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# Beyond Family Law

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## BEYOND FAMILY LAW

*Sarah Abramowicz*<sup>†</sup>

## ABSTRACT

Family law has traditionally been treated as an exceptional field, a marginalized and special case in which the usual rules of the legal canon do not apply. This Article argues that the current challenge to family-law exceptionalism has been largely one way, to the detriment of a central concern of family law: the protection of children and of the parent-child relationship. Family-law scholars have focused primarily on whether and how to import the tools and insights of other areas of law into the zone of family relations, while largely overlooking the possibility that the tools and insights of family law might instead be exported outward, into the rest of the legal canon. In the process, family-law scholars have contributed to an already existing blind spot regarding the extent to which the conditions of child rearing are affected, often profoundly, by jurisprudence that we do not think of as involving family relations, but that affects the conditions of children's development by affecting their parents or caretakers.

This Article considers how family law's perspective on children's interests might be exported into areas of law that affect children indirectly. The Article investigates two paradigmatic fields in which children's interests may be affected by cases involving their parents: criminal law and contracts. By using the perspective of family law to examine the relevance of children's interests to criminal law and contracts, the Article shows how taking children's interests into account in cases involving their parents can further the internal consistency and legitimacy of each field. The Article builds upon this rationale to formulate a model for assessing when and how it is appropriate for courts to factor children's interests into their decision making in cases that involve children only indirectly.

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## INTRODUCTION

Family law has traditionally been treated as an exceptional field, a marginalized and special case in which the usual rules of the legal canon, such as the ordinary operation of contracts, criminal sanctions, and torts, do not apply.<sup>1</sup> Many family law scholars today are engaged in challenging this family law exceptionalism.<sup>2</sup> For several years, scholars have contested the suspension of the usual rules of law within the specialized zone of family relations.<sup>3</sup> More recently, others have begun to argue for importing the tools and insights of other legal fields into family law, for instance by applying fiduciary law,<sup>4</sup> tort law,<sup>5</sup> or partnership law<sup>6</sup> to problems within family law, or by recognizing the constructions of the family by seemingly unrelated areas of law such as criminal law and welfare law.<sup>7</sup>

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1. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 840–41 (2004) (noting the suspension of usual legal rules within the family domain, in the form of judicial refusal to enforce inter-spousal contracts for domestic services, differential treatment of marital rape, and inter-spousal tort immunity).
  2. See, e.g., Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005) (contending that the law refuses to countenance certain types of economic exchange within the family in order to signal the sanctity of intimate relations, and in the process exacerbates the deprivations of women and the poor).
  3. See, e.g., Hasday, *supra* note 1, at 839–42 (arguing that the suspension of the usual rules of contracts, criminal law, and torts within the family reflects the persistence of the gendered doctrine of coverture); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 134 (1998) (contending that the selective non-enforcement of the non-monetary aspect of premarital agreements betokens a refusal to recognize the value of domestic labor); DAN MARKEL, JENNIFER M. COLLINS, AND ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES, at xii–xiii (2009) (criticizing the suspension of the ordinary rules of criminal law within the family, which the authors characterize as creating either “family ties benefits” or “family ties burdens”).
  4. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401–02 (1995) (employing the tools of fiduciary law and agency theory to reconceptualize the parent-child relationship).
  5. See, e.g., Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 57 (1991) (applying tort-law analysis to the problem of alimony).
  6. See, e.g., Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993) (reconceptualizing marriage and divorce from the standpoint of business partnership law).
  7. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008)

This Article argues that the current challenge to family-law exceptionalism has been largely one way, to the detriment of a central concern of family law: the protection of children and of the parent-child relationship. Family law scholars have focused primarily on whether and how to import the tools and insights of other areas of law into the zone of family relations,<sup>8</sup> while largely overlooking the possibility that the tools and insights of family law might instead be exported outward, into the rest of the legal canon. In the process, family law scholars have contributed to an already existing blind spot regarding the extent to which the conditions of child rearing are affected, often profoundly, by cases that we do not think of as involving family relations.

While family law attends with care to the ways in which the situation of parents affects their children's development and well-being, other areas of law either marginalize or ignore entirely the extent to which what happens to a parent can affect a child as well. This Article considers how family law's perspective on children's interests might be exported into areas of law that affect children indirectly by affecting their parents. The Article will consider two paradigmatic instances of fields in which children's interests may be affected by cases involving their parents: criminal law and contracts.

In criminal law, children are affected especially profoundly by cases involving the incarceration of their parents. How to treat children's interests in such situations has long been a puzzle within criminal law. By considering children's interests from within the limited perspective of their own doctrinal field, however, criminal-law scholars in favor of taking children's interests into account have struggled to articulate a convincing theoretical rationale for doing so, while those opposed have reached the conclusion that children's interests are collateral to, or even at odds with, the overarching goals and premises of criminal law.<sup>9</sup> This Article turns that conclusion on its head, showing that, when viewed from the perspective of family

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(suggesting that family law look to these and other areas of law to expand its conception of caregiving relationships).

8. Others argue for including within the family-law canon areas of law that regulate familial rights and responsibilities but are not traditionally recognized as family law, such as welfare law, *see* Hasday, *supra* note 1, at 892–98 (“The exclusion of welfare law from the family law canon has allowed legal authorities to avoid explaining why the law applies very different rules to govern familial rights and responsibilities in poor families.”), and immigration law, *see* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1633 (2007) (demonstrating the ways in which immigration law regulates marriage and arguing that “conceiving of immigration law as a form of family law . . . could alter the way we understand both immigration law and family law”).
9. *See* discussion *infra* Part II.A.3.

law's insights about the nature and importance of childhood, taking children's interests into account can be seen as furthering and enhancing the goals and legitimacy of criminal law.

In contract law, by contrast, scholars are often blind entirely to the ways in which children are affected by cases involving their parents. Currently, contracts scholars consider children's interests only in cases involving contracts that regulate the family directly.<sup>10</sup> These agreements, such as surrogacy and adoption contracts, are typically excised altogether from the realm of contract law and relegated to the specialized region of family-law exceptionalism, in which the ordinary rules of contract law do not apply. On the other hand, there is almost no discussion by contracts scholars regarding the ways in which children are affected by non-familial contracts involving their parents, such as ordinary commercial contracts or consumer agreements. This Article uses the perspective of family law to consider whether children's interests should be taken into account in such cases.

By using the perspective of family law to examine the relevance of children's interests across the legal canon, this Article shows how taking children's interests into account in cases involving their parents can be seen as furthering the internal consistency of criminal and contract law, as well as promoting certain goals and premises that are shared across a range of doctrinal fields. The Article builds upon this rationale to formulate a model for assessing when and how it is appropriate for courts to factor children's interests into their decision making in cases that involve children only indirectly.

The Article begins, in Part I, by investigating what family law assumes about why children's interests matter. It does so by analyzing the one area of law in which children's interests are paramount: child custody disputes. In assessing children's interests in the context of custody disputes, courts articulate the myriad ways in which the conditions of child development form the adult self. This articulation brings to light, as most legal discussions do not, the extent to which unchosen conditions of child development—such as parenting, education, and socioeconomic status—can either expand or circumscribe the choices available to each adult. Part I ends by drawing out the insights of courts deciding custody disputes about the connection between the conditions of child development, on the one hand, and the extent to which each child is likely to function as a productive and autonomous adult, on the other.

Part II employs family law's insights about the importance of child development to examine how children are affected in cases involving their parents in two doctrinal areas: criminal law and contract law. Focusing on two exemplary situations—the

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10. See discussion *infra* Part II.B.3.

incarceration of parents under criminal law and the enforcement under contract law of agreements to which the parents of minor children are parties—Part II uses the insights about child development articulated by family law to show the extent to which children’s development is potentially affected by legal cases involving their parents in both fields. Part II then describes the current treatment of children’s interests in cases involving their parents in criminal law and contract law, and the scholarly debate within each field about whether children’s interests should be taken into account. Part II ends by showing the limits of, and gaps within, the current scholarly debate about children’s interests in both doctrinal areas.

In Part III, the Article develops a new rationale for taking children’s interests into account across the legal canon, even in cases where children are affected only indirectly. Much recent scholarship on children’s interests argues that these should be taken into account to promote deliberative democracy; the argument is that facilitating children’s development is a necessary precondition of social citizenship.<sup>11</sup> Another argument for facilitating optimal conditions of child development is that this is necessary to compensate caretakers for their unrecognized contribution to the social good.<sup>12</sup> This Article contributes a new perspective to the debate by grounding the argument for attending to children’s interests in the underlying assumptions within and across the various doctrinal areas in which children are affected by cases that involve them indirectly.

The central such assumption is a model of the legal subject that is taken for granted by a number of legal fields, including criminal law and contract law. As Part III demonstrates, both criminal law and contract law, when discussing the actions of competent adults, assume a legal subject who is autonomous in the sense of both free and rational, and as such can be held responsible for his or her actions and decisions. Part III then shows how the insights of family law contradict this model. When family-law courts discuss which custodial outcome is in a child’s best interests, they acknowledge the extent to which each adult is formed by his or her childhood experience. They

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11. See, e.g., LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 85 (2006) (noting “[t]hat society counts on families” to prepare children to “take their place as capable, responsible, self-governing members of society”); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 433 (2006) (“The implications of developmental research for constitutional law are simply stated: When sufficiently responsive to a young child’s needs, early caregiving relationships help to cultivate the cognitive and emotional processes that are the foundation for adult citizenship.”).
  12. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 44–48 (2004) (arguing that society owes a collective debt to caretakers and therefore needs to support and facilitate their “society-preserving labor”).

acknowledge, moreover, that a relatively deficient or optimal upbringing can either limit or enhance the rational capacity of, and the range of free choices available to, the adult that each child becomes. Family law thus brings into question the assumptions about individual autonomy that, as Part III demonstrates, underlie a number of doctrinal fields that deal with the actions of adults, such as criminal law and contract law. Part III concludes that taking children's interests into account in cases involving their parents can be seen as enhancing the consistency and legitimacy of these doctrinal fields.

Part IV builds upon this rationale to formulate a model for assessing when and how it is appropriate for courts to take children's interests into account in cases involving their parents. It develops this model by investigating how we can best promote the goals and premises of each doctrinal area of law, such as the model of individual autonomy shared by criminal law and contract law, while at the same time balancing the policy needs of each field.

The model developed in Part IV does not call for taking children's interests into account in every instance where they are potentially at stake, or for making children's interests the primary consideration. Part IV concludes that we should take children's interests into account in cases involving state action against parents, such as criminal prosecution. Children's interests in these cases should not trump every other consideration, as they do in family law. But when the state acts to reshape the family in ways that adversely affect a child's development, it should consider the likely effect on the child's future capacities as an adult and should balance this against the competing policy concerns specific to the relevant doctrinal field, such as, in criminal law, deterrence, retribution, incapacitation, and rehabilitation.

Part IV also contends, however, that courts should not take children's interests into account in instances of private litigation, such as contract disputes, unless that litigation concerns a scenario that is likely to affect children in a systemic way. When courts and legislatures encounter a type of private litigation that repeatedly affects children, they should fashion rules that protect children but apply regardless of whether children are involved in a particular case. These across-the-board rules would promote children's interests without incurring the risks of unfairness, inefficiency, and parental disempowerment that would occur if children's interests were taken into account in private litigation on a case-by-case basis.

## I. BEST-INTERESTS EXCEPTIONALISM AND FAMILY LAW'S INSIGHTS ON CHILD DEVELOPMENT

Judicial concern with how children develop into their adult selves is largely limited to one of the most anomalous areas of the legal canon: family law's "best interests of the child" analysis. As this Part will

discuss in Section A, courts rarely apply the best-interests test. When they do, however, they embark on a legal analysis that makes children's interests paramount. The result, as this Part will discuss in Section B, is to provide an unusually robust perspective on how children develop, one that recognizes—to an extent unmatched elsewhere in legal analysis—the connection between children's upbringing and early experience and the type of adult that each child becomes.

A. *Bests-Interests Exceptionalism*

Family law's "best interests of the child" analysis is exceptional in both applicability and scope. Only in certain carefully delineated instances do courts apply the best-interests standard. Once applied, however, the best-interests analysis is exceptionally broad, and employs a methodology both substantively and procedurally distinct from most modes of legal analysis and decision making. This Section will discuss the most salient aspects of best-interests exceptionalism—when the standard is used and how it works. It will then discuss the rationale behind this exceptional legal standard.

1. Limited Applicability of the Best-Interests Analysis

The "best interests of the child" analysis is typically triggered whenever two or more adults, each with equal rights to a child, ask a court to resolve a dispute about the child's upbringing or custody.<sup>13</sup> In its most familiar form, this type of dispute occurs when the parents of a child divorce or separate. Every state in the United States, as well as most foreign jurisdictions, resolves such disputes with reference to the best-interests standard.<sup>14</sup>

After the initial allocation of custody, the best-interests analysis can be triggered again in the course of subsequent disagreements. Parents may ask the court to revisit the original custody award<sup>15</sup> or they may ask the court to resolve differences regarding various aspects of a child's upbringing, ranging from the details of a child's

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13. See Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM L.Q. 815, 815–16 (1999).

14. See generally *id.* (describing the dominance of the best-interests approach in custody decision making); see also Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 5 (1997) ("Today, when married or unmarried parents separate, both parents have equal rights to custody under a best interest of the child standard . . .").

15. See, e.g., WYO. STAT. ANN. § 20-2-204(a) (2011) ("Either parent may petition to enforce or modify any court order regarding custody and visitation.").

education<sup>16</sup> or medical care<sup>17</sup> to a parent's right to relocate.<sup>18</sup> In these situations, the triggering of the best-interests analysis is not automatic. When a parent requests a change in custody, most jurisdictions require that an initial burden—such as a showing of a material change of circumstances—be met before a court will revisit its initial decision by re-engaging in a full-fledged best-interests analysis.<sup>19</sup> Courts are even more averse to resolving differences over the details of a child's upbringing, and will often avoid the need to do so by dividing up decision-making authority over various aspects of the child's life.<sup>20</sup> In a number of jurisdictions, however, courts will, in some circumstances, resolve such disputes with reference to a child's best interests.<sup>21</sup>

The "best interests of the child" analysis is also used in proceedings for termination of parental rights or adoptive placements.

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16. *See, e.g.*, *Lombardo v. Lombardo*, 507 N.W.2d 788, 792 (Mich. Ct. App. 1993) (remanding to the trial court for determination of which school placement was in the child's best interests, where divorced parents disagreed).
  17. *See, e.g.*, *Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson and Sanger, L.L.P.*, 764 N.W.2d 534, 538 (Iowa 2009) ("When joint legal custodians have a genuine disagreement concerning a course of treatment affecting a child's medical care, the court must step in as an objective arbiter, and decide the dispute by considering what is in the best interest of the child.").
  18. *See, e.g.*, N.D. CENT. CODE § 14-09-07(1) (2009) ("A parent with primary residential responsibility for a child may not change the primary residence of the child to another state except upon order of the court or with the consent of the other parent, if the other parent has been given parenting time by the decree.").
  19. *See, e.g.*, WYO. STAT. ANN. § 20-2-204(c) (2011) ("A court having jurisdiction may modify an order concerning the care, custody and visitation of the children if there is a showing by either parent of a material change in circumstances since the entry of the order in question and that the modification would be in the best interests of the children . . ."); *see also, e.g.*, WIS. STAT. § 767.451(1) (2010) (requiring a showing of harm to modify a custody order within two years and a finding of a substantial change of circumstances and that modification is in the best interests of the child to modify the order after two years have passed).
  20. *See, e.g.*, *Brzozowski v. Brzozowski*, 625 A.2d 597, 600 (N.J. Super. Ct. Ch. Div. 1993) (giving residential parent the right to make decisions regarding nonemergency medical care in the event of disagreement with the nonresidential parent, absent a clear showing that a given decision would be contrary to the child's interests).
  21. *See, e.g.*, *Jordan v. Rea*, 212 P.3d 919, 928–29 (Ariz. Ct. App. 2009) (directing the trial court to consider the child's best interests in determining school placement where divorced parents disagreed, and collecting cases from other jurisdictions taking the same approach).

Here, a high initial bar must be met before a court can assess a child's best interests. In order to terminate parental rights in the absence of consent, a court must first establish an independent ground for doing so, typically some form of abuse, abandonment, or neglect.<sup>22</sup> Once the court finds a sufficient basis for terminating parental rights, it engages in the best-interests analysis to assess whether termination is in the child's interests.<sup>23</sup> Where an adoptive placement is at issue, the court typically must first terminate parental rights, on the basis of both grounds for termination and a best-interests assessment, and then determine whether the placement is in the child's interests.<sup>24</sup>

On the other hand, children's interests are never assessed or second-guessed in an intact family that shows no evidence of endangering its children. Nor are they assessed in the initial allocation of parental rights. A few scholars have proposed that courts consider children's interests in determining who has the right to parent a newborn child. In the early 1980s, ethical philosopher Hugh LaFollette made the provocative suggestion that states institute a licensing requirement for becoming a parent, arguing that the state has an

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22. *See, e.g.*, N.C. GEN. STAT. § 7B-1111 (2011) (outlining various grounds for terminating parental rights).
  23. *See, e.g.*, NEB. REV. STAT. § 43-292 (Supp. I 2010) (providing for termination of parental rights where court both finds a ground for termination and determines such termination to be in the child's best interests).
  24. *See* 1 JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE § 4.04(1) (2009); *see also, e.g.*, TEX. FAM. CODE ANN. § 162.016(a) ("If a petition requesting termination has been joined with a petition requesting adoption, the court . . . must make separate findings that the termination is in the best interest of the child and that the adoption is in the best interest of the child.").

A number of jurisdictions have special rules that apply to stepparent adoptions. Where a stepparent petitions to adopt the child of a spouse who has custody of the child, the nonresidential parent may lose the right to consent to the adoption, and thus face unwanted termination of his or her parental rights, by having failed to communicate with the child or to pay support for a certain period of time. *See, e.g.*, LA. CHILD CODE ANN. art. 1245 (Supp. 2012) (dispensing with consent requirement for stepparent adoption where the nonresidential parent fails without just cause to communicate with the child or to pay support for at least six months). In that event, the court will order an adoption, and terminate parental rights accordingly, if it finds that to do so is in the child's best interests. *See, e.g.*, LA. CHILD CODE ANN. art. 1255 (2004) (providing for a rebuttable presumption that adoption is in the child's best interests where the court has granted custody to the parent married to the stepparent petitioner); *In re Leitch*, 732 So. 2d 632, 635 (La. Ct. App. 1999) (taking into consideration the effect on the child of severing ties with the nonresidential parent).

obligation to ensure that each child has an optimal upbringing.<sup>25</sup> James Dwyer has recently made a modified version of this argument, proposing that the state deny parental rights at the outset to those who seem particularly likely to become unfit parents.<sup>26</sup> The broad consensus, however, is that we must have clear default rules allocating initial parental rights, with the possibility of subsequently removing children from parents who have demonstrated unfitness in the form of abuse or neglect.

The best-interests analysis, then, is used only in certain limited circumstances. Parents either must invite the court to interfere in their parenting by virtue of their disagreement with one another or they must have harmed, abandoned, or endangered their child in a significant way. The law assigns initial parental rights without any assessment of children's interests, and, absent evidence of harm, allows parents to raise their children as they see fit. In the majority of families, children develop into adulthood without any judicial assessment of their interests.

## 2. Broad Scope and Methodology of the Best-Interests Analysis

While limited in applicability, the best-interests analysis, once triggered, is exceptionally far ranging. Judges engaged in a best-interests assessment can consider any aspect of a child's life, and they take a much more active role in truth seeking than is typical for a judge in the American legal system.<sup>27</sup> From its inception in the nineteenth century, the best-interests inquiry has been, in the words of one court, more of an "inquest" than a civil trial.<sup>28</sup> The court can order a psychological evaluation,<sup>29</sup> and can also appoint a guardian ad litem

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25. Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 182, 182 (1980).

26. See James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 409 (2008).

27. See, e.g., OR. REV. STAT. § 107.425(1) (2011) ("[T]he court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties for the purpose of protecting the children's future interest.").

28. See *Gishwiler v. Dodez*, 4 Ohio St. 615, 619 (1855) (describing custody inquiry as "a proceeding partaking more of the character of an inquest than of a trial").

