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Essay

The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children

Lynn D. Wardle*

I. INTRODUCTION

We live in an age of rights—or at least an age of rights rhetoric. We Americans no longer reserve rights for sublime principles such as Jefferson's "Life, Liberty and the Pursuit of Happiness." When we value something, no matter how mundane, we confer a right upon it. Americans couch nearly every controversy in the language of rights.

Rights are the tools of a lawyer's trade. Lawyers speak the language of rights. However, one should remember a warning (commonly) that rights have been extended to nearly every form of existence, any issue is likely to be argued in terms of rights. Justice Douglas of the United States Supreme Court, who was an avid environmentalist, once suggested that trees and the environment had "rights." Sierra Club v. Morton, 405 U.S. 727, 741-43 (1972) (Douglas, J., dissenting) (proposing that the rules of standing be expanded to give "inanimate object[s] about to be despoiled, defaced, or invaded by roads and bulldozers" a voice before the courts). One author has even gone so far as to suggest that animals may deserve something similar to suffrage rights: "I am suggesting that there is nothing unthinkable about, and there might on balance even be a prevailing case to be made for, an electoral apportionment that made some systematic effort to allow for the representative 'rights' of non-human life." Christopher D. Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 487 (1972). See also Laurence H. Tribe, Ways Not to Think About Plastic Trees: New Foundations for Environmental Law, 83 YALE L.J. 1315, 1338-46 (1974) (suggesting the furtherance of explicit legal rights for, and human obligations to, plants, animals and other natural "objects of beauty"). For example, in Santa Monica, California, the City Council received unexpected opposition to an ordinance forbidding people from using the public bathroom facilities of the opposite sex. Robert Reinhold, Santa Monica Journal; In Land of Liberals, Restroom Rights Are Rolled Back, N.Y. TIMES, Nov. 15, 1991, at A14. In response to this law designed to keep male drug dealers from selling narcotics in women's restrooms, an activist complained that this ordinance in fact denied women the right to use the men's room: "This is the first step down a long dark road of restricting women's rights in the name of public safety." Id. But see David R. Schmehmann & Lori J. Polacheck, The Case Against Rights for Animals, 22 B.C. ENVTL. AFF. L. REV. 747 (1995) (criticizing the movement to give animals judicial rights).

* Professor of Law, J. Reuben Clark Law School; B.A., Brigham Young University, 1971; J.D., Duke University, 1974. Copyright 1995 Lynn D. Wardle, Provo, Utah. 1. The Declaration of Independence para. 2 (U.S. 1776). 2. Because rights have been extended to nearly every form of existence, any issue is likely to be argued in terms of rights. Justice Douglas of the United States Supreme Court, who was an avid environmentalist, once suggested that trees and the environment had "rights." 2. Sierra Club v. Morton, 405 U.S. 727, 741-43 (1972) (Douglas, J., dissenting) (proposing that the rules of standing be expanded to give "inanimate object[s] about to be despoiled, defaced, or invaded by roads and bulldozers" a voice before the courts).
attributed to Mark Twain—that when the only tool you have is a hammer, all of your problems begin to look like nails. Lawyers may be making the mistake Twain alluded to by applying the rhetoric of rights to promote the welfare of children. Lawyers may be using the wrong tool sometimes, and in doing so, compounding the problems by the overuse of rights rhetoric in the "children's rights" context.

The growing "cult of rights" in family law is especially troubling.³ By "cult of rights" I mean an almost mystical belief in the power of rights, laws, and governments to do good, to solve all human problems. In the early 1970s, a children’s rights movement emerged, drawing energy from the various civil rights movements of that time.⁴ Child advocates began using the language of rights to address the needs of children: children need to be loved, therefore they have a "right to grow up nurtured by affectionate parents."⁵ Children have interests in what takes place in the political process, therefore they should have a right to vote.⁶ Yet, despite over twenty years of declaring new rights for them, the plight of the nation’s children has worsened markedly.⁷


⁶. See Farson, supra note 3, at 327.


In 1979, the poverty rate among children was 14.7%. In 1986, it was 20.4%.

... The number of children in the United States who are reportedly abused has
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This Essay will first distinguish its analysis from the views of those who support a return to days gone by as well as from those who pin inordinate amounts of blame on a "rights" structure. This Essay will then criticize some aspects of children's rights and their advocates. This Essay, however, will also explain why recognition of the constitutional rights of children (and parents) is not only proper, but also very important for children and for society. Then, from constitutional history, this Essay will identify a principled approach to children's rights that is consistent with the awareness that there are better ways to think about the interests and needs of children, and better ways to solve their problems in our society than by the indiscriminate use of "rights." Finally, this Essay will relate the importance of marriage to the rights of children, and note the limits of pluralism and the flaws of perfectionism.

II. CRITICISM WITHOUT NOSTALGIA OR CRITICAL LEGAL STUDIES

To avoid misunderstanding, this Essay's approach must be distinguished from those commentators who espouse a romanticism about the law or about families, or yearn to return to the golden days of yesteryear. Nostalgia (usually fostered by highly selective memories) does not qualify as a legal theory of merit. The problems and families of the 1990s are different from families and their problems a century ago. Society needs to meet the challenges of the modern era, which is the greatest, most exhilarating, fulfilling, and wonderful time for families, as well as the most challenging, dangerous, and poten-

tripled since 1980, to almost three million. The number of child murders doubled in the 1980s. Teenage suicides doubled over the last twenty years.

Id.
8. See infra part II.
9. See infra part III.
10. See infra part IV.
11. See infra part V.
12. See infra part VI.
13. See, e.g., RITA KRAMER, IN DEFENSE OF THE FAMILY: RAISING CHILDREN IN AMERICA TODAY 6 (1983) (noting that families in the past had to face "[flame and plague, fear and ignorance"]). Even if the golden days were, in fact, better than the present day, it would be quite impossible to go back. See, e.g., Myron Magnet, The American Family, 1992, FORTUNE, Aug. 10, 1992, at 42, 43 (noting that the 1950s are "culturally and socially as far away as Shangri-La").
14. See generally STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992) (debunking some of the popular myths of the way the family was in times past).
15. See, e.g., id., at 2-7 (outlining some of the new challenges faced by today's families).
tially disastrous time for families. Neither the romantic rhetoric nor the rigid legal framework of 1895 suffices for the circumstances of families and children in 1996.

This Essay's criticism of children's rights must also be distinguished from the critique of rights articulated by members of the Critical Legal Studies ("CLS") movement. Those scholars assert, generally, that "rights" mask the ugly realities behind the law, realities such as greed, pursuit of self-interest, abuse of power, and oppression; that society's power wielders can manipulate the meaning of "rights" in any way they wish because that concept is vague and indeterminate; and that the "regime of rights" oppresses society. Some CLS commentators assert that even the language of rights undermines efforts to accomplish genuine social change by diverting attention from the real abuses (power-imbalance, economic disparities, and social oppression) and focusing on symbolic abstractions. These commentators further argue that rights language focuses attention on a debate over empty "parchment barriers" (Madison's memorable phrase) that mean nothing, solve nothing, and change nothing, instead of on action that might remedy the problems.

