

ARTICLE

THE PRE-POLITICAL CHILD OF CHILD-CENTERED JURISPRUDENCE

*Annette Ruth Appell**

TABLE OF CONTENTS

| | |
|---|-----|
| I. INTRODUCTION..... | 704 |
| II. THE LEGAL CONSTRUCTION OF CHILDHOOD..... | 707 |
| A. <i>The Developmental Child</i> | 708 |
| B. <i>The Dependent Child</i> | 710 |
| C. <i>The Private Child</i> | 711 |
| III. FEMINIST AND CHILD-CENTERED JURISPRUDENCE..... | 715 |
| A. <i>Feminist Jurisprudence</i> | 718 |
| B. <i>Child-Centered Jurisprudence</i> | 724 |
| 1. <i>Children's Rights</i> | 727 |
| 2. <i>Children's Legal Representation</i> | 732 |
| 3. <i>Missing Questions in</i> <i>Child-Centered Jurisprudence</i> | 734 |

* Professor and Associate Dean for Clinical Affairs, Washington University Law School. I am grateful to Ellen Marrus and Laura Oren for organizing this symposium, Child Centered Jurisprudence and Feminist Jurisprudence: Exploring the Connections and the Tensions, University Of Houston Law School Center For Children, Law, & Policy, November 2008. I also owe a great debt to the other paper presenters whose works have consistently informed and pushed my study of vulnerable children and mothers: Marty Guggenheim, Martha Albertson Fineman, Angela P. Harris, and Barbara Bennett Woodhouse. This project has also benefited from insightful comments and questions of David Thronson, Pauline Kim, Susan Appleton, Rebecca Dresser, Bob Polikoff, Ian McMullen, Adele Morrison, Peter Joy, Camille Nelson, Marion Crane, Peter Joy, Neil Richards, and Warren Binford. Finally, I am thankful for the research assistance of Washington University law student Jera Oliver (Class of 2011).

| | |
|--|-----|
| IV. THE CREATION OF A NEW AMERICAN CHILDHOOD | 737 |
| A. <i>Ideological Conditions Contributing to Modern Constructions of Childhood</i> | 737 |
| B. <i>Material Conditions Contributing to Modern Constructions of Childhood</i> | 745 |
| V. TOWARD A JURISPRUDENCE OF CHILDHOOD..... | 750 |
| A. <i>The Developmental Child Revisited</i> | 751 |
| B. <i>The Dependant Child Revisited</i> | 752 |
| C. <i>The Private Child Revisited</i> | 753 |
| D. <i>Justice for Children?</i> | 755 |

I. INTRODUCTION

Childhood, the category that holds, defines, and governs children, is a social construct that is contingent upon time and place.¹ There is some universality in the vulnerability and dependency of young children, but the length, contours, and extent of that dependency, as well as the assignment of children to dependency, vary greatly across time, nation, and geography.² The present construction of children in the United States as dependent—and dependency as private, familial, and developmental—naturalizes childhood and the roles children perform as a class, within racial, ethnic, national, age, gender, and economic groups. This construction limits interrogation of what the public might owe these dependent persons³ and what

1. CHRIS JENKS, *CHILDHOOD* 7 (1996). The story of the temporal and spatial contingency of childhood and the recency of its modern form is by now familiar. Any discussion about the creation of childhood must begin with PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* (Robert Baldick trans., Random House 1962) (1960), which traces the changing portrayals, treatment, and characteristics of children from the Middle Ages through the twentieth century. For leading American stories, see generally HOLLY BREWER, *BY BIRTH OR CONSENT* (2005); *CHILDHOOD IN AMERICA* (Paula S. Fass & Mary Ann Mason eds., 2000); LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* (1999); JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT* (1991); CAROLINE F. LEVANDER, *CRADLE OF LIBERTY* (2006); MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS* (1994); KAREN SÁNCHEZ-EPLER, *DEPENDENT STATES: THE CHILD'S PART IN NINETEENTH-CENTURY AMERICAN CULTURE* (2005). Steven Mintz in particular displays the variety of childhoods in various regions, times, classes, and levels of servitude. See STEVEN MINTZ, *HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD* (2004).

2. See DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 25–27 (2d ed. 2004) (explaining the variability of the social construction of childhood with both biological and cultural changes); ALLISON JAMES, CHRIS JENKS & ALAN PROUT, *THEORIZING CHILDHOOD* 124–31 (1998) (highlighting statistical differences between children of different cultures). As Jenks notes, “Childhood . . . always relates to a particular cultural setting.” JENKS, *supra* note 1, at 7.

3. See Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 5 (2008) (making this

public roles children play. With childhood safely ensconced in the family and without a voice outside the family, the public can avoid universal questions and answers about what children, as persons, need and want; what goods children, as a class, should have; and what material conditions, opportunities, and influences are optimal for all children.⁴ Instead, we ask what our *own* children should have and what *they* need for success. This Article uncovers the political nature of childhood and the distributive work that the legal regulation of childhood performs.

Just as feminist jurisprudence has revealed the political roles, contours, possibilities, and limits of dependency, privacy, and autonomy through the lens of gender, this Article illustrates similar dynamics through the lens of childhood. Just as feminists have challenged the privacy and naturalness of family and its political function of creating and ordering gender, so too will a critical approach to children and the law unearth the political roles of childhood and reveal the liberating and subordinating functions of placing children in families as vehicles for the creation and distribution of economic and social roles and resources. This analysis will place children at the center of the inquiry of the legal construction of childhood⁵ and will challenge

observation and claiming that family privacy and liberty are major obstacles to equality). My hypothesis here, and one that I will develop in the next part of this project, is that the massive inequalities among children in the United States are not an inherently liberal problem tied to parental rights and family privacy, but instead a question of legal regimes that are only tangentially related to family liberty. These legal regimes combine with the naturalized construction of childhood to create an illusion that the problems of wealth disparities are familial, private, and personal.

4. Even the study of intergenerational justice does not seem concerned so much with children as children, but rather with the duties of adult children to their parents, or with the older generation more broadly and its duty to plan responsibly to reduce its burden on the next generation or to future generations in a macro sense. See Frédéric Gaspart & Axel Gosseries, *Are Generational Savings Unjust?*, 6 POL. PHIL. & ECON. 193, 193–94, 208–09 (2007) (focusing on the general duty of a generation to save wealth to pass onto the next generation); Peter Laslett, *Is There a Generational Contract?*, in JUSTICE BETWEEN AGE GROUPS AND GENERATIONS 25–27 (Peter Laslett & James S. Fishkin eds., 1992) (describing generational relationships through generational contracts). In addition, the study of intergenerational justice is concerned with those not yet born—duties that include, among other things, addressing global warming and conserving resources. See Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577, 585–86 (2007). Some sociological studies of class, however, note the intergenerational characters of class. See Patricia Hill Collins, *African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class*, 65 U. CIN. L. REV. 825, 844–45 (1997) (contrasting intergenerational wealth transfers between white and African-American families).

5. See Nancy Scheper-Hughes & Carolyn Sargent, *Introduction* to SMALL WARS: THE CULTURAL POLITICS OF CHILDHOOD 1, 15 (Nancy Scheper-Hughes & Carolyn Sargent eds., 1998) (“A child-centered anthropology contains all the elements for a radical paradigm shift, similar to the salutary effects resulting from the feminist critique of the

the contours of childhood, examine children's agency, and critically explore what purposes childhood serves.

This Article lays the groundwork for the next stage of this project which will explore, in more depth, the subordinating and emancipating functions of our current legal construction of childhood and suggest how a critical view of childhood, consistent with the empiricism of critical theory, would differ from other critical theories that primarily (if unselfconsciously) contemplate only adults as subjects of social, political, and moral freedom. A jurisprudence of childhood might account for the unique developmental issues facing children, while analyzing the generational aspects of childhood with particular attention to its transitive and temporary aspects. This analysis will view children in the context of a transformative childhood that sits within the context of a larger system that treats dependency as both autonomy-promoting—as relational and generational matters—and autonomy-limiting—as a functional matter.

In other words, although children inhabit a socially constructed category deeply connected to race, gender, class, and citizenship,⁶ children's vulnerability and dependency perform differently according to unique aspects of childhood, as well as along racial, class, and gender lines that affect not only children themselves, but also the adults on whom they depend. Moreover, unlike other subordinated groups, children will outgrow their subordination as children; but whether they will be subordinated as adults depends very much on their childhood, i.e., their race, class, and gender, or perhaps more accurately the race, class, and gender of their parents.

Thus, just because this inquiry borrows methods of critical jurisprudence, these methods do not necessarily dictate that childhood be the same as adulthood or that children should vote, possess legal authority, or have agential status in other arenas. Nor is it clear that they should not. Childhood encompasses a certain set of vulnerabilities and dependencies that are intertwined in present social, economic, and political systems, and this combination can be a source of power for, and also a weapon against, children and adults. This Article deconstructs the legal category of childhood and frees childhood jurisprudence to travel its own course.

discipline. But to date that process has hardly begun.”).

6. BERRY MAYALL, *TOWARDS A SOCIOLOGY FOR CHILDHOOD* 122 (2002) (comparing the oppression of women based on class, gender, and ethnicity to the shaping of children's lives by the same factors).

Part II sketches the category of childhood in the United States as a naturalized state characterized by dependency, privacy, vulnerability, and development. Part III briefly surveys and compares feminist and child-centered jurisprudence, particularly as they have been organized around and have addressed dependency. This Part contrasts their approaches to the naturalized aspects of their respective subjects.⁷ Part IV denaturalizes childhood by analyzing the changing and variable roles children and childhood play in law and society. This section uncovers the historical, philosophical, political, and economic roles of children in our liberal system. It illuminates the centrality of the creation and privatization of childhood to liberalism, current notions of individualism, and the construction of social goods and problems as private and individual, rather than collective. Part V suggests the implications of the politicized child for a jurisprudence of childhood.

II. THE LEGAL CONSTRUCTION OF CHILDHOOD

Children occupy a structural site, or category, often referred to as childhood in both common parlance and the growing field of childhood studies.⁸ This category is socially constructed, but corresponds to

a developmental stage of the life course, common to all children and characterised by basic physical and developmental patterns. However, the ways in which this is interpreted, understood and socially institutionalised for children by adults varies considerably across and between cultures and generations, and in relation to their engagement with children's everyday lives and actions.⁹

Children inhabit this category, but individual children and groups of children experience this site differently and experience and exercise varying amounts of agency within it. In other words,

7. The feminist jurisprudence comparison is not meant to suggest that critical childhood jurisprudence should track the content of feminist jurisprudence, but simply that the methodology of feminist jurisprudence or other critical jurisprudence, such as that of critical race theory or LatCrit, be applied to childhood to excavate the definition and regulation of children to better understand what political purposes this definition and regulation serve.

8. See Barrie Thorne, *Crafting the Interdisciplinary Field of Childhood Studies*, 14 CHILDHOOD 147, 149–50 (2007) (describing childhood studies).

9. ALLISON JAMES & ADRIAN L. JAMES, CONSTRUCTING CHILDHOOD 13 (2004); see also JENKS, *supra* note 1, at 6–7 (arguing that childhood must be understood in relation to a particular cultural setting); Jens Qvortrup, *Childhood Matters: An Introduction*, in CHILDHOOD MATTERS 1, 6–7 (Jens Qvortrup et al. eds., 1994) (noting this structural category varies over time, space, and culture).

“child” and “children” refer to the actual flesh and blood beings that are considered to be children, and are defined and regulated by childhood.¹⁰

As childhood scholars have shown,

[T]he Law operates as one of the main regulatory devices that shape the space of childhood. It does this through developing social policies . . . that seek to control the kinds of activities that children can do; the social and material environments they inhabit and the resources they have access to.¹¹

In the United States, the category of childhood constructs children as dependents in social, political, legal, and economic matters; naturalizes and privatizes this dependency; and assigns children’s care to their parents, subject to general laws governing child rearing and certain state-provided benefits.¹² A legal regime governs dependency in all aspects of children’s lives and agency, essentially assigning to their parents or other adult caregivers the power and authority to represent children’s needs, legal interests, policy goals, education, religious and moral training, and other social aspects of their lives.¹³ This regime assigns these awesome responsibilities and privileges while providing little direct, material distribution to the assignees.¹⁴ Interrelated and overlapping constructs of development, dependency, and privacy characterize the legal regulation of childhood in the following ways.

A. *The Developmental Child*

Childhood is primarily a time-limited developmental category that contains children until they become adults. In other words, childhood is the developmental process of becoming an adult. This is a time of physical, cognitive, and emotional

10. See JAMES & JAMES, *supra* note 9, at 14.

11. Allison James, Penny Curtis & Joanna Birch, *Care and Control in the Construction of Children’s Citizenship*, in CHILDREN AND CITIZENSHIP 85, 88 (Antonella Invernizzi & Jane Williams eds., 2008).

12. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 703–04 (2001) (discussing the extent of parental rights).

13. See Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 582–83 (2008) (emphasizing parents’ responsibility for dependents and the privatization of care). This regime, of course, allows adults to delegate some of this authority to children.

14. Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 151 (1998) (contending that, in accordance with Western liberalism, laws focus on liberty and individualism, rather than providing collective assistance).

development during which children have special educational, nutritional, and safety needs and vulnerabilities.¹⁵ From this developmental perspective, childhood constructs children as fragile, vulnerable, inexperienced, unworldly, and without value systems.¹⁶ Children are also unreliable decisionmakers who are unable to project into the future, are subject to peer pressure, and possess poor impulse control.¹⁷

These developmental aspects define and dictate the legal regulation of childhood. Indeed, it is difficult to overstate the dominance of this view of children. It guides law, medicine, psychology, education, health, and political participation. The legal regulation of children assigns responsibility for their development to families, schools, and professionals, with regulations primarily operating through developmental standards,¹⁸ the creation of disability,¹⁹ educational standards and assessments,²⁰ safety requirements,²¹ and a general presumption against paid child labor.²² All of these regulations aim to shepherd children into a self-sufficient, democratic, productive, and autonomous adulthood.

15. JANE WALDFOGEL, WHAT CHILDREN NEED 12, 18 (2006).

16. See Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550–51 (2000). See generally ARCHARD, *supra* note 2, at 49–50 (summarizing the modern conception of children); JAMES, JENKS & PROUT, *supra* note 2, at 9–16 (examining conventional constructions of children).

17. See Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927, 927 (2006).

18. See, e.g., WORLD HEALTH ORG., WHO CHILD GROWTH STANDARDS (2006), available at http://www.who.int/childgrowth/standards/Technical_report.pdf (discussing physical development); CDC, Child Development, <http://www.cdc.gov/ncbddd/child/default.htm> (last visited Sept. 18, 2009) (discussing cognitive, social, and emotional development); see also JAMES, JENKS & PROUT, *supra* note 2, at 172–73 (discussing sociological research on children that assumes age is a constant variable).

19. Disability is defined here both as deviation from these standards and the more universal childhood disability of not being an adult.

20. For example, the No Child Left Behind Act requires annual testing through the use of mandatory standardized tests, like the National Assessment for Educational Progress. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 6, 115 Stat. 1425, 1454 (codified as amended in scattered sections of 20 U.S.C.).

21. For example, at least twenty states have enacted bicycle helmet laws, while every state, including the District of Columbia, has occupant restraint laws for children. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: BICYCLE HELMET USE LAWS (2004), <http://www.nhtsa.dot.gov/people/injury/newfact-sheet03/BicycleHelmetUse.pdf>; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., 2006 MOTOR VEHICLE OCCUPANT PROTECTION FACTS 7, 19–21 (2008), <http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810654.pdf>.

22. See Appell, *supra* note 13, at 584.

B. The Dependent Child

As a legal matter, these developing beings are minors and are dependent on others for care and decisionmaking from birth to the age of eighteen.²³ The breadth of childhood dependency is vast, while the contours of childhood are shallow, confined primarily to private,²⁴ psychological, and physical developmental sites. Children's dependency extends to virtually every aspect of public life for children, including children's scientific, political, legal, and socioeconomic experiences, their opportunities, and societal views regarding children. This is not to say that children lead shallow, helpless lives; on the contrary, children live rich, diverse, and meaningful lives,²⁵ but as a matter of legal construction, they are passive, dependent, private, and incompetent.