29. See, e.g., OR. REV. STAT. § 107.425(2) ("The court, on its own motion or on the motion of a party, may order an independent physical, psychological, psychiatric or mental health examination of a party or the children and may require any party and the children to be interviewed, evaluated and tested by an expert or panel of experts.").

who will make an independent assessment of the child's interests.<sup>30</sup> Judges making custody determinations also frequently interview children in camera, to learn the children's preferences as well as to get a sense of the children's relationships with their parents.<sup>31</sup>

In addition to being atypical procedurally, family law's best-interests assessment is unusually open ended. One of the frequent criticisms of the best-interests standard is the great amount of discretion it affords judges to determine how and by whom children are raised.<sup>32</sup> Courts and legislatures have, for over a century, tried to cabin judicial discretion in child-custody decision making by imposing various preferences.<sup>33</sup> The nineteenth century saw a shift from a preference for fathers to one for mothers, particularly in cases involving children "of tender years";<sup>34</sup> by the 1980s, the maternal preference had been largely abandoned, and gave way, in some jurisdictions, to a preference for the primary caretaker,<sup>35</sup> which in turn was subsequently rejected in favor of the open-ended best-interests standard that prevails today.<sup>36</sup> A few jurisdictions today prefer joint custody,<sup>37</sup> and West Virginia presumes that custody

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30. See Barbara Ann Atwood, *Representing Children*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 192 (2005) ("[I]n the context of custody disputes . . . most states grant full discretion to courts in deciding whether to appoint a representative for the child.").
  31. See Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 638 (2003) (noting that a majority of judges surveyed "agreed that judges can acquire a better understanding of the child and the parties through an *in camera* interview").
  32. See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 397 (2008) ("The outcomes of child custody disputes remain difficult to predict and may rely on the judge's 'gut' feeling tied to a factor.").
  33. See *id.* at 393 ("The last forty years have seen various attempts to reign [sic] in judicial discretion with new presumptions, preferences, and lists of factors.").
  34. See MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 50-87 (1994).
  35. See *id.* at 121-33.
  36. See Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluating the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 48-49 (2008) (noting that "in practice, even in the few states that have established or considered the presumption, the primary caretaker presumption has all but disappeared in favor of a more discretionary best interest standard").
  37. See, e.g., FLA. STAT. ANN. § 61.13(2)(c)(2) (West Supp. 2012) ("The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental

should be awarded by approximating the amount of time that each parent spent in caring for the child prior to separation.<sup>38</sup> Typically, however, judges have the freedom to consider a number of factors in assessing children's interests, including the child's attachments to each parent,<sup>39</sup> the child's need for continuity,<sup>40</sup> each parent's moral fitness,<sup>41</sup> and the ability and willingness of each parent to foster a positive relationship with the other parent<sup>42</sup>—a list that, when provided for by statute, typically ends with a catch-all clause allowing courts to consider any other factor that has bearing on a child's well-being.<sup>43</sup>

Finally, the court's finding of a child's best interests is exceptional in that it trumps a number of other significant interests, including the needs and rights of the parents.<sup>44</sup> From the earliest custody disputes, courts have held that once the best-interests assessment is

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responsibility would be detrimental to the child."); *see also* Elrod & Dale, *supra* note 32, at 397 ("Joint legal custody, which allows both parents to retain decision-making authority, solved the 'winners and losers' problem for judges.").

38. *See* W. VA. CODE ANN. § 48-9-206(a) (LexisNexis 2009) ("Unless otherwise resolved by agreement of the parents . . . or unless manifestly harmful to the child, the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation . . .").
39. *See, e.g.*, MICH. COMP. LAWS § 722.23(a) (2012) (directing custody court assessing best interests of the child to consider "[t]he love, affection, and other emotional ties existing between the parties involved and the child").
40. *See, e.g.*, § 722.23(d) (directing court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity").
41. *See, e.g.*, § 722.23(f) (directing court to consider "[t]he moral fitness of the parties involved").
42. *See, e.g.*, § 722.23(j) (directing court to consider "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents").
43. *See, e.g.*, § 722.23(l) (directing court to take into account "any other factor considered by the court to be relevant to a particular child custody dispute").
44. *See, e.g.*, *Kuntz v. Allen*, 48 Pa. D. & C.3d 105, 108 (Pa. Ct. Com. Pl. 1987) ("The paramount concern of the court in any case involving the custody or visitation of children is the welfare and best interest of the child. All other considerations, including the rights of parents, are secondary and subordinate to a child's physical, intellectual, moral, spiritual and emotional well-being." (citations omitted)).

undertaken, a court awarding custody will not consider how a parent stands to be affected by the outcome<sup>45</sup> unless the parent's well-being itself has bearing on the child's interests.<sup>46</sup>

Among the parental interests routinely trumped by the best-interests-of-the-child standard are a number of constitutional rights that our legal system typically fiercely protects. Thus, parents' First Amendment rights are frequently outweighed by a custody court's determination of a child's interests.<sup>47</sup> Courts allocating custody can, and often do, consider a parent's religious practices and other beliefs or forms of expression.<sup>48</sup> Where a custody court finds a child endangered by a parent's speech or religious practices, it can even impose a gag order on parents, or require them to engage in or refrain from engaging in certain religious practices with their children—an incursion into freedom of speech and of religion rarely countenanced in our legal system.<sup>49</sup>

A child's best interests also routinely trump a parent's right to travel; parents can be, and frequently are, prevented from retaining custody of their children if they decide to relocate.<sup>50</sup> Parents' right to privacy is similarly minimal in the face of a court's best-interests assessment; in a number of jurisdictions, for instance, courts can order

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45. See, e.g., *Wilkerson v. McGinn*, 188 P. 472, 473 (Wash. 1920) (“[T]he welfare of the children, and not the wishes of the parents, should govern the court in matters of this kind . . . .”); *Corrie v. Corrie*, 4 N.W. 213, 214 (Mich. 1880) (“In contests of this kind the opinion is now nearly universal that neither of the parties has any rights that can be allowed to seriously militate against the welfare of the child. The paramount consideration is what is really demanded by its best interests.”).
46. See, e.g., *Ireland v. Ireland*, 717 A.2d 676, 681 (Conn. 1998) (noting, in the context of a custodial parent's request to relocate, that “the child's interests can become so intricately interwoven with the well-being of the new family unit [created by divorce] that the determination of the child's best interest requires that the interests of the custodial parent be taken into account” (internal quotation marks omitted)).
47. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006) (critiquing extent to which custody decisions interfere with parents' freedom of speech and of religion).
48. See Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1631–40 (1998) (finding that while some jurisdictions require actual or possible harm to the child before taking a parent's religious practice into account in awarding custody, others permit consideration of religion even in the absence of possible harm).
49. See Volokh, *supra* note 47, at 631 (collecting cases).
50. See, e.g., MICH. COMP. LAWS § 722.31 (2012) (restricting custodial parent from moving over 100 miles from initial residence without judicial approval).

that parents not have an overnight romantic visitor while their child is in the house.<sup>51</sup> The only constitutional provision that has been found to trump a child's best interests in the custody context is the prohibition of discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, which the Supreme Court held prevented a custody court from taking into account the stigma a child would suffer from living in an interracial household.<sup>52</sup> Even here, however, lower courts have often allowed the consideration of race when awarding custody, as long as the award is not based on overt racial prejudice.<sup>53</sup> Children's interests are considered sufficiently powerful to justify incursions into constitutionally protected domains that would be forbidden elsewhere in the legal canon.

### 3. Rationales for Best-Interests Exceptionalism

#### *a. Rationale for Limited Applicability: Parental Autonomy*

Given the wide-ranging nature of judicial inquiry and oversight once the best-interests standard is employed, it is understandable that the occasions on which courts engage in a full-fledged best-interests assessment are limited. To allow the best-interests "inquest"<sup>54</sup> to become widespread would infringe on parental autonomy and family privacy.

Parental autonomy is protected under the Constitution as a fundamental right.<sup>55</sup> This protection stems in part from parents' own

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51. See, e.g., *Muller v. Muller*, No. 259271, 2005 WL 2810399, at \*1 (Mich. Ct. App. Oct. 27, 2005) (per curiam) (upholding trial court order preventing parents from having "an unrelated member of the opposite sex overnight while having parenting time with the minor children").
52. *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).
53. See, e.g., *Davis v. Davis*, 658 N.Y.S.2d 548, 550 (App. Div. 1997) (holding, in a case discussing which parent could better nurture the child's biracial identity, that while "race is not a dominant, controlling or crucial factor[, it] must be weighed along with all other material elements of the lives of [the] family" (second alteration in original) (internal quotation marks omitted)).
54. *Gishwiler v. Dodez*, 4 Ohio St. 615, 618 (1855).
55. See *Troxel v. Granville*, 530 U.S. 57, 65–74 (2000) (finding that a statute as applied to permit the court to order third-party visitation over a parent's objection, on the basis that to do so was in the child's best interests, violated the parent's fundamental right to make decisions concerning the care, custody, and control of her children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down a law requiring attendance at public school as violating "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923) (holding that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes the right of parents to "bring up children" and to "control the education of their own," and striking down

interests in the custody and care of their children,<sup>56</sup> and in part from concerns about the policy implications of infringing on parental rights.<sup>57</sup> Parental autonomy is widely seen as necessary to promote the pluralistic society that is essential to our liberal democracy.<sup>58</sup> In the words of a foundational Supreme Court decision protecting parents' rights to control the education and upbringing of their children, these rights are necessary to prevent the government from "standardiz[ing] its children" by dictating how and by whom they are raised.<sup>59</sup>

The limited applicability of the best-interests assessment serves to protect parental autonomy by leaving the majority of families free from judicial oversight. In an intact family that shows no evidence of endangering its children, parents are free to raise their children as they see fit. Parental autonomy is similarly facilitated by having clear default rules determining who has the right to parent a newborn child. These default rules have become murky in the wake of assisted reproductive technology and other recent changes in family forms.<sup>60</sup> However, we do not, as a general matter, assess children's interests before making the original allocation of parental rights. There is

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a prohibition on foreign language instruction as an unconstitutional infringement on this liberty).

56. See *Troxel*, 530 U.S. at 65 ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.").
57. See Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940–41 (1996) (enumerating rationales for robust protections of parental autonomy); see also Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1340 (2007) (arguing that a liberal democracy must protect parental autonomy while also accommodating countervailing interests, in particular "the need for children to develop the autonomy that liberalism demands").
58. See Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 1022 (1993) (tracing the development of the constitutional doctrine of family privacy and noting that the "diverse ways of life promoted by differing family traditions . . . nourish our liberal political system" (internal quotation marks omitted)).
59. *Pierce*, 268 U.S. at 535.
60. See Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) (noting that children born to unmarried couples through assisted reproductive technology often fall outside the scope of parentage rules that apply only to heterosexual married couples, and arguing that the resulting uncertainty in parental rights and obligations renders children financially vulnerable); Cahn, *supra* note 14, at 36–48 (discussing potential solutions to the "indeterminacy of definitions of parenthood" in light of "the new reproductive technologies as well as the changing shape of the American family").

general agreement that—even apart from the question of a “natural” parent’s fundamental right to the custody of his or her children—to assess children’s interests in making the initial determination of parental rights would give the state too much power to determine how its citizens are formed.<sup>61</sup>

b. *Rationale for Broad Scope: The Importance of Child Development to the Adult Self*

Given the importance we attribute to allowing parents to raise their children as they see fit, in the name of what countervailing interest do we allow courts to infringe on parental autonomy to the extent that they do once they engage in the best-interests inquiry? Particularly in today’s society, where divorce and custody disputes are routine, we do not fault parents for divorcing or for disputing custody of their children. The best-interests inquiry is not a punishment; we do not characterize the parents in these cases as wrongdoers who have, in acting badly, lost their right to autonomy.<sup>62</sup>

The justification for the exceptional scope of family law’s best-interests inquiry—a justification so powerful that it outweighs our almost equally powerful concern with family privacy—lies in the special nature of children and of childhood. Child-custody jurisprudence tells us that children require special protection in part because they are helpless. In the earliest Anglo-American custody cases, when the power of courts to intervene in custody disputes was first challenged, courts responded that they were empowered to step in as necessary to protect children’s interests under the *parens patriae*

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61. See, e.g., David D. Meyer, *The Constitutionality of “Best Interests” Parentage*, 14 WM. & MARY BILL RTS. J. 857, 857 (2006) (“[T]o imagine a new law of parentage focused exclusively on the needs and interests of children . . . assumes a governmental control over the question of parentage that would strike many as alien.”); Johnson v. Calvert, 851 P.2d 776, 782 n.10 (1993) (“[To] decide *parentage* based on the best interests of the child . . . raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody.”); see also Cahn, *supra* note 14, at 44–60 (arguing that two-step approach by which courts first identify a child’s parents and then award custody in accordance with the child’s interests helps to limit judicial discretion in determining parental status); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 330 (2010) (arguing that children’s interests require that states create clear default rules that will clarify legal parentage from the moment of birth).

62. See, e.g., Ashwell v. Ashwell, 286 P.2d 983, 987 (Cal. Dist. Ct. App. 1955) (“[I]n determining where custody of children shall lie the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals . . .”).

jurisdiction,<sup>63</sup> which historically empowered the King to act as father to those unable to protect themselves—namely, “infants, idiots, and lunatics.”<sup>64</sup> Children—like incapable adults—do not possess the faculties to make fully rational decisions or the power to implement those decisions, and for that reason need adults to intervene on their behalf.<sup>65</sup> As an early scholar of equity argued when the jurisdiction to intervene in a custody dispute first came under assault, an argument echoed by the House of Lords in a foundational case upholding the jurisdiction,<sup>66</sup> such a power simply must be assumed to exist in any civilized country.<sup>67</sup>

The exceptional scope and power of family law’s best-interests inquiry, however, is grounded in more than children’s mere helplessness and incapacity. Child-custody jurisprudence, in discussing why children’s interests merit such special attention, explains that the state has a particular stake in children because children will become

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63. *See, e.g.,* *People ex rel. Ordranax v. Chegaray*, 18 Wend. 637, 643 (N.Y. Sup. Ct. 1836) (noting that the statute conferring on court the “power . . . of interfering between the husband and the wife in relation to the charge and custody of their minor children” was “suggested by” the English chancery practice of doing so on the basis of the “authority . . . said to belong to the king, as *parens patriae*, and . . . exercised by the chancellor as his representative”); *Wellesley v. Wellesley*, (1828) 4 Eng. Rep. 1078 (H.L.) 1081 (finding jurisdiction because, under *parens patriae*, “it is the duty of the Crown to see that the child is properly taken care of”).
64. Sarah Abramowicz, Note, *English Child Custody Law, 1660–1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346 (1999).
65. *See De Manneville v. De Manneville*, (1804) 32 Eng. Rep. 762 (Ch.) 767 (“[O]f necessity the State must place somewhere a superintending power over those, who cannot take care of themselves.”).
66. *See Wellesley*, 4 Eng. Rep. at 1084 (“[I]f your Lordships were to hold that there was not authority [to make orders with respect to the care of infants], you would do the greatest possible mischief to the country . . .”).
67. In defending Chancery’s jurisdiction to intervene in custody disputes, John Fonblanque argued:

That in every civilized state, such a superintendence and protective power does somewhere exist, will scarcely be controverted. That if not found to exist elsewhere, it may be presumed to vest in the crown, will not, I think, be denied. Assuming, therefore, that the general superintendence of infants did originally vest in the crown, I shall conclude, that *eâ ratione*, it is now exercised in the court of Chancery as a branch of its general jurisdiction.

John Fonblanque, *A TREATISE OF EQUITY* 229 n.a (London, J. & W.T. Clarke 5th ed. 1820) (1794).

participatory adult citizens.<sup>68</sup> The assumption that underlies this claim—and the best-interests inquiry more generally—is that childhood is a formative stage. Children merit special protection not just because they are vulnerable, but because the conditions of their development will shape their future as adults. Childhood experience is important because it will help to determine the adult that each child will become.

The premise of the best-interests inquiry—that children are shaped into their adult selves by their upbringing and early environment—is a notion that we take for granted today, but was relatively new at the time the best-interests standard first emerged in nineteenth-century American legal practice.<sup>69</sup> The environmental theory of child development had its roots in the late seventeenth-century writings of John Locke, who argued that children enter the world as a blank slate and develop their understanding, capacities, and character through experience.<sup>70</sup> Locke's emphasis on the importance of properly molding children into adults with desirable characteristics<sup>71</sup> became increasingly influential over the course of the eighteenth and nineteenth centuries.<sup>72</sup> The best-interests inquiry grew out of a new solicitude for children's experience, on the theory that the way in which a child is brought up and educated can determine the child's adult self.<sup>73</sup>

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68. See, e.g., *Bishop v. Benear*, 270 P. 569, 571 (Okla. 1928) (“These children in the future will be men and women, and citizens of this state, and their welfare and education and training along moral and religious lines is of interest to every citizen of the state.”).

69. For a history of the emergence of the best-interests doctrine in nineteenth-century America, see MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 234–85 (1985).

70. See JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Roger Woolhouse ed., Penguin Books 1997) (1690) (rejecting the notion that ideas are innate and arguing that they are instead acquired through experience); JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* § 32 (John W. Yolton & Jean S. Yolton eds., Oxford Univ. Press 1989) (1693) [hereinafter LOCKE, *EDUCATION*] (“[T]he difference to be found in the Manners and Abilities of Men, is owing more to their *Education* than to anything else; we have reason to conclude, that great care is to be had of the forming Children's *Minds*, and giving them that seasoning early, which shall influence their Lives always after.”).

71. See LOCKE, *EDUCATION*, *supra* note 70, at § 217 (arguing that children are like “white Paper, or Wax” that can be “moulded” through the influences of early environment and education).

72. See JAY FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750–1800*, at 12–29 (1982) (demonstrating the importance of Locke's educational and developmental theories to early American thought).

73. See Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 *YALE J.L. & HUMAN.* 37, 62–80 (2009) (tracing the influence of the

This developmentalist premise is reflected in the future-oriented aspect of contemporary child-custody decisions. Courts awarding custody try to alleviate children's immediate pain and suffering. But they take for granted that their goal is to find the caregiving environment most likely to give each child the best possible adulthood.<sup>74</sup> Judges making custody decisions often express anxiety about the responsibility of making, on a child's behalf, a decision that will shape the child's adult life.<sup>75</sup> Heightening the anxiety of making such an important decision is the difficult nature of the best-interests analysis, which courts have described as requiring them to predict the future by assessing the type of adulthood that one or another custodial situation is likely to create for a child.<sup>76</sup>

*B. The Developmentalist Insights of the Best-Interests Analysis*

The best-interests analysis of child custody law is focused—as is no other area of law—on the connection between childhood experience and the adult self. In assessing which custodial outcome is best for a child, family-law courts often engage in a nuanced examination of every aspect of a child's early experience that might have bearing upon the child's future. Custody case law therefore offers a perspective unique in legal analysis on the various factors that shape children's development.

In looking to children's future well-being, custody courts often articulate their goal in attending to the developmental process. While courts differ in how they frame this goal, it typically involves producing a well-adjusted and happy adult. Courts seek, in particular,

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environmental theory of child development on early best-interests jurisprudence).

74. *See, e.g.*, *Harmon v. Emerson*, 425 A.2d 978, 983 (Me. 1981) (“The court’s decision may have a crucial and potentially long-term impact on the physical and psychological well-being and potential future development of the child at a time in its life when its future as a balanced, healthy and happy individual is most clearly at stake.”).
75. *See, e.g., id.* at 982–83 (“The issue of child custody is among the most sensitive and vital questions that courts decide.”); *Prost v. Greene*, 652 A.2d 621, 633–34 (D.C. 1995) (Schwelb, J., concurring) (“[I]n this kind of case, . . . the future of the children is in the balance . . . .”); *In re Minors of Luck*, 10 Ohio Dec. 1, 2 (Prob. Ct. 1899) (“The destiny and future usefulness and prosperity of a child, possessed of infinite possibilities, is to be affected in no small degree by the judgment of the court.”).
76. *See, e.g., In re C.B.*, 618 N.E.2d 598, 603 (Ill. App. Ct. 1993) (“[D]eciding what is in a child’s best interest is difficult, if not impossible to predict without a crystal ball or the gift of foresight.”).

to foster what they may term “independen[ce],”<sup>77</sup> “self-sufficien[cy],”<sup>78</sup> or “productiv[ity]”<sup>79</sup>—in short, the “autonomy” that is the hallmark of adulthood.<sup>80</sup> The overarching goal of the best-interests analysis is to ensure that children acquire the emotional, psychological, cognitive, and educational tools necessary to leave the dependency of childhood behind and to function in the world as competent adults.<sup>81</sup>

In some cases, courts have the luxury of deciding between two relatively beneficial alternatives. Parents disputing custody may offer extended evidence of the excellent schools, enriching extracurricular activities, and nurturing family environment that each parent can provide for the child.<sup>82</sup> Where each parent is well situated and psychologically healthy, and the child is equally attached to both, a court may base its decision on the marginal advantages offered by one parent over another, such as worldwide travel, better parenting skills, or superior educational opportunities.<sup>83</sup>

More typically, judges face custody situations that will likely inflict some degree of harm on a child. Some of these harms are incident to the dispute itself and the changes in a child’s life that it entails. The parental conflict that gave rise to the custody dispute

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77. *Prost*, 652 A.2d at 625 (finding that “regular interaction with both parents [is] important to [children’s] development into independent, well-rounded, confident adults” (internal quotation marks omitted)).
78. *Saplansky v. Saplansky*, 19 Phila. Cnty. Rptr. 29, 42–43 (Pa. Ct. Com. Pl. 1989) (selecting the custody arrangement most likely to render child “relatively self-sufficient later in life”).
79. *Herrera v. Herrera*, 944 S.W.2d 379, 386 (Tenn. Ct. App. 1996) (“The true test for the award of custody is to arrive at the point of deciding with whom to place the child in preparation for a caring and productive adult life.”).
80. *See, e.g., Harris v. Harris*, No. FA 940543256, 1997 WL 710437, at \*11 (Conn. Super. Ct. Oct. 31, 1997) (discussing how to foster child’s future “autonomy”).
81. *See id.* (“To achieve trust, autonomy, initiative, and industry children need to be securely attached emotionally so that they can take on the risks implicit in growing up. At the same time, they need to be challenged by goals that are worth pursuing. Children who are fortunate to experience such contexts are likely to enjoy their lives, while at the same time contributing to the common good.” (quoting Mihaly Csikszentmihalyi, *Contexts of Optimal Growth in Childhood*, 122 *DÆDALUS: J AM. ACAD. ARTS & SCI.* 31, 44 (1993))).
82. *See, e.g., Berg v. Berg*, 490 N.W.2d 487, 491 (N.D. 1992) (comparing the potential benefits that each of two loving and fit parents could provide to their children).
83. *See id.* at 490 (affirming trial court’s award of custody to the parent whose superior ability to expose the children to new experiences rendered her more likely to help them become “better prepared for independent life, as adults”).

may put a child's development at risk, as may the necessity of separating children from one of their parents. Judges making custody decisions also discuss a number of possible developmental harms that are present in intact families as well, such as financial problems, suboptimal parenting, or the disruptions caused by relocation. Custody decisions therefore offer a wide-ranging picture of possible harms to a child's development, with a particular focus on harms that may diminish the likelihood that a child will become a healthy, productive, and autonomous adult.