CLS criticisms have appropriately publicized some of the lacunae between legal rhetoric and reality, and disclosed some conflicts of interest in the American legal system. The CLS critiques of rights that could be applied helpfully to the dilemma of children's rights include recognition that the indeterminacy of legal "rights" allows judges to insert their personal or cultural biases into the law; that the

16. See KRAMER, supra note 13, at 200-07 (positing ideas on how families can meet the challenges modern life poses).


18. See Tushnet, Critique of Rights, supra note 17, at 24-27; Tushnet, Essay on Rights, supra note 17, at 1382-86.

19. See Tushnet, Critique of Rights, supra note 17, at 32-34.

20. The Supreme Court has also recently "embrace[d] the idea that the creation of rights can be destructive to democratic governance." Cass R. Sunstein, Rights and Their Critics, 70 NOTRE DAME L. REV. 727-28 (1995).

21. See Wendy A. Fitzgerald, Maturity, Difference, and Mystery: Children's
language of "rights" generates a mentality of absolutism and rigidity incompatible with relationships that call for care, compassion, understanding, compromise, and balance; and that rights-talk fosters excessive individualism that ignores, obscures, and harms relationships, and sometimes causes individuals to neglect their responsibilities. Many of these insights, however, have been developed much more thoroughly and persuasively by family law scholars who are not generally identified with the CLS movement. For instance, Barbara Bennett Woodhouse has very perceptively noted that "rights talk by definition seems to exclude children simply because not all children can talk." Martha Minow has argued eloquently for the revision of the current language of rights talk because "something [is] terribly lacking in rights for children that speak only of autonomy rather than need, especially the central need for relationships with adults who are themselves enabled to create settings where children can thrive.

The Critical Legal Studies rights-critics make two critical mistakes. First, they overvalue the significance of their approach. Beyond demonstrating that the system of legal rights is as imperfect as all other human institutions capable of being abused and manipulated to further the interests of the powerful at the expense of the disadvantaged (an important but hardly a novel insight), the CLS movement has surprisingly little to offer. Expert pessimism and fault-finding do not ade-

Perspective & the Law, 36 ARIZ. L. REV. 11, 53-64 (1994).
22. For articles presenting a good review and critique of Critical Legal Studies arguments about rights, see supra note 17.
26. See, e.g., Sunstein, supra note 20, at 729:
quately substitute for a meaningful explanatory or operative theory. Second, CLS scholars often undervalue the “regime of rights” that they are so fond of criticizing. They ignore the reality of the many wonderful contributions, successes, and unprecedented achievements of liberty, equality, stability, and prosperity fostered by the “regime of rights” in America and in many other nations committed to the pursuit of liberty under law.  

III. COMMON ERRORS AMONG CHILD ADVOCATES

Some advocates of children’s rights commit mistakes similar to those of Critical Legal Studies scholars: They undervalue the significance and importance of the institutions they want to replace (marriage and parenting), and they overvalue the capacity of their proposed replacement (children’s rights) to make things right.

A. Undervaluing the Institutions of Marriage and Parenting

Some advocates of children’s rights seem to be blinded by human failures. That is understandable. Today the failings and frailties of families are perhaps more widely known and felt than ever before in history. Americans hear constantly about premarital sex, incest, other forms of family sexual abuse, abortion and other forms of child abuse, severe child neglect, verbal and physical abuse of spouses, adultery, divorce, desertion, “deadbeat dads,” and many other dysfunctional family failings. Moreover, statistically, it seems that the incidence of

In the end, I claim that the critique of rights has no merit as such, and that the plausible claims that it contains should be stated far more cautiously and narrowly. When so stated, the claims can be discussed as part of a debate over which rights it is best to have, rather than as a debate over whether rights are pernicious merely by virtue of being rights.

Id. at 748. “[T]he critics should not claim to be making so general a criticism of rights.” Id. “Rights of the most traditional sort . . . may be the necessary condition for enabling a sense of collective responsibility to flourish.” Id. at 747.

27. For a sampling of some articles addressing these problems, see, e.g., Donald C. Bross, Terminating the Parent-Child Legal Relationship as a Response to Child Sexual Abuse, 26 Loy. U. Chi. L.J. 287, 289 (1995) (reporting that 22% of adults had been sexually abused as children) (citing David Finkelhor et al., Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics and Risk Factors, 14 Child Abuse & Neglect 19 (1990)); Ann L. Estin, Economics and the Problem of Divorce, 2 U. Chi. L. Sch. Roundtable 517, 576-79 (1995) (discussing the evolution of no-fault divorce and alternatives); Roger J.R. Levesque, Targeting “Deadbeat” Dads: The Problem with the Direction of Welfare Reform, 15 Hamline J. Pub. L. & Pol’y 1, 11-13 (1994) (discussing the problem of “fugitive” fathers); Ventrell, supra note 4, at 259 (noting that 2.9 million cases of child abuse or neglect were reported to the United States Department of Health and Human Services in 1992, of which one million were
these problems has increased significantly in American society, wholly apart from the increased reporting of these events. 29 With the drumbeat of that kind of data constantly in the background, and sometimes personally scarred by such family failings, some children's rights advocates not surprisingly think that marriage is a failed institution and that parenting is untrustworthy.

With compassion for those suffering, and commitment to justice for them, one must also remember how many good marriages exist (and good periods in marriages that have bad spells), and how much good the people labeled "bad" parents contribute to the lives of their children. Because the headlines and the talk shows neglect these stories, Americans tend to forget the magnificent service given by ordinary husbands and wives, moms and dads, stepparents, grandparents, aunts, uncles, brothers, and sisters. We take their contributions for granted. We forget that "the amount of social care that families provide for their elderly and handicapped members [not to mention children] far exceeds the amount of social care provided by the state." 30 We forget how many millions of parents fulfill "[a child's] . . . need for unbroken continuity of affectionate and stimulating relationships with an adult", which is necessary for normal, healthy development. 31

Marriage is the oldest and surest method of providing committed


29. See, e.g., WILLIAM J. BENNETT, OUR CHILDREN AND OUR COUNTRY: IMPROVING AMERICA'S SCHOOLS AND AFFIRMING THE COMMON CULTURE 62 (1988) [hereinafter BENNETT, OUR CHILDREN] (reporting that between 1960 and 1980 the rate of homicide among the young more than doubled, the number of births to unwed teenage mothers rose 200%, and by 1980, nearly one-half of all teenage pregnancies ended in abortion); COONTZ, supra note 14, at 2 (reciting a depressing litany of statistics regarding children and families). Coontz notes:

More than 20 percent of American children live in poverty . . . . almost 100,000 are homeless on any given night . . . . Every day, 135,000 children take a gun to school; . . . . in Chicago's inner city, 74 percent of the children have witnessed a shooting, stabbing, or robbery . . . .

