

# INTRODUCTION

## FEMINIST JURISPRUDENCE AND CHILD-CENTERED JURISPRUDENCE: HISTORICAL ORIGINS AND CURRENT DEVELOPMENTS

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In its initial conception, this Symposium was intended to explore two jurisprudential threads—theories of “feminist jurisprudence” and theories of what may be called “child-centered jurisprudence.”<sup>1</sup> The participants in the live Symposium represent some of the leading practitioners in their respective fields. Annette R. Appell is Associate Dean of Clinical Affairs and Professor of Law at Washington University Law School in St. Louis.<sup>2</sup> She has focused on the child welfare system, adoption, mothering, race, and children’s rights, representation, and justice. She is especially interested in the construction of childhood and the role of children in the distribution of social, economic, and legal justice. Martha Albertson Fineman is the Robert W. Woodruff Professor of Law at Emory University School of Law. She is a leading authority on feminist jurisprudence and family law.<sup>3</sup> Martin Guggenheim is the Fiorella LaGuardia

1. Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 485, 487 (1996); see also June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1298–99 (2005) (describing the Connecticut Supreme Court’s use of “after-the-fact decision-making” of what best meets the needs of a child as “consistent with the calls of many of the most prominent family law theorists for a child-centered jurisprudence”); Joan M. Smith, *A Child-Centered Jurisprudence: Reconciling the Rights of Children and Parents Within the Family*, in CHILDREN AS EQUALS 145, 154–57 (Kathleen Alaimo & Brian Klug eds., 2002) (recommending a judicial approach to children that takes into account their individual capabilities, and requires their advocates to be sufficiently familiar with the children to accurately represent them); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1748–49 (1993) (positing that the current legal rights of parents “undermine those values of responsibility and mutuality necessary to children’s welfare”).

2. See Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 703 n.\*(2009).

3. Audio tape: Martha Albertson Fineman, *Vulnerability Theory: Beyond Equality*

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One idea behind the Symposium was that we might explore "tensions" or "connections" between the two legal approaches. As the project developed, first in its live version and now in this written version, the challenges of the enterprise became clearer. While feminist jurisprudence has been elaborated into a number of well-established variants since the 1970s, what we now call child-centered jurisprudence has yet to be characterized more fully because children's voices are not heard in the same way as those of adult women. Historically, however, both approaches arose from critiques of the common law treatment of women and children in the family. Moreover, as the contributions to this Symposium demonstrate, today's advocates seek legal theories and social policies that do not pit the needs of women against the needs of children, but rather are simultaneously both woman-centered and child-centered, and that also serve the interests of families and society together.

While the excellent articles published in this Symposium issue speak for themselves, this Introduction offers some historical context for the contemporary developments reflected in those pieces.

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in *Assessing the Interests of Mothers and Children*, Conference on Child Centered Jurisprudence and Feminist Jurisprudence: Exploring the Connections and the Tensions, held by the Center for Children, Law & Policy and the University of Houston Law Center (Nov. 14, 2008) (on file with Houston Law Review), available at <http://www.law.uh.edu/center4CLP/events/feminist-child-centered-jurisprudence-conference-2008/audio.asp>.

4. Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 759 n.\* (2009).

5. Audio tape: Angela P. Harris, *Five Generations: Child Sexual Abuse and the Search for Transformative Justice*, Conference on Child Centered Jurisprudence and Feminist Jurisprudence: Exploring the Connections and the Tensions, held by the Center for Children, Law & Policy and the University of Houston Law Center (Nov. 14, 2008) (on file with Houston Law Review), available at <http://www.law.uh.edu/center4CLP/events/feminist-child-centered-jurisprudence-conference-2008/audio.asp>.

6. Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism and Vulnerability*, 46 HOUS. L. REV. 817, 817 n.\* (2009).

## I. FEMINIST JURISPRUDENCE: ORIGINS AND DEVELOPMENT

A. *The Core Principles of Feminism, Then and Now*

Before there was feminist jurisprudence, there were political movements for women's rights. As a result, in an historical sense it may be said that there is a clear set of defining principles of feminism. In her book entitled *The Grounding of Modern Feminism*, historian Nancy Cott contended that what may be called feminism in American history has "three core components, none of them highly exact":

First is belief in what is usually referred to as sex equality [or] opposition to sex hierarchy. . . . Second [is a] presuppos[ition] that women's condition is socially constructed, that is, historically shaped by human social usage rather than simply predestined by God or nature. . . .

. . . [T]hird [is a thesis] that women perceive themselves not only as a biological sex but (perhaps even more importantly) as a social grouping. Related to that understanding is some level of identification with "the group called women," some awareness that one's experience reflects and affects the whole. The conviction that women's socially constructed position situates [women] on shared ground enables the consciousness and the community of action among women to impel change.<sup>7</sup>

According to Professor Cott's analysis, feminists of the nineteenth century "First Wave" of the women's rights movement and their successors in the twentieth century "Second Wave" all subscribed to some version of these core principles of equality, social construction of women's status, and self-conscious identity politics.<sup>8</sup>

B. *The Common Law Background: Law of the Family and the Separate Spheres Doctrine*

In early national America, the U.S. Constitution was largely irrelevant to the rights of women and children. Instead, common law (with its regional variations) determined the legal status of free white women and children, and the positive law of slavery dictated the fate of non-free black women and children.<sup>9</sup> The

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7. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 4-5 (1987).

8. *See id.* at 5-7 (positing that modern feminism is shaped by core values that became defining elements in the 1910s and 1920s, but that were actually formulated through earlier efforts).

9. In Texas and other states influenced by Hispanic or French law, the marital

common law was highly gendered, operating mostly through the law of husband and wife or marital status. Marriage carried all kinds of legal consequences. The common law model rested on the twin ideas of “marital unity” and “coverture.”<sup>10</sup> Once a woman married a man, they became legally as one (marital unity).<sup>11</sup> Moreover, the woman largely lost her separate legal identity, entering into a state of coverture or “civil death.”<sup>12</sup> She could no longer make contracts without the joinder of her husband, sue or be sued without the husband’s participation, or manage and control her real and personal property, which was in the sole discretion of her husband.<sup>13</sup> This was even true in a state like Louisiana that had a civil law influenced code that gave wives a community ownership interest in property acquired by either party during the marriage.<sup>14</sup> Under marital unity law, it was presumed that if a wife committed a crime in the presence of her husband, she did so by his direction (and therefore had less or even no criminal responsibility).<sup>15</sup> Once a woman consented to sexual intercourse by marrying her husband, she had no ability

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property regime included community property. *See, e.g.*, GRACE GANZ BLUMBERG, *COMMUNITY PROPERTY IN CALIFORNIA* 90–97 (3d ed. 1999) (noting that the 1850 California community property law gave the husband unlimited managerial control over his wife’s separate property, except that he could not convey or encumber it without her consent); MARK M. CARROLL, *HOMESTEADS UNGOVERNABLE* 129–30 (2001) (documenting the Texas legislature’s desire to protect frontier women by limiting a husband’s ability to unilaterally dispose of his wife’s property). For a discussion on black families, see HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925* (1976).

10. *See* Laura Oren, *Marriage*, in *HANDBOOK OF AMERICAN WOMEN’S HISTORY* 353, 353 (Angela Howard Zophy & Frances M. Kavenik eds., 1990); *see also* NORMA BASCH, *IN THE EYES OF THE LAW: MARRIED WOMEN’S PROPERTY RIGHTS IN NINETEENTH-CENTURY NEW YORK* 26 (1982) (commenting on the early notion of a woman’s disability through the common laws associated with marriage). The standard English treatise was WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1769). The first American treatise was TAPPING REEVE, *THE LAW OF BARON AND FEMME* (1816). For another early American treatise discussing the marital relationship, see 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 109–10 (9th ed. 1858) (1826).

11. Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 *VAL. U. L. REV.* 859, 861 (2005).

12. *Id.* at 861–62.

13. MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 14–15, 41–42 (1986). Depending first on the colony and then on the state, there were various mechanisms available to modify the regime of property management. *See id.*, at 3–13 (examining the diversity in laws governing the property rights of women in early America).

14. *See* *Kirchberg v. Feenstra*, 450 U.S. 455, 456–59 (1981) (describing a Louisiana law in effect until 1980 “granting the husband exclusive control over the disposal of community property”). In *Kirchberg*, a husband unilaterally mortgaged the couple’s community property house in order to pay attorney’s fees in his trial for assaulting his wife. The Supreme Court invalidated Louisiana’s husband-only community property management law for violating the Equal Protection Clause. *Id.* at 456–61.

15. LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* 14 (1998).

to rescind or modify that consent.<sup>16</sup> In other words, there was no such thing as marital rape.<sup>17</sup> Husbands enjoyed the right of moderate physical chastisement over their wives (and, of course, over their children).<sup>18</sup> Fathers also enjoyed the right of custody over their children and the right to the fruits of their labor.<sup>19</sup> In cases of conflict with their husbands, separation, or divorce, mothers generally had no control over their children.<sup>20</sup> Husband-fathers had the sole right to determine domicile for the whole family.<sup>21</sup> Because women and children were their dependents, however, husband-fathers also had obligations to them. Married fathers were required to support their children,<sup>22</sup> and husbands had to support their wives.<sup>23</sup> In addition to these restrictions arising from marital status, all women lacked important rights of citizenship. With little exception,<sup>24</sup> although they were citizens, even white women could not vote. They could not be elected to office or serve on juries.<sup>25</sup> They had no independent voice, but had to be satisfied with the virtual representation of their interests by their husbands and fathers.<sup>26</sup> Non-free women did not have to

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16. *E.g.*, *State v. Haines*, 25 So. 372, 372 (La. 1899) (“[T]he husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.”).

17. The requirement that the victim not be the spouse of the accused remained an element of sexual assault in Texas until September 1, 1991. *See* Act of Sept. 1, 1991, 72d Leg., R.S., ch. 663, § 1, 1991 Tex. Gen. Laws 2412 (codified as amended at TEX. PENAL CODE ANN. § 22.011).

18. 1 BLACKSTONE, *supra* note 10, at \*444–45.

19. MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 235–36 (1985).

20. *Id.* at 235–36.

21. *See id.* at 25.

22. 1 BLACKSTONE, *supra* note 10, at \*447; *see* GROSSBERG, *supra* note 19, at 197 (describing how nonmarital children were considered *filius nullius* and therefore did not have the same right of support as children born to a marriage). The differential treatment of children regarding the support obligation was not overturned until a series of equal protection cases, culminating in *Clark v. Jeter*, 486 U.S. 456, 464–65 (1988), which held that imposing a six-year statute of limitations on nonmarital children seeking child support violated the Equal Protection Clause.

23. 1 BLACKSTONE, *supra* note 10, at \*443. Other legal doctrines also protected dependent wives to a greater or lesser degree. Wives had a dower interest in the family’s real property. SALMON, *supra* note 13, at 18. In common law separate property states, wives who were left out of their husbands’ wills nonetheless could claim an elective share of the real property, typically one third. *Id.* at 141.

24. New Jersey women who owned property could vote until the state legislature disfranchised them in 1807. *See* SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY* 201–02 (2005).

25. JOAN HOFF, *LAW, GENDER, AND INJUSTICE* 224–27 (1991) (examining the history of restrictions on women’s right to serve on juries).

26. In declaring their independence from Britain, the American rebels rejected the theory that their interests were protected in Parliament through “virtual representation.” WILENTZ, *supra* note 24, at 8; *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–87

contend with the doctrine of marital unity. That is because the law of slavery refused to give any legal recognition whatsoever to the marriages of people of color.<sup>27</sup> They were merely chattel and consequently enjoyed no legal autonomy.<sup>28</sup> Non-free women could not control the labor or sexuality of their own bodies,<sup>29</sup> or the disposition of their children.<sup>30</sup> They could express their agency through running away or other forms of resistance, but the law did not recognize these acts.<sup>31</sup>

Women played an important economic role in American life, especially on farms, but also as the wives and daughters of artisans and merchants. Daughters of New England farmers became the first factory workers, some of them living in dormitories beside water-powered mills.<sup>32</sup> However, despite their productive contributions either outside or inside the home, the idea of “separate spheres” (although its content changed over time) meant that women were associated with family and children in the “private sphere” and men occupied the “public sphere” of law, politics, and most waged labor.

### C. *The First Feminists’ Critique of the Separate Spheres*

The Enlightenment ideals of equality expressed in the Declaration of Independence, the evangelical reform passion of the Second Great Awakening, and the organizing lessons learned in the antislavery movement helped to inspire the First Wave of

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(2002) (discussing the virtual representation discourse of antisuffragists during the late nineteenth and early twentieth centuries).

27. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 301 (2006); see also, e.g., *State v. Samuel*, 19 N.C. (2 Dev. & Bat.) 177, 183 (1836) (holding that there was no testimonial privilege between married slaves because slave marriage was not recognized by law).

28. E.g., *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829) (holding that there was no liability for assault of a slave, although the owner had a right to damages under the doctrine of bailment); *State v. Boon*, 1 N.C. (Tay.) 191 (1801) (holding that, while subject to other laws against the killing of a slave, general laws of murder do not apply to those who kill slaves); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM 186–89* (4th prt. 1950) (1947) (describing the Black Codes, which governed “every aspect of the life of the slave. . . [from] the point of view . . . that slaves were not persons but property . . .”).

29. See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 199 (1987) (noting that the law did not recognize rape of a slave woman as a crime).

30. Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)Productivity*, 19 YALE J.L. & FEMINISM 1, 3–4 (2007).

31. E.g., U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII; Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462; ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 207–08 (1975) (describing the failure of challenges to the Fugitive Slave Acts).

32. SARA M. EVANS, *BORN FOR LIBERTY* 82–83 (1989).

the women's rights movement.<sup>33</sup> This was manifested at the Seneca Falls Conference in 1848 where feminist women (and their male abolitionist allies) issued a Declaration of Sentiments, patterned on the Declaration of Independence.<sup>34</sup> In it, they condemned the disabilities that the law imposed upon women, presenting a list of indictments that touched on everything from property ownership and work, to divorce and child custody, to education and the double moral standard, to juries and the vote.<sup>35</sup> According to these feminists there was nothing "natural" or divinely ordained that required unequal treatment of women at law. Instead, the women and men of the First Wave of the women's rights movement saw this as just another instance of the kind of tyranny that masters exercise over their dependents. This First Wave believed that by the principles of self-governance and popular sovereignty, women should have the same ability as men to operate in the public sphere.<sup>36</sup>

#### D. *The Separate Spheres After the Civil War*

For a variety of reasons, the political movement against the separate spheres and in favor of women's equality did not succeed in the mid-nineteenth century.<sup>37</sup> The "new revolution" of the Reconstruction (with its three great constitutional amendments and many civil rights statutes) did not encompass women (and later suffered setbacks itself).<sup>38</sup> Women's rights

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33. See HOFF, *supra* note 25, at 135 (describing how the Second Great Awakening and the Abolitionist movement paved the way for the First Wave).

34. Seneca Falls Declaration of Sentiments and Resolutions, *reprinted in* THE AMERICAN READER 153, 153–54 (Diane Ravitch ed., 2d ed. 2000) (1848) [hereinafter Declaration of Sentiments].

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

*Id.* For background information on the conference and the activists involved, see ELEANOR FLEXNER, CENTURY OF STRUGGLE 41–77 (4th prt. 1970) (1959).

35. Declaration of Sentiments, *supra* note 34, at 154–56.

36. *Id.* at 158 ("Resolved, That woman has too long rested satisfied in the circumscribed limits which corrupt customs and a perverted application of the Scriptures have marked out for her, and that it is time she should move in the enlarged sphere which her great Creator has assigned her.").

37. *E.g.*, *Minor v. Happersett*, 88 U.S. (1 Wall.) 162, 177–78 (1874) (holding that women had no right under the Fourteenth Amendment to vote); *Bradwell v. Illinois*, 83 U.S. (1 Wall.) 130, 138–39 (1872) (ruling that women had no right under the Fourteenth Amendment to become lawyers).

