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Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations

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I. INTRODUCTION

An old woman from Missouri enjoyed recounting her memory of her parents’ divorce. She was five years old, crying in the county court house, because she didn’t know what would happen to her. The judge took her by the hand and sat her on his lap. Then he asked her, “Do you want to live with your mother or your father?” With a sense of certainty and pride she said, “I told him, ‘I want to live with my mother.’” The judge said, “Then you will.” The young judge, Harry S Truman, later became the thirty-third President of the United States. Known for his common sense and decisive actions, President Truman led the country through World War II with a sign on his desk reading “The buck stops here.”

The woman told her story with a sense of accomplishment. It made good listening because the judge was Harry Truman. It made good telling because this important man had asked her to make the most important decision in her own life. He used his power to empower her. To

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1. My thanks to Robert J. Foss of El Rescate Legal Services for sharing this anecdote about an old family friend.

2. “President Truman believed in common sense and common decency.” President Bill Clinton, Weekly Radio Address (July 30, 1994).
every child caught in a custody battle, the judge is a very important person; a person with the awesome power to decide one’s fate. Not all children are as lucky as the one in the story. Most feel confused, dislocated and disempowered as a result of their parents’ divorce. Most judges, and the law as a whole, do not respect children enough to “pass the buck” in their direction.

Today, although child custody law permits discretionary consideration of the child’s preference, that preference carries only as much weight as each judge sees fit to give it, using a multi-factorial “best interests” calculus. Even if the judge determines that the child is mature and intelligent enough for her preference to be considered, the child’s preference is treated as mere evidence; important for what it reveals about the child, but of de minimis legal significance for its con-
CHILDREN’S CHOICE

Diagnosed, rather than respected, children’s stated preferences are subjected to analysis by mental health professionals as custody evaluators and expert witnesses according to doctrines derived from psychological theories sometimes even distorted versions of theories. It is as though the child has “legal laryngitis.” The child’s voice is heard as a symptom of the child’s condition rather than as a statement of the child’s intentions.

This Article proposes a simple rule for empowering children in contested child custody cases: the rule of children’s choice. In deciding between fit parents who cannot agree on their child’s custodial allocation, the stated preference of any child over the age of six years should be legally dispositive of that child’s custody. On one level, this Article is a straightforward argument for the right to choose one’s parental custodian from middle childhood onward, supported by constitutional law, child development theory, and practical policy concerns.

On a deeper level, this Article is a critical reexamination of the relationship between legal theory and psychological theory in the law of child custody, and of the vision and treatment of children resulting from it. In speaking of children, the theories emphasize vulnerability over resilience, protection over freedom, and “needs” over “rights.”

("In determining the appropriate weight to give an expressed preference, the courts will closely scrutinize those factors which have influenced the child in making his choice . . . .")


The interviewer must assess the extent to which information received from the child represents reality. . . . While some children may be unwilling or unable to express a preference, an examiner would be foolish to accept the preference of those who do at face value. . . . Even if the only question the interviewing judge posed were, “with whom do you want to live?” and the child responded quickly, “my mother,” the interviewer could not confidently conclude . . . that this was the child’s true preference.

Id. at 826-28 (citation omitted).


9. Richard Farson, a leading advocate of children’s rights, lists the right to “Self-Determination” as the most important right of children. Almost as important are the rights to “Alternate Home Environments” and to “Educate Oneself” by designing one’s own education. RICHARD FARSON, BIRTHRIGHTS (1974); see also JOHN HOLT, ESCAPE FROM CHILDHOOD (1974) (advocating making adult rights and responsibilities available to all children). Contra LAURO M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN (1992) (arguing that parents are the best judges of what children will need to be in the future).

10. The scholarly writing on best interests is not monolithic. Martha Fineman argues for a return to a maternal rights-based analysis of child custody issues. Martha Fineman, Dominant
law conceptualizes children as hypersensitive beings who must be in the care of "psychological" parents in "stable environments," and who are traumatized by "conflict." Their adventurousness, individuality, and thirst for independence are ignored.\textsuperscript{11}

Downplayed in this legal vision of the child, are those aspects of the human personality in which legal "personhood" is grounded: the intelligence to make expressive statements of one's feelings and beliefs,

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Presumably these authors would be willing to change their ideas as new psychological insights emerge. Throughout this vast literature, however, parents' rights are contrasted with children's needs. Even when children are deemed to have rights, those rights are of a different kind than parents' rights. \textit{See}, e.g., Fitzgerald, supra note 8, at 37-45. Parents' rights are "negative" rights—the right to free speech, choice, decision-making autonomy, and the right to raise one's family as one sees fit, without government involvement. Children, by contrast, have "positive" rights—the right to food, clothing, shelter, and nurturing. No one would deny the importance of both positive and negative rights. But since our Constitution and legal system are built on negative rights, to grant children only positive rights is, in some sense, to give them no rights at all. Even assuming \textit{arguendo} that the law were to recognize the positive rights of food, clothing, shelter, nurturance, and education for children (a position which I heartily advocate for all age groups), the attribution of only negative rights to parents and only positive rights to children places the two groups in distinct legal positions.

11. The Runaway Bunny, a famous children's story that my mother often read to me, illustrates the stifling of the child. \textit{Margaret W. Brown, The Runaway Bunny} (1972). In the story, a baby bunny shares with his mother his fantasies of freedom. He tells her how he is going to run away: "I will become a little sailboat, and I will sail away from you." \textit{Id.} Anything to be an individual. But his mother is too strong for him. Whatever he proposes she has an answer ready. She will become a big wind on the sea and blow the bunny ship home. \textit{Id.} There is simply no escape. My mother loved this story, but I hated it with a passion. In a personal interview, Dr. Istar Schwager, noted educational psychologist and advisor to \textit{Sesame Street Magazine}, made this comment about \textit{The Runaway Bunny}:

Margaret Wise Brown is usually right on point when it comes to children's feelings and sensibilities. But The Runaway Bunny treads upon children's desire for autonomy and shows an overbearing mother who won't let her child escape, even in fantasy. The boundaries between mother and child are not clear. Wherever the bunny escapes to, the mother shows up and recaptures him. I think children who want to see themselves as independent may squirm when they hear this.

Personal interview, June 1994; \textit{see also} Francis Schrag, \textit{Children: Their Rights and Needs, in Whose Child: Children's Rights, Parental Authority, and State Power} 237 (William Aiken & Hugh LaFollette eds., 1980) (arguing that recognizing children's "rights" will interfere with the satisfaction of their "needs"); \textit{cf.} \textit{Howard Cohen, Equal Rights For Children} (1980) (suggesting giving blanket equal rights to children—but creating "child agents" whose capacities children may "borrow" to perform tasks or make judgements they cannot make for themselves).
and the autonomy to make legally binding decisions about one's life. Although children obviously lack the maturity and wisdom of adults, whenever the law takes a parentalistic approach, depriving one group of rights that others enjoy, the danger that the will to dominate will overshadow the concern for protection cautions us to restrict rights no more than necessary. Yet in child custody law, that susceptibility to harm and risk which "justifies" the curtailment of individual freedom for "the good" of the individual is magnified. In the curious amalgam of legal and psychological theory which dominates child custody law, the child's personhood is reconceived as "patienthood," and the child's

12. In comparing the children's liberation movement with the civil rights and women's movements, Ann Palmeri observes "[t]hat blacks and women have so often been thought to be 'childlike' and, on the basis of that claim, been paternalistically treated shows how much deeper the claims for paternalistic practices with respect to children are entrenched." Ann Palmeri, *Childhood's End: Toward the Liberation of Children, in Whose Child? Children's Rights, Parental Authority, and State Power* 105, 109 (William Aiken & Hugh LaFollette eds., 1980). Gay men and indigenous peoples have received similar treatment:

Colonel Fred Peck . . . expressed love for his gay son, he also used the occasion to support the policy banning his son from serving in the military . . . . Colonel Peck explained that . . . his policy position was indeed inspired by his paternal love. He did not want his son in the armed forces because he was afraid that soldiers would kill or maim Scott because of his homosexuality.


13. See *Howard Cohen, Equal Rights for Children* 10-12 (1980) (pointing out three fallacies in the dominant approach of child protectivism: that adults are better able to perceive what is in a child's best interest than are the children themselves, that there is harmony between the adults and children involved in child protection, and that the quality of care can be improved by passing control over children from adult to adult.)

14. An eminent scholar in the field of law and psychology bemoans the distortions of psychological theory which sometimes pass as judicial notice of psychological facts:

The problems with the notice doctrine acquire special significance when applied to children's cases . . . . Judges in family law cases often seem compelled to use their opinions as fora about the nature of the family as a social institution. These discussions are often mythological, expounding the nature of the child and the family. Therefore, formidable obstacles may stand in the way of consideration of child development research by the judiciary. First, even clearly mistaken conclusions may be believed to be so intuitively correct and no evidence is needed to support them and no evidence will be sufficiently strong to rebut them. Second, although stated empirically, statements of social fact about children and families may be more normative than descriptive . . . . Even though their decisions ostensibly rest on psychological foundations, these assumptions actually may never have been empirical, or at least may never have been applied critically.


15. Numerous medical sociologists and anthropologists have analyzed the role of the medical "patient" in Western society as including a prescribed dependent passivity, a suspension of liberties, and an obligation to submit to the directions of professionals privileged with the authority to lead one on the course to well-being. See *Michel Foucault, The Birth of the*
"best interests" is approached therapeutically.

The therapeutic paradigm which informs the "best interests" standard for inter-parental custody cases seems irreproachable. Law and psychology use similar terms for seemingly similar concepts: person, identity, responsibility, autonomy, harm, and risk, for example. The interdisciplinary apparatus attached to child custody determinations seems to combine the best of intentions with the best of science.

Yet the objectivity is illusory. Even assuming arguendo that law and psychology do not share a common class and cultural bias, the

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CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION (1973); DAVID LANDY, The Position of the Afflicted in Society, in CULTURE, DISEASE, AND HEALING: STUDIES IN MEDICAL ANTHROPOLOGY 385 (1977); TALCOTT PARSONS, The Social System 475-79 (1951). Failure to accept the diagnosis, or to conform to ameliorative directions (like a child's disobedience to authority figures) becomes, in and of itself, a sign of illness or pathology. Just as physicians authoritatively constrain their patients' environments and monitor their progress towards health with "objective" measures (temperature, blood pressure, blood cell count), the child's special status in the law of custody imposes certain roles upon children. The law authorizes the curtailment of certain liberties for the healthy child's own benefit, which are identical to restrictions imposed upon adult patients by virtue of their illness or disease. These are: (1) The child's special sensitivities to environmental instability, interpersonal hostility, change, and adverse influences constitute "risks" which the law must accommodate; (2) The child's need for special treatment, a special environment, or special curative conditions which justify the need for differential treatment, even at the loss of autonomy and decision-making authority; (3) The special qualities and risks of their condition obligate them, and may even compel them to submit to the directions and decisions of others deemed to act in their interests; (4) Their condition, improvement and development are monitored by others, especially professionals according to external and purportedly "objective" standards reflecting desired social norms, such as school achievement, good behavior, and self-esteem, rather than by individual autonomous desires. Philosopher Ann Palmeri enumerates these same characteristics as definitive of "paternalism." Palmeri, supra note 12, at 106-07.

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16. Many of the measures which are used to assess post-divorce adjustment are class and culturally biased. Measures such as school achievement and obedience reflect European-American middle class norms. Even progress through the developmental stages of childhood is culturally variable. Different ethnic groups value different personality types and behaviors in adults, raise their children to express such traits, and expect and reward different behaviors and attitudes from them at different stages. See, e.g., Alexander L. Hinton, Protolegomenon to a Processual Approach to the Emotions, 21 ETHOS 417, 431-32 (1993). At a somewhat later stage of childhood, self-identification with an ethnic group also intensifies such differences in behavior, perception, and cognition. See generally, CHILDREN'S ETHNIC SOCIALIZATION: PLURALISM AND DEVELOPMENT (Jean S. Phinney & Mary J. Rotheram eds., 1987); BARBARA GOLDSMITH, LITTLE GLORIA... HAPPY AT LAST (1987) (analyzing how the judge who tried the Gloria Vanderbilt custody trial misunderstood the aloofness of the upper classes towards their children and the degree to which child raising was entrusted to nurses, governesses and other servants as signs of neglect rather than means to building character); CATHERINE A. LUTZ, UNNATURAL EMOTIONS: EVERYDAY SENTIMENTS ON A MICRONESIAN ATOLL & THEIR CHALLENGE TO WESTERN THEORY (1988) (asserting that emotions are socially constructed and culturally distinctive and taught through processes of child rearing); RICHARD A. SCHWEDER, THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY (1990) (discussing the cultural construction of psychological makeup). On the causal relationships among child raising, culture, and personality, see generally RUTH BENEDICT PATTERNS OF CULTURE (1934); SIX CULTURES: STUDIES OF CHILD REARING (Beatrice B. Whiting ed., 1963); BEATRICE B. WHITING & CAROLINE P. EDWARDS,
law's use of psychology is not value-free.\textsuperscript{17} When law turns to psychology for answers, it does so much as a lawyer turns to an expert witness, with a set of hypothetical questions based upon assumptions derived from the legal vision of the child. The law asks, "What are the risks and traumas of divorce?" and "How can the state make benevolent decisions for children unable to do so on their own behalf?"

The law strives to make decisions for children to protect them from harm rather than helping and supporting them to make decisions for themselves. Thus, in applying the best interests standard, the law turns to psychology and asks, "Given that the child is incompetent to make important decisions, and given that divorce is a time of stress, what custody rule should the state employ?" The law does not ask, "When are children rational, mature, or experienced enough to exercise a particular right?" Nor does it consider the importance to the child of exercising self-determination and autonomy.\textsuperscript{18}

The problem with this line of questioning is that it assumes what it should try to discover; namely, what psychology can reveal about when in the child's development it becomes oppressive rather than protective to deem the child legally incompetent to decide his own custody. When law turns to psychology and asks, "Given that the child is a developing person, when is it appropriate for the child to exercise autonomy in family matters?" a very different answer results.

This Article compares and appraises these two very different approaches to the use of psychology in the development of custody law doctrine—the protectivist/patienthood paradigm which assumes the incompetency and delicacy of the child, and the empowerment/personhood paradigm which envisions the child as a developing (legal) person. Section I traces the history of the protectivist/patienthood paradigm to show that its present psychological cast masks a centuries-old power struggle for control of the child, that eclipses the child's autonomy without adequate justification. Section II addresses the need for change in the legal vision of the child to an empowerment/personhood paradigm on the basis of constitutional law, psychological theory, and practical policy concerns.

\begin{thebibliography}{9}
\bibitem{17} Cf. Martha L. Fineman \& Annie Opie, \textit{The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce}, 1987 \textit{Wis. L. Rev.} 107 (1987) (arguing that social science data is selectively used and interpreted to support gender-neutrality in custody determinations).
\bibitem{18} Ann Palmeri argues that we should reject the "mental immaturity" argument (children are neither rational nor experienced), recognizing instead the rights of children as "developing persons." Palmeri, \textit{supra} note 12, at 110-21.
\end{thebibliography}
II. THE HISTORICAL ANTECEDENTS OF THE CHILD AS PATIENT

A. Habeas Corpus Homonymous: How Children Lost Their Voices

Throughout the nineteenth and early twentieth centuries, the writ of habeas corpus was a major vehicle for determining the custody of children. In hearings on the writ, the voices and wishes of children regarding their custody were audible and often heeded. At first, courts interpreted their authority under the writ strictly; the judge was under an obligation to determine whether the child was under an illegal restraint. If, however, no restraint existed, or once any restraint was removed; courts held it improper to use the summary vehicle of habeas corpus to decide questions of guardianship or custody. If the child seemed competent to form and state an opinion, the child was free to leave the courthouse with whomever she wished. As time passed, courts progressively redefined their latitude pursuant to the writ. Habeas corpus, as used to determine child custody, mutated into a vehicle for full-scale custody proceedings in which the voices of mothers and fathers were heard over that of the child, in the name of the child’s “best interests.”

Before the dawn of the nineteenth century, the voices of children were heard in the first two English cases (adopted as precedent in the United States) to challenge absolute parental authority. The courts used the writ of habeas corpus as a vehicle to recognize the child’s decisions against the claim of paternal right for the first time in 1763, in *Rex v. Delaval.* Lord Mansfield determined that, “[i]n cases of writs of habeas corpus directed to private persons, ‘to bring up infants,’ the

19. Prior to the merger of the courts of law and equity, the writ was used in child custody determinations much as orders to show cause are used today. In addition to initiating speedy judicial action, the use of habeas corpus to determine custody served another important purpose in the nineteenth century. Because it was difficult to obtain a legal divorce or separation, many couples simply lived apart. The writ enabled the court to make changes in the custody of the children of such separately-dwelling couples independent of the jurisdiction conferred by divorce or separation actions. For a discussion of the nineteenth century jurisdictional problem, see Latham v. Latham, 71 Va. (30 Gratt.) 307 (1878).

20. By the latter part of the nineteenth century, the writ was used, for purposes of child custody, more as a vehicle for the control of children than for their liberation. ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 453 (Albany, W.C. Little & Co., 2d ed. 1876).

21. See *In re Wollstonecraft,* 4 Johns. Ch. 80 (N.Y. Ch. 1819) (court allows 12 year old child to determine her own custody). In another case decided that same year, the court used the same doctrine to protect the mother indirectly. *State v. Cheeseman,* 5 N.J.L. 522 (1819). There, a thirteen year old boy was living with his widowed mother and her second husband. Although the court had appointed someone else as guardian, the state sought a writ to transfer custody of the boy. The court held that custody appropriately belonged with the state, that custody could not be changed under the writ, and that the court could only release the restraints and let the boy go wherever he wanted. *Id.* at 525-26.

Court is bound, *ex debito justitiae*, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege."\(^{23}\) The "infant" at issue in *Delaval* was an eighteen year old woman who chose to go home with her lover rather than her somewhat unsavory father. But the courts quickly applied the rule to the custody of chronological (rather than simply legal) children. Eleven years later, in *Blissets Case*,\(^{24}\) the same court refused to change the custody of a six year old girl from her mother and maternal grandfather to her bankrupt and abusive father. The court explicitly recognized the significance of the child's wishes, finding that she desired to stay with her mother.\(^{25}\)

American courts immediately adopted the English precedent.\(^{26}\) A series of apprenticeship cases made it clear that the courts recognized the child's liberty interest to include a right of independent choice. In the 1810 case of *Commonwealth v. Hamilton*,\(^{27}\) a mother petitioned for custody of her daughter who had been apprenticed by contract in Canada. The court found that the girl was not bound by the contract, yet did not return her to her mother's custody. Instead, "the chief justice

\(^{23}\) Id. at 914.
\(^{25}\) Id. at 899-900. The court interpreted *Delaval* to mean that the previously absolute power of the father over his child could now be subordinated to the power and constitution of the state when the father deviated from his "natural" role. Although two subsequent English cases, De Manneville v. De Manneville, 33 Eng. Rep. 78 (Ch. 1806) and Rex v. Greenhill, 4 L.R.-Adm. & Eccl. 624 (1836), took a more absolutist position towards paternal rights, the law developing simultaneously in the United States limited them. In United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256), Justice Story firmly incorporated the limitations on paternal custody rights into American law, reasoning:

> As to the question of the right of the father to have custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant . . . It will . . . endeavor, as far as possible, to administer a conscientious, parental duty with respect to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody.

*Id.* at 31-32.

\(^{26}\) In *Nickols v. Giles*, 2 Root 461 (Conn. 1796), the court denied the writ to a father who sought custody of his child, then living with the mother at the maternal grandfather's home. While finding that the child was being cared for properly, the *Nickols* court did not enunciate whether the denial of the writ was based upon the court's discretion or the child's decision. For a fascinating and elegant history of the role of the English and early American child custody habeas corpus cases in shaping the modern law of adoption, see Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 N.W.U. L. Rev. 1038 (1979).

\(^{27}\) 6 Mass. 273 (1810).
inquired of the child if she was restrained against her wishes; to which
she answered that she was not," but that she was very desirous of staying
with the master.\textsuperscript{28} The court then decreed, "[L]et the child be dis-
charged, with liberty to remain in the defendant's family, as she has
requested . . . ."\textsuperscript{29}

In a case decided the following year, a New York court demon-
strated even more respect for a child's autonomous decision. In In re M'Dowle,\textsuperscript{30} two boys, aged 8 and 11, had been apprenticed to a carpenter
and blacksmith of the Shaker community with which the mother was
religiously associated.\textsuperscript{31} After the mother's death, the boys' father peti-
tioned for their return to his custody. The court found the apprenticeship
contracts were technically defective. Because the boys had not signed
them they were not bound, but their father was.\textsuperscript{32} The court determined
that they were free from illegal restraint and could go with whom they
chose. After the boys chose the Shaker masters, counsel for the boys'
father suggested that the boys had been unduly influenced by the
Shakers.\textsuperscript{33} In response, the court convened a committee of three mem-
bers of the Massachusetts bar to speak with the boys privately.\textsuperscript{34} The
boys confirmed that they wanted to remain with the Shakers, and were
allowed to do so.\textsuperscript{35}

The strong preference for a child's choice emerging in cases like
Hamilton and M'Dowle was curtailed where the battle was between the
natural parents rather than with third parties. Thus in Commonwealth v.
Addicks,\textsuperscript{36} the court interpreted its responsibility under the writ quite
differently than the M'Dowle court had. Although the children in both
cases were virtually the same ages, the Addicks court determined that it
had discretion to decide the children's custody, and granted custody to
their mother although she was an "adulteress."\textsuperscript{37}

\begin{enumerate}
\item \textsuperscript{28} Id. at 275.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} 8 Johns. 328 (N.Y. Sup. Ct. 1811).
\item \textsuperscript{31} Id. at 328, 332.
\item \textsuperscript{32} Id. at 331.
\item \textsuperscript{33} Id. at 331-32.
\item \textsuperscript{34} Id. at 332; see State v. Scott, 30 N.H. 274, 278 (1855) (court may appoint committee to
examine child to determine his wishes); see also Commonwealth ex rel. Gilkeson v. Gilkeson, 5
Pa. 131, 134 (1851) (holding apprenticeship contract involving fifteen year old girl invalid,
leaving her free to choose with whom she would live).
\item \textsuperscript{35} In re M'Dowle, 8 Johns. at 332. Similarly, in In re Wollstonecraft, 4 Johns. Ch. 80 (N.Y.
Ch. 1819), the court stated that the object of the proceedings was "only to deliver the party from
illegal restraint; and if competent to form and declare an election, then to allow the infant to go
where she pleased . . . ." Id. at 82-83. Finding her competent to make the choice, the court
released the girl to the mother's custody. Id.
\item \textsuperscript{36} 5 Binn. 520 (Pa. 1813).
\item \textsuperscript{37} Id. at 521. The court stated, "[s]o far as regards her treatment of the children, she is in no
fault . . . . It is to them, that our anxiety is principally directed; and it appears to us that,
After \textit{Addicks}, courts continued to determine that they had the power to decide custody cases between natural parents. In 1836, the court in \textit{New York ex rel. Ordronaux v. Chegaray,} \textsuperscript{38} struggled over whether it was appropriate to consult three children (ages fifteen, thirteen, and nine) when their mother petitioned for a writ of habeas corpus, seeking a change in custody because she was allowed only infrequent visits with the children. The \textit{Ordronaux} court recognized that this child custody habeas corpus proceeding was not "for the purpose of relieving the [children] from any improper restraint; but [rather] . . . a contest between parents in relation to the future charge and custody of their children."\textsuperscript{39} Contemporaneously, in the celebrated case of \textit{In re Burrus,} \textsuperscript{40} the U.S. Supreme Court observed that "to take away an infant child from the parent having it in nurture and keeping, upon the allegation that such keeping is a wrongful imprisonment . . . is a bold figure of speech, or rather fiction . . . ."

