unwed father who is deemed a parent for constitutional purposes retains a right of veto, an unwed mother cannot unilaterally decide to place her child for adoption, even if she correctly believes that adoption is in the child’s best interests.

In contrast, one declared a nonparent is usually considered to have inferior rights, or no rights at all, with respect to a child. In normal circumstances, a nonparent — a grandparent, an ex-foster parent or simply a nosey next door neighbor — may be effectively removed by the parent from the child’s life, prohibited from having any sort of contact whatsoever with the child and denied standing to bring any legal action that would interrupt the parent’s right to the care, custody and control of his or her own child.

2. Critique of Stanley

Psychologists think that children need stability in their family lives. Stanley and its progeny might be understood as an attempt by the U.S. Supreme Court, among other things, to provide children with such stability. Whatever the advantages of a middle-class upbringing, Stanley would clearly prohibit, for example, a state from terminating an individual’s parental rights in his or her child on grounds of parental poverty. Since a child is far more likely to be concerned about the loss of family than about class slippage, from the child’s point of view Stanley produces, in this sort of case, the right result.

Stanley and its progeny also protect birth parents, providing them with a valuable Dworkinian “trump card” that they may play against those who would be happy to take their children from them — both against state welfare agents and state court judges, who may not fully credit the simple achievement of keeping hearth and home together, and against would-be adoptive parents, who may otherwise, through tactics of delay and forum-shopping, be in a position to manipulate an expensive and intimidating legal system in their favor.

156. See supra note 149.


At the same time, Stanley and its progeny are problematic in seeming to disregard the risk to the child that is imposed by granting the unwed father such a trump card that he may play at will against his child. The case of Baby Richard is one in which this risk eventuated.  

As noted above, the Illinois Supreme Court held that Stanley and its progeny required a certain interpretation of the state statutory scheme — an interpretation that deprives the child of the right to have his interests heard until such time as the father voluntarily relinquishes his own parental rights to the child. Thus, the court, having already ruled that Kirchner's parental rights had been improperly terminated, further ordered that Kirchner was automatically entitled to the exclusive care, custody and control of Baby Richard.  

It is no accident that the decisions that seem most oblivious to children's needs and interests involve cases in which father and child lacked the "substantial relationship" that was the focus of the Court in Lehr. Thus, in the Baby Richard matter, it was the Illinois court's award of exclusive custody to a man who was, from the child's point of view, a virtual stranger that created the risk that the child would be devastated. The court might have construed the ambiguous Lehr to require an actual "substantial relationship" between parent and child. Instead, the court

160. Similar issues have arisen in other cases as well. See In re Clausen, 502 N.W. 2d 649 (Mich. 1993), stay denied sub nom, DeBoer v. DeBoer, 114 S. Ct. 1 (1993). See generally the discussion in Fitzgerald, Maturity, supra note 10, at 72 ff. The Baby Jessica rulings have already had an adverse affect on children; at least, the Illinois court cited the Baby Jessica case in support of its own ruling that "no such liberty interest exists as regards Richard's psychological attachment to the Does." In re Kirchner, 649 N.E.2d 324, 339 (Ill. 1995) (citing In re Clausen, 502 N.W. 2d 649 (Mich. 1993)). See generally Clark, Children and the Constitution, supra note 8, at 14-29 (Court's opinion in Stanley "concentrated exclusively on the rights of the father, treating the children more like inanimate objects than persons.").