In a recent national poll, one in seven Americans claimed to have been sexually abused as a child . . . .

Id.; WILLIAM MURCHISON, RECLAIMING MORALITY IN AMERICA 40 (1994) (citing a study by the Centers for Disease Control which found that between 1970 and 1990 the rate of 15-year-old girls who had experienced sex rose from 4.6% to 25.6%).


parents for children. Marriage signals to potential parents that their stable, long-term relationship is critical to the welfare of their children—the welfare of the next generation. Marriage vows, if taken seriously and followed assiduously, foster an environment in which parents and children feel loved and secure. Committed parents contribute extensively to all members of society. Their example, even more than their words, transmits not only knowledge but also the intangible values and living-skills (including commitment, sacrifice, and love) of society to the next generation. We all have a substantial stake in the future that parents nurture for us.

How important are parents to children? Take, for example, the problem of juvenile crime; juveniles comprise "[t]he fastest growing segment of the criminal population" in America. Violence among American youth is so rampant that the American Academy of Pediatrics


33. Perhaps the best evidence of this message is seen when young people do not see stable families as the norm. See, e.g., Amitai Etzioni, The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda 27 (1993):

Millions of teenagers see little meaning in life other than to have a child, without having a serious commitment to their infants. Marriage for many has become a disposable relationship. It is all too often entered into like a rental agreement—with an escape clause that if it does not suit the parties involved, they may look for another apartment. We are no longer clear if and when we ought to marry or if fidelity in marriage is to be expected. And if we beget children, it is unclear what we owe them.

Id.

34. See Murchison, supra note 29, at 43 (extolling the sense of security a strong marriage gives family members). Speaking of the vows exchanged in marriage ceremonies, Murchison writes:

Nothing is omitted; all eventualities are included in the promise. Here is commitment in the fullest sense: It frees in the instant it binds. If the marriage vow forecloses quick escape from the relationship, so it affords freedom from gnawing anxiety, gained from the knowledge that one's partner is similarly bound. In such an environment mutual trust can grow: We are in this together.

Id. Since the stability provided by marriage vows comes, in part, from their perpetuity, the fact that divorces have never been easier to obtain necessarily weakens the above salubrious effects. See, e.g., Robert L. Plunkett, Vow For Now, Nat'L Rev., May 29, 1995, at 48, 52 (attributing the emergence of no-fault divorce laws to the abolition of marriage).

35. See Murchison, supra note 29, at 45: "[M]ore unmarried relationships means fewer of the building block institutions on which our society relies to rear children, transmit cultural values, and produce economic wealth and community health." Id.

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has labeled it "a public health emergency."\textsuperscript{37} A clear connection exists between the explosion of juvenile crime and the deterioration of the family:

Nationally, more than 70 percent of all juveniles in state reform institutions come from fatherless homes. . . . [E]ven after the groups of subjects are controlled for income, boys from single-mother homes are significantly more likely than others to commit crimes and to wind up in the juvenile justice, court, and penitentiary systems. . . . The relationship [between crime and one-parent families] is so strong that controlling for family configuration erases the relationship between race and crime and between low income and crime.\textsuperscript{38}

Likewise, marriage is the best safeguard against child poverty in the world. According to William Galston, Domestic Policy Counsel to President Clinton:

Changes in family structure over the past generation are strongly correlated with rising rates of poverty among children. . . .Child poverty rates today would be one-third lower if family structure had not changed so dramatically since 1960. Fifty-one percent of the increase in child poverty observed during the 1980s is attributable to changes in family structure during that period.\textsuperscript{39}

The benefits of marriage for children extend across the board to education, health, self-esteem, and achievements—the evidence is overwhelming.\textsuperscript{40} As sociologist David Popenoe has observed:

Social science research is almost never conclusive . . . . Yet in three decades of work as a social scientist, I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: on the whole, for children, two-parent

\textsuperscript{37} Louis S. Richman, Struggling to Save Our Kids, FORTUNE, Aug. 10, 1992, at 34.

\textsuperscript{38} Barbara D. Whitehead, Dan Quayle Was Right, THE ATLANTIC MONTHLY, Apr. 1993, at 47, 77.


\textsuperscript{40} See, e.g., Whitehead, supra note 38, at 47.

[Children in single-parent families are two to three times as likely as children in two-parent families to have emotional and behavioral problems. They are also more likely to drop out of high school, to get pregnant as teenagers, to abuse drugs, and to be in trouble with the law. Compared with children in intact families, children from disrupted families are at a much higher risk for physical or sexual abuse. . . . Children who grow up in single-parent or stepparent families are less successful as adults, particularly in the two domains of life—love and work—that are most essential to happiness.]

\textit{Id.}
families are preferable to single-parent and stepfamilies.\footnote{Id. at 82. For a discussion of the roles that mothers and fathers play in a child’s early development, see Kramer, supra note 13, at 55-59.}

We do not have to have perfect marriages or be perfect parents to produce very good benefits for children. A perfectionist's perspective can distort and magnify problems in marriage and parenting, making us prone to conclude prematurely that families with problems are hopeless, label them “dysfunctional,”\footnote{It is almost impossible to escape the label of “dysfunctional.” See Wendy Kaminer, I’m Dysfunctional, You’re Dysfunctional: The Recovery Movement and Other Self-Help Fashions 12 (1992) (describing the view of families people in the codependency movement have). Kaminer explains: Their unhappiness begins at home, in the dysfunctional family, codependency authors stress, drawing heavily on family systems theory explaining how individuals develop in relation or reaction to their families. In the world of codependency, families are incubators of disease: they manufacture “toxic” shame, “toxic” anger, “toxic” self-doubts, any number of “toxic” dependencies, and a “toxic” preoccupation with privacy. Id. Because 96% of Americans suffer from some form of codependency, id. at 10, very few families in the country are not dysfunctional. Id. at 14. “The characters of children in dysfunctional families, which supposedly include virtually all families, are said to be determined early on by bad relationships . . . .” Id.} and give up on troubled marriages and struggling parents too easily. A number of years ago, an editorial in a major national newspaper related a story emphasizing the importance to children of families which many people would view as tragically lost:

In a story making the rounds among child welfare workers, Billy, who is 12, has run away at least twice from the foster home where he was placed by the [Massachusetts] Department of Youth Services. Each time he went back to his home—to his alcoholic mother and to his father who routinely beats him. After he was picked up the second time and asked why he keeps returning to those dreadful conditions, he replied: “Why, they love me. You should have seen what they gave me for Christmas.”

It turns out that the boy’s Christmas present was a $3 pair of sneakers, and the story is being told to explain the growing feeling among child welfare professionals that their efforts should be redirected toward families and away from the traditional near-exclusive concentration on children. The argument is that even in families usually written off as hopeless, there may be shreds of love upon which to build; the result of that care and attention could be a stronger and healthier society.