By the mid-nineteenth century, the rule governing habeas corpus petitions for child custody allowed a court to use its discretion in determining whether a child should choose which parent she preferred or whether the court should choose based on "best interests." In 1851, Kent's \textit{Commentaries} summarized this rule:

The [parent] may obtain the custody of his children by the writ of \textit{habeas corpus,} when they are improperly detained from him; but the courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere upon \textit{habeas corpus,} and take a child, though under fourteen years of age, . . . and deliver it over to the [parent] against the will of the child. They will consult the inclination of an infant, if it be of a sufficiently mature age to judge for itself, and even control the right of the [parent] to the possession and education of his child when the nature of the case appears to warrant it.\textsuperscript{41}

The courts' rationale for assuming broad discretion in deciding child custody was the impossibility of determining whether the child was under an illegal restraint without knowing to whom custody prop-

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38. 18 Wend. 637 (N.Y. Sup. Ct. 1836).
39. Id. at 643-44.
40. 136 U.S. 586, 602 (1890).
41. 11 JAMES KENT, COMMENTARIES ON AMERICAN LAW 194 (7th ed. 1851). The law remained sufficiently stable throughout the mid-nineteenth century for Kent's statement of the law to be quoted \textit{verbatim} in 1876. \textit{See} Hurd, supra note 20, at 454-55. Even one hundred years later, the standard remains virtually unchanged. \textit{See}, e.g., Ross v. Pick, 86 A.2d 463, 469 (Md. 1952) ("[w]e adopt the rule that there is no specific age of a child at which his wishes should be consulted and given weight by the court. The matter depends upon the extent of the child's mental development.").
}
erly belonged. Since paternal right was no longer absolute, courts could not decide custodial rights without inquiring into the relevant facts and circumstances.

The law ultimately vested in the courts a double discretion. First, the court could decide whether to use the “best interests” test or, if the child was of suitable age and maturity, it could let the child make the decision. Second, as there was no set age of maturity, the court could use its own discretion in determining the maturity of the child. Naturally, the court was likely to find the child to be sufficiently mature if the child made a decision which the court thought was correct.

Courts developed a practice of asking the child with which party she would like to live, but would follow the child’s request only when the court thought it was appropriate. Thus, the child’s preference, which had carried dispositive weight in custody cases, now provided only evidence for the court to utilize. Within a few years, courts were finding reasons, such as immaturity, or undue influence by relatives, to disregard even the

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42. See Marshall v. Reams, 32 Fla. 499 (1893). The Marshall court held:

Welfare, controls ‘choice,’ and the court will not permit the choice of the infant to lead it into an improper custody . . . . The decisions in this country do not fix any definite number of years when the age of discretion begins, but mental capacity is the test, and when the minor shows sufficient capacity mentally to exercise an intelligent choice, and no objection can be made to the person chosen, the court will ordinarily allow such choice to prevail.

Id. at 503-04 (emphasis added).

43. The converse was also true. For example, in Rust v. Vanvacter, 9 W. Va. 600, 613 (1866), the court awarded custody of a nine year old girl, who had lived most of her life with her maternal grandparents, to her father. The court disregarded the girl’s wish to remain with her grandparents, finding her immature and unlettered. Id.

44. See New York ex rel. Wilcox v. Wilcox., 22 Barb. 178 (N.Y. App. Div. 1854). For various reasons, a nine year old girl had been living with her paternal grandparents since birth. When the maternal grandfather died, the child inherited a substantial estate. The mother was named trustee, and, thereafter, petitioned to regain custody. Id. at 179-81. The child wanted to stay with her grandparents. Id. at 183. While the court praised the child’s intelligence and maturity, it, nonetheless, awarded custody to the mother. Id. at 194; see also Albert v. Perry, 14 N.J. Eq. 540, 545 (N.J. Prerog. Ct. 1862) (explaining that the court interviewed the child for the purpose of evaluating her care, not so that it could consider her wishes in determining custody).

45. In State v. Richardson, 40 N.H. 272 (1860), the court ignored the wish of a seven-year-old to stay with a distant relative rather than return to her father, and held the opinion of a child younger than fourteen was subordinate to a father’s right to custody. Id. at 276. Although a consistent trend was developing against honoring the child’s choice, the courts were not unanimous. See, e.g., Ellis v. Jesup, 74 Ky. (11 Bush.) 403 (Ky. 1875) where the court respected the wish of an “intelligent” child of nearly fourteen years. Relying on Delaval, Smith, M’Dowle, and Woolstoncraft, the court stated that the child’s “choice should control the action of the court in the matter.” Id. at 416 (emphasis added).

46. In Wilson v. Mitchell, 111 P. 21, 30 (Colo. 1910) the court granted custody of a 10-year-old to his mother despite the boy’s desire to remain with his paternal grandparents who had raised him. The court advised,

It is urged that as . . . Russell’s preference was to stay with his grandparents, . . . we should recognize that preference and let the child remain where it is . . . . In
By the end of the nineteenth century, the writ of habeas corpus in child custody cases had become a mere homonym with the writ in adult improper imprisonment cases. The child had lost the liberty to determine custody for himself. By 1887, the District Court of Alaska asserted: "The habeas corpus proceeding would be a mockery if, after all, the child should be permitted to decide for himself where he will go, or under whose roof he will shelter." The state's traditional interest in raising children to be moral citizens was heightened by the social-engineering approach of the "child savers," with burgeoning immigration, intrusive parentalism seemed justified to "civilize" children into good considering the aversion to his mother it must be remembered that prior to this contest there was... the tenderest love and affection... [T]he aversion is the result of... the bitterness aroused by this contest... [that] has been... instilled in the child... 

Id.

47. E.g., In re Neff, 56 P. 383, 384 (Wash. 1899) (In a contest between the stepfather and father for custody of a 15-year-old, a 13-year-old, and a 10-year-old, the court stated: "But little weight... can be attached to the wishes of the children, as it appears they had not seen their father for years, and had been surrounded by influences that perhaps would not make them think favorably of him."); see also Giffin v. Gascoigne, 47 A. 25, 26 (N.J. Ch. 1900).

48. See Dallin H. Oaks, Habeas Corpus in the States 1776-1865, 32 U. CHI. L. REV. 243, 270-74 (1964). The conventional wisdom, challenged here, assumes that this distortion of the writ's function allowed the courts flexibility in making decisions about the child.

49. In re Can-Ah-Couqua, 29 F. 687, 690 (D. Alaska 1887) (emphasis added). A native-Alaskan mother sought to reclaim her nine year old son who, four years earlier, had been placed at a Presbyterian mission school pursuant to a five-year verbal apprenticeship agreement. The presiding judge stated: "I can only look to the capacity, information, intelligence, and judgment of the child, and I am clearly of the opinion that [he] has not yet reached that discretion which would enable him to choose wisely." Id. at 690. Can-Ah-Couqua forms a stark contrast to earlier cases such as Hamilton, M'Dowle, and Fox. No doubt, the court's misplaced cultural chauvinism propelled it to find a need to "civilize" the Native American child and therefore make a disposition contrary to decisions regarding young recruits to the Christian, work-oriented Shakers. Still, in 1810, a boy of nine was deemed mature and intelligent enough to choose his custodian. In 1890, he was not.

50. The efforts of the social reforming "child-savers" were focused in areas such as adoption, neglect and abandonment, and delinquency. In these instances the state intervened to remove children from the custody of their parents. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 92-119 (1994). Intrafamilial custody adjudication was inevitably affected by the spillover from legal institutions expanding the parens patriae role of the state and by the xenophobically-tinged, do-gooder ideology to which exploding cultural and economic diversity gave birth. Certainly, immigrant slum children were not to be given voices of their own.

The cause of immorality among poor children was traced to an improper environment; but the slum child was to be saved less for his own sake than because he was a potential threat to society. As Charles Loring Brace [founder of the Children's Aid Society] warned, "This dangerous class has not yet begun to show itself as it will in eight or ten years, when these boys and girls are matured.... [T]hey will have the same rights as ourselves.... [T]hey will poison society." BERNARD WISHY, THE CHILD AND THE REPUBLIC 16 (1968) (quoting CHARLES L. BRACE, FIRST ANNUAL REPORT OF THE CHILDREN'S AID SOCIETY 12-13 (1854)).
citizenship. Children's choices were used to "break ties" if the law was unclear, if the equities were equally balanced, or if the court wanted to go against the general weight of the law by awarding custody to a non-parent.

Otherwise, children's wishes were disparaged. The 1930s case of Alan Glendening, the son of heiress Alicia Maddox DuPont, is illustrative. In a petition for change of custody from his father to his mother, Alan, who was almost seventeen, and the top student in his class at the prestigious Lincoln School, stated emphatically that he wanted to live with his mother. Yet the court denied his request, using the same rationale for this elite, educated young man that had been applied fifty years ago.

   It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions. This social interest must play an important part in determining what individual interests in such relations are to be secured, how far they are to be secured and how they are to be secured. . . . Today certain social interests are chiefly regarded. These are on the one hand a social interest in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future.

52. See *Illinois ex rel. Hickey v. Hickey*, 86 Ill. App. 20 (Ill. App. Ct. 1899) (considering a child's wishes in a custody suit between two adulterous parents); *Rallihan v. Motschmann*, 200 S.W. 358, 363 (Ky. 1918) (holding that the child's wishes will be considered only where the court's decision is unclear).

53. See *Neville v. Reed*, 32 So. 659 (Ala. 1902) (holding child's preference to stay with his guardian was controlling although the law would place the child with a surviving parent); see also, *Garrett v. Mahaley*, 75 So. 10 (Ala. 1917) (relying on the wishes of nine year old girl to uphold custodial award to putative father who otherwise had no parental rights); *Arkansas ex rel. Rosenstein v. Hoover*, 229 S.W. 15 (Ark. 1921) (denying change in custody from guardian to mother's sister because of child's desire to remain with guardian). Rollin Hurd states: "It is not the whim or caprice of the child which the court respects, but its feelings, its attachments, its reasonable preference, and its probable contentment." Hurd, *supra* note 20, at 533. However, Hurd explains that the wishes of children of sufficient capacity to choose for themselves should be given special consideration when their parents have for a long time voluntarily allowed them to live in the family of another. Id. at 535-40.


55. Id. at 697-700.

56. The court stated it was "firmly convinced that the boy's welfare, his real and enduring happiness and his true and best interests will be served by continuing custody in the father . . . especially now when the boy is of an age that requires more than ever before the strong, loving paternal influence and guidance the father has demonstrated he can give." Id. at 700. Justice Callahan wrote an outraged dissent:

   The boy has grown to be almost seventeen years of age. He is well through his high school course . . . . In a very short time the boy will be able to make a choice over which the courts shall have no control . . . . The father has had far more opportunity to win the boy's affection than has had the mother. Yet, he has not been
years earlier in *In re Can-Ah-Couqua*, where the District Court of Alaska denied a native-Alaskan child the freedom to return to his mother. The court reasoned: "To rule otherwise is to disregard the established facts, practically to abandon the jurisdiction of the court, and make a boy of sixteen the sole judge of his own moral, intellectual, physical and spiritual welfare."57 Childhood itself had become a disenfranchised minority status.58

Fortunately there were a few notable exceptions.59 An Ohio statute operative during the 1940s60 and a Utah statute in effect until 1969,61 granted children ten years of age and older a legally binding choice as to their custodial parent, provided that parent was fit.62 The Ohio statute actually gave children a significant amount of control over their own lives. For example, in *Dailey v. Dailey*,63 two children were originally in their mother's custody. The court held that the older daughter's tenth birthday constituted a change of circumstances sufficient to permit a determination as to change of custody.64 In making that determination, the girl's request to live with her father was binding on the court as a matter of law.65 The older girl's decision also affected her sibling, since the appellate court found that the older child's move constituted a change of circumstances, enabling the trial court to rule that the siblings should not be separated.66

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57. Id. at 700
58. See Stapleton v. Poynter, 63 S.W. 730, 731-32 (Ky. 1901), where the preference of a nine year old boy to remain with his grandparents was subordinated to his mother's claim to custody as a matter of right.
59. See, e.g., New York ex rel. Humex v. Phelps, 109 N.Y.S. 625, 627-28 (N.Y. Sup. Ct. 1908) (relying on the established reciprocal affective ties as expressed by a "remarkably intelligent" 10 year old girl to deny the mother's petition for change of custody from the foster parents).
60. 1945 Ohio Laws 568 stated, in pertinent part: "[I]f . . . children be ten years of age or more, they must be allowed to choose which parent they prefer to live with, unless the parent so selected, by reason of moral depravity, habitual drunkenness or incapacity, be unfitted to take charge of such children, in which event the court shall determine the custodian . . . ."
61. 1895 Utah Laws 30-3-5 (amended 1969). In *Anderson v. Anderson*, 172 P.2d 132, 136 (Utah 1946), the Utah Supreme Court held that the child's preference was controlling in an initial custody determination but not in a modification of custody. The 1969 change to the statute deleted all mention of the child's preference. 1969 Utah Laws 30-3-5.
63. 64 N.E.2d 246 (Ohio 1945).
64. Id. at 247.
65. Id.
Children's rights were soon abridged. By 1950, the Ohio statute had been modified to allow only children ages fourteen and older to have a dispositive choice regarding the custodial parent. By 1956, the statute had been modified further: "must be allowed to choose" was changed to "may be allowed to choose"—replacing the child's judgment with the court's.

Beginning around World War II, judicial treatment of the child's preference changed again. Rather than merely being weighed lightly by the court, that preference became subject to intense scrutiny by psychiatrists and psychologists. For example, in the 1945 case, *In re Heller*, one of the first published decisions relying on expert psychiatric testimony, the court convened a panel of three psychiatrists whose report carried great weight in the ultimate conclusion that the mother of the eleven year old boy should not have visitation rights. The psychiatrists testified that visitation would be injurious to the child as "likely to produce a mental disorder of the folie a deux type and further cause conflicts and difficulties . . . [and] a neurotic state . . . ."

Gradually, the voice of the child was buried so deep under the mental health expert's opinion that it could not be heard without expert with many problems arising under it. In *Schwalenberg v. Schwalenberg*, 29 N.E.2d 617, 618 (Ohio Ct. App. 1940), though the mother charged that her son had been unduly influenced with activities and gifts by his father, the appellate court sustained an award of custody to the father. The court found that "this entertainment occurred in the natural course of events in the household" and "was the natural expression of affection of a father for his son . . . ." *Id.* Furthermore, the court concluded that undue influence at the hearing was insured against by "agreement of counsel [that] the boy was interviewed privately by the court before a stenographer as to his choice at a time when he was divorced from the influence of both parents . . . ." *Id.*

67. *See Rowe v. Rowe*, 97 N.E.2d 223, 225 (Ohio Ct. App. 1950). Under the new statute, the voices of the state investigators in their parens patriae functions were given more credence than those of the child. *Id.* For example, in *Newman v. Newman*, 104 N.E.2d 707 (Ohio Ct. App. 1951) the appellate court reversed the trial court's determination that an eight-year-old should remain in the custody of the father, based on her own statement of preference. Additionally, the court awarded custody to the mother based on the investigator's report that "she is little less than a scullery servant and required to look after and care for the small children of appellee and his present wife, who curses and beats her . . . ." *Id.* at 709.

68. *Ohio Rev. Code Ann.* § 3109.04 (Anderson 1992); *see e.g., Watson v. Watson*, 146 N.E.2d 443, 445-46 Ct. (Ohio Ct. App. 1956) (denying a 14-year-old's preference to live with her mother under the new statute, because the mother had committed adultery by having an affair with her second husband before he had succeeded in obtaining a divorce).

69. 54 N.Y.S.2d 734 (N.Y. Sup. Ct. 1945).

70. During the mid to late 1940s courts routinely appointed mental health experts and custody evaluators. Not all litigants, however, welcomed such use of experts. *See Jones v. Jones*, 161 P.2d 890, 893 (Wash. 1945) (father's attorney rejected court's recommendation that a social worker visit the home).

71. *Heller*, 54 N.Y.S.2d at 735. Apparently the mother had a history of psychiatric illness, though the opinion does not state this.

72. *Id.*
excavation. Consider, for example, the case of Steve Daryl Doherty, whose parents provided in their divorce decree that when Steve "reaches the age that he can express an intelligent preference with regard to his custody, he shall have the right to express said preference and that the parties hereto shall abide by that preference ... ." When he turned eleven, Steve decided to live with his mother. At trial a psychologist, a psychiatrist, and two teachers testified, and, based on their testimony, a special verdict was rendered that Steve had, indeed, reached the age at which he could express an intelligent preference.

The Heller court based its decision on an alchemical table of mental horrors that denigrates the autonomy of the child in a way which would have been inconceivable to the M'Dowle court. That court, 130 years earlier, had convened a panel of three attorneys to make certain that a child of roughly the same age was forming his own decision about his custody. Similarly, the adversarial diagnostics of the Doherty case are a far cry from the helpful energies exerted by the M'Dowle court in helping a boy of almost the same age to exercise his rights.

This brief history reveals that the therapeutic paradigm was neither inevitable nor necessarily benign. With the demise of absolute paternal right in the late eighteenth and early nineteenth century, a door opened briefly on a legal vision of the child as a developing person who could be assisted by the court towards the independent exercise of important rights. That door soon slammed shut. To understand why, we must examine the claims advanced by various family members, who competed for control of the child.

B. Mother's Tonic for Tender Years and Grandma's Glue of Earned Affection

Many of the legal assumptions about the child's sensitivity and vulnerability used to justify a protectivist approach are rationalized today by recourse to psychological theory. But their antecedents are the legal arguments used by mothers and grandmothers during the nineteenth century to win custody of children in the face of paternal right claims.

Looking at the nineteenth century cases with a litigator's eye, we can examine the relationship between nineteenth century law and nine-
teenth century family structure, to understand how legal doctrine became the grist of legal arguments for adults seeking custody, and how legal conflict among adults came to effectuate doctrinal changes.\textsuperscript{78}

Nineteenth century child custody law can be summarized as follows: “Best-interests,” or as it was then known, the child’s “welfare,” was of paramount concern.\textsuperscript{79} The de facto presumption was that older children belonged with fathers, who could suitably “educate” them, younger children of “tender” years and sometimes girls or sickly children belonged with mothers, who could “nurture” them.\textsuperscript{80} The rules, however, left room for argument; tender years was never age specific.\textsuperscript{81}

\textsuperscript{78} This approach departs from standard doctrinal history, which focuses on the logic of courts and the policies of legislatures while ignoring the ways law is shaped by its ordinary users. It is also a departure from the approach of social historians of the law who see legal arguments as accurate reflections of the social construction of controversies among ordinary users of the law at different times. \textit{See generally} Robert L. Griswold, \textit{Family and Divorce in California, 1850-1890} (1982); Michael Grossberg, \textit{Governing the Hearth: Law and the Family in Nineteenth Century America} (1985); Elaine T. May, \textit{Great Expectations: Marriage and Divorce in Post-Victorian America} (1980); Nancy F. Cott, \textit{Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records}, 10 J. Soc. Hist. 20 (1976). Rather, it is assumed that there is a body of legal doctrine and dicta which reflects the dominant values of the period, and that litigants, in bringing their controversies to court, will emphasize, to the point of exaggeration, those facts which give them the advantage when applying the existing doctrine to their case and will ignore facts unrelated to the legal doctrine. If the doctrine is concerned with the health of children, the law will ask many questions about illness, diet, and adjustment, and will ask little or nothing about adventurousness, autonomy, or individuality. Ultimately, questions asked and answered, judicial opinion, and dicta will result in the development of a legal vision of the child which places significance only on certain parts of the child’s personality. \textit{Cf.} Philippe Aries, \textit{Centuries Of Childhood: A Social History of Family Life} 25-32 (1962) (arguing that there was no special vision of children during the Middle Ages); Janet E. Ainsworth, \textit{Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court}, 69 N.C. L. Rev. 1081, 1084 (1991) (arguing that the distinctive characteristics of the juvenile justice system are based on a faulty and obsolete vision of children).

\textsuperscript{79} Mary A. Greene, \textit{The American Mother’s Right to Her Child}, 52 AM. L. REV. 371, 373 (1918).

\textsuperscript{80} As compared to “education” (the masculine form of the concept of “rearing”), “nurture” (the feminine form) carried an association with immaturity. Although the emphasis on “nurture” was undoubtedly a boon to mothers in custody battles, the association of the “nurture” concept with immaturity had several consequences which perpetuated the gender imbalance between mothers and fathers. First, mothers gained custody of young children while fathers continued to receive custody of older children, who were frequently considered financial assets. Second, the “natural nurter” stereotype, ironically promoted by many feminist groups, had the unfortunate secondary effect of confining women to the domestic sphere. Grossberg, \textit{supra} note 78, at 244-50. “Tender years” ideology was a double-edged sword.

\textsuperscript{81} In the nineteenth century, the word “child” was “used loosely to cover the years from infancy to what we now call early adolescence.” Wishy, \textit{supra} note 50. Theologian Horace Bushnell distinguished developmental stages: an early stage in which the child was sensible to \textit{impressions}; and a later stage in which the child was sensible to \textit{influence} and \textit{reason}. He was not precise about the associated ages, however. The earlier stage might have ended with toddlerhood or continued until six or seven years of age. Horace Bushnell, \textit{Christian Nurture} 198-213 (1847), \textit{reprinted in} Child-Rearing Concepts, 1628-1861, at 137 (Philip J. Greven, Jr. ed., 1973). The term “adolescence” was invented in 1904. Stanley Hall, \textit{Adolescence} (1904).
Parents could forfeit their presumptive rights by immorality or unfitness, qualities which would make them unsuitable to perform the role "natural" to their gender. The law was sometimes stated as a paternal right to custody subject to a tender years exception; sometimes as a pair of parental gender/offspring age presumptions—a difference which varied jurisdictionally, temporally, and idiosyncratically.

Nineteenth century family structure was complex. The typical nineteenth century litigated custody case involved an extended family, often divided among three households. After dissolution of a marriage by death or divorce, parents typically moved in with other family members. While some cases were merely inter-parental custody battles at divorce, two other scenarios were commonplace. In the first, a divorced couple would leave their young children with grandparents while they went to earn a living and reestablish their lives. Some years later, recently remarried, with new home and household, mother or father would again seek the children's custody. In the second scenario, the mother would die in childbirth, and the father would leave the baby with the grandparents until he remarried and would then seek to regain custody.

The way custody battles took shape reflected the natural-law thinking of the period. In the judicial discourse, both fathers and mothers

82. During the mid-nineteenth century, leaving one's husband without cause was often deemed a barrier to maternal custody. Further, often when the custodial preference seemed to tip in favor of one gender, vicious allegations of drunken, violent, and gambling fathers, and wanton and adulterous mothers, were mutually hurled. See, e.g., Van Buren v. Van Buren, 198 N.W. 584 (Mich. 1924) (overcoming tender years presumption because mother took child with her on an adulterous escapade); Arix v. Arix, 180 N.W. 463 (Mich. 1920) (awarding custody to father because mother had a lover). But see In re Pinnell, 198 P. 215, 217 (Cal. Ct. App. 1921) (statutory tender years presumption prevails); Stafford v. Stafford, 132 N.E. 452, 458 (I11. 1921) (father prevails against maternal aunt only by proving through many witnesses that the charges of drunkenness and gambling against him were fabricated); Sorge v. Sorge, 191 P. 817, 818 (Wash. 1920) (tender years presumption outweighs possible moral fault in awarding custody to the mother). In fact, it was not until the 1950s that the reflexive application of the maternal presumption made it almost impossible for fathers to obtain custody without attacking the mothers' morality. The change in sexual mores, to which the law was pretending to be blind, made it extremely easy to prove the "adultery" of one's estranged spouse. During that period, the custody cases begin to read like a litany of vituperative attacks on the chastity of mothers.