Children do not have legal agency in most respects. Children's developmental vulnerability and potential propel limitations to their legal agency and to the appointment of surrogates who determine their objectives and make decisions for them in healthcare, legal matters, and other decision points inside and outside of the family.²⁶ Indeed, dependency largely defines and circumscribes children's rights.²⁷ Thus, their parents or guardians generally represent them in legal matters and in decisions regarding their daily care, control, education, travel, medical treatment, and custody.²⁸ Rules applicable to children's care and development further affect children's freedom and autonomy: laws require that they be educated and how; laws limit their ability to work outside the home; laws regarding curfew and minimum ages for driver's licenses govern their movement; and laws define and limit their sexuality.²⁹

23. See Scott, *supra* note 16, at 550–51. There are some exceptions, but for most purposes people are children until they are of voting age. See *id.* at 567 (discussing the exception of the mature minor doctrine, allowing adolescents to give valid, legal consent in some medical situations).

24. Here, I use “private” primarily in the sense that children are not political actors. They do not have political agency. In addition, while parents have significant authority regarding their children's moral and economic development, it is true that a major site of childhood is in the public, or publicly regulated, school system.

25. See generally ROBERT COLES, *THE POLITICAL LIFE OF CHILDREN* (1986) (capturing the political views of children across the globe); MINTZ, *supra* note 1 (tracing the transformation of childhood through adventures and stories).

26. See Jennifer Durcan & Annette R. Appell, *Minor Birth Mothers and Consent to Adoption: An Anomaly in Youth Law*, *ADOPTION QUARTERLY*, April 2002, at 69, 70–71 (rehearsing the mature minor doctrine and reproductive rights of minors).

27. See Scott, *supra* note 16, at 547 (identifying limits lawmakers place on children).

28. Durcan & Appell, *supra* note 26, at 70.

29. See generally David McDowall, Colin Loftin & Brian Wiersema, *The Impact of*

Of course, in exchange for the limiting conditions of this dependency, children usually gain family, community, love and affection, belonging, language, culture, moral authority, race, and class.³⁰ This site is a place (but not the only place) where children develop autonomy, identity, loyalty to kin, moral codes, and the capacity to govern in a democracy.³¹ In other words, the family is a political site that cares for and produces future democratic citizens whose loyalties and values will be plural and not possessed or unduly shaped by the state.³² This site also serves the adults who parent children because child rearing itself is a component of a liberal democracy that values and protects the creative and moral work of having and rearing children.³³ This work is both a practice of self-expression—of adult autonomy—and a moral and political practice to create and promulgate value.³⁴

C. *The Private Child*

The developmental and dependent aspects of childhood help naturalize and privatize childhood. Childhood is thus largely private, not public. This assertion is descriptive as a structural matter in two senses: first, childhood constructs children as natural,³⁵ rather than political or social creations; second,

Youth Curfew Laws on Juvenile Crime Rates, 46 CRIME & DELINQUENCY 76 (2000); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000); Jean T. Shope & Lisa J. Molnar, *Graduated Driver Licensing in the United States: Evaluation Results from the Early Programs*, 34 J. SAFETY RES. 63 (2003).

30. See Appell, *supra* note 13, at 583.

31. See Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1225–26 (1999) (observing how the ties of affection and kinship that accompany family relationships will better enable citizens to defend against national encroachments of local political interests); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 958–59 (1993) (analyzing the role that family plays in promoting and developing democracy). For a discussion on the division of authority between parents and the state concerning influence over children, see William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 874 (1999).

32. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 168 (1997) (“The Fourteenth Amendment was also held to encompass, as a ‘fundamental theory of liberty,’ the principle that ‘the child is not the mere creature of the State.’” (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925))).

33. See Appell, *supra* note 12, at 707–08 (analyzing how families fit into the model of individual liberty); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 636–37 (1980) (describing the ability to have a child as an occasion for self-definition); David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980) (examining parental rights to childbearing under the liberal conception of human rights).

34. See Appell, *supra* note 12, at 707–09.

35. See JENKS, *supra* note 1, at 6–8 (defining the “natural” child). This is not to say

children do not have political agency.³⁶ This is not to say that children cannot exercise agency in many private determinations or engage in political action and organization,³⁷ but they do not vote, do not sit on juries, and generally do not hold political office.³⁸ Children are not political citizens.³⁹ Instead, the concept of the citizen in liberal theory, although ageless, is an adult,⁴⁰ and thus it does not account for children.⁴¹ Instead, children depend on others to represent their interests, often their parents and lawyers.⁴² Children do not have political rights, status, or claims.⁴³

Moreover, as a normative matter, children are domesticated; they are not out in the market as laborers (although they most

that children are not publicly regulated or subject to public surveillance and control at school and on the streets. Children are private in the sense that they are not constructed as political actors and childhood itself constructs childhood and its contours as inevitable (i.e., natural), rather than as a political construction.

36. See James, Curtis & Birch, *supra* note 11, at 87; see also Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 150 (2004) (discussing how the Indian Child Welfare Act places parents and the tribe in charge of children's political rights). By contrast, children do have some rights, which is a political phenomenon. DAVID WILLIAM ARCHARD, *CHILDREN, FAMILY AND THE STATE* 1–2 (2003).

37. See, e.g., *infra* notes 268–72 and accompanying text.

38. Appell, *supra* note 13, at 585. But some states have foster child boards and children are often trained for political action in future. See, e.g., American Legion Boys State, <http://www.legion.org/programs/youthprograms/boystate> (last visited Sept. 18, 2009) (describing a program exposing high school boys to the rights and privileges of citizenship); American Legion Auxiliary Girls State, http://www.legion-aux.org/Programs/GirlsState_GirlsNation/index.aspx (last visited Sept. 18, 2009) (outlining a similar program for high school girls); Close Up, About Us, <http://www.closeup.org/About/AboutUs.aspx> (last visited Sept. 18, 2009) (“Using the nation's capital as a living classroom, participants get a ‘close up’ view of government and democracy in action.”).

39. JAMES & JAMES, *supra* note 9, at 35 (claiming that of three types of rights of citizenship—political (right to vote or strike), civil (free speech, justice, property, and personal freedom), and social (access to welfare and education)—children have no political rights and limited civil and social rights).

40. See Monique Lanoix, *The Citizen in Question: Feminist Interventions in Democratic Theory*, 22 HYPATIA 113, 114–15 (2007); see also Susan Moller Okin, “Forty Acres and a Mule” for Women: Rawls and Feminism, 4 POL., PHIL. & ECON. 233, 233 (2005) (“Liberal political theory . . . claims to have as its subject human individuals who can exist independently of each other. They are never helpless infants . . .”).

41. Indeed, perhaps the only specific aspect of citizenship is age: adulthood. See Lanoix, *supra* note 40, at 115 (“The guiding ideal is to make the conception of the citizen one that is open to all characteristics of human beings but specific to none. Save one, however: adulthood.”). It is not surprising then that political scientists have been slow to come to the field of childhood studies. See JAMES & JAMES, *supra* note 9, at 30 (noting that political scientists have not addressed children or childhood, unlike sociologists and anthropologists).

42. See Appell, *supra* note 13, at 585; Karen Sánchez-Eppler, *Playing at Class*, reprinted in *THE AMERICAN CHILD* 40, 57–58 (Caroline F. Levander & Carol J. Singley eds., 2003) (examining early philanthropic organizations benefiting children).

43. See JAMES & JAMES, *supra* note 9, at 35.

certainly are consumers).⁴⁴ The developmental child is socioeconomically a family member, student, and a consumer of leisure. As vulnerable dependents of parents or adult guardians, children generally do not work outside the home until they reach a certain age and, even then, the hours and conditions are limited.⁴⁵ Instead, their job is to become adults. Children receive many social and material goods—religion, values, culture, language, access, wealth, education, health care, nutrition, opportunity, risk, mobility, quality of life, and the like—through their parents and, by extension, their communities.⁴⁶ In other words, they have access to the private *and* public goods that their parents do or can provide for them.

The privacy of childhood circumscribes outside intervention into family life and parental authority.⁴⁷ Although the United States provides very basic floors of education, child protection, and temporary aid to needy families, it is not deeply engaged with the question of what children might need, as children, to have autonomy (i.e., “actual choices”) as adults.⁴⁸ Instead, attention to childhood focuses on the negative autonomy of parents and provides little positive assistance for parents to exercise that autonomy, unless parents have the resources to buy or otherwise influence what their children need.⁴⁹

The domestication of childhood does not mean that children do not have vital public or political roles. Aside from their

44. Of course children do work for money and other benefits outside and inside the home. See MAYALL, *supra* note 6, at 64–66 (reviewing a few studies on children’s work). Moreover, infants may even be marketed for adoption purposes. See Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 65–73 (2006).

45. See Appell, *supra* note 13, at 584 (“The law . . . frowns upon or ignores such phenomena as child labor . . .”).

46. See *supra* text accompanying note 30.

47. See Alstott, *supra* note 3, at 4–5 (“The U.S. Supreme Court has interpreted the Constitution to endow parents with nearly unfettered freedom to control children’s lives.”); Appell, *supra* note 12, at 704–06 (discussing privacy within the family and the exception of governmental intervention).

48. See KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 30 (2005) (“What holds together the desire to educate children, provide welfare for the poor, and give physical assistance to the handicapped who need it is the idea that assistance of these sorts enables people to develop lives worth living. . . . To have autonomy, we must have acceptable choices.”); LEVANDER, *supra* note 1, at 174–75 (recounting W.E.B. Du Bois’s proposition that children as social agents could disrupt and transform the corrosive and negative aspects of adult gendered and racialized dependency).

49. See, e.g., Eichner, *supra* note 14, at 160–61 (noting the limited role of the liberal state in supporting child rearing); Donald J. Hernandez, *Demographic Change and the Life Circumstances of Immigrant Families*, FUTURE OF CHILDREN, Summer 2004, at 17, 28–29 (tracing children’s welfare to parental resources).

symbolic roles in political discourse,⁵⁰ children perform important roles in the distribution of wealth and class⁵¹ and the creation and maintenance of pluralism in a liberal democracy⁵² as recipients and carriers of race, gender, national heritage, language, moral values, and religion.⁵³ Children are also future democratic citizens who will govern the nation as voters and elected or appointed public officials.⁵⁴ They are, of course, also future economic producers. As future political citizens, children can be essential to not only the maintenance of the nation's character, but also to the nation's very existence.⁵⁵

In sum, childhood as we know it today in the United States, although politically significant, is by definition a dependent, inchoate, pre-capacitated, and largely private site that serves to distinguish between competents and incompetents. The former—adults—are fully formed as independent, rational, autonomous individuals. Children, in contrast, are not; they are in a stage of development toward a culturally constructed adulthood.⁵⁶ In other words, as a developmental, social, moral, and ultimately political matter, children are both different from adults and less

50. See, e.g., BREWER, *supra* note 1, at 3 (showing the centrality of notions of childhood to the founding of the United States); LEVANDER, *supra* note 1, at 108–09 (2006) (arguing that in the late nineteenth century, “governments used the image of the child to transform mounting social problems facing the nation into signs of personal and familial, rather than civic, failure”); Barrie Thorne, *Re-Visioning Women and Social Change: Where are the Children?*, 1 GENDER & SOC'Y 85, 89–90 (1987) (discussing children on the public agenda, both as threats to social order and as victims).

51. Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856, 861–62 (1989) (illustrating the connection between poverty and family types within a larger understanding of race).

52. See Appell *supra* note 12, at 707–08.

53. At the same time, children, particularly immigrant children, do change and challenge this diversity as they become acculturated to U.S. norms and reject or revise those of their parents. See MINTZ, *supra* note 1, at 200–12 (describing the acculturation of immigrant children).

54. See Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1370–71 (2007) (arguing that perpetuation of a liberal democratic government requires the instilling of civic virtues into children).

55. For example, the widespread and ongoing removal of Native American children from their tribes to Indian Schools and to adoption outside their tribes imperiled the very political viability and existence of tribes. With too few children in the tribe, on the land, or speaking the language, some tribes struggled to continue as the generations passed. See Appell, *supra* note 36, at 144–50 (describing how this centuries-long removal of children led to passage of the Indian Child Welfare Act, which was meant to stem this tide and maintain Indian political life).

56. See ARCHARD, *supra* note 2, at 93–96 (noting the equation of adulthood with rationality, maturity, and independence, and children as achieving these milestones in a steady progression as they reach adulthood). Archard also describes the view that the “the ideal of adult cognitive competence is a peculiarly Western philosophical one.” *Id.* at 93.

than adults. Children are not yet full persons.⁵⁷ Although they are increasingly recognized as rational, unique, and even moral beings,⁵⁸ children are by definition in a stage of developing cognitive ability that takes both time and experience to mature.⁵⁹ That is, as children age, their intellectual abilities move from concrete to abstract; their judgment improves, but this development cannot be perfected until they have the wisdom that comes with experience.⁶⁰ Until they can govern themselves, they are dependent.

III. FEMINIST AND CHILD-CENTERED JURISPRUDENCE

This inevitably (i.e., naturally) private, vulnerable, and dependent child is reminiscent of the naturally private, vulnerable woman of the pre-feminist past, so the organizing theme for this symposium—feminist jurisprudence and child-centered jurisprudence—is apt. Both sets of jurisprudence share concerns about dependency and agency, but they each have different subjects (women and children, respectively) and categories of analysis (gender and age, respectively). Feminist jurisprudence, an established and well-developed study of the law, has delegitimized the legal incompetence and dependency of the female subject.⁶¹ Not without its critics within and outside of critical theory,⁶² feminist jurisprudence has examined how law

57. See Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 588–89 (2003).

58. See MAYALL, *supra* note 6, at 87–88, 110, 164 (examining children as moral agents); Samantha Brennan & Robert Noggle, *The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice*, 23 SOC. THEORY & PRAC. 1, 15 (1997) (arguing that children are moral beings).

59. See ARCHARD, *supra* note 2, at 93–96 (exploring theories of children's cognitive development); see also Harry Brighouse, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 698–99 (2003) (“[M]ost children only develop certain rational and emotional capabilities . . . around the age of six or seven.”); Schapiro, *supra* note 57, at 588–90 (“[C]hildhood has to be conceived as a condition of as-yet incomplete liberation from nature's rule.”).

60. Scott, *supra* note 16, at 555–56.

61. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1284–86 (1991) (describing how feminist demands for equality have been translated into law).

62. See, e.g., BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 133–34 (1984) (contrasting differing feminist views of motherhood based on race and class); Appell, *supra* note 12, at 758–87 (criticizing revisionist perspectives of motherhood that ignore biologically-based parental rights for failing to propose alternate standards for determining caregivers, taking privacy of family for granted, and ignoring the effect on public families); Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in REPRESENTATIONS OF MOTHERHOOD 56, 56–57 (Donna Bassin et al. eds., 1994) (criticizing feminist analyses of motherhood that fail to consider the context of race, class, and gender); Elizabeth M. Iglesias, *Rape, Race, and*

constructs gender. That is, it has operated to denaturalize womanhood, taking women out of the private realm of family and situating them in the market and the polity; to show that families are not pre-political; to remove women from dependency on fathers and husbands; and to free them from the dependency that arises out of caregiving.⁶³ In other words, feminist jurisprudence has viewed women as moral agents and political actors.

Feminist jurisprudence is concerned with politicizing the legal construct of woman, interrogating gender, and placing women at the center of analysis. But to the extent that feminism seeks to politicize children, it is as dependents, not agents. This is not surprising because the deep and pervasive connection between women and motherhood has produced negative consequences for women in a world that privileges men,⁶⁴ and because even child advocates tend to seize on children's dependency rather than their agency.⁶⁵ In so doing, feminist jurisprudence and child-centered jurisprudence assume childhood primarily as a privatized space.⁶⁶ This is surprising because feminist jurists have worked hard to take

Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality, 49 VAND. L. REV. 869, 916–22 (1996) (contrasting the role of motherhood between the races); Denise A. Segura, *Working at Motherhood: Chicana and Mexican Immigrant Mothers and Employment*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 211, 212–13 (Evelyn Nakano Glenn et al. eds., 1994) (“[N]otions of motherhood for Chicanas and Mexicanas are embedded in different ideological constructs operating within two systems of patriarchy.”).

63. See Thorne, *supra* note 50, at 88–89 (describing how feminism has altered the perception of women and women's relationships with men and the family).

64. See Eichner, *supra* note 14, at 157 (noting that women who choose to enter civil society must do so on male terms); *infra* note 287 and accompanying text (noting the impoverishment of women caregivers).

65. See Appell, *supra* note 13, at 605–06 (“[C]hildren's attorneys may unselfconsciously insert their own views of what is best for *children* into the representation of an *individual child*.”). A major exception to these approaches is work in the relatively new interdisciplinary childhood studies field, coming out of such disciplines as sociology, anthropology, political science, and history, also known as the sociology of childhood. Those studies examine children's moral, social, and political agency and perspectives, as well as their role in the creation and maintenance of culture. See Thorne, *supra* note 8, at 150 (describing the field and its distinction from the more dominant developmental psychology approaches).