The custody literature reflects a consensus that disruption of a child's environment can inflict significant harm on the child's development. Custody jurisprudence advocates providing children with as much continuity and stability as is consistent with avoiding other harms.<sup>84</sup> Within the general mandate to minimize disruptions to children, the foremost change that custody courts seek to avoid is disruption of a child's tie to a parent or caretaker. Custody courts since the nineteenth century have looked to protect the "ties of affection" between children and their caregivers.<sup>85</sup> Today, custody courts routinely observe that children separated from their parents can suffer life-long harm to their emotional, social, and cognitive development.<sup>86</sup> A court awarding custody will often cite psychological studies and expert testimony detailing the risk to children of

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84. *See, e.g.*, MICH. COMP. LAWS § 722.23 (2012) (instructing judges awarding custody to consider, inter alia, the "desirability of maintaining continuity" in a child's environment and caretaking arrangements, and to weigh this against factors such as the child's potential exposure to domestic violence); *Sullivan v. Sullivan*, 466 A.2d 937, 938 (N.H. 1983) (acknowledging a "correlation between the stability of family relationships and the healthy psychological development of children").
85. *See* *The Queen v. Gyngall*, [1893] 2 Q.B. 232 at 244 (refusing to remove child from caregiver where this would constitute "a very serious dislocation of an existing tie"). The importance of protecting children's "ties of affection" to their psychological parent figure was influentially set forth in the English case of *Gyngall*, 2 Q.B. at 243, which was then widely cited by American custody courts. *See, e.g.*, *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.) (citing *Gyngall* on the importance to children's welfare of the ties of affection).
86. *See, e.g.*, *Burchard v. Garay*, 724 P.2d 486, 493 (Cal. 1986) ("We have frequently stressed . . . the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds."). The developmental harm that children stand to suffer when separated from a primary parent figure was detailed by Joseph Goldstein, Anna Freud, and Albert J. Solnit in their 1973 work *Beyond the Best Interests of the Child*, which has been widely influential in child-custody jurisprudence. *See* JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

separation from a parent at a given developmental stage.<sup>87</sup> Courts are especially wary of separating an infant or toddler from a primary caregiver, on the basis that children who undergo such a separation often have trouble regulating their emotions and forming relationships later in life, and may also suffer deficits in language acquisition and other cognitive skills.<sup>88</sup>

In recent years, courts and legislatures have increasingly insisted on the importance to children's development of maintaining ties with both parents.<sup>89</sup> A number of state custody statutes specify that courts should take into account a child's developmental stage, and the related need for contact with both parents, when arranging parenting plans or visiting schedules<sup>90</sup> or when assessing whether the primary caretaker should be permitted to relocate.<sup>91</sup> Custody courts may

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87. See, e.g., *In re S.J.*, 846 N.E.2d 633, 636 (Ill. App. Ct. 2006) (citing research indicating that when a two-year-old's relationship "with a primary caregiver is disrupted, the young child can develop trust issues that may inhibit development of his own personality and his ability to form relationships"); see also, e.g., *In re Luis*, 847 N.Y.S.2d 835, 846–47 (Fam. Ct. 2007) (discussing importance of toddler stage to child's future emotional and intellectual development, and noting that changes in family arrangements during this stage "can alter the developmental course for children in a major way").
88. See, e.g., *In re K.A.W.*, 133 S.W.3d 1, 21 (Mo. 2004) (en banc) ("Countless psychological and child development studies have shown that children—especially infants and young children under the age of five—who are needlessly separated from their familiar parent suffer resulting deficits in their emotional and intellectual development.").
89. See, e.g., *Luis*, 847 N.Y.S.2d at 846–47 (discussing the potential harm that could result from disrupting the father-child bond between the ages of eighteen and thirty-six months); *Mark L. v. Gail S.*, N.Y. L.J., May 30, 2006, at 25 (Nassau Cnty. Sup. Ct.) (observing that mother's limitation of children's contact with father created risk of "personality disorder features and pathological interpersonal relationships in the future"). For an early work advocating protection of children's ties to their secondary as well as primary caretakers, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 533–35 (1984).
90. See, e.g., VT. STAT. ANN. tit. 15, § 650 (2010) ("[I]t is in the best interests of [a] minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact."); see also *Cummings v. Cummings*, No. M2003-00086-COA-R3-CV, 2004 WL 2346000, at \*9 (Tenn. Ct. App. Oct. 15, 2004) ("[T]he child's developmental level is a very important consideration in fashioning a parenting arrangement.").
91. See, e.g., FLA. STAT. ANN § 61.13001 (West Supp. 2012) (instructing court ruling on parent's relocation request to consider "[t]he age and developmental stage of the child . . . and the likely impact the relocation will have on the child's . . . emotional development" and on the child's relationship with the non-relocating parent); *Sylvester v. Sylvester*, 992

insist, for instance, that children under the age of five maintain weekly contact with both parents, on the basis that younger children do not have a well-developed sense of time and therefore need frequent contact with both parents in order to bond with them, as well as that even a two-week separation from a parent could inflict trauma on a very young child.<sup>92</sup>

Courts assessing children's interests also recognize a number of other forms of instability that can impair children's development. Foremost among these is the instability created by a parent's financial distress. Although some jurisdictions prohibit custody courts from considering a parent's financial situation in awarding custody,<sup>93</sup> others allow<sup>94</sup> or even require<sup>95</sup> such consideration. Courts recognize, albeit reluctantly, that financial deprivation and its attendant harms—including frequent moves, foreclosures, material deprivation, and parental stress—can undermine a parent's ability to provide children with a sufficiently safe and stable environment for them to prosper and thrive as they develop into adults.<sup>96</sup>

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So. 2d 296, 296–97 (Fla. Dist. Ct. App. 2008) (delaying parent's relocation until child reached five years of age).

92. See, e.g., *Cummings*, 2004 WL 2346000, at \*9 (explaining reversal of trial court's order alternating six-month custodial periods with each parent).
93. See, e.g., *Burchard v. Garay*, 724 P.2d 486, 491 (Cal. 1986) (en banc) (“[C]omparative income or economic advantage is not a permissible basis for a custody award.”).
94. See, e.g., *P.A. v. A.H.O.*, 757 N.W.2d 58, 62–63 (N.D. 2008) (finding parents' relative income levels a permissible factor in the best interests analysis).
95. See, e.g., MICH. COMP. LAWS ANN. § 722.23(c) (West 2011) (directing custody court to consider “[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . , and other material needs”); see also, e.g., *Bjorkland v. Eastman*, 719 N.Y.S.2d 744, 747 (App. Div. 2001) (“Courts must weigh many factors when making custody decisions, and the respective financial situations of the parties is one such factor to be weighed with others.” (citation omitted)). But see *Dempsey v. Dempsey*, 296 N.W.2d 813, 813 (Mich. 1980) (per curiam) (holding that courts assessing the statutory best interests factors should not place undue weight on parties' economic circumstances).
96. See, e.g., *Secada v. Secada*, No. FA990174204S, 2002 WL 1041726, at \*11 (Conn. Super. Ct. Apr. 30, 2002) (finding that the financial insecurity of the parent would “inevitably affect and harm the children”); *Housand v. Housand*, 509 S.E.2d 827, 830 (S.C. Ct. App. 1998) (recognizing potential developmental harms that accompany financial deprivation); *Fanning v. Fanning*, 717 P.2d 346, 353 (Wyo. 1986) (“We believe that best interest is attendant with educational opportunity and stable environment for which economic resources are not insignificant.”).

A related harm that custody courts seek to avoid is disruption of a child's established custodial environment. The best-interests assessment frequently details the developmental damage that children can suffer when they are forced to leave their home, school, or network of family and friends. Each of these disruptions, courts note, can thwart a child's educational and social progress.<sup>97</sup> A court may for this reason refuse to allow the custodial parent to relocate, even when the relocation would otherwise benefit the parent and child, for instance by providing the parent with a more desirable job.<sup>98</sup>

The best-interests standard therefore provides a primer on how various aspects of a child's environment can influence the likelihood that the child will develop into a functional and autonomous adult. Best-interests jurisprudence holds that children's development suffers above all when a child is separated from a parent. Children's development is also threatened whenever a parent's situation is disrupted to an extent that the child lives the consequences. Where a parent suffers from job loss, foreclosure, forced relocation, or a decline in material well-being, the child suffers as well. When a child's environment is disrupted, the child can experience more than transient discomfort. A sufficient disruption can derail a child's intellectual, emotional, and educational development, diminishing the likelihood that the child will become the well-regulated, capable, and productive adult that custody decisions hope to produce.

### *C. Implications*

The best-interests assessment of child-custody law brings out the extent to which—in every family, including the majority of families that never come before a custody court—children are formed by conditions beyond their control. Judges attend to child development primarily in the context of custody disputes. In most other instances, children are delegated to their parents' care, and no further attention is paid to how they are raised. The family is in most cases a black box that the law declines to peer inside. When judges assess children's interests in custody disputes, they shed light on what goes on in families generally. In lifting the lid off the black box of the family, these cases demonstrate the extent to which children at once have no control over their upbringing and are largely determined by it.

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97. *See, e.g.*, *Dow v. Dow*, 761 N.Y.S.2d 682, 683 (App. Div. 2003) (attributing child's educational difficulties and behavioral problems to mother's frequent moves).

98. *See, e.g.*, *Cohn v. Cohn*, 658 So. 2d 479, 481 (Ala. Civ. App. 1994) (denying mother's relocation request on the basis that "removing the children from their current surroundings and environment at this time was not in their best interests" given the potential consequences "on the children's educational, cultural, and social needs").

Child-custody case law thus raises the question of whether the law should do more than it currently does to facilitate those factors of family life—such as child-parent contact, stability, and financial well-being—that, according to the best-interests literature, are most likely to affect a child’s chances of becoming an autonomous, productive, and psychologically healthy adult. The primary reason the law does not get involved in the workings of the intact family is that judicial intervention would diminish parental autonomy, a fundamental right necessary to the flourishing of a pluralistic, democratic society with a diverse citizenry.<sup>99</sup> But what about situations where the law could work alongside parents to strengthen their ability to provide their children with optimal conditions of development, in a manner that does not interfere with—and in fact fosters—parental autonomy?

Family-law scholars currently debate the extent to which it is possible for the government to help parents carry out their task of child rearing without impinging on parents’ autonomy, for instance by subsidizing day care or education.<sup>100</sup> This Article takes a different approach. Instead of considering the ways in which the law could more actively foster optimal conditions of child development, the Article asks instead that we consider inflicting less harm on children than we currently do. For there are a number of legal cases that have nothing to do with children directly, but where courts, in passing judgment on children’s parents, reshape families and family circumstances in ways that harm children’s development. What would it look like to assess these cases in light of the robust perspective on children’s interests and child development articulated by courts deciding custody disputes?

## II. BEYOND FAMILY LAW: CASES AFFECTING CHILDREN INDIRECTLY

Within the context of family law, courts and commentators faced with the problem of how to resolve custody disputes articulate at length how children are affected by the circumstances of their parents’ lives. When a child stands to be separated from a parent figure,

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99. See Dailey, *supra* note 58, at 1022 (“In the United States, the process of becoming a self-governing individual capable of meaningful political participation takes place initially and primarily within the family. . . . Our liberal democracy rejects the conformity resulting from direct state indoctrination; instead it requires intermediate institutions to initiate individuals into the political life of the state.”).

100. See, e.g., FINEMAN, *supra* note 12, at 307 (advocating an approach that “allows the caretaker-dependent unit to flourish, supported and subsidized by the larger society without the imposition of conformity”); McCLAIN, *supra* note 11, at 90 (arguing that “both governmental action and restraint are necessary to help families engage in nurturing the capacities of family members”).

exposed to financial instability or deprivation, or subjected to a disruptive change in environment, courts assessing children's interests routinely act to prevent such outcomes in the name of protecting children from developmental harm.

Across the rest of the legal canon, attention to children's interests is significantly more limited. Courts may attend to children when they are parties to a case, or when they are directly involved, for instance as the victim of a crime. There is very little attention to children, however, in the great majority of situations where they are affected by cases involving their parents.

This Part will discuss two areas of law in which children are potentially affected by cases involving their parents: criminal law and contract law. From the perspective of family law's best-interests jurisprudence, we can see that children's development can be affected, often profoundly, by cases involving their parents in both fields. As we will see, however, criminal law gives only limited consideration to children's interests in such cases, and contract law often fails to address the matter altogether.

While criminal law scholars have long puzzled over whether to consider children in cases involving their parents, they have done so from the limited perspective of their own doctrinal field, and thus have failed to recognize the full theoretical import of whether to attend to children's interests in such cases. In contract law, scholars have attended to children's interests only with respect to contracts that redefine the family, and have largely overlooked the ways in which children are affected by other parental contracts. Scholars in both criminal law and contract law have thus missed an opportunity to consider the connection between children's interests and the underlying goals and premises of their respective fields.

#### A. *Criminal Law*

Perhaps the area of law that most dramatically illustrates the collateral consequences for children of cases involving their parents is criminal law. Children are potentially affected by many aspects of criminal cases involving their parents. For instance, the very definition of what is and is not a criminal offense can affect a defendant's child, sometimes in a protective way, as where the law criminalizes acts of violence against the child.<sup>101</sup> Indeed, the law can often reshape families for the better, as it does in criminalizing domestic violence.<sup>102</sup>

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101. *See, e.g.*, W. VA. CODE ANN. § 61-8D (LexisNexis 2010) (criminalizing acts of violence against child by a parent, guardian, or custodian).

102. *See, e.g.*, ALASKA STAT. § 12.55.155(c)(18)(C) (2012) (providing for sentence enhancement where domestic violence committed in the presence of a child living with victim or perpetrator).

But children's interests are also at stake when their parents are convicted of crimes unrelated to the children. And here, unlike in the child abuse or domestic violence context, the child is not at the forefront of the court's analysis. Nonetheless, children may well be deeply affected by the outcome of such a case. Children are especially likely to be affected by a criminal case involving a parent where the parent faces incarceration. This Section will therefore focus on the effects of parental incarceration on minor children, and the extent to which the existing sentencing regime takes these effects into account when sentencing parents.

1. Effect of Parental Incarceration on Children

Family law's best-interests analysis helps to bring out the extent of developmental damage that parental incarceration can inflict on a child. As we have seen, best-interests jurisprudence holds up separation of parent and child as particularly harmful to a child's development. A child whose parent is incarcerated endures an extreme form of such separation. Many children see their incarcerated parents rarely or not at all: in 2007, nearly fifty percent of both incarcerated mothers and incarcerated fathers had no visits with their minor children,<sup>103</sup> and many incarcerated parents had no form of contact with their children.<sup>104</sup> Prisons are often located far from the communities in which prisoners resided prior to their incarceration, which, in combination with limited visiting hours and other prison policies, can make visitation pragmatically difficult or prohibitively expensive for children and their caretakers.<sup>105</sup>

This form of extreme separation from a parent can thwart the bonding process between a parent and a young child, leading to the attachment problems that family-law courts try to prevent when they

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103. See LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 18 app. tbl. 10 (rev. 2010).

104. See *id.*

105. See Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 99–104 (2011) (describing aspects of prison policies that make visitation of parents difficult for children and their caretakers); Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 745–46 (2006) (noting that because of the limited number of federal prisons for women, mothers convicted of federal crimes are especially likely to be incarcerated far away from their children); Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1675 (2003) (analyzing data suggesting that parental incarceration limits parent-child contact to an extent that inflicts “long-lasting . . . [damage] upon the parent-child relationship”).

insist on frequent contact between parents and children in the infancy and toddler stage.<sup>106</sup> Disruption of an existing bond between parent and child is also potentially damaging. For children under the age of five, both lack of parent-child bonding and disruption of an existing bond can create difficulties in cognitive and language development as well as in forming relationships and regulating emotions later in life.<sup>107</sup> Older children separated from their parents suffer developmental harm as well, often in the form of behavioral and educational difficulties.<sup>108</sup>

The damage inflicted on a child by separation from the incarcerated parent is often compounded by the financial and other difficulties that parental incarceration tends to create.<sup>109</sup> If the parent contributed to the household finances or to household labor, the loss of that contribution through incarceration will diminish the child's material well-being.<sup>110</sup> As custody courts acknowledge, a decline in a child's socio-economic circumstances can reduce the likelihood that the child will flourish.<sup>111</sup> Where a parent is imprisoned, the child's remaining caretaker is often forced to take on new employment or to move to more affordable housing, sometimes including homeless shelters. As a result, the child is subjected to disruptions in education, home life, and environment, as well as to the anxiety and diminished availability of an overburdened caretaker.<sup>112</sup> We know from family

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106. *See supra* text accompanying notes 83–92.

107. *See supra* text accompanying notes 83–92.

108. *See supra* text accompanying notes 83–92.

109. *See* Joyce A. Arditti, Jennifer Lambert-Shute & Karen Joest, *Saturday Morning at the Jail: Implications of Incarceration for Families and Children*, 52 FAM. REL. 195, 201–02 (2003) (summarizing study finding that incarceration inflicts myriad harms on inmates' families, including financial loss, emotional stress, declining health, and social stigma, and concluding that “[w]e believe that incarceration pushes many families over, ripening conditions related to rotten outcomes for family life and child development” (internal quotation marks omitted)).

110. *See id.* at 199–200 (describing multiple factors contributing to decline in financial well-being of families in which a member has been incarcerated, including loss of income from the incarcerated parent, increased likelihood that the remaining parent will leave paid work in order to care for the children, and the expenses associated with incarceration).

111. *See supra* text accompanying notes 83–86.

112. *See* NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 117–20 (2005) (detailing the pervasive disruptions in the life of the child of an incarcerated parent); DONALD BRAMAN, *DOING TIME ON THE OUTSIDE* (2004) (employing ethnographic methodology to document the damage incarceration inflicts on family structure and on the material well-being of offenders' families and communities); Arditti et al., *supra* note 109, at 200 (describing parenting strain, difficulty coping, and sense of isolation experienced by family members of incarcerated parents).

law's best-interests jurisprudence that each of these factors can harm a child's emotional, cognitive, and educational progress to a significant degree.<sup>113</sup>

Despite the myriad harms that incarceration of a parent inflicts on a child, those children who are able to reside with a remaining parent are the relatively fortunate ones. When a single parent is incarcerated, the child may be placed with relatives—often grandparents—or family friends who struggle to cope with caring for the child and as a result may move the child from one household to another.<sup>114</sup> Here children suffer repeated instances of the instability and disruption that family law presents as destructive to a child's development.<sup>115</sup> A number of children, moreover, are placed in foster care as a result of parental incarceration, or are have been placed in foster care shortly before their parent's arrest.<sup>116</sup> Children in foster care are frequently moved from one placement to the next,<sup>117</sup> and often suffer abuse and neglect.<sup>118</sup> Under the Adoption and Safe Families Act, parental rights must be terminated where a child is in foster care for more than fifteen months of any twenty-two month period, unless certain limited exceptions apply.<sup>119</sup> Where parental

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113. See *supra* text accompanying note 86.

114. See BERNSTEIN, *supra* note 112, at 109–42 (describing financial and practical struggles of grandparents caring for children of incarcerated parents).

115. See, e.g., GOLDSTEIN ET AL., *supra* note 86, at 32–33 (observing that when children's ties to their parents or caretakers are interrupted repeatedly, children “tend to grow up as persons who lack warmth in their contact with fellow beings”).

116. See TIMOTHY ROSS, AJAY KHASHU, & MARK WAMSLEY, VERA INST. OF JUSTICE, *HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION* (2004) (presenting study of incarcerated mothers showing that while some children are placed in foster care as the result of a mother's arrest, in the majority of cases, a child's placement in foster care precedes the mother's arrest, and theorizing that the child's removal tends to make arrest more likely by accelerating the mother's downward spiral).

117. See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 653–54 (1999) (noting that children in foster care tend to experience multiple placements).

118. See generally 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 (1988) (describing abuse and neglect experienced by children in foster care).

119. See Adoption and Safe Families Act (ASFA) of 1997, 42 U.S.C. § 675(5)(E) (2006).

rights are thus terminated, the tie between parent and child is severed altogether as a result of incarceration.<sup>120</sup>

Family law's best-interests jurisprudence helps demonstrate the myriad ways in which parental incarceration can harm children's development. Separation of child from parent, lack of parent-child contact, financial instability, and disruption of a child's environment—all likely results of parental incarceration—each threaten children's well-being and developmental progress. When these factors are compounded, as they so often are when a parent is imprisoned, family law tells us that the effect is to diminish the likelihood that the child will become an autonomous, productive, and emotionally healthy adult.

## 2. Current Judicial Approaches

Criminal law is one of the few areas of law outside of family law that will on occasion take children's interests into account in cases involving their parents, and it does so primarily in the context of sentencing. A number of jurisdictions provide for some consideration of children's interests when sentencing parents. Given the significance of parental incarceration for children, this is not surprising. Even within criminal-sentencing law, however, consideration of children's interests in cases involving parents is often limited or prohibited altogether.