83. These family members were most often parents, but included siblings, aunts, uncles, or cousins. Further, parents who were "single," intending to live either on their own or in a boarding house, were singularly disadvantaged in custody determinations. Courts found single parent homes in which children would live among strangers unsuitable, where no preexisting bonds of blood or association with the child existed. See, e.g., Jones v. Darnall, 2 N.E. 229, 230 (Ind. 1885) (allowing grandparents to retain custody after mother's death because father "had no wife and no family, and worked by the month, and went from place to place"); see also Gardenhire v. Hinds, 38 Tenn. (1 Head) 402 (1858).

84. Characteristic of the nineteenth century concept of child rearing was a Lockean environmentalism, in which children were viewed as tabulae rasaec, capable of being shaped into ideal Americans through proper environment and parental role models; what was "proper" was
fulfilled their natural functions as educators or nurturers by acting as role models for their children. Mothers were believed to be fitted by nature for the nurture of their children, while fathers were believed to be naturally suited to their "education"—a broad term which embraced socialization to one’s economic station in life, good republican citizenship, and Christian morality. The father’s natural right to educate his children derived from his natural role.

Because gender roles were conceived as inherently different, children, envisioned in Lockean style as toddler tabulae rasae, were deemed to need parents of both genders as appropriate role models. In making


85. MARY CABLE, THE LITTLE DARLINGS: A HISTORY OF CHILD REARING IN AMERICA 77 (1975). Cable explains:

Book learning was still a small and rather unimportant part of what was understood to be meant by the word education. According to The Parent’s Monitor and Young People’s Friend, one of the many parents’ magazines that began to appear after 1830, education meant ‘the implanting of right dispositions, the cultivation of the heart, the guidance of the temper, the formation of character.’

86. For at least the first half of the nineteenth century, the most influential books on child rearing were written by theologians. Although the puritan Calvinistic tone had lightened, the emphasis was nonetheless moral. The goal of American child rearing was “to guarantee that every child could be as just in resisting the world as he was powerful in commanding it, or, put another way, that a child could be raised without sacrificing Christian faith and morality, worldly success, and the happiness implied in the American ideals of 1776.” WISHY, supra note 50, at 10-12. Wishy suggests that the very task of rearing children to fulfill such contrary goals may have contributed to the child-as-patient paradigm: “the very way in which moralists defined the alternatives for the child doubled anxiety about his possibilities and deepened frustration with his failures.” Id. at 10.

87. Johnson v. Terry, 34 Conn. 259, 263 (1867) (“That the father is entitled to the custody and control of his minor children, even to the exclusion of the mother, is elementary law. The right arises necessarily from and is incident to his duty to maintain, protect and educate them.”) Throughout the nineteenth century, the father’s custodial right and responsibility was phrased in terms of his educative function. See, e.g., New York ex rel. Barry v. Mercein, 3 Hill 399, 415 (N.Y. 1842) (“[The father] . . . is qualified, and eminently so, for the moral and mental instruction of this child . . . .”). In Verser v. Ford, 37 Ark. 27 (1881), the court explained:

[I]n the great majority of cases, his greater ability and knowledge of the world renders him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate and promote the happiness of the child, according to his own best judgment and the means within his power. Any system of jurisprudence which would enable the Courts, in their discretion and with a view solely to the child’s best interests, to take from him that right and interfere with those duties, would be intolerably tyrannical, as well as Utopian.

Id. at 30.

88. WISHY, supra note 50, at 32. According to the author, “[E]nvironment, persuasion, example, precept, carefully formed habits were thus stressed by both the orthodox and the more benign nurture enthusiasts.” Id. Furthermore, the maternal custody presumption was by no means universal. In the late nineteenth century, in Welch v. Welch, 33 Wis. 534 (1873), a court considered custody of a boy aged 14, well beyond his tender years. The father had married the
or changing a custodial placement, therefore, nineteenth century courts pragmatically appraised the entire household constellation, and the relationship between the custody-seeking parties. When maternal custody was considered, it was assumed that a grandfather, male sibling, or uncle would play the role of the paternal parent. In making a choice for maternal custody, therefore, there was no question but that the child would also have an in-house male role model who would provide the educative prong of the child's rearing. Similarly, when paternal custody was at issue, there had to be no doubt in the judicial mind that the "nurture" prong would be fulfilled by a woman. Thus, in reaching a determination the court considered who in the paternal home might fulfill the female nurturant prong.

In essence, the issue in the nineteenth century was not which parent could do a better job, but whether the father should have custody as the child was "nurtured" by women from the father's family, or the mother should have custody as the child was "educated" by men from the mother's family. The necessity for the child to have both nurturing and education led to the exercise of broad judicial discretion dependent

mother because she was pregnant and was suing him for support. He deserted her a year later and never supported or visited his son. Id. at 535-38. At the time the father sought custody, the mother was remarried and was living in a Christian community with a good school and church, both of which the boy regularly attended. The father was running a gambling saloon. Id. Yet the Wisconsin Supreme Court found that an award of custody to the father was not an abuse of discretion. Although Wisconsin had a seemingly progressive statute governed by the child's welfare, and authorizing the courts to use their discretion in awarding custody to either parent, the court turned its discretionary authority against the mother by reading a common law paternal preference into the statute. Id. at 541-42.

89. For example, in In re Turner, 19 N.J. Eq. 433, 434-35 (N.J. Prerog. Ct. 1868) the court considered the family household constellation in deciding between the paternal and maternal grandfathers as possible custodians of an orphan girl. "[M]uch evidence was taken on both sides, as to the capability of the paternal and maternal grandfathers, and their families to take care of and educate the child. Each grandfather has in his family several unmarried daughters, willing and able to care for and attend to the infant." Id; see also Wand v. Wand, 14 Cal. 512, 518 (1860) ("Indeed, if the dominion of the child should be given to the father, it is very evident that he must confide her to some female to care for and keep her . . . .''); Foster v. Alston, 4 Miss. 406, 459 (1842) (granting custody of children to remarried mother over bachelor uncle because no female would be available to perform motherly duties); New York ex rel. Rhoades v. Humphreys, 24 Barb. 521 (N.Y. App. Div. 1857) (sustaining father's claim to custody because he took his six month old baby from his estranged wife and placed it in the care of his mother).

90. E.g., Umlauf v. Umlauf, 21 N.E. 600, 601 (Ill. 1889) (awarding custody of nine year old boy to father, in part because mother was employed and would be unable to devote sufficient time to the child; in the father's home, the child's older sister would attend to him); see also New York ex rel. Barry v. Mercin, 3 Hill 399 (N.Y. Sup. Ct. 1842). In Barry, so closely matched in their suitability as parents were the mother and father, that the father had to petition for habeas corpus four times before the court finally determined that the child was past her tender years and should be placed in the custody of her father. Id. at 404. Significant in the decisional calculus of each case was the availability of a father-figure in the mother's home, and mother-figures in the father's home, so that each household was capable of fulfilling both the educative and nurturance prongs.
heavily upon the facts and circumstances of each case.91

Throughout the century, many courts acknowledged claims of paternal right,92 while mothers needed fact-specific arguments to tip the balance in their favor. The "tender years" doctrine was developed as a maternal rights strategy on the theory that biological mothers were naturally better at nurturing. Beginning as a narrowly crafted exception for nursing babies or seriously sickly children, the doctrine grew to encompass all small children, all female children, and those children of "delicate health."

The "tender years" doctrine did not follow a linear course in over-taking paternal rights.93 Later courts tried to introduce a "moral threshold" for triggering the "tender years" inquiry.94 Judges feared that permitting mothers who left their spouses without just cause to retain custody of their children would cause divorces to proliferate, destroying the integrity of the family,95 the institution considered to be the central

91. Courts also considered the household's financial ability to support a child. Although child support was occasionally awarded during the nineteenth century, it was neither obligatory nor common. The rule seems to have been, "when husband and wife are divorced, if they agree that he shall support the children, although she retains them, he will be liable. But a mere divorce gives her no authority to bind the husband for the child's support." Brow v. Brightman, 136 Mass. 187 (1883) (citation omitted).

92. The "idea" of paternal authority seems to have outlived the reality. Bernard Wishy observes that the same authors who wrote child-rearing advice directed to mothers also wrote books for children portraying the father as the head of the family. Wishy, supra note 50, at 55.

93. Some of the earlier nineteenth century cases awarded custody to the mother, even in the presence of her moral fault. See supra notes 36-37 and accompanying text. Later American cases temporarily retreated from this liberal position. See supra notes 38-39 and accompanying text; see also New York ex rel. Nickerson, 19 Wend. 16, 16 (N.Y. 1837) (applying a seemingly distorted interpretation to New York statute authorizing the court to give mother custody of children as the case might require, deeming its provisions applicable only where the separation was upon cause or by consent). In the latter half of the twentieth century, courts seem to have again shifted towards liberalism, with the issue of mothers' moral fault returning to the focus again.

94. New York ex rel. Brooks v. Brooks, 35 Barb. 85 (N.Y. App. Div. 1861), held that if the parties were equally lacking in moral fault, the father had superior rights, but where fault existed in either party, it should be determinative. Id. at 92-93.

95. Courts thought that mothers were more likely to remain with their children than were fathers. E.g., Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 204 (1834) ("[u]nless there is some justifiable cause of separation, the Court ought not to sanction the unauthorized separation of husband and wife by ordering the child into the custody of the mother, thus separated and out of the custody of the father."). The dissenting opinion in New York ex rel. Barry v. Mercein, 3 Hill 399 (N.Y. Sup. Ct. 1842), which favored the mother, was silent on the implications of the doctrine, limiting its language to a discussion only of the child's health, as though "tender years" were a neutral and child-centered doctrine. Id. at 423-26 (Nelson, C.J., dissenting). The majority opinion gives ample expression to this concern, and its potential for destroying the father's primary right to custody, by extending the "tender years" doctrine throughout the length of the child's minority.

When we are told . . . that this child is still in such delicate health as to require a mother's care, the first answer which strikes the mind is the generality and
building block of the new American society. Especially after passage of the Married Woman’s Property Acts\textsuperscript{96} in the late nineteenth century, conservative courts worried that gender equality would sound the death knell for the family as an institution. Courts, therefore, established stricter standards for invoking the “tender years” doctrine.\textsuperscript{97} Evidence to support granting a divorce was examined in tantalizing detail. Thereafter, the matter of a parent’s moral fault in causing the divorce resurfaced in various guises as a bar to custody.\textsuperscript{98}

Thus, courts applied the “tender years” doctrine more stringently to mothers they regarded as less “moral.” In the mid-nineteenth century, where a mother would seek a divorce without what a court considered just cause, the court recognized a “tender years” exception to the paternal right to custody only where very sick babies were involved.\textsuperscript{99} The unsatisfactory nature of the allegation—an allegation by which, if allowed, the [father] may still be baffled till his child is twenty-one.\textsuperscript{Id. at 413.} When a court deemed the wife had deserted the husband without just cause it might award the father custody to induce her to return to the marital relationship. See, e.g., Carr v. Carr, 63 Va. (22 Gratt.) 168, 174-76 (1872).

96. Under early common law, a married woman was under severe economic disabilities; the husband had ownership and control of her property under the theory that the couple were “one.” In the 1800s, state legislatures enacted a series of statutes to eliminate the wife’s financial disabilities. These were known as The Married Woman’s Property Acts. PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND PROBLEMS 281-82 (1990).

97. The seemingly stricter standards which courts applied to potential custodial mothers during the mid-nineteenth century represented a broad based attempt to counteract the liberalizing tendencies surfacing in legislatures and society in general. Two influential books of the period, both directed primarily towards mothers, emphasized gently guiding and nurturing the child towards Christian virtue. LYDIA H. SIGOURNEY, LETTERS TO MOTHERS (1938); BUSHNELL, supra note 81. These books mark the decisive point of change from previous stern Calvinistic views. See Crispus (Anonymous), On the Education of Children (1814), reprinted in Child-Rearing Concepts, 1628-1861, supra note 81, at 99 (“The root and foundation of misconduct in children is human depravity; depravity in the parent, and depravity in the child. This ought never to be overlooked, nor forgotten in any of our systems of education, . . .”). Maternal associations, and mothers’ magazines encouraging mothers to gently steer children toward Christianity at their own pace also emerged during this period. See Wishy, supra note 50, at 28-30; see also Cable, supra note 85, at 90-91. Taking a more secular approach to the moralistic child care experts of the nineteenth century, Cable also acknowledges the emergent gentleness and says that such books as JOHN ABBOTT, THE MOTHER AT HOME (1833) and THEODORE DWIGHT, THE FATHER’S BOOK (1834), both extremely popular in the 1830s, “tempered their Calvinism with compassion . . . .” Cable, supra note 85, at 91.

98. During the twentieth century, adultery, rather than separation without cause, became the primary moral failing which served as an argument against custody. See, e.g., Duncan v. Duncan, 80 So. 697 (Miss. 1919) (awarding custody to father in part because of mother’s adultery); Jensen v. Jensen, 170 N.W. 735, 736 (Wis. 1919) (accepting argument that mother’s remarriage prior to a statutory waiting period constituted adultery sufficient to deprive mother of custody).

99. In Carr v. Carr, 63 Va. (22 Gratt.) 168 (1872), a young wife had too hastily left her husband who, though rude, petulant, and ill-tempered, was not violent toward her. For three years, the husband entreated her to return. The court granted the mother neither custody nor visitation and postponed the divorce decree for six months, noting that both parties were to blame, and urging the couple to work out their differences. Id. at 176. Carr is an example of the efforts
harder it was to prevail on the exception, the harder mothers tried to convince courts that their children were sickly, nervous, and dependent.\textsuperscript{100}

to constrain the “tender years” doctrine by finding the wife’s unjustified desertion of her husband, in and of itself, to constitute a type of immoral conduct because of its threat to family integrity. Although, in the court’s view, the blame regarding the problems in the relationship was equally distributed, \textit{id.} at 175, the mother’s moral failure in leaving, without just cause, a marriage which the husband desired to continue served as a limitation upon her “tender years” claim. The four-year-old had been living with the mother since the separation. The court, decided “[t]he tender nursing period has passed by, and the time for moral training and impressions has arrived . . . .” \textit{id.} at 174. The court stated further, “she has undertaken, of her own accord, to disregard and sever the sacred bond of marriage . . . we are asked to compel the father and deserted husband to allow his innocent and unoffending daughter to share with the mother this undefined, ambiguous position, this burden of disgrace, during the critical period of moral training and education . . . .” \textit{id.}

In a later case, relying heavily on \textit{Carr} and \textit{Barry}, the court further restricted the “tender years” doctrine to a special case exception. \textit{Latham} v. \textit{Latham}, 71 Va. (30 Gratt.) 307 (1878). In \textit{Latham}, the court denied custody to a mother, finding no legal basis for the divorce or separation and that “the infant is a male child four years of age—not sickly or feeble—with nothing in its condition requiring the special attention of the mother beyond that of any other infant of like age.” \textit{id.} at 335. It stated the law thus:

In this country the doctrine is not materially different from that now held by the English Courts. The father is universally considered as having claims paramount to those of the mother, his legal authority only yielding to the claims of the infant, whenever the morals or interests of the others strongly require it. Whenever the father so conducts himself that it will not be for the benefit of the children to live with him, if his domestic habits, associations or opinions are such as tend to the injury of his children, the court will withdraw them from him and confer the custody of them upon the mother, or take the children from both and commit them to some third person to nurture and educate . . . . In passing upon the claims of the parents, the court will enquire who is most to blame for the separation, giving the preference to the innocent party, because with such a party the infant is most likely to be cared for properly.

\textit{id.} at 332-33 (citation omitted); \textit{see also} \textit{New York ex rel.} Rhoades v. Humphreys, 24 Barb. 521 (N.Y. App. Div. 1857). Without even considering “tender years,” this harsh decision sustained the removal of a six-month-old from the mother, awarding custody to the father, and finding that the mother had no right to the child. Although the husband has been wanting in respectful and kind attentions to her, and has often used harsh, profane and vituperative expressions to her, and to others concerning her . . . there is no proof or pretense that he has used or threatened any violence to her person, or failed to provide for his family in a suitable manner, or that it would be unsafe for her to cohabit with him. A complaint by the wife for a separation or limited divorce could not, upon the facts disclosed, stand a moment.

\textit{id.} at 522.

\textsuperscript{100} In \textit{Parrish} v. \textit{Parrish}, 82 S.E. 119 (Va. 1914), a father petitioned for a change of custody, arguing that his eight year old son was past his “tender years,” and that his best interests demanded that he be reared and educated by his father. \textit{id.} at 120. The custodial mother argued that by virtue of his physical delicacy, the boy’s “tender years” extended through his middle childhood, alleging “that the child is of an extremely nervous temperament, and by reason of his [delicate] physical condition requires the constant and watchful care of a mother . . . .” \textit{id.} The court adopted the mother’s health-based argument, affirming the trial court’s decision to give the mother custody during the nine winter months and the father custody during the three summer months. \textit{id.} at 121.
In the arguments mothers used throughout the nineteenth century to expand the doctrine of "tender years" lies the germ of the legal vision of the child-as-patient—a vision which began with an evidentiary emphasis on childhood diseases a century before it developed into the current psychotherapeutic paradigm. In the context of high child mortality rates the "tender years" idea was reasonable enough. Through its application in accumulating decisions, and its common law case-by-case development, the doctrine of "tender years" became inextricably associated with testimony about the ill-health or delicacy of particular children, and the expert testimony of attending physicians.101

Several cases illustrate this point. In State v. King,102 an 1841 Georgia case, expert testimony of two physicians helped a mother separated from her husband gain custody of her daughter and son. The physicians testified that the children "will be better attended to and more closely watched" by their mother.103 In another case, the testimony of a physician assisted a mother in winning custody of her six year old son.104 In making its determination, the court considered the "tender" age of the child, his delicate health, and his tendency toward illness and relied on the physician's judgment, in finding that he still required the care of his mother.105 Similarly, in McKim v. McKim,106 although the court disapproved of a young wife who left her husband without just cause, it awarded her custody of their four year old child because of the child's health.107 The physician who had attended the child for two

101. Around this time, pediatrics became a specialized field of medical study and physicians joined the ranks of theologians in writing guides for parents. See William Alcott, The Young Mother (1836); P.H. Chavasse, Advice to Mothers on the Management of Their Offspring During the Periods of Infancy, Childhood, and Youth (1844); Andrew Combe, A Treatise on the Physiological and Moral Management of Infancy (1840); William P. Dewees, A Treatise on the Physical and Medical Treatment of Children (1825). In the popular advice-to-mothers writing of this period, the "law of nurture" is an admixture of health and morality. See Wishy, supra note 50, at 34-37.

102. 1 Ga. 93 (1841).

103. Id. at 95. A year later, however, in New York ex rel. Barry v. Mercein, 3 Hill 399 (N.Y. Sup. Ct. 1842), the New York court considered the father's third habeas corpus petition for custody of his daughter, then four and one-half years old. The parties, though not divorced, were living separately pursuant to a signed agreement. Id. at 401-44. The father retained a steadfast interest in reconciliation, yet the mother refused to return to him. He had been denied custody one and one-half years earlier because of the child's tender years, ill-health, and feeble constitution. Id. at 405. The sole issue was whether the specific health needs of the daughter justified continued custody with the mother. The court held that the father should gain custody because the child was older now, and no longer in poor health. Id. at 420-21. While the court did not find either parent guilty of such immorality as might impugn their parental fitness, the court regarded the mother's refusal to return to her husband as wrong. Id. at 413.


105. Id. at 531-34.

106. 12 R.I. 462 (1879).

107. Id. at 464. Compare McKim with Latham v. Latham, 71 Va. (30 Gratt.) 307 (1878) (A
years testified:

[The child] is afflicted with a bronchial affection, and with another trouble which impairs her health; that she is better now than formerly, but is still delicate, requiring constant watchfulness and care by some person who is familiar with her character and constitution, and that, in his opinion, she would suffer if taken from her mother, who is devoted in attention to her.108

Another case illustrating the trend toward “medicalizing” custody proceedings is *Umlauf v. Umlauf*.109 The father petitioned for a change in custody of his nine and six year old sons. The physician who testified described the boys’ conditions; he had treated the younger for typhoid and malarial fevers, and the older was extremely delicate and nervous.110 The physician’s testimony was fraught with symptomatology.111

At first, the tender years doctrine was a narrow exception, applied in situations involving the ill-health or special delicacy of a small child. Gradually, however so many cases, such as *Umlauf*, appeared before the courts, and so many judges elaborated on them, that the sickly, needy child became the typical child of the common law, and the heavily-litigated “tender years” exception enlarged into a judicial presumption. The presumption evolved into the concept of childhood itself as a state of delicacy, risk, and potential ill-health.

For a substantial period of American history, every time a mother wanted to obtain custody of a child, in the absence of parental fault, she was required to depict her children as ailing, especially sensitive, or particularly at risk of harm.112 The maternal muscle beneath the “tender years” doctrine was a significant force in shaping the present legal construction of the child as patient. On the cusp of the century, the discovery of the unconscious prompted the transition from emphasizing physical symptomatology to psychology.113 The precursor to the lexical

court declined to use the “tender years” doctrine to award a mother custody of her healthy four year old son, opining in the process that the cause of the couple’s marital troubles was the wife’s arbitrary refusal to have sex with her husband.).

108. *Id.* at 462.
109. 21 N.E. 600 (Ill. 1889).
110. *Id.* at 601.
111. *Id.* After a detailed consideration of the two households, the court decided that the younger boy’s condition still required nurturance, but transferred the older boy’s custody to the father because the need for education outweighed any possible health risk. *Id.*
112. Historical studies of court records suggest that mothers were most often awarded custody of their children—even in the face of a paternal presumption. See Griswold, *supra* note 78, at 153; Grossberg, *supra* note 78, at 251; May, *supra* note 78, at 173.
113. From the 1870s forward, the children’s upbringing became medicalized and subject to empirical study.

[S]cientific and medical studies proliferated and deepened, gaining public prestige from their fight against disease, their seeming disinterestedness, and the hope they
shift is evident in child custody decisions beginning in the last quarter of the nineteenth century. Fathers, in an effort to rebut the "tender years" presumption, offered extensive evidence of mothers' flaws as parents, which courts subjected to a microscopic analysis of emotions, relationships, and parenting skills. The individual personalities of parents emerge through a wealth of specific behavioral details, distinguishing these opinions from the earlier, more shorthand and stereotyped summations. Gradually, over the course of the century the concept of "tender years" expanded in substance to encompass all minor children, at least well into their teenage years. The biological mother's personal and individual attentions enlarged from a talisman against specific childhood diseases, for children specially at risk, to a salubrious prophylactic, a vital tonic essential to the health of all children. While this extension of the "tender years" doctrine increasingly helped mothers gain or retain custody, it had a curious side-effect. It introduced into child custody discourse the notion of the child as a person at risk, a patient whose supposed "needs" must be met even at the sacrifice of his own desires. Finally, by the end of the nineteenth century the "tender years" doctrine became virtually synonymous with the nurturance prong of custody. The father's right, or educative prong, disappeared, paving the way for the replacement of the child-as-property with the child-as-patient para-

held out for longer and healthier lives. This reputation, along with the rapid accumulation of what seemed realistic indisputable facts about the child's development, obviously contrasted with advice on nurture cast in abstractions . . . . It seemed impossible to ignore 'the claims of science.'