66. I mean this both in the sense that children have no political rights and little legal autonomy and in the sense that few are calling for children to be given over to the state or to support themselves in the market. Even those calling for more public support for children, childcare, and broader public accountability for education do not suggest that children do not belong in families. See *infra* notes 81–93 and accompanying text (discussing feminist remedies for the dependency of caregiving). Indeed, progressive children's rights advocates seek to keep children free from the state. Appell, *supra* note 13, at 616; see also Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 9, 12–14 (advocating changes in education policies to reverse the flow of the school-to-prison pipeline).

women—and child care—out of the private realm and to lay bare the construct of family.⁶⁷

In contrast to feminist jurisprudence, there is no self-conscious, named, or well-developed school or methodology regarding children's jurisprudence, child-centered jurisprudence, or a jurisprudence of childhood. This is not to say there are no legal writings or categories regarding children and the law,⁶⁸ but unlike feminist jurisprudence, child-centered jurisprudence has largely assumed the naturalness of the child, childhood, and dependency. It has not systematically examined the legal construction of childhood, fundamentally interrogated dependency, or engaged extensively with the political role of childhood. Instead, child-centered jurisprudence has focused primarily on children's dependency and vulnerability: their relationships with parents, the state, and educational systems.⁶⁹ As a result, child-centered jurisprudence is largely unconcerned with the political nature and purpose of childhood and assumes dependency and privacy as givens.⁷⁰ Unlike the woman at the center of feminist jurisprudence who is complex, multifaceted, and autonomous, the child at the center of child-centered jurisprudence is a developing being in need of protection and education during a legally and perhaps cognitively defined period of childhood.⁷¹ Moreover, it is not uncommon for child-centered jurisprudence to construct the family as the problem.⁷² In light of the feminization of family, the problem in some strands of child-centered jurisprudence may well be the mother.⁷³

67. One of the key insights of feminism was that the family was not pre-political, but rather a political construct. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 842 (1985) (“[T]he state constantly defines and redefines the family and adjusts and readjusts family roles.”); see also Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 6–9 (1996) (analyzing changing theoretical views of the family).

68. For example, Cynthia Price Cohen's multivolume set, *Jurisprudence on the Rights of the Child*, digests the Committee on the Rights of the Child's assessments of the reports of State Parties in meeting the mandates of the United Nations Convention on the Rights of the Child. In addition, Martha Minow utilized the phrase “jurisprudence of children's rights” in her essay, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3 (1986).

69. See *infra* Part III.B (discussing current inquiries of child-centered jurisprudence).

70. See Scott, *supra* note 16, at 550–51 (detailing how legal policy assumes that children are dependent and subject to parental authority).

71. See *infra* Part III.B.

72. See, e.g., ELIZABETH BARTHOLET, *NOBODY'S CHILDREN* 59–60 (1999) (describing how abuse and neglect within the family significantly hinders healthy child growth and development).

73. See, e.g., *id.* at 68–70 (blaming women who use drugs or alcohol during

A. *Feminist Jurisprudence*

The task of feminist jurisprudence is to interrogate the legal category of woman (and man) and, relatedly, gender relations, showing them to be powerful and often confining political and social constructs.⁷⁴ A major contribution of feminism and feminist jurisprudence has been the revelation that the liberal subject—the citizen—is autonomous, free, independent, and unattached.⁷⁵ That is, the liberal subject is not a child, not a parent, most likely not a woman, and not poor. In short, the liberal subject is a white, middle-class man.⁷⁶

This project has proliferated and has included the disaggregation of women from motherhood and motherhood from women;⁷⁷ the destruction of coverture;⁷⁸ the recognition of and increased opportunities for women in the labor market, politics, and at home;⁷⁹ and broad recognition of women's agency inside and outside of the home and family.⁸⁰ In a world constructed

pregnancy for their children's lifelong problems); Suellen Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41, 41 (1995) (chronicling how a mother's failure to identify a child's true father during adoption proceedings caused the child to later be removed from her adoptive parents).

74. See, e.g., Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621, 627 (1987) ("The single most important advance in feminist theory is that the existence of gender relations has been problematized. Gender can no longer be treated as a simple, natural fact."); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995) (noting that most differences between men and women are normative, not biological); MacKinnon, *supra* note 61, at 1286 (describing the women's movement and criticizing its failure to interrogate the meaning of equality).

75. See Eichner, *supra* note 14, at 151–52 ("According to [the liberal] worldview, society is composed of a collection of discrete, autonomous individuals engaged in the pursuit of diverse, equally acceptable plans of life.")

76. See Okin, *supra* note 40, at 234 ("[W]hile liberal theorists claim to be writing about individuals . . . they are almost all actually talking about male heads of households.")

77. Appell, *supra* note 12, at 746–53 (detailing how feminists have challenged the gender-based connection between women and motherhood, while also privileging and universalizing the notion of motherhood).

78. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2132–40 (1994).

79. At the same time, Jeannie Suk's delightful essay on privacy reveals how privacy and the home (and gay male sex) remain feminized. Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 509–13 (2009) (revealing how Court discussions about privacy in the home often employ feminine imagery).

80. Compare *Muller v. Oregon*, 208 U.S. 412, 416–17, 422–23 (1908) (upholding state statute prohibiting women from working in factories more than ten hours per day based in part on women's needs arising out of the "discharge of her maternal functions"), and *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (arguing that a woman should be denied admission to the legal bar because of her "paramount destiny" to be a wife and mother), with *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724–25

around gender roles and differences that privilege persons without dependants (we'll call them "men"), singles them out for public life and economic rewards while depending on and yet largely ignoring those who care for dependants (we'll call them "women"), dependency is problematic for women. Martha Fineman has famously and persuasively illustrated how the privatization of dependency relies on women as caregivers for dependents and, in turn, makes women dependent.⁸¹ Many others have also taken issue with the deeply embedded and all but mandatory equation of woman and caretaker, and the resulting disadvantages women face.⁸²

Feminist jurists have proffered a variety of resolutions for the problematic aspects of this equation. These solutions are adult-centered and primarily concerned with sex or gender equality,⁸³ particularly regarding the responsibility for care. For example, Martha Fineman has proposed public support for dependent care.⁸⁴ Maxine Eichner accepts this theory, but

(2003) (upholding unpaid leave for women under the Family Medical Leave Act), *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (striking down a policy prohibiting women from working in jobs that could damage a fetus), *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (holding "hostile environment" sex discrimination actionable under Title VII), and *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981) (striking down state law granting husband sole authority over marital property).

81. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 169 (2004).

82. *E.g.*, ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 130 (1988) ("The pregnant body is still a problem because the female is seen as one and the same as the mother, engendered by her sex 'difference.'"); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 139 (1989) ("[W]omen are made vulnerable, both economically and socially, by the interconnected traditions of female responsibility for rearing children and female subordination and dependence . . ."); MacKinnon, *supra* note 61, at 1315 ("Fetal rights . . . are thus in direct tension with sex equality rights."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 47 (1988) ("Because they are compulsory, motherhood and heterosexuality are tremendously constraining, damaging, and oppressive."); *see also* Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 143 (1995) (illustrating the challenge of analyzing motherhood).

83. *See* Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285, 1294 (2005) (book review) (showing that feminist approaches to dependency seek "to achieve sex equality and other societal goods that should matter to a liberal democratic polity").

84. FINEMAN, *supra* note 81, at 47–49. More recently, Fineman has proposed a more universal and central conception of the human subject, replacing dependency with vulnerability as the organizing theme. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–10 (2008). This approach proposes vulnerability (and the risk of vulnerability) as a universally shared condition that should replace autonomy as the norm of personhood. *Id.* This approach could bridge both age and gender through its breadth and foundation in connection and need, rather than independence and autonomy. *See id.* at 11–12 (noting that, unlike the liberal subject which can only be an adult, "the vulnerability perspective" spans all developmental stages). In her view, questions of gender, race, class, care, and dependency give way to vulnerability as the standard for state action and equalization. *See id.* at 15–18.

broadens and deepens it, suggesting that employment, family, and other social systems must be reformed to reflect multiple levels of dependency, including dual parental responsibility for children, the conceptual disaggregation of women from caregiving, and dismantlement of the single breadwinner model.⁸⁵ Others have focused more narrowly on the family, seeking dual parental responsibility for dependency.⁸⁶

Feminists in law and other disciplines have delved more deeply and broadly into the problematic aspects of privatized dependency. These feminists examine how wealth is structurally located and transmitted through families⁸⁷ in a manner that maintains economic stratification and racial identification and barriers.⁸⁸ They illustrate how this transmission is related not to family functioning, but instead to the conditions of the communities in which families live.⁸⁹ For example, the relocation of production to the suburbs, the demise of public transportation, the stratification of housing along racial lines, and the localized funding of schools all serve to create and maintain cleavages of opportunity that diminish the prospects for children in families without economic capital and connections, while reinforcing the prospects for children in families with such capital.⁹⁰ According to this analysis, wealth transmission is not a matter of personal or familial failure, but is instead a larger structural problem, at least from a distributive justice perspective.⁹¹

85. See Eichner, *supra* note 83, at 1302–08 (advocating a public integration caretaking model, in which the state assists parents to integrate both caregiving and breadwinning roles into their lives).

86. See *id.* at 1295 (describing the parental parity caretaking model in which parents equally share the burden of caretaking).

87. See Collins, *supra* note 4, at 843–47 (“[A]lthough families . . . form a site for intergenerational control over, and transfer of, racialized wealth, these same social locations simultaneously constitute an important site for intergenerational male control of property.”).

88. See Patricia Hill Collins, *It's All in the Family: Intersections of Gender, Race, and Nation*, 13 HYPATIA, 62, 64–65 (1998) (“Individuals typically learn their assigned place in hierarchies of race, gender, ethnicity, sexuality, nation, and social class in their families of origin.”); Maxine Baca Zinn, *Feminism and Family Studies for a New Century*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 44 (explaining how families train their children to take their place in society).

89. See, e.g., Angela Harris, Margaretta Lin & Jeff Selbin, *From “The Art of War” to “Being Peace”: Mindfulness and Community Lawyering in the Neoliberal Age*, 95 CAL. L. REV. 2073, 2079–82, 2089–90 (2007) (describing public disinvestment in Oakland and the relocation of economic production to the suburbs); Zinn, *supra* note 51, at 865–71 (identifying the material conditions that removed economic vitality and production from the inner cities to the suburbs, particularly among African-American and Latino communities, and noting the absence of transportation options to carry workers from the city to their jobs).

90. See *id.* at 864–67 (identifying seemingly race-neutral economic changes that have profoundly affected minorities).

91. See Collins, *supra* note 4, at 843–44 (stating that the family serves as “a

Nevertheless, feminists note that received knowledge rewards and blames mothers for the status of their children,⁹² and this puts the “bad” mothers at risk of losing their children.⁹³ Thus, these structural conditions that serve to all but monopolize wealth and poverty challenge feminists to view children not as a burden, but as a privilege that has been and continues to be hard won for poor women and women of color. African American women in particular have fought for generations to rear their children outside of state or state-sanctioned interference or removal.⁹⁴ In contrast to those feminists who view the domestication and privacy of child rearing as isolating and burdensome, critical race feminists value the opportunity to care for their children in the home and want better present lives and futures for their children.⁹⁵

It is not surprising then that feminist jurisprudence has a complicated relationship with children. The vulnerability of children creates dependency, which can be a burden for the caregiver, who in turn becomes dependent because of the caregiving. The “natural” connection between women and children, through the operation of motherhood, causes other problems for women because it conflates womanhood and motherhood, binds women to constricting social scripts that

gendered site of wealth transmission that is grounded in assumptions about marriage . . . in which the family is viewed as a key site of inheritance. . . . Wealth matters because it is directly transferable from generation to generation, thus[] assuring that positions and opportunity remain in the same families’ hands.”); Val Gillies, *Perspectives on Parenting Responsibility: Contextualizing Values and Practices*, 35 J.L. & SOC’Y 95, 100 (2008) (arguing that deprivation in England is a consequence of inequality rather than of individual parenting practices and family values).

92. See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 365 (1996) (noting the “culturally dominant image of the mother as all powerful, always idealized, and, as a result, always blamed when things are not well”); Gillies, *supra* note 91, at 100 (“With social and economic marginalization explained at the level of the developing individual, working-class mothers can be viewed as too ignorant to pass on social betterment skills.”); see also Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 442–44 (2004) (reviewing RANDALL KENNEDY, *INTERRACIAL INTIMACIES* (2003)) (“[P]overty is often confused with neglect.”).

93. Appell, *supra* note 92, at 442–43 (noting that impoverished mothers are more vulnerable to state intervention, and thus, losing their children).

94. See, e.g., Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER SOC. POL’Y & L. 1, 13–15 (1993) (explaining how African-American mothers were denied their children in slavery and, more recently, are denied parental rights in the welfare system); see also Roberts, *supra* note 82, at 146 (describing common images in American culture of African-American women as unfit and dangerous mothers).

95. See Appell, *supra* note 12, at 766–67 (suggesting that for some women, “motherhood is a seat of power and value production”).

relate to ideal images of mothering,⁹⁶ and effectively undermines women's "full and equal political and economic participation."⁹⁷ Feminists have also exposed the interrelated patriarchal, male-centered structures of the home and market—structures that are built on, and sustained by, the domestic labor of women as care-givers.⁹⁸ At the same time, motherhood—the privilege of rearing children—is an important aspect of autonomy and constitutes political action, which also helps to maintain value pluralism.⁹⁹

Despite their disagreements regarding children, race, and class, feminists have made progress in disaggregating women from compulsory motherhood, dismantling many aspects of patriarchy within this system, and achieving political power and authority.¹⁰⁰ These achievements have no doubt changed and often improved women's lives and have certainly been transformative, even if feminism has not been successful in dislodging men (non-caregivers) from the center of social organization. These successes can be attributed to many things, not the least of which is the fact that women were the leaders in the intellectual, legal, and political movements that led to these reforms.

These changes may have helped children, particularly with respect to gender,¹⁰¹ but children as agents have not been the

96. See OKIN, *supra* note 82, at 56 (illustrating how a traditionalist approach to family binds women to the roles of bearing and rearing children, precluding their involvement in other activities typically afforded to men); ADRIENNE RICH, *OF WOMAN BORN* 13 (1976) (arguing that women are confined by their bodies, both biologically and ideologically).

97. Susan Moller Okin, *Humanist Liberalism*, in *LIBERALISM AND THE MORAL LIFE* 39, 52 (Nancy L. Rosenblum ed., 1989).

98. See Eichner, *supra* note 83, at 1288–89 (illustrating how the autonomous individual of liberal theory relies upon the labor of women as caregivers).

99. See HOOKS, *supra* note 62, at 133–34 (illustrating that African-American women historically have viewed mothering as “humanizing labor . . . that affirms their identity as women”); Appell, *supra* note 12, at 750–53, 781–83 (revealing the positive effects of disconnecting caretaking from gender, for both men and women); Collins, *supra* note 62, at 71–72 (noting the Native American tradition of viewing motherhood as natural and invested with power); Iglesias, *supra* note 62, at 903–04, 917–21 (describing African-American and Latin images of motherhood as a seat of power); Laura T. Kessler, *The Politics of Care*, 23 *WIS. J.L. GENDER & SOC’Y* 169, 169 (2008) (“[F]amily caregiving can be a liberating practice for caregivers qua caregivers. Specifically, care work can constitute an affirmative political practice of resistance to a host of discriminatory institutions and ideologies, including the family, workplace, and state, as well as patriarchy, racism, and homophobia.”).

100. See *supra* note 80 (discussing U.S. Supreme Court cases on women's rights).

101. For example, Title IX increased opportunities for girls and helped break down gender scripts that affect both girls and boys. See Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 *CLEV. ST. L. REV.* 473, 486–87 (2007); see also MINTZ, *supra* note 1, at 332–33 (describing U.S. Supreme Court cases regarding gender

center of these movements.¹⁰² On the contrary, as Leena Alanen observed, feminists have largely failed to critically examine childhood, and this failure has limited both children's and feminism's advances:

Feminist theories of motherhood have been limited in a particular way, and they have not been able to move further because they have been trapped in the dominant cultural assumptions about mothering. These, in turn, rest on unexamined notions of childhood, particularly on children's "needs", derived from psychological models of child development. Translated into children's authentic "interests," these needs were inevitably considered, as well as experienced, as constraints on women, making children into women's "appendices" while necessarily treating women and children as adversaries. Thus, the feminist theoretical project about the liberation of women could not simultaneously consider the liberation of children. Therefore, a separate "child question" never arose.¹⁰³

It is not surprising then that feminists have continued to struggle with dependency and the woman-child relationship, but have not systematically applied feminist methodologies to children.¹⁰⁴ As the next subsection illustrates, child-centered jurisprudence, too, has largely failed to apply those methodologies to children¹⁰⁵ and has, like the feminist

equity for minors).