161. See supra notes 145-47 and accompanying text.

162. See supra notes 144 and accompanying text.

163. See supra notes 149-152 and accompanying text.

164. Notably, the facts described by the dissent in Lehr indicate that in this case the unwed father had attempted to establish a relationship with his child, which attempt had failed due to conduct that might be described as the mother's "deceit." Lehr v. Robertson, 463 U.S. 248, 268-69 (1983). The Court nonetheless found his parental rights not to have been violated when, without his consent, the stepfather's adoption of the child was permitted to proceed. Consequently, the Illinois court might have understood Lehr to require the state only to respect any actual "substantial relationship" between unwed parent and child, but not require the state to respect merely hypothetical, or subjunctive, relationships (the relationship child and parent would have had, had such-and-such events not taken place), or, in the words of the Supreme Court in Lehr,
reasoned that such a requirement must be dispensed with in view of the fact that the unwed father's efforts to develop a relationship with his child had been thwarted by a combination of "lies, deceit and subterfuge"; 165 "[i]f one hold otherwise would be to encourage and reward deceit similar to that which occurred in the instant case." 166 Faced with the issue of whether Baby Richard's own liberty interest in maintaining his relationship with his would-be adoptive parents did not itself militate against an award of exclusive custody to Kirchner, the court took the view that although "children have a due process liberty interest in their family life, that interest is not independent of the child's natural parents' interest absent a finding of unfitness." 167 Kirchner not being unfit, Baby Richard has "no such liberty interest." 168 Thus the court fails to recognize in any meaningful way the child's own right of liberty. Its bold conclusion — that children in the context at issue have no liberty interest — would seem required by neither law nor logic and positively barred by any reasonable

"inchoate" relationships, between parent and child. Id. at 249. The subjunctive relationship is a relationship to which the child is by definition impervious. And so allowing the biological parent who bears a merely subjunctive substantial relationship to the child to claim a full range of rights in the child will almost always devastate, rather than secure, the child. In contrast, in the case of children old enough to identify the adults who are acting as parents, and old enough to experience trauma in the event that the relationship is severed, the actual substantial relationship necessarily will be a reciprocal one. The child will be conscious of it, and may be glad that it is protected, just in case the parent as well is conscious of it and aims to have it protected, by court order if necessary. See generally Katharine T. Bartlett, Re-Expressing Parenthood, 98 Yale L.J. 293, 318 ff. (1988), who notes that some states have concluded that "an unwed father who repeatedly attempts to establish a relationship with his infant might, nevertheless, have no parental rights if the mother succeeds in denying him access." Id. at 319 (citing In re T.E.T., 603 S.W.2d 793 (Tex. 1980), cert. denied, 450 U.S. 1025 (1981); and In re Steve B.D., 730 P.2d 942, 945 (Idaho 1986)).

The Supreme Court rejected the opportunity to disambiguate Lehr in a manner favorable to Baby Richard, just as it had in the Baby Jessica matter a few months before. DeBoer v. DeBoer, 114 S.Ct. 11 (1993) (application for stay denied). In that case, Justice Blackmun wrote: "This is a case that touches the raw nerves of life's relationships. While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk." Id.

165. In re Kirchner, 649 N.E.2d 324, 328 (Ill. 1995).
166. Id. at 333.
167. Id. at 339.
168. Id. (noting the Supreme Court's own failure in Smith v. Organization of Foster Families, 431 U.S. 816 (1977), to decide whether a child had a liberty interest in remaining with foster parents with whom a close psychological attachment had been formed). As noted, the Illinois court's view is not. See supra note 16.
extension of Millian theory to children. The argument in support of this holding was succinct: "To hold otherwise would be to overturn the entire jurisprudential history of parental rights in Illinois."

C. Baby Richard’s Right of Liberty and the Problem of Remedies

The Illinois Supreme Court has a clear interest in regulating the integrity of the proceedings before it, as well as the proceedings before any lower court. Moreover, the court has a need to insure that, to the extent possible, reparations are made for egregious violations of rights, particularly constitutional rights, resulting from the mistaken rulings of lower courts. Thus, it will hardly do to object to the court’s handling of the Baby Richard matter without addressing the dilemma of how the court is both (1) to give effect to Baby Richard’s liberty right and (2) to protect those who seek relief from the perpetuation of the serious errors of the courts below. The child’s needs, and the court’s, must be addressed in tandem.