Wisr, supra note 50, at 105.

114. E.g., New Jersey ex rel. Landis v. Landis, 39 N.J. 274, 280 (N.J. 1877) (finding insufficient evidence of ill-treatment or neglect by mother to deny her custody); McNeir v. McNeir, 129 N.Y.S. 481, 490 (N.Y. Sup. Ct. 1911) (scrutinizing the minutiae of Mrs. McNeir's parenting skills). Fathers' parenting skills were criticized in a way which emphasized the expectation that they would display emotion and nurture children. For example, in Ex parte Bell, 153 P. 240 (Cal. 1915), a father failed to obtain custody of his daughter from her maternal aunt after the mother's death, in part because he did not "caress" his daughter when he visited. Id. at 241. In Goodrich v. Goodrich, 44 Ala. 670 (1870), more than 20 witnesses testified about the parenting skills and attitudes of both the mother and father, claiming that the mother was "tender, diligent and affectionate, and that she nursed them with untiring care and assiduity when sick, even at the peril of her own health" while the father "spoke of them as 'damned dirty babies' . . . ." Id. at 678.

115. For example, in New York ex rel. Wilcox v. Wilcox, 22 Barb. 178 (N.Y. App. Div. 1854), aff'd, 14 N.Y. 575 (1856), in changing custody of a nine year old girl from her paternal grandparents who raised her from infancy, to her mother, who had raised the younger sister, the court surmised the parenting challenge the mother would face: [s]he will have to gain the affections of a child literally weaned from her, and whose affections have for so many years been bestowed upon another . . . . [I]t will require all of a mother's tenderness and fortitude to meet all the conflicting interests, and rear these children amid the jealousies and difficulties which naturally arise amongst children of the same family after so long a separation.

Wilcox, 22 Barb. at 186.
digm. Eventually, psychology replaced morality as the measuring stick of the “good.”

While mothers’ arguments advanced the vision of the child as delicate, dependent, and at risk, grandparents promoted the idea that children needed the stability and continuity of established relationships and familiar places. In a typical scenario, a mother died in childbirth, and for a number of years the maternal grandparents raised her baby. The father of the child returned with his new wife, and wanted his child. What strategy could such grandparents assert against parental rights?116

In seeking to retain custody of grandchildren who for years were in their de facto custody, grandparents could no longer easily assert that they were legally equivalent to either natural or adoptive parents. From the mid-nineteenth century on,117 new statutes formalizing the adoption process118 left grandparents with de facto custody in legal limbo. The adoption statutes created different rights between parents and all third parties, so that grandparents could no longer rely on natural rights derived from a blood relationship. These statutes also established standards for legal adoption contracts which could rarely be satisfied by the informal transfer of children during family crises. While the general preference for blood relatives over outsiders as custodians continued, grandparents, when opposing parents for custody, legally were “strangers” to the child.

In response mid-nineteenth century grandparents seeking custody employed three strategies. First, nurturing grandmothers tried to use the

116. In general, extended family members were treated better on custody issues than third parties with the exception of apprentice masters, and legal adoptors. See Note, Relinquishment of Parent’s Right of Custody of Child to Third Person, 6 VA. L. REV. 470, 479 (1882).

117. Earlier cases regard it as appropriate to grant grandparents legal custody where they have been exercising de facto custody with the parents’ permission. For example, in In re Waldron, 13 Johns. 417 (N.Y. 1816), a child was born at the grandparents’ home, where the father had taken the mother because of his financial difficulties. Id. at 418. Upon the mother’s death, the father petitioned for custody of the child. The court denied the writ of habeas corpus, leaving custody with the grandparents, whom the court found were not improperly restraining the child. Id. at 421. In the later case of Ward v. Roper, 26 Tenn. (7 Hum.) 110 (1846), the paternal grandfather, as testamentary guardian, petitioned to change custody of an 11 year old girl who had been living with her maternal grandparents since infancy. Id. at 111. Acknowledging the agreement between the parents that the maternal grandparents raise the girl, the court treated the contest between the paternal and maternal grandparents as an issue of paternal rights versus the child’s “best interests”, much as it would have treated a case between the parents. Because the girl was of “delicate health,” the court allowed the maternal grandparents to retain custody, reasoning that the paternal “legal right will not be impaired, but will be controlled, in a case where the interest of the child obviously requires that it should be done . . . . Those strong ties, arising from nature and nurture, between her and her grandmother should not be broken.” Id.

118. The first modern adoption statute was passed in Massachusetts in 1851. Within the next 25 years, more than 20 states passed such statutes, most modeled on the Massachusetts law. Zainaldin, supra note 26, at 1042-43.
"tender years" doctrine. The courts, however, were less deferential to the nurturing instincts of mother substitues; grandmothers and stepmothers lost more often than parents.

Second, grandparents asserted versions of the theory that the natural parent or parents had made a voluntary parole contractual transfer of custodial rights and responsibilities. While verbal contracts transferring children to extended family members for nurture until the age of eighteen had previously been quite common, their legal status was ambiguous. Arguments grounded in such contracts steadily lost force as the courts failed to uphold the contracts. The courts refused to find contracts implied by the behavior of the parties, holding that contracts to transfer control of the child must be written, and definite and certain in their terms. Courts would find verbal contracts to be only temporary agreements to help cope with crisis conditions, or valid contracts voidable by the parent.

119. See, e.g., Verser v. Ford, 37 Ark. 27, 30-31 (1881) ("In this case, the motherless infant, two days old, was taken by the maternal grand-mother . . . and tenderly guarded through all the perils of infancy. There has been all of a mother's care, and scarcely less than a mother's affection."); Hussey v. Whiting, 44 N.E. 639, 640-41 (Ind. 1896), (determining that because of the delicacy of her health, a 13 year old girl should remain in the custody of her grandparents, rather than move with her father); Indiana ex rel. Sharpe v. Banks, 25 Ind. 495 (1865); Ward v. Roper, 26 Tenn. (7 Hum.) 110, 111 (1846) ("The daughter was of very delicate health, and the grandmother has much skill as well as great tenderness in the treatment of children . . ."); Rust v. Vanvacter, 9 W. Va. 600, 604 (1866) (grandmother alleges that when her grandchild was brought to her at the age of five months she "was almost in the arms of death, and that nothing but the motherly love and constant nursing of the grandmother saved her life . . .").

120. E.g., in Anonymous, 55 Ala. 428, 433 (1876), a mother retained custody when the child's father petitioned for habeas corpus. The court found it to be a material consideration that if the father received custody he would rely upon his mother or sister to provide care, which would not be superior to care from the natural mother. Id.

121. E.g., Jones v. Darnall, 2 N.E. 229, 231 (Ind. 1885) (failing to find evidence of an unconditional gift of the child to the grandparents); Kinnaird v. Lowry, 59 So. 843, 844 (Miss. 1912) (returning custody of daughters to mother who had sent them, during a period of marital difficulty, to live with the grandmother); Armstrong v. Stone, 50 Va. (9 Gratt.) 102, 108 (1852) (holding that "[t]he conduct of the mother in permitting the child to remain with the defendant whilst she herself was laboring for her own support, does not impair her right to the custody.").

122. See, e.g., Miller v. Wallace, 76 Ga. 479, 487 (1886) (determining that a contract to transfer control of the child would have to be "clear, definite, and certain" and that it is "more than doubtful whether the [father] ever consented to relinquish the control of his child . . ." Id. at 487 (citation omitted)); Weir v. Marley, 112 S.W. 798, 800 (Mo. 1890) (advising that father's custodial rights and responsibilities can only be transferred through adoption or apprenticeship, both of which required written agreements).

123. See Jamison v. Gilbert, 135 P. 342, 343 (Okla. 1913); see also Montgomery v. Hughes, 58 So. 113, 115 (Ala. Ct. App. 1912) (holding that any transfer in custody made by a parent of his child is presumed temporary).

124. Stapleton v. Poynter, 62 S.W. 730, 732 (Ky. Ct. App. 1901) (voiding contract signed by mother to transfer custody to paternal grandparents unless and until a reconciliation with the father was effected); Tillman v. Tillman, 66 S.E. 1049, 1055 (S.C. 1910) (voiding an agreement that would have transferred custody of two children to their paternal grandparents without the knowledge or consent of the mother). Contra Ex parte Collins, 125 N.W. 389, 390 (Mich. 1910)
The third argument—ultimately the most potent and durable one advanced by grandparents—emphasized their position as de facto custodians. It drew on the potential of blood ties, simulating and even improving upon them through stable nurturing. It was an amalgam of two factors: (1) the existence of established reciprocal affective ties between grandparents and grandchild; and (2) the importance, for the moral upbringing and education of children, of remaining in the community, position, and general "station" in life for which they are situated.

In arguing for the status quo, grandparents could assert a claim which put them in a position superior to their children. But in so doing, the grandparents must convince the courts that disruptions of routine and personality are dangerous; and that children benefit from stability, continuity, and routine. This new perspective challenged the previous socio-legal construct of children as more adaptable than adults and better

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125. See Verser v. Ford, 37 Ark. 27, 31 (1881) ("[t]ies have been woven between the grandmother and grand-daughter, which [the father] is under strong obligation to respect . . . ."); Richards v. Collins, 17 A. 831, 832 (N.J. 1889) (denying parents petition for custody of child cared for since birth by the mother's sister and her husband, based on "the fact that all [the child] knew of home and family ties grew up with the parental care and love bestowed upon it" by them); In re Murphy, 12 How. Pr. 513, 514 (N.Y. Sup. Ct. 1856) (sustaining custody of a nine year old boy to his aunt and uncle "to whom the lad himself naturally now clings with more than filial affection."); Coffee v. Black, 82 Va. 567, 569 (1866), (refusing parental custody "where the father has voluntarily relinquished the custody of an infant, to a female, or other relatives, or suitable persons . . . [and applies] to the court to interpose to break up formed ties of affection. [T]he question is no longer to be viewed in the light of the father's legal rights . . . but in the light of a cautious regard for the happiness and welfare of the infant."); cf. In re Gould, 140 N.W. 1013, 1016 (Mich. 1913) (holding father forfeited his paternal rights to consent to adoption through irresponsibility, and using the concept of established reciprocal affective ties to resolve the custody dispute on a best interests basis); Ex parte Davidge, 51 S.E. 269, 270-71 (S.C. 1905) (The court, in denying a father custody of his son who had lived with his grandparents since his mother's childbirth-related death, determined "[t]he infant . . . has been extremely delicate from birth, and [his maternal grandmother] has nurtured him with the most intelligent care . . . . It is clear his health and life would be greatly imperiled by depriving him of her experienced attention."); Peese v. Gellerman, 110 S.W. 196, 199 (Tex. 1908) ("After the child has become endeared to [her aunt and uncle], it might be the refinement of cruelty to break up the tender realities and destroy happy associations merely to carry out a sentimental theory about the brutality of disturbing the strongest, purest, and holiest love of a father for his daughter.").

126. E.g., Albert v. Perry, 14 N.J. Eq. 540, 545 (N.J. Prerog. Ct. 1862) (denying maternal custody because "[t]he interest of the infant could not be promoted by a change in her position, social relations, habits of life, and mode of training at her present age."); In re Murphy, 12 How. Pr. 513, 514 (N.Y. Sup. Ct. 1856) (The court, in leaving a nine year old boy in the custody of the aunt and uncle with whom he lived since the age of 11 weeks, stated "his education, his inclination, his prospects in life, all, as far as can now be seen or foreseen, will be best promoted by his remaining with his adopted parents."); Commonwealth ex rel. Gilkeson v. Gilkeson, 5 Pa. 31, 34 (1851) (denying paternal custody of a 15 year old girl who lived with an aunt since aged nine, because she "has been estranged from the customs and government of her father's house . . . [and] has formed new habits and views, and become accustomd to different associations and modes of living.").
able to form, dissolve, and reform deep emotional ties to nurturing relatives or other adults.\textsuperscript{127} Throughout the nineteenth century, and into the twentieth, these two versions of children competed in the discourse of legal opinions.\textsuperscript{128}

The growth of the “status quo” and “social ties” doctrines as offensive weapons employed by grandparents and other family members against a claim of parental right spans the mid-nineteenth century. In 1881, the future Supreme Court Justice David J. Brewer, authored an influential opinion\textsuperscript{129} enunciating a balancing test between parental rights and established ties, giving the latter greater weight.\textsuperscript{130} Custodial claims of non-parent family members and other foster parents were thereafter to be favored during the child’s early years, aided by the modern concept of psychological parenthood.

By the end of the nineteenth century, virtually all jurisdictions had established, either by statute or common law, the principles that (1)

\textsuperscript{127} For example, in Wilcox v. Wilcox, 22 Barb. 178 (N.Y. App. Div. 1854), the court removed custody from the paternal grandparents, with whom the girl has lived all nine years of her life, and awarded custody to the mother. \textit{Id.} at 183. While commenting that the child clearly wanted to stay with the grandparents, the courts regarded the child’s desires as “the infant heart speaking its simple language.” \textit{Id.} at 183. The court then concluded, “as regards the child, I entertain no doubt but if placed with her mother she will soon become attached to both her and her sister; that she will soon learn to love her mother as she has loved her grandparents.” \textit{Id.} at 184. In Wilson v. Mitchell, 111 P. 21 (Colo. 1910), the court philosophized that “the feeling of attachment to those with whom [a 10 year old boy] has most recently been associated will soon yield to that affection, regard, and love which none but a mother can feel and manifest toward her own offspring.” \textit{Id.} at 28. But cf. New York ex rel. Humex v. Phelps, 109 N.Y.S. 625, 627-28 (N.Y. Sup. Ct. 1908), where the court found that an 11 year old girl should stay with her foster parents because of the strong affective ties between them. Had she been younger, the court reasoned, it would have been easier to break such ties. \textit{Id.} at 627.

\textsuperscript{128} Hutchison v. Harrison, 107 S.E. 742, 750 (Va. Ct. App. 1921) (“Children of [tender years] will react to new surroundings and adjust themselves to new conditions. The childish memories will soon grow dim. But not so when dealing with a child of maturer years and more fixed affections . . . .”).

\textsuperscript{129} Chapsky v. Wood, 26 Kan. 650 (1881).

\textsuperscript{130} Judge Brewer wrote:

\begin{quote}
[W]hen . . . the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then, whether the courts will enforce the father’s right to the custody of the child, will depend mainly upon the question whether such custody will promote the welfare and interest of such child . . . . [W]hen reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child’s life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact, that ties of blood weaken; and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.
\end{quote}

\textit{Id.} at 653. By 1882, a law review article complained of the large number of cases in which parents lost custody of their children, mostly to extended family members, without an express agreement to relinquish custody. Note, supra note 115.
parental rights were subordinate to the child’s best interests; (2) paternal rights were either superior to or equal to maternal rights, yet mothers presumptively had custody of children of “tender years”;¹³¹ and (3) parental custody could be forfeited because of unfitness. Successful litigation ultimately led to the extension of “tender years” into adolescence, while minors fourteen years of age and older had virtually absolute rights to choose their own custodians. By the beginning of the twentieth century mothers had a custodial preference in practice, whether or not it was acknowledged by statute or common law.

Many interrelated changes no doubt influenced this result. First, the household changed from a unit of production to a unit of consumption. Second, the transfer of children’s education to public sector schools and the prolongation of formal education and the childhood years consequent to industrialization made children economic liabilities rather than economic assets. Finally, increasing urbanization led to an increase in the father’s time away from home. Thus, the father’s role as family “educator” melted away with the paternal right to custody. At the same time, the ideology of the domestic sphere as a woman’s domain developed,¹³² and popular theories of child-raising changed their emphasis from strict governance to gentleness, persuasion, and guilt.¹³³

The Victorians envisioned the child as innocent, sensitive, and in need of a nurture separate from the adult world. Children were sources of invention, inspiration, and change.¹³⁴ The study of children became

¹³¹ A typical statute of this type stated in pertinent part: “As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.” Horsley v. Horsley, 175 P.2d 580, 583 (Cal. Ct. App. 1946) (quoting CAL. CIV. CODE § 138 (replaced 1970)).

¹³² MARGARET E. SANGSTER, RADIANT MOTHERHOOD (1905), a turn-of-the-century child care book begins, “[T]his book is not addressed to fathers. They would not have time to read it. Who ever heard of fathers in congress, conferring over the best methods of training children . . . striving to learn from one another what might best be done for the next generation?” Id. at forward. This passage was later quoted in Cable, supra note 85, at 163-64.

¹³³ See generally JACOB ABBOTT, GENTLE MEASURES IN THE MANAGEMENT AND TRAINING OF THE YOUNG (1871). “Abbott told the late-Victorian mother exactly what she wanted to hear: that hers was an exalted and difficult mission; that it was possible to be both gentle and authoritative at the same time; and that she need not feel guilty if she were, in certain areas, permissive.” Cable, supra note 84, at 101; see Wishy, supra note 50, for excellent examples of the change from whipping, to “this-hurts-me-more-than-it-hurts-you,” to the “Oh, I’m so disappointed in you” style of child discipline.

¹³⁴ In discussing the vision of children in children’s literature between 1860 and 1880, Wishy observes:

After the Civil War . . . everything seems to intervene between the best will in the world and moral or material victory. There is still the ‘happy ending’ but not without young people learning how much more life costs than their predecessors realized and how less often and more slowly the rewards of character and piety come. Above all, although the notion endured that only the pure and innocent could
part of the Victorian naturalist’s zeal, and the new scientific approach to child raising, combining elements of empiricism and Darwinism, emphasized hereditary potential through environmental regulation.135 By 1900, the Victorian vision of the innocent and delicate child had shattered with the introduction of Sigmund Freud’s theories of infant sexuality and repression, Stanley Hall’s description of “adolescence” as charged with pulsating sexuality,136 and John Dewey’s practical empiricist approach to education.137

While contemporaneous popular child-rearing manuals emphasized strict discipline and training,138 none of the power or precocious insight of children, which the psychologists revealed, is reflected in child custody opinions. The struggle among adults for the child’s control has persisted throughout the nineteenth and twentieth centuries. The arguments which have furthered interests of particular parties have persisted across the metonymic divide between the natural law/morality lexicon of the nineteenth century and the scientific/psychological lexicon of the twentieth century. The discourse of the previous century encoded the psychological within the moral, and today’s discourse encodes the moral within the psychological.

The children still cannot talk; they are only talked about. What is said about them sounds in the language of psychopathology, a science which found its way into the popular literature on child raising in the 1920s and 1930s. Linguistic and cognitive precursors of the psychotherapeutic model of child care such as diseases of the “nerves” and

save the world, it was increasingly feared that the world might be too much for the pure and innocent.

Wishy, supra note 50, at 930. In the 1880s, new literature of children’s fantasy developed where “the child had near-magical powers to do what adults had failed to do or to put right what adults had bungled.” Id. at 171. In the post-Civil War period, child-care books recommended yet gentler measures, and took a social Darwinist approach to the perfectibility of the child through environmental influences. See generally Abbott, supra note 133.

135. “[T]he child was no longer merely a beloved offspring or the nation’s future in microcosm but a home-laboratory experiment as well.” Wishy, supra note 50, at 119.

136. Hall, supra note 81.

137. Sigmund Freud, Interpretation of Dreams (1899), and John Dewey, School and Society (1899), were both published in the same year. In 1909, the same year that Sigmund Freud visited the United States for the first time, Stanley Hall founded the Children’s Institute at Clark University. “Stimulated by Hall’s famous pamphlet, The Study of Children, published in 1883, child-study clubs, including the Child Study Association, sprang up in several American communities, and these soon expanded into national groups like the National Congress of Mothers (1897). Many new, special journals of child study were begun, among them The Pedagogical Seminary in 1891 and The Child Study Monthly in 1895.” Wishy, supra note 50, at 107; see also Wishy’s extended discussion of “The Society for the Study of Child Nature” founded in 1888 under the auspices of the Ethical Culture movement. Id. at 115.

"mind"—the lexical grandparents of today's "stress," "anxiety," and "depression"—begin appearing frequently in the custody opinions of the early twentieth century. \(^{139}\) Gradually, psychoanalytic ideas and terminology start appearing in law reviews, \(^{140}\) eventually replacing the old health and morality terminology.

The clinical gaze of psychology was also applied with increasing scrutiny to individual cases. *Hutchison v. Harrison* \(^{141}\) is exemplary. In that case, Susan Ish, a teenager, had been living predominantly with her maternal grandparents since infancy. In finding that custody should remain with the grandparents, the court determined that the established ties between Susan Ish and her grandparents were strong enough to jeopardize her mental health if she were returned to her parents. \(^{142}\) The girl's physician gave expert testimony that with her grandparents, Susan

\(^{139}\) For example, a mother alleges that because of her son's "extremely nervous temperament, . . . slight shocks to his nervous system or improper diet often produce convulsions and have created such a physical condition that, unless he receives constant and watchful attention, the result to his mind and body may be disastrous or fatal . . . ." *Parrish v. Parrish*, 82 S.E. 119, 120 (Va. 1914).

\(^{140}\) E.g., Albert Levitt, *The Custody of an Infant: I: General Survey of The Interests Involved*, 92 CENT. L.J. 228, 233 (1921). Professor Levitt used a popularized version of Freudian developmental theory to inform his discussion of the child's best interests. Levitt maintained that "[e]ven when the trained psychologist has made his experiments and formulated his theories and laws of social and spiritual existence, the judge is unable, because of time, temperament and training, to apply this data to the concrete case before him." *Id.* at 233. He bemoaned the fate of the boy whose father is bringing him up "in the old method of education and control through inflexible discipline and the repression of physical instincts . . . ." without sports, poetry, or dancing. *Id.* The boy, "becomes too repressed, unhealthy-minded, self-centered, unsocial and too individualistic . . . .[o]r else, the gregarious instinct proves too strong, and the 'gang' is too great an attraction, so that he breaks parental bounds, flouts paternal discipline and becomes a 'problem' and a juvenile delinquent." *Id.* Levitt's argument is strikingly simple and contemporary. He concludes that bad parenting makes children maladjusted, and maladjustment leads to lawlessness. Thus, to become a moral citizen requires psychologically correct parenting, and the state, in its *parens patriae* function, must protect the child's mental health by scrutinizing the adult's parenting style.

\(^{141}\) 107 S.E. 742 (Va. 1921).

\(^{142}\) *Id.* at 749. It can scarcely be doubted that the 16 year old girl should have been able to remain where she wanted, but what was important was the basis of the decision. The court relied on Susan Ish's liberty interests—in a way which harked back to the habeas corpus decisions of the previous century. It found: "There is no restraint of Susan Ish contrary to her wishes. If the grandmother, or grandfather, or both, have refused to allow her to be taken by her parents, this action has met with her full approval. She is under no constraint, save the constraint of affection." *Id.* at 748.