102. See Leena Alanen, *Gender and Generation: Feminism and the "Child Question,"* in CHILDHOOD MATTERS, *supra* note 9, at 27, 33 ("The feminist conception of mothering . . . tends to objectify children by considering activities that are done to children."); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585, 1592 (1995) ("[F]eminist thought . . . highlights the vulnerability and helplessness of minors while underscoring their dependent status.").

103. Alanen, *supra* note 102, at 34 (citation omitted).

104. Martha Minow and Barrie Thorne are among the exceptions; they applied feminist methodologies to childhood over two decades ago. See Minow, *supra* note 68, at 3, 14-15 (illustrating the legally constructed distinctions between children and adults, and arguing that a jurisprudence of children's rights could reflect feminist values of "connection, care-taking, and social relationships"); Thorne, *supra* note 50, at 95-98 (exploring the connections between gender and age, including the exclusion of women and children from the dominant male standpoint of competent, complete, public, and agential).

105. By suggesting that childhood jurisprudence might apply methods of feminist jurisprudence to children, I mean that as a methodological, and not a substantive, matter, a childhood jurisprudence would ask similar questions as feminist jurisprudence (or any critical theory): How do law and society construct and regulate children? What purposes does that regulation serve? Whom does it help and whom does it harm? The application of these methodologies will not necessarily lead to the same conclusions feminists have reached regarding women. In other words, I am not suggesting that a critical childhood jurisprudence would obliterate the category of childhood and equate children with adults and adult rights, capacity, and responsibility.

jurisprudence, embraced the psychological model of childhood as a private place of need, vulnerability, and development.

B. Child-Centered Jurisprudence

While feminist jurisprudence's fundamental method of denaturalizing women was to distinguish sex and gender, child-centered jurisprudence has not sought to distinguish age and childhood. Instead, it has assumed children's dependency and privacy.¹⁰⁶ In contrast to feminist jurisprudence, which asks political questions regarding the law's construction of women as private and dependent (while also care-giving), child-centered jurisprudence is generally concerned with narrow legal questions of children's rights and children's representation, and not with the construction of childhood as private, natural, and bounded. Instead, child-centered jurisprudence addresses what rights children have or should have *vis-à-vis* the state or their caregivers and what duties their legal representatives owe them. Even law school textbooks on children and the law do not pose or ask these questions. Instead, they follow the law that governs children in families, in schools, and against the state, while also examining what rights and liberties children have.¹⁰⁷

Children's rights advocates have tried to denaturalize and delegitimize parental control over children, but they have not, for the most part, interrogated the naturalness of children's dependency or childhood's private locale.¹⁰⁸ In fact, child-centered jurisprudence has assumed a natural childhood, even while calling for the law to apply specifically, contextually, and with nuance to children.¹⁰⁹ This jurisprudence has not engaged in a

106. See Scott, *supra* note 16, at 550–51.

107. See, e.g., DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW* (3d ed. 2007) (covering topics including the representation of children, child welfare, juvenile justice, children's rights and legal obligations, adoption, regulatory legislation, and medical decisionmaking); ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* (6th ed. 2009) (covering topics such as child welfare, juvenile justice, family relations, medical treatment, child custody, and state limitation of liberty of children).

108. By "private locale," I mean that children are assigned to families, are largely prohibited from the market, do not have political agency, and receive most of their support through their families (and not directly from the state). It is true, however, that children are also under public control and surveillance particularly in schools and through their laws that regulate their activities.

109. See JAMES & JAMES, *supra* note 9, at 34–35; David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 988–90 (2002) (describing an approach to children's rights that considers the child as a particular person, requiring law to account for the best interests of the child and the views of the child in light of their age and maturity). *But see* JENKS, *supra* note 1, at 7 ("All contemporary approaches to the study of childhood are clearly committed to the view that childhood is not a natural phenomenon and cannot properly be

sustained examination of how legal and social norms regarding children shape society and conceptions of justice for children and adults. Instead, the child at the center of this jurisprudence is a developmental being in need of protection and education during a legally-defined period of childhood.¹¹⁰ Yet the regulation of children—what and who a child is, what a child can and cannot do, to whom children belong, and who is responsible for children—has deep and broad implications for children themselves, the adults to whom they relate, and the adults children will become.

This is not to say that there is no critical or child-centered literature about children and the law. Children's rights jurisprudence includes a critical wing that has studied the content, purposes, and work of children's rights—approaches that have laid bare the very adult and even political work that lawyers and policymakers perform on the backs of children.¹¹¹ In addition, British philosophers David Archard and Harry Brighouse have examined children's moral status and the repercussions of that status for children's rights.¹¹² Other child-centered jurists have suggested how law and legal representation might embrace, or at least reflect, what children need and want. These approaches have seriously and vigorously interrogated presumptions that children lack agency and voice in

understood as such.”).

110. WALDFOGEL, *supra* note 15, at 12–14.

111. *See, e.g.*, MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 243–44 (2005) (suggesting that adolescent abortion cases are not about children's rights, but instead represent a disagreement between adults over unwanted teenage pregnancy); ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN 152–54, 244 (PON Books 1996) (1985) (stating that abortion litigation raises questions concerning the temporal boundaries of childhood and the degree to which children should be treated like adults); Appell, *supra* note 36, at 150–56 (noting the difference between rights given to children “despite their minority” and those given “because of their minority”); Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573, 1583 (1995) (arguing that adults “invoke children to wage their own battles with one another” on topics such as juvenile delinquency, parental consent to abortion, and regulating behavior of pregnant women); Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L.Q. 393, 401 (2007) (revealing that state-sanctioned removal of children from poor families may be driven by societal bias rather than the child's best interests); Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1140–42 (2006) (showing that juvenile courts have been used by the majority to exert influence on perceived deviant minorities); Barbara Bennett Woodhouse, “Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1051–52, 1056–59 (1992) (describing how children's rights often conflict with parental rights).

112. *E.g.*, ARCHARD, *supra* note 36, at 28–29 (suggesting that children should have different rights from adults even though, as adults, they are entitled to the same moral consideration); Brighouse, *supra* note 59, at 698–99.

the law and legal proceedings and have articulated schemata to empower children and bring their wishes to bear on matters affecting them, even while acknowledging children's dependency and vulnerability.¹¹³

However, it would be difficult to identify a common methodology or shared objectives among these sets of literature regarding children and the law.¹¹⁴ Most of this very important and foundational child-centered jurisprudential work acknowledges and responds to children's development, dependency, agency, and vulnerability, but it has not taken on, in a systematic way, structural questions about why and how the law creates and defines childhood, what purposes this designation serves, and why children are domesticated. Instead, thus far child-centered jurisprudence, as vital and important as it is, confines itself primarily to legalistic or individualizing approaches to rights, agency, and representation.

113. See, e.g., JEAN KOH PETERS, CHILDREN IN CHILD PROTECTIVE PROCEEDINGS § 7-3, at 385-87 (3d ed. 2007) (describing the lawyer's counseling process with a child and when a lawyer is not bound by a child's wishes); Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 135-38 (2008) (noting that both the Indian Child Welfare Act and Bureau of Indian Affairs Guidelines provide avenues for children to participate in court proceedings); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 889-94 (2007) (arguing that children's voices should be heard and considered by the decisionmaker in proceedings concerning children); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1603-07 (1996) (justifying a child's right to counsel in civil litigation by comparing children to prisoners); Scarnecchia, *supra* note 73, at 42-46 (using the case of Baby Jessica to argue that courts should consider the impact on the child when making a determination in a contested adoption); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 831-32 (2005) (suggesting dual standards for evaluating the competency of juveniles facing criminal charges); Thronson, *supra* note 109, at 1014-15 (urging greater consideration of children's rights in immigration law); Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2481-83 (2000) (discussing how juvenile courts protect children by diverting them from the harsh treatment of the criminal justice system).

114. This absence is particularly stark in contrast to the extensive work in the sociology and history of childhood, both domestically and internationally. See MAYALL, *supra* note 6, at 14-19 (describing the field of childhood studies). This literature focuses, *inter alia*, on the constructedness of childhood, children's subjectivity, and children's agency. See, e.g., JAMES & JAMES, *supra* note 9, at 12-13; JENKS, *supra* note 1, at 7. The literature also examines the cultural and political work childhood performs in a variety of disciplines. See, e.g., BREWER, *supra* note 1, at 347-51 (examining how cultural perception of children affects changes in art, literature, philosophy, and the law); Sánchez-Eppler, *supra* note 42, at 58 (showing how adults identify with and relate to the play of street children); see also Qvortrup, *supra* note 9, at x-xi (describing the exploratory study, in the absence of sociological studies of childhood, employed by the Childhood Project); Thorne, *supra* note 8, at 149-50 (describing the discipline of childhood studies).

1. *Children's Rights*. Child-centered rights jurisprudence¹¹⁵ generally consists of and comments on two types of rights: quasi-civil rights and dependency rights.¹¹⁶ Both categories construct children as dependents and measure their freedom and rights accordingly.¹¹⁷ Quasi-civil rights are like adult civil rights, but may be cabined by children's youth. These rights include the right to be free from coercive state intervention,¹¹⁸ to equal treatment among dependents,¹¹⁹ to procedural due process, and modified versions of several of the constitutionally guaranteed substantive freedoms adults enjoy.¹²⁰ Dependency rights center on children's vulnerability and dependency and sometimes overlap with quasi-civil rights, particularly in the context of educational rights. Moreover, some child-centered jurists advocate children's right to be free "from the shackles of their parents' authority."¹²¹

This child-centered jurisprudence seeks to preserve and protect children's voice and conscience,¹²² as in freedom of choice

115. The children's rights arm of this jurisprudence comprises the law, advocacy, and the commentary regarding children's rights.

116. See Brighthouse, *supra* note 59, at 698–702 (defining and comparing children's welfare and agency rights); Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIM. L. BULL. 313, 313 (2008) (defining children's rights to include protective and dependency rights, as well as civil rights).

117. See *infra* text accompanying notes 123–37.

118. *E.g.*, *Breed v. Jones*, 421 U.S. 519, 541 (1975) (holding the prosecution of a juvenile in criminal court violated the Double Jeopardy Clause when the juvenile had already been convicted in juvenile court); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (holding that students are entitled to a hearing regarding temporary suspension from public school); *In re Winship*, 397 U.S. 358, 358–59, 368 (1970) (holding the standard of proof in a juvenile adjudicatory hearing is proof beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 33–34, 41, 55, 57 (1967) (holding that juveniles in juvenile proceedings are afforded many of the same due process rights as criminals in criminal proceedings). *But see* *Schall v. Martin*, 467 U.S. 253, 255–57, 265 (1984) (limiting minors' due process rights to contest punitive custody because "juveniles, unlike adults, are always in some form of custody").

119. *Levy v. Louisiana*, 391 U.S. 68, 70–72 (1968) (holding that State may not block child plaintiffs' right of recovery on the basis of their illegitimacy); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregation in the public schools violates the Equal Protection Clause).

120. See, *e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 642–44 (1979) (requiring states with parental notification laws to provide a judicial bypass for minors seeking abortion services); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (affirming freedom of political speech in school); *In re Gault*, 387 U.S. at 3–4 (affirming the right to due process for juveniles accused of criminal offenses).

121. GUGGENHEIM, *supra* note 111, at 220; *accord* Woodhouse, *supra* note 111, at 1114–15 (seeking to free children from their parents' religious expressions, cultural identity, and class aspirations); *cf.* Scarnecchia, *supra* note 73, at 45–46 (arguing that children have a right to protect relationships with adoptive parents).

122. See Appell, *supra* note 36, at 151–52 (defining children's rights to include voice and needs).

and speech cases, or in freedom from coercive intervention cases. In this way, children's quasi-civil rights are similar to adult rights, but they are also cabined by youth. Children's dependency and vulnerability often circumscribe the full extent of constitutional freedom. For example, girls do not receive women's right to (relatively) autonomous decisions regarding termination of pregnancy;¹²³ instead, girls have a right to bypass their parent and seek permission for the procedure from a judge.¹²⁴ At the same time, this perceived decisionmaking vulnerability has afforded greater freedom to children in at least one context: in *Roper v. Simmons*, the Court ruled that because of children's youth (i.e., their underdeveloped brains), it is constitutionally cruel and unusual to subject them to the death penalty.¹²⁵

In other civil rights areas, children or their lawyers advocate for children to be treated as equals among children.¹²⁶ For example, children have the equal right to attend schools that are not de jure racially segregated,¹²⁷ to attend school regardless of immigration status,¹²⁸ and to legitimacy under the law despite their parents' marital status.¹²⁹ These rights represent attempts

123. Adult women's autonomy here has been increasingly circumscribed. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (upholding portions of partial birth abortion ban); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

124. *Casey*, 505 U.S. at 899.

125. *Roper v. Simmons*, 543 U.S. 551, 568–70 (2005) (holding that the Eighth Amendment forbids death penalty for juvenile offenders in part because of "[a] lack of maturity and an under developed sense of responsibility . . . in youth" (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993))). Of course that freedom to live might well be a life without freedom, given that the United States is one of the few countries that permit life sentences for children convicted of crimes. Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1 (indicating that Israel, South Africa, and Tanzania were the only other countries currently detaining juvenile defenders for life sentences).

126. *See generally* MNOOKIN, *supra* note 111 (detailing several major children's rights cases).

127. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). But children are not positively entitled to racially integrated schools, nor are they entitled to attend schools as good as those attended by more privileged children. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) ("For schools that never segregated on the basis of race . . . or that have removed the vestiges of past segregation, . . . the way to achieve a system of determining admission to public schools on a nonracial basis is to stop assigning students based on a racial basis." (internal quotation omitted)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) ("[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts . . . such disparities [are not] so irrational as to be invidiously discriminatory.").

128. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (finding no substantial state interest in excluding children from public school on the basis of their immigration status).

129. *See, e.g.*, *Gomez v. Perez*, 409 U.S. 535, 537–38 (1973) (*per curiam*) (holding that

to liberate children from the oppressive or discriminatory arm of the state. While parents may often bring, orchestrate, or support these cases,¹³⁰ this jurisprudence is aimed at freeing children from state action that undermines constitutional personhood.

Dependency rights are also centered on the child, but they are concerned with the protection and socialization of children.¹³¹ These rights apply to what the parents and the state owe children *as dependents* who must be cared for and reared to adulthood. Hence, they govern adult responsibilities to children regarding education, basic sustenance, and physical and medical care.¹³² Although dependency rights promote children's long term freedom and interests as adults, they are not aimed at emancipating children as children.¹³³ Moreover, in the context of many dependency rights, it is adults who define the terms, choices, and occasions to invoke these rights.¹³⁴ For example, it is adults who choose whether they want a legal relationship with children, what choices children can make regarding custody, that children will go to school, what they will study in school, and to what care they are entitled.¹³⁵ Here, although child-centered jurisprudence might call for children's voices to dictate, or at least bear upon, these outcomes and choices,¹³⁶ these rights are

states cannot require parental support of marital children while excluding non-marital children); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169–70 (1972) (holding states cannot privilege marital children over non-marital children in distribution of a father's worker's compensation benefits); *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (holding that non-marital children have a right to recover for wrongful death of biological mother, just as marital children).

130. See, e.g., *Parents Involved*, 551 U.S. at 713 (“Petitioner Parents Involved . . . is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race.”).

131. See Appell, *supra* note 36, at 141 (“[T]he right to protection, support and continuity in a caregiver, arise[s] out of the child protection strain of *parens patriae* doctrine . . .”).

132. *Id.* at 156–57; see also Taylor-Thompson, *supra* note 111, at 1149–50 (noting the work of reform schools and public facilities during the nineteenth century in providing “wholesome basics”).

133. See Schepher-Hughes & Sargent, *supra* note 5, at 10–12 (“In gaining their ‘rights’ in the form of protection from family work, apprenticeship, and wage labor, modern children may have gained their childhoods but lost considerable power and status.”). Child protection and labor laws, for example, are geared toward protecting children, rather than emancipating them.

134. See Thorne, *supra* note 50, at 92–93 (“Adult power over children, including the power of definition, constitutes the usually unspoken context within which modern studies of socialization and child development take shape.”).