It is by no means obvious that the supreme court’s original ruling overturning the trial court’s finding that Kirchner failed to show a reasonable degree of interest in Baby Richard within the first thirty days of the child’s life was correct. But if it was correct, then the question of how to repair the trial court’s error — and make reparations to the aggrieved Kirchner — arises. The level of “lies, deceit and subterfuge” engaged in by Janikova, the Does and their lawyer is also a subject of dispute between the majority opinion and a dissenting opinion. But if the parties

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169. Particularly, had the Illinois court interpreted Lehr with an eye to the child’s right, it might have reached a different conclusion regarding the application of the Marriage and Dissolution of Marriage Act, see supra note 145 and accompanying text, or, more generally, the constitutionality of the state legislative scheme, as well as the separation of powers issue. See supra note 144 and accompanying text.

170. The puzzle of remedies arose as well in the case of Baby M. There, the New Jersey Supreme Court held that, even though the child’s natural mother was erroneously deprived of custody in her four-month-old child, it would be unfair to the child to remedy this wrong by returning the child to the mother after three years. Thus, the wrong done the mother was never fully remedied (although it was partly remedied, by a recognition of her parental rights with respect to the child and a generous visitation schedule), and to some extent the father and his wife were allowed to benefit from the terms of a contract that should never have been recognized to begin with. But the court, rightly I believe, determined that the compromise was necessary to secure the child’s interest. In re Baby M., 537 A.2d 1227, 1257-58 (N.J. 1988) (“The child’s interests come first: we will not punish it for judicial errors assuming any were made.”).

171. Kirchner, 649 N.E.2d at 343-46 (McMorrow, J., dissenting).
did intentionally deceive the trial court, then the supreme court should be able to correct for this deceit and free the judicial system from taint. Finally, there is a vagueness to the constitutional rule that the supreme court adopts. Just how deep must the subterfuge be, in order that "fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship?"\textsuperscript{172} Must the subterfuge be itself illegal in nature, or just immoral? Or is the court's intent simply to impose a positive obligation on the mother to notify the father of the child's birth and to make the child available to the father so that the requisite substantial relationship can be formed? Does misconduct on the part of the unwed father himself have any bearing on whether the mother's subterfuge is to be excused by the court? Notwithstanding these questions, let us suppose that this vagueness can be clarified, and that in the Baby Richard case there occurred a subterfuge that was of the right kind and depth to trigger constitutional protection of Kirchner's parental rights.

To right all of these wrongs at once, the court gave immediate effect to Kirchner's parental rights with respect to Baby Richard, including particularly his rights of custody and control.\textsuperscript{173} But the question immediately arises whether the court could have fashioned suitable remedies to this litany of wrongs done and at the same time attended to the needs and interests of Baby Richard. Because the court deemed the child's interests to be identical to the father's,\textsuperscript{174} it left unaddressed a critical issue — whether the means exist, short of balancing the books on the back of a very young child, by which both the risk of future misconduct could be effectively limited and the wrong done to Kirchner repaired.

In fact, there is no reason to suppose that in each case the appropriate remedy is the most stringent available, or indeed to suppose "one size fits all" rather than a "mix and match" approach to remedies is appropriate or desirable. In lieu of ordering a full restoration of the unwed father's parental rights, including the rights of custody and control, the court could have pursued some combination of other sanctions, including fines, disbarment and incarceration. Or the court could have ordered

\textsuperscript{172} Id. at 333.
\textsuperscript{173} See supra notes 144-48 and accompanying text.
\textsuperscript{174} "While children have a due process liberty interest in their family life, that interest is not independent of the child's natural parents' interest absent a finding of unfitness." Kirchner, 649 N.E.2d at 339.
the modification or vacation of the prior order of adoption but stopped short of restoring to the unwed father exclusive custody and control with respect to the child.

Extending a right of liberty to children would serve to limit the otherwise vast array of sanctions and remedies available to the court. While sanctions should be imposed to protect the integrity of judicial proceedings, the extension of a right of liberty to children would require that the court’s interest in guarding itself and others against fraud take into account the child’s interest in maintaining close and loving affiliative relationships. Thus, attention to the child’s interests would require the court to limit sanctions to those that reflect the child’s circumstances. Full restoration of parental rights, including an award of exclusive custody and control to the unwed father, may thus be appropriate when the child is two weeks old but not when the child is two or four or eight years old.