Yet this did not resolve the issue in the same way as it would have a century earlier. The court saw itself as bound to a two-fold determination. "Our task is to determine whether the grandparents of this child should be required to deliver her to the parents contrary to the child's expressed wishes, and whether such action would be to the best interests of the child?" *Id.* at 748. The latter consideration was especially significant, for rather than relying on what the girl *said* she wanted, it used her behavior as *evidence* of what she needed. *Id.* at 749.
Ish was “in a much more desirable surrounding in every way.”\textsuperscript{143} The doctor’s expert testimony subsumed emotion as a medical issue, spawning the psychotherapeutic paradigm; emotional stability was now mandated for the child’s mental health.\textsuperscript{144} Since both the parents and grandparents were close to the moral, psychological, and social norm, the court was obliged to closely examine familial relationships to find differential mental health implications. Although the court purported to act in the child’s best interests, the child lost again in the power struggle between the child and the state. The child’s status as a person was diminished; her status as a patient augmented.

In the decades between the first and second World Wars, Sigmund Freud reformed the popular view of the human personality and claims for custody became coated with a psychoanalytic glaze. The celebrated Vanderbilt cases\textsuperscript{145} moved one step beyond Hutchinson in the legal construction of the child-as-mental patient.

Following the death of her father, Gloria lived with her paternal aunt.\textsuperscript{146} Two years later, Gloria’s mother obtained a writ of habeas corpus, seeking custody of Gloria.\textsuperscript{147} The court denied custody to the mother, stating that to do so “operated against the welfare of the infant.”\textsuperscript{148} At trial, three physicians and a nurse testified about Gloria’s hatred of her mother, her hysteria, nightmares, excitability, and nervous-

\textsuperscript{143} Id. The physician’s testimony recalls the familiar nineteenth century description of the “delicate” child:

She is not a strong child now, but she is much better than I have ever seen her. She had a bad heart murmur, what we call a haemic murmur, and that has disappeared. Her chest is not fully developed now, but it will be. She has much more flesh on her, and she has certainly grown larger, taller and stronger.

\textit{Id.}

\textsuperscript{144} In reversing the trial court, and allowing Susan to determine whether or not to leave her grandparents, the court opined:

Evidently the trial court did not consider that the effect of removing Susan Ish to a new environment would be seriously to the prejudice of her health or happiness . . . . Nor does he seem to have attached much importance to the evidence as to her nervous temperament, her extreme sensitiveness, the fluctuations in her health attendant upon her trips to Tennessee, the strength of her attachment for her grandparents, and her positively expressed wish to remain in Virginia . . . . So far from advancing these interests, such action may permanently embitter the child’s relations to its parents, and change the whole current of its life. Should she pine for the old home and fail to grow into the new, the parents will in time come to resent that attitude, and a wall will be established between them and their child.

\textit{Id. at 750.}


\textsuperscript{146} \textit{Vanderbilt}, 275 N.Y.S. at 796.

\textsuperscript{147} \textit{Id.} at 797.

\textsuperscript{148} \textit{Id.}
They claimed that under her aunt's care Gloria had steadily improved, and advised against granting custody to Gloria's mother. The Glendening case is another example of the characterization of the child as a patient in the context of custody litigation. Alicia Maddox Dupont spent fifteen years attempting to obtain custody of her son, Alan. At the time of the last hearing, Alan was almost seventeen, socially well-adjusted, athletic, and at the top of his high school class. He testified emphatically that he wanted to live with his mother. Despite his obvious high regard for Alan's achievements and maturity, the judge gave no weight to Alan's preference. Moreover, the judge granted custody to the father, presuming this was best for Alan. The judge was persuaded by Alan's teachers, who testified that Alan's class "standing is normally not achieved if the pupil lives in an essentially unhappy home environment." Alan's competency was turned against him. Rather than demonstrating Alan's capacity to make a mature decision, Alan's successes were used as clinical evidence of the excellent job his father was doing as custodian.

Psychological terminology rapidly moved from common parlance into custody decisions following the Hutchinson, Vanderbilt, and Glendening cases. The child's words and actions became evidence, requiring expert evaluation of what was best for the child, rather than a dispositive statement of the child's custodial preference. The psychological testimony in noteworthy cases such as Vanderbilt and Glenden-
ing came from physicians and educators. By the mid-1940s, however, expert testimony by psychologists and psychiatrists was commonplace, even for custody disputes among the ordinary middle-class.158

C. The Search for a Bright-line Psyche

In the twentieth century, physicians, psychologists, and child-development experts have written popular books on child care, rephrasing old arguments about “tender years” and “established reciprocal ties” into psychological terms such as “bonding” and “psychological parent.” Unfortunately, the underlying legal vision of the child has remained the same; popular literature has portrayed children as sensitive and delicate beings who require stability, security, and the status quo.

Until the 1970s, psychology impacted upon custody decisions through case-by-case evaluations of the parents and children involved in the suit. Parents based their claims for custody on allegations of flawed child-raising. Fathers challenged the maternal custody presumption by showing that the mother was either a “bad woman” (an unfaithful wife)159 or a “bad mother” (her children possessed unstable psyches).160 Mental health practitioners became ubiquitous as experts and evaluators; their terminology infiltrated judicial decisions and their opinions received ever-increasing deference.161 Many contested child custody cases became clinical evaluations of both parents and the child.162

But prior to the 1970s, divorce was premised on moral fault; psychological theories did not directly influence the substantive rules of law. The shift in the popular view of divorce as a “life crisis” came as an indirect consequence of two United States Supreme Court cases. In

159. E.g., Morrissey v. Morrissey, 154 N.W. 2d 66 (Neb. 1967) (mother who commits adultery is unfit to have custody as a matter of law).
161. See Bender v. Bender, 304 N.Y.S. 2d 482, 483 (N.Y. App. Div. 1969) (where parents stipulated that psychiatrist’s report should be determinative of custody, appellate court allowed its use provided in the stipulation, but held that its weight should rest in the judge’s discretion).
162. See, e.g., Murphy v. Murphy, 99 S.E.2d 77, 78 (Ga. 1957) (finding a change of circumstances sufficient for a change of custody where the children “are extremely nervous and emotionally upset; that . . . the condition of the children has deteriorated to the point that it now threatens to become a permanent disordered mental and emotional condition or psychosis; that the children are in desperate need of medical and psychiatric attention”); Barbara v. Barbara, 249 N.E.2d 269, 271 (Ill. App. Ct. 1969) (discussing psychiatrist’s finding of symptomatology in both mother and father which could cause clinical disturbances in their children); Seitz v. Seitz, 64 A.2d 87, 88-89 (N.J. 1949) (awarding custody to father despite maternal presumption, after hearing conflicting testimony of pediatrician, a pre-school teacher, and five psychiatrists regarding the boys “neurotic tendencies” and pathological thinking processes).
Frontiero v. Richardson, the plurality applied strict scrutiny to discriminations based on sex, and in Craig v. Boren, the majority adopted the standard of intermediate scrutiny for sex-based discriminations. Some states already had made the move to gender neutrality, but Frontiero and Craig became justifications for dramatic national reform of the divorce laws. Most states eliminated moral fault as grounds for divorce, and gender bias in the form of the "tender years" presumption as a basis for custodial allocations.

Thereafter, a psychological orientation pervaded all aspects of divorce law. For adults, divorce was a psychological crisis in personal development; for children, a psychological crisis in care. The infusion of psychology into family law freed adults to make decisions in accordance with their personal morality and in conformity with liberal constitutional premises, and had the precisely contrary effect on children. What Professor Lee Teitelbaum characterizes as the change from teleological morality to empirical psychology served to reformulate the Victorian vision of childhood as innocence and sensitivity in a psychotherapeutic model.

Accordingly, the courts were called upon to make custody decisions in a new legal climate. The "best interests" doctrine became meaningless without the "tender years" presumption to serve as an operational rule of thumb. The courts were left with two alternatives: (1)

164. 429 U.S. 190 (1976).
166. See Watts, 350 N.Y.S.2d at 289 ("The traditional and romantic view . . . that nothing can be an adequate substitute for mother love . . . [is] out of touch with contemporary thought about child development and male and female stereotypes.").
167. Professor Carl Schneider eloquently discusses the "psychologization" of family law which accompanied no-fault divorce and the cessation of explicit judgments about parents' sexual morals. Infusing the classic Freudian paradigm with a bit of 1980s "me generation" thinking, Schneider argues that the change from the view of divorce as a social sin to divorce as a personal life crisis placed emphasis on individual self-fulfillment and choice. This new view of personal choice and fulfillment fits the constitutional view of a liberal society, emphasizing free choice. Professor Schneider concludes that these changes moved the locus of decisionmaking responsibility from the state to the people governed. Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1845-63 (1985). But it did not change the locus of decisions about children.
168. See generally Teitelbaum, supra note 84.
169. See, e.g., JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9-10 (2d ed. 1973). In this popular book on child custody law, the authors write that, "[c]hildren are presumed by law to be incomplete beings during the whole period of their development . . . . The legal status of the child is matched on the psychological side by a number of tenets." Id.
struggle with a case-by-case analysis of each child's psyche; or (2) find a new, gender-neutral presumption grounded in psychological theory. *Frontiero* signalled a watershed change. The mental health approach had previously been applied to individual cases. Later, psychological theories were used to form general custody rules and presumptions.  

Every rule, from sole custody, to joint custody, to broad judicial discretion, has been justified in the name of the child's psychological well-being, and rationalized by psychological theory. Yet, despite the incompatibility of the rules, their references to psychology are biased in a consistent way. In keeping with the legal vision of the child-as-patient, the law has asked psychology to identify custodial placements offering the lowest risk of psychopathology, rather than offering the greatest opportunity for self-determination. 

In each case the law has asked: "Given the child's delicate, weak, and sensitive nature, and her need for stability and security, what custody rule is best?" In each case the law has assumed that the child is incompetent to answer this question for herself. Beginning with an assumption of the child's incapacity, the law asks psychologists, "What custodial placement will best shelter this child from harm?" A better question would be, "What can you say about the abilities of this child and how can your findings empower the child to exercise his fundamental freedoms of choice in family matters?" Psychology is used to reinforce court assumptions that children cannot choose for themselves rather than to help formulate a more sensible legal vision of children. 

In many jurisdictions courts are given broad power to determine which form of custody is in the child's best interests by statutes enumerating a series of factors. Such factor statutes emphasize the child's

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170. In child custody matters psychology and law have become welded together in four ways: (1) parents and children are subject to psychological evaluation in individual cases; (2) psychological theories (e.g., "psychological parent") have been converted into legal doctrines or explicitly codified (as in the "primary caretaker" presumption); (3) psychologists (as custody evaluators and mediators) have become part of the custody decision-making personnel; and (4) child custody has spawned a plethora of psychological studies on children's adjustment to divorce the results of which have directly influenced changes in child custody law.
attachment to and continued contact with each parent; the child’s adjustment to home, school and community; and maintaining the continuity of the pre-divorce environment. These statutes simply rephrase, in contemporary psychological language, the same factors courts have considered for two centuries. They allow judges to decide cases based on what they believe will be “best” for the child. The result is indeterminate outcomes and difficult settlement negotiations.

Further, the operation of such statutes increases the likelihood of misunderstanding facts and circumstances and allowing biases to interfere with decisions. Without any explicit preferences or presumptions to guide them, judges will make custodial decisions based on either a per-


sonal view of what is best for the child or a standard which can be “objectively” rationalized as necessary for the child’s psychological well-being. Unfortunately, “psychological well-being” can become a shield which protects arbitrary judgments from review. Judges may misuse such psychological concepts to mask value-laden judgments about cultural diversity as issues of a child’s mental health and well-being. Cultural differences between parents are often disguised as personality conflicts which are likely to have detrimental effects on children. Some courts have found that exposure to the minority mores of one parent places a child at risk psychologically, while other courts have found children to be at risk if they are not isolated within a minority community.

Unfortunately, the presumptive rules also have problems. The most enduring of the “preference” rules is that custody should be given to the “psychological parent,” an idea generally associated with Joseph Gold-

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175. E.g., Eric Harrison, *Her Dream Becomes a Nightmare: A Mother Who Sought a New Life in L.A. Loses Her Sons to Her Former In-Laws in Mississippi*, L.A. TIMES, Sept. 21, 1993, at A1 (describing a mother’s loss of custody to the paternal grandparents because the mother “mentally abused” the boys by subjecting them to her African-American boyfriend and her lesbian sister); Elizabeth Mehren, *New Salvo in Custody Wars, Courts: How Much Can a Single Parent Rely on Daycare? How Important is Care from a Family Member? A Michigan Case Raises Fears-and Hackles*, L.A. TIMES, Aug. 3, 1994, at E1 (reporting on the award of custody to a father because his mother would babysit the three year old child, which would provide more “security” than the child’s mother’s plan to put the child in daycare).

176. The conflation of culture and psychology allows courts to avoid hard issues of ethnic, religious, and lifestyle differences, either between parents, or between the parents and majority norms. The problem is exacerbated when psychiatrists, psychologists, and members of the clergy confuse the two in their testimony. See, e.g., Funk v. Ossman, 724 P.2d 1247, 1251 (Ariz. Ct. App. 1986) (rabbi testifying that a dual religious upbringing is not healthy for a child because it creates a conflict); Andros v. Andros, 396 N.W.2d 917, 920 (Minn. Ct. App. 1986) (upholding decision by trial court to allow consulting psychologist’s testimony on unhealthy effects of parents’ religious differences). The view that cultural diversity presents a “decision-making problem” rather than an opportunity to develop a bicultural identity illustrates the difference between the child-as-patient paradigm and the vision of the child as a developing person.

177. The Florida case of Mendez v. Mendez, 527 So. 2d 820 (Fla. 3d DCA 1987) illustrates the tendency of courts to find that a child should be mainstreamed. The appellate court issued a short per curiam opinion affirming the custody award to the Catholic father instead of the Jehovah’s Witness mother. Experts testified unanimously that, were cultural issues equal, the mother should get custody. *Id.* at 820. In her dissenting opinion, Judge Baskin criticized the majoritarian assumptions behind the expert psychological testimony “that contact with the mother’s Jehovah’s Witness religion is not in the best interests of the child, who needs ‘to adapt herself to the mainstream of culture.’” *Id.* at 821 (Baskin, J., dissenting).

178. Where the child is recognized as a “minority” group member, the court’s preference is often in favor of the more traditional or “visible” minority parent. See, e.g., *In re Marriage of Malak*, 227 Cal. Rptr. 841, 847 n.1 (Cal. Ct. App. 1986) (enforcing a foreign custody award directing the children, who resided with their mother in the United States, to be sent to live with their father in the Middle East, based on difficulty of obtaining Islamic education in America); Perlstein v. Perlstein, 429 N.Y.S.2d 896, 900 (N.Y. App. Div. 1980) (chastising the Jewish custodial mother for failing to personally practice the ritual observances and dietary proscriptions of the Orthodox Yeshivas and summer camps to which she had consented to send her son).
stein, Anna Freud, and Albert J. Solnit’s book Beyond the Best Interests of the Child.\textsuperscript{179} This book recommends that courts award custody to the person the child becomes attached to through a “psychological interplay . . . superimposed upon the events of bodily care.”\textsuperscript{180} Calling this “the least detrimental alternative”\textsuperscript{181} the authors proposed the “psychological parent” be given exclusive, permanent, and unmodifiable custody, including absolute control over the child’s visits with the other parent.\textsuperscript{182} Their rationale was the fostering of continuity in relationships, surroundings, and environmental influence that is essential for a child’s normal development.\textsuperscript{183} Further, they argue that children have a sense of time which differs from adults so that even regularly scheduled visits may seem like disruptive discontinuities.\textsuperscript{184} Although they recognize that only very young children have a dramatically different time sense from adults, they found a significant difference even for adolescents.\textsuperscript{185} Next, they maintain that children can freely love more than one adult only if the adults feel positively towards one another; otherwise children “become prey to severe and crippling loyalty conflicts.”\textsuperscript{186} Finally, they claim, “[w]here there are changes of parent figure or other hurtful interruptions, the child’s vulnerability and the fragility of the relationship become evident. The child regresses along the whole line of his affections, skills, achievements, and social adaptation.”\textsuperscript{187}

Despite their extremism,\textsuperscript{188} these works, and the “psychological

\textsuperscript{179} Goldstein et al., supra note 169. The authors also wrote two sequels, further discussing the subject. See Joseph Goldstein et al., Before the Best Interests of the Child (1979), and Joseph Goldstein et al., In the Best Interests of the Child (1986). The term "psychological parent" actually appears in legal opinions prior to the date of the first book and has earlier scientific antecedents, especially in the work of John Bowlby, who posited that the proper development of human infants requires continuous care and contact with a primary parent. See generally John Bowlby, The Nature of the Child’s Tie to His Mother, 39 INT’L J. PSYCHOANALYSIS 350 (1958).

\textsuperscript{180} Goldstein et al., supra note 169, at 18.

\textsuperscript{181} The least detrimental alternative, then, is that specific placement and procedure for placement which maximizes, in accord with the child’s sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.

\textsuperscript{182} Id. at 53.

\textsuperscript{183} Id. at 38.

\textsuperscript{184} Id. at 31-32.

\textsuperscript{185} Id. at 31-49.

\textsuperscript{186} Id. at 34.

\textsuperscript{187} Id. at 12.

\textsuperscript{188} Courts subscribed readily to the psychological parent concept, while avoiding the specific, constitutionally problematic suggestions of the authors. The dictatorial powers recommended for the custodial parent were tantamount to a termination of parental rights. It is unconstitutional to terminate the rights of a fit parent who has maintained an actual parental relationship with the
parent" preference found widespread support. Timing may have influenced popularity. Beyond the Best Interests of the Child was published in 1973, the same year that Frontiero sounded the death knell to the tender years presumption. In addition to being written by a prominent interdisciplinary team, it explicitly enunciated a bright-line rule for child custody decisions that was gender-neutral and supported by psychological theory. The rule itself—award custody to the psychological parent—was appealing because it combined the two arguments which had been used to challenge gender-based parental rights for the preceding 150 years: parental nurture and established reciprocal affective ties. Gender neutrality and decisional certainty were achieved using these familiar legal principles translated into the socially appropriate lexicon of psychology, solving a major doctrinal problem, and satisfying the law's penchant for predictability, stability, and finality of judgments.

The book significantly accelerated the legal construction of the child-as-patient because it justified awarding custody to the "psychological parent"; the one who would avoid causing psychopathology in the child. Not only "delicate" and "sickly" children were at risk in a divorcing family. See Lehr v. Robertson, 463 U.S. 248, 261 (1983); Caban v. Mohammed, 441 U.S. 380, 444 (1979); Quillio v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 657-58 (1971). For Anna Freud, such extremism was nothing new. In the 1920s she was a leader in the psychoanalytic pedagogy movement which strove to produce neurosis-free children through a laissez-faire and instinct liberating school curriculum that involved a minimum of parent and teacher intervention. The program was abandoned because the children showed obsessions, depressions, and concealed anxieties. By the 1940s and 1950s, the members of the movement had decided that they had misunderstood Freud's theories and that education required control over instincts; lack of structure, authority, and limits would spoil children. Purdy, supra note 9, at 93-97. See generally Regulated Children/Liberated Children: Education in Psychohistorical Perspective (Barbara Finkelstein, ed. 1979).

189. See, e.g., Davis v. Page, 714 F.2d 512, 529 (5th Cir. 1983) (dissenting opinion) (arguing child's need for continuity lies in the preservation of his family so long as it is functional); In re Revello, 606 P.2d 933, 941-42 (Idaho 1980) (noting law can destroy relationships but not compel their development); Powers v. Hadden, 353 A.2d 641, 649 n.3 (Md. Ct. Spec. App. 1976) (placing right of biological parent subordinate to those who have performed parental duties under theory of least detrimental alternative for the child's development); Van Haren v. Van Haren, 407 A.2d 1242, 1245 (N.J. Super. Ct. App. Div. 1979) (deeming "right" custody decision elusive where both parents are capable); Hoy v. Willis, 398 A.2d 109, 113 (N.J. Super. Ct. App. Div. 1978) (describing factors involved in creation of psychological parent-child bond); Mansukhani v. Pailing, 318 N.W.2d 748, 753 (N.D. 1982) (asserting continuity in a child's life is one of the most important factors determining the child's best interests); Filler v. Filler, 219 N.W.2d 96, 98 (N.D. 1974) (supporting idea that court should award sole custody to only one parent); Whaley v. Whaley, 399 N.E.2d 1270, 1272 (Ohio Ct. App. 1978) (endorsing principle of finality in custody cases as necessary for a continuing relationship between child and person who cares for him); In re Tremayne Quame Idress R., 429 A.2d 40, 48 n.6 (Pa. Super. Ct. 1981) (recognizing continuity in environment is critical, particularly in early childhood); In re Carlita B., 408 S.E.2d 365, 375 (W. Va. 1991) (bemoaning delay by judicial system since continuity of relationships, surroundings, and environmental influences are essential for a child's normal development).

190. See supra part II.B.
All children, because of their “vulnerability” and “fragility,” could potentially regress “along the whole line of their affections, skills, achievements, and social adaptation.” 191 Childhood was characterized as a time of chronic low-grade psychological symptomatology; the court must take a firm physician’s hand in allocating custody so as to ward off acute episodes of illness with lifelong detrimental consequences. 192

These fundamental psychological assumptions, that stability is the most important factor in the child’s well-being, and that variety, diversity, and discontinuity are presumptively bad for children, have remained enshrined as key legal principles of the best interests doctrine.

Although the “psychological parent” presumption is grounded in a child-as-patient view, it does not always and inevitably diminish the child’s right of autonomy and self-determination. It is reasonable to assume that, in most cases, people will choose to live among those with whom they have the strongest emotional bonds. However, because the child does not have the right to choose, the psychological parent presumption is oppressive, even a bit absurd. The child knows to whom she feels closest, but cannot speak dispositively to her own emotions. Rather, the court turns to mental health experts to diagnose the child’s emotions. 193

The “primary caretaker” presumption developed in the past decade as a spin-off of the psychological parenthood idea. It is ostensibly easy to prove by objective facts. Under the “primary caretaker” presumption, custody is awarded to the parent who has assumed the bulk of child care responsibilities, on the theory that reciprocal affection is strongest between the child and the primary caretaker. 194

191. Goldstein et al., supra note 169, at 18.
192. Beyond the Best Interests of the Child, supra note 168, claims that continuous and stable environments and relationships are important for young children because they have a different time sense and have not internalized parental images and attitudes. This idea is the opposite of the view expressed by one court 50 years earlier, which found that younger children “will react to new surroundings and adjust themselves to new conditions.” Hutchison v. Harrison, 107 S.E. 742, 750 (Va. 1921). Grandparents and other de facto parents fought the Hutchison view for half a century. After 1970, the book’s view dominated the mental health paradigm of child custody, making possession of the child a de facto presumption of custody. Today the view is socially accepted. America cried with two year old Jessica DeBoer when she was returned to her natural parents. See DeBoer v. DeBoer, 114 S. Ct. 1 (1993). A Newsweek article written one year later, portrayed Jessica as happy in her new home; she had not “regressed” at all. Michele Ingrassia & Karen Springen, She’s Not Baby Jessica Anymore, Newsweek, Mar. 21, 1994, at 60. Without evidence showing that children are better adjusted today than they were 50 years ago, this view of age related plasticity seems to be merely a social construction.
193. The psychological parent presumption was originally intended to apply in foster care situations where the child had established a close relationship with his foster parents and had only minimal contact with the biological parents. Identification of the psychological parent is more difficult in the nuclear family context because interfamilial bonds are both subtle and complex.
194. See Pikula v. Pikula, 374 N.W.2d 705, 710-11 (Minn. 1985) (adopting the primary
favored by scholars, but has floundered in practice.  