38. See Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 836, 847–48 (1987) (describing feminists' failed attempts to promote a concept of universal suffrage).

activists continued to organize after the 1870s, but they began to focus more narrowly on the vote as the most important political right.<sup>39</sup> After a long struggle, the Nineteenth Amendment was ratified in 1920.<sup>40</sup> In the meantime, there were gains in terms of control of property and in other family law doctrines that seemed to favor women. Starting in the late 1830s, states adopted waves of Married Women's Property Acts (MWPAs), which gave wives a limited ability to control their own property, if they were lucky enough to own property in the first place.<sup>41</sup> Sometimes the impetus behind these reforms was more about sheltering a portion of a family's property from debt and the claims of creditors in the face of recurring economic crises than it was about equality.<sup>42</sup> The 1860 New York MWPA, however, was inspired by feminists who argued that women needed to be able to control their own wages in order to protect themselves and their children from irresponsible, and perhaps drunken, husbands.<sup>43</sup> As family law developed into a discrete focus in the late nineteenth century, mothers received more consideration for custody of their children. Michael Greenberg, however, argues that the "tender years presumption" (automatically granting custody of children under a certain age to the mother in a divorced family) and other developments were attributes of "judicial patriarchy" in that they gave the *courts* more authority to make decisions concerning children's welfare.<sup>44</sup> Despite the eventual decline of the doctrines of marital unity and coverture, and despite the achievement of the vote and surges in women's education and workforce participation, the law remained highly gendered well into the twentieth century. Even progressive class legislation such as the protective labor laws of the early twentieth century only reinforced the legal distinctions between

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39. FLEXNER, *supra* note 34 at 164.

40. U.S. CONST. amend. XIX.

41. See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1397-1400 (1983) (describing early development of MWPAs).

42. Norma Basch, *Equity vs. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson*, 3 J. EARLY REPUBLIC 297, 311-13 (1983); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2135-36 (1994).

43. See Siegel, *supra* note 42, at 2144 (noting that the demand to protect a woman's wages from a profligate husband was a tactical shift from earlier appeals for a broader range of reforms including suffrage and joint property rights).

44. Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235, 246-48 (1983) (explaining that the trend toward maternal custody "shifted the locus of patriarchal authority much more than [it] challenged the subordinate status of women"); GROSSBERG, *supra* note 19, at 289-90 (analyzing the judiciary's role in the nineteenth century as a "buffer and referee between the family and the state").

men and women.<sup>45</sup> To a significant degree, women retained their association with dependency and the private sphere of the family. Inspired in part by a new civil rights revolution (the “Second Reconstruction”), starting in the 1960s and especially by the mid-1970s, a Second Wave of organized feminist political and legal activity was required to address the many remnants of the separate spheres.

*E. The Politics and Sources of the Second Wave of the Women’s Rights Movement*

The changes came from two chief sources. By the 1960s, there was a professional women’s movement, perhaps best represented by Betty Friedan, founder of the National Organization for Women (NOW).<sup>46</sup> Its first legal milestone was the passage of the Equal Pay Act of 1963.<sup>47</sup> The Equal Pay Act was a modest product of the recommendations of the U.S. Commission on the Status of Women, appointed by President Kennedy and led by Eleanor Roosevelt.<sup>48</sup> The 1960s was also the era of a new civil rights revolution (sometimes called the Second Reconstruction).<sup>49</sup> After the assassination of President Kennedy, Congress passed the Civil Rights Act of 1964.<sup>50</sup> The original bill for Title VII, which prohibits employment discrimination on the basis of race, religion, or national origin, was amended on the floor of Congress to make “sex” a prohibited ground as well.<sup>51</sup>

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45. See *Muller v. Oregon*, 208 U.S. 412 (1908). In *Muller*, the strategy was to argue that women, unlike men, were not free agents in the marketplace, in order to make an opening wedge into the substantive due process liberty of contract doctrine. This was successful and the Court upheld the regulation of women’s hours and labor conditions. *Id.* at 422. Even with the renunciation of the liberty of contract doctrine and limitations on the Commerce Clause during the New Deal, which permitted widespread regulation of labor conditions, gender distinctions remained. Laura Oren, *Honor Thy Mother?: The Supreme Court’s Jurisprudence of Motherhood*, 17 HASTINGS WOMEN’S L.J. 187, 205–07 (2006).

46. See EVANS, *supra* note 32, at 274–75, 277 (describing the emergence of the “new feminist sensibility” in the 1960s and 1970s).

47. *Id.* at 275.

48. *Id.* at 274–75.

49. *Id.* at 272–74; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1404 n.236 (1991).

50. Civil Rights Act of 1964, Pub. L. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 42 U.S.C.).

51. EVANS, *supra* note 32, at 276; see also Cynthia Deitch, *Gender, Race, and Class Politics and the Inclusion of Women in Title VII of the 1964 Civil Rights Act*, 7 GENDER & SOC’Y 183, 186 (1993) (recounting conservative lawmakers’ inclusion of sex in the bill as an attempt to derail civil rights legislation).

However, there were no effective regulations regarding sex-based discrimination until after 1972.<sup>52</sup>

Also beginning in the late 1960s, and also associated with the revived civil rights movement, there was another source of women's rights activity. This was associated with a younger and more radical group of women.<sup>53</sup> Some of them gained experiences in the direct action civil rights movement in the South, which led them to find parallels between racial and sexual inequality. From their experiences, they also took what became the signature organizing technique of the "women's liberation" movement: "consciousness-raising."<sup>54</sup> The critical point of consciousness-raising was to challenge the private-public split with the idea that "the personal is political."<sup>55</sup> What this meant was that when women got together to talk about allegedly private experiences and issues, they discovered instead that there was a public or political dimension to them. The issue of abortion serves as a good example. The radical women's organization called "The Redstockings" held an "abortion rap" in 1969 at which women told stories about their own abortions.<sup>56</sup> Feminist lawyers followed up with litigation in New York in which they insisted that women (not doctors or clerics) were the real experts on this issue and that they had the right to speak, testify, and decide for themselves.<sup>57</sup>

#### F. *The Elaboration of Feminist Jurisprudence*

The organized activity of the Second Wave of the women's movement was reflected in the elaboration of theories of feminist jurisprudence. While the constitutional guarantees in the Fourteenth Amendment might seem a logical support for women's rights, in the 1870s First Wave feminists had failed dramatically in their efforts to use the Privileges and Immunities Clause to vindicate their claims to work as attorneys or to vote.<sup>58</sup>

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52. EVANS, *supra* note 32, at 291.

53. SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* 156-57 (1979).

54. *A CIRCLE OF TRUST: REMEMBERING SNCC* 130-31 (Cheryl Lynn Greenberg ed., 1998).

55. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 190-91 (1989).

56. DIANE SHULDER & FLORYNCE KENNEDY, *ABORTION RAP* 3-4 (1971).

57. *See id.* at xv-xvi, 4. These lawsuits were mooted when the New York legislature passed a "reformed" abortion law. *Id.* at 178. In turn, the law was mooted by *Roe v. Wade* in 1973. *Roe v. Wade*, 410 U.S. 113 (1973).

58. *See Minor v. Happersett*, 88 U.S. (1 Wall.) 162 (1874) (holding that women had no privilege or immunity under the Fourteenth Amendment to vote); *Bradwell v. Illinois*,

It also seemed that neither the Equal Protection nor Due Process Clauses offered any better chance of defeating gendered laws until after 1970.<sup>59</sup> Although women gained the right to vote with the Nineteenth Amendment in 1920, the Equal Rights Amendment drafted by Alice Paul in 1923 as a follow-up went nowhere.<sup>60</sup> In the early 1970s, however, this constitutional wasteland began to change. Feminist practitioners and theorists such as Ruth Bader Ginsburg (and the American Civil Liberties Union Women's Rights Project (WRP) headed by Ginsburg) made progress. They unsuccessfully sought "strict scrutiny" of sex-based laws.<sup>61</sup> However, the Supreme Court reviewed some sex-based legislation with a jaundiced eye as early as 1971 and soon began invalidating such laws with increasing frequency.<sup>62</sup> Eventually, it ruled that all such classifications were subject to "intermediate" scrutiny.<sup>63</sup> In 1973, the Court decided a case brought by the young lawyer Sarah Weddington, who came out of the younger women's liberation branch of the movement.<sup>64</sup> The case, *Roe v. Wade*, resulted in the Court's holding that a state could not bar a woman from exercising her due process right to make a decision about continuing or aborting a pregnancy without state interference, at least until the last trimester.<sup>65</sup>

In its theoretical form, feminist jurisprudence represented a critique of prevailing normative law, which purported to be natural and neutral, but really was not. Instead, law helped to socially construct gender in a way that reflected, reinforced, and imposed inequality and hierarchy. Feminists believe that law may revise the unequal social construction of gender. Women may be freed from a separate, privatized sphere in which they were allowed neither autonomy nor equality. The Ginsburg approach to this project was to attack gender stereotypes,

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83 U.S. 130, 137–39 (1872) (holding that women had no privilege or immunity under the Fourteenth Amendment to become lawyers).

59. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a state law that banned women from tending bar unless they were daughters or wives of a male bar owner); see also Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 881, 884 (1971) (despairing of any possible constitutional progress without passage of an independent equal rights amendment).

60. CHRISTINE A. LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS 164–67 (1986).

61. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (narrowly failing to adopt strict scrutiny for gender classifications).

62. E.g., *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

63. *Id.* at 218.

64. See SARAH WEDDINGTON, A QUESTION OF CHOICE (Penguin Books 1993).

65. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

demonstrating, for example, the fallacies of the alleged contrast between the wage-earner man (public sphere) and the home-keeper woman (private sphere).<sup>66</sup> The WRP successfully used this “formal equality” philosophy to persuade the U.S. Supreme Court to overrule laws that gave male wage earners benefits for their wives, who were irrebuttably presumed to be economically dependent, while denying female wage earners benefits for their husbands unless they *proved* economic dependency.<sup>67</sup> Formal equality insists that for virtually all relevant legal purposes women are more like than unlike men and should be treated the same. Gendered laws are subject to attack because they are likely to be based on unthinking stereotypes. They also pose the danger of perpetuating those stereotypes as excuses for unequal treatment.

Formal equality, however, has its own theoretical limits. It does not work very well in situations where men and women do not start out similarly situated in the marketplace or in society. Feminist jurisprudence therefore was also concerned with an overlapping demand for substantive equality. As it developed, Title VII jurisprudence came to reflect theories based on this approach. For example, it takes account of disparate impact (for sex as well as race), and not just the kind of disparate treatment that the Court says is forbidden by the Constitution’s Fourteenth Amendment.<sup>68</sup> Thus, a facially neutral rule that is not pretextual but nonetheless has a disparate, negative impact on a protected class is subject to challenge under Title VII.<sup>69</sup> Furthermore, in order to compensate for past disabilities imposed upon women, state or private employers may engage in affirmative action.<sup>70</sup>

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66. *Califano v. Goldfarb*, 430 U.S. 199, 216–17 (1977).

67. *E.g., id.* (invalidating under the Equal Protection Clause a gender-based provision of Social Security Act that allowed widows to receive benefits without proving that they had been economically dependent on their deceased husbands, while requiring widowers to prove their economic dependency).

68. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (“[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”).

69. *Id.* at 425–26, 436 (holding that an employer was prohibited from requiring a high school diploma or passing a standardized intelligence test when these requirements were not shown to be job-related and had a disparate impact on a protected class).

70. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996). As the Court in *Virginia* explained:

Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” [and] to advance full development of the talent and capacities of our Nation’s

Pregnancy, a condition unique to women, poses its own challenges. In the quest for an equality that takes women's biological differences into account, some feminist theorists defend special treatment for pregnant women. They argue that women should not bear the sole burden of having to choose between their reproductive and socially-productive roles, a handicap that men do not face. Therefore, the law should take sex into account, for example, in providing maternity leave or lactation policies.<sup>71</sup>

As they elaborated the jurisprudence, some feminists found the initial equality theories wanting. For example, Catharine MacKinnon criticized both wings of what she considered "liberal feminism": the "sameness" prong (women and men are alike) and the "difference" prong (take into account women's differences to promote their inclusion).<sup>72</sup> Instead, she argued that the real dynamic was power. She propounded a dominance/subordination theory.<sup>73</sup> Her primary question was how a law reinforces or combats female subordination. In a tour de force of persuasion, she induced first the Equal Employment Opportunity Commission (EEOC) and then the U.S. Supreme Court to accept her views about sexual harassment in the workplace.<sup>74</sup> She argued that this behavior potently combines two forms of subordination (in social-sexual and employment relationships) with the intent and purpose of keeping women in their place.<sup>75</sup> Sexual harassment that creates a hostile work environment burdens women and reinforces an unequal hierarchy; therefore, it should be considered unlawful under Title VII. She especially favored the Title VII form of remedy because, as a civil rights lawsuit, it put the tools to vindicate women's rights directly in women's hands, thereby promoting their agency.<sup>76</sup> While her view

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people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

*Id.* (first two alterations in original) (internal footnote and citations omitted); *Johnson v. Transp. Agency*, 480 U.S. 616, 641-42 (1987) (upholding county's affirmative action program under Title VII against challenge by male who was denied employment).

71. *E.g.*, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (upholding a California law requiring leave and reinstatement for employees disabled by pregnancy).

72. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination* (Oct. 1984), in *FEMINISM UNMODIFIED* 32, 34 (1987).

73. *Id.* at 40.

74. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (recognizing a hostile environment created by sexual harassment as violation of Title VII's prohibition on sex discrimination).

75. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1-2, 9-10 (1979).

76. Similarly, MacKinnon favored a civil pornography ordinance because it would put the remedy in the hands of the victim. *See* CATHARINE A. MACKINNON, Francis Biddle's Sister: Pornography, Civil Rights, and Speech (Apr. 5, 1984), in *FEMINISM*

on that prevailed, she failed dismally when she turned the same analysis to the problem of pornography. The U.S. Supreme Court affirmed the Seventh Circuit's view that creating a civil remedy against harms due to pornography failed the First Amendment test of content neutrality.<sup>77</sup> MacKinnon also had an interesting take on *Roe v. Wade*.<sup>78</sup> As the Supreme Court presented the issue, it was about due process, privacy, and autonomy, and not really about equality or equal protection of the laws.<sup>79</sup> The Court's emphasis on privacy, however, can be considered problematic in light of the centrality of the feminist attack on the separate spheres doctrine. The notion of the private sphere of the family can become a trap for women. After all, it was this idea of family privacy that justified a refusal to punish marital rape or wife-beating at common law (and continues to allow corporal punishment of children by their parents). MacKinnon contrasted the privacy ruling of *Roe v. Wade* with the Court's ruling in *Harris v. McRae*, in which the Court held that an indigent woman did not have the right to a *medically necessary* abortion, even if the state was willing to finance all other kinds of nonelective medical procedures.<sup>80</sup> MacKinnon concluded that "the *McRae* result sustains the meaning of privacy in *Roe*: women are

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UNMODIFIED, *supra* note 72, at 163, 283 n.52.

77. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324–25, 332 (7th Cir. 1985) (striking down, on First Amendment grounds, an Indianapolis antipornography ordinance that MacKinnon helped draft), *aff'd*, 475 U.S. 1001 (1986) (mem.).

78. MACKINNON, *supra* note 55, at 186–94 ("The logic of the grant of the abortion right . . . translat[es] the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy.").

79. *Roe v. Wade*, 410 U.S. 113 (1973). However, in his partial concurrence in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Blackmun argued:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."

*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part and dissenting in part) (quoting *id.* at 897 (majority opinion)) (other citations omitted).

80. *Harris v. McRae*, 448 U.S. 297, 311 (1980); MACKINNON, *supra* note, 55, at 186–87 ("It is apparently a very short step from that in which the government has a duty *not* to intervene, to that in which it has *no* duty to intervene.").

guaranteed by the public no more than what they can get in private—what they can extract through their intimate associations with men. Women with privileges, including class privileges, get rights.”<sup>81</sup> The Court’s due process privacy approach meant that “[w]omen were granted the abortion right as a private privilege, not as a public right.”<sup>82</sup>

MacKinnon’s critique of liberal feminism, however, drew criticism in turn. Inspired by insights from critical race theory and postmodernism, “nonessentialists” accused both liberal feminism and MacKinnon’s radical feminism of mistakenly treating women as a uniform class with identical interests. These critics labeled this fallacy “essentialism.”<sup>83</sup> Angela P. Harris has explained that by essentialism she means “[t]he notion that there is a monolithic ‘women’s experience’ that can be described independent of other facets of experience like race, class, and sexual orientation.”<sup>84</sup> The problem is a “voice that claims to speak for all.”<sup>85</sup> Nonessentialist feminists insist that race, class, and sexual preference make profound differences in the lives of women.<sup>86</sup> Poor women or women without independent means may choose not to prosecute their abusive male partners because the latter provide financial support for the women and their children. A legal policy that dictates mandatory prosecution of all abusers across the board, therefore, ignores the class dimension of women’s lives. It deprives some women of their voice and their agency in the name of protecting all women.