[The former Massachusetts State Commissioner of Youth Services said:] “We have loaded our kids down with helpers but we have done little to help their parents.” There is some small
amount of evidence that work with families is more cost-effective, and certainly cheaper, than working with a child alone. But even if it were not, it is a challenge that a caring society should accept.43

America has devoted a tremendous amount of resources to help children,44 but it has expended very little effort to help families perform their crucial task.45 The editors of Family Perspectives, a professional journal in the field of family studies, put it this way:

The most beneficial way to ensure the positive development of children is to support the people who are in direct contact with them. If society supports parents in their attempt to be responsible caretakers and provides assistance when needed, the outcome will be more productive than if parents are not supported or are hampered in their efforts.46

Just as we all recognize the need to provide healthy environments for our children, we must strive to provide healthier environments for our families.47

Thus, this Essay's first critique of children's rights is that often its advocates undervalue marriage and parenting. They sometimes look at problems in marriages or parenting through perfectionist lenses; if all is not perfect, all of the time, they are ready to trash those relationships and replace them with the abstract perfection of "rights." Children's rights advocates often are too quick to give up on families.

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44. By 1976, for instance, the federal government had developed more than 260 programs designed to help children. BENNETT, OUR CHILDREN, supra note 29, at 61-62.
46. Id.
47. See, e.g., BENNETT, INDEX, supra note 36, at 65:

[The] messages [that society disseminates] ultimately greatly effect [sic] the existence and well-being of the family. It makes an enormous difference whether children get messages from television telling them that honesty is the best policy, and to honor their fathers and mothers—or whether they get messages telling them that adultery is the norm, and that the breakup of a family is an expected thing. Likewise, if schools, churches, elected officials, community institutions, and neighborhoods are reinforcing parents' efforts, it makes their jobs easier. If the institutions of society work at cross-purposes, the job is harder.

Everyone knows that a child needs and deserves a nurturing, sustaining environment. What is less commonly understood, but equally true, is that the family also needs and deserves a nurturing, sustaining environment.

Id.
B. Overvaluing Children's Rights

Second, some advocates of children's rights manifest the lingering hubris of the belief in the infinite and invincible capacity of the law to do good.\textsuperscript{48} They see law as a secular Messiah, a cure-all for every social ill, a big yellow social bulldozer that can shove away the old problems and build new temples of goodness.\textsuperscript{49} But rights and relationships are very different things. It is troubling to try to define relationships between parent and child in terms that suggest separation, individualism, boundaries, legalism, lawyers, courts, lawsuits, and forced compliance. For example, in a recent Illinois case, the trial judge held a woman in criminal contempt and incarcerated her because she violated a court order by refusing to visit her children, whom the state had taken away.\textsuperscript{50} Justifying its affirmance of the lower court's order, the appellate court lamented:

One would hope that courts need not order parents to visit their children, who were removed from their parents' custody because of physical abuse. Sadly, in the world in which we live, such orders sometimes are necessary, as this record reveals. Given the increasing evidence around us of family disintegration, as well as a general breakdown in values, morals, and judgment, trial courts in juvenile court proceedings may need to call upon their inherent power of contempt more frequently in order to motivate recalcitrant parents and other respondents to comply with court orders.\textsuperscript{51}

Defining parent-child relationships in terms of rights misses the point and undermines the real needs of the parties themselves.

\textsuperscript{48} See, e.g., Beatrice Gross & Ronald Gross, \textit{Introduction} to \textit{The Children's Rights Movement}, supra note 3, at 1-2 (aspiring to end various forms of oppression by changing "our laws and institutions [so that they] recognize the fact that age is no precondition to human rights").

\textsuperscript{49} Consider, for instance, the child advocate who believes that otherwise complicated child custody hearings can become simple once children are given their own lawyers: "Our intervention changes the beast . . . . We're not here to divide families, but if you simply focus on the child's rights, what needs to be accomplished in each situation becomes obvious." Heather M. Little, \textit{Kids Get Their Day in Court}, CHI. TRIB., Apr. 17, 1994, §6, at 1, 11 (quoting Sue Davis, executive director of the Children's Legal Clinic in Chicago). \textit{But see id.} (comment of Dr. Alan Levy, professor of psychology and custody and also custody and visitation expert) (suggesting that judges should consider but not rely solely on what the child wants, and advocating a shift from focusing on "children's rights" to "desired outcomes").


\textsuperscript{51} Id. at 794. \textit{See also In re J.C.}, 617 N.E.2d 1378, 1381 (Ill. App. Ct. 1993) (affirming the trial court's order instructing a parent who sought to terminate her parental rights to visit her child).
Ferdinand Schoeman observed some years ago that relations between parents and children are more aptly described in spiritual/poetic terms than in legal terms, in terms that suggest union and identification rather than separation. As parents, we share ourselves with our children. Most parents, even lawyers, willingly and happily sacrifice for their children, yearn for their welfare, aspire and work continuously for their success, encourage, love, nurture, comfort, teach, protect, and promote them without giving any thought to the "rights" of their children. Parents devote themselves out of love for their children, not because their children have "rights."

What happens when parents' relationships with their children are reduced to "rights?" Divorce provides a clear example. Particularly revealing is the relationship between noncustodial parents (fathers mostly) and their children. Some noncustodial parents maintain very strong relationships with their children despite the pains and obstacles of divorce. These parents continue to share themselves with their children, sacrifice for them, love, support, protect, and nurture them in every way possible—even more than many parents in intact families do. Unfortunately, however, noncustodial parents more frequently tend to drift away (or are driven away) after divorce, and within a short time, they no longer actively seek the welfare of their children and often even neglect to make consistent child support payments.

53. Id. at 8-9:

We typically pay attention to the rights of individuals in order to stress their moral independence . . . . [T]he language of rights typically helps us to sharpen our appreciation of the moral boundaries which separate people. . . . We share our selves with those with whom we are intimate and are aware that they do the same with us. . . . The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one that the language of rights is forged to suit. So, rather than encouraging abusive parents to feel more intimate with their children, it may cause parents . . . to question their consciousness of a profound sense of identification with, and commitment toward, their families.

54. See, e.g., Whitehead, supra note 38, at 65 (describing the alienating effects divorce has on children's relationships with their non-custodial fathers). Whitehead reported:

The father-child bond is severely, often irreparably, damaged in disrupted families. In a situation without historical precedent, an astonishing and disheartening number of American fathers are failing to provide financial support to their children. Often, more than the father's support check is missing. Increasingly, children are bereft of any contact with their fathers. According to the National Survey of Children, in disrupted families only one
Because more than a million marriages end in divorce, this tragedy touches millions of children every year.\textsuperscript{55} After divorce, a non-custodial parent’s relationship with his children is reduced to one of “rights.” Children of divorce have rights galore.\textsuperscript{56} Most of them would rather have two parents.

Aleksandr Solzhenitsyn understood the limits of “rights” when, in his celebrated commencement address at Harvard University, he declared:

I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man’s noblest impulses.