There are major problems with the primary caretaker preference. First, the quantity of child care may not correspond with either the quality of child care or the quality of the parent-child relationship. Second, the presumption is unworkable in families where parents share or allocate parenting tasks or change parenting roles, either during marriage or after separating. Finally, it has generated huge quantities of litigation revolving around such petty issues as who changes the diapers, who does the supper dishes, or who makes the peanut butter sandwiches. The preference succeeds only in the easy case—where one parent is a full-time homemaker caring for small children.

The psychological parent and primary caretaker presumptions seem to be general guidelines for custody determinations grounded in appropriate psychological theory. Their interdisciplinary relationship, however, is spurious. The presumptions are psychologically sound only for young children of preschool age. School age children neither have nor need primary caretakers to wash and dress them. Furthermore, merely because one parent is responsible for the washing, cooking, shopping, and cleaning, he or she is not necessarily the psychological parent. Similarly, according to most traditional psychoanalytic theories, school age children do not need constant contact with a psychological parent, nor does their well-being decline under shared parenting routines. In stretching the applicability of these presumptions to school age children, the law has ignored these developmental truths. The reason is similar to

caretaker presumption as a workable index of the psychological parent); see also David L. Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 MICH. L. REV. 477 (1984); O’Kelly, supra note 10, at 560 (recommending a primary caretaker preference except where the primary caretaker is not the psychological parent). Others have espoused the presumption on slightly different grounds. See Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (listing specific parenting behaviors as indicia of primary caretaker preference); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 283-84 (1992) (asserting primary caretaker presumption increases bargaining advantage of women and avoids the detrimental effects of mandating joint custody as a compromise solution for parents in high conflict situations); Bartlett, supra note 10 (claiming primary parent has built up earned equity credits towards custody); Scott, supra note 10 (arguing presumption is provable and fair—primary caretaker, by acting as such, has proven competency and deserves to exercise it); Woodhouse, supra note 8 (stating children have a right to proven good parents).

195. At least 16 states have flirted with the “primary caretaker” presumption, but only West Virginia has retained it as a judicial preference. W. VA. CODE § 44-10-4 (1995). Minnesota formerly had a statutory preference, but now includes it as part of a general factor-type statute. MINN. STAT. ANN. § 518.17 (1994); see Gary Crippen, Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment With the Primary Caretaker Preference, 75 MINN. L. REV. 427, 428-40 (1990).

196. Crippen, supra note 195, at 460-61.

197. Id. at 475-77.

198. Id. at 452-60.
the explanations of tender years and established reciprocal affective ties in the nineteenth century: legally children are "infants" under adult control, and the tendency of the legal system is to assume infantility.

The obvious alternative to the psychological parent/primary caretaker presumption is a presumption favoring shared or divided custody and responsibility. In its strong form, this is the joint custody presumption—which has generated much psychological research, particularly from a family systems perspective. In its weak form, the presumption is often phrased as a rule of frequent-and-continuing contact with both parents. The arguments both for and against joint custody and frequent-and-continuing-contact have been justified by the same "psychologized" doctrines supporting the "psychological parent" and "primary caretaker" presumptions.

Psychological research showing that children suffer due to loss of contact with the noncustodial parent following divorce has been used to support legal argument that joint custody is consistent with stability and continuity of relationships. Arguments against joint custody are premised on the idea that moving between two homes and responding to two domestic regimes disrupts the stability and continuity on which the child depends. Moreover, opponents have argued that the detrimental effects of unrelenting interparental conflict which occurs in some fami-
lies outweighs the advantages of contact with both parents.\textsuperscript{204}

Thus the ease with which the same psychological premises, and even the same psychological studies, can be marshalled in support of contrary legal rules\textsuperscript{205} exposes the inadequacy of psychology for these purposes.

The data\textsuperscript{206} are more subtle\textsuperscript{207} and less conclusive than the advocates for and against joint custody would argue.\textsuperscript{208} The real issue is how to reach a balance between the advantages of joint custody/continuing


\textsuperscript{206} There are a vast number of studies. One article tested several hypotheses about children's adjustment to divorce on the basis of 180 previously published statistical studies. Amato, supra note 202, at 24. Another scholar criticized Amato for failing to include qualitative studies. Katherine R. Allen, \textit{The Dispassionate Discourse of Children's Adjustment to Divorce}, 55 \textit{J. MARRIAGE & FAM.} 46, 47 (1993).

\textsuperscript{207} For example, in high conflict families, children's adjustment is related to frequency of access to the non-primary parent. Further, children's adjustment is more directly linked to the adjustment of the primary parent than to conflict, and the detriment of ongoing conflict may be indirect—operating through its effect on the adjustment of the primary parent. Johnston, supra note 204, at 172-75.

\textsuperscript{208} Compare Forehand et al., supra note 204, at 159 ("Self-perceived cognitive and social competence among adolescents from divorced homes was lower than that of adolescents from nondivorced homes; however, no association was found for level of marital conflict") with Camara & Resnick, supra note 204, at 169-70 (It is not the existence of conflict between parents but the way that parents resolve conflict that is determinative).
contact and the detriment of conflict. The child-as-patient proponents would request more and better studies to determine conclusively what type and degree of conflict is risky for a statistically significant number of children. They would then convert the psychological data to a legal rule.

States have adopted various approaches. Some will not order joint custody unless both parents agree to it.²⁰⁹ Such a rule may be over or under inclusive in any given case, and may fail to serve the child's best interests. Another approach is to undertake a case-by-case inquiry with its attendant likelihood of prolonged evaluation and litigation, and risk inflaming the very conflict sought to be avoided. No joint custody rule will be successful until it is known for which children joint custody promotes stability and continuity and for which it has the opposite effect.

There is no reason to believe that psychology will yield bright-line answers about optimum custodial placements. First, as the leading researchers admit, the substantial accumulation of longitudinal studies, using statistical and clinical methods, conducted in different parts of the country, has failed to yield any clear predictors of post-divorce adjustment.²¹⁰ Second, children's post-divorce adjustment depends upon the evolving pattern of social relationships and interaction with age and gender that cannot be predicted by the "psychological snapshot" taken by the court in the middle of the divorce crisis,²¹¹ when familial conflict is at its height and parenting competency at its nadir.²¹² Parent-child roles and relationships inevitably change following divorce.²¹³ How parents and children will react to new challenges or what the compatibility of

²¹⁰. Dr. Judith Wallerstein, principal investigator of the California Children of Divorce Project and director of the Center for the Family in Transition writes: "I was surprised to discover that the severity of a child's reactions at the time of the parents' divorce does not predict how that child will fare five, ten, and even fifteen years later . . . . One cannot predict long-term effects of divorce on children from how they react at the outset." JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 15 (1989). Similarly, E. Mavis Hetherington, principal investigator of the Virginia Longitudinal Study, finds that some children exhibit "delayed effects" while others "emerge as psychologically enhanced and exceptionally competent and fulfilled individuals." E. Mavis Hetherington, Coping with Family Transitions: Winners, Losers, and Survivors, 60 CHILD DEV. 1, 1 (1989).
²¹¹. Hetherington, supra note 199, at 39. ("[D]ivorce cannot be viewed as a single event but is part of an extended chain of multiple transitions.").
²¹². The acute phase of the divorce is characterized by parents' diminished physical and psychological ability and diminished capacity to provide nurturance and discipline. Judith S. Wallerstein, Children of Divorce: An Overview, 4 BEHAV. SCI. & L. 105, 109 (1986).
²¹³. This is especially true of relationships with noncustodial parents. Id. at 109-10. "Our evidence is that the visiting parent-child relationship is likely to differ markedly from the preexisting relationship during the marriage." Id; see also Judith S. Wallerstein & Joan B. Kelly, Effects of Divorce on the Visiting Father-Child Relationship, 137 AM. J. PSYCHIATRY 1534 (1980).
personalities may be among children, stepparents, and stepsiblings is not subject to measurement. Thus, no matter what statistics we have, each individual life-course is unpredictable.

Third, children’s adjustment to divorce is, in part, a function of the prevalence of divorce in the society, societal trends, and the social and economic conditions of a particular time period. This is known as the “cohort effect.” Since society is always changing, legal rules based on the results of psychological studies will inevitably be obsolete.\textsuperscript{214} Further, law changes societal conditions, through its power to sanction and model behavior, and thus indirectly affects research results. Law and empirical research are engaged in a self-perpetuating cycle.

Fourth, cultural bias is inherent in both the measures used (such as school achievement, discipline, and “adjustment”) and in the acceptable outcomes. This use of psychology devalues the child rearing styles of parents who differ from the mainstream, and the behaviors of children who deviate from the norm. Since experts cannot accurately predict what factors “create” a well-adjusted child, the interests of children are not served by denying their autonomy, personhood, and identity in the name of their well-being. Implicit in today’s “psychological” (and therefore ostensibly “objective”) standards is a social morality that is similar to the nineteenth century normative morality. The clinical measures of the psychological studies are the contemporary idiom through which the state exercises its parens patriae function to produce well-adjusted, employed, moral citizens. The state uses child custody laws not to meet children’s needs, but to mold them into what the state thinks they ought to be. And the legal construction of the child as patient justifies a reduction of children’s liberty in the name of diagnosis, cure, and mental health.

Such approaches are based on assumptions about the child which denigrate his personhood. The first assumption is that the child is not a competent gauge of his own emotions. Consider the question: How much family conflict would one endure to remain close to one’s most important relatives? Should the state answer this for a person of six, or ten, or twenty-five years? This is a very personal question. Some children may be delighted by the diversity of joint custody, while others

\textsuperscript{214} For example, older studies tend to yield larger differences between children from divorced and non-divorced families than more recent ones, in relation to measures of academic achievement, conduct, psychological adjustment, and quality of life. One explanation for this is that divorce has become more common. See Amato, supra note 204, at 143; Paul R. Amato & Bruce Keith, Parental Divorce and the Well-Being of Children: A Meta-Analysis, 110 PSYCHOL. BULL. 26 (1991); Paul R. Amato & Bruce Keith, Parental Divorce and Adult Well-Being: A Meta-Analysis, 53 J. MARRIAGE & FAM. 43 (1991); cf. Teitelbaum, supra note 84, at 437 (blaming the current “instability” in family law on a combined commitment to empiricism and rights talk).
may be disturbed by an arrangement that requires them to switch blankets and beds. The second is that the child's psychological adjustment (as determined by such "objective" measures as school achievement, gregariousness, or obedience to parents) is more important than the child's identity. A child, acting as an autonomous individual, may choose to suffer stress or disobey conventional mores to satisfy personal goals and inclinations. The law protects such autonomous exercise of identity in adults. Denying children similar protection assumes either that children are at a significantly greater risk of damage, thereby justifying the parens patriae function of the state, or that the parens patriae function of the state usurps the identity-defining choices of children. Neither of these assumptions is justifiable.

To summarize, during the last quarter-century courts have used psychology to support and justify their decisions. Applying psychological theories to bolster these approaches taken in the "best interests" of the child adds a superficial air of scientific validity. Looking beneath the psychological terminology of the decisions reveals that each of them is grounded in the view of children as fragile, incompetent, and in need of continuity and stability. These same legal arguments were made during the nineteenth century, long before the development of modern psychological research.

The answers which psychology gives the law are, in large part, products of the questions which the law asks, and often the law asks psychology the wrong question. Asking the right question results in a different answer. Consequently, the seemingly different approaches discussed in the next section share a fundamental similarity—they are not rules by which the court makes decisions about the child, but ways to enable the child to decide.

III. TOWARDS THE CHILD AS PERSON

This section challenges the protectivist/patienthood vision of children with an empowerment vision of the child as a developing person. I first argue that the parameters established by the U.S. Supreme Court jurisprudence of the child demonstrate that the way to secure children's rights is to empower them to exercise those rights as soon as they are able to do so. Next, I explore psychological theories to determine when a child is able to choose among fit custodial parents, and conclude that developmental psychology, informed by the social context of divorce, indicates that children can make those decisions competently from the age of six years (the onset of middle childhood). Finally, I present an argument for children's choice of custody based on the practical needs
of custody litigation: children’s choice combines fact specific sensitivity with the outcome certainty that promotes settlement and fairness.

A. The Argument from Constitutional Law

The state law governing child custody decisions in divorce articulates vaguely with the constitutional law of the family. Nonetheless, from U.S. Supreme Court family law jurisprudence it is possible to discern a constitutional orientation towards the child to inform and guide an approach to custody determinations. The underlying concern is whether the constitutional orientation favors the protectivist child-as-patient paradigm, or the empowering child-as-developing-person paradigm.

The constitutional cases do not affirmatively mandate a protectivist approach to children, and there is no constitutional right to a custodial placement that is in the “best interests” of the child. The “best interests of the child” doctrine does not rise to constitutional dimensions; it implicates neither substantive nor procedural due process rights. Further, it is subject to limitation in the interests of the state, the interests of parents, and the interests of children themselves.

In two cases decided during the 1993 term, the Court spoke directly of “best interests.” In Reno v. Flores, the Court considered the claims of a class held in detention composed of more than 8500 alien juveniles arrested on suspicion of being deportable. These children, many of whom had no relatives in the United States to assume their custody, mounted a substantive and procedural due process challenge to the Immigration and Naturalization Service (INS) regulations that permitted possibly deportable alien juveniles to be detained pending deportation hearings. Arguing that qualified adults were ready and able to assume

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215. It would be presumptuous to speak of anything more specific than an “orientation.” Prior to the passage of the Twenty-sixth Amendment in 1971 (prohibiting the denial or abridgment of the right to vote to any citizen 18 years or older on account of age), nothing in the Constitution, nor the records and debates leading to its drafting and ratification, mentioned children. Further, the Supreme Court cases addressing or impacting upon the rights of children lack a consistent vision of children or childhood. Homer H. Clark, Jr., Children and the Constitution, 1992 U. Ill. L. Rev. 1, 1-2 (1992).


217. Plaintiffs alleged that the children were kept in severe prison-like conditions. Id. at 1446. However, before the case came before the Supreme Court, new regulations were issued requiring the detention facilities to conform to the standards for foster-care institutions. Id. at 1445. Therefore, the Supreme Court did not consider the actual conditions of the facilities, and treated the procedural due process claim as a generic challenge to “institutional custody,” as though it might have applied to any child, whether a potentially deportable alien or not. Id. at 1448.

218. The immigration regulations governing children differ significantly from those governing adults, who are generally released on their own recognizance unless deemed to constitute a threat to national security. Under INS regulations, a child could be released only to a parent, legal
their custody, the children asserted a constitutional right to "an individualized hearing on whether private placement would be in the children's 'best interests'—followed by such placement if the answer is in the affirmative."219

The Court's opinion quickly dispensed with the claim that "best interests" had constitutional status.220 The Court held that "best interests" could not be asserted as a constitutional right in claims for children against parents by non-parents.221 Neither could it be asserted as a constitutional claim for a particular standard of care by children against their own parents.222 And finally, "best interests" could not be asserted by children as a claim against the state.223 The crux of Flores is clear—the constitutional standard of child care is adequate, not optimum, care, and adequacy is to be determined by balancing the rights and interests of the children, with the rights and interests of others.224 In other words, there is no constitutional mandate to put a child first among others in the family, nor to maximize the child's opportunities.

A few months after the Flores decision, the Supreme Court denied an application for stay of an order requiring the prospective adoptive parents to return two year old Jessica DeBoer to her natural parents.225
Justice Stevens reasoned that a grant of certiorari was highly improbable because neither federal nor state law authorized nonrelatives to retain custody of a child whose natural parents were fit and willing, merely because the nonrelatives were potentially better able to provide for the child. By denying the application for stay of enforcement, the Supreme Court once again made it clear that “best interests” is not a constitutional doctrine.

Flores and DeBoer are decisions of very different consequence, yet are both of one mind: there is no constitutional right to optimum caretaking. Similarly, in Palmore v. Sidoti the Supreme Court found that although the goal of granting custody in the best interests of the child is a substantial government interest, it cannot prevail against an equal protection challenge based on racial discrimination. The Palmore Court reversed a Florida state court decision changing custody of a three year old European-American child from the mother to the father when the mother married an African-American man. The trial court's rationale was that the child would suffer the stress of social stigmatization by her peers and classmates on account of her mother’s interracial marriage. Significantly, the Supreme Court did not deny that such stigmatization would occur, but found it less significant that the equal protection challenge and the governmental interest in ending racial discrimination. The decision indicates that a child’s psychological well-being is not the only factor to consider in custodial placement when constitutional rights are implicated. In sum, Flores, DeBoer, and Palmore determine whether constitutional grounds for a hearing existed. O’Connell v. Kirchner, 115 S. Ct. 1084 (1995) (O’Connor, J. dissenting from denial of application for stay). The split among the states between the best interests and parental rights approaches to flawed adoptions may prompt the Court to consider, at some future time, the substantive issue of whether the best interests approach is in conflict with parents’ fundamental liberty interest in raising their children.

226. Id. at 2.
227. Flores denied the children much more than their right to an “optimum” custodial placement. The Court held that there was no substantive due process right to be free from physical restraint that would have required a blanket release of all these children into adult custody. Flores, 113 S. Ct. at 1447. The Court, quoting Schall v. Martin, 467 U.S. 253, 265 (1984), found that juveniles are always in some kind of custody, and where the custody of the parent or legal guardian fails the government must either exercise custody or appoint someone else to do it. Id. DeBoer, on the other hand, was a correct and courageous decision to reunite a child with her natural parents.
229. Id. at 433.
230. Id. at 434.
231. Id. at 434.
232. Id. at 431.
233. Id. at 432.
234. The Court held:

The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause. It
more together delineate an approach to children’s custody in which “best interests” is unmandated, minimalist, and of insubstantial weight against such fundamental constitutional rights as parental liberty and equal protection.

In DeShaney v. Winnebago County Department of Social Services,235 the Supreme Court went further, rejecting the Fourteenth Amendment substantive due process claim of four year old Joshua DeShaney, who had been beaten into a permanent state of mental retardation by his violently abusive custodial father.236 Joshua had been removed and subsequently returned to his father’s custody by the county authorities. The social worker meticulously documented her suspicions of abuse, but, despite Joshua’s numerous emergency room visits, took no affirmative steps to intervene.237 In deciding the case, the Court reasoned that the Fourteenth Amendment’s Due Process Clause afforded no right of protection against private violence.238 The majority refused to

would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not . . . . The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

Id. at 433-34. The Court’s opinion did not address the issue of whether the change of custody violated the mother’s fundamental liberty to raise her child as she saw fit.

In Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), the Court upheld a strict interpretation of provisions of the Indian Child Welfare Act (ICWA) granting exclusive jurisdiction to the Indian tribal courts over non-parental custodial placements of Indian children domiciled on the reservation. The issue was whether the twin babies of an Indian couple, who had deliberately left the reservation to give birth to the children with the intention of having them adopted by a prosperous, non-Indian couple, were reservation domiciliaries under the Act. Id. at 37-39. In finding the babies to be reservation domiciliaries, the Court considered the purposes of the ICWA: “‘protection of the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.’” Id. at 37 (quoting the statute). Congress concluded that it would be in the best interests of Indian children and Indian society that the children remain under the jurisdiction of the tribe. The ICWA and the holding in Mississippi Band are not inconsistent with the “child-as-patient” paradigm. The Act was based in part on the findings that Indian children reared in non-Indian society suffered stigma, prejudice, and identity confusion. Id. at 33 n.1. The children were losing their identity, as the tribe was losing its existence by removal of its children. The tribe needed the children for its cultural survival, and the children needed the tribe to survive because of their psychological need for cultural identity. Thus, cultural and psychological aspects were fused. Palmore and Mississippi Band demonstrate that maximization of the psychological health of the individual child may be constitutionally subordinated to the good of the group (at least a minority group).

236. Id. at 193.
237. Id. at 193.
238. Id. at 197.
accept the argument that, because of their knowledge of the abusive situation and their proclaimed intentions to help him, the county social services department assumed a “special relationship” with Joshua which imposed upon it an affirmative duty of intervention.\(^{239}\) The Court reasoned that Joshua’s situation was not comparable to that of a prisoner or an involuntarily committed psychiatric patient, where the “State’s affirmative act of restraining the individual’s freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint of personal liberty . . .”\(^{240}\) triggers an affirmative duty to provide the services necessary for survival and safety.\(^{241}\) Although subsequent federal cases relying on DeShaney have held that a special relationship and affirmative obligation to provide minimally safe care may exist where the state has imposed a foster care placement upon a child,\(^{242}\) these courts have not recognized that the placement of children in the custody of parents imposes a similar affirmative duty upon the state to protect the child from violence. Nor have the courts imposed upon the state an affirmative obligation to place children in custodial situations that maximize their best interests.\(^{243}\)

While these cases make it clear that children qua children have no affirmative constitutional right to a “best interests” level of care, they do not resolve whether the minimum standards of adequacy they allow represent a constitutional floor or ceiling. When is it permissible for the state, in its parens patriae capacity, to order a custodial placement in the child’s “best interests,” and when may the court choose such a placement for the child?\(^{244}\) While “best interests” does not prevail over certain constitutional rights, the question as to how those rights are implicated in interparental custody disputes remains. The answer requires a two step analysis. First, how does the Constitution address

\(^{239}\) Id. at 197-98.

\(^{240}\) Id. at 200.

\(^{241}\) Id.

\(^{242}\) See Karen M. Blum, DeShaney: Custody, Creation of Danger, and Culpability, 27 Loy. L.A. L. Rev. 435, 439-44 (1994), and cases cited therein. See also Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (despite some in loco parentis function, public schools do not exercise such control over children as to give rise to a duty to protect).

\(^{243}\) Gary B. Melton comments cynically that

\[\text{[a]t least since 1979, decisions in children's cases have been typified by a passing (begrudging?) acknowledgement that minors are 'persons' entitled to the protection of the Bill of Rights, and then by extended discussion of why these rights should not be fulfilled. To reach this conclusion, the Court has often had to adopt a curiously narrow vision of minors as vulnerable to all sorts of threats—except threats to their liberty or privacy.}\]

\(^{244}\) See, e.g., Schall v. Martin, 467 U.S. 253 (1984) (justifying pretrial detention for juvenile delinquents to protect them from the physical dangers they might encounter by continued disobedience, and from the risks of a life beyond the law).
the fundamental liberty of adults regarding family and family choices? Second, do children possess a lesser right, simply because they are children?

The durability and diversity of constitutionally protected familial bonds is demonstrated in decisions about whether to have a family, household composition and makeup, education, ethnic and religious identity, and intimate association. Further, the parent-child bond is sacrosanct against attack from outsiders claiming an interest in the child. Parents' rights cannot be terminated involuntarily except upon stringent grounds subject to the strictest due process safeguards. Each parent-child relationship, once established, is entitled to the highest constitutional protection. The state has no parens patriae interest in separating fit parents from their children, and no right to intrude into relationships between fit parents and their children on the grounds of the children's "best interests."

While the rearrangement of parent-child relationships at divorce undoubtedly constitutes a weaker parens patriae intrusion on fundamen-

247. Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish parents from criminal penalty for failure to send children to secondary school and authorizing traditional training in non-mechanized farming and community values as means of enculturating Amish adolescents into the Amish community); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (finding that prohibiting parochial primary school education is unconstitutional provided school meets minimum state educational requirements); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding prohibition of primary school education in the German language is unconstitutional).
250. DeBoer v. DeBoer, 114 S. Ct. 1 (1993) (requiring return of child to her natural parents where adoption procedure was flawed, in spite of the mutual affection which had grown between adoptive parents and child); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (subordinating custodial rights of foster parents to those of fit parents).
252. Santosky, 455 U.S. at 767; see also Stanley, 405 U.S. at 652 ("We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. [T]he State spites its own articulated goals when it needlessly separates him from his family.").
253. Cf. Santosky, 455 U.S. at 760 (holding both parents and state share an interest in preventing the erroneous termination of the parental relationship).
tal liberties than does a parental-rights termination proceeding, the same concerns are implicated. "Best interests" decisions, based upon evaluations of the quality and content of parenting, impose significant restrictions on parental decision-making and time and contact with children. Under the line of case law leading from *Meyer v. Nebraska* through *Wisconsin v. Yoder*, such court imposed restrictions would be impermissible state interference with married parents' fundamental liberties to raise their children. At divorce, however, custody has historically been treated differently. Traditionally, parents' child-rearing rights have been viewed as derivative of the right to marry. Divorce weakens or evaporates those rights. Furthermore, divorce diminishes the right of familial privacy that normally shields the parent-child relationship from outside interference.