### G. *Feminists and Family Law*

Because of common law doctrines about marital unity and the governance of the household, the private family was a critical focus for First Wave feminists.<sup>87</sup> The Second Wave, with its challenges to outmoded stereotypes on the one hand, and its insight that “the personal is political” on the other, similarly called into question many remaining presuppositions about the

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81. MACKINNON, *supra* note 55, at 191.

82. *Id.* at 192.

83. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588–92 (1990).

84. *Id.* at 588.

85. *Id.*

86. *See id.* at 588–89 (lamenting the forced fragmentation of identity black women must endure when their experience is examined under MacKinnon’s essentialist framework of analysis).

87. *See* Oren, *supra* note 10, at 353 (examining women’s position in the family under common law).

private family.<sup>88</sup> The WRP pointed out that the neat role division between wage-earner husbands and homemaker wives no longer obtained.<sup>89</sup> Women's liberation took on the issue of domestic violence and attacked the idea that, because violence between spouses occurred within the private family, it was somehow outside of and unreachable by the public realm of law.<sup>90</sup>

Feminists of the nineteenth and twentieth centuries recognized the links between women's caretaking roles, dependency, and inequality. The First Wave feminists who campaigned for reform of married women's property rules in New York understood that women who could not control any of their own earnings were vulnerable, along with their children, in the face of irresponsible husbands and fathers.<sup>91</sup> They also sought to correct the one-sided view of child custody based on fathers' prerogatives in the family.<sup>92</sup> Feminists of the twentieth century also looked for reforms of family law. While it is misleading to claim that the "divorce reform revolution" that swept the nation after 1970 was part of a feminist agenda,<sup>93</sup> advocates for women quickly became aware of the unintended consequences of those changes in terms of equality and equity.<sup>94</sup> As divorce became easier to obtain and less dependent on proof of fault, legal critics observed that the more economically dependent party to the marriage lost leverage in negotiating the best post-divorce financial terms.<sup>95</sup> In reconfigured post-divorce families,

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88. MACKINNON, *supra* note 55, at 191–92.

89. See Ruth B. Cowen, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976*, 8 COLUM. HUM. RTS. L. REV. 373, 392 (1977).

90. See, e.g., ELIZABETH PLECK, DOMESTIC TYRANNY 125–26, 182–84 (U. of Ill. Press 2004) (1987) ("The rebirth of feminism was necessary for the rediscovery of wife beating. . . . [The women's movement] forced policymakers to consider remedies that had been unthinkable only a few years before."); LENORE E. WALKER, THE BATTERED WOMAN 205–21 (1979) (proposing ways to improve the legal system's treatment of abused women and their abusers).

91. See Siegel, *supra* note 42, at 2149 (detailing legislative reforms designed to give married women greater control over their personal property).

92. Grossberg, *supra* note 44, at 235–36 ("As a result of countless demands by women for their children, the traditional superiority given paternal custody and guardianship rights in England and colonial America became untenable.").

93. See Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130, 130 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (suggesting no-fault divorce advocates' central goal was to "rid domestic relations law of the bad features of the old system," not to insure the financial welfare of women).

94. See, e.g., LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 72–74 (1985) (revealing the significant drop in the amount of property awarded to women under no-fault divorce laws).

95. See *id.* at 29–30 ("The new economic reality [associated with no-fault divorce]

custodial mothers and their children typically enjoyed a lower per capita income than they had in the intact family, while many noncustodial fathers saw a rise in their per capita income.<sup>96</sup>

Beginning in the mid-1970s, there was renewed attention to child support.<sup>97</sup> This is attributable more to class-based anxieties about increases in public assistance than to a feminist agenda.<sup>98</sup> Indeed, the state's preoccupation with welfare dollars produced coercive laws that were very intrusive upon a woman's choices regarding her family relationships.<sup>99</sup> At the same time, however, the "feminization of poverty" was uncovered and the tools for child support enforcement were generalized even outside of the public assistance setting.<sup>100</sup>

The tender years presumption developed by courts acting in a *parens patriae* capacity in the late nineteenth century presumed that young children were generally better off in the custody of their mothers.<sup>101</sup> In the latter part of the twentieth century, the standard came under legislative and judicial attack as overt gender bias against men.<sup>102</sup> Scholars like Martha Fineman looked beyond such formally gendered laws and focused feminist insights on the supposedly neutral and universally

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also means that there are no financial rewards for 'good behavior' during marriage."). *But see* Sugarman, *supra* note 93, at 130–32 (concluding Weitzman's data gives "little reason to think that women as a class are importantly worse off financially under California's unilateral, no-fault divorce system than were under the pre-1970 fault regime," which is not to say anything about how well off they are).

96. WEITZMAN, *supra* note 94, at 332–34 ("[Divorced wives] are expected to live at less than half (42 percent) of their former *per capita* standard, while their former husbands advance to 142 percent.").

97. Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1194 (1999).

98. *See* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 70–82 (2004) (analyzing U.S. Supreme Court cases where indigence was a factor in a state's treatment of putative fathers in paternity suits).

99. *See, e.g.*, Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2359–60 (1975) (amending the Social Security Act to require custodial mothers to identify nonmarital fathers in order to receive public assistance); *Bowen v. Gilliard*, 483 U.S. 587, 589–90, 597 (1987) (upholding requirement that mothers applying for Aid to Families with Dependent Children (now superceded by TANF) must seek public assistance for every child in the household, even if one is supported by the father); *Wyman v. James*, 400 U.S. 309, 326 (1971) (permitting unannounced warrantless home visits in AFDC program).

100. Sara S. McLanahan, Annemette Sørensen, & Dorothy Watson, *Sex Differences in Poverty, 1950–1980*, 15 SIGNS 102, 119–21 (1989).

101. GROSSBERG, *supra* note 19, at 248; STEVEN MINTZ, *HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 162–63 (2004).

102. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 738–39 (1988).

beneficent standard of “best interest of the child” (BIC).<sup>103</sup> Rather than advocate the BIC standard, she promoted the “primary caregiver” presumption for use in custody decisionmaking.<sup>104</sup> The BIC standard is indeterminate and highly discretionary. In cases where custody disputes arise, the loose standard may mask the effects of unequal power relationships in the family on judicial decisionmaking. Professor Fineman argued that the use of social workers merely compounded the problems of indeterminate standards.<sup>105</sup> She proposed instead that courts called upon to award custody rely on a rule that looks in the first instance to objective measures of conduct and to reliance interests based on the parents’ prior behavior.<sup>106</sup> This rule presumes that if one parent provided the day-to-day care for the child (bathing, feeding, taking to school, doing homework, etc.) she (or he) should continue as the primary custodian.<sup>107</sup> The use of this presumptive rule in place of an amorphous BIC standard would be subject to rebuttal if children’s interests were truly threatened with harm. In the ordinary case, however, the rule should prevent the imbalance of economic and other power within the private family from dictating an unfair result for mothers who had arranged their lives in order to meet their primary responsibility for childcare.<sup>108</sup> In some states, issues of child custody “rules” or “factors” became politicized. In Texas, for example, Texas Fathers for Equal Rights lobbied successfully for joint legal custody,<sup>109</sup> while women’s rights organizations fought with considerable success for rules and presumptions either denying joint managing conservatorship or otherwise determining which parent receives custody in the presence of domestic violence.<sup>110</sup>

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103. *Id.* at 737–39.

104. *Id.* at 770–72.

105. *See id.* at 765 (observing that mediation in child custody hearings merely conceals conflict rather than eliminating it).

106. *Id.* at 771.

107. *Id.* at 770–71.

108. *Id.* at 771–73.

109. *See* Stewart W. Gagnon, *1995 Legislative Changes in Family Law*, 33 HOUS. LAW. 16, 17 (1995); TEX. FAM. CODE ANN. § 153.134 (Vernon 2008) (providing joint legal custody, termed a joint managing conservatorship in Texas). Texas courts may appoint parents as joint managing conservators only if the appointment is in the best interest of the child. *Id.*

110. *See* TEX. FAM. CODE ANN. § 153.004 (Vernon 2008); Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539, 554–55 (1982).