135. See GUGGENHEIM, *supra* note 111, at 41–42.

136. See Atwood, *supra* note 113, at 138–45 (noting the importance of children's voices in legal proceedings, particularly in Indian Child Welfare Act proceedings); Bruce A. Green & Bernardine Dohrn, *Foreward: Children and the Ethical Practice of Law*, 64

concerned wholly with children's care and custody as children, but often with an eye toward adulthood.¹³⁷

No discussion of children's rights can ignore the United Nations Convention on the Rights of the Child (CRC), even in the United States, which has not adopted it.¹³⁸ Based on liberal principles, the CRC embraces both dependency and quasi-civil rights and is fairly consistent with this country's conception and regulation of childhood as a status that is dependent, developmental, and optimally located in family.¹³⁹ While the CRC contemplates the family as the primary caregiver for the child, it promotes more state support for children and child rearing than the United States because it directs signatories to provide positive benefits to support dependent children and their caregivers, and it exceeds the right to primary and secondary education the United States grants children by providing for children's access to primary, vocational, and higher education.¹⁴⁰ Thus, the CRC more explicitly acknowledges and addresses the universal needs of children to which state signatories must attend. In this way, the CRC contemplates a slightly more public child than the private child of the United States, which leaves all but the most fundamental needs in parents' hands. Nevertheless, the CRC also assumes children's privacy and dependency.

Child-centered jurisprudence also acknowledges the limitations of children's rights, the adult purposes they serve,

FORDHAM L. REV. 1281, 1284-90 (1996) (recommending that children's lawyers given children a voice in legal proceedings).

137. See GUGGENHEIM, *supra* note 111, at 39-42 (noting that the best interests standard must consider the child's wellbeing both in the child's immediate and adult futures). For example, mandatory education is aimed at making children independent adults. *See id.* at 27, 41-42.

138. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC]. The United States is one of two nations that have not adopted calls for dependency and civil rights for children. *Id.*

139. See Sharon Stephens, *Children and the Politics of Culture in "Late Capitalism,"* in CHILDREN AND THE POLITICS OF CULTURE 3, 38-39 (Sharon Stephens ed., 1995) (noting that in the CRC, "a child's right to a cultural identity is built on liberal democratic principles of tolerance for diverse views and freedom of self-expression," and that the CRC fails to address structural economic inequalities that disadvantage nations and children). Allison James, Penny Curtis, and Joanna Birch note that under the CRC, "progressive governments [have] created a wider net of social control" over children. James, Curtis & Birch, *supra* note 11, at 88.

140. See CRC, *supra* note 138, art. 27(2) ("The parent(s) . . . have the primary responsibility to secure . . . the conditions of living necessary for the child's development."); *id.* art. 27(3) ("States Parties . . . shall take appropriate measures to assist parents . . . to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."); *id.* art. 28 (requiring parties to make primary education compulsory, and to make vocational and higher education accessible to all).

and the dissembling they perform.¹⁴¹ This jurisprudence recognizes that children's rights, like rights more generally, tend to be "individualistic, individualizing, legalistic, and reinforce existing power structures and socio-economic inequities."¹⁴² Nevertheless, self-identified children's rights advocates rarely address structural changes to remedy sources of childhood risks, such as racism, poverty, poor schools, lack of economic opportunity, and lack of access to health care.¹⁴³ Indeed, rights-based approaches tend to be confined by inherently conservative law and legal systems.¹⁴⁴ Moreover, advocates for social justice do not necessarily identify as children's rights lawyers.¹⁴⁵ The shallowness of these notions of children's rights might be related to children's lack of agency and independence,¹⁴⁶ and the related fact that they normally receive lawyers in defensive or protective

141. See, e.g., Appell, *supra* note 92, at 459–61 (identifying welfare and adoption policy as two areas in which political agendas are pushed in the name of children); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002) (arguing that family court remedies often exacerbate class and racial disparities); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 809–10 (2006) (arguing that children's attorneys really represent state interests, rather than their clients' interests); Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 132–37 (1999) (examining welfare and adoption policies promulgated in the name of children).

142. Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 701 (2006); see Wendy Brown, *Rights and Identity in Late Modernity: Revisiting the "Jewish Question,"* in IDENTITIES, POLITICS, AND RIGHTS 85, 118–19, 123 (Austin Sarat & Thomas R. Kearns eds., 1995) (describing how rights can strengthen the very inequalities they seek to remedy); Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1, 9 (2004) (noting that most civil liberties exhibit individual dimensions).

143. See Appell, *supra* note 142, at 701 ("[L]egal justice approaches do little to address systemic problems that create risks for children . . ."); see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487 (1976) (illustrating how the school desegregation movement overlooked the socioeconomic conditions underlying the racial subordination of African Americans).

144. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING 31, 48 (Austin Sarat & Stuart Scheingold eds., 1998) ("A decade of Republican appointments to courts [has] caused most public interest lawyers to revamp their legal strategies."); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING, *supra*, at 3, 8 ("Whether cause lawyers are struggling for basic liberal rights or working on behalf of broader democratic values, they are usually swimming against the prevailing political tide.").

145. See Appell, *supra* note 142, at 709–10 ("[S]ocial justice advocates and their communities may in fact be motivated by the needs and future of children and use rhetoric regarding children, but they do not appear to identify with children's attorneys, nor the children's attorneys with them.").

146. See Federle, *supra* note 102, at 1585–86 (proposing that rights be thought of in terms of power rather than capacity).

matters.¹⁴⁷ In other words, neither children nor their voices are driving the children's rights movement.¹⁴⁸

2. *Children's Legal Representation.* Child-centered jurisprudence also examines how children are represented before the law, particularly raising questions about who represents children and what role children play in this representation. This work is both academic and political in that it occurs in the academy for theoretical and normative purposes as well as in policymaking fora.¹⁴⁹ Here, the primary debates are whether children determine the objectives of the representation or whether these objectives are guided by children's best interests.¹⁵⁰ These debates also center on children's vulnerability and dependence.¹⁵¹ Research and advocacy in this area invoke metrics of child development, capabilities, and capacities, and the safety of the child.¹⁵² This work is also concerned with the disparities between lawyers and their child clients.¹⁵³

The legal literature regarding children's representation is deeply concerned with the balance between children's voice or agency and their vulnerability. The law routinely, although not exclusively, assigns legal representatives for children who will represent and advocate for their best interests and not necessarily what the children want.¹⁵⁴ Even attorneys appointed

147. See Appell, *supra* note 13, at 575 (noting that federal and state laws require providing representation to children in protective or coercive state interventions).

148. See *id.* at 574–76 (“[A]dults outside the family have pressed children’s interests in courts and before public policy makers with increasing breadth and frequency.”).

149. See, e.g., A.B.A., STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996); NAT’L ASS’N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (2001); JUVENILE JUSTICE STANDARDS ANNOTATED (Robert E. Shepherd, Jr. ed., 1996); Bruce A. Green & Annette R. Appell, *Representing Children in Families—Foreword*, 6 NEV. L.J. 571 (2006); *Special Issue: Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1281 (1996).

150. See Green & Dohrn, *supra* note 136, at 1283; *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 592–96 (2006) [hereinafter *UNLV Recommendations*].

151. See Appell, *supra* note 13, at 595–606 (proposing a changing role for children’s attorneys based on the age of the client and type of case).

152. See Green & Dohrn, *supra* note 136, at 1288–90 (recognizing that a child’s capacity must be a factor in determining how a children’s lawyer represents a child, but acknowledging difficulties with determining that capacity in the first place).

153. See Appell, *supra* note 13, at 576–78 (discussing the issues lawyers face when representing children as a result of power differentials); *UNLV Recommendations*, *supra* note 150, at 592–93 (exploring the role of lawyers who represent children and offering recommendations to improve client representation).

154. See Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5106a(b) (2006) (providing for appointment of guardians ad litem for children in child abuse and neglect proceedings and requiring that they make recommendations “concerning the best

to serve in the traditional lawyer role may not represent their clients' wishes.¹⁵⁵ Attorneys, academics, policymakers, and judges continue to debate the proper role of children's attorneys,¹⁵⁶ and they struggle with the contradictions in representing clients who may not have authority to dictate the objectives or scope of the representation or to pursue substantive rights.¹⁵⁷

This wing of child-centered jurisprudence includes a significant call for children's agency in the representation. In addition to the standards and recommendations from the juvenile defenders and Fordham and UNLV conferences¹⁵⁸ calling for attorneys to allow the child to direct the objectives and means of the representation, child-centered jurists also advocate that children have a direct voice in legal matters relating to them or their interests, even if the child's wishes will not be determinative.¹⁵⁹ Indeed, children's vulnerability may constitute a rationale for appointing counsel for children precisely to protect their rights.¹⁶⁰ Child-centered jurisprudence has developed methodologies for representing children who cannot direct all or portions of the representation¹⁶¹ or who simply may be unable to

interests of the child"); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 246–48 (2005) (noting how the best interest standard often results in the attorney discounting the wishes of the child client); Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1014–15 (2006) (finding more than half the states "require the child's representative to express or advocate the child's views before the court").

155. See Robert E. Shepherd, Jr., *Still Seeking the Promise of Gault: Juveniles and the Right to Counsel*, CRIM. JUST., Summer 2003, at 22, 25 (showing faults in the quality court appointed child advocates).

156. See, e.g., Green & Appell, *supra* note 149, at 571–75 (describing conferences and studies seeking to better children's representation); Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385, 1386–88 (2006) (criticizing the NCCUSL draft proposal in the context of the UNLV Conference for failing to ensure independent representation for all child clients).

157. See Appell, *supra* note 13, at 625–28 ("[The children's bar has] explored how the attorney-client relationship and its individualistic, rights-based characteristics present challenges to representing children because so often children are not legally empowered to make decisions, but instead are dependent on others . . .").

158. See *supra* notes 149–50.

159. See Atwood, *supra* note 113, at 145–49 (advocating meaningful participation for Native American children in their own placement proceedings); Green & Dohrn, *supra* note 136, at 1285–86 (discussing the role of the child's voice in legal proceedings); UNLV Recommendations, *supra* note 150, at 592–96 (encouraging children's attorneys to promote children's participation in legal proceedings).

160. Ross, *supra* note 113, at 1572.

161. See Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1507–12 (1996); *Recommendations of the Conference on Ethical Issues in the Legal*

control their lawyer.¹⁶² These positions represent a serious respect for and engagement with the child as a moral being whose perspective is both helpful to the decisionmakers and worthy of expression because of the child's personhood, even if the child's competence to make decisions is not settled.

3. *Missing Questions in Child-Centered Jurisprudence.* Even though children's rights "move children into the public realm,"¹⁶³ child-centered jurisprudence is only occasionally engaged with substantive questions surrounding the privacy and dependency of childhood outside of legal representation, education, and custodial matters.¹⁶⁴ Although child-centered jurisprudence is concerned with children's participation in their own legal representation and sometimes their direct voice in court,¹⁶⁵ it is not yet heavily engaged with other participation questions. These include children's role in forming or informing public policy, their voice when they are the subjects of study, or their right to vote. These questions engage childhood scholars in other parts of the world and in other disciplines in this country,¹⁶⁶ but not, for the most part, the U.S. legal academy.

Moreover, this discourse equates progress with the transition of children from property to persons,¹⁶⁷ but it sheds little light on what personhood means for children outside of their dependent status.¹⁶⁸ In other words, this personhood exists within the boundaries of dependency, *vis-à-vis* parent, state and

Representation of Children, 64 *FORDHAM L. Rev.* 1301, 1301–11 (1996); *UNLV Recommendations*, *supra* note 150, at 593–97.

162. See Appell, *supra* note 142, at 694–95 ("Because children are not able to direct their lawyers as forcefully or as coherently as adults, lawyers for children should exercise extra care and special strategies to ascertain children's needs and wishes . . .").

163. Brennan & Noggle, *supra* note 58, at 15.

164. See Appell, *supra* note 142, at 697–704 (criticizing legalistic approaches to child advocacy).

165. See, e.g., *supra* note 159; Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 *NEV. L.J.* 1302, 1303 (2006) (discussing the importance of giving foster youth the opportunity to participate in their court proceedings).

166. See, e.g., Francis Schrag, *Children and Democracy: Theory and Policy*, 3 *POL., PHIL. & ECON.* 365, 370–76 (2004) (analyzing the effect of children's disenfranchisement); Symposium, *Theorizing Children's Participation: International and Interdisciplinary Perspectives*, 16 *INT'L J. CHILD. RTS.* 281 (2008).

167. See generally MASON, *supra* note 1 (tracing the legal status of children in the United States); Woodhouse, *supra* note 111 (exploring the legal status of children throughout history).

168. Howard Cohen is a notable exception. Compare HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* (1980) (proposing fully extending rights to children), with MASON, *supra* note 1 (tracing children's legal status as dependents, of their parents or the state, throughout American history), and Woodhouse, *supra* note 111 (same).

school. The question of what this cabined personhood means for children in material, social, and economic terms is folded into their dependency, which is in turn privatized and assigned to parents or guardians, and to various public entities designed to address children's vulnerability.¹⁶⁹ In this way, child-centered jurisprudence internalizes the privacy and dependency of children and contemplates children within the bounds of childhood—the structural site that defines and regulates children—rather than interrogating this site itself to explore the role of childhood in distributing power, agency, and justice (and, perhaps most crucially, the transition from child to adult).

When child-centered jurisprudence critiques the private family,¹⁷⁰ it does so without accounting for social inequalities, often along class and racial lines, or for the value pluralism that undergirds liberal theory.¹⁷¹ That is, in a liberal democracy, rearing children in private families that propagate and preserve value pluralism while fostering private allegiances will, in theory, produce critical thinking citizens with the requisite distance from the state to govern.¹⁷² I have argued elsewhere that this private aspect of the political child has great utility, particularly for protecting the moral autonomy of marginalized women and children.¹⁷³ However, the material aspects of the

169. Debates in this discourse tend to address familial relational rights: how parenthood should be defined; which relationships and what type of relationships should be afforded parental status; and what types of parents are best for families. *See, e.g.*, JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 24–67 (2006); Emily Buss, *Children's Associational Rights?: Why Less is More*, 11 WM. & MARY BILL RTS. J. 1101 (2003); David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117 (2003). Other issues, such as child sexual abuse, of course, also engage discussions of children and justice. *E.g.*, MARCI A. HAMILTON, *JUSTICE DENIED: WHAT AMERICA MUST DO TO PROTECT ITS CHILDREN* (2008). The title of this book, which is about child sexual abuse and the need for statute of limitations reform, illustrates the narrow, though important, ways we approach children's lives and needs in the name of justice. According to this narrative, what America must do to protect its children is not provide equal opportunity, safe neighborhoods, a living wage for parents, day care, health care, or universally good schools; instead America must address the horrendous and *unlawful* things that are done to children by adults. *Id.* at 2–3.

170. *See, e.g.*, BARTHOLET, *supra* note 72, at 58–78 (criticizing family preservation policies in light of their impact on children who are victims of abuse and neglect); Woodhouse, *supra* note 111, at 1050–67 (discussing the conflict between the private family and children's rights in the regulation of education and labor).

171. *See* DAVIS, *supra* note 32, at 90–117 (exploring parenthood and the family from a historical perspective, highlighting the influence of slavery); Appell, *supra* note 12, at 684–86 (highlighting the diverse arrangements in which families live); Roberts, *supra* note 94, at 7 (analyzing the “intimate intertwining of race and gender”).

172. Appell, *supra* note 12, at 706–09.

173. *See id.* at 784 (illustrating the negative consequences to underprivileged women and children if the private aspect of the political child is eroded). There are a number of practicing children's attorneys and academics who disagree. *See, e.g.*, Akhil Reed Amar &

privatized dependency have served to reify and naturalize multiple inequalities, limiting the political and economic roles and options of certain children and families, an insight that has been largely absent from child-centered jurisprudence.¹⁷⁴

In these ways, child-centered jurisprudence, while extraordinarily important, tends to be confined *to* or *by* the contours of dependency without systematically interrogating the beneficial and harmful conditions of these constructions. For the most part, child-centered jurisprudence does not challenge the structure of dependency or the relegation of that dependency to the private realm.¹⁷⁵ For example, child-centered jurisprudence rarely challenges the legal norm that children are raised in families or the fact that public investment in children is primarily centered on children's caregivers. Child-centered jurisprudence does not ask whom and what purposes privatized dependency serves.¹⁷⁶

It is worth exploring the political aspects of locating the developing child in the family and then privatizing the dependency of this child. Following the lead of feminist jurisprudents, child-centered jurisprudence might ask the same sorts of questions about how the law constructs childhood. Whom does this construction serve? Who benefits from it and who suffers? How does the relegation of our future citizens to incapacity and need serve children and adults? Who thrives under these conditions and who does not? How much of children's

Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1363–65 (1992) (arguing that the Thirteenth Amendment provides a better remedy for victims of abuse than the doctrine of substantive due process). Most recently, two more law professors have suggested that states be given greater power to individually assess certain parents and preemptively remove their children at birth. See Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 375 (2009) (“[C]ourts should be empowered by statute . . . to issue a temporary no-procreation order effective until [a] person becomes fit”); James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 482–86 (2008) (advocating monitoring births to identify and investigate children born to parents with criminal histories or who have previously been involuntarily committed to a psychiatric facility).