Beginning in the 1970s and 1980s, the federal government and the majority of states moved from a flexible sentencing system in which judges could consider a number of factors to a more tightly regulated one in which judicial discretion was significantly constrained.<sup>121</sup> At the federal level, this shift occurred with the adoption of the Federal Sentencing Guidelines in 1987,<sup>122</sup> which apply in conjunction with independently enacted statutory mandatory minimums for certain offenses.<sup>123</sup> Many states adopted their own statutory guidelines to

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120. See, e.g., Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1498–99 (2012) (discussing how ASFA interacts with maternal incarceration to accelerate the termination of maternal rights, and analyzing the systemic harm inflicted on black mothers and their children by the intersection of the foster care and maternal incarceration); Genty, *supra* note 105, at 1677 (“ASFA has likely had a disproportionate impact upon incarcerated parents with children in foster care.”).

121. See Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 72 (1999) (discussing the consensus that emerged in the 1970s that judicial discretion in sentencing should be reduced).

122. See *id.* at 70.

123. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 8–9 (2010) (describing history and proliferation of federal mandatory minimums, which are enacted by statute and “set the lower limits for sentencing particular offenses and particular offenders”); see

limit judicial discretion at sentencing<sup>124</sup> or achieved similar results through rules such as mandatory minimums and habitual offender laws.<sup>125</sup>

The Federal Sentencing Guidelines greatly limit the situations in which courts can take children's interests into account when sentencing parents. Under the Guidelines, "family ties"—including those between parent and child—are "not ordinarily relevant" at sentencing.<sup>126</sup> According to commentary added to the Guidelines in 2003, this means that courts following the Guidelines can only take children's interests into account when they stand to suffer a degree of harm that "substantially exceeds" the harm that a child would "ordinarily" suffer upon a parent's incarceration.<sup>127</sup> This, in turn, requires, at a minimum, that the incarceration will result in a "loss of essential caretaking" to the child, such that no viable caretaker can be found to take the parent's place.<sup>128</sup>

Some courts interpreting the Federal Sentencing Guidelines have found that the harm facing a child is not sufficiently extraordinary to merit consideration even where the child stands to enter foster care as a result of the parent's incarceration,<sup>129</sup> or where the offender who

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*generally* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011) (providing overview of federal mandatory minimums, including their history and their interaction with the Federal Sentencing Guidelines).

124. *See* Frase, *supra* note 121, at 72.

125. *See* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakeley: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 242 (2006) (identifying mandatory minimums and habitual offender laws as among the sentencing reforms that gained popularity in the 1970s); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 75 (2009) ("Between 1975 and 1996, mandatory minimums were America's most frequently enacted sentencing law changes. . . . By 1994, every state had adopted mandatory penalties; most had several." (citation omitted)).

126. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2011).

127. *Id.* § 5H1.6 cmt. 1(B)(ii).

128. *Id.* § 5H1.6 cmt. 1(B)(i), (iii).

129. *See, e.g.,* United States v. Leandre, 132 F.3d 796, 807–08 (D.C. Cir. 1998) (upholding district court's denial of departure for single father whose children faced foster care); United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990) ("A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children. It is apparent that in many cases the other parent may be unwilling or unable to care for the children, and that the children will have to live with relatives, friends, or even in foster homes.").

faces incarceration is a single parent with several children, including an infant.<sup>130</sup> These courts require medical problems or other special circumstances before a child's interests can be taken into account when sentencing parents.<sup>131</sup> Other courts have interpreted the Guidelines to permit consideration of children's interests in a wider set of circumstances, for instance where the child will be losing a single parent or a primary caretaker.<sup>132</sup>

Many states have taken a similar approach, either by statute or through case law. A number of states follow an "excessive hardship" standard comparable to that of the federal guidelines.<sup>133</sup> Other states require courts to focus on the wrongfulness of defendants' conduct rather than on harm to their families, and thus forbid consideration of a defendant's children altogether unless relevant to the egregiousness of their parent's criminal conduct.<sup>134</sup> Some states, by contrast, allow children's interests to be considered more broadly when sentencing parents.<sup>135</sup> As in the federal system, state sentencing regimes often impose an additional restriction on judicial discretion in the form of mandatory minimums that apply to particular offenses or offenders.<sup>136</sup>

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130. *See, e.g.*, *United States v. Dyce*, 91 F.3d 1462, 1466–67 (D.C. Cir. 1996) (finding family circumstances not sufficiently extraordinary to warrant a downward departure for single mother of three children under the age of four, including an infant of three months who was still being breast-fed).
131. *See, e.g.*, *United States v. Roselli*, 366 F.3d 58, 62–63, 70 (1st Cir. 2004) (finding downward departure warranted where defendant's two young children required extensive caretaking for cystic fibrosis, and his wife was herself unwell and unable to care for them); *United States v. Spedden*, 917 F. Supp. 404, 406–07, 409 (E.D. Va. 1996) (departing downward where wife suffered from cancer and daughter from a potentially fatal illness, while noting that "[t]he Fourth Circuit has construed downward departures based on family ties very narrowly").
132. *See, e.g.*, *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992) (upholding downward departure on basis of single parent status).
133. *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(11) (West 2007) (requiring "excessive hardship" for child's interests to be taken into account); N.J. STAT. ANN. § 2C:44-1(b)(11) (West 2005) (same); *People v. Pearson*, 462 N.W.2d 839, 843 (Mich. Ct. App. 1990) (requiring "exceptional circumstances").
134. *See, e.g.*, *Rafferty v. State*, 799 So. 2d 243, 248 (Fla. Dist. Ct. App. 2001) (reversing as inappropriate downward departure that was given on basis that defendant's child needed financial support); *State v. Amo*, 882 P.2d 1188, 1191 (Wash. Ct. App. 1994) ("The birth of [defendant's] son while she was in custody does not make the commission of her three crimes any less offensive.").
135. *See, e.g.*, *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (interpreting sentencing guidelines to permit consideration of children's interests in determining whether to suspend a parent's sentence).
136. *See* *Tonry*, *supra* note 125, at 75 (describing the proliferation of mandatory minimums in the states between the 1970s and the 1990s).

At both the federal level and in many states, guidelines-imposed limits on considering children's interests when sentencing parents have recently been brought into question by the Supreme Court's 2005 decision in *United States v. Booker*, which rendered the Federal Sentencing Guidelines merely advisory, on the ground that imposing mandatory sentences on the basis of judge-found facts violates the Sixth Amendment right to trial by jury.<sup>137</sup> Under *Booker*, federal courts must still calculate the Guidelines sentence, but are free to depart from it.<sup>138</sup> The *Booker* decision also brought into question the validity of many state sentencing regimes.<sup>139</sup>

Federal courts were initially uncertain about the extent to which *Booker* left courts free to exercise discretion in imposing criminal sentences.<sup>140</sup> One area of uncertainty was the degree to which courts could reject policies embedded in the Sentencing Guidelines, including the limitation on taking children's interests into account when sentencing parents.<sup>141</sup> Left with the option of following the Guidelines and the possibility of reversal if they did not, many courts continued to follow the Guidelines rule that children's interests are not relevant unless incarceration would result in the loss of an irreplaceable caretaker and in so doing inflict substantially greater harm than ordinarily suffered by the child of an incarcerated parent.<sup>142</sup> Given that, as we have seen, most children of incarcerated parents stand to suffer a fair degree of harm,<sup>143</sup> this rule significantly limits consideration of children's interests when sentencing parents.

In the years following *Booker*, however, the Supreme Court has made increasingly clear the extent to which the Guidelines are now truly advisory. In *Gall v. United States*, the Court held that a

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137. *United States v. Booker*, 543 U.S. 220, 226, 245 (2005).

138. *Id.* at 259–60.

139. See Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785–88 (2008) (discussing effect of *Booker* on state approaches to sentencing).

140. See Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post-Booker/Fanfan World*, 1 FED. CTS. L. REV. 301, 331–32 (2006) (describing the uncertainty wrought by *Booker*).

141. Compare *United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006) (finding that *Booker* allows sentencing courts greater leeway to take into account family ties), with *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006) (finding that even after *Booker*, sentencing courts are still largely constrained by the Guidelines, and can only significantly depart to take into account family ties when faced with “dramatic facts”).

142. See Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 18 (2010) (finding that many post-*Booker* judges continued to sentence within the Guidelines).

143. See *supra* Part II.A.1.

sentencing court can depart significantly from the Guidelines even in the absence of extraordinary circumstances.<sup>144</sup> In the companion case of *Kimbrough v. United States*, the Court further clarified that district courts may now reject a Guidelines sentence on the basis of a disagreement with the policy that underlies the Guidelines approach.<sup>145</sup> This line of cases opens up the possibility that federal sentencing courts may revisit their hesitant approach to considering children's interests when sentencing parents.

In the wake of *Booker* and its progeny, both the federal government and the states are newly debating how to reframe their approaches to sentencing.<sup>146</sup> Added pressure to revisit criminal sentencing has come from a need to reduce the prison population, for both financial<sup>147</sup> and constitutional reasons.<sup>148</sup> An issue this debate must confront is whether and to what extent courts should be allowed to take children's interests into account when sentencing a parent. Now is thus a critical time to revisit the rationales for and against considering children's interests when incarcerating their parents.

### 3. Current Debates About Considering Children When Sentencing Parents

As sentencing expert Douglas Berman has noted, while the literature "makes quite compelling the social policy reasons for" taking children's interests into account when sentencing parents,<sup>149</sup> the criminal-justice rationale for doing so has been undertheorized.<sup>150</sup>

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144. *Gall v. United States*, 552 U.S. 38, 47 (2007).

145. *Kimbrough v. United States*, 552 U.S. 85, 100 (2007) (upholding rejection of Guidelines sentence on the basis of district court's disagreement with the Guidelines policy implementing a 100:1 ratio for sentences involving crack versus powder cocaine). For an extended analysis of the implications of *Booker*, *Gall*, and *Kimbrough* for consideration of parental status at sentencing, see Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 823–29 (2011).

146. See, e.g., Symposium, *Judicial Discretion: A Look Forward and a Look Back Five Years After Booker*, 22 FED. SENT'G REP. 297 (2010).

147. See Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A1 (describing actions taken by a number of states to reduce their prison populations in order to control mounting prison costs).

148. See *Brown v. Plata*, 131 S. Ct. 1910 (2011) (directing California to reduce its prison population in order to address prison overcrowding that created conditions violating the Eighth Amendment prohibition on cruel and unusual punishment).

149. Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT'G REP. 274, 278 (2001).

150. See *id.* at 274 ("Because there has not been serious attention given to precisely *why* family circumstances should lead to a reduced sentence,

Sentencing theory traditionally focuses on the goals of criminal law—deterrence, rehabilitation, incapacitation, and retribution.<sup>151</sup> Criminal law typically seeks to achieve these goals by focusing on the behavior of the defendant. Berman acknowledges that parental status can have some bearing on the wrongfulness of a defendant's actions, the extent to which incarceration will inflict punishment, and the likelihood of rehabilitation.<sup>152</sup> He argues, however, that it is difficult to articulate a principled basis for considering children's interests for their own sake that is consistent with current sentencing jurisprudence.<sup>153</sup>

Advocates for both prisoners and children have nonetheless long argued for greater consideration of parental status when incarcerating offenders.<sup>154</sup> Some take a defendant-centered approach to the issue. A number of commentators point to studies showing that maintaining ties between offenders and their children reduces rates of recidivism among parents.<sup>155</sup> Protecting parent-child ties, then, can be seen as a measure to reduce crime rates. Professor Myrna Raeder, a frequent advocate for the rights of incarcerated mothers and their children, suggests that considering parental status is also necessary as a matter of fairness, since parents who are incarcerated are punished more harshly than similarly situated offenders who are not parents, by virtue of the added pain inflicted by separation from their children.<sup>156</sup> She argues that sentencing courts deciding whether and where to incarcerate a parent should consider not only the offender's parental

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the departure jurisprudence concerning family circumstances has been purposeless and sentencing outcomes have been inconsistent.” (internal quotation marks omitted)).

151. *See id.* at 276.

152. *See id.* at 277–78.

153. *See id.* at 274 (“[I]t is difficult to provide a principled explanation for exactly why a criminal offender should merit a lesser punishment simply because he or she has a spouse or children or other relatives.”); *see also id.* at 278 (calling on the Sentencing Commission to “develop express principles concerning whether and when reduced sentences may be permitted under the guidelines based on the potential harm to a defendant's family”).

154. *See, e.g.,* Genty, *supra* note 105, at 1683–84 (“The defendant's role as a parent must be an explicit factor in sentencing.”).

155. *See* Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 136 (1999) (“[T]here is considerable evidence that family relationships . . . affect the mother's rehabilitation.”); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 142 (1999) (“[S]trong family relationships during incarceration may lower recidivism rates . . .”).

156. *See* Raeder, *supra* note 105, at 745–46.

status but also the extent to which incarceration in a particular facility would make contact and visitation with a child more difficult.<sup>157</sup>

Among those who take a child-centered approach to parental incarceration, the most common argument is that putting parents in prison has a criminogenic effect on the next generation, by increasing the likelihood that the children themselves will commit crimes in the future.<sup>158</sup> A related argument is that incarcerating parents unfairly punishes children who have done nothing wrong. This argument is typically framed in criminogenic terms as well. As Judge Patricia Wald put it, incarcerating parents turns blameless children into the “next generation of . . . sociopathic criminals.”<sup>159</sup>

The theoretical argument for considering parental status at sentencing has been enhanced in recent years by scholars who have added a constitutional perspective to a position that formerly was largely grounded in the pragmatic goal of reducing crime rates and the moral imperative of treating either offenders or their children fairly. Thus, Myrna Raeder contends that incarcerating mothers implicates the fundamental rights of parents to the custody and care of their children and argues that courts should take this into account more than they currently do when imposing sentences of incarceration.<sup>160</sup> Chesa Boudin, who takes a child-centered approach to the issue, has put forth the argument that consideration of children’s interests when sentencing parents and developing prison policies is necessary in order to protect children’s First Amendment right of freedom of association and their due process liberty interest in maintaining family integrity.<sup>161</sup>

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157. *See id.* at 747 (“In deciding whether and where to incarcerate a mother of young children, . . . it is appropriate for judges to take into account the distance from home and visiting policies of the facility to which the female offender is likely to be incarcerated.”).

158. *See Hagan & Dinovitzer, supra* note 155, at 146 (discussing studies indicating that children of incarcerated parents are significantly more likely to become incarcerated than their counterparts); Acoca & Raeder, *supra* note 155, at 136 (contending that children of incarcerated parents are “more likely to become victimizers of others”).

159. Patricia M. Wald, “*What About the Kids??: Parenting Issues in Sentencing*,” 8 FED. SENT’G REP. 137, 138 (1995).

160. *See Raeder, supra* note 105, at 723–26; *see also id.* at 744–45 (noting that incarceration may also reduce a woman’s chances of becoming pregnant, and arguing that “women’s advocates should boldly attempt to fashion [sentencing] arguments based on fundamental rights to privacy, birth, and family, citing constitutional and policy underpinnings for such a doctrine”).

161. Boudin, *supra* note 105, at 105–12.

On the other side of the debate are those who argue that we should hesitate to take children's interests into account when sentencing their parents. Professors Dan Markel, Jennifer Collins, and Ethan Leib are prominent voices on this side of the debate. They discuss parental incarceration in the context of their broader argument that family status generally should not be taken into account by the criminal law.<sup>162</sup> While recognizing the unfairness to children of the harms inflicted by parental incarceration, they argue that it is preferable to attend to children's interests in these cases by ameliorating prison policies<sup>163</sup> and addressing larger social inequalities through distributive justice.<sup>164</sup> They recommend limiting consideration of children's interests at the sentencing of parents to a narrow set of circumstances—namely, to those cases where children would suffer a loss of “irreplaceable caregiving” upon a parent's incarceration and where it would be feasible, moreover, to defer the parent's incarceration.<sup>165</sup> These recommendations would arguably limit consideration of children's interests to an even greater extent than do the Federal Sentencing Guidelines.<sup>166</sup>

Markel, Collins, and Leib make both a principled argument and a pragmatic one for limiting consideration of children's interests at parental sentencing. On the level of principle, they assert that taking family ties into account in violates the principle of equal treatment under the law by treating similarly situated defendants differently on the basis of family status,<sup>167</sup> and thereby undermines the legitimacy of the criminal justice system.<sup>168</sup> Their pragmatic argument is that

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162. See MARKEL ET AL., *supra* note 3, at 49 (arguing that “ordinarily, a defendant's family ties and responsibilities should not serve as a basis for a lighter sentence”).

163. See *id.* at 53–56 (arguing for greater consideration of family ties in the penal system than at sentencing, for instance by considering “ease of access for those who may facilitate [the prisoner's] reentry (whether family or friends) when making decisions regarding prison construction or prison assignment after conviction”).

164. See *id.* at 50–51 (“Ordinarily, . . . we think that harms to innocent third parties should be ameliorated through the institutions of distributive justice, not criminal justice.”).

165. See *id.* at 51. Markel, Collins, and Leib recommend extending such consideration not only to “those with a blood relationship or marriage,” but to any third parties with whom a defendant has an “established relationship of caregiving.” *Id.*

166. See *supra* text accompanying notes 126–31.

167. See MARKEL ET AL., *supra* note 3, at 31 (“[T]he principle of equality should be a lodestar guiding our collective actions in the criminal justice system.”).

168. See *id.* at 30 (“[The] principle of equality under the law . . . is a prerequisite for a legitimate system of criminal justice.”); see also *id.*

affording special treatment to parents might increase crime rates by incentivizing parents to commit crimes.<sup>169</sup>

As the debate currently stands, advocates of considering children's interests at sentencing have had difficulty persuading those opposed to the practice to change their stance.<sup>170</sup> The popular criminogenic argument for taking children's interests into account—that to do so would reduce crime rates by reducing the likelihood that the children themselves will commit crimes later in life—is vulnerable to the counterargument that letting parents off the hook could cut the other way. More importantly, the criminogenic argument does not address the objection that we need a principled basis for reducing parents' sentences and that, in the absence of one, we should not sacrifice fairness for utility. It does not provide a satisfactory response to the argument of Markel et al. and others that to take parental status into account at sentencing violates the principle of equal justice under the law and thereby undermines the legitimacy of criminal law.

A further problem with the current discussion concerning parental incarceration is that this discussion remains relatively marginalized within criminal law more generally. Much of the scholarly literature concerning criminal responsibility and the justification for criminal punishment does not merely fail to justify the harm that we inflict on offenders' children; it fails to confront the issue at all. A major contribution of Markel, Collins, and Leib has been to provide a comprehensive account of family status throughout criminal law, thus bringing to the foreground an aspect of the field that a number of criminal law scholars and philosophers have largely overlooked.

None of the arguments put forth in favor of considering parental status sufficiently makes the case that doing so is not just consistent with, but essential to, the underlying theoretical justifications of criminal law. Where parental status has no bearing on a defendant's guilt, punishment, or rehabilitative potential, why should the criminal law attend to the interests of his or her child? The notion of preventing harm to helpless children is compelling, but those who

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(“Unjustified disparities in sentence disposition or duration contribute to the perception of the *illegitimacy* of the criminal justice system.”).

169. See *id.* at 32 (“[I]f sentencing policies serve to create a nonincarcerable (or less carcerable) class of persons because these persons are ‘irreplaceable caregivers,’ then those persons will seek out criminal endeavor or be, other things being equal, more sought after by others to serve in criminal enterprises.”).

170. See, e.g., Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT’G REP. 251, 251 (2001) (“It is disappointing to realize that nearly ten years have passed since I first began writing about the sentencing guidelines’ shortsighted policy of discouraging family ties as a basis for a departure, during which time there has been no significant change in that policy.”).

urge us to do so have yet to formulate a principled argument for why criminal law should address children's interests when sentencing parents and how doing so can be consistent with criminal law's legitimacy.

This Article argues that a principled argument for taking children's interests into account—one consistent with the legitimacy of criminal law—is available if we look beyond the confines of criminal law to consider family law's insights on the connection between childhood and the adult self. These insights, in turn, bring out the currently overlooked relationship between theories of criminal responsibility, on the one hand, and our treatment of offenders' children, on the other.<sup>171</sup> Family law thus helps to demonstrate that the question of parental incarceration has greater bearing on the underlying justifications of criminal law than has previously been recognized.

### B. *Contract Law*

At the opposite end of the coerciveness spectrum from criminal law—which can place a parent in prison—is contract law, which enforces agreements freely entered into between private parties. Regardless of how one stands on taking children's interests into account in criminal cases involving parents, it is irrefutable that the decision to incarcerate a child's parent can have profound and harmful consequences for the child. Accordingly, despite resistance to taking children's interests into account, criminal law, as we have seen, does provide for doing so in at least some instances. Within the context of criminal law, then, courts and commentators are accustomed to recognizing and articulating the connection between the legal treatment of parents and the well-being of their children.

The effect on children of contract litigation involving their parents is less obvious, and thus less often remarked upon. We recognize that children are affected by contracts that involve them directly, such as a contract reallocating parental rights. And contract law also acknowledges that children are affected by contracts to which they are parties. But there is virtually no discussion, by either courts or commentators, of how children are affected by ordinary commercial or consumer contracts involving private parties who happen to be parents.

Yet when we approach ordinary parental contracts from family law's perspective on the myriad factors that can alter a child's development, we see that the enforcement of any private contract, insofar as it affects a child's parent, can affect the child as well, often profoundly. This Section will discuss how children are potentially affected by contracts involving

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171. See discussion *infra* Part III.A.

their parents, and the extent to which the law takes children's interests into account when enforcing such contracts.