## II. CHILD-CENTERED JURISPRUDENCE: ORIGINS AND ELABORATION

### A. *The Historical Social Construction of Childhood*

Children enjoyed no separate legal identity at common law and were subject to paternal authority in the family. They played an economic role at one time that they no longer fulfill in contemporary society. As contributor Annette Appell points out, scholars have taught us that the very definition of something called “childhood” is a social construction that has been transformed over time and place.<sup>111</sup> As Professor Janet E. Ainsworth has noted:

[There is a] dramatic contrast between the modern Western conception of childhood and the conception held in the medieval European world. . . . At that time, the primary age-based boundary was drawn between infancy, a time of physical dependence ending roughly at age seven, and full personhood. Those persons older than seven, especially those in the lower social classes, participated in the normal range of adult activities: they were apprenticed to begin their working lives, drank in taverns, shared the same games and amusements as adults, gambled, and were exposed to sexual behavior and jokes. Wearing the same kind of clothing, these young people even looked like adults. Not surprisingly, then, medieval art depicted them as miniature adults. In short, within the medieval world, the young were fully integrated members of the community. No one believed that young people were innocent beings who needed to be quarantined from a harsh adult world.<sup>112</sup>

Professor Appell also notes that ideas about childhood have been connected to broader political and philosophical developments.<sup>113</sup> She observes that the “notions of childhood as we construct it today began to crystallize with the rise of industrialization.”<sup>114</sup>

In the nineteenth century, reforms animated by a “child-saving impulse” not only expressed the developing ideas about childhood but also shaped them in turn.<sup>115</sup> Steven Mintz, author

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111. Appell, *supra* note 2, at 704 & n.1.

112. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1093 (1991) (footnotes omitted).

113. Appell, *supra* note 2, at 738.

114. *Id.* at 746.

115. See MINTZ, *supra* note 101, at 162.

of the most comprehensive history of American childhood, identifies three overlapping child-saving phases in the nineteenth century, “each with its own constituency and distinctive approach.”<sup>116</sup> Between the 1790s and the 1840s, “child-savers created congregate institutions to separate children from the corruptions of the public world and provide them with the order and discipline that their families lacked.”<sup>117</sup> While this congregate policy remained the dominant approach throughout the rest of the nineteenth century, “[t]he Civil War sparked a second phase in child-saving as a new generation of reformers invoked the state’s police powers to protect children from abuse, exploitation, and neglect.”<sup>118</sup> They founded “quasi-public societies to prevent cruelty to children.”<sup>119</sup> Increasingly, reformers insisted that children were different from adults and should be withdrawn from adult institutions such as almshouses, and that special laws should protect them.<sup>120</sup> Child-saving reformers of the Progressive era (from the 1890s to World War I) initiated a new phase in which they “greatly expanded public responsibility and professional administration of child welfare programs.”<sup>121</sup> While Mintz thinks that they did not achieve as much as they could have, he notes that Progressive reforms “set precedents for the programs inaugurated by the New Deal.”<sup>122</sup>

Developments in legal principles peculiarly applicable to children accompanied the child-saving impulse of the nineteenth century. Along with the idea that children were “weak, vulnerable, and defenseless creatures” came such legal principles as the best interests of the child standard.<sup>123</sup> According to historian Michael Grossberg, the idea developed in part through a newly specialized law of the family. Indeed, he argues that there was a new “legal creation” of the family.<sup>124</sup> In his view, this body of doctrine reconstructed not only the law of husband and wife, but also of parent and child, and child and state.<sup>125</sup>

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116. *Id.* at 156.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* This included suppressing obscene literature to which children might be exposed, attacking child prostitution, raising the age of consent for sex, and prosecuting the new law of statutory rape. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 162; accord GROSSBERG, *supra* note 19, at 239.

124. GROSSBERG, *supra* note 19, at ix.

125. *Id.* at xi–xii.

Specifically, during the century, legal change diminished paternal authority, enlarged maternal and filial prerogatives, and fixed more clearly the state’s

Professor Grossberg does not contend that the legal changes encompassed by the best interests of the child or the tender years maternal custody presumption somehow signified the equality of women.<sup>126</sup> Rather, the new custody approach represented the assertion of judicial authority, what he called “judicial patriarchy,” i.e., the right of courts to make decisions about families by acting in *parens patriae*—as substitute parents.<sup>127</sup> The additional authority and discretion of judges also meant that, even though parental rights to custody were generally superior, sometimes courts favored nonparents.<sup>128</sup>

*B. The Modern Development of Child-Centered Jurisprudence*

It may be said that the best interests of the child standard criticized and departed from common law norms about children, parents, and the state—all in the name of a new emphasis on child welfare and child saving. In many senses, child-centered jurisprudence constitutes a growing critique of the deficiencies and traps of the best interests of the child standard, at least as it was developed by the courts and the legislatures of the late nineteenth and early twentieth centuries. The exact fashion in which the child-centered jurisprudential critiques developed, however, has been strongly affected by context and by the particular issues involved. The contexts vary *inter alia* from child custody in divorce cases, removal and fostering of children due to alleged abuse and neglect by parents, adoption, and the disposition of criminal charges against children. In each case when the law touches on children’s welfare, there is a trilateral set of relationships involved: child, parent, and the state, through the doctrine of *parens patriae* and the exercise of its police power. The dynamics differ according to the alignments of these three parties.

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responsibilities in domestic affairs. . . . [Judges and jurists] became the public custodians of the family. In many vital ways, then, the American law of domestic relations was a judicial invention.

These fundamental circumstances of nineteenth century family law—a republican reorientation, a rearrangement of family power, and an assumption of authority by the judiciary—together produced an American way of governing the hearth.

*Id.*

126. *Id.* at 248–49.

127. *See id.* at 289–306.

128. *See id.* at 255–58 (providing several examples of judges using their discretionary powers to grant custody to surrogate rather than biological parents).

C. *Origins of Child-Centered Jurisprudence in Substantive Due Process: Meyer and Pierce*

The modern constitutional context for child-centered jurisprudence may be traced at least in part from two old substantive due process cases<sup>129</sup> in which the Supreme Court was essentially more concerned with parental rights than the rights of children. However, these cases also implicated children's constitutional interests. In *Meyer v. Nebraska*, a teacher was convicted, pursuant to state law, of teaching a child who was in a grade lower than eighth a language other than English.<sup>130</sup> The Court ruled that this prohibition materially interfered "with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."<sup>131</sup> *Pierce v. Society of Sisters* again raised the constitutional rights of parents and teachers, in a suit contesting the application of compulsory education laws to prevent children from attending private parochial schools.<sup>132</sup> Building on *Meyer*, the *Pierce* Court made it clear that the state's law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>133</sup> Justice McReynolds, speaking for the Court, emphasized that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>134</sup> The child's own voice was not heard in *Pierce* or *Meyer*. Both cases assume children's dependence and subjection to the control of someone, be it parent, guardian, or state.

Parents, however, do not have complete control of their children. In *Prince v. Massachusetts*, the Court upheld the conviction of a guardian who allowed her ward to distribute religious tracts at night in violation of a state child labor law.<sup>135</sup> Furthermore, while parents could physically discipline their children, if the discipline became excessive and was determined to be abuse or neglect, the court could remove the child and

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129. The Court later described these cases as stemming from the First Amendment. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

130. *Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923).

131. *Id.* at 401.

132. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925).

133. *Id.* at 534–35.

134. *Id.* at 535.

135. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

eventually terminate parental rights—a power that was easily abused and invasive of family life.<sup>136</sup>

*D. Child Welfare: Abuse and Neglect*

Child abuse was discovered as a social problem during the 1870s.<sup>137</sup> The Boston chapter of the Society for the Prevention of Cruelty to Children (SPCC), for example, undertook to supervise what it saw as abuses of children among Catholic, ethnic, and immigrant working-class families.<sup>138</sup> Initially, the SPCC enjoyed great success, gaining legislative authority to initiate prosecutions and to remove children on their own, pending later judicial action.<sup>139</sup> Many of these early attempts at protecting children were brought by private and religious organizations.<sup>140</sup> But during the Progressive Era between 1900 and 1920, a more professionalized and state-oriented field of “child welfare” developed.<sup>141</sup> Historians argue that the Progressives came to emphasize neglect over maltreatment and to focus on prevention as the primary goal.<sup>142</sup> The legal reforms after 1910 included the establishment of domestic relations courts “with legal authority over family crimes such as domestic assault and nonpayment of child support.”<sup>143</sup> “The basic goal of these courts was to preserve the family, act in the best interests of the child, and offer a curative rather than punitive approach to family problems.”<sup>144</sup> Accompanying the heightened interest in child welfare was a move toward informality in procedure and toward family preservation as a goal in cases involving the mistreatment of children within the family.<sup>145</sup>

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136. See *Santosky v. Kramer*, 455 U.S. 745, 790–91 (1982) (Rehnquist, J., dissenting); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: Deshaney in Context*, 68 N.C. L. REV. 659, 708–09 (1990).