\textsuperscript{55} See, e.g., Plunkett, supra note 34, at 52 (attributing the explosion of the divorce rate to the emergence of no-fault divorce laws); see also Whitehead, supra note 38, at 50 (reporting that one million children endure divorce or separation every year).

\textsuperscript{56} The right to receive a welfare check has a similar alienating effect on children’s relationships with their fathers. In his dissent in Bowen v. Gilliard, 483 U.S. 587 (1987) (Brennan, J., dissenting), Justice Brennan noted:

Those who are affected by the Government in these cases are fathers and children who have sustained a relationship whereby the child is supported by the father, not dependent on the State. The State has told the child that if it is to live with a mother not so fortunate, it too must become a dependent of the State. If it does so, the child’s material needs will no longer [be] met by a father’s attention to his particular child. Rather, the child will be one of many who are supported by the Government, and the father, powerless to direct assistance to his child, can only reimburse the Government for supporting the entire household. Such an arrangement calls to mind Aristotle’s criticism of the family in Plato’s Republic: “[E]ach citizen will have a thousand sons: they will not be the sons of each citizen individually: any and every son will be equally the son of any and every father; and the result will be that every son will be equally neglected by every father.” Regardless of the benevolence with which it is issued, a Government check is no substitute for the personal support of a loving father.

\textit{Id.} at 633 (Brennan, J., dissenting) (citations omitted).
And it will be simply impossible to bear up to the trials of this threatening century with nothing but the supports of a legalistic structure.57

Whenever we infuse the language of rights into a controversy, we invite some form of government to become involved in that controversy, because we look to the government to protect our rights.58 By this process we weaken the various forms of association upon which a society is built (e.g., family, friendship, neighborhood, citizenship), because rights necessarily focus on the demands of the individual against the activities of the group.59 As anthropologist Stanley Diamond observed: “We live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts.”60 He lamented the “progressive reduction of society to a series of technical and legal signals, [and] the consequent diminution of culture, that is, of reciprocal, symbolic meanings . . .”.61 By “legalizing” our society, we are driving wedges into the entities that promote unity and citizenship.62 Because we rely on the various associations that comprise society and are necessary to provide prosperity

58. See, e.g., THOMAS PAINE, THE RIGHTS OF MAN 267, 305-09, in REFLECTIONS ON THE REVOLUTION IN FRANCE BY EDMUND BURKE & THE RIGHTS OF MAN BY THOMAS PAINE (Anchor Books Edition 1973) (discussing how governments are formed to preserve the various rights of the people).
59. See GLENDON, supra note 23, at 109 (noting how “rights talk disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of human personhood”).
61. Id. at 72.
62. See GLENDON, supra note 23, at 3 (noting the way “legalization” disintegrates our culture):

This “legalization” of popular culture is both cause and consequence of our increasing tendency to look to law as an expression and carrier of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law. With increasing heterogeneity, it has become quite difficult to convincingly articulate common values by reference to a shared history, religion, or cultural tradition. The language we have developed for public use is . . . more legalistic than [ever before, drawing] to a lesser degree on other cultural resources. Few American statesmen today are—as Abraham Lincoln was—equally at home with the Bible and Blackstone. . . . Legality, to a great extent, has become a touchstone for legitimacy. As a result, certain areas of law, especially constitutional, criminal, and family law, have become the terrain on which Americans are struggling to define what kind of people they are, and what kind of society they wish to bring into being.

Id.
and security, the consequences of the deterioration of these associations could be dire.

Some advocates of children's rights also seem to forget how subjective and unstable rights are. For example, a review of children's rights cases during the past thirty years reveals a swinging pendulum motion. From about the mid-1960s to the early or mid-1980s, the most prominent cases emphasized broadly the legal rights of minors. For the past decade or so, however, the pendulum has swung in the other direction, recognizing some significant restrictions on children's rights that do not apply to adults. Children's rights change as the popular social model of the family changes.

Rights advocates also forget how easily rights can be abused. For example, the lead litigating party in many of the minors'-right-to-abortion cases has been Planned Parenthood. The real dispute in those cases did not involve parent-versus-child conflicts but rather parent-versus-Planned Parenthood conflicts. Planned Parenthood disputed the legal principle that parents would be the crucial advisor

63. See Paine, supra note 58, at 400 (attributing to the principles of society and civilization the safety and prosperity of the people).

64. See, e.g., Bellotti v. Baird, 443 U.S. 622, 651 (1979) (striking down a Massachusetts statute requiring an unmarried pregnant minor seeking an abortion to receive her parents' consent or, if her parents refuse to consent, to receive judicial approval because the statute unduly burdened a minor's right to obtain an abortion); Planned Parenthood v. Danforth, 428 U.S. 52, 83 (1976) (holding a state abortion statute that required married women seeking an abortion to acquire written spousal consent and unmarried minors to obtain written parental consent unconstitutional); Goss v. Lopez, 419 U.S. 565, 583 (1975) (finding that students had the rights, under the Due Process Clause of the Fourteenth Amendment, to notice and opportunity to be heard prior to suspension from public high school); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (holding a school policy unconstitutional because it violated students' right to expression by prohibiting the wearing of armbands to school in protest of the Vietnam War).

65. See, e.g., Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (holding that a public school district policy mandating random drug testing for interscholastic athletes did not violate students' right to be free from unreasonable searches); Ohio v. Akron Center for Reprod. Health, 497 U.S. 502 (1990) (holding that a state statute requiring a doctor, prior to performing an abortion on an unmarried minor, to provide notice to the minor's parents or obtain a court order of approval did not violate the Fourteenth Amendment); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (finding that public school principal did not violate students' First Amendment rights when he censored part of the student newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding school district's actions of sanctioning a public high school student for using indecent language in his nominating speech during a student assembly).

66. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); Danforth, 428 U.S. at 52. These cases all addressed, inter alia, mandatory parental participation laws.

67. Casey, 112 S. Ct. at 2823; Ashcroft, 462 U.S. at 478; Danforth, 428 U.S. at 54.
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for their pregnant minor children in an abortion decision. All too often it seems that activist groups on the right and the left use children’s rights (or parents’ rights) to further their much broader social reform political agendas (as in the Planned Parenthood abortion cases) of imposing their values on someone else’s children.

Thus, one should not be optimistic about the consequences of recasting the model for parents’ relationships with their children in a legalistic “rights” model. In a society facing the most dramatic disintegration of families in recorded human history, it is of little comfort if parents are encouraged to think about their relationship with their children in abstract legal terms and concepts that foster separation and boundaries.

IV. THE CONSTITUTIONAL RIGHTS OF CHILDREN

“The idea of children having rights is, in many ways, a revolutionary one.” This observation is especially true of constitutional rights. The United States Constitution makes no mention of either parental rights or children’s rights. Indeed, it would have been impossible to speak of the “constitutional rights” of parents or children (rights which they could assert against each other in disputes over domestic issues) prior to the twentieth century. A different theory of “rights” prevailed at the time the Constitution was drafted and for more than a century thereafter. The parent-child relationship was not derived from the state, was not a property right, and certainly was not perceived in legalistic terms.