1. How Contract Litigation Can Affect Nonparty Children

Any type of contract litigation can affect the children of parties to the litigation. Contract law governs a wide range of transactions, such as consumer credit agreements, large-scale commercial transactions, and employment agreements, that can have significant financial as well as other consequences for parties who happen to be parents. Where parents are affected by the outcome of a contract dispute, children may be as well.

Consider, for instance, a distributorship agreement giving a parent exclusive rights to market a certain brand of shoes in a geographical area. On signing the contract, the parent invests extensive resources building and maintaining a store that sells only that brand of shoes. Five years pass, and the shoe manufacturer decides to provide the shoes to a major department store chain, which will effectively put the parent's shoe store out of business. The contract is silent about when the exclusive distributorship ends, and the court must determine whether the manufacturer is liable for the damages caused by the termination. Consider the scenario in which, should the court decide that the manufacturer has a right to terminate the agreement without paying damages, the parent will suffer catastrophic financial losses. Imagine that this will mean that her family, including two young children, will lose their home, and that the children will be taken out of their schools, where they have been thriving.

As we have seen in the context of family law's best-interests analysis, any of these disruptions to a child's life—financial hardship, change of schools, and geographical relocation—can harm the child's development.<sup>172</sup> Family law courts try to avoid such disruptions on the theory that they may diminish children's future well-being and their likelihood of becoming autonomous, productive, and happy adults.<sup>173</sup> Should the court in our hypothetical take the potential effects on children into account when enforcing the contract governing the exclusive distributorship agreement? Should harm to children affect the manufacturer's right to terminate the agreement or the damages awarded to the parent if the contract has indeed been breached? No court or scholar to date has addressed such a possibility.

The distributorship agreement affects children only remotely; other parental contracts more directly influence children's lives. At one end of the influence spectrum are contracts that reallocate

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172. *See supra* Part I.B.

173. *See supra* Part I.B.

parental rights, such as surrogacy contracts and prenuptial custody agreements. Children are clearly directly affected by contracts of which they are the subject matter. Contracts in the middle of the spectrum consist of those that relate to the child in some way, such as agreements concerning children's education and health insurance. Toward the indirect end of the influence spectrum are contracts that do not immediately concern the children, but affect them by affecting their parents, such as contracts relating to employment, home ownership, or consumer credit. At the far end of the spectrum are agreements between commercial actors, such as the hypothetical distributorship agreement discussed above, that are even further removed from the parties' children, but may have consequences for them nonetheless. To what extent should courts take children's interests into account in these situations? When, if ever, should a court treat a contract differently simply because one of the parties happens to be a parent?

## 2. Current Judicial Approaches

### a. *The General Irrelevance of Parties' Status as Parents*

Under classical contract theory, the status of a contracting party as the parent of a minor child is irrelevant. The premise of classical contract theory—and of the revived forms of that theory, such as the notion of contract as promise—is that the role of contract law is to enforce whatever bargains parties make amongst themselves, instead of policing and second guessing those bargains on the basis of each party's status.<sup>174</sup> A contract is an arm's-length bargain between two autonomous individuals who freely consent to be bound to one another.<sup>175</sup>

Where a party cannot consent to an agreement—for instance, if, at the time of contract formation, a party lacks capacity for full rational choice because of infancy or other reasons, or lacks volition because of duress—contract law will recognize this by finding that there is no enforceable agreement.<sup>176</sup> Thus, when a child agrees to

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174. Henry Maine famously claimed that freedom of contract had brought about a shift “*from Status to Contract*.” HENRY SUMNER MAINE, ANCIENT LAW 174 (10th ed. 1920) (1861).

175. See P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 404–08 (1979) (providing a historical account of the rise of classical contract theory, and of the notion that courts should enforce whatever agreements the parties arrange amongst themselves instead of policing the fairness of bargains). For recent revivals of the classical liberal emphasis on autonomy and individual choice as the justification for contract enforcement, see CHARLES FRIED, CONTRACT AS PROMISE 16 (1981), and Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

176. See E. ALLAN FARNSWORTH, CONTRACTS § 4.2 (4th ed. 2004) (incapacity generally); *id.* § 4.4 (incapacity because of infancy); *id.* § 4.19 (duress).

form a contract, special rules apply to limit the enforceability of the agreement.<sup>177</sup> But as long as two parties capable of giving legal consent have agreed to be bound by what would otherwise be an enforceable contract, each party's status is irrelevant, and a court will not take either party's familial obligations or other burdens into account when enforcing the contract.

Contemporary theories of contract law have complicated and contested the classical approach. Relational contract theory, for instance, recognizes that parties to a long-term contract are not at arm's length, but instead are bound to one another by their contractual relationship, and as such owe one another duties beyond those owed by strangers engaged in discrete transactions.<sup>178</sup> In another strand of contemporary contract theory, some ground contract law in concerns about distributive justice<sup>179</sup> or fairness,<sup>180</sup> in a way that takes both status and contractual context into account. Thus, some argue that special rules should apply to contracts between certain types of parties, such as landlords and tenants, in a way that recognizes the unequal power between these groups, and shifts wealth from one to another.<sup>181</sup> Finally, scholars have noted, and much debated, the special treatment afforded familial contracts, such as interspousal contracts for household labor,<sup>182</sup> premarital agreements,<sup>183</sup> and contracts reallocating parental

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177. See *id.* § 4.4 (contracts by infants enforceable only if for necessities); see also Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 287–94 (2006) (contesting contract law's construction of children's incapacity).

178. For the foundational work on relational contract theory, see Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983), and Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000).

179. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995).

180. See James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981).

181. See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 772 (1983) (justifying the nondisclaimable warranty of habitability as “an instrument of redistribution that seeks to shift control over housing from one group (landlords) to another (tenants)”).

182. See Hasday, *supra* note 2, at 499–507 (arguing that the law refuses to enforce interspousal contracts for domestic services in order to signal the special and intimate nature of spousal relationships); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2130 (1994) (tracing the early history of wives' unsuccessful attempts to enforce interspousal contracts for domestic services and characterizing this trend as

rights and obligations.<sup>184</sup> It continues to be a premise of contract law, however, that each party's status outside the scope of the contractual relationship—a party's status as a woman or a mother, for instance, in a contract for the sale of goods—is irrelevant to contract enforcement.

In short, whether a party to a contract has a child generally has no bearing on how or whether the contract is enforced. The familial status of the parties is relevant, if at all, only insofar as it has bearing on the parties' relationship to each other, and thus to the power dynamic between them (for instance, under the doctrine of undue influence, where the parties are spouses, this may impose heightened duties of fairness on their contractual dealings)<sup>185</sup> or to the contract itself (for instance, spouses are not always permitted to contractually reconfigure their marital obligations).<sup>186</sup> With a few rare exceptions, which this Article will now discuss, a contracting party's parental obligations are not seen as worthy of mention, let alone consideration, by either scholars or courts.

*b. Exceptions*

*Contracts Reallocating Parental Rights.* As a rule, courts will not take children's interests into account when adjudicating contracts made by their parents. Courts adjudicating contract disputes will rarely see fit even to acknowledge that a party to the contract is the caretaker of a minor child. The primary exception to this rule occurs

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transforming into the modern idiom of contract doctrine the status-based notion that the husband owns his wife's labor).

183. While a minority of states treat premarital agreements as ordinary contracts, *see, e.g.*, *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), many states police such agreements for both procedural and substantive fairness, *see, e.g.*, *Blige v. Blige*, 656 S.E.2d 822 (Ga. 2008). On the other hand, slightly more than half of the states have adopted the Uniform Premarital Agreement Act (UPAA), under which, apart from certain limited exceptions, premarital agreements are unenforceable only if either they were not entered into voluntarily or they are both procedurally unfair for lack of financial disclosure and substantively unfair because they contain unconscionable terms. *See* UNIF. PREMARITAL AGREEMENT ACT § 6 (2001). As many have noted, the UPAA “appears to require a greater showing before invalidating an agreement than would conventional contract law.” Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 156 (1998) (summarizing current approaches to and scholarly debate over enforcement of premarital agreements).

184. *See* discussion *infra* Part II.B.2.b.

185. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981) (contract unenforceable where parties with special relationships, such as spouses, take advantage of those relationships to exercise unfair persuasion).

186. *See supra* note 183.

when children are directly involved in the contract in question. The paradigmatic instance of this is when a contract reallocates parental rights. Here, where children are the subject matter of contractual exchange, courts do acknowledge that children's interests are at stake and take those interests into account in determining whether and how the contract should be enforced.

Thus, courts routinely consider children's interests in determining whether to enforce custody agreements between parents.<sup>187</sup> Courts will typically refuse to enforce a custody agreement that is part of a premarital contract, on the basis that such an agreement is likely to have little relevance to a child's interests.<sup>188</sup> The rule in most states is that even a custody agreement reached at the time of separation or divorce is enforceable only to the extent that it is consistent with the child's best interests.<sup>189</sup> Many of these states will consider the agreement as a factor in assessing the child's interests,<sup>190</sup> and some will presume that those interests correspond with the agreement,<sup>191</sup>

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187. See Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004) (arguing for greater deference to parental custody agreements, and noting that the majority of states give no deference to such agreements).

188. See, e.g., *In re Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. Ct. 2009) ("The law severely limits on public policy grounds the enforceability of contracts affecting the custody and support of minor children. Illinois law *per se* rejects premarital agreements that impair child-support rights or specify custody.").

189. See, e.g., *Eickbush v. Eickbush*, 171 P.3d 509, 511–12 (Wyo. 2007) ("[C]ourts have a duty to disregard, if necessary, agreements entered into by parents and to make provision for the proper support and care of minor children according to their best interests. This obligation arises because although the settlement agreement significantly impacts the children, they are not parties to the contract nor are they typically represented in the negotiation thereof." (citation omitted) (internal quotation marks omitted)); *Zahl v. Zahl*, 736 N.W.2d 365, 368 (Neb. 2007) (holding that parental agreements do not control child custody because the court must look to the children's best interests); *Brockman v. Brockman* (*In re Marriage of Brockman*), 240 Cal. Rptr. 96, 98–100 (Ct. App. 1987) (same).

190. See, e.g., *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1263 (N.Y. 1982) ("[N]o agreement of the parties can bind the court to a disposition other than that which a weighing of all the factors involved shows to be in the child's best interests. Thus, an agreement between the parties is but one factor to be weighed by the court in deciding whether a change of custody is warranted.") (citations and internal quotation mark omitted).

191. See, e.g., *Keen v. Keen*, 629 N.E.2d 938, 941–42 (Ind. Ct. App. 1994) (holding that parents' agreement as to custody must be given great weight but cannot be enforced where court has clear basis for finding it at odds with children's best interests); *Serr v. Serr*, 746 N.W.2d 416, 419

but under both approaches, the child's best interests prevail. One state, West Virginia, will enforce parenting arrangements agreed to by separating or divorcing parents unless it is shown that doing so is harmful to a child.<sup>192</sup> No state, then, will enforce a custody agreement without taking the child's interests into account to some extent. In the arena of child custody, children's interests predominate over the usual rules of contract law.

Another type of agreement related to children is a contract by which the parties agree to terminate, transfer, or take on parental rights. This includes adoption agreements, which are regulated by state statute and must be approved by judicial decree,<sup>193</sup> and surrogacy agreements, which are increasingly regulated by statute as well.<sup>194</sup> When a contract reallocating parental status has come before

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(N.D. 2008) (holding that parents' stipulation as to custody to be given great deference but is not determinative).

192. See W. VA. CODE ANN. § 48-9-201 (LexisNexis 2009) (requiring courts to enforce parenting plans entered into voluntarily and knowingly unless harmful to the child); cf. *id.* § 48-9-206 (providing that, where parents cannot agree on such a plan, courts allocating custody should take into account "any prior agreement of the parents" where "appropriate . . . under the circumstances as a whole including the reasonable expectations of the parents in the interest of the child").

193. See GROSSBERG, *supra* note 69, at 268–80 (tracing the history of state regulation of adoption, beginning with Massachusetts in 1851); UNIF. ADOPTION ACT § 3-703 (1994) (requiring determination that adoption is in child's best interests in order for court to approve adoption petition, even where biological parents have consented to the adoption); see also Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can it Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483 (1996) (describing need for greater enforcement of agreements providing for post-adoption contact, and summarizing five state statutes permitting such agreements with consent of the court). But see Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 264 (2002) (setting forth a "counterhistory [that] presents adoption practice and law as nonstatutory, with deep private-ordering roots in contract law").

194. A number of state statutes prohibit enforcement of surrogacy agreements. See, e.g., ARIZ. REV. STAT. ANN. § 25-218(A) (2011); MICH. COMP. LAWS § 722.855 (2012); N.Y. DOM. REL. LAW § 122 (McKinney 2010). Other states have enacted legislation imposing lesser restrictions on surrogacy contracts, such as providing that they are unenforceable when compensation is involved. See, e.g., NEB. REV. STAT. § 25-21,200 (2008); WASH. REV. CODE §§ 26.26.230, 26.26.240 (2010). Still other states have statutorily provided for enforcement of surrogacy agreements in certain limited circumstances; in Virginia, for instance, such agreements are enforceable if the intending parents and the surrogate meet a number of requirements (including that the intended mother is infertile or has medical reasons for not being able to bear a child) and obtain judicial pre-conception approval of the

courts in the absence of a clear statutory rule on the subject, the response has often been to refuse to enforce the contract on public policy grounds.<sup>195</sup> Thus, in the well-known *Baby M* case, the New Jersey Supreme Court refused to enforce a surrogacy contract by which a biological mother agreed to terminate her parental rights and allow her child to be raised by the biological father and his wife.<sup>196</sup> While the court had several public-policy objections to the surrogacy contract, it found that “worst of all” was “the contract’s total disregard of the best interests of the child.”<sup>197</sup> Such an agreement, the court found, was “based on . . . principles that are directly contrary to the objectives of our laws,” because it allocated parental rights in a manner that “totally ignore[d] the child.”<sup>198</sup> Other courts refusing to enforce such agreements have similarly asserted that custody decisions must be based, not on parental contracts, but on judicial assessment of the child’s best interests.<sup>199</sup>

When it comes to considerations of children’s interests in contracts involving their parents, then, the law takes an all-or-nothing approach. In the majority of cases, the fact that a parent has children who may be affected by enforcement of the parent’s contract is

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agreement. See VA. CODE ANN. § 20-160 (Supp. 2012). *But see id.* § 20-161 (directing court to vacate the order approving the agreement where a genetically related surrogate decides to terminate the agreement within 180 days of assisted conception). For a summary of current state approaches to surrogacy, see Darra L. Hofman, “*Momma’s Baby, Daddy’s Maybe*”: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449 (2009).

195. See, e.g., *R.R. v. M.H.*, 689 N.E.2d 790, 796–97 (Mass. 1998) (refusing to enforce traditional surrogacy contract); *T.F. v. B.L.*, 813 N.E.2d 1244, 1251 (Mass. 2004) (refusing to enforce agreement to assume parental rights and obligations, on the basis that “[p]arenthood by contract’ is not the law in Massachusetts”). *But cf.* *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (en banc) (finding that gestational surrogacy agreement was not inconsistent with public policy and could therefore be considered as evidence of intent to parent in order to resolve dispute between birth mother and genetic mother, both of whom fit the statutory definition of “natural mother”). For the early history of courts’ refusal to enforce adoption contracts before a statutory mechanism was in place to facilitate adoptions, see Abramowicz, *supra* note 73.
196. *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988) (finding that surrogacy agreement conflicted both with public policy considerations and with statutory provisions prohibiting compensation for adoption and making consent to adoption revocable in private placement adoptions).
197. *Id.* at 1248.
198. *Id.* at 1250.
199. See *R.R.*, 689 N.E.2d at 797 (“The mother and father may not . . . make a binding best-interests-of-the-child determination by private agreement.”).

treated as altogether irrelevant. Where a contract reallocates parental rights, however, an entirely different set of rules applies. Contract law drops away entirely, and family law takes over.<sup>200</sup> Contracts reallocating parental rights are not enforced as contractual obligations; instead, they become, at most, one factor a court can consider in assessing the paramount concern of child custody law—the best interests of the child.

*Children and Negative Externalities.* Contract theory does provide a potential basis for taking children's interests into account in cases that affect them indirectly: the concept of negative externalities. A negative externality is the harm a contract inflicts on third persons who are not parties to the contract.<sup>201</sup> To take an extreme case, a contract for murder would impose a negative externality on the targeted victim, as well as on society at large, which is harmed by the violation of its criminal laws. The law protects against such negative externalities by holding such contracts illegal and unenforceable.<sup>202</sup> Another example is a noncompetition agreement that harms the public by distorting market forces and restraining trade. Here, too, the law will protect against these unwanted negative externalities by limiting the enforcement of such contracts as against public policy.<sup>203</sup>

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200. Scholars continue to debate the differential treatment of contracts reallocating parental rights, particularly in the wake of the new permutations of parenthood permitted by assisted reproductive technology. *See, e.g.*, Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 396–98 (arguing for enforcing such agreements in the context of assisted reproductive technology, with protective mechanisms to ensure disclosure and informed consent); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 865 (2000) (arguing against the enforcement of such agreements, on the basis that “our legal tradition precludes per se enforcement of all contracts concerning children” and that there is no evidence that the situation of assisted reproductive technology is sufficiently different to justify inconsistent treatment).

201. As F.H. Buckley explains, “What I do affects others, for good or for ill, and this may supply a reason to restrict bargaining freedom. The economist’s assumption that a person will not agree to a contract which leaves him worse off might have little traction when the costs are born by an unwilling third party.” F.H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 139 (2005).

202. *See, e.g.*, *McMahon v. Anderson*, 728 A.2d 656, 658 (D.C. 1999) (“[W]hen parties have entered into an illegal contract, such contract is unenforceable.”); RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b (1981) (“[W]hen an agreement involves a serious crime . . . unenforceability is plain.”).

203. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 186(1) (1981) (“A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade.”).

According to those who explain contract law from an economic or efficiency perspective, the goal of limiting negative externalities is behind several features of contract law,<sup>204</sup> from the refusal to enforce certain contracts on the basis of illegality or public policy to the limitation of contractual freedom through mandatory default rules.<sup>205</sup> From an economic perspective, negative externalities render a contract inefficient,<sup>206</sup> and thus militate against enforcement,<sup>207</sup> when they impose costs on third parties that significantly outweigh the benefits to both contracting parties.<sup>208</sup> Attention to negative externalities is also mandated by the liberal, autonomy-based approach to contract law, which holds that negative externalities form a necessary limit to contractual freedom, because the right of individual liberty, including freedom of contract, does not entail a right to inflict harm on others.<sup>209</sup>

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204. See Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2390 (1995) ("According to economic analysis, contracts . . . become less than fully enforceable where there are substantial negative third-party effects.").
205. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88–89 (1989) (describing prevention of harm to third parties as one of the two primary normative justifications for imposing immutable rules that limit freedom of contract).
206. Economists speak of two types of efficiency, Pareto efficiency and Kaldor-Hicks efficiency. A transaction is Pareto efficient when it makes at least one party better off, and makes no one worse off. A transaction is Kaldor-Hicks efficient where it maximizes welfare in the aggregate, in that, in a world with no transaction costs, the parties that benefit from the transaction could pay off those that suffer from it. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12–13 (3d ed. 1986).
207. See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 58–61 (1993) (explaining how refusals to enforce contracts on the basis of negative externalities can be seen as consistent with the economic, efficiency-based approach to legal analysis).
208. As many have noted, the question of when negative externalities are sufficient to render a contract unenforceable raises a difficult problem of line drawing. See Richard A. Epstein, *Externalities Everywhere?: Morals and the Police Power*, 21 HARV. J.L. & PUB. POL'Y 61, 63 (1997) ("Simply to point out that . . . externalities exist, however, is not to demonstrate that they always exceed the private gains to the parties—or even that the costs of preventing the external harms is smaller than the harms themselves."); TREBILCOCK, *supra* note 207, at 58 ("Almost every transaction one can conceive of is likely to impose costs on third parties.").
209. See TREBILCOCK, *supra* note 207, at 61–64 (discussing the connection between concern with externalities and the liberal theory of harm promulgated by John Stuart Mill).

Children are often considered relevant victims of externalities in the context of familial contracts. Indeed, the concept of negative externalities in the form of harm to children is held up as justifying the limited enforceability of such contracts. For instance, a number of scholars who oppose the enforcement of surrogacy contracts have grounded their position in the notion that such contracts inflict negative externalities on children,<sup>210</sup> such as conveying that they are commodities<sup>211</sup> or allocating them to new parents without assessing their interests.<sup>212</sup> Courts refusing to enforce surrogacy contracts, while not using the term “negative externalities,” have used a similar logic.<sup>213</sup> Children are also seen as victims of negative externalities in connection with other contracts allocating parental rights, such as custody agreements.<sup>214</sup> Some have argued that negative externalities affecting children should likewise be considered in the context of the enforcement of marital property agreements, even where these do not directly touch upon the custody or care of the children themselves.<sup>215</sup>

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210. See Brinig, *supra* note 204, at 2381, 2384–85, 2391–92 (discussing the third-party effects of surrogacy contracts on children, including the surrogate’s other children, and concluding that such contracts should not be enforced); see also Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2320–23 (1995) (acknowledging that children are relevant externalities in assessing the enforceability of surrogate contracts, but concluding that the risk of harm to children is not high enough to warrant a limit on the enforcement of such contracts).
211. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–29 (1987).
212. See Garrison, *supra* note 200, at 892–98 (arguing that there is no reason to except surrogacy from the usual rule that contracts allocating parental rights are void when at odds with a child’s best interests); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1555–56 (proposing that the trend toward privatization in family law, including surrogacy contracts, be limited when children’s interests are at stake); see also Judith Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741, 1747 (1988) (opposing enforcement of surrogacy contracts on the basis, inter alia, that they put children at risk by increasing the likelihood that they will be abandoned at birth).
213. See *In re Baby M*, 537 A.2d 1227, 1246 (N.J. 1988) (finding surrogacy contract unenforceable on the basis, inter alia, that it allocated custody without determining the best interests of the child).
214. See Singer, *supra* note 212, at 1553 (raising possibility of “two-tiered” system limiting private agreements regarding family relations when children are involved).
215. See Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. CHI. LEGAL F. 265, 282 (noting that harms to children are currently considered relevant externalities in the rules governing marital property division); see also Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV.