137. Oren, *supra* note 136, at 666.

138. *Id.*

139. *Id.*

140. *Id.* at 665–66.

141. *Id.* at 666.

142. *Id.*

143. *Id.* at 706–07.

144. PLECK, *supra* note 90, at 126. In a development that paralleled the changes in child welfare policies, Illinois established the first separate juvenile courts in 1899. From there, the movement spread quickly. By 1925, forty-six states had courts for juveniles that diverted them from the adult legal system. The theory was that children were different, dependent, and in need of special protection by the state. MINTZ, *supra* note 101, at 176–78. As a result, juvenile courts were supposed to be animated by a philosophy of “counseling and treatment over punishment, and rehabilitation over retribution.” *Id.* at 177. The juvenile courts also followed informal procedures that dispensed with such adult legal rights as trial by jury, the right to an attorney, and the right of confrontation of witnesses. *Id.* at 177–78.

145. See, e.g., PLECK, *supra* note 90, at 146, 173 (discussing the history of reformers’

Interest in child abuse was rekindled in the early 1960s through the “pediatric awakening,” when doctors developed criteria for identifying physical indicia of child abuse,<sup>146</sup> and judges applied legal doctrines such as *res ipsa loquitur* to deal with problems of proof.<sup>147</sup> States soon began to require mandatory reporting of suspected abuse or neglect.<sup>148</sup> Subsequently, federal grant-in-aid programs led all states to adopt mandatory child abuse and neglect reporting systems that met minimum federal standards.<sup>149</sup> As a result, reports of child abuse or neglect skyrocketed.<sup>150</sup> Critics later claimed, however, that the maltreatment statistics overreported allegations that are later found unsubstantiated, while at the same time underreporting actual incidence of abuse.<sup>151</sup>

Beginning with the 1974 Child Abuse Prevention and Treatment Act,<sup>152</sup> the interjection of federal funding encouraged the universal spread of specialized state social service agencies with statutory duties to protect children at risk. The first outcome of the spread of this system was a flood of children taken out of their homes and placed into foster care.<sup>153</sup> Whether children were taken into care or not, families affected by the child welfare system necessarily suffered a “usurpation of the parental role” in favor of the state.<sup>154</sup> Moreover, there was a relatively low threshold for invoking the child welfare system and for taking children into care in the best interest of the child.

As a result of the rapidly rising numbers of children in foster care, and as child advocates began to notice apparent class and ethnic biases, questions arose about the effectiveness and beneficence of the system.<sup>155</sup> For example, Joseph Goldstein, Anna Freud, and Albert Solnit (a Yale University lawyer, London child psychiatrist, and Yale child psychiatrist, respectively) wrote an influential series of books that questioned the supremacy of

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emphasis on family preservation, and private measures such as child abuse hotlines and advertising campaigns).

146. *Id.* at 173; Oren, *supra* note 136, at 666–67.

147. *E.g.*, *In re S*, 259 N.Y.S.2d 164, 165 (N.Y. Fam. Ct. 1965).

148. Oren, *supra* note 136, at 667.

149. *Id.* & n.69.

150. Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113, 120 n.42 (1991).

151. *Id.*

152. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4.

153. Oren, *supra* note 150, at 121–22.

154. *Id.* at 122 (citing Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1756 (1987)).

155. *Id.* at 124.

the best interests of the child standard.<sup>156</sup> They promoted a different standard called “the least detrimental alternative,” which would discourage state intervention and promote preservation of the child’s family to the greatest extent possible.<sup>157</sup> On the other hand, they also argued that if intervention became absolutely necessary, it should be swift and sure, leading quickly to the re-creation of another permanent family as a substitute.<sup>158</sup> In 1980, Congress enacted the Adoption Assistance and Child Welfare Act (AACWA) to lessen the reliance on foster care.<sup>159</sup> The number of children taken out of their homes and put in care fell immediately and substantially, but subsequently began to creep up again.<sup>160</sup> The Act provided funding to improve foster care placements, supplied money for additional reunification services, and was designed to offer better procedural protections for families.<sup>161</sup> In order to obtain federal funding, states had to require: (1) an individual case plan for children in foster care; (2) a judicial finding as to whether reasonable efforts were made to keep the child in the family home or to reunite the family; (3) six-month reviews of out of home placements and the case plan; and (4) a permanency planning hearing within twelve months to determine if the child could be returned home.<sup>162</sup> If the child was not to be returned to the parents’ care, the state would develop a permanent plan of adoption, guardianship, or long-term foster care with periodic reviews.<sup>163</sup>

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156. See generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & SONJA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

157. E.g., GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, *supra* note 156, at 53, 182–83 n.2.

158. E.g., *id.* at 35, 117.

159. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.) (amending the Social Security Act (SSA) to lessen emphasis on foster care); see Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 262 n.347 (1988) (“[T]he purpose of the Adoption Assistance and Child Welfare Act of 1980 is to expeditiously either return the child to his parents, or to arrange for the child’s adoption.”).

160. Oren, *supra* note 150, at 124–25.

161. See Deborah L. Sanders, *Toward Creating a Policy of Permanence for America’s Disposable Children: The Evolution of Federal Funding Statutes for Foster Care from 1961 to Present*, 17 INT’L J.L. POL’Y & FAM. 211, 215–16 (2003) (discussing AACWA provisions).

162. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101(a)(1), 94 Stat. 500, 501, 503, 511 (codified in scattered sections of 42 U.S.C.).

163. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272,

However, children still remained in foster care in excess of twelve months, and research indicated that children were less likely to be returned home if they remained in foster care for more than a year.<sup>164</sup> In response, Congress amended the Act with the Adoption and Safe Families Act of 1997,<sup>165</sup> which placed a twelve-month limit for the permanency hearing and allowed termination of parental rights prior to twelve months if certain conditions existed.<sup>166</sup> Furthermore, states were placed in a quandary, and reunification efforts would often conflict with the need to find an adoptive home for the child. This forced states to work on both plans at the same time causing confusion for families and case workers. A description of state neglect and abuse laws helps demonstrate the ways in which these laws can be abused by the state to the detriment of the child and his family.

Actions based on the maltreatment of children start with an allegation of abuse against the caretaker.<sup>167</sup> Due to the state's desire to protect children from harm, a child may be removed from the family home after a cursory investigation that substantiates the allegations and indicates a need for emergency removal.<sup>168</sup> Although a hearing must be held quickly, the initial removal may be upheld in a hearing in which the judge makes the determination based on a statutory scheme that provides a fairly low standard: whether "sufficient evidence [exists] to satisfy a person of ordinary prudence and caution" that there is a danger to the child's health or welfare.<sup>169</sup> Some states demand a higher burden of proof (clear and convincing evidence),<sup>170</sup> and others are somewhere in between. The court must also find that removal is the least restrictive means available to protect the child

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§ 101(a)(1), 94 Stat. 500, 511 (codified as amended at 42 U.S.C. § 675).

164. See David Fanshel, *The Exit of Children from Foster Care: An Interim Research Report*, 50 CHILD WELFARE 65, 67-68 (1971).

165. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.) (amending the SSA further to emphasize child health and safety within the foster care system).

166. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 101(a), 302, 111 Stat. 2115, 2116-17, 2128-29 (codified as amended at 42 U.S.C. § 675). For example, if the court determined that a child had been abandoned or if the parent had committed murder or voluntary manslaughter of another child in the home, termination of parental rights could happen sooner with adoption immediately following. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115, 2128-29 (codified as amended at 42 U.S.C. § 675).

167. Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 325.

168. *Id.* at 326.