The Founders of our country, however, believed passionately that certain preconditions were essential for the success of the consti-

68. Casey, 112 S. Ct. at 2830; Ashcroft, 462 U.S. at 492; Danforth, 428 U.S. at 67.
69. For an interesting discussion on how the legal system dissolves “families into their component parts,” see GLENDON, supra note 23, at 121-30.
71. See GLENDON, supra note 23, at 122 (noting that family members did not have causes of action against one another for much of our history).
72. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 184-98 (1967); JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, THE AUTHORITY OF RIGHTS 1-15 (1986). For instance, Montesquieu, the political writer most frequently cited in America during the Founding Era, emphasized the distinction between “manners” or “customs” on the one hand and “laws” on the other, and emphasized that matters of custom and manner were inappropriate subjects for legal regulation. C.L. DE SECONDAT (BARON DE MONTESQUIEU), THE SPIRIT OF LAWS, Book XIX, ch. 14 (T. Nugent trans., 1902).
tutional government. These preconditions included the values and relations we now refer to as parental rights and children’s rights. The Founders considered Americans’ “domestic habits” as necessary “preconditions” for maintaining the constitutional Republic. These domestic habits included the traditions of protecting and preparing children for citizenship, and of parental authority and family integrity. The Founders included these domestic habits among the cornerstones of liberty, even though they did not consider them “rights” in the narrow meaning of the word that then prevailed. Today a broader concept of rights exists, labeling as fundamental rights principles that were not within the narrow eighteenth century conception of rights. Because the modern-day concept of rights has expanded, it surely should encompass those relations, institutions, and principles (including both children’s rights and parents’ rights) which two centuries ago were considered essential to the constitutional system of liberty.

Recognizing the constitutional rights of children and parents is much more important today than it was 200 years ago for several reasons. First, rights have proven particularly valuable to protect the individual from abuses of the power of the state. The state and its agencies have become much more powerful, pervasive, and potentially intrusive today than they were in 1787. Therefore, children’s rights and parents’ rights must now be recognized in order to protect individual parents and children from abuses of state powers.

Second, the concept of rights also marks the minimum essential protections that all persons owe to each other in our society. Children are humans, too; they live, breathe, and have their being. If we exclude any human beings from our system of rights, we violate one of the fundamental principles on which our constitutional system of laws, and our very society, is established—the principle of equal worth under law of all humanity. If rights do not apply to all humanity, we all may suffer the stifling consequences.

73. FRANCES GRUND, ARISTOCRACY IN AMERICA 212-13 (1959). See infra note 95 and accompanying text.
74. GRUND, supra note 73, at 212-13.
75. Consider, for example, the fact that Thomas Jefferson listed only three rights in his Declaration of Independence: “Life, Liberty and the Pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The founders believed that the purpose of government was to secure natural rights like those listed above, while leaving other concerns to the people. See id.
76. For a chilling description of what life is like when facing a pervasive government without being protected by a system of individual rights, see generally ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO Vols. I-III (Thomas P. Whitney trans., 1973).
Third, to live as a free and independent human being and citizen, capable of the pursuit of happiness and of fulfilling the minimal responsibilities of citizenship, demands much greater rights protection in 1996 than it did in 1795. As a result, the concept of rights has expanded. Today, in the age of complex technologies, global market competition, and an information explosion, people require more to be self-supporting and to fulfill basic family and civic responsibilities than 200 years ago. Thus, people require more rights protection in order to secure individualism.

Fourth, in the past 200 years, many of the mediating structures that used to constitute community and protect the individual have disappeared or atrophied. Many writers have noted that there is an inverse correlation between close relationships and commitments to institutions of community, on one hand, and legal rights, on the other. As the former decreases, the latter increases. That is, as relationships of closeness and insulating institutions of community have waned, the resort to "rights"—the paradigm that exists for regulating relations among strangers—has predictably increased. For example, in previous generations, large nuclear families (many siblings), interactive extended families, and churches provided substantial support for many people. Today, those mediating institutions have become much weaker, fewer, and less able to give support. In the resulting vacuum, many Americans cut off from these institutions have turned understandably to "rights rhetoric" to obtain what such institutions no longer provide.

Thus, the question is not whether children have constitutional rights; they undeniably do. But rights—even constitutional rights—are not a panacea. The Constitution does not provide the answers to all questions, not even to all important questions. Rights are the wrong answer to some problems. Government and rights are not the best solution to all of the problems of society, particularly not for the problems and needs of children. Thus, we must consider what rights children have and how we can best effectuate those rights without damaging the network of family relationships that are so important for the healthy growth, nurturing, and development of children.

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77. See supra notes 57-63 and accompanying text.

78. See, e.g., GLENDON, supra note 23, at 3 (considering our focus on "rights" and the "legalization of our culture" and that such a focus brings as the "cause and consequence" the deterioration of the pillar institutions of our society).

79. See supra part III.
V. VIRTUE AND RIGHTS

To answer these questions, we can turn again to the origins of the Constitution. The Founders of our Constitution had no illusions about human nature. They believed firmly in the dual nature of humanity—the capacity for good and for evil. As James Madison noted in the Federalist Papers: "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence."\(^8\) Alexander Hamilton agreed that society should "view human nature as it is, without either flattering its virtues or exaggerating its vices . . . ."\(^8\) Many people in the Founding Era shared this view.\(^8\) Recognition of this dual nature created a great dilemma for the founders of our government. Madison described that dilemma best:

What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place to oblige itself to control itself.\(^8\)

Madison also described the Founders’ solution to this conundrum: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."\(^8\) By "auxiliary precautions" Madison meant the Constitution, including the structural checks and balances and the substantive and procedural rights it guaranteed. That would include, today, children's rights and parents' rights as declared under the law. But the 'primary' protection was nonlegal—a "dependence on the people." By that, he meant a dependence on the character of the people, what political thinkers in that generation called, quaintly, "virtue." The Founders believed, with Benjamin Franklin, that "only a virtuous people are capable of freedom. As nations become corrupt

\(^8\) The Federalist No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961).
\(^8\) The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
\(^8\) Id.
and vicious, they have more need of masters." Madison declared: "To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea." Samuel Adams believed that "neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt." John Adams acknowledged: "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

Virtue—the "responsibility to one's neighbors and to one's nation"—was the substructure upon which the superstructure of constitutional rights and government was built. If the foundation slipped, the government and the liberties it protects would not survive. Perhaps a contemporary of Alexis de Tocqueville, Francis Joseph Grund, best described this belief when he commented about American virtue and American government:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the

86. 5 THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904).
87. 1 THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 22-23 (William V. Wells ed., 1865).
89. Sunstein, supra note 20, at 742. Sunstein also notes that virtue "is an aspect of citizenship that is notoriously neglected in public discussion and social practice. Whether rights are the culprit here may be questioned. But insofar as rights are understood in purely self-interested terms, it is certainly conceivable that they can crowd out issues of responsibility." Id. at 743.
90. The Founders considered their enterprise as an experiment testing the proposition that men are capable of governing themselves sufficiently to have an expansive role in the government of their nation. See, e.g., THE FEDERALIST No. 1, at 1 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (proclaiming that America had the task of deciding "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend . . . on accident and force").
Thus, the most important right we can give our children is the right to be taught virtue. If enough children do not acquire that quality—if a generation arises that lacks a critical mass of citizens who are genuinely committed to the common good and have the capacity to be faithful and constant in their commitments (even at the cost of sacrificing personal desires and self-interest)—our system of self-government, and with it our liberties, will be lost. For the sake of our children and ourselves, our rights and our government, the Founders understood (and we must rediscover) how important it is to protect, preserve, promote, and encourage those institutions that teach children virtue, especially marriage and family. No time in the history of the United States has known a greater need for societal recognition and inculcation of the importance of marriage and family integrity.