Preserving the integrity of the judicial process was not the court’s only concern. The court believed that Kirchner had been wronged as well. By error of the lower court, Kirchner’s parental rights were terminated without his consent, and he failed to form a substantial relationship with his child because he had been deceived as to the live birth and the whereabouts of the child.175 Under these circumstances, according to the supreme court, as a matter of both federal constitutional law and the Illinois statutory scheme Kirchner has exactly the same rights with respect to Baby Richard as the unwed father who has managed to develop the requisite “substantial relationship” has with respect to his, including, according to the court, the rights of custody and control.176

It is at this juncture that a court’s recognition of children’s liberty rights would lead it to fashion some alternative means of remedying the wrong done to Kirchner. Even the badly deceived unwed father may not automatically be accorded a right of custody and control, when the child has no significant relationship with the unwed father and has in fact developed a close affiliative relationship with someone else. According to children a right of liberty would have required the court to fashion a remedy that would balance the constitutional rights of Kirchner against the

175. Of course any deception by Janikova or the Does would not itself count as a violation of Kirchner’s Fourteenth Amendment rights. Rather, the court finds it constitutionally necessary to interpret the statutory scheme in such a way as to extend to deceived unwed fathers the same due process rights that have already been extended under Stanley v. Illinois, 405 U.S. 645 (1972) and its progeny to unwed fathers who in fact have developed the requisite substantial relationship. See supra note 146 and accompanying text.

176. See supra notes 145-47 and accompanying text.
child's interest in maintaining the well-developed affiliative relationship with the Does.\textsuperscript{177} One alternative would have been to acknowledge the unwed father's parental rights but allow custody to be determined in accordance with the child's best interests.\textsuperscript{178} Another alternative would have been to allow both parental rights and custody in this special set of circumstances to be determined by the child's best interests.\textsuperscript{179}

Either way, the court would effectively discourage misconduct on the part of would-be adoptive parents, and their lawyers, who have no interest in taking any risk that a court will terminate custody on grounds of the child's best interest. Moreover, the court would have, had it selected either alternative, given some measure of protection to Kirchner's own parental rights. While not restoring Kirchner to the full panoply of parental rights, either alternative would have given Kirchner the opportunity to investigate the question of whether his child was in fact being well-cared for by the Does and to argue before an impartial court that the child's best interests required that custody of the child be transferred to him.

The question arises whether we have not simply arranged a "stand-off," a "tie" between the unwed father's constitutional right to his child and the child's constitutional right to remain with those whom he or she takes to be "parents." If so, it is unclear that there is any particular constitutional problem with a state's electing to resolve the "tie" in favor of the unwed father. If \textit{someone} must lose, and both deserve to win, why \textit{not} the child?

In addressing this issue we might consider such matters as the extent to which the unwed father was himself at fault and thereby risked termination of his parental rights. We might consider as well who, as between the child and the unwed father, is in a better position to tolerate the trauma of an adverse judgment. The unwed father could, of course, seek help: he could seek counselling, possibly money damages, and solace from friends and family. In contrast, the child, placed in the control

\textsuperscript{177} By analogy, it is unimaginable that due process would allow a court, for the purpose of insuring a fair trial for one defendant, to order the violation of the constitutional rights of another.

\textsuperscript{178} This remedy is essentially the remedy suggested by the Illinois state assembly and rejected by the Illinois court as a violation of the doctrine of separation of powers. \textit{See supra} note 143-44 and accompanying text.

\textsuperscript{179} The New Jersey Supreme Court rejected such a rule, which had been formulated by the district court in the Baby M matter, on the grounds that its application would have violated the parental rights of the surrogate mother, who neither was unfit nor had abandoned her child. \textit{See In reBaby M}, 537 A.2d 1227, 1253-55 (N.J. 1988).
of the unwed father, has few options. Finally, we must consider the nature of the interests involved — the child's, in maintaining the critical affiliation with those whom he regards as parents, versus the unwed father's, in seeking to create an affiliation with someone who is, in fact, a stranger to him and whom he knows to be happy with and well-cared for by others.