Any contract that adversely affects children could be characterized as inflicting a negative externality. This includes contracts that do not concern either the children themselves or the structure of their family, such as a commercial or consumer contract to which a parent is a party. If the terms of the commercial or consumer contract are adverse to the parent, such that enforcement will cause significant economic distress, then they are likely to be adverse to the child as well, insofar as children's fortunes typically follow those of their parents. As with any negative externality, there may be good reasons not to take harm to children into account. But it seems undeniable that harms to children are potential negative externalities to many types of contracts involving their parents.

Neither courts nor theorists, however, have considered children relevant victims of negative externalities in non-familial contracts involving their parents. While harms to children are often considered in connection with contracts that reconfigure the family, children are typically absent from discussions of parental contracts that have no direct connection to family matters, such as ordinary commercial or consumer contracts. Despite the potential harms that such contracts may inflict on the children of the parties who form them, there is currently little or no analysis of such harms either in the case law or in the scholarly literature on negative externalities in contract law.

*Unconscionability.* While not typically framed as such, the doctrine of unconscionability provides another possible mechanism for courts to take children's interests into account in enforcing contracts that affect them indirectly. Unconscionability has both a substantive and a procedural aspect. Courts may refuse to enforce a contract if either its terms (substantive unconscionability) or the bargaining process (procedural unconscionability) are so unfair as to suggest that no meaningful choice was exercised in the formation of the contract.<sup>216</sup> A court refusing to enforce a contract on the basis of unconscionability often points to a combination of substantive and procedural unconscionability, such as an inequality of bargaining power that produces unreasonably oppressive contractual terms.<sup>217</sup>

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9, 87–91 (1990) (advocating that divorce be made more difficult to obtain when children are involved).

216. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 (1967) (formulating the distinction between procedural and substantive unconscionability).

217. See Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1074–76, 1098 (2006) (demonstrating through empirical study that while courts often articulate a need for both a substantive and a procedural element to render a contract unenforceable on the basis of unconscionability, substantive unconscionability alone can also, in practice, suffice).

Unconscionability is measured at the time the contract is formed, and hence typically requires overreaching by the dominant party.<sup>218</sup>

There is no suggestion in the contracts literature that unconscionability applies, in particular, to contracts involving parties with minor children. But unconscionability doctrine gives courts leeway to take a party's situation—including parental obligations—into account in assessing the unfairness of the bargaining process and of contractual terms. Thus, in *Williams v. Walker-Thomas Furniture Co.*, the most well-known case on unconscionability doctrine, the court seemed to take a consumer's status as a mother into account in assessing the fairness of her contract with a retail furniture store.<sup>219</sup> The contract between Mrs. Williams and the Walker-Thomas Furniture Company provided for an installment payment plan whereby the store could repossess everything Mrs. Williams purchased over several years if she defaulted on a payment for any one item. In condemning the store for contract terms that it saw as "unreasonably favorable"<sup>220</sup> to the seller, the court noted, in particular, that the store sold Mrs. Williams a \$514 stereo set on this plan, even though it knew that she still owed a balance on previously purchased furniture, and that she lived on a welfare check of \$218 per month and "had to feed, clothe and support both herself and seven children on this amount."<sup>221</sup>

The *Williams* court did not expressly articulate a doctrine under which courts will assess unconscionability by looking to the effects on a party's minor children of enforcing the terms of a contract. But the court did treat Mrs. Williams's status as a mother of seven children—and the store's awareness of this status—as relevant to its assessment of both the behavior of the store and the fairness of the contract terms. The Walker-Thomas Furniture Company, the court appeared to suggest, should have refrained from allowing someone so financially constrained, and with seven dependents, to enter into such an unfavorable arrangement, particularly for a nonnecessity such as a stereo.<sup>222</sup> In assessing the unfairness of the repossession arrangement,

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218. See U.C.C. § 2-302 (2012) (court may refuse to enforce contract if unconscionable at time it was made).

219. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

220. *Id.* at 449.

221. *Id.* at 448 (quoting *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964)).

222. See *id.* ("The reverse side of the stereo contract listed the name of appellant's social worker and her \$218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a \$514 stereo set." (quoting *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964))); see also *id.* at

moreover, the court seemed to consider the harm that enforcement would inflict on the seven children of this single mother. The implication is that courts can wield the unconscionability doctrine to encourage contracting parties to take special care not to exploit economically vulnerable parties with dependent children.

While *Williams* seemingly enables courts to take parental status into account in assessing unconscionability, no commentator frames the case as extending unconscionability to contract disputes where children's interests are at stake. The fact that the *Williams* plaintiff had seven children is frequently mentioned in accounts of the case.<sup>223</sup> But the bearing of the case on children as a general matter is rarely raised in discussions of *Williams* and its progeny.<sup>224</sup> Despite the mention of children in *Williams*, neither courts nor commentators explicitly frame unconscionability doctrine as potentially taking children's interests into account in contracts involving their parents.

### 3. Arguments About Considering Children's Interests

Throughout most of contract law, children are invisible. They are taken into account in exceptional situations involving custody agreements, for instance, or contracts by children themselves. In such cases, the usual rules of contract law do not apply, and family-law principles or paternalism take over instead. But when it comes to ordinary contract disputes, courts and contract theorists rarely contemplate the possibility that children's interests could be taken into account in enforcing contracts involving their parents.

To the extent that commentators have touched upon the effect on children of the law that regulates their parents' nonfamilial contracts, they have done so obliquely. An example is the attention to children in recent discussions of mortgage and foreclosure law, which, while it rests upon contractual arrangements, is more heavily regulated than contract law generally, and thus would seem more amenable to taking children's interests into account.<sup>225</sup> The current financial crisis has

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450 (Danaher, J., dissenting) ("What is a luxury to some may seem an outright necessity to others.").

223. See, e.g., Leff, *supra* note 216, at 555 (noting that the Walker-Thomas Company knew that Mrs. Williams had seven children).

224. A typically brief and undeveloped mention of children in connection with the *Williams* case occurs in Arthur Leff's seminal article on unconscionability doctrine. Leff criticizes the application of the doctrine in *Williams* as "sneakily" working to achieve goals that no legislature would openly admit to, such as the goal of "foster[ing] in the deserving poor" the "traditional middle-class virtues of thrift and child care." *Id.* at 558.

225. See, e.g., Truth in Lending Act of 1968, 15 U.S.C. §§ 1601–1667 (2006) (mandating certain disclosures from lenders to home buyers); see generally Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure:*

made clear that children are affected, often deeply so, when a bank forecloses on the family home or evicts a family because it has foreclosed on the landlord. In the recent furor over the foreclosure crisis, both politicians and the media have focused on harm to families from foreclosure on their homes, and have spoken in particular about harm to children.<sup>226</sup>

Despite the attention to the harms inflicted on children by the financial crisis, there is little discussion by lawmakers or legal scholars of the possibility that foreclosure law treat parties differently on the basis that they are the parents of minor children. When lawmakers have confronted the foreclosure crisis, despite the rhetoric of saving “families,” they have for the most part protected homeowners and renters generally, as opposed to singling out those with minor children or other dependents.<sup>227</sup> Only a few scattered municipalities have enacted ordinances requiring special treatment of foreclosure evictions where children are involved; one example is San Francisco, which recently enacted legislation prohibiting owner move-in evictions during the school year where households include children under the age of eighteen.<sup>228</sup>

The primary area in which parties with children may be treated differently in the context of foreclosure evictions is in the practical application of laws that are facially neutral with respect to children. Thus, a family with children may be given protective treatment by a court setting an eviction date, or overseeing the renegotiation of a mortgage contract. And in some instances, the sheriff charged with executing an eviction order may hesitate where young children are involved. Thus, for instance, in late 2008, Thomas J. Dart, the sheriff of Cook County, Illinois, suspended all foreclosure evictions,

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*The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399 (2004) (discussing history of state and federal regulation of foreclosures).

226. See, e.g., Stephanie Armour, *Foreclosures' Financial Strains Take Toll on Kids*, USA TODAY, July 9, 2008, [http://usatoday30.usatoday.com/money/economy/housing/2008-07-08-children-foreclosure-homeless\\_N.htm](http://usatoday30.usatoday.com/money/economy/housing/2008-07-08-children-foreclosure-homeless_N.htm).
227. See, e.g., Press Release, Office of the Mayor, City of Providence, R.I., New Hope for Homeowners & Tenants Facing Foreclosure (Aug. 7, 2009), available at <http://cityof.providenceri.com/NewsReleaseArchive/article.php?id=545> (quoting mayor as explaining that city foreclosure ordinance, which protects tenants and homeowners regardless of family status, was intended to “protect families from the impact of a nationwide foreclosure crisis that has devastated too many families in our neighborhoods”).
228. See S.F. ADMIN. CODE § 37.9(j)(1) (2011) (“It shall be a defense to an eviction . . . if any tenant in the rental unit has a custodial or family relationship with a child under the age of 18 who is residing in the unit, the tenant with the custodial or family relationship has resided in the unit for 12 months or more, and the effective date of the notice of termination of tenancy falls during the school year.”).

describing the experience of “seeing little children put out on the street with their possessions” as “gut-wrenching.”<sup>229</sup> But such exceptions are rare and are at odds with the applicable law.

Federal lawmakers have not ignored the plight of children altogether. But their efforts to help children have been directed either at all victims of foreclosure or at situations not directly connected to contracts and foreclosure law, such as education funding. Thus, for instance, initial legislation on the current foreclosure and housing crisis—the Housing and Economic Recovery Act of 2008<sup>230</sup>—included a provision directing federal funds to educational institutions able to provide assistance to children who became homeless as a result of foreclosure of the family home or eviction from foreclosed rental properties.<sup>231</sup> Insofar as it directly regulates foreclosure, however, this same legislation does not treat families with children differently from other homeowners and renters.

A similar pattern occurs in the context of bankruptcy law. Bankruptcy law does not, for the most part, take into account whether parties have dependent children when determining whether to permit a discharge in bankruptcy.<sup>232</sup> Nevertheless, one of the rationales for extending the right to a discharge in bankruptcy, and for contract law’s refusal to enforce a waiver of that right,<sup>233</sup> is that bankruptcy provides protection to a debtor’s dependents, including children. Contracts scholar Charles Fried has noted that the right to

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229. John Leland, *Sheriff in Chicago Ends Evictions in Foreclosures*, N.Y. TIMES, Oct. 8, 2008, at A14.

230. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

231. See 42 U.S.C. § 11432(h)(1) (Supp. IV 2011) (funding educational activities for children and youth who have become homeless as a result of foreclosure).

232. For the most prominent exception, see 11 U.S.C. § 523(a)(8) (2006), which allows the discharge of student loan debt on the basis of “undue hardship on the debtor and the debtor’s dependents.” A debtor’s status as the parent of minor children is also relevant, albeit indirectly, to whether the debtor can file for Chapter 7 bankruptcy. A debtor can be precluded from Chapter 7 bankruptcy if his or her monthly income, minus certain reasonable or actual monthly expenses, exceeds a certain amount. See *id.* § 707. In calculating the debtor’s expenses, courts are directed to consider certain expenses for dependents, including dependent children. See *id.* § 707(b)(2)(A)(ii)(IV). Here, the goal of considering the debtor’s parental status seems not to protect children from hardship, but to determine with accuracy the debtor’s reasonable expenses.

233. See John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 449–50 (2000) (noting that prepetition waiver of the right to discharge in bankruptcy is unenforceable, even if knowing and voluntary on the part of the debtor).

a discharge in bankruptcy ensures that “no matter what a man’s contractual obligations, he will not be disabled from supporting himself and his family at some reasonable level.”<sup>234</sup> But the reference to children is here, as typically, oblique, folded within the more general category of “family” or “dependents.”<sup>235</sup> There is no suggestion that the protections of bankruptcy should be made more readily available when children’s interests are at stake. And despite the general sense that bankruptcy law serves to protect dependents, there is very little discussion of the reasons for protecting children in particular, who—as bankruptcy expert Thomas Jackson conceded in a rare, and footnoted, exception to the scholarly tendency to overlook the issues of children and the distinct set of problems that they pose—cannot themselves negotiate with a caretaking adult to protect their interests when making credit decisions.<sup>236</sup>

While bankruptcy law does not consider children’s interests in determining whether to extend its protections in the first instance,<sup>237</sup> there are a number of ways in which the operation of bankruptcy law does countenance, and to some extent protect, the needs of children. For instance, bankruptcy law protects child and parent creditors by providing that domestic support obligations are not dischargeable in bankruptcy.<sup>238</sup> Children are also protected by homestead exemption laws,<sup>239</sup> which protect children by keeping the family home—or some

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234. FRIED, *supra* note 175, at 108.

235. See also, e.g., Conrad K. Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 AM. BANKR. L.J. 99, 150–52 (1975) (advocating reforms to consumer bankruptcy law in order to better protect “young families” from “economic collapse”); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 537 (1991) (characterizing bankruptcy law as driven by the notion that “[t]he family unit should not suffer the consequences of financial mistakes in which it did not directly participate”).

236. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1419 n.82 (1985) (excepting children from the argument that dependents are generally well-positioned to ensure that the people they depend on for support consider their interests when making credit decisions).

237. A prominent exception to this is the discharge of student loan debt, which is available upon a showing of undue hardship to a debtor and the debtor’s dependents. See 11 U.S.C. § 523(a)(8) (2006).

238. See 11 U.S.C. § 523(a)(5) (2006); see also Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181, 1202–10 (2006) (discussing legislative concern with protecting women and children who are owed spousal and child support by debtors filing for bankruptcy).

239. See Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1100–01, 1115–18 (2009)

portion of its value—out of the reach of creditors.<sup>240</sup> Traditionally, the homestead exemption was available only to heads of families, which was often interpreted as requiring that the debtor claiming the exemption had dependents in need of support.<sup>241</sup> Today, while most jurisdictions provide a homestead exemption to all individuals,<sup>242</sup> a few limit homestead protections to those with dependents,<sup>243</sup> and others provide greater protections (typically, a greater exemption amount) for those with dependents.<sup>244</sup> The homestead exemption laws thus seem designed, in part, to protect children from the financial vicissitudes of their parents.

Children are also taken into account in the formulas by which bankruptcy law calculates how much income certain debtors should be able to exempt from repayment in order to fulfill their basic needs. Thus, a debtor who files for Chapter 13 bankruptcy is required, when a trustee or unsecured creditor objects to confirmation of a proposed bankruptcy plan, to comply with a requirement that all of the “debtor’s projected disposable income” be devoted to paying

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(describing homestead exemption laws and noting that they are often justified as protecting children from dislocation, while disputing as an empirical matter that children suffer psychological harm when parents lose their homes).

240. Some states protect the family home in its entirety from the reach of creditors. *See, e.g.*, FLA. CONST. art. 10, § 4. But others protect as little as \$5,000 of the value of the family home. *See, e.g.*, ALA. CODE § 6-10-2 (LexisNexis 2005) (limiting homestead exemption to \$5,000); W. VA. CODE ANN. § 38-9-1 (LexisNexis 2011) (same).
241. *See* Alison D. Morantz, *There’s No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 245 (2006) (discussing changing judicial interpretation of head of family status in the context of nineteenth-century homestead exemption laws).
242. *See, e.g.*, ALA. CODE § 6-10-2 (LexisNexis 2005) (“The homestead of every resident of this state, with the improvements and appurtenances, not exceeding in value \$5,000 and in area 160 acres, shall be . . . exempt from levy and sale under execution or other process for the collection of debts during his or her life and occupancy . . .”).
243. *See, e.g.*, W. VA. CODE ANN. § 38-9-1 (LexisNexis 2011) (“Any husband, wife, parent or other head of a household residing in this State . . . owning a homestead shall by operation of law have a homestead exemption . . .”).
244. *See, e.g.*, CAL. CIV. PROC. CODE § 704.730 (West Supp. 2012) (providing homestead exemption in the amount of \$75,000, but raising exemption to \$100,000 where either debtor or debtor’s spouse is a member of a “family unit”); *id.* § 704.710(b)(2) (West 2009) (defining “family unit” as including the debtor along with a minor child that the debtor or the debtor’s spouse “cares for or maintains in the homestead”).

unsecured creditors under the plan.<sup>245</sup> In calculating the projected disposable income of a debtor, the court will deduct expenses that are “reasonably necessary” for “the maintenance or support of the debtor or a dependent of the debtor,”<sup>246</sup> and in so doing will consider factors such as special circumstances giving rise to the need for a debtor’s child to have a private-school education.<sup>247</sup> Here, however, it is not clear that bankruptcy law sets out to protect children, so much as to obtain an accurate calculation of each debtor’s reasonable expenses. Moreover, recent changes in bankruptcy law have tightened the restrictions on the child-related expenses that certain parent-debtors can exempt from their projected disposable income under the rubric of “reasonably necessary” expenses. Where a debtor has an above-median income, courts must now calculate the debtor’s projected disposable income under a formula that, rather than allow courts to determine, as formerly, the expenses that are reasonably necessary for any given child,<sup>248</sup> limits exemption for children’s private school expenses, for instance, to \$1,775 per year.<sup>249</sup>

Some have recently begun to advocate that bankruptcy law address more directly the plight of debtors with dependent children.<sup>250</sup> Most

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245. See 11 U.S.C. § 1325(b).

246. § 1325(b)(2)(A)(i).

247. See, e.g., *In re Webb*, 262 B.R. 685, 687, 690–91 (Bankr. E.D. Texas 2001) (holding that \$550 per month to pay for private school was a reasonably necessary expense, given the child’s special needs).

248. See *id.*

249. See 11 U.S.C. § 1325(b)(3) (2006) (directing that amounts “reasonably necessary to be expended” under § 1325(b)(2)(A)(i) be determined in accordance with § 707(b)(2) if the debtor’s income is greater than the median income of the applicable state); *id.* § 707(b)(2)(A)(ii)(IV) (“[D]ebtor’s monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,775 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary . . .”).

250. See, e.g., Eric S. Nguyen, *Parents in Financial Crisis: Fighting to Keep the Family Home*, 82 AM. BANKR. L.J. 229 (2008) (providing empirical evidence that parents are more likely than childless debtors to file for bankruptcy in order to save their homes, and arguing that bankruptcy law should enable courts to provide heightened homeownership protection to debtors with children); Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 27–37 (2004) (arguing for changes to bankruptcy law to better address the increasing financial distress of middle class families with children). Some have also made the related argument that consumer credit regulation fails to sufficiently protect children from the harm that accompanies their parents’ financial distress, and should be reformed accordingly. See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 58–61 (2008).

prominently, Elizabeth Warren has shown that families with children are significantly more likely to go into bankruptcy than other families, and contends that this is because those with children bear greater economic risks than their childless counterparts.<sup>251</sup> Warren argues that we should consider how bankruptcy law might better protect children from the financial distress of their parents, for instance by imposing greater limits on creditors who attempt to repossess family homes or cars.<sup>252</sup> As Warren observes, “the bankruptcy system offers a vision deep into our collective values,” including our valuation of families and of child rearing.<sup>253</sup>

But Warren’s attention to children’s interests is the exception rather than the rule. Even this exceptional attention to children’s interests, moreover, tends to be limited to certain heavily regulated areas of law that overlap with contract law, such as foreclosure law and bankruptcy. In more general scholarly discussions of the limits of contract enforcement, while there is extensive commentary on the relevance of children’s interests to the enforceability of agreements that affect them directly, such as surrogacy contracts, there is no mention of even the possibility that children’s interests be taken into account when enforcing contracts by their parents that have no direct bearing on the children, but might well affect their lives nonetheless.

### III. THE AUTONOMY-DEVELOPING RATIONALE ACROSS THE LEGAL CANON

Currently, the arguments for taking children’s interests into account in cases involving their parents—to the extent that scholars recognize the issue at all—have reached a stalemate. Framed within the confines of each doctrinal field, these debates are either overly narrow, as in contract law’s limited understanding of which agreements affect children, or undertheorized, as in the parental incarceration debate within criminal law. Moreover, the issue of children’s interests is largely marginalized within each field, and receives little attention in general scholarly accounts of each field’s underlying rationale. No scholar has recognized the connection between the law’s treatment of a child’s parents, on the one hand, and, on the other, how each doctrinal area will treat the child upon reaching adulthood—a connection that makes children’s interests an essential component of any discussion of each field’s legitimacy.

This Article reframes the issue of children’s interests in cases involving their parents—and argues for the central importance of

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251. Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1010–14, 1020–22 (2002).

252. *Id.* at 1024.

253. *Id.* at 1025.

these interests across the legal canon—by importing into the discussion the perspective of family law about why and how childhood matters. Family law’s insight about the influence of childhood on the adult self has shown, in Parts I and II, the extent to which children’s development can be affected by cases involving their parents. The Article now brings this insight to bear on the related question of why we should take children’s interests into account in these cases. When viewed in light of the formative influence of childhood experience, children’s interests can be seen as integral to—rather than collateral to—the two exemplary areas of law we are examining, criminal law and contract law. As this Article will now demonstrate, both of these areas of law are premised on a model of the adult legal subject that is closely intertwined with the conditions of each child’s development. This is the model of the adult legal actor as sufficiently autonomous, in the sense of both rational and free, to be held responsible for his or her actions.