The most important virtue-teaching institution is the family established on a lasting marriage. Children learn how to be obedient to the unenforceable in the stable family home. Children learn how to be committed beyond self-interest from the lasting marriage of their parents. From the marriage of their parents, children learn why and how to serve, sacrifice, support, and sustain even when circumstances may be difficult.

Some public policy decisions during the past three decades (both judicial and legislative) regarding family law have seriously undermined the foundation for rights by demoralizing marriage and family law. By convincing ourselves that we could more fully enjoy our individual rights if we did not bind ourselves to the commitments of marriage and family, and by making family relations more dispensable, we have chipped away at the substructure of virtue that is the very foundation of our rights. We have ceased in some instances to protect and preserve, much less to promote and encourage, those institutions in which children learn best and most indelibly the lessons of virtue. The breakdown in support for the family has done more to deprive children of their rights, including the critical right to be schooled in the quality of virtue, than anything else that has happened in our society. Nothing is so disastrous to children, and if the

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92. Vetterli & Bryner, supra note 82, at 31-32 (emphasis added).
93. For a discussion of the multitude of maladies suffered by children from broken homes, see generally, Whitehead, supra note 38.
94. See, e.g., Plunkett, supra note 34, at 48 (asserting that the emergence of no-fault divorce laws, which make divorce too easy to obtain, has effectively abolished marriage).
95. In addition to teaching virtue, two parent homes better provide for their children. See Drinan, supra note 7, at 143. "Forty percent of children in America are, what has
Founders were right, to the future of our constitutional government and liberties, as the disintegration of the family. This disintegration has been stimulated by and contributed to the diminution of legal support for and commitment to strong, stable marriages and families.

VI. OF PLURALISM, PERFECTIONISM, AND PANACEAS

Despite all of the talk about pluralism in recent years, it seems that the concept has not sunk deeply into our consciousness. Policymakers tend to search for the perfect policy that will work for all communities, in all cultures, under all conditions. In fact, many communities and many subcultures comprise our society. Children in the United States grow up in a diversity of conditions, cultures, and social circumstances. Consequently, one-size-fits-all policies for children's rights are doomed for failure. This reality mandates flexibility and plural approaches. We disserve the children of America when we ignore the reality of diversity, and pretend that there is only one world out there, when, in fact, there are many worlds. The concept of one policy that will work successfully in our “homogenous” society is an illusion and a failure in child welfare policy.

Two hundred fifty years ago, Charles Louis de Secondat, better known as the Baron de Montesquieu, discovered (or rediscovered) the best solution to the complexity of pluralism. Considered one of the founding scholars of sociology and one of the most important political philosophers in the history of Western civilization, Montesquieu's *The Spirit of the Laws* heavily influenced the political writers in America during the era of the founding of our nation. The Founders read, quoted, debated, analyzed, and largely believed Montesquieu more than any other secular writer. The title of his most famous work, *The Spirit of the Laws*, captures one of Montesquieu's most brilliant insights. Montesquieu wrote that laws should be framed to reflect the values—the spirit—of the community. Montesquieu recognized that

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96. See *De Secondat (Baron de Montesquieu)*, supra note 72.
98. See, e.g., THE FEDERALIST No. 47 (James Madison) (characterizing Montesquieu as the oracle responsible for the separation of powers doctrine employed in the U.S. Constitution).
99. *De Secondat (Baron de Montesquieu)*, supra note 72, at Book XIX, ch. 5 (discussing “[h]ow far we should be attentive lest the general Spirit of a Nation be changed”).
communities would differ. Thus, he did not advocate a one-size-fits-all form of government. Although he greatly admired and supported the republic, he did not believe that a republican form of government was suitable or would be successful to govern all societies. Instead, he believed that the spirit of the laws should reflect the spirit of the community. Thus, he stated:

[T]he government most conformable to nature, is that which best agrees with the humour and disposition of the people in whose favor it is established. . . . [Laws] should be adapted in such a manner to the people for whom they are framed. . . .

As a result, "[i]t is the business of the Legislature to follow the spirit of the nation . . . ." Montesquieu had an obvious influence on the Founders of the United States Constitution. The system of federalism which they adopted exhibited a belief in the need for the laws to reflect the spirit of local (state) communities. The dual-sovereignty of the American government left substantial authority in the states. These states were closer to the people in their respective communities and would be able to enact laws that reflected the different character and spirit of the different state communities.

As applied to the discussion of children's rights, one critical application of this principle of the spirit of the laws leads to the conclusion that we must not expect any single policy will work in all communities. The needs and circumstances, values and aspirations, skills and understandings, preparation and commitments of individuals and couples vary within a single state: between white collar and blue collar communities; between religious and non-religious; between Catholic, Protestant, and Jewish backgrounds; between rural, inner-city, and suburban communities; between communities largely composed of intact families and communities largely composed of single parents; between never married, divorced, and abandoned families; between people who were abused as children and people who were spoiled as children; between people who grew up as only children and people

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100. Id. at Book XIX, ch. 7 (noting the differences between the people of ancient Athens—a democracy—and the people of ancient Sparta).
101. Id. at Book I, ch. 3.
102. Id. at Book XIX, ch. 5.
103. Thus, while the Founders created a strong central government, the genius of the system of government they created was federalism—the retention of separate, equal, independent states with a large measure of residual sovereignty. See, e.g., The Federalist No. 32, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (characterizing federalism as an "equilibrium" between state and federal power).
104. See, e.g., The Federalist No. 45, at 200 (James Madison) (Clinton Rossiter ed., 1961) (discussing how the states will have an advantage over the proposed federal government because the former will be closer to the people).
who grew up with many siblings; between people who are gregarious and people who are loners; between people who have mental illness and people who do not, etc.

Thus, this Essay does not advocate marriage for all individuals and in all circumstances. Clearly, marriage will not work in some circumstances and in some subcultures. Some people are not prepared to implement successfully the principles this Essay espouses.