D. Further Notes on Rights and Remedies

Any discussion of remedies presupposes, of course, that the unwed father's rights to custody and control were improperly terminated. Just as the circumstances of the child and, in my view, the need to attend to the child's interests will partly determine what remedy is appropriate, so will how bad the bad act is. Thus, a court should decline to transfer parental or custodial rights with respect to a toddler or child to compensate for an inadvertent error by counsel, or an erroneous interpretation of the law by a lower court, even if such errors have led to an improper termination of the unwed father's rights.

At the same time, even innocent errors could conceivably lead to dramatic court action. Suppose, for instance, the judicial system had functioned very swiftly in the Baby Richard matter. And suppose that the errors that led to improper termination of parental rights were entirely innocent. On these facts, the court would have good reason to restore Kirchner fully to the position he would have occupied had the errors not occurred. For ex hypothesi in these circumstances the matter would have been resolved before the child had developed a significant interest in remaining with his would-be adoptive parents. But any significant delay by the court allows the child's interest in remaining where he or she is to develop. Once the child is engaged in a close affiliative relationship, the full restoration of rights to the biological parents is unlikely to be consistent with the child's own right of liberty.

180. Thus Kirchner was reported to have told Baby Richard on the day of the transfer that the child could see his mother the next day and "every day that week." The promise was breached; and we have no assurance other than Kirchner's that by the next day the child did not in fact care one way or the other. Janan Hanna, Kirchner Reneges on Letting "Richard" Visit Does, CHI. TRIB. May 4, 1995, at 1A.

181. The unwed father should have the right to raise the issue whether his child is in fact happy and well-cared for. Otherwise, we accord the child an unrestricted right of liberty in choosing to remain with those whom he regards as parents, or we simply take the would-be adoptive parents' word for the child's circumstance — neither of which option is satisfactory.
Moreover, conduct that does not entitle the unwed father to the full panoply of parental rights might nonetheless be conduct that the court should sanction. Suppose, for example, that the would-be adoptive parents participate with their counsel in a scheme to deceive the unwed father and prevent him from exercising his rights as parent. Suppose the court thinks that sanctions against parents and their counsel for their participation in this scheme are in order. But suppose as well that the unwed father has himself engaged in misconduct. It would not necessarily follow, on these facts, that he should be awarded custody and control of the child.\(^{182}\)

Where a \textit{very} bad act has led to the improper termination of the unwed father’s rights, the rights of the child would seem rarely to militate against an order restoring the unwed father’s rights to custody and control. Suppose Baby Richard’s close psychological bond had been formed with kindly kidnappers, rather than the Does, and that custody had been achieved by force. \textit{Then} would Baby Richard have had a constitutional right to maintain his relationship with his kidnappers — a right, that is, against the state, not to be transferred to the man who is, though a perfect stranger, his natural father? The right of liberty I have proposed for children is one that is limited by a principle of paternalism. Implementation of such a right must entail that various persons, including the state, and perhaps always any natural or custodial parent, be given the opportunity to argue the issue of whether what the child wants is in fact in the child’s interests. Thus, in view of the fact that kidnappers (and other felons) make demonstrably questionable parents, it is hard to see how the kidnapping case poses any serious problem for the view I have proposed.

Nonetheless, even here the state’s interest in discouraging kidnapping and the biological parent’s interest in the safe return of his or her stolen child are to be protected with one eye on the child’s own wishes and interests. Thus, a compromise might be in order. Suppose, for example, that a grandmother kidnaps a young child out of what the grandmother takes to be an abusive situation. If the child lives with the grandmother for several years and is well cared for by her during that period, then a court might order that the grandmother be allowed to visit the child and maintain contact with the child, even while denying the grandmother’s claim of custody.