Under contemporary jurisprudence, however, fundamental parental

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254. See supra note 247.

255. The linkage between the fundamental liberty to raise a family and marital status derives from *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the Supreme Court considered the constitutionality of a Nebraska statute prohibiting teaching children below the eighth grade a foreign language (other than Latin, Greek, or Hebrew). *Id.* at 399. The target of the legislation, passed in the xenophobic aftermath of World War I, was the German-American community. The statute's purpose "was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals . . . ." *Id.* at 401. The Court held that the statute was arbitrary as applied, and unrelated to an end within the state's competency. *Id.* at 403. Justice McReynolds, writing for the majority, stated that the Fourteenth Amendment "[w]ithout doubt . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children . . . ." *Id.* at 399. In the cultural context of America between the World Wars, the question of whether married and divorced parents should have equal rights to determine the upbringing of their children was not yet a social concern. Justice McReynold's influential dicta linking marital and parental rights was probably a reflection of a period when divorce rates were low and out-of-wedlock childbirth was considered immoral. The language of *Meyer* contains the germ of the later constitutional theory that parental substantive due process rights attach only within the shell of privacy surrounding the intact family unit.

256. In the third quarter of this century, while divorce rates soared, substantive due process retreated temporarily to the background of constitutional discourse, and the right of privacy, which subsumed the fundamental liberty to raise a family, moved center stage. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding right of married adults to use contraceptives based on the zone of privacy that surrounds the marital relationship). Professor Kenneth L. Karst explains, "[t]he Court's opinion located that right within a generalized 'zone of privacy,' created in part by the First Amendment, but by the Third, Fourth and Fifth Amendments as well." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624-25 (1980) (footnote omitted). More important than the source of the right was its subject. "[T]he main object of constitutional protection in *Griswold* was the marital relationship." *Id.* at 625. *Griswold* viewed the decision of whether to procreate as the first of many that a married couple makes about raising a family. Cases dealing with marriage, divorce, and family relationships after *Griswold* employ the discourse of equal protection, procedural and substantive due process to create a shell of privacy around the marital relationship. *Id.* at 653. This right of privacy includes the right of married couples to raise their children as they see fit, but excludes equivalent rights for divorced parents who are outside the marital relationship. See Janet L. Dolgin, *The Family in Transition from Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1539 (1994) (explaining that the
liberty is grounded in the dyadic relationship between a parent and a child, independent of the horizontal bond of matrimony. The Supreme Court has erased distinctions between children of married and unmarried parents and has recognized the fundamental parental rights of unmarried parents who have established relationships with their children as equal to those of married parents.257

Moreover, implicit in the Meyer and Yoder line of cases is the assumption that, within marriage, husbands and wives act as a single parental unit. This assumption, lingering from the days of coverture, is incompatible with the present constitutional jurisprudence of marriage as an association of two autonomous individuals. In Eisenstadt v. Baird,258 the Supreme Court enunciated a new view of marriage, stating, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."259 Justices O'Connor, Kennedy, and Souter quoted Eisenstadt approvingly in their joint majority opinion in Planned Parenthood v. Casey260 finding a statutory provision requiring a pre-abortion husband notification provision to be unconstitutional. Even within marriage, they wrote, each person individually exercises "a person's basic decisions about family and parenthood",261 and individually makes "personal decisions relating to . . . family relationships, child rearing, and education."262 Casey signaled an important change in the discourse on familial liberty from privacy (and freedom from state interference) towards affirmative protection of individual autonomous decisionmaking and self-determination.263 Under the Casey view of parental rights, when divorce cracks the shell of marital privacy, that which already exists becomes visible: each parent's individual liberty to make decisions about how the child should be raised. Thus, the funda-
mental liberty to raise one's child deserves the same protection after divorce as during marriage. 264

Imposition of a court's judgment under the guise of "best interests" is no less an infringement on constitutional liberty when a parent is divorced than when a parent is married. Undeniably, a modifiable custodial allocation which provides both fit parents frequent contact with a child is a minimal intrusion compared to abolishing parental rights in a termination proceeding. Under Santosky v. Kramer,265 however, the state's interest is de minimis to nonexistent. It would be impermissible for the state to intrude in this relationship on its own initiative. Courts use the "best interests" standard in inter-parental custody proceedings only because it seems to be fair when parents, having failed to negotiate a settlement between themselves, bring their case before the court, inviting the state to decide.266

Given this analysis of the relationship between parental liberties and "best interests," should children not have the reciprocal right to make choices regarding their parents and custody? In articulating the jurisprudence of familial liberty, the Supreme Court has focused on parents—not on children. In doing so, the Court has assumed the interests of parents and children are identical.267 On the other hand, the Supreme Court has often stated that children are entitled to the protection of the Constitution, the Fourteenth Amendment, and the Bill of Rights.268

264. Further, central to the concept of liberty envisioned by the Casey Court are the beliefs and values, the elements of personhood, shown to be the hallmarks of cultural identity. The Court explains: "choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Id. at 2807.


266. Although "best interests" is a ubiquitous standard, I remain dubious about its constitutionality. Consider whether joint custody is not constitutionally required wherever both parents want custody, unless there is an affirmative showing that joint custody is detrimental to the child. "Best interests" seems to be a fair standard to decide between parents of equal right who have affirmatively sought the aid of a court. But is it fair, or even constitutional, as applied to the parent who would willingly remain married or negotiate but has been hauled to court by an intransigent spouse?

267. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1971) (considering only the testimony of parents in granting Amish children an exemption from high school).

Since no provision of the Constitution, nor any Supreme Court case denies that children are persons within the contemplation of the Constitution, a basic assumption must be that children have the same constitutional right to a relationship with a fit parent as that parent has with his or her child.\(^{269}\)

Assuming that children have the same fundamental liberties regarding their families as adults have, are these rights implicated in the same or a different way in interparental child custody proceedings? Arguably the "best interests" standard, as presently construed to substitute a court's judgment for the child's choice, infringes more seriously on the rights of children than on the rights of parents.

From the child's perspective, a custody proceeding has practical implications of finality not present from the parent's perspective, and which, for the child, make it very similar to a parental rights termination proceeding. When one parent is awarded sole or primary custody, and the other lives in a different place or loses interest, the child will have neither the money nor the wherewithal to initiate phone conversations and long visits, to move or to select a school close to the other parent, or to make other efforts to keep that parent involved. By contrast, a non-custodial parent who wants greater involvement with the child can choose to live close by, call frequently, or bring a motion for change of custody.

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\(^{269}\) In his vigorous dissent in Bowen v. Gilliard, 483 U.S. 587 (1987), Justice Brennan reasoned that heightened scrutiny is required when the state interferes with children's fundamental liberty to have relationships with their parents. The majority affirmed a state statute requiring remittance to the state of child support payments received by custodial parents from noncustodial parents, where federal support was also received. Brennan wrote:

The Government has told a child who lives with a mother receiving public assistance that it cannot both live with its mother and be supported by its father. The child must either leave the care and custody of the mother, or forgo the support of the father and become a Government client. The child is put to this choice not because it seeks Government benefits for itself, but because of a fact over which it has no control: the need of other household members for public assistance. A child who lives with one parent has, under the best of circumstances, a difficult time sustaining a relationship with both its parents. A crucial bond between a child and its parent outside the home, usually the father, is the father's commitment to care for the material needs of the child, and the expectation of the child that it may look to its father for such care. The Government has thus decreed that a condition of welfare eligibility for a mother is that her child surrender a vital connection with either the father or the mother.

The Court holds that the Government need only show a rational basis for such action . . . . Plaintiff child support recipients in this case, however, are children who wish not to receive public assistance; but to continue to be supported by their noncustodial parent. Their claim is not that the Government has unfairly denied them benefits, but that it has intruded deeply into their relationship with their parents. More than a mere rational basis is required to withstand this challenge . . . .

\textit{Id.} at 610-11 (Brennan, J. dissenting).
Furthermore, the child’s participation in a divorce related custody proceeding is entirely involuntary, while the parents voluntarily choose to bring their dispute to the court for resolution.\textsuperscript{270} If the “best interests” standard is constitutional because parents have voluntarily invoked the powers of the court, and because the custodial allocation is a relatively minimal and modifiable intrusion on parental liberties, then the standard may well be unconstitutional regarding children unless they have a choice as to their custodian.

The Supreme Court has emphasized that children are always in some kind of custody: the custody of fit parents or parent substitutes or, failing that, the custody of the state.\textsuperscript{271} If anything, a child’s inability to “escape” from some kind of custody should push the equities towards recognizing his freedom of choice. Finally, the nature and quality of the child’s custodian is often the key to the child’s ability to exercise his other rights. While under the DeShaney line of cases a child who is in the custody of his parent is in “free society,”\textsuperscript{272} under Meyer,\textsuperscript{273} Prince,\textsuperscript{274} and Yoder,\textsuperscript{275} the parents make the decisions about the child’s educational, community, and religious affiliations which will contextualize the child’s developing identity. Even many common law rights are exercised by the parents for the child. For example, a child may have a substantive right to be free from bodily harm, but only his parents can decide whether to exercise that right by bringing a tort action. For children, exercising freedom of choice in family matters is important not only for its own sake, but because such choice necessarily becomes the vehicle for ensuring the child’s other rights, and creating the environment in which the child’s identity will develop.

\textsuperscript{270} Constitutional problems may also exist in regard to the parent who is an entirely unwilling participant in a divorce and custody action. See supra note 265 and accompanying text.

\textsuperscript{271} Reno v. Flores, 113 S. Ct. 1439, 1447 (1993) (deciding detention of juvenile aliens is constitutional, on grounds that children are always in some form of custody); Schall v. Martin, 467 U.S. 253, 265 (1984) (finding “protective” pre-hearing detention for delinquent juveniles constitutional because children are always in some form of custody); Parham v. J.R., 442 U.S. 584, 617-19 (1979) (denying counsel to a child committed to mental hospital on theory that children are always in some kind of custody). The Supreme Court’s perpetual custody theory, used to justify prison-like detention situations for children, has produced an ironic result: parental custody is the same as state custody. The Court took the opposite position in the nineteenth century regarding the use of habeas corpus in child custody proceedings. The concept of “custody” today is used to constrain children against their will, but in the nineteenth century, could be used to free them from improper constraint. The Court’s decisions in Parham, DeShaney v. Winnebago County Dept. of Social Servs. 489 U.S. 189 (1989), and their progeny militate against imputing any protectivist dimension to the Supreme Court’s conceptualization of children’s rights.

\textsuperscript{272} DeShaney, 489 U.S. at 201.

\textsuperscript{273} Meyer v. Nebraska, 262 U.S. 390 (1923).

\textsuperscript{274} Prince v. Massachusetts, 321 U.S. 158 (1944).

\textsuperscript{275} Wisconsin v. Yoder, 406 U.S. 205 (1971).
The fact that parents have a right to privately determine the custody of their child prior to voluntarily seeking the court's assistance, while children are involuntary participants who lack any rights of choice raises an Equal Protection question. The answer, however, is not clear, because the Supreme Court has extended rights to and withheld rights from children on a case-by-case basis, in accordance with its view of their maturity to exercise the right in question.\textsuperscript{276}

The child's right to make decisions may be constitutionally limited to those for which she exhibits the requisite maturity. Although the Court has not enunciated a generally applicable test for determining maturity, the doctrine of the "mature minor" has crystallized out of the reproductive freedom and abortion cases.\textsuperscript{277} The mature minor doctrine developed to allow a child with the maturity of an adult to make decisions that would normally be made by an adult. Read expansively, it implies the right of children to make decisions and exercise liberties for which adults receive constitutional protection, provided they possess the requisite maturity.\textsuperscript{278} Applying the mature minor doctrine to interparental custody contests would allow any child mature and experienced enough to balance the options and evaluate the possible consequences of her choice, the constitutional right to choose between fit parents.\textsuperscript{279}

The Supreme Court's failure to directly address children's fundamental familial liberties leaves the issue vulnerable to ambiguities in interpretation consistent with either a personhood paradigm or a

\textsuperscript{276} See Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (upholding a public school program of drug testing student athletes, the Court reasoned that the Fourth Amendment applies to the extent consistent with educational purposes). In his opinion in Hodgson v. Minnesota, 497 U.S. 417 (1990) (Kennedy, J., concurring in part and dissenting in part), Justice Kennedy stated, "[t]he law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent." \textit{Id.} at 482 (citing Parham v. J.R., 442 U.S. 584, 621 (1979). This statement actually involves two issues. The first is whether a child is mature enough to exercise a particular right. The second is whether the parent has the authority to exercise such right instead of the child. The abortion rights cases generally implicate both issues, in addressing the question of whether a minor can consent to an abortion without parental consent or notification. In this article, the parental control aspect of the mature minor doctrine is not implicated. Under the suggested rule, the child's choice is subordinate to the parents'—and is determinative only when the parents are unable to reach a satisfactory custody agreement. The issue is whether the child, rather than the state, should be allowed to make the decision.


\textsuperscript{279} See Edith Friedler, \textit{From Extreme Hardship to Extreme Deference: United States Deporation of Its Own Children}, 22 HASTINGS CONST. L.Q. 491 (1995) (suggesting extending the use of the mature minor doctrine in the deportation context to protect the constitutional relationship between children and parents against state intrusion).
patienthood paradigm, its refusal to constitutionalize “best interests” or affirmative protections of children tips the balance in favor of the former. Given the liberal vision of the child which informs Supreme Court jurisprudence, influenced by the mature minor doctrine, and rationalized by the idea of family choices as fundamental liberties pertaining to adults and children alike, the doctrine of children’s choice should prevail. The question remains: based on knowledge of child development, at what age can children appropriately exercise such a choice?

B. The Argument from Developmental Psychology

Constitutional context, if not constitutional command, points towards recognizing children’s right to make autonomous decisions in the area of fundamental familial liberties as soon as they are able. But when is that? Psychoanalytic and family systems models, as incorporated into custody law to support the child-as-patient paradigm, do not provide the answer. The child-as-patient paradigm, however, is not the inevitable end result of a collaboration between law and psychology on questions of child custody. Rather it is an artifact produced by the legal vision of the child as delicate and incompetent. There is another way to use psychology as a legal resource. Developmental psychology, which focuses on moral, intellectual and emotional development and is concerned with the child’s progress towards autonomy, identity, and self-determination, may shed much light on the issue.

In this Section, I argue, based on the work of the major developmental theorists, that the child is mature enough to choose her own custodian by the beginning of middle childhood—roughly the age of six years. The argument is both less and more than a scientific justification

280. The argument that children should be granted liberal expressive rights of self-determination because the United States Constitution is grounded in liberal theory does not derive only from philosophical consistency. Given the legal, political, and economic disempowerment of children, it is more realistic for children to participate in the existing structure of “negative” rights, at an appropriate age, than that they be granted different, “affirmative” rights which are without any existing constitutional basis. See Clark, supra note 215, at 40 (“[T]he Supreme Court’s treatment of children... is generally to accord them the rights extended to adults. But... where children need special treatment for the very reason that they are not adults... the Court is often oblivious to their interests. An obvious reason for this... is that the Constitution has nothing to say about children...”).

281. The child’s right to choose a custodian should be a reciprocal of the adult’s right of choice in family matters. It does not confer full adult freedom and responsibility; rather, it enables the child to select the adult who will exercise a panoply of rights on the child’s behalf and in the child’s interests. Consistent with the concept of the child as a “developing person” or “maturing minor,” the child’s choice puts her in the custody of a parent, not vice versa. See John Eckelaar, The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism, 8 INT’L J. L. & FAm. 42 (1994) (arguing, with reference to the United Nations Convention on the Rights of the Child, that children’s rights and children’s needs can be reconciled through developmentally appropriate self-determinism).
of the right of choice in middle childhood. It is less because "development" (like "adjustment") is sensitive to context, environment, and individual variation, so that general theories cannot explain the individual case; because the mid-range theories relating development to gender, class, and culture which yield population specific statistics suitable for generating decisional guidelines are not addressed; because this section is not a comprehensive review of the pertinent scientific literature; and because contorting psychological theories into legal principles for ulterior purposes is the evil this Article criticizes.

It is more than a mere justification because this exercise will illustrate how the answers that psychology gives the law are conditioned upon the questions asked; will demonstrate that the appropriate question is, "When can the child choose?"; and will show that, despite the lack of detailed research on the question, the substantial agreement among diverse developmental theories provides sufficient support for legal recognition of the right of choice in middle childhood.

Developmental theory is particularly suitable to the articulation of children's rights. Developmental psychology envisions the child as a person growing towards a morally competent, rational, responsible, autonomous decisionmaker—in short, developing toward our collective vision of a legally competent adult. This is not coincidental. Developmental psychology and American constitutional theory both have their intellectual antecedents in Enlightenment philosophy, a tradition in which the delineation of rights derived from the nature of human beings plays a central role. Even if both are merely products of a common metaphor, it is a metaphor of individual human empowerment. Psychoanalytic and family systems theories, by contrast, find their origins, respectively, in the unconscious and in social relations. They are suited to "cure" intrapsychic pathology and to "adjust" dysfunctional behavior. But it is through expressive rights, not through affirmative rights, cures,
or legal entitlement, that our Enlightenment-derived legal system functions.

The psychology of the child-as-person and the psychology of the child-as-patient may yield equally valid answers to the questions the law asks. In the absence of certainty as to which question or answer is "true," however, it is best to build the law of custody on a psychological theory of the child which comports with our legal theory of the person, and to err on the side of equality.

The argument, then, from the developmental psychology perspective is as follows. At about the age of six years, cerebral changes take place which result in increased physical and cognitive capacities, enabling children to think more deeply and logically, and to simultaneously keep track of many aspects of a situation. In virtually all cultures, at the time of this onset of "social intelligence," children receive increased independence and responsibility and are expected to understand and conform more nearly to societal norms. The common theme among the diverse developmental theories is that children acquire the majority of their morality and reasoning skills during middle childhood.

Pioneering psychologist Jean Piaget developed the theory that children progress through a series of "operational" stages in their moral and cognitive capacities. At the age of seven, or slightly earlier, children enter the stage of "concrete operations," so-called because children in this stage are able to mentally merge, isolate, categorize, and alter objects and actions when such objects are in their presence, or create mental representations of them. In the concrete operational stage children become adept at coordinating their experiences into a cohesive,

284. These changes include "proliferation of brain circuitry, changing relationships between different kinds of brain-wave activity, and the greatly expanded influence of the brain's frontal lobes in guiding behavior." COLE & COLE, supra note 283, at 560.
285. Id. at 440.
286. For example, by the age of six, the Ifaluk of Micronesia expect their children to have attained "social intelligence," which includes a knowledge and ability to work, follow social standards, and exhibit compassion for others—all attributes associated with mature adult conduct. Catherine Lutz, Goals, Events, and Understanding Ifaluk Emotion Theory, in CULTURAL MODELS IN LANGUAGE AND THOUGHT 240 (Dorothy Holland & Naomi Quinn eds., 1987).
287. See, e.g., Barbara Rogoff et al., Transitions in Children's Roles and Capabilities, 15 Int'l J. Psychol. 181, 182 (1980).
288. An "operation" is an internalized mental action that fits into a logical system. MILLER, supra note 283, at 59.
289. Jean Piaget has articulated his theory of the stages of mental development in a number of books including, JEAN PIAGET, THE DEVELOPMENT OF THOUGHT (Arnold Rosin trans., 1977); THE PSYCHOLOGY OF INTELLIGENCE (Malcolm Picry & D.E. Berlyne trans., 1950); THE CONSTRUCTION OF REALITY IN THE CHILD (Margaret Cook trans., 1954); THE ORIGINS OF INTELLIGENCE IN CHILDREN (Margaret Cook trans., 1952); THE MORAL JUDGMENT OF THE CHILD (Marjorie Gabian trans., 1932); THE CHILD'S CONCEPTION OF THE WORLD (Joan & Andrew
logical format which, in turn, leads to more systematic and constructive thought patterns. The most vital skill of the stage is the mastery of “reversibility”—that is, the understanding that certain operations can negate or reverse the effect of others. This understanding enables children to mentally organize past, present, and future situations.

During this stage, children are also able to participate in games according to preexisting socially constructed rules. They gain practice in weighing their own objectives against the values of society, modifying their personal behavior, and comprehending that social rules produce a format that makes possible viable interactions with others. Consequently, children are better able to regulate their social relations. Because of children’s newly acquired comprehension of “constancy,” the world becomes more predictable. Because children can now grasp the notion of “prerogatives,” they understand that things are not purely right or wrong. In addition, they account for “intentions” when judging others’ behavior, an ability which Piaget called “autonomous moral reasoning.”

Lawrence Kohlberg modified Jean Piaget’s ideas about moral thinking to provide a more complete theory of how reasoning develops in relation to children’s changing cognitive abilities and social experiences. According to Kohlberg, in the stage most relevant to middle childhood, children’s concepts of morality are based on mutual interpersonal expectations, relationships, and interpersonal conformity, and are in accordance with the “Golden Rule.” Children draw conclusions based on their view of themselves in relation to society as a whole; perceiving majority opinions and consensus as having importance beyond personal interest. They are able to acknowledge that their actions cause reactions.

William Damon, another psychologist who contributed significantly to the understanding of moral development in children, studied...
children's development of a sense of fairness, which he termed "positive justice." During middle childhood, this sense develops in two steps. First, at the age of six or slightly later, children begin to develop a sense of "merit and deserving," and begin to understand the concept of "reciprocity in actions." Second, at about the age of eight, they come to understand "moral relativity," realizing that while other people's views of justice may differ from their own, these views may be equally valid. Children in this stage begin to analyze circumstances independently of one another. They are also able to weigh the needs of others against their own, and to conclude that fair does not necessarily mean equal.

The theories of Erik Erikson suggest the same conclusion: that children of six are developmentally ready to choose their custodian. Erikson posited that children develop a sense of identity by favorably resolving a series of eight crises, or developmental stages, occurring throughout the life cycle. Of these stages, two are especially relevant.