174. In contrast, childhood jurisprudence might address these structural and generational impediments to individual and group advancement, while protecting the integrity of subordinated families.

175. See Appell, *supra* note 142, at 697–702 (advocating hearing children's voices in justice proceedings, both independently and through their representatives).

176. For example, a 2008 special issue of the British Journal of Law and Society devoted to “Children, Family Responsibilities, and the State” had very little to say about the child as citizen or member of the state, but instead addressed the state's relationship with parents *vis-à-vis* children, or directly for child protection from parental neglect or abuse or to children who commit crimes. Symposium, *Children, Family Responsibilities, and the State*, 35 J.L. & Soc'Y 1 (2008).

legal coverture is necessary and helpful? Why do children not have the right to vote? Why are they not involved in the legislative process? To begin this inquiry, the next section rehearses how childhood came to its current construction. This background both explains and denaturalizes childhood, laying the groundwork for a clearer understanding of the expansive and integral role childhood and children play in liberal conceptions of justice. The first step in this analysis is to identify and interrogate the category of childhood as a social and political, as opposed to natural, category. It draws on the field of childhood studies, which is concerned with the social and political work that children do literally and symbolically, and questions of children's voice, participation, and agency.

IV. THE CREATION OF A NEW AMERICAN CHILDHOOD

Childhood was not always, and still is not universally, an inchoate period during which human beings under eighteen years old are tucked away from the polity and market. On the contrary, far from being bit players in an adult pageant, children and their political, symbolic, and legal images had and continue to have deep and broad roles in shaping culture, class, race, economics, and politics in the United States. Children continue to serve important roles in the transmission of culture, wealth, and justice. Both material and ideological conditions¹⁷⁷ contributed to the emergence of our contemporary notions of childhood as a private time of social, psychological, and physical development when children need care, nurture, and education to become functioning, independent adults.¹⁷⁸ These notions of childhood were central to the formation of and continue to be at the core of contemporary American ideas about justice, liberty, and the polity.

A. *Ideological Conditions Contributing to Modern Constructions of Childhood*

Contemporary notions of childhood as a separate and dependent status, in opposition to adulthood and moral and political agency, are grounded in the epistemological, moral, and

177. See generally BREWER, *supra* note 1 (analyzing the role of ideology in changing conceptions of children through Anglo-American history); GILLIAN BROWN, *THE CONSENT OF THE GOVERNED* (2001) (exploring the impact of Locke in American culture and on the rights and roles of children); HAWES, *supra* note 1 (describing history of children's rights in America); MASON, *supra* note 1 (chronicling child custody in American history).

178. See ARCHARD, *supra* note 2, at 39–45 (discussing the modern conception of childhood as a developmental period); JAMES & JAMES, *supra* note 9, at 13 (same).

political philosophy of the Enlightenment and the rationalist and empiricist thinking that informed it.¹⁷⁹ These intellectual movements centered on notions that people had the intellectual capacity and knowledge to find, or at least explain, meaning in rational, rather than solely faith-based or divine terms.¹⁸⁰ This turn toward the individual as a source of knowledge and understanding reached through rational or empirical processes underscores the connection between agency and adulthood—a time when abstract thinking is, normally, at its height. This humanization and individuation of capacity for wisdom set the stage for movement away from central authority and toward a more autonomous or unbounded agency—one that paved the way for the U.S. Constitution.¹⁸¹

The framework that legally and politically separates children from adults is traceable at least as far back as John Locke, whose political and moral philosophy greatly influenced American political theory.¹⁸² The distinction between adults and children was central to Locke's interdependent epistemic and political theories. This distinction both created and located power in knowledge while simultaneously accounting for why children do not have power, but are subordinated to adults.¹⁸³ Locke

179. See BREWER, *supra* note 1, at 169–71 (noting, for example, Hale's argument that development of the human understanding comes only with age). Of course, the characterization of children as vulnerable, dependent, and immature has ancient origins. See John Wall, *Human Rights in Light of Childhood*, 16 INT'L J. CHILD. RTS. 523, 524–27 (2008) (chronicling this view over time, beginning at least as far back as Plato).

180. This is admittedly a gross oversimplification and perhaps an inelegant way of summing up several crucial centuries of moral and political philosophy, including Rene Descartes, John Locke, David Hume, Immanuel Kant, and their peers and predecessors. Still, my point is that modern philosophy reflected a turn to self or the individual—through reason, not revelation—as a primary source of knowledge and understanding rather than the church or God. See FREDERICK COPLESTON, IV A HISTORY OF PHILOSOPHY: DESCARTES TO LEIBNIZ 16–23 (4th impression 1965) (1958) (detailing the development of rationalism).

181. This individuality freed philosophers and scientists from following certain norms, such as writing original works rather than commentaries, and writing in the vernacular rather than in Latin. Indeed, Copleston notes that distinctions between the medieval and modern philosophers included the moderns' tendency to write original treatises and to use the vernacular (e.g., English, German, or French). *Id.* at 4.

182. See generally STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE* (1990) (analyzing the influence of Lockean liberalism in American revolutionary and constitutional ideology); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988) (same); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9, 30 (1987) (same). Locke's epistemology may also have influenced notions of child rearing and childhood. See MINTZ, *supra* note 1, at 51 (“Much more widely read than political discourses . . . were childrearing tracts, like [Locke's] *Essay Concerning Human Understanding* . . .”).

183. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 304 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“*Children* . . . are not born in this full state of

established an epistemology that was fairly novel at the time in that it held that knowledge is not innate, but acquired through sensation and reflection.¹⁸⁴ He utilized children (and “idiots, etc.”) to prove his point that there are no universal maxims imprinted at birth because children do not know what adults know until they learn it.¹⁸⁵ In contrast to adults, children are blank slates that acquire knowledge through accumulated and increasingly complex experience of and reflection on the world.¹⁸⁶ According to Locke, much of this learning and certainly the basic principles of science and abstract knowledge are the provenance of the academy.¹⁸⁷ Here, one can see a familiar framework for child development and capacity¹⁸⁸ wherein children are undeveloped, unknowing, and unwise but in a state of becoming the opposite of those adjectives.

Childhood scholars have demonstrated the centrality of the distinction between adult and child capacity and dependency to the construction of the liberal civil polity and the distinction between public and private.¹⁸⁹ Besides children’s role in reproducing culture, which has political repercussions,¹⁹⁰ the actual and symbolic removal of children from the polity in 1787,

Equality, though they are born to it. . . . Age and Reason as they grow up, loosen [the bonds of dependency] till at length they drop quite off, and leave a Man at his own free Disposal.”); *id.* at 306 (“The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood.”).

184. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 37–38 (John W. Yoldton ed., J.M. Dent & Sons Ltd. 1977) (1690) (asserting that knowledge is acquired through experience).

185. *Id.* at 40.

186. *Id.* at 45, 50, 59 (positing that children acquire reason and knowledge in stages).

187. *Id.* at 62.

188. These notions also may have contributed to the conditions for the discipline of psychology and its concern with the individual psyche. This is not to say that Locke had a radical take on children or that children were viewed before or after the time of Locke as fully rational, moral, or religious beings. On the contrary, philosophers have since ancient times viewed children as vulnerable and undeveloped. *See* Wall, *supra* note 179, at 527 (observing Aristotle’s perception that children were “pre-rational” but still capable of further moral and virtuous development). In addition, doctrine in many religions demarks childhood and adulthood for purposes of accountability and being counted. *See, e.g.*, BREWER, *supra* note 1, at 52 (noting the Protestant method of counting members of the church upon their baptisms).

189. *See* BREWER, *supra* note 1, at 131 (“[Democratic-republican theorists] excluded children from the privileges of citizenship and . . . from some of its obligations, emphasizing that only those who had discretion, who could reason, could be bound to obedience. They did so in order to distinguish between consent that was coerced and influenced, and consent that was free.”); LEVANDER, *supra* note 1, at 1–3 (contending that children’s differences from adults are a fact on which social and civil institutions largely depend); Appell, *supra* note 36, at 144–45 (exploring the political role of parental rights and their centrality to liberal democracy).

190. *See* Appell, *supra* note 36, at 144–45.

as Holly Brewer has demonstrated, was an integral part of the movement from divine rule to rule by consent.¹⁹¹ This transformation was centuries in the making. It required a shift away from power relations and authority framed by a patriarchal lineage where authority came from God to king to subjects, and parents to children. Like children, who could not consent to parental authority, the king's subjects had no power to consent to royal authority or to parent-like control over those born into lower stations.¹⁹² The revolutionary change undergirding the birth of the United States was the distinction between adults and children in terms of capacity for self-governance and the ability to consent to authority.¹⁹³

This distinction was the product of several conceptual changes that occurred during and after the Reformation regarding the location and authority of sovereignty in religion and in the polity.¹⁹⁴ In step with these changing notions of epistemology and intellectual authority,¹⁹⁵ the political paradigm shifted from primogeniture to consent of the governed.¹⁹⁶ Locke's political writings provided a compelling framework for consent that drew upon children, just as he did in his epistemological work.¹⁹⁷ Under his political theory, all men were born free, rational, and equal.¹⁹⁸ Accordingly, they were perfectly capable of governing themselves.¹⁹⁹

Children's vulnerability and subordination challenged this born-free view of the citizen.²⁰⁰ Children were not free in fact; their parents or other adults ruled them. This seeming contradiction operated both to explain and distinguish children's nonconsensual subjection to parental authority and the freedom into which men

191. See BREWER, *supra* note 1, at 130–35 (discussing the removal of children from the polity in revolutionary America).

192. See *id.* at 22.

193. See *id.* at 130–35.

194. See *id.* at 48–49.

195. See Susanna L. Blumenthal, *The Default Legal Person*, 54 UCLA L. REV. 1135, 1150–51 (2007) (discussing the centrality of mental capacity, personal wisdom, and virtue in the construction of political persons at the time of the founding of the United States).

196. BREWER, *supra* note 1, at 87–91.

197. E.g., LOCKE, *supra* note 183, at 304; see also Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 991–92 (1993) (addressing how the “connection between freedom and rationality is central to Locke's assertion that natural freedom and children's subjection to their parents are compatible concepts founded on a shared principle of liberty”).

198. LOCKE, *supra* note 183, at 269.

199. *Id.* at 330–31.

200. See BREWER, *supra* note 1, at 91 (pointing out the contradiction between a child's status as a free political citizen and as obedient to his or her parents).

were born.²⁰¹ Locke drew upon the epistemological point that children live in a temporary stage of dependency, a status they eventually outgrow as they gain the knowledge and ability to govern themselves (i.e., enter adulthood).²⁰² In contrast to children, adults can reason for themselves and should therefore have the corresponding right to consent to their government.²⁰³ Thus, adulthood became synonymous with authority and childhood synonymous with dependency. Children are the instantiation of the Lockean blank slates that acquire knowledge through accumulated and increasingly complex experience of and reflection on the world until they can be free from parental control and are able to govern themselves and others.

Although these ideas seem obvious today, Locke's work was practically revolutionary, and it influenced thought for centuries to come, including the political views of the American colonists and the Framers of the Constitution.²⁰⁴ In England at the time, political office and participation were inherited and children could be kings.²⁰⁵ For at least a century to come, children could hold political office simply by virtue of their birthright. There were child kings; and children under eighteen years of age could be elected to the House of Commons.²⁰⁶ Status (i.e., birthright), not consent, dictated political power. In turn, people owed allegiance through birth; that is, the father's allegiance passed to his son, even when the son became an adult, and in turn his son would owe allegiance to his father's king.²⁰⁷

Thus, political participation was based on status and not age or reason. Children were not excised from the polity, but could hold office because their political status and allegiance came through birthright, not consent of the governed. Kings and other members of the ruling class obtained their status as a result of their parentage (just as those without power obtained their

201. See Federle, *supra* note 197, at 991–92 (“This connection between freedom and rationality is central to Locke’s assertion that natural freedom and children’s subjection to their parents are compatible concepts founded on a shared principle of liberty.”).

202. LOCKE, *supra* note 183, at 304–08 (distinguishing children’s need for parental authority from adults’ lack of need for authority); see also BREWER, *supra* note 1, at 91–92 (noting that, for Locke, children should be dependent on their parents until they reached an “age of discretion”). Childhood theorists have named this Lockean child the pre-sociological “Immanent Child.” See JAMES, JENKS & PROUT, *supra* note 2, at 15–16.

203. See BREWER, *supra* note 1, at 91 (explaining that Locke “distinguished adults who could reason from children who could not”).

204. *Id.* at 108.

205. *Id.* at 23–25.

206. See *id.* at 23–28. Thus, children could gain the title *pater patriae*, or “father of the country.” *Id.* at 23–24.

207. See *id.* at 130.

status as a result of their parentage).²⁰⁸ Childhood, to the extent it existed, was primarily a complicated relational, not developmental, category that dictated one's place in the power structure regardless of age.²⁰⁹ In effect, then, childhood was not based on developmental principles or age.

Even in the colonies, it was not unheard of to elect "elite young members" to lower houses of the legislature—boys as young as fifteen.²¹⁰ Similarly, children, boys as young as twelve and thirteen, were appointed to office.²¹¹ Both boys and girls participated in political action of their own or in conjunction with adults.²¹² But as knowledge and power became more democratic (in the sense that it was accessible to people and obtainable through reason and observation), the distinction between those with and without reason became politically salient. This distinction was essential to the creation of the United States.

Indeed, the social contract we know as the Constitution of the United States reflected a revision of the construction of childhood.²¹³ This revision of authority displaced birthright with consent—moving power to the people who would choose their government.²¹⁴ In America, the people were sovereign.²¹⁵ This meant that they had to consent to be governed. At the time, the very notion of consent encompassed capacity—reason and knowledge.²¹⁶ Children (and others)²¹⁷ did not have that capacity,

208. *Id.* at 22.

209. In other words, children could rule adults.

210. BREWER, *supra* note 1, at 28.

211. *Id.*

212. See, e.g., J. L. Bell, *From Saucy Boys to Sons of Liberty: Politicizing Youth in Pre-Revolutionary Boston*, in CHILDREN IN COLONIAL AMERICA 204, 204–13 (James Marten ed., 2007) (noting the political role some children played in pre-Revolutionary Boston).

213. See, e.g., BREWER, *supra* note 1, at 34 (discussing the Framers' position that public office should not be available to men only twenty-one years old, even though that was an accepted demarcation between childhood and adulthood).

214. See U.S. CONST. pmb1.

215. These people were initially white, male, and often propertied.

216. See BREWER, *supra* note 1, at 8 ("The concept of an 'age of reason' became critical for determining who could give meaningful consent.").

217. See Stefan Olsson, *Children's Suffrage: A Critique of the Importance of Voters' Knowledge for the Well-Being of Democracy*, 16 INT'L J. CHILD. RTS. 55, 56–58 (2008) (noting that it was not until the late nineteenth century that the right to vote became more universal for adults); see also U.S. CONST. amends. XV, XIX (providing suffrage for former slaves and women, respectively). As Lucia Hogsdon suggests, the disenfranchisement of children alongside large scale disenfranchisement of African Americans and women feminized and racialized children. Lucia Hodgson, *At the Crossroads of Children's Studies and American Studies: Intersections, Possibilities, Challenges*, NEWSLETTER (Soc'y Hist. Child. & Youth, Milwaukee, WI), Winter 2009, at 18, 19. Similarly, the antebellum equation of slaves and children reinforced the political and

so they had to be excised from the polity until they reached adulthood. Otherwise, the notion of popular sovereignty would be meaningless. As an ideological and political matter, childhood became a category based on developmental, rather than birth or relational, status.²¹⁸ Childhood could not be a place of power; rather it was a time and place of irrationality, vulnerability, and dependency upon adults for governance. The site of this dependency was at the hearth and not the polity.

Children were not without political value, however. Childhood became a site for the development of political actors—the adults who would be the future voting citizens and republican leaders.²¹⁹ The founders understood the important role children would play as adults in a liberal republican democracy and saw child rearing intervention as a method to help preserve the social order and republican values of “self-discipline, a respect for authority, and a deep regard for civic virtue.”²²⁰ This intervention must begin early to ensure that a child’s character develops appropriately, and it brought to the forefront the previously unappreciated child rearing role of mothers who traditionally cared for children in their early years.²²¹ The greater appreciation of the role of motherhood meant that even girls needed a good education so that they could better perform their political roles as mothers and independent citizens.²²² Schools also played an important role in this ideology to teach “[k]nowledge and virtue”²²³ and “convert men into republican

social disenfranchisement of slaves. Lesley Ginsberg, *Of Babies, Beasts, and Bondage: Slavery and the Question of Citizenship in Antebellum American Children’s Literature*, in THE AMERICAN CHILD, *supra* note 42, at 85, 90 (describing antebellum views comparing slaves and children).