\(^{182}\) The issue inescapably arises in the Baby Richard matter but was never addressed in the court’s majority opinion. \textit{See In re Kirchner}, 649 N.E.2d 324, 343-47 (Ill. 1995) (McMorrow, J., dissenting).
It is clear from the forgoing discussion that the facts of a specific case are highly relevant to the issues of sanctions and remedies. In the Baby Richard matter, identifying the kinds and orders of misconduct engaged in by each of the parties before the court was critical to a determination of appropriate remedies and forms of redress. But the Illinois Supreme Court ordered no such an investigation and instead relied, in condemning the conduct of the Does, on lower court records developed for other purposes. Extending a right of liberty to Baby Richard would have required the court to consider all its options and to tailor its remedies in accordance with the child's own right of liberty.

VII. Conclusion

I am interested in whether liberal theory can plausibly be extended to children. It is not that I am not critical of liberal theory, or that I think that the proposals of Fitzgerald, Minow or Woodhouse have less to offer children than liberal theory does, extended or not. My interest in liberal theory arises out of my view that a defective version of liberal theory has been used to support constitutional doctrines regarding the family that are profoundly child-insensitive. Thus my aim has been to sketch a natural and logical extension of traditional liberal theory and to suggest that the body of constitutional family law that liberal theory, so extended, would anchor is far more solicitous toward children than is our existing parent-centered approach. Thus, where a child makes a choice with respect to a matter that is fundamental to the child, and that choice is one that evidently benefits the child and furthers the child's interests, there is no sound basis within liberal theory — the theory that we, as a nation, allege informs how we think the Constitution should be interpreted — on which to refrain from giving constitutional protection to that choice.

My proposal is modest. That it is modest does not even begin to suggest that it is right. Rather, the virtue of its being modest is that it invites reexamination and further refinement. In that sense, it is an open question whether liberal theory can plausibly be extended to children. While I believe that it can, I do not know how.

183. In one of the dissenting opinions the argument was made that questions regarding the conduct of the Does and their attorney should have been resolved at an evidentiary hearing at the lower court level. *Id.* at 340-42 (Miller, J., dissenting). That the majority and dissenting opinions assessed so differently the question of fault is a strong indication that such a hearing was necessary.

184. In fact, in many respects I think their work has more to offer. However, disconnected from its nineteenth century partner of laissez-faire economics, liberalism has its advantages. See, e.g., SUSAN MOLLER O'KIN, JUSTICE, GENDER, AND THE FAMILY, 61-62, 89-109 (1989) for a discussion of liberalism's potential role in furthering certain feminist goals.
modest is that it does not challenge any deeply entrenched constitutional doctrines; its implementation requires no sweeping and unlikely emendations in our constitutional thinking. Unlike Fitzgerald’s, my proposal involves an unfolding of the implications of traditional liberal theory, as stated by Mill, not the jetisoning of it. It retains faith in a version of the rule of law and supposes an ability to test, in the usual way, substantive state and federal laws regarding children for their constitutionality. Unlike Minow’s, my proposal does not suggest that the proper objects of our concern might be something other than the individual, or challenge the notion that the Constitution parcels out only “negative,” never “positive,” rights. Unlike Woodhouse’s, my proposal does not suggest any divergence from the principles of equality that liberalism at its best endorses. At the same time, unlike a thesis of “rugged” individualism my proposal would not have us set aside the moral obligations we have toward children, or have us, in Fitzgerald’s words, “abandon [children] bereft of adult guidance, to foolish choices regretted in later life.” Since many choices that a child might make will not involve fundamental interests, and since many choices will involve interests that, while fundamental, do not evidently benefit the child, we cannot even anticipate a deluge of children’s rights claims in the federal courts. Most importantly, my proposal would protect children’s interests in the family, and would provide a basis for challenging state actions that treat children as less than fully human. The deep need parents have for their children is equalled only by the deep and demonstrable need children have for those whom they take to be “parents.” The insult to the child, when the state intercedes to breach their strongest affiliations, is just as great as the insult to any adult.

In Bowers v. Hardwick, Justice Blackmun referred to the “fundamental interest all individuals have in controlling the nature of their intimate associations with others.” What I have tried to do here is to argue that there is no reason in the world not to understand this principle, properly restricted, to apply to children.

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185. Fitzgerald, Maturity, supra note 8, at 33.