Between the ages of four and five years old, children pass through the stage of "initiative versus guilt," in which they develop drive and imagination, fostering accomplishment and a sense of conscience that is "the ontogenetic cornerstone of morality." During this stage, children develop an inner sense of right and wrong, and preservation of the

298. For Erikson, identity is "a conscious sense of individual identity; ... an unconscious striving for a continuity of personal character; ... a criterion for the silent doings of ego synthesis; ... [and] a maintenance of an inner solidarity with a group's ideals and identity." Erik H. Erikson, The Problem of Ego Identity, 1 Psychol. Issues 101, 102 (1959).
299. The eight stages are: basic trust versus basic mistrust; autonomy versus shame and doubt; initiative versus guilt; industry versus inferiority; identity versus role confusion; intimacy versus isolation; generativity versus stagnation; ego integrity versus despair. Erikson, Childhood and Society, supra note 297, at 247-69.
300. Erikson locates the stage of initiative vs. guilt in early childhood between the third and sixth year. In this stage children learn to initiate their own activities, enjoy their own accomplishments, and become purposeful. They feel guilty for their attempts to become independent if they are not allowed to follow their own initiative. Guiding children to make their own decisions, and respecting the decisions they have made, leads to the successful completion of this stage and toward a healthy, mature personality. Id. at 255-58.
301. The "sense of initiative" permits the child "to forget many failures rather quickly and to learn to approach new areas that seem desirable, even if they also seem dangerous, with undiminished zest and some increased sense of direction." Erikson, Identity: Youth and Crisis, supra note 297, at 115.
302. Id. at 119.
potential for fairness and accomplishment depends upon an “experience of essential equality in worth [with adults], in spite of the inequality in developmental schedule.”\textsuperscript{303} The subsequent stage of “industry versus inferiority,” that commences at six and lasts until adolescence, is a time for learning, planning, and producing.\textsuperscript{304} To triumph in this stage, to avoid developing “a sense of inferiority, the feeling that one will never be ‘any good,’”\textsuperscript{305} children must attain a sense of accomplishment and fruition in their plans and projects. Erikson’s theories confirm that by middle childhood children have both the moral judgment and the reasoning skills to make choices about such important matters as their custody and residence. Moreover, Erikson’s theory adds an imperative: not only are children able to make such decisions, but guidance and facilitation\textsuperscript{306} are critical to their ultimate psychological well-being and participation in democratic society.\textsuperscript{307}

The work of Piaget on cognitive development, and Kohlberg on moral development, reveals that children must “learn by doing” to develop through the requisite stages; Erikson’s theories suggest that independent decision making is a requisite to the acquisition of democratic participatory ideals, which depend on mutual respect for autonomous wills.\textsuperscript{308} Drawing upon these theorists in his study of children’s competency to consent, Gary Melton concludes, “[t]he implication of these analyses is that a requisite of enhanced moral development is the opportunity for . . . independent moral decision making by children.”\textsuperscript{309} Further, ample evidence indicates that control over a situation, or at least a perception of control, correlates positively with increased life satisfac-

\textsuperscript{303} Id. at 121. For Erikson, the adult’s respect for the child was critical to fostering the child’s sense of equality. The development of the conscience was fraught with risk and it was important for adults to respect the child’s moral judgments during this formative period. “[F]rom the point of view of human vitality, we must point out that if this great achievement is overburdened by all too eager adults, it can be bad for the spirit and for morality itself.” Id. at 119. For Erikson, respect for the developing identity of the child plays a vital role in raising children to sustain democracy rather than support dictatorship.

\textsuperscript{304} Id. at 122-23.

\textsuperscript{305} Id. at 124-25.

\textsuperscript{306} “[C]hildren at this age do like to be mildly but firmly coerced into the adventure of finding out that one can learn to accomplish things . . . which owe their attractiveness to the very fact that they are not the product of play and fantasy but the product of reality, practicality, and logic . . . .” Id. at 127.

\textsuperscript{307} “[T]his is socially a most decisive stage. . . . [T]he configurations of culture . . . must . . . [support] . . . the free exercise of dexterity and intelligence in the completion of serious tasks unimpaired by an infantile sense of inferiority. This is the lasting basis for co-operative participation in productive adult life.” Id. at 126.


\textsuperscript{309} Id. at 27.
tion and psychological and physical health.\textsuperscript{310} Recent psychological studies employing measures such as locus of control (who has responsibility for decision making?) and personal causation (who makes the result happen?) indicate that children who are given decision-making responsibility mature in their ability to make decisions; while those who are sheltered from such responsibilities develop habits of "learned helplessness" and "acting-out" behavior.\textsuperscript{311}

To summarize, a survey of developmental psychology suggests that from early middle childhood on, children have the maturity to choose their custodians. The law's recognition of their right to do so contributes to children's psychological well-being and prepares them to be responsible citizens of a democracy: two goals that have been most important to the defenders of the child-as-patient paradigm for two centuries.

Arguably, permitting children to choose their custodians may exacerbate the guilt that some feel about their parents' divorce. This view, though consistent with conventional wisdom, lacks supporting research.\textsuperscript{312} Further, even assuming arguendo that guilt is an issue, it is equally problematic under the present rule allowing children to state a preference while affording that preference limited dispositive weight—thus conferring the harm without any corresponding benefit. Also, the present preference rule is complex and rarely explained to children, many of whom may believe that they are being asked to choose a custodial parent even when they are questioned indirectly.\textsuperscript{313} Explaining that he is not choosing "between" parents, but deciding what is most important in his own life—residence, community, school, friends, activities, responsibilities, and opportunities, may minimize a child's guilt. Furthermore, emphasizing that no determination is final, and no parent is being lost\textsuperscript{314} would relieve children's minds.

\begin{itemize}
\item \textsuperscript{310} See generally Choice and Perceived Control (L.C. Perlmutter & R.A. Monty eds., 1979) (containing twenty-three studies on control and perceived control).
\item \textsuperscript{311} Melton, supra note 308 and studies cited therein.
\item \textsuperscript{312} I have found no study comparing the "guilt" (or any other measure of mental health or behavior) experienced by children who have expressed a custodial preference with those children who have not.
\item \textsuperscript{313} The present rule could be explained to a child as follows. "The judge is going to ask you what you want. If he thinks you are old enough and sensible enough he may consider your request—if he thinks it is a good idea." The child will be required to talk to the judge about his parents without necessarily receiving the corresponding benefits of initiative, empowerment, responsibility, or even simply getting what he wants. If the court's order is different from the child's preference, the child may misunderstand the legal rule, and feel disappointed, disillusioned, or guilty. The child may reason the judge's failure to grant his wish indicates that his opinion is foolish and immature. The child may suffer a decrease in self-esteem, and/or disillusionment with the legal system.
\item \textsuperscript{314} Children are better able to understand and handle such direct choices than adults think.
\end{itemize}
Whether to permit children to make legally significant choices affecting their own lives creates a tension between self-esteem, control, and power on one hand, and stress and guilt on the other. Resolving such tension with certainty or universality is impossible. Adults making legally significant statements in court face the same conflict. Because our legal system values individual autonomy, liberty, and freedom of choice, exercising this right is not only worth the stress and guilt involved, but is basic to legal and social personhood in the United States. When we deny these same choices to children to protect them from “stress,” we are denying their personhood. Such a protective attitude might be justified if the data conclusively showed that choosing one’s custodial parent riddled children with guilt and stress. But the data is, at best, ambiguous. In such circumstances, we should err on the side consistent with our fundamental values and constitutional rights; let the child exercise her fundamental liberty to choose the family she sees fit, even at the risk of guilt and stress.

Further, encouraging and facilitating the early maturation of responsible decision making in children whose parents are divorcing may benefit society. One consistent finding in the divorce research is that children in single parent families have more egalitarian relationships with their parents, and exercise greater autonomy, decision-making

Judicial practice, and even some scholarly and practical articles, recommend indirectly asking children to choose. See, e.g., Richard A. Gadner, Family Evaluation in Child Custody Litigation 173 (1982). But whose sensibilities are protected by these indirections—the child’s or the judge’s? Ambiguous choices foster anxiety rather than relieving it. Melton, supra note 308, at 35. Between 1991 and 1993, I conducted an observational study of court sponsored mediation at the Los Angeles Superior Court, Conciliation Services. When mediators spoke privately with children, they did not directly ask children to make a choice. They typically asked younger children “to make three wishes;” and older ones how they “felt” about the situation. But the children were not deceived. They freely expressed explicit custodial preferences and their reasons for them that were based as much in their interests and friendships as they were in their love for one particular parent. If indirect questioning succeeds in masking the court’s motives, then these children are deceived as well as confused, for they might have answered very differently if they had known the consequences. No adult witness would be expected to make a legally consequential choice without understanding the question. This practice is acceptable, even preferable, only because we regard their words as “evidence” of hidden psychological needs, rather than as expressions of volitional choices.

315. See id. at 22-24; Michael S. Wald, Legal Policies Affecting Children: A Lawyer’s Request for Aid, 47 Child Dev. 1, 5 (1976).

316. Adults who move to the United States from countries where they are allowed fewer choices experience stress. I have heard Indian women complain about the stress involved in choosing one’s future spouse rather than trusting parents to choose for them; Chinese complain of the strain of choosing a career direction rather than letting the government tell them what to do. Learning to make stressful and significant choices about one’s future is part of growing up in the United States.
power\textsuperscript{317} and genuine responsibility\textsuperscript{318} in their households. In light of this, promoting a child’s making and accepting responsibility for important decisions is sensible. Thinking of the child as a person rather than a patient transforms the choice of a custodial parent into a significant decision on the path towards adulthood.

In sum, by middle childhood, children are able to make reasoned decisions which balance their own interests against those of others, weigh individual norms of fairness and justice against societal norms and rules, and understand the long range consequences of their decisions. According to the generally accepted insights of mainstream developmental theory, they should have the rationality and reasonableness to make their own choice as between or among fit parental custodians.

Although the onset of middle childhood does not coincide with an exact chronological age, and not all children mature at the same rate, children should have the right of custodial choice at the age of six years. At this age, society imposes a host of new social roles, responsibilities, and rituals on children, making it appropriate to accord them increased rights of decisional autonomy. At age six, all children are required to attend school. Spending large portions of the day away from home, they develop new networks, friends, and interests, and take on social roles and responsibilities important to their developing personhood distinct from their relationship to family. By this age, children have an independent interest in where and how they want to live. This interest deserves recognition as distinct from their choice of a “favorite” custodian or the interests of the family unit. In addition, serious societal responsibilities attach at approximately this age. A child is deemed sufficiently responsible for his actions to be prosecuted in juvenile proceedings of the age of seven.\textsuperscript{319} If society considers children to have the requisite moral judgment to subject them to quasi-criminal proceedings, and the requisite mental abilities to participate in five full days of formal learning each week, then they should also be capable of making decisions about their personal lives, especially in the context of a choice

\textsuperscript{317} Hetherington & Clingempeel, \textit{supra} note 199, at 9.


between fit custodians.\footnote{Guggenheim argues that for children seven years and older, the right to counsel guaranteed by \textit{In re Gault}, 387 U.S. 1 (1967), should include the right to direct counsel, and that counsel is bound by the client's instructions (when consistent with the law) and to act to achieve the client's objectives. He reasons that where the responsibility attaches, rights should also attach. Guggenheim, \textit{supra} note 319, at 78-79.}

Of course, not every child matures into middle childhood by age six. However, the legal age for children to exercise custodial choice should be younger rather than older, because children are the relatively disempowered parties as compared to parents in custodial proceedings, and children therefore deserve the benefit of an advantage. I have no doubt that where their child wants to live with the co-parent, there will be parents who strive to prove that the child is not mature enough to exercise choice. Such a scenario would be no more than a replay of the nineteenth century struggle over "tender years." Some of those parents may be right. Yet undoubtedly, the efforts of parents to prove their child's immaturity would succeed more often than efforts of children trying to prove their capacity to exercise choice ahead of schedule. Given the legal disadvantage children face, the age of choice is most appropriately set at the youngest reasonable age.

C. The Argument from Pragmatics

Child custody cases present peculiar practical problems for courts. Unlike most civil cases, which require retrospective judgments about past facts, child custody cases require prospective judgments about ongoing human relationships. Further, the adversarial nature of divorce inevitably exacerbates the very tensions it strives to resolve. In this context, a rule of child custody should meet three pragmatic criteria. First, it should be consistent with the child's best interests. Second, it should be substantially fair to the parents. And third, it should be predictable and clear enough to facilitate negotiation and settlement, reducing the amount of stressful and costly litigation, and responding to the unique facts and circumstances of each case. The rule of children's choice meets all three concerns.

While the state properly acts in its \textit{parens patriae} function to remove a child from the custody of an abusive or neglectful parent to whom the child remains stubbornly loyal, the typical divorce-related custody dispute involves two fit parents. When both parents are eager to be active custodians of the child and are competing for custody, any choice the child makes is necessarily consistent with his best interests. In this context the child's exercise of self-determination poses no greater risk to his well-being than if the choice were made by the parents.
While no choice can possibly maximize all benefits (for affection and discipline, work and recreation, adventure and stability) "best interests" practice never strives for this impossible ideal. Rather, the majority of custodial allocations are arranged through interparental negotiations and routinely "so ordered." Any choice the child makes would be acceptable if made by the parents. The difference is that the child exercises the right of choice, thus facilitating his development as a person.

Some might argue that children are too nearsighted to assess the long-range implications of their choices, and too young to be held to the long-range consequences of their decisions. However, custodial placements may always be changed upon a showing of changed circumstances; and children are at least as likely to choose wisely as parents engaged in a heated custody battle, or judges lacking firsthand knowledge of the family. Others contend that children's choices may be motivated by concern for the needs and feelings of one parent or anger at the other, rather than by pure, rational egocentrism. But these are the same emotions that propel divorcing parents. Thus, to deny children the right to choose because that choice is based on altruism or animosity discriminates against them.

Further, a rule of children's choice would encourage out-of-court settlements of custody disputes, thereby decreasing the number of children who would experience any anxiety or guilt about testifying as to their preference. Most parents know what the child's choice is without even having to ask.321 Where parents are unaware of their child's wishes they could consult the child in an intimate family setting or, at worst, in an informal setting with the lawyers present. The child would have time to decide or to change her mind. Rarely would a parent then go to court knowing that the child's preference, it being dispositive of the case, was against her.322

Moreover, under the rule of children's choice, the child's preference is not merely evidence, but is treated as dispositive, eliminating the need for pointed questioning or stressful examination and cross-examination.323 The child need only be asked simple, straightforward questions regarding his life and relationship with his parents following the

321. GADNER, supra note 314, at 173.
322. The need for a child to state a preference in court could be further reduced by a rule that required parents to make a showing, prior to bringing the matter to court, that the child had stated inconsistent preferences, that the child was unable to decide, or that, for good reason, neither they nor their attorneys had been able to ask the child.
323. Undoubtedly, some parents will challenge the child's right of choice on the basis of undue influence, manipulation, parent alienation syndrome, or some similar theory. Consistent with both the respect for the child's choice expressed in this article, and the concern for the emotional stress on children (and adults) involved in court appearances, I would require a steep preliminary showing before granting an evidentiary hearing on such a motion.
divorce.\(^3\)\(^2\)\(^4\)

The rule of children's choice may serve the children's interests during the period of divorce by involving them in discussions of domestic rearrangements.\(^3\)\(^2\)\(^5\) Research shows that parenting competency diminishes during a divorce (parents becoming more dictatorial or more laissez-faire in their style) as parents tend to ignore their children's needs and concentrate on their own problems. Parents' knowledge that children play a significant role in the ultimate custody question may lead them to take their children more seriously, and show them increased concern and respect during this difficult time.\(^3\)\(^2\)\(^6\)

The rule of children's choice is also fair to parents. Where there is a significant disparity in the strength of the parent-child bonds, a child will, in all likelihood, choose to live with the psychological parent, unless she has a reason for feeling a need to separate from that parent. Often, the psychological parent will also be the primary caretaker. The child will recognize and the choice will reflect the difference in the quality of caretaking time between the parents. The rule of children’s choice is likely to reward a parent's investment of love and shared experiences with a child in a way which the judicial eye can only approximate.

Unfairness to one parent is a risk if the other parent tries to "unduly influence" the child's choice.\(^3\)\(^2\)\(^7\) However, if "influence" consists in showering attentions on the child during the divorce period (spending quality time in shared activities or providing extra help with homework), it should be encouraged rather than lamented. Another possibility is that a parent tries to influence a child by "buying her off" with toys, presents, or permissiveness without any corresponding sincere effort to establish a quality relationship. I think it is unlikely children will be

\(^3\)\(^2\)\(^4\) E.g., "Where do you want to live? What interests, activities, concerns are most important to you? When do you want to be with mom? With dad?"

\(^3\)\(^2\)\(^5\) See Note, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce, 87 YALE L.J. 1126, 1163-64 (1978) (stating exclusion from the decision-making process may make children angry and depressed).

\(^3\)\(^2\)\(^6\) Furthermore, parents may cope better by focusing on their children rather than on their own inner turmoil.

\(^3\)\(^2\)\(^7\) See Siegel & Hurley, supra note 4, in which the authors state:

> In determining the appropriate weight to give an expressed preference, the courts will closely scrutinize those factors which have influenced the child in making his choice, since the possibility exists that the preference was based on undesirable or improper influences. The young child in making a choice can easily be influenced by immature desires for less discipline although such discipline is reasonable and is in the child's best interests. Other more insidious influences on the child's choice involve conduct by the parents to manipulate the decision.

\( Id.\) at 10-11. For cases discounting the child's choice because of the parents' behavior, see Gregory v. Gregory, 292 So. 2d 50, 51-52 (Fla. 2d DCA 1974); Smith v. Smith, 133 N.W.2d 677, 681 (Iowa 1965); Wallis v. Wallis, 200 A.2d 164, 166 (Md. 1964); Davis v. Davis, 355 P.2d 572, 574-75 (Okl. 1960); Neal v. Medcalf, 244 S.W.2d 666 (Tex. Civ. App. 1951).
fooled by their parents. There is no reason to suspect that children cannot perceive who really cares about them. They are at least as likely to reject pandering without genuine affection as they are to fall for it. However, it may be that one genuinely involved parent has significantly greater financial resources to provide things and activities for the child during the divorce period than the other, and uses those resources to make an appeal to the child for custody. The undue influence of financial inducement can be curtailed during the divorce period through *pendente lite* support orders, and/or by a stipulation or order that any such special presents or activities come from both parents.

Even if parents “compete” in the provision of quality parenting time, the child may still benefit from their involvement. Such competition is likely to be a healthier experience for the child than more hostile forms of rivalry and argument in which the parents might otherwise engage. True, a child may choose a previously disinterested parent who deliberately lavishes attentions during the divorce period while the other parent (who may previously have been the primary caretaker) is too busy, preoccupied, or emotionally distraught. But unless we replace the child’s “best interests” with parental rights based on “sweat equity,” this should not be negate the validity of the rule. A parent who attempts to win custody to spite the co-parent may be indifferent to the child after the divorce. This seems unlikely. A parent who seeks custody only as a financial bargaining chip or to get revenge on the co-parent is likely to drop the custody claim before the divorce is settled. In the unusual event such a parent wins custody, the other parent may motion the court to change custody.

More serious, yet presently more speculative, risks are posed by the possibility of a lasting taint to the emotional relationship between the child and the parent. For example, one parent may “poison the child’s mind” against the other parent. Parents efforts at mental manipulation occur even under present custody rules, and are difficult, perhaps impossible, to police. However, they can be curtailed by strict sanctions for contempt. A still more serious risk is that the parent whom the child does not choose as primary custodian may remain hurt and resentful for

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328. See, e.g., Bhama v. Bhama, 425 N.W.2d 733 (Mich. Ct. App. 1988). Several colleagues who have read or heard earlier versions of this article find the possibility of “mind poisoning” to be the most problematic aspect of “children’s choice.” While I have given serious attention to this concern, I remain convinced that the risk of such manipulation would not be significantly greater than it is under the present rule.

329. The rule of children’s choice might indirectly affect the parents’ negotiations about assets and support. A parent who was known to be the child’s chosen one, could use that knowledge to extract financial concessions from the other parent. However, since such leverage would mean more funds for the primary custodial parent, any interparental un fairness would be balanced by the advantage to the child’s interest.
a long time, rejecting or distrusting the child rather than being the involved parent she otherwise would have been. Under present custody rules, such resentment is usually directed less malignantly at the ex-spouse or at the court.

On balance, despite some risk that one parent might unduly influence a child against the other parent, the rule of children's choice would basically work substantive justice for parents because of the likelihood that a parent's investment of love and labor in the child will be rewarded in the child's choice. The rule of children's choice is also likely to improve the procedural fairness of the child's input from the parents' perspective. Typically, children are interviewed in camera by the judge through indirect questions, usually without the parents' attorneys present, and often no transcript (or even notes) of the interview are made. This practice, usually rationalized as protecting the child from courtroom induced trauma, raises genuine concerns of due process for parents. Through indirect questioning, judges may misinterpret children's preferences, or garner information beyond the scope of the case which influences their decision—all shielded from cross-examination and appellate review. The rule of children's choice would protect the child from lengthy cross-examination, while safeguarding the parents' due process rights.

A rule of children's choice would certainly be sensitive to the specific facts-and-circumstances of each case. Judges can only strive to understand the dynamics of family relationships and the desires and needs of the children in a time of heightened stress, through the exaggerated scenarios of the family presented by adversary attorneys, and upon the recommendations of mental health experts who may have briefly seen the members of the family. On the other hand, the child has known his parents for a lifetime, and has experienced the family divorce from the eye of the storm. It takes only a minimal respect for the child to realize that the choice of the child reflects a more profound sensitivity to the particular case than any expert or judge can claim.331

330. A survey of 26 Michigan judges found that more than 50% asked indirect questions designed to elicit information inferentially; 64% would not allow attorneys to be present; and 54% made no stenographic record of the interview. Of this 54%, 29% kept no record whatever of the interview. Frederica K. Lombard, Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study, 17 U.C. DAVIS L. REV. 807, 813-816 (1984).

331. One of the most interesting and least predictable results is what effect the rule of children's choice might have on sibling relationships. Sibling relationships, like children's choice, is an understudied area and it is possible only to suggest possibilities. Although there is virtually no conclusive research on sibling relationships in the divorce context, some research indicates that, during the circum-divorce period, siblings behave more antagonistically and aggressively than cooperatively towards each other. See, e.g., E. Mavis Hetherington, Coping with Marital Transitions: A Family Systems Perspective, in COPING WITH MArITAL TRANSITIONS 1,7 (E.
The rule of children's choice, however, should be subject to certain limitations. It should be triggered only where the parents cannot agree to a custodial allocation. Because adults unwilling or unable to accept caretaking responsibilities are likely to perform them half-heartedly or inadequately, custodial choices should be posed to children only in the form that parents are willing to accept. If one or both parents is unwilling to have joint custody, the choice should be posed as an alternative between maternal and paternal custody. Finally, a child who is definitely unable or unwilling to state a preference should not be forced to make one. The jurisdiction's best interests test would be a default rule when parents cannot agree and the child cannot state a preference.332

IV. CONCLUSION

In this Article I have suggested a rule of children's choice in custody determinations: as between fit parental custodians who cannot agree on the child's custody, the choice of children six years old and older should be legally dispositive as to their custody. I have demon-
strated that constitutional jurisprudence and the insights and theories of developmental psychology support the rule of children's choice. I have also shown that the rule has practical advantages over existing discretionary or presumptive variants of the "best interests" doctrine. It is simultaneously sensitive to the facts and circumstances of each case, predictable and certain enough to foster settlement, fair to the parents, and good for the child.

I have also used the proposed rule of children's choice to illustrate a deep disservice to children in the present marriage of law and psychology. I have shown that, despite the seeming objectivity of this interdisciplinary union, the answers which the law gets from psychology are significantly shaped by the questions asked, and these questions are determined by a legal vision of the child as delicate, incompetent, and at risk. I have called this vision the protectivist/patienthood paradigm and, tracing its roots through the nineteenth century, I have shown that it unjustifiably denigrates the personhood of the child, depriving children of their fundamental liberty and decision-making autonomy. I propose an alternative empowering vision of the child as a developing person—a view more compatible with fundamental constitutional values of identity and autonomy—and show, using the rule of children's choice as an example, that when the law poses questions to psychology from the basis of the empowerment/personhood paradigm, it gets very different answers.