218. This is not to suggest that birth status did not and does not matter. Of course, just as the institution of slavery somehow coexisted with these ideas of consent to be governed, to whom one is born continues to this day to dictate the social and economic, though in theory not political, status one will have. *See infra* Part V.C.

219. *See* MINTZ, *supra* note 1, at 71 (underscoring the significance of children to the new republic and the role that education would play in crafting responsible citizens).

220. *Id.*

221. *See id.* at 71–72 (noting that before then, child rearing literature was addressed to fathers, “[b]ut after the Revolution, ministers and other moralists invested mothers with primary responsibility for inculcating republican values and virtue in the young and teaching them to be responsible and patriotic citizens, reflecting a growing recognition of young children’s vulnerability, malleability, and educability”).

222. *See id.* at 72–74 (“Since women were going to play a crucial role in forming children’s character, it was essential that they be properly prepared for this task.”); A. Kristen Foster, “A Few Thoughts in Vindication of Female Eloquence”: The Case for the Education of Republican Women, in CHILDREN AND YOUTH IN A NEW NATION 129, 131 (James Marten ed., 2009) (emphasizing the role of women as guardians of republican virtue).

223. MINTZ, *supra* note 1, at 72 (quoting Samuel Stillman).

machines.”²²⁴ Despite their exile from the polity, children served an important role as future leaders and voters. Childhood deliberately became a place to groom a variety of political actors,²²⁵ some of whom would be voting citizens and others whose role would be to teach or support these future citizens (i.e., women and slaves).²²⁶

In fact, as Caroline Levander illustrates in her rich, multilayered study of the structural and symbolic roles of the child in the United States, “the child functions as a point of origin for the human” and instantiates “the promise of autonomy and the reality of dependence.”²²⁷ Symbolically, the liberal child featured prominently in the formation of national identity at important historical moments in the United States and served to distinguish and reify racial categories.²²⁸ In each of these functions, childhood served as the conceptual framework for subordination in a liberal system. That is, childhood modeled the natural dependence that terminates in the independence that would become the liberal subject, but at the same time childhood served to reflect and naturalize the very racial inequalities that produce dependency in disfavored races.²²⁹ For example, psychological models of human development were based on “late-nineteenth-century U.S. sociological accounts of race . . . [which served] to reinforce the essential nature of racial differences.”²³⁰ These “essential” racial differences were constructed as both natural (ancestral) and linear so that children of different races had predetermined ceilings, with white children having the highest ceiling.²³¹ These distinctions helped to maintain white supremacy after abolition and through manifest destiny.²³² As Levander summarizes, the United States emerged

out of a series of racial encounters between Mexican, Native American, Anglo, and African peoples. Yet

224. *Id.* (quoting Benjamin Rush).

225. The notion, however, of children as future citizens and cultural progenitors was certainly in play from the early days of the country, when federal policy and charitable agencies aimed to “civilize” Native American children. *See* Appell, *supra* note 36, at 145-47.

226. Universal suffrage for African Americans and for women was nearly a century or more away. *See* U.S. CONST. amends. XV, XIX.

227. LEVANDER, *supra* note 1, at 3.

228. *See id.* at 2-6.

229. *See id.* at 157-60 (discussing the efforts of W.E.B. Du Bois to promote a raceless citizenry through comparison to the “immortal child”).

230. *Id.* at 136.

231. *See id.* at 137-38.

232. *See id.* at 41-42, 46-47, 50, 67-69, 135 (illustrating other instances of expansionism, racialized differences, and white supremacy).

analysis of the child in an American context illustrates not only how the U.S. nation materializes out of a series of racial conflicts but, more fundamentally, how the nation is imaginatively created and sustained through the logic of racial hierarchy that the child helps to naturalize.²³³

The American child defined the liberal subject as its opposite but also as its regulator, both dictating its terms and guarding its entry. Thus, the ideological distinction between childhood and adulthood was at the core of a new world order that both democratized power and managed to maintain hierarchy along racial and gender lines. The role of childhood in the creation of this authority made such a feat possible because the child in this new order appeared to be natural, developmental and dependent—and, therefore, private, even as childhood itself served to model, distribute, and regulate power and authority along racial, ethnic, class, and gender lines.

B. *Material Conditions Contributing to Modern Constructions of Childhood*

Unlike the philosophical child of Locke, the domesticated child of contemporary liberalism succeeded the formation of the United States by over a century.²³⁴ Children were deployed to support the economy from colonial days, through slavery, and into the industrial revolution and today.²³⁵ They were also vehicles through which wealth was passed.²³⁶ This aspect of pre-liberal philosophy—socioeconomic birthright—remained even as political authority became more democratic.²³⁷

Although children had been politically exiled at the time of the founding of the United States, they remained valuable

233. *Id.* at 4 (footnote omitted).

234. See BREWER, *supra* note 1, at 341–43 (expounding on the concept of Locke’s child during the American Revolution); HAWES, *supra* note 1, 4–5 (describing how the *Body of Liberties*, enacted in 1641, expressed ideas that contributed to the “modern concern with . . . children’s rights”); MASON, *supra* note 1, at 6–13 (discussing domestication of children in early colonial times in terms of a father’s legal duty to provide educational and religious instruction); see also MINTZ, *supra* note 1, at 75–76 (placing the start of modern childhood in the early nineteenth century). Mintz also notes that as early as the eighteenth century, families in the middle colonies were bound by affection rather than economics, and families became “an instrument for shaping children’s character.” *Id.* at 49.

235. See, e.g., *infra* notes 238, 267 and accompanying text.

236. See Collins, *supra* note 4, at 833–36 (showing how the transmission of wealth through families perpetuates inequality).

237. It appears, however, that primogeniture is no longer the rule. See Paul L. Menchik, *Primogeniture, Equal Sharing, and the U.S. Distribution of Wealth*, 94 Q. J. ECON. 299, 303–15 (1980) (illustrating that neither gender nor birth order within families produces different parental death bequests).

economic producers and very much a part of the market outside and inside the family. From the colonial era through much of the nineteenth century, children worked; they worked at home, were bound out as servants and apprentices, or were slaves,²³⁸ and they fought in military combat.²³⁹ The idea of childhood as a separate time for leisure did not apply to most children.²⁴⁰ Western, and particularly American, notions of childhood as we construct it today began to crystallize with the rise of industrialization.²⁴¹

As the economy changed, work and family were increasingly separated; farming and various trades declined while employment in offices and factories rose. With the rise of urbanization and industrialization in the nineteenth and twentieth centuries, there was less of a role for children to work in the cities, and the notion of childhood as a distinct and dependent phase of life became normative.²⁴² At the same time, children became more integral to maintaining class distinctions because they helped produce and define leisure and because the dependency norm obscured class, racial, and gender distinctions among children.²⁴³ Indeed, Sánchez-Eppler explains that “the same patterns of urbanization and industrialization that separate[d] workplace from home, labor from leisure, simultaneously function[ed] to commodify leisure time and to idealize middle-class domesticity, especially that of childhood.”²⁴⁴ Of course, in urban poor and single-mother-headed families, children continued to play a crucial role in supporting the family by peddling goods or services in the streets,²⁴⁵ much as they do today.²⁴⁶

238. See MINTZ, *supra* note 1, at 23–24, 32–33 (describing children’s work inside the home and as indentured servants).

239. *E.g.*, *id.* at 53–54, 62–64, 67–68, 120–25.

240. Indeed, in later years, whether or not children had leisure time was among the more distinctive features of class. Sánchez-Eppler, *supra* note 42, at 40.

241. See *id.* at 41 (discussing the connection between urbanization and industrialization, and increased leisure time for children).

242. See Paula S. Fass & Mary Ann Mason, *Childhood in America: Past and Present*, in CHILDHOOD IN AMERICA, *supra* note 1, at 1, 2–3 (describing children’s value to their families as shifting from economic to emotional toward the end of the nineteenth century).

243. Sánchez-Eppler, *supra* note 42, at 44–45.

244. *Id.* at 41.

245. See GORDON, *supra* note 1, at 8 (describing how children, particularly those of single mothers, were forced to find work in the streets to help support the family); see also MASON, *supra* note 1, at 106–07 (chronicling the rise of child neglect laws designed to keep children from engaging in these activities, indirectly worsening the plight of the single mother).

246. See Samuel G. Freedman, *Working Children in Contemporary Chinatown*, in CHILDHOOD IN AMERICA, *supra* note 1, at 275, 275–77 (noting that inner-city Chinese-American children regularly worked more than twenty hours per week at the end of the

These poor, working children were the children who would become objects of rescue for the child savers who shipped many of them out to rural families to provide agricultural or other labor.²⁴⁷ In addition to aiding the economic and political project of domesticating Midwestern and Western states and territories,²⁴⁸ these rescued children also served to help “decrease the amount of work expected of other children in the family, and thus helped produce the ideal of middle-class childhood leisure even within these rural settings.”²⁴⁹ As the idea of childhood as a distinct, private, and leisurely space and time spread, the middle class child became increasingly normative. By the last quarter of the nineteenth century, child development had become a field of study,²⁵⁰ medicine was developing a pediatric specialty,²⁵¹ Macy’s had opened “the nation’s first toy department,” the U.S. census was tracking child labor,²⁵² and governmental agencies were counting and developing methods to prevent infant deaths.²⁵³

This rising concern with children’s health and welfare led to systematic monitoring of children and their families and to more intrusive interventions into family life, movements that were related and consistent with the rise in the professions²⁵⁴ and increased the authority of the state.²⁵⁵ At the same time,

twentieth century).

247. See GORDON, *supra* note 1, at 8–10 (describing the Children’s Aid Society’s practice of placing inner city children on farms in rural western towns); Sánchez-Eppler, *supra* note 42, at 53.

248. See GORDON, *supra* note 1, at 8–10; MINTZ, *supra* note 1, at 164–66 (describing the importance of children in the “labor-short rural areas” of the West).

249. Sánchez-Eppler, *supra* note 42, at 53.

250. MINTZ, *supra* note 1, at 188–89.

251. *Id.* at 188. For example, in 1860, Dr. Abraham Jacobi opened the first clinic for the treatment of children’s diseases in New York City. *Id.* By the early twentieth century, pediatrics had become a recognized medical specialty. JAMES, JENKS & PROUT, *supra* note 2, at 151.

252. Sánchez-Eppler, *supra* note 42, at 41.

253. JAMES, JENKS, & PROUT, *supra* note 2, at 151–52.

254. For example, Native American children were subject to increasingly expansive “protection” in the form of tribal socialization during colonial times. See Appell, *supra* note 36, at 147 (describing missionary aspirations to “educate” Native American children). But it was not until the urbanization after the Civil War and the Progressive Era that surveillance and interventions became systematic and professionalized. See HAWES, *supra* note 1, at 66–77 (describing federal programs created to enhance children’s welfare in the wake of the Depression); see also JAMES, JENKS & PROUT, *supra* note 2, at 151–52 (discussing the rise of pediatrics and government concern over infant mortality rates).

255. See Appell, *supra* note 36, at 158–59 (noting the increased role of the state in children’s affairs as part of New Deal legislation); Ian Hacking, *The Making and Molding of Child Abuse*, 17 CRITICAL INQUIRY 253, 264–66 (1991) (discussing the rise of state funded children’s welfare programs in the United States and other countries during the second half of the nineteenth century and continuing into the beginning of the twentieth).

childhood was evolving into a physically and psychologically vulnerable site. Building on the work and ideology of the early private child-saving organizations of the 1800s,²⁵⁶ local and national official efforts took on the monitoring, protection, and regulation of children. This state action included the establishment of juvenile courts²⁵⁷ and the federal Children's Bureau, founded in 1912.²⁵⁸ The role of childhood in constructing and maintaining class and racial distinctions continued through the remainder of the twentieth century, as social workers and juvenile courts formalized the business of rescuing poor working children from themselves and their families,²⁵⁹ and as children (often characterized as "abused" or "orphans") figured prominently in political discourse and public policy regarding support for African-American mothers.²⁶⁰

The development of the professions, particularly psychology, pediatric medicine, and social work, continued to play a large role in the development and regulation of childhood as we know it now: a time of leisure and physical, cognitive, and emotional development.²⁶¹ Beginning in the early twentieth century, the role of psychology in mapping child development and behavioral

256. See, e.g., Hacking, *supra* note 255, at 264–65 (describing the Children's Aid Society founded in 1853 in New York and the New York Society for the Prevention of Cruelty to Children founded in 1874).

257. The first juvenile court was opened in 1899. DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 23 (2004). Within twenty years, they were established throughout the country. Marvin Ventrell, *Evaluation of the Dependency Component of the Juvenile Court*, 49 *JUV. & FAM. CT. J.* 17, 26 (1998).

258. Hacking, *supra* note 255, at 266.

259. See GORDON, *supra* note 1, at 309–10 (observing that child saving agencies removed children "on the basis of culturally biased standards of child raising"); HAWES, *supra* note 1, at 31–35 (describing the emergence of social work as a profession and establishment of the first juvenile courts; specifically noting that the "best interests of the child" goals of these institutions strengthened racial and class distinctions); MASON, *supra* note 1, at 149–51, 153–54 (noting that poverty greatly influences the removal from children from their homes even though poverty is no longer a direct ground for removal).

260. See Appell, *supra* note 92, at 459–64 (detailing policies that have encouraged the removal of African-American children from their families and promoted their adoption by white families in an attempt to "improve society").

261. See HAWES, *supra* note 1, at 54–55, 58–59, 61–63, 99–105 (noting the rise in scientific approaches to child development and family functioning throughout the twentieth century); Hacking, *supra* note 255, at 264–68 (describing the medical techniques used to detect child abuse); Michelle A. Massé, *Constructing the Psychoanalytic Child: Freud's From the History of an Infantile Neurosis*, in *THE AMERICAN CHILD*, *supra* note 42, at 149, 149 ("The emergence of the 'psychoanalytic child' and of 'children's literature' are almost coterminous: in the latter half of the nineteenth century, both deliver the newly created 'child' to an industrial world in need of docile subjects in order to run smoothly."); Stephens, *supra* note 139, at 33 (referring to "the notion of childhood as a domain of *play*, made possible by existing structures and carrying with it the possibility of moving beyond these structures").

norms was on the rise and middle class families increasingly turned to psychologists for assistance in managing their children.²⁶² By the second half of the twentieth century, child abuse had become officially recognized as a medical condition with the introduction of battered child syndrome.²⁶³

Just as children's immaturity and vulnerability were employed to justify and distinguish membership and exclusion from the polity, eventually immaturity and vulnerability became the defining social and economic aspects of childhood. The connection between leisure and childhood and demarcations between adult and child rose steadily through the Great Depression, even as many children needed to work outside of the home to survive. In fact, leisure had increasingly become associated with children's psychological wellbeing.²⁶⁴ During the Great Depression, with schools cutting back for lack of funding, rising adult unemployment, and youth competing for those same jobs, "there was a growing consensus that children had to be removed from the labor force and put in the classroom."²⁶⁵ The effect of this was to keep children in school until at least sixteen and to raise the demarcation between childhood and adulthood, effectively increasing the capacity or length of childhood and creating a new group of children eventually known as "teenagers."²⁶⁶ Although market fluctuations dictate the normative value of child labor, and child labor regulation follows those norms,²⁶⁷ child labor became exceptional to childhood.

Similarly, although as a normative matter, childhood was a time of play and not work or politics; in fact, children have been actively engaged periodically in political and legal movements. For example, children engaged in letter writing campaigns to Eleanor Roosevelt during the Great Depression,²⁶⁸ convened the 1936 Youth Congress,²⁶⁹ were brought into the war effort during

262. MINTZ, *supra* note 1, at 219–21.

263. Hacking, *supra* note 255, at 266–67.

264. See MINTZ, *supra* note 1, at 218 ("Adults regarded children's toys and literature as . . . intended to meet children's psychological needs . . .").

265. *Id.* at 238–39.

266. *Id.* at 239.

267. For example, during World War II, children's labor became more valuable because of labor shortages and the war's production demands. Labor laws were therefore relaxed, permitting children to work more. *Id.* at 258–59. This new youth identity, associated with leisure, gave rise to youth cultures that further separated childhood from adulthood, both through the relative independence from parents and the growing identity and uniqueness of youth culture. See *id.* at 214–18 (describing various changes in youth behavior, culture, and identity).