This Essay advocates marriage as an important mechanism to secure the “rights” of children. Marriage is a relationship that virtually all adults have the potential to enjoy and to participate in successfully for the benefit of children. But not all individuals are prepared for or committed to marriage, not all couple-combinations create successful marriages, and in some environments marriage will not flourish.105 Judging from caricatures of marriage and irresponsibility portrayed in the typical television programming and movies, it is apparent that there are some subcultures in America in which marriage would not be a successful solution to the needs of children. Thus, this Essay is not proposing marriage as an all-or-nothing, one-size-fits-all solution to the problem of children’s rights. This Essay is, however, proposing marriage as a solution that works extremely well in some communities—so well that it historically was and should be the aspiration, model, or ideal for the nation at large.106

Marriages can be a very successful—apparently the most successful—system for guaranteeing the rights and welfare for children.107 Does this mean that we should mandate marriage? Should we compel all persons over thirty years old to get married? Is this Essay advocating that we abolish divorce even when there has been

105. See, e.g., MURCHISON, supra note 29, at 43-44. As Murchison acknowledges: Not all marriages are lovingly committed; otherwise, why would there be a 50-percent divorce rate? Lawfully wedded husbands and wives sometimes beat each other up, ignore each other’s basic needs, or abuse their own children, and sometimes all three. The point is not that all marriages are good, because many are awful. The point is that the institution of marriage, based as it is on exalted promises, is good.

Id. (emphasis added).

106. See, e.g., id., at 50.

Though far from perfect as a social institution . . . the intact family offers children greater security and better outcomes than its fast-growing alternatives: single-parent and stepparent families. Not only does the intact family protect the child from poverty and economic insecurity; it also provides greater noneconomic investments of parental time, attention, and emotional support over the entire life course.

Id. (quoting Barbara Whitehead).

107. Id.
infidelity, or repeated or severe physical abuse, or unbearable and con-
tinuing emotional abuse? Should we force parents to remain together "for the sake of the children?" Should we limit divorce only to couples who have no minor children? The answer to all of these questions is obviously and emphatically—No! Marriage cannot be mandated nor divorce eliminated. Indeed, so long as public policy is to encourage and support marriage, there must be a safety valve, because there will be individuals who marry even though they are not prepared for marriage—because of the social encouragement and social support available for marriage. Those unprepared individuals and those ill-
paired couples need a safety valve. Thus, this Essay does not advocate mandatory marriage or the abolition of divorce.108

The concept of pluralism also teaches us that there are, and must be, multiple approaches to protecting the interests of children. Legal rights constitute a very important element of the total program of securing the welfare of children in our country; but they are not the only solution or the only program. Society must provide things designed to help families flourish, such as prudent public assistance, social service support agencies, employment considerations (ranging from getting a job to child care to child birth and adoption leave programs, to flex-
time, etc.), psychological support, medical support, education and the educational systems, police, religion, other value-supporting mediating institutions (including Boy Scouts, Girl Scouts, service organizations, etc.), the family (including the nuclear family, the extended family, and reconstituted families), and alternative or quasi-family relationships (including foster care, informal quasi-parenting arrangements, etc.).109

108. While divorce should not be abolished, Robert Plunkett makes an interesting argument in favor of altering the divorce laws so as to make divorce more difficult to obtain. Contending that no-fault divorce laws in which one person can unilaterally dissolve a marriage have abolished the crucial element of perpetuality in marriages, Plunkett insists:

Marriages should be dissolvable only by mutual agreement or on grounds, such as adultery, desertion, and criminal physical abuse, that clearly involve a wrong by one party against the other and that by their very nature constitute a violation of the marriage vows as they are traditionally understood. A husband or wife who faithfully performs his or her duties in the marriage should have the absolute right to insist that the marriage remain intact. The addition of "mutual agreement" to the traditional grounds for divorce eliminates the need for fraudulent, collusive divorces by preserving the right of couples to end a marriage in which they both feel trapped.

Plunkett, supra note 34, at 53.

109. See, e.g., BENNETT, OUR CHILDREN, supra note 29, at 65 (asserting that families need society’s support to flourish); see also Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. REV. 79, 135-37 (concluding that the first
Another dimension of the concept of plurality and diversity is that one scheme does not have to work for all communities. American society is large enough and the dynamics of its many subcultures are vital enough that a little leavening will leaven the whole lump. Many dysfunctional families can benefit from the example of a few very good, functional families. We need not expect 100% success in marriages or parenting or family stability for our society to continue and for our system of liberty to survive. Unanimity and perfection are not required—but a critical mass is. Thus, the question is not how we can get everyone to be perfect, functional parents, with perfect, stable marriages; rather, the question is what we need to do as a society to generate and maintain a “critical mass” of stable and successful marriages and families.¹¹⁰

Finally, marriage is not a panacea for the needs of children. Not all individuals are prepared for marriage. Not all combinations of individuals in marriage will make for successful marriages. Not all marriages will be stable and secure. Not all marriages will last. No marriage will be perfect all of the time. Some marriages will be downright terrible most of the time. Even when there are stable, secure, loving marriages, that will not guarantee that the marriage partners will always be good parents, or that the children will feel loved, valued, and supported. And not all good parents have perfect children. Even the best parents in the most secure marriages experience some difficulties with their children. Thus, marriage is not a panacea. There is no “magic potion” that will work all of the time with all children and all adults to guarantee the kind of nurturing, love, and training that we want all children to have. Perfection is not reality, and we should not expect perfection of our marriages or our public policies.¹¹¹ However,

¹¹⁰ See, e.g., Plunkett, supra note 34, at 54. Commenting on how societal and legal conditions can deteriorate the bonds of marriage, Plunkett notes:

People earnestly want commitment from their beloved, but it is no longer possible to have final commitment to or from anybody. You can devote your life to someone else, but the law and society give you no security against the other person's leaving and making all your effort pointless. People are rational; when they know this they will, for their own protection, hold back on giving love and making sacrifices. Knowing that they can be thrown away at any time and that divorce has become the rule rather than the exception has transformed married couples from partners in life's journey into players in a game of prisoner's dilemma.

Id.

¹¹¹ See, e.g., MURCHISON, supra note 29, at 44 (asserting that the institution of marriage is beneficial and good, even though there are individual marriages that are defective).
marriage works best to fill the needs and protect the rights of children.  

VII. CONCLUSION

A few years ago, Professor Robert A. Burt wrote: “In my view, children cannot be adequately or even sensibly protected by giving them ‘rights’ that state officials will enforce against parents. Children can only be protected by giving them parents.” This Essay agrees with this observation, adding that the best way to “give” children parents is to encourage the marriage of their parents. Parents—a mother and a father—who are committed to their marriage can best protect children’s rights. To protect children, we need to strengthen and protect marriage as a social institution. Lawmakers can and should do that for the sake of our children. That is what we need to secure children’s rights.

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112. See, e.g., id. at 50 (quoting Barbara Whitehead) (revealing how having married parents positively affects nearly every aspect of a child’s life).