169. TEX. FAM. CODE ANN. § 262.201 (Vernon 2008).

170. *E.g.*, CAL. WELF. & INST. CODE § 361(c) (West 2008).

and that reasonable efforts were made to have the child remain at home.<sup>171</sup> The removal hearing is typically followed by a hearing that determines whether the allegations of abuse or neglect are true and can be proven by either a preponderance of the evidence<sup>172</sup> or by clear and convincing evidence,<sup>173</sup> depending on the jurisdiction. However, if the child is to remain in an out of home placement, it is likely to be determined by a lower standard of proof.<sup>174</sup> Furthermore, children can be moved from placement to placement without any clear reasons or findings by a court. These decisions are unreviewable because they are not final judgments.<sup>175</sup>

The U.S. Supreme Court has heard very few cases in this area, primarily in the context of termination of parental rights cases. In these cases, the Court has found that due to the seriousness of the state action—the severing of parent–child ties—the standard of proof must be clear and convincing.<sup>176</sup> However, as a matter of due process, indigent parents may only be appointed counsel at these hearings under certain circumstances, and have no constitutional right to counsel in abuse and neglect proceedings.<sup>177</sup> Furthermore, children are not granted attorney representation except by state statute.<sup>178</sup>

It is this discretion left to state courts and the concern for possible abuse and excessive intrusion into the family that Professor Martin Guggenheim raises in his article for this Symposium. In 2008, under the guise of protecting children, the state of Texas used child abuse and neglect statutes to remove

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171. See Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299, 331 & n.187 (2002) (explaining that a “state must show that removing the children from the parents’ care is the least restrictive alternative available,” and that “reasonable efforts were made to prevent removal of [the] child from [their] home”).

172. E.g., FLA. STAT. ANN. § 39.507(b) (West Supp. 2009).

173. E.g., N.C. GEN. STAT. § 7B-805 (2007).

174. See Marrus, *supra* note 167, at 332 (“Usually, no standard of proof governs the court’s placement decisions . . .”).

175. See *id.* at 332–33 (stating that decisions to move a child from one home to another are “basically unreviewable because they are merely interim rulings rather than final judgments”).

176. E.g., *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982).

177. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that appointment of counsel in termination of parental rights cases should be determined on a case-by-case basis). Although the Court did not mandate appointment of counsel for all parents in these hearings, all states appoint counsel for parents at termination hearings, due to the fear of being overturned in a termination case. Indigent parents, however, do have a constitutional right to a free transcript in order to appeal the termination of their parental rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996).

178. See Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 TEMPLE POL. & CIV. RTS. L. REV. 663, 665–66 (2006) (explaining that children are only appointed counsel in jurisdictions that have statutes requiring it).

children from the homes of members of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) in San Angelo, Texas.<sup>179</sup> Professor Guggenheim asserts that the state should use the criminal justice system in such situations because criminal law is better equipped to protect individual due process rights and constrain the state's infringement into family life, and would still protect children from any possible sexual abuse that might occur in a polygamous setting.<sup>180</sup> On the other hand, child welfare agencies, and the courts that support them, are too well known for not following the rule of law, but rather using the legal system to make moral judgments against parents' actions. This failing, in Professor Guggenheim's opinion, outweighs the benefits that may come from the protection of children through this system. As he notes:

Child welfare practice . . . is often driven by striving to do what is perceived to be best for children, with considerably greater discretion left to officials to make as-applied decisions designed to serve a particular child's best interests. This is one of the dangerous qualities of these prosecutions.

Criminal law is monitored by officials who are committed to the rule of law or have been trained to become so committed. Whether the result of oversight by federal courts through habeas corpus review of improper state prosecutions, the vigorous application of federal constitutional principles in state-developed criminal procedure, or some combination thereof, state officials recognize that when they invoke the criminal process, federal constitutional norms must be obeyed. But a considerably more lax set of rules applies in child welfare cases.<sup>181</sup>

*E. Child-Centered and Woman-Centered Jurisprudence Join Hands: Beyond Dependence on the Private Family*

The relationship of the state to the family has proved to be just as problematic from the standpoint of child-centered

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179. Guggenheim, *supra* note 4, at 800.

180. *Id.* at 762.

181. *Id.* at 801–02 (internal footnotes omitted). At least one scholar would push this concept even further. Professor Angela Harris does not believe that the child welfare system or the criminal justice system can put an end to the violence that children face. Instead she argues that children and families need to be protected through a community-based and collaborative effort that will include mental health professionals, survivors, legal professionals, prison reform groups, and other community based members. Audio Tape, *supra* note 5.

jurisprudence as it has from the woman-centered approach. On the one hand, as Professor Guggenheim explains, the private family provides an important bulwark against heavy-handed intrusions by the state that may serve more to promote majority beliefs than to protect children.<sup>182</sup> On the other hand, some of our contributors argue that strict dependence on private families may not benefit either the children or the women in those families. An ideological commitment to individualism does nothing to distribute societal resources more equitably in order to combat inherited inequality and to enhance social justice, as sought by practitioners of child-centered *and* feminist jurisprudence. As a result, child-centered scholars like Barbara Woodhouse and Annette Appell advocate social and legal policy that goes beyond dependence on the resources of the private family.

In arguing that a “world fit for children is a world fit for everyone,” Professor Woodhouse explains what she has named “ecogenerism,” the placing of the child at the center *and* in socioeconomic context within the family and society.<sup>183</sup> She claims that feminism and ecogenerism “are mutually complementary and compatible approaches to a broad range of concerns that threaten shared values of human flourishing.”<sup>184</sup> She insists that “[f]eminist theory . . . challenges inequality and systematic marginalization of others besides women. Likewise, generist theory does not cease to be generist theory when it challenges the oppression of others besides children.”<sup>185</sup> Moreover, the two issues are linked in large part through the limitations of individualistic concepts of the private family. After Professor Woodhouse compares a number of programs enhancing the lives of young children in Italy to the situation in the United States, she concludes that Americans need a new paradigm if we want to achieve progress in our children’s health, education, nutrition, and preparation for the future.<sup>186</sup> In embarking on that enterprise, Professor Woodhouse contends we should not be misled by false notions of family privacy that are used to deny societal resources to children and the women who would mother them.<sup>187</sup>

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182. Guggenheim, *supra* note 4, at 782.

183. Woodhouse, *supra* note 6, at 821–22.

184. *Id.* at 819.

185. *Id.* (internal footnote omitted).

186. *Id.* at 861.

187. *Id.* Professor Fineman made a similar argument. She suggested going beyond equality in assessing the interests of mothers and children. To do this, she turns feminist questions about the naturalness of the private family into an examination of the role of the family within society. She asks why the individual family should be the natural

Professor Annette Appell focuses on the repercussions of the legal construction of childhood “as a private and personal, rather than structural, matter.”<sup>188</sup> She notes that “[t]he construction of childhood as natural and dependent has left all children without a direct, political voice and relegated them to the privacy of the family and, therefore, with few affirmative claims against the state.”<sup>189</sup> On the one hand, Professor Appell acknowledges that a privatized childhood supports important goals. It nurtures and protects a place where families can create their own values, which in turn promotes pluralism, democracy, and the liberty interests of adult parents.<sup>190</sup> On the other hand, however, she notes that assigning nearly exclusive responsibility for children’s welfare to private families has a negative side: it “works to facilitate a shift of social responsibility from the state onto the self.”<sup>191</sup> It contributes to the impoverishment of children, but also to what has been described elsewhere as the feminization of poverty. It masks the fact that in a country that has great variations of wealth, children’s futures are determined by the economic status of their parents.<sup>192</sup> The net result is that our children do not start out on a level playing field in preparation for assuming adult roles in society.<sup>193</sup>

#### F. Conclusion

Whether they think of themselves primarily as practitioners of child-centered or of feminist jurisprudence, the contributors in this Symposium issue are important thinkers who are engaged in developing the theory and practice of social justice. Their

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source of all material social goods for the child (something that she calls “privatized dependency”). This approach leaves the state as the “stigmatized fallback for those families unable to meet their obligations.” Audio Tape, *supra* note 3. Professor Fineman argues that the legacy of feminist family reform in the United States focused on the relationship between husband and wife. Therefore, those reforms emphasized how to achieve equality and autonomy, concerns that do not transfer easily to questions about children and motherhood, which involve dependency. In order to go beyond the first stage of feminist family reform (the husband and wife dimension), Professor Fineman proposes a theory of what she calls “vulnerability.” Policies along these lines would move away from the model of formal equality and toward equitable needs-based programs. She argues that gender equality reforms will not succeed in the long run unless they include changes in the larger society. All humans are vulnerable and pass through stages of dependency. The right way to address this reality is through a combination of education, the workplace or market system, the family system, and social responsibility. *Id.*

188. Appell, *supra* note 2, at 754.

189. *Id.*

190. *Id.*

191. *Id.* (quoting CAROLINE F. LEVANDER, CRADLE OF LIBERTY 13 (2006)).

192. *Id.* at 754–55.

193. *Id.* at 755–56.

explorations of the strengths and deficiencies of the privatized family teach us that the questions to be asked are not easy and that the solutions may be complex. The enterprise, however, is well worth the effort.