From the perspective of the autonomy assumption, considering the effect on children of legal decisions involving their parents no longer seems at odds with the overarching concerns of criminal law, contract law, or many of the other doctrinal areas of law in which children’s interests are indirectly at stake. For according to family law’s best-interests-of-the-child assessment, the likelihood that each child will actually develop into a rational and independent adult—and thus will resemble the model of the autonomous legal actor taken for granted across the legal canon—is greatly influenced by the conditions of each child’s upbringing and early experience. Thus, attending to children’s interests in cases that affect them indirectly can be seen as contributing to the legitimacy and internal consistency of any area of law that predicates responsibility on adult autonomy. Considering how legal outcomes affect children’s upbringing will enhance the legitimacy of these areas of law by increasing the likelihood that the children will grow up to resemble what the law will later assume them to be—autonomous adults capable of acting rationally and exercising freedom of choice.

#### A. *The Autonomy Premise in Criminal Law*

A central debate in criminal law is the degree of autonomy that a person must possess in order to be held responsible for his or her actions. Because criminal law brings the power of the state to bear on individuals more severely than any other area of law, legal philosophers are especially concerned that individuals not be held criminally liable unless they can be blamed for their actions.<sup>254</sup>

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254. See Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2280 (1992) (discussing the connection between blame and criminal punishment, and noting that “[t]he criminal law is the most visible and explicit institutional setting

Despite disagreement about the proper basis of criminal punishment, there is a widespread consensus that blameworthy conduct requires a minimal degree of autonomy, in the form of both rationality and freedom of choice.<sup>255</sup> In the formulation of H.L.A. Hart, in order to be held criminally responsible, a legal actor must possess both the capacity (rationality) and the opportunity (freedom of choice) to conform her behavior to the law.<sup>256</sup>

This twofold requirement for criminal responsibility is reflected in the substantive provisions of criminal law, which are predicated on a minimal degree of autonomy in the form of rationality and freedom of choice. Criminal liability typically requires both a *mens rea* (culpable state of mind)<sup>257</sup> and an *actus reus* (a voluntary act or omission).<sup>258</sup> The *mens rea* component emphasizes that criminal responsibility requires a degree of rational choice. If a legal actor is unaware of the facts that made his actions unlawful, for instance, he may lack the requisite *mens rea*.<sup>259</sup> The higher the degree of rational activity, the more culpable a person may be for the same underlying conduct. It is for this reason that premeditation, deliberation, and intent have traditionally distinguished first-degree murder from lesser charges.<sup>260</sup>

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for the working out of questions of individual responsibility”); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 681 (1988) (“[T]he criminal law is premised on the belief that wrongdoers should not be punished in the absence of moral desert.”); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS., Summer 1986, at 47, 79 (“Punishment follows directly from desert because only if desert is fulfilled can we be regarded fully as persons—free, morally responsible, and deserving—at all.”).

255. See Abramowicz, *supra* note 145, at 843–46 (summarizing debates about the nexus between autonomy and criminal responsibility).

256. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 181 (1968).

257. See MODEL PENAL CODE § 2.02(1) (1985) (“Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”).

258. See *id.* § 2.01(1) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”).

259. See Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1107 (1985) (“Ignorance . . . should be regarded as . . . the negation of these forms of *mens rea*.”).

260. See, e.g., CAL. PENAL CODE § 189 (Deering Supp. 2012) (defining murder in the first degree as including “willful, deliberate, and premeditated killing”); NEB. REV. STAT. § 28-303 (2008) (“A person commits murder in the first degree if he or she kills another person . . . purposely and with deliberate and premeditated malice . . .”). *But see* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.1(a) (2d ed.

The actus reus requirement adds to this the mandate that conduct be volitional if it is to become the basis for criminal responsibility. There is no actus reus, and therefore no crime, for instance, where conduct is the result of an involuntary spasm, or where the actor is unconscious.<sup>261</sup>

Criminal law's twofold autonomy requirement is also reflected in the major excuses from criminal liability, such as insanity and duress.<sup>262</sup> The insanity defense makes sufficient rationality a prerequisite to criminal responsibility. Under every version of the insanity defense, an actor is excused if he lacked the capacity to understand either the nature or the wrongfulness of his actions.<sup>263</sup> The duress excuse, in turn, conveys that criminal responsibility requires a certain degree of free choice.<sup>264</sup> A person who acts with a gun to his head is not responsible because he did not act with sufficient freedom: he had some volition, but his range of choices—obey the gunman or face death—was too limited to merit criminal liability.

Even as criminal law mandates autonomy as the basis for criminal responsibility, however, legal philosophers have long acknowledged that we often hold actors legally responsible for their conduct in the absence of full autonomy. On the one hand, the legitimacy of criminal law rests on the assumption that we only inflict punishment on those who acted with sufficient autonomy to merit blame for their actions. At the same time, however, criminal law presumes that all minimally competent adults meet this standard of autonomy. In the process, we hold liable a number of adults whose rational capacity and freedom of choice are significantly impaired.

This wrinkle in criminal law's autonomy requirement is visible in the debate over an excuse for criminal behavior that has been widely rejected by courts and scholars: the "Rotten Social Background" excuse. In the 1970s, Professor Richard Delgado, building upon the work of Judge David Bazelon, proposed that we excuse from criminal liability those who have been brought up in conditions that have diminished their capacity to deliberate rationally and to regulate their

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2003) (describing shift away from requiring premeditation as an element of murder).

261. See MODEL PENAL CODE § 2.01(2)(a) (listing types of acts that are not "voluntary" within the meaning of the "voluntary act" requirement for criminal liability); see also Markus D. Dubber, *Legitimizing Penal Law*, 28 CARDOZO L. REV. 2597, 2609 (2007) (linking both mens rea and actus reus requirements to criminal law's insistence on autonomy as a prerequisite for criminal responsibility).

262. See 2 LAFAVE, *supra* note 260, § 9.1(a)(4) (discussing excuses from criminal liability).

263. See 1 *id.* § 7.1 (discussing insanity defense).

264. See 2 *id.* § 9.7 (discussing the defense of duress).

emotions.<sup>265</sup> The proposed “Rotten Social Background” defense concerned adults who met the minimum standard of capacity that rendered them liable under criminal law—they understood the nature of their actions, and acted with a degree of volition—but who had experienced a difficult childhood that led to significant difficulty in conforming their behavior to the law.<sup>266</sup> Such a defendant, Delgado argued, should not bear responsibility for actions that resulted from an early upbringing and environment that had been inflicted on him through no fault of his own.<sup>267</sup>

Most criminal law scholars and legal philosophers reject the prospect of a “Rotten Social Background” excuse even while acknowledging that upbringing and early experience can diminish a legal actor’s ability to avoid wrongdoing.<sup>268</sup> These scholars recognize that childhood background can impair the two elements of autonomy, rationality and self-control, and in so doing can lead adult actors to engage in conduct that they might have avoided had they been raised in a different environment.<sup>269</sup> But they argue that as long as adult

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265. See Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); *United States v. Alexander*, 471 F.2d 923, 959–60 (D.C. Cir. 1973) (Bazelon, C.J., dissenting in part) (finding that trial court improperly instructed jury on testimony concerning defendant’s “rotten social background,” where expert testified that this background made it difficult for defendant to control his conduct, and the judge instructed the jury that “[w]e are not concerned with a question of whether or not a man had a rotten social background” but only with whether defendant was mentally ill); David L. Bazelon, *The Morality of Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976) (arguing that we should not convict those who engage in proscribed conduct unless “society’s own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act” (footnote omitted)).

266. See Delgado, *supra* note 265, at 65; *Alexander*, 471 F.2d at 960 (“The thrust of [the defendant’s] defense was that the environment in which he was raised—his ‘rotten social background’—conditioned him to respond to certain stimuli in a manner most of us would consider flagrantly inappropriate.”).

267. See Delgado, *supra* note 265, at 54 (“In some cases, a defendant’s impoverished background so greatly determines his or her criminal behavior that we feel it unfair to punish the individual.”).

268. See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 961 (1999) (describing widespread rejection of the proposed “Rotten Social Background” defense).

269. See, e.g., Moore, *supra* note 259, at 1130–31 (recognizing that criminal conduct can be caused by character traits created by upbringing and early environment); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 720 (1992) (criminal responsibility should not depend

actors meet a minimal standard of capacity<sup>270</sup>—such as possessing the ability to understand the nature and wrongfulness of their actions, which in most jurisdictions establishes legal sanity—we should act on the premise that adults are autonomous, and hold them responsible accordingly, instead of assessing the extent to which they fall short of actual autonomy.<sup>271</sup>

There are a number of reasons for criminal law to treat adults as if they are autonomous, even when they are not. As a pragmatic matter, once we begin excusing adults from liability on the basis that their capacity to refrain from wrongdoing has been diminished by experiences beyond their control, we open up the argument that no one can be held responsible for his or her actions, because all of us are determined by some combination of genetics and environment.<sup>272</sup> Another argument is that recognizing the extent to which certain sane adults fall short of full autonomy would diminish the dignity of those adults,<sup>273</sup> with potentially pernicious results: were we to treat certain adults as children who cannot control their actions, their rights and liberties could be curtailed accordingly.<sup>274</sup> Still others argue that we must treat adults as autonomous because the assumption of adult autonomy is

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upon whether unchosen influences diminished a legal actor's ability to "freely choose" to engage in criminal conduct).

270. See Moore, *supra* note 259, at 1149 (arguing that a minimal ability to engage in "practical reasoning" should suffice to render an adult legal actor criminally responsible).

271. For a more extended discussion of the autonomy premise in criminal law, see Abramowicz, *supra* note 145, at 843–57.

272. See Weinreb, *supra* note 254, at 77 ("The criminal law departs from convention in order not to undermine the conventional basis of desert altogether, by calling into question whether a person can ever truly be said to have acted with freedom and responsibility despite the determinate conditions of his existence."); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 Rutgers L.J. 671, 680 (1988) (noting that "science . . . is increasingly forcing us to acknowledge the unhappy conclusion that human behavior is caused by many factors, some inherent and others social, over which we have no control").

273. See Moore, *supra* note 259, at 1147 ("To stand back and to refuse to judge because one understands the causes of criminal behavior . . . betokens a refusal to acknowledge the equal moral dignity of others."); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1267–68 (1976) ("[T]he law's presumption of responsibility . . . treats all persons as autonomous and capable of that most human capacity, the capacity to choose. To treat persons otherwise is to treat them as less than human.").

274. See Morse, *supra* note 273, at 1257, 1262 (arguing that excusing defendants on the basis that their criminal conduct was determined by their background could lead to repressive results, such as preventive detention, forced therapy, and an intrusive "therapeutic state").

necessary to provide “meaning in life” and to “construct a normative order in a world otherwise indifferent to human norms.”<sup>275</sup>

Underlying these arguments is a broad consensus that the criminal law must take adult autonomy for granted and assign liability accordingly, rather than investigate the extent to which each adult legal actor is truly autonomous in the sense of possessing both rational capacity and full freedom of choice. We do so because, for our system of criminal law to function, we need to operate on the assumption that most adult legal actors can, and should, be held responsible for their actions. As Herbert Packer put it in his discussion of criminal liability, “the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.”<sup>276</sup>

*B. Autonomy as Premise and as Goal in Contract Law*

Autonomy is also a central concern of contract law. In criminal law, as we saw, autonomy is relevant to whether a defendant acted with sufficient moral agency to justify the imposition of punishment. The stakes in contract law are not as high—the losing party to a contract dispute faces loss of money or property, not of liberty or life—and therefore contract law does not exhibit the same fraught preoccupation as criminal law with precisely the degree of individual autonomy necessary to render a person legally responsible. But contract law, as well, depends on the assumption that the legal actors on whom the power of the state is brought to bear acted with sufficient autonomy to justify state action.

In contract law, autonomy functions, in somewhat circular fashion, as both justifying premise and normative goal. The defining feature of contract law is that it enforces agreements that have been voluntarily entered into. Thus, in theory, contract law brings the power of the state to bear only upon those who have deliberately invited the state to intervene in their affairs and have themselves set the terms of this intervention. Moreover, insofar as contractual obligations are freely assumed, their enforcement is seen as enhancing the autonomy of the contracting parties. The argument, in short, is that as long as contracting parties are autonomous, enforcing their agreements will make them more so.

Individual autonomy was especially important to classical contract doctrine, in particular its ethos of freedom of contract, under which courts shifted from policing the fairness of bargains to enforcing whatever agreements the parties arranged amongst themselves.<sup>277</sup> As

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275. Pillsbury, *supra* note 269, at 721.

276. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74–75 (1968).

277. See ATIYAH, *supra* note 175, at 402–05.

long as parties to a contract were autonomous adults, in the sense of both rational and free, then freedom of contract, it was argued, would facilitate freedom more generally.<sup>278</sup> The decline of classical contract theory, and its replacement by a more regulatory approach to contract law, was the result, in part, of criticism of autonomy as both premise and goal of contract law. As contract scholars began to observe the extent to which contracting parties often fall short of the ideal of autonomous choice, it became more difficult to argue that freedom of contract necessarily facilitates the free and rational choices of the contracting parties.<sup>279</sup> At the same time, many began to argue that contract law does, and should, promote values other than autonomy, such as efficiency<sup>280</sup> or distributive justice.<sup>281</sup> Today, autonomy contract theorists are outnumbered by efficiency contract theorists, who argue, as both a normative and a descriptive matter, that contract law functions primarily to promote the efficient distribution of resources.<sup>282</sup>

Nonetheless, autonomy continues to be one of the major theoretical approaches to contract law. The most prominent proponent of the autonomy approach to contract law is Charles Fried, who in *Contract as Promise* revived the argument of classical contract doctrine that enforcement of promises is necessary to respect the autonomy of the promisor.<sup>283</sup> Fried begins by exploring the moral basis of contractual obligation and concludes that “[t]he obligation to keep a promise is grounded not in arguments of utility but in respect

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278. See, e.g., A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 189 (1905) (attributing the “extension of individual liberty” in England from 1825 to 1870 to “freedom of contract” principles); MAINE, *supra* note 174, at 169 (characterizing the rise of “Contract” as having created “a phase of social order in which all . . . relations arise from the free agreement of Individuals.”).

279. See ATIYAH, *supra* note 175, at 231–37.

280. See, e.g., Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1263–64 (1980) (arguing for a wealth-maximizing understanding of contract law).

281. See Kronman, *supra* note 179, at 474 (“[R]ules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive.”).

282. See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 491 (1989) (contending that autonomy theories cannot help to determine the proper content of default rules); see generally TREBILCOCK, *supra* note 207, at 8 (evaluating the competing claims of the autonomy approach to contracts and the efficiency, or welfare-maximizing, approach).

283. FRIED, *supra* note 175.

for individual autonomy and in trust.”<sup>284</sup> Randy Barnett further developed the importance of autonomy to contract law with his consent-based theory of contracts.<sup>285</sup> While Barnett grounds contract enforcement not on the morality of promising, but on the fact of consent, his approach shares with Fried’s a concern with individual autonomy.<sup>286</sup> More recently, some contracts scholars, such as Nathan Oman and Jody Kraus, have argued for integrating the autonomy approach with the efficiency approach to contract law.<sup>287</sup>

Autonomy comes into play in efficiency theories of contract as well, as premise if not as goal. Efficiency theorists argue that contract law should seek to maximize individual welfare, and that this is often best achieved by enforcing the free choices of the contracting parties, which presumably reflect their values and preferences.<sup>288</sup> Under this view, for contract law to achieve the goal of efficiency, the agreements it enforces must indeed be the product of autonomous choice.<sup>289</sup>

Contract law’s emphasis on individual autonomy is visible in the defenses to contractual enforcement. Many of these are premised on

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284. *Id.* at 16.

285. See Barnett, *supra* note 175, at 270 (“Consent is the moral component that distinguishes valid from invalid transfer of alienable rights.”).

286. See *id.* at 319 (“A consent theory’s concern with the issue of individual will and autonomy is reflected in the manner by which consent is determined—the theory looks for a manifestation of intention to be legally bound.”).

287. See Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 421–22 (2001) (explaining how efficiency and autonomy theories of contract law can be “combined as logically distinct components of a unified theory” by “preserving the most defensible claims, and subordinating or abandoning the weakest claims, of each kind of theory”); Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 829 (2007) (arguing for a unified approach in which autonomy determines the basic structure of contract law and efficiency fills out the details).

288. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (40th anniversary ed. 2002) (asserting that a welfare-maximizing approach to contract law requires that “the transaction is bi-laterally voluntary and informed”); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 497 (“The system of wealth maximization consists of institutions that facilitate, or where that is infeasible approximate, the operations of a free market and thus maximize autonomous, utility-seeking behavior.”).

289. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212 (1995) (noting that efficiency theory relies on “the empirical premise that in making a bargain a contracting party will act with full cognition to rationally maximize his subjective expected utility”).

defects in the two components of autonomy that we discussed in the context of criminal responsibility: volition and rational capacity.<sup>290</sup> In the lack-of-volition category are excuses such as duress and undue influence.<sup>291</sup> Here, contract law refuses to enforce contracts that are the product of a power imbalance that makes the choice to enter into the contract insufficiently voluntary.<sup>292</sup> Contract excuses in the lack-of-rationality category include mutual mistake and impracticability.<sup>293</sup> The defense of mutual mistake prevents contract enforcement in certain situations where the contracting parties lacked the information necessary to rationally assess the benefits of entering into the contract, whereas impracticability denies enforcement in certain situations where a contracting party has made an inaccurate calculation of the costs of performing as promised.<sup>294</sup> These defenses to contract enforcement, then, attempt to ensure that autonomy holds true as a premise of contract law, by refusing to enforce contracts made by parties who lacked sufficient volition or rationality to make an autonomous choice.

The two components of autonomy, rationality and volition, are also behind the contractual rules of incapacity. Contracts can be voided for lack of capacity, for instance on the basis of infancy or mental incompetence.<sup>295</sup> The theory is that those who are incapacitated for these reasons lack a sufficient degree of autonomy to form a binding contract because they lack a fully developed ability to make rational choices and at the same time are unusually susceptible to pressure from others.<sup>296</sup> The incapacity defense is central to the

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290. See discussion *supra* Part II.A.

291. See FARNSWORTH, *supra* note 176, §§ 4.16–4.21.

292. See TREBILCOCK, *supra* note 207, at 78–101 (discussing “the preconditions to voluntary consent” in the case of a contractual transaction and noting that “[t]his issue is deeply problematic, if only because of the pervasiveness of scarcity, which renders all choices constrained choices”).

293. See FARNSWORTH, *supra* note 176, § 9; see also TREBILCOCK, *supra* note 207, at 103 (“[H]ow much information is required for the exercise of autonomous choices presents a complex puzzle: it is difficult to conceive of a choice as autonomous without basic information on its implications, but . . . it may be rational to choose to forgo the acquisition of further information where its expected benefits are less than its expected costs.”).

294. See TREBILCOCK, *supra* note 207, at 127–46 (discussing mutual mistake, impracticability, and other contract defenses related to “symmetric information imperfections”).

295. See FARNSWORTH, *supra* note 176, §§ 4.2–4.6.

296. See *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 290 (Wis. 1968) (allowing a minor to disaffirm the purchase of an automobile under infancy doctrine, and explaining that “the minor [i]s immature in both

claim of contract theorists—and in particular of freedom-of-contract proponents—that contract promotes individual autonomy by enforcing only the choices of free and rational individuals.<sup>297</sup>

In contract law as in criminal law, a central question is where to draw the line in absolving adult actors of legal responsibility. In contract law, even more than in criminal law, this debate hinges on the conflict between autonomy as premise and autonomy as goal. The argument on one side is that we should not hold parties responsible for their promises where they lacked full autonomy in making them. The argument on the other side is that refusing to enforce contracts will diminish the individual autonomy that contract law is designed to promote, both in an expressive sense (by treating adults like children) and in a practical one (by making it more difficult for them to enter into binding agreements).

Thus, autonomy is on both sides of the equation in one of the most contested issues of contract enforcement—the doctrine of unconscionability, which allows courts to refuse to enforce agreements that are substantively and procedurally unfair.<sup>298</sup> Under the doctrine of freedom of contract, which rose to dominance in the late nineteenth century, courts that had formerly policed the fairness of bargains began to see their role instead as to enforce whatever agreements the parties had arranged amongst themselves.<sup>299</sup> Courts continued to be

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mind and experience and . . . therefore . . . he should be protected from his own bad judgments as well as from adults who would take advantage of him”). See generally FARNSWORTH, *supra* note 176, §§ 4.4–4.5 (discussing avoidance of contracts by minors).

297. See MAINE, *supra* note 174, at 173 (asserting that children are the exception that prove the rule that contract promotes freedom of choice, because the rule of incapacity of infants underscores the extent to which “the faculty of forming a judgment on [one’s] own interests” is “the first essential of an engagement by Contract”).

298. See U.C.C. § 2-302 (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . .”); see also Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 291–92 (1999) (“An unconscionability determination generally revolves around a two-part formula. First, the court asks whether there is evidence of procedural unconscionability. Second, it considers whether the weakness in the bargaining process has resulted in a substantively unfair contract. . . . It is unclear whether a finding of unconscionability requires both procedural and substantive unconscionability.”).