268. *Id.* at 238.

269. This was a coalition of student groups seeking the right to work. *Id.* at 245.

World War II,²⁷⁰ were instrumental in the Civil Rights movement in the desegregation of schools and transportation,²⁷¹ and, of course, had a key role in the anti-Vietnam War movement, culminating in the Twenty-Sixth Amendment to the United States Constitution, lowering the voting age to eighteen.²⁷²

Today, the category of childhood remains a developmental, dependent, and private site, which performs important public functions, particularly in the distribution of wealth and culture. Childhood continues to reflect white and middle-class norms, while the United States has all but divested public support of poor families; increased coercive treatment of children in schools, juvenile detention, adult prisons, and foster care; and abdicated broad-based community support, development, and even education.²⁷³ In fact, during the last quarter of the twentieth century, child poverty in the United States increased by half.²⁷⁴

V. TOWARD A JURISPRUDENCE OF CHILDHOOD

The foregoing synthesis of the evolution of American childhood helps to briefly illuminate childhood as partly, if not entirely, an artificial social category, framed and reinforced by the law to create, define, and maintain power. The elasticity and contingency of childhood and its norms respond to changing material and ideological conditions. This review also reveals how childhood and adulthood work in opposition to each other, and also as points on a chronological line. Absent in these structures, however, is meaningful engagement in the relationship between childhood and adulthood—that is, how this transition to adulthood occurs.²⁷⁵

Moreover, and relatedly, this construction of childhood formulates the child as raceless (i.e., white) and middle-class, much like the raceless (i.e., white) middle-class man who is the

270. This included collecting scrap metal, helping more at home, and even working outside the home as labor restrictions relaxed as a result of the number of adults serving in the war. *Id.* at 258–59.

271. *Id.* at 305.

272. *Id.* at 333–34; see also *id.* at 310–14, 331–32 (describing various youth movements of the 1960s and 1970s).

273. See generally LAWRENCE GROSSBERG, CAUGHT IN THE CROSSFIRE: KIDS, POLITICS, AND AMERICA'S FUTURE 15–74, 175–89, 235–37, 251–52, 259–60 (2005) (chronicling the increased coercive treatment of children in many facets of our society).

274. LEE RAINWATER & TIMOTHY M. SMEEDING, POOR KIDS IN A RICH COUNTRY 29 (2003).

275. See Gill Jones, *Youth, Citizenship and the Problem of Dependence*, in CHILDREN AND CITIZENSHIP, *supra* note 11, at 97, 100–01 (examining some of the complexities involved in analyzing an individual's transition from childhood to adulthood).

liberal subject that feminist and critical theorists have exposed and contested.²⁷⁶ No matter who this child is or from whence she or he comes, this same child is expected to become the white, male, middle-class, adult liberal subject upon reaching adulthood. Childhood's defining characteristics as natural, dependent, and private mask the differences among children while reinforcing the normative middle-class child as the measure of childhood; moreover, these characteristics further obfuscate the inequalities among the adult liberal subjects children are expected to become.²⁷⁷ This standardization effectively serves to reproduce poverty, race, and wealth because the privacy and dependency of childhood ensures that children will step into the adult shoes their childhoods provided.

A. *The Developmental Child Revisited*

Despite the extensive political work that childhood performs, childhood has come to be equated with child development in medical and psychological terms. This equation is central to American understanding of a liberal, republican democracy in which government is both by (reasoned) consent and in the hands of enlightened republican citizens who can exercise their consent toward the public good. In this equation, children are the opposite of this citizen, but also capable of becoming this citizen through the process of maturation and education. The liberal child is, strangely, the precursor to, and opposite of, the liberal subject (adult).

Constructed primarily as developing beings, children's needs are immediate and time-limited. The developmental child needs basic care and education—nutrition, school, and protection from their physical, emotional and cognitive vulnerabilities—so that they will reach adulthood. Homing in on this narrow, scientific version of development both universalizes childhood through developmental standards and individualizes childhood by regulating only for physical, moral, and cognitive development.

276. See Okin, *supra* note 40, at 236–39 (criticizing the liberal subject for ignoring women).

277. In effect, these norms disenfranchise poor children from the category of childhood because poor parents do not have the material and political resources—such as health care, nutrition, education, cultural experiences, housing, and safety—to fully mitigate their children's dependency, which in turn creates disenfranchised adults. See Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective*, FUTURE OF CHILDREN, Fall 2006, at 19, 19, 27–31 (noting the lack of social mobility in the United States); Hernandez, *supra* note 49, at 28–29 (explaining how children's developmental, educational, and physical welfare are tied to parental resources).

This scientific approach carries the appearance of objectivity, truth, and universality. Possessing only individual and personal needs, children inhabit a childhood that (1) relies on professionals to identify, measure, and assess what developmental milestones they must achieve to become liberal citizens; and (2) permits a suspension of questions regarding other conditions that affect children's lives and chances, such as the quality and safety of their housing, neighborhoods and schools, how many hours their parents have to work to support them, and to what cultural cornerstones they are exposed.

This scientific approach is culturally bound and tied to middle class norms,²⁷⁸ even as the experience, terms, and objectives of child development vary according to class.²⁷⁹ Tethered to the middle-class child, assessments of what children need and what constitutes development contemplate only one type of child, one who has middle-class resources and whose needs are individual and personal and available at home or in the community. Yet mental health professionals establish measures and interventions for all children without regard for other conditions that affect children's lives and chances and how developmental trajectories and needs might differ according to socioeconomic status and geographic location.

B. *The Dependant Child Revisited*

Childhood's dependency effectively subsumes children's identities. A wide range of adults have authority over and for children. These adults range from their parents to teachers, health care providers, and for some children, lawyers. These

278. See Gillies, *supra* note 91, at 102 (“[M]iddle-class child-rearing practices are articulated as normal and desirable through the language of developmental psychology.”); see also ANNETTE LAREAU, *UNEQUAL CHILDHOODS* 13 (2003) (“[Child rearing] strategies of the working-class and poor families are generally denigrated and seen as unhelpful or even harmful to children’s life chances.”).

279. For example, Annette Lareau’s study of child rearing and family lives of twelve middle-class, working-class, and poor African-American, white, and interracial families (and personnel at the children’s schools) illustrated different practices and views of childhood and, consequently, child rearing among different classes, with less interracial disparity. LAUREAU, *supra* note 278, at 8, 235–45. For example, African-American and white middle-class families scheduled their children in a variety of activities designed to “cultivate their cognitive and social skills,” while “working-class and poor parents viewed children’s development as unfolding spontaneously.” *Id.* at 238. Val Gillies found similar practices in the United Kingdom. See Gillies, *supra* note 91, at 102–03 (noting that middle-class parents organized their children’s lives around obtaining white-collar skills while those with less advantage wanted their children to have self-preservation skills, such as “assertiveness and self-defence”). Similar differences were also seen among the views of various early immigrant groups raising children in the United States. See MINTZ, *supra* note 1, at 202–06.

adults, with varying levels of knowledge and authority regarding a child, have great power in a child's life, but little accountability to the child because of the child's lack of authority.²⁸⁰ In addition, this lack of authority inhibits direct public accountability to children both because of children's lack of authority and because this scheme expects the child's adult agents to promote children's interests. These agents, however, are not equally situated (in the case of parents) or inclined (in the case of professionals) to advocate for children or apprehend what they need.²⁸¹

Moreover, this equation of childhood and dependency disaggregates childhood from adulthood. This is true even though childhood evokes, and terminates in, adulthood. Adulthood and childhood remain binary, or at most tangential, because of the centrality of child development in defining and regulating childhood.²⁸² In other words, despite the deep, pronounced, and gradual connections between childhood and adulthood, the transition is abrupt. Once children become adults, they are the liberal citizen: autonomous, independent, unattached, and self-sufficient. They are no longer entitled to care and support, but are responsible for their own lot, their own achievements, and their own resources. This is true even though children experience their dependency in widely disparate conditions.

C. *The Private Child Revisited*

The construction of childhood as natural and dependent has left all children without a direct, political voice and relegated them to the privacy of the family and, therefore, with few affirmative claims against the state.²⁸³ At the same time, this privatized childhood promotes important liberal goals: it provides a private site of value creation and promulgation that supports pluralism, strengthens democracy, and preserves the liberty of adults.²⁸⁴ Privacy also provides protection for the most vulnerable and marginalized parents and children who might be at greater

280. Of course, parents and other kin share bonds of love, affection, and intimacy, so they are most likely to make as good decisions about and for their children as any. There are no objective indications that show a significant fraction of parents or parental figures who abuse this authority. That is not necessarily the case for children's attorneys. *See, e.g.*, Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, but Who Am I?," 64 *FORDHAM L. REV.* 1917, 1924–32 (1996) (discussing common inadequacies of child advocates).

281. *See, e.g.*, Appell, *supra* note 13, at 605–06.

282. *See supra* text accompanying notes 242–44.

283. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 41 U.S. 1, 35–36 (1973) (finding that education is not a fundamental right).

284. *See supra* text accompanying notes 50–55.

risk of family dissolution and loss of identity if child rearing were more public.²⁸⁵

On the other hand, the privatization of childhood and its assignment to families serve to individualize social and economic needs and goods and to mask the political nature of resource distribution. As Caroline Levander explains, in addition to forming the basis of the distinction between the self (the individual) and the state, “the child also works to facilitate a shift of social responsibility from the state onto the self.”²⁸⁶ The construction of childhood as a private and personal, rather than structural, matter has larger repercussions. It has contributed to the impoverishment of women who are caregivers,²⁸⁷ and to the personalization and individualization of wealth and poverty.²⁸⁸ Moreover, this privacy both accounts for and masks the distributive functions of childhood by naturalizing and individuating childhood.

Thus, children’s needs are private, both in terms of lack of public accountability for their needs, and because what children “need” is very much tied to their families. This is true in structural, economic, social, and ideological spheres. As Patricia Hill Collins has observed, “[d]espite ideas that social mobility is widespread, U.S. children routinely enjoy or suffer the economic status of their parents. Families constitute important sites for inheritance, not solely of cultural values, but of property.”²⁸⁹ Because children’s dependency resides in families in a country with great variations in wealth,²⁹⁰ some children will have tremendous economic resources and want for nothing, while other children will need more. That is, there may not be enough food at home; their families may not have access to good nutrition or medical care; they may not have childcare when

285. See Appell, *supra* note 12, at 714 (“[R]aising children is a private matter. . . . Unless the parents are unfit . . . , the state may not second-guess [their] decisions”).

286. LEVANDER, *supra* note 1, at 13.

287. See, e.g., Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 14 (2000) (noting that the primary caregivers of households often go unrecognized and uncompensated for their contributions).

288. See Collins, *supra* note 4, at 826–28.

289. See Collins, *supra* note 88, at 73; see also Collins, *supra* note 4, at 844–45 (describing the structural racial and economic conditions that impact intergenerational wealth transmission).

290. Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1222–23 (2007) (“[F]ive percent of the U.S. population owns sixty percent of the nation’s wealth.”).

their parents are working.²⁹¹ What they receive in education varies greatly both in comparison to other children not only because schools are primarily funded through local taxes,²⁹² but also in terms of what goals their parents and others have for them, and, therefore, what education they need.²⁹³

Similarly, what social goods children have and need depends very much on their families, which dictate to a large degree what they have, what they can and should achieve, and what their social capital will purchase.²⁹⁴ For example, the physical location of jobs and social and employment networks are geographically stratified, so where a child lives is likely to have a great impact not only on what type of employment his or her parents have, but also on what type of employment the child might have as a child or an adult.²⁹⁵ This privatized childhood does not place children on a level playing field and thus produces (and reproduces) inequality among adults that derive from their privatized upbringing but for which they are accountable as political citizens.

D. Justice for Children?

The negative public engagement with childhood is possible and unremarkable because childhood, having adopted medical and psychological measures of development to create and define categories of competence and incompetence, assigns incompetence to children (primarily) and relegates it to the private realm. At the same time, childhood assigns competence to adults and the public realm. Childhood thus defines children in

291. See Victor Battistich et al., *Schools as Communities, Poverty Levels of Student Populations, and Students' Attitudes, Motives, and Performance: A Multilevel Analysis*, 32 AM. EDUC. RES. J. 627 (1995) (providing statistical analysis of the effects of poverty on children). See generally Marta Tienda, *Poor People and Poor Places: Deciphering Neighborhood Effects on Poverty Outcomes*, in MACRO-MICRO LINKAGES IN SOCIOLOGY 244, 249–51 (Joan Huber ed., 1991) (examining the relationship between behavioral outcomes and growing up in poor neighborhoods).

292. GROSSBERG, *supra* note 273, at 67.

293. See LAREAU, *supra* note 278, at 238 (comparing “concerted cultivation” child rearing in middle-class families with “accomplishment of natural growth” in working-class and poor families); Gillies, *supra* note 91, at 103 (describing differing parenting goals between middle- and working-class parents in the United Kingdom).

294. See, e.g., LAREAU, *supra* note 278, at 241–44 (contrasting socialization of middle-class and working-class children); Collins, *supra* note 4, at 836 (“[B]ecause wealth is typically possessed and transmitted through family, focusing on wealth fosters a shift from the individual to the family as the fundamental unit of social-class analysis.” (footnote omitted)).

295. See generally Zinn, *supra* note 51, at 865–67 (examining decline in opportunity structures through the loss of jobs in inner cities, the decline of public transportation, and the related loss of social connections and networks that would lead to jobs).

naturalized terms, which limit their autonomy and disempower and disengage them from active roles in public life; that is, until they leave the category of childhood.

Current notions of justice for children appear to be confined to contemplating relations within the family or the state's role in protecting, punishing, or regulating children.²⁹⁶ A more expansive and ambitious approach might look at what justice for children would mean both during their childhood *and as adults* and include what children will need as children to have substantive equality as adults. In other words, justice for children might involve consulting with children about what they want as children and correcting the structural conditions that produce unequal opportunity beginning in childhood.²⁹⁷

Such a set of inquiries regarding children might lead to a childhood jurisprudence that breaks out of a narrow focus on dependency and vulnerability while appreciating and bolstering the public role of childhood and its deep connections to adulthood—both to the adults who support children and through the adults the children will become. In addition, this intergenerational and politicized jurisprudence would likely inure to the benefit of women, who continue, despite many advances, to be intimately and deeply connected to and bound by dependency. Toward that end, this Article has pushed existing child-centered jurisprudence to view children's moral and political claims, rights, welfare, and identity outside of, but also as members of, families.²⁹⁸

These approaches are consistent with our conception of childhood as a time of increasing capacity and opportunity to become adults. As noted above, children are defined in part by their deficiencies but also by their capacity to become members of the polity. This is a distinct aspect of childhood, a transient stage that is expected to prepare one for full capacity as an adult—a moral and political actor. So far, however, we tend to view this development and capacity in narrow and largely psychological and legal terms of physical and cognitive maturation and legal and political incapacity. The historical context of the development of contemporary American notions of childhood, along with its continued structural and ideological replication,

296. See *supra* notes 69–70 and accompanying text.

297. See Ludvig Beckman, *Public Justifiability and Children*, 16 INT'L J. CHILD. RTS. 141, 147 (2008) (noting the importance of “keeping distinct the interests of the child *qua* child and the interests of the child as a future adult person”).

298. This exploration might also lead to more expansive and generous methods of viewing liberty and equality for women and children in a liberal system.

2009]

THE PRE-POLITICAL CHILD

757

continue to frame the child in individualized, developmental, and familial contexts, rather than in broader socioeconomic terms.²⁹⁹

We might also examine what it would mean to recognize children as beings with agency, voice, and authority. What might children say? How might they vote? What would they say they need? Who else should be consulted? Are there methods short of full agency and political citizenship that would promote justice for children? What, if any, portions of the construction of childhood can be improved, consistent with liberalism, to comport with liberalism's abandonment of the right of birth as the measure of power? Are there other ways of conceiving justice that would be consistent with family privacy and the moral liberty that privacy entails and promotes?

This Article presents a first step toward a critical jurisprudence of childhood. It aims to challenge this Author, other students of children and the law, and even those who marginalize childhood to take a fresh look at the role of children in law and society; to take children out of the compartment of childhood and examine the connection between adulthood and childhood; and to ask a new set of questions regarding the role of childhood in the political order. The next stage of this project, "The Political Child," will begin to form a positive theory of justice that will address children's agency, but may be more engaged with intergenerational and transitional phenomena uniquely related to the organization of a society around adulthood and childhood.

299. See Appell, *supra* note 36, at 160–66 (describing how those who determine a child's rights according to these contexts often underestimate the value of poor parents of color, the child's ties to them and to his or her cultural heritage).