299. See Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 82 (2006) (“Classical contract doctrine did not stake its claim on contract thought until the nineteenth century. It was then that contracts scholars began to erode prior convictions that only fair exchanges warranted enforcement.”).

reluctant to enforce extremely unfair bargains, however, and would on occasion refuse enforcement on other grounds, for instance by finding that the terms were presumptively the product of fraud or duress.<sup>300</sup> By the mid-twentieth century, courts began to use the doctrine of unconscionability to strike down bargains that fell short of fraud, duress, or incapacity in the traditional sense, but where one of the parties agreed to unfair terms under conditions that limited the party's freedom of choice or rationality, such as inequality of bargaining power, economic pressure, or lack of sophistication.<sup>301</sup>

The application of unconscionability doctrine to police substantively unfair bargains typically occurs in the name of protecting historically vulnerable and oppressed groups, such as the poor and women. The most prominent discussions of unconscionability in recent years have concerned the protection of disadvantaged consumers (as in *Williams v. Walker-Thomas Furniture Co.*, discussed above);<sup>302</sup> vulnerable spouses, typically wives (as in the debate over the enforceability of prenuptial agreements);<sup>303</sup> and poor women (as in the debate over surrogacy agreements).<sup>304</sup> The effect of using the unconscionability doctrine in these contexts, it is argued, is to further diminish the autonomy of these already disadvantaged groups by characterizing them as incompetent and

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300. See *id.* at 82–83; see also *Hume v. U.S.*, 132 U.S. 406, 413 (1889) (discussing cases finding terms sufficiently unfair that “fraud was apparent upon the face of the contracts”).

301. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”); see also *id.* (“In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract . . . ?” (footnote omitted)).

302. See *supra* text accompanying notes 219–24.

303. See, e.g., Eisenberg, *supra* note 289, at 256–57 (describing how courts have expanded unconscionability doctrine to encompass post-divorce economic injustice, regardless of whether the injustice arose at the time of contract formation, and arguing that such cases are better understood as driven by the limits of cognition).

304. See, e.g., Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1238 (1998) (discussing how surrogacy agreements pose “what feminist legal scholars know as the ‘dilemma of choice,’ namely, the conflict between promoting women’s autonomy and freedom of choice on the one hand, and protecting women from the harmful consequences of choices made under conditions of inequality on the other”).

overriding their decisions and preferences on the basis that they are necessarily either irrational or coerced.<sup>305</sup> The argument on the other side is that the unconscionability doctrine protects the autonomy of women, the poor, and other disadvantaged groups by ensuring that their contractual choices are made freely<sup>306</sup> and with full information.<sup>307</sup>

Those who argue for enforcing the contracts of surrogate mothers or hard-pressed consumers do not insist that their promises were necessarily made in conditions of absolute rationality and freedom of choice. They argue, rather, that the autonomy-enhancing effects of enforcing contractual promises are such that these groups, and society generally, will be better off if we treat most minimally competent adults as if they are autonomous, drawing the line only at those who act under certain extreme limits on their autonomy, such as cognitive incapacity, fraudulent misinformation, or duress.<sup>308</sup>

Thus, in contract law as in criminal law, many scholars advocate an as-if approach to autonomy and individual responsibility. Under this approach, we treat most adult legal actors as if they are autonomous, and hold them to their promises accordingly, without inquiring into the degree to which this premise holds true.

*C. The Perspective of Family Law: Autonomy, Parenting,  
and Child Development*

Scholars within both criminal law and contract law, then, have devoted great attention to the premise of adult autonomy; have noted that this premise does not, in practice, always hold true; and have engaged in an often tortured debate about the problems posed by this

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305. See *id.* at 1248 (noting that those singled out for special treatment are “thereby . . . identified, in the logic of contract, as less competent . . . than the autonomous agent with whom the law ordinarily deals”); see also *id.* (proposing that we address this dilemma by reconceptualizing rational choice as expressive and thereby reconfiguring the basis of contractual obligation).

306. See, e.g., Radin, *supra* note 211, at 1909–11 (describing arguments that surrogacy agreements should be prohibited to prevent mothers from being coerced by poverty to sell their children).

307. See, e.g., Brinig, *supra* note 204, at 2388 (“[S]urrogacy contracts are suboptimal because the surrogate cannot ex ante have perfect, or even minimally adequate, information.”).

308. See, e.g., Shultz, *supra* note 200, at 355 (arguing that the refusal to enforce surrogacy contracts on the basis that they are not voluntary treats women “as non-autonomous persons”); cf. Radin, *supra* note 211, at 1915–16 (discussing the dilemma of the “double bind,” under which commodification exacerbates the oppression of women by devaluing their personhood, but disallowing commodification prevents women from taking steps that they believe are preferable to remaining in their impoverished circumstances).

disjunction to each field's legitimacy. At the same time, criminal law theorists have struggled to develop a coherent rationale for taking children's interests into account in cases involving their parents, with many concluding that to do so would undermine the goals and legitimacy of criminal law. And contract theorists have confronted the issue of children's interests as well, albeit only in the limited domain of familial contracts. Yet no scholar from either criminal or contract law has thought to link the premise of adult autonomy with the problem of how to treat children in cases where they are affected indirectly.

When the premise of adult autonomy is considered from the perspective of family law, the connection between these two problems—the premise of autonomy when it comes to adults and the question of how to treat children in cases involving their parents—becomes clear. As we saw in Part I, family law tells us that subtle differences in the ways children are raised can have profound effects on the extent of autonomy that children are able to exercise upon reaching adulthood. Family law looks, in particular, to how the variables of each parent's environment, and of each parent's continued contact with, or separation from, his or her child, can either facilitate or hinder the cognitive, emotional, educational, and social developments crucial to each child's future ability to make free, rational choices as an independent adult.

We have also seen, in Part II, the extent to which these determinants of children's future autonomy can be shaped by the resolution of criminal or contracts cases involving parents. The connection between the legal treatment of parents and the developmental trajectory of their children is most stark in cases involving parental incarceration, which in most instances separates parents from their children. As we saw in our discussion of family law's best-interests assessment, many courts consider separation of child from parent as inflicting particularly profound harm on a child's intellectual and emotional development, with potentially devastating effects on a child's adult self. Family law attempts, accordingly, to avoid separations of this nature whenever possible, in the name of protecting children's development and future potential.

The potential effect on children of contracts involving their parents is typically less devastating than that of parental incarceration, particularly with respect to ordinary commercial or consumer contracts that do not restructure family ties. Nonetheless, from the perspective of family law's best-interests analysis, we can see that even non-familial contract disputes by parents can adversely affect their children's development in ways that may diminish their future autonomy. Family-law jurisprudence acknowledges that children's development may well be hindered, both educationally and emotionally, by the financial distress of their families. The impairment of children's development is particularly severe when the financial distress entails

disruption of the child's environment and diminishment of the parent's own well-being and ability to function, as is often the case, for instance, when a parent is forced into bankruptcy or foreclosure.

We have largely marginalized our attention to the effect of legal decision making on children's development within the specialized field of family law. The marginalization of children's interests within family law works to blind us to the contradiction between our treatment of children across various non-family-law fields of the legal canon and our assumptions in these fields regarding adults. As long as we allow this contradiction to stand unaddressed, it will continue to undermine the legitimacy of any area of law that, like both contract law and criminal law, treats most minimally competent adults as autonomous and assigns liability on that basis.

*D. Taking Children's Interests into Account in Cases Involving Their Parents*

Both criminal law and contract law treat most adult legal actors as if they are autonomous, even in many situations where they are not.<sup>309</sup> A primary argument for this as-if approach to adult autonomy is that it would be paternalistic to treat adults as less than fully capable. Paternalism, it is argued, is inappropriate when it comes to the treatment of adults. It diminishes their autonomy both practically, by overriding their decisions, and expressively, by conveying that they are either irrational or lacking in volition.

The anti-paternalism argument, however, does not have the same power when it comes to the protection of children. Children, it is widely agreed, are neither as rational nor as free as adults, and thus require protection in many situations where adults do not. It is for this reason that we treat children differently from adults in cases involving them directly. Children are not liable for crimes in many instances where an adult would be, because they lack the requisite cognitive ability and freedom of choice to merit criminal responsibility.<sup>310</sup> Similarly, children are not bound by their promises to the same extent that adults are, because they lack the cognitive and volitional capacity to give proper contractual consent.<sup>311</sup>

The law thus recognizes that children lack the autonomy of adults and often exempts them from liability accordingly. But there is little discussion, outside of family law, of the interaction between legal decision making, child development, and the degree of autonomy that

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309. See *supra* Part II.A–B.

310. *But see* Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 429–42 (2006) (discussing recent trend toward treating children as adults when charged with particularly serious offenses, and noting the scholarly opposition to this trend).

311. See *supra* note 177 and accompanying text.

a child will exercise upon becoming an adult. And children's future autonomy is almost never discussed in connection with cases that affect them indirectly, by affecting their parents or caretakers. Yet, as we have seen, cases that affect children's parents, whether by incarcerating them or by changing their financial fortunes, will often affect children themselves.<sup>312</sup> And the effect on children of such cases is often to impede their development in ways that will limit the degree of autonomy they will exercise upon reaching adulthood.

The perspective of the autonomy premise turns on its head the prevailing arguments against taking children's interests into account in cases involving their parents in the area of criminal law, and shows the blind spot of scholars in other areas of law who fail to address the issue at all. The very same rationales that militate against treating adults as less than fully responsible for their actions—that adults are best treated as if they are autonomous—argue in favor of protecting children. Children not only lack autonomy, but are engaged in a developmental process that will determine the extent of autonomy they enjoy in the future. Children who are adversely affected by a criminal or a contract case involving their parents bear no responsibility for the situation they find themselves in. Despite this, they may well find their future autonomy diminished as a result of the legal action taken against their parents. If the law is going to treat children as autonomous upon reaching adulthood, it must also recognize its own role in shaping the conditions in which children are raised, and thus influencing—and perhaps diminishing—the likelihood that the children will become free and rational adults who deserve to be held responsible for their actions.

#### IV. MODEL FOR ASSESSING WHEN TO TAKE CHILDREN'S INTERESTS INTO ACCOUNT

##### *A. Introduction*

This Article has established that taking children's interests into account will improve the consistency and legitimacy of areas of law that are premised on a model of the autonomous adult legal actor. By attending to the ways in which legal decisions might harm a child's future autonomy, areas of law that take adult autonomy for granted will contribute to their legitimacy by making it more likely—or at least not making it less likely—that this premise will hold true.

That there is good reason to attend to children's future autonomy, however, does not mean that it necessarily makes sense for the law to do so in every case, or at the expense of countervailing considerations. To protect children's future autonomy at all costs

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312. *See supra* Part II.A.1, B.1.

would undermine the goals of most areas of law, including the goal of promoting autonomy.

Where, then, do we draw the line? There is already extensive discussion of where to draw the line in cases involving children directly, such as those where a child is charged with a crime.<sup>313</sup> At the other end of the spectrum, this Article will leave for future discussions whether and how to take children's interests into account in every legal case that might affect them in some way. Instead, this Article narrows its inquiry to a distinct subset of cases that affect children indirectly—those involving children's parents—and assesses whether and to what extent it makes sense to take children's interests into account in such cases.

This Article will conclude by presenting a general model for assessing both when and how to take children's interests into account in cases involving their parents. The model is intended to be applicable to any area of law in which children are potentially affected by such cases. It entails three steps, which together provide a mechanism for determining whether it makes sense to take children's interests into account in a given area of law, and, if so, how and to what extent those interests should be considered and balanced against competing concerns. The proposed model addresses several potential objections to taking children's interests into account, including unfairness, counterproductiveness, and inefficiency.

*B. When to Take Children's Interests into Account*

1. Step One: Evaluating Premises and Goals

In determining whether to take children's interests into account in a given area of law, we must first consider the extent to which the conditions of child development bear upon the premises and goals of that area of law. Where children may be affected by cases involving their parents in ways that have bearing upon the assumptions that a given area of law will apply to the children as adults, we have sufficient reason to proceed with our analysis and to consider taking children's interests into account.

The two areas of law we have examined, criminal law and contract law, are both premised on an assumption of adult autonomy.<sup>314</sup> As we have seen, both criminal and contract law treat minimally competent adults as autonomous and assign liability on that basis, even where a legal actor is, in reality, less than fully autonomous. We have seen, as well, that both criminal and contract cases involving parents can affect children's development in ways that will either facilitate or hinder children's future capacity for

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313. See, e.g., Ward, *supra* note 310, at 430.

314. See *supra* Parts III.A–B.

autonomy.<sup>315</sup> Thus, taking children's interests into account in such cases can be viewed as enhancing the legitimacy of both fields by making the autonomy presumption more of a reality. Similarly, consideration of children's interests would be merited in any other area of law that takes adult autonomy for granted.

While this Article has focused on the premise of adult autonomy, there may also be a strong rationale for taking children's interests into account in fields that do not share this premise. To begin with, even where a given field does not presume that adults are autonomous, the fact of adult autonomy may well contribute, on an instrumental level, to achieving the goals of that area of law. Consider, for instance, the deterrence rationale of criminal law. In order to effectively deter the population from committing crimes, criminal law requires that each legal actor have the capacity for deliberative, rational thought that will lead to weighing the benefits of committing any given offense against the costs of being caught and punished.<sup>316</sup> A child who is brought up in a way that enhances her potential for autonomous, rational choice will be more likely to be deterred from committing crime than one who was not. From this perspective, promoting children's future autonomy can be seen as enhancing the effectiveness of any area of law that hopes to achieve its goals through deterrence, or through any other mechanism of reasoned thought on the part of the adult population that is subject to its rule.

Additionally, the family-law best-interests jurisprudence this Article examined in Part I makes clear that the conditions of child development have bearing not just upon adult autonomy, but upon many other aspects of adult capacity as well. Family law tells us that how children are raised potentially affects every facet of their adult selves, from intellectual capacity, emotional regulation, and educational attainments to productivity and sense of ethics.<sup>317</sup> Thus, to determine the wisdom of taking children's interests into account in a particular legal field, we should think broadly about the ways in which children's adult capacities are potentially affected by cases involving their parents within that field, and about how these capacities may be linked to the goals and the premises of that doctrinal area of law.

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315. See *supra* Part II.

316. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950–51 (2003) (contending that criminal law's deterrent effect ceases to function properly when its fundamental assumptions—an actor's knowledge of the law and ability to perform a rational cost-benefit analysis—are absent).

317. See *supra* Part I.A.3.b.

In determining whether to take children's interests into account in cases involving their parents within a given area of law, then, our first step will be to determine whether there is a potential rationale within that field for attending to children's interests. This rationale will likely take the form of recognizing the ways in which child development can affect a type of adult capacity that has bearing upon the premises or goals of the given doctrinal field. Should we find such a rationale, however, this does not end our inquiry, but merely brings us to the second step of our analysis, which reflects the recognition that there may well be reasons to refrain from considering children's interests despite having identified a potential rationale for doing so.

## 2. Step Two: The Nature of the Parties

The second step of the model entails determining whether the case at hand involves state action against individuals, or whether it instead involves litigation between private parties. This Section will both explain and demonstrate this aspect of the proposed mechanism for assessing when to take children's interests into account in cases involving their parents.

### *a. State Action Against Individuals*

Taking children's interests into account in cases involving their parents is most feasible and most advisable where one of the parties is the state and the other is a private individual. The paradigmatic legal confrontation between an individual and the state occurs in criminal law. Criminal law involves state action at its most forceful and coercive, in that the state initiates the prosecution against the criminal defendant, and it often does so with the aim of curtailing the defendant's freedom, and sometimes his or her life. By examining what it would look like to take children's interests into account when sentencing their parents, we can think more generally about the advantages and disadvantages of taking children's interests into account in other litigation involving state actions against individuals who happen to be parents.

The state, unlike a private litigant, has an obligation to ensure that children are raised in conditions that will enhance, rather than diminish, their future autonomy. This obligation exists, at least in part, because the state has established a coercive system of law that will hold most children accountable for their actions upon entering adulthood, on the premise that those children have become autonomous legal actors who bear responsibility for what they do.<sup>318</sup>

A further basis for the state's obligation to attend to children's conditions of development is that the state delegates parental rights to private families and backs these rights with the force of law.

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318. *See supra* Part III.A.

Children themselves bear no responsibility for the conditions of their upbringing, because these conditions are necessarily involuntary—children cannot choose their parents. Parents, of course, do bear responsibility for their children, but this does not negate the simultaneous responsibility of the state. Since the state arranges and enforces our current system of parent-child relationships, and will treat children as autonomous, and hold them responsible for their actions accordingly, when they become adults, the state bears a corresponding obligation to consider children's future autonomy when taking action against their parents.<sup>319</sup>

Cases where the state is a party, moreover, are especially likely to disrupt children's lives. Disputes between private individuals that do not involve matters of family law or children typically involve monetary damages or other property rights. While the outcome of even ordinary commercial disputes involving a parent may affect a child's upbringing,<sup>320</sup> in many instances such disputes will have little or no effect on the child at all. A criminal case against a parent, on the other hand, is likely to have a significant adverse effect on his or her child, especially where the parent faces incarceration. When the state incarcerates an involved parent, it actively reshapes a child's family in ways that can have profound effects on the child's future autonomy and well-being.<sup>321</sup> Thus, it makes sense to single out cases involving potentially coercive state actions as ones in which children's interests should be considered.

Finally, the state is well-positioned to take on the costs and burdens of protecting children's interests. As the next Section addresses, imposing the costs of other people's children on private litigants may in many cases be both unfair and inefficient. But the state is large enough to bear those costs effectively, and thus to respond to children's interests without creating the sorts of inefficiency and counterproductiveness that can occur when the burden of children's interests falls instead on private individuals and corporations.

*b. Litigation Between Private Parties*

*Generally.* Taking children's interests into account in cases that affect them only indirectly is significantly more problematic in

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319. Linda McClain and Anne Dailey have each made the related argument that the state should attend to child development because doing so fosters the traits of autonomy and rational capacity that are a precondition of democratic citizenship and are necessary to engage in deliberative democracy. See MCCLAIN, *supra* note 11; Dailey, *supra* note 11.

320. See *supra* Part II.B.1.

321. See *supra* Parts II.A.1, IV.B.1.b.

litigation between private parties, such as tort actions, property disputes, and contract law. Insofar as an area of private law assumes adults to be autonomous, taking children's interests into account in cases that affect them indirectly would help, in the short term, to make this premise more of a reality by promoting each such child's future autonomy. But, as we can see by examining how this approach would play out in contract law, taking children's interests into account in such cases would often be counterproductive. In ordinary commercial or consumer contract disputes involving children's parents, for instance, case-by-case consideration of children's interests would undermine many of the goals of contract law, such as autonomy, efficiency, and predictability. It would also, in the long run, undermine our very goal in attending to children's interests in the first instance: the facilitation of conditions of child development most likely to produce autonomous adults.

Take, for example, the contract this Article discussed at the outset: a distributorship agreement giving a parent exclusive rights to market a certain brand of shoes in a geographical area.<sup>322</sup> After five years, the shoe manufacturer decides to end the exclusive agreement, which in turn will force the parent out of business. The contract is silent about termination, and a court must determine whether the manufacturer has a right to terminate the agreement. Should the court take into account the effect of its decision on the parent's two young children?

Regardless of the harm the children might suffer, taking their interests into account in an ordinary commercial dispute of this nature would be both inefficient and unfair. It would distort the ordinary mechanisms of the market to burden a business owner with the costs of children simply because he happens to conduct business with a parent. To interpret a distributorship agreement differently when one of the parties is a parent would give some manufacturers a competitive advantage over others simply because they did not have the misfortune to sell to a parent who becomes financially vulnerable. The result, in an extreme case, could be to put out of business the manufacturer who produces better products at more competitive prices, for reasons entirely unrelated to the shoe-manufacturing industry. This is not only an inefficient method of weeding out businesses but also unfair to the manufacturer and its employees.

Allowing contract enforcement to hinge on parental status would also, in the long run, diminish the autonomy of parents themselves, thus impeding their ability to provide their children with optimal conditions of development. Were parents to potentially escape contractual liability whenever their children's interests were at stake, parents would become less appealing as contractual partners.

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322. See discussion *supra* Part II.B.1.

Businesses would be less likely to enter into agreements with parties who have children, both in a commercial setting and in a consumer one. The result would be to disempower parents by making it more difficult for them to form binding agreements and thus to enter into employment, obtain credit, or purchase goods.<sup>323</sup>

The difficulty here is comparable to the one addressed by this Article's discussion of unconscionability doctrine.<sup>324</sup> Absolving a certain group of responsibility for their contractual obligations—whether it is parents or poor consumers—will make it more difficult for members of that group to take advantage of the benefits of contract law, such as enhancing autonomy and maximizing wealth. Just as *Williams v. Walker-Thomas Furniture Co.* was criticized for potentially making it more difficult for inner-city residents to purchase goods on credit, differential treatment of contracts entered into by parents could have the same effect.<sup>325</sup> It might be possible to address this problem through regulation that prohibits discrimination on the basis of parental status. But such regulation would be difficult to enforce, insofar as discrimination in choosing contractual partners is often difficult to prove. Thus, extending special protection to parents on a case-by-case basis could backfire, in ways that could ultimately diminish, rather than enhance, children's future autonomy.

For these reasons, it is generally not advisable to take children's interests into account in private litigation that has no direct bearing on the children but affects them indirectly through their parents. Despite the good reasons for helping individual children, attending to their interests in such cases would impose the costs of doing so on private parties who have no reason to bear those costs, instead of distributing them across society more generally. This uneven and unpredictable distribution of costs on an unlucky few could, in turn, distort the goals of the doctrinal area of law at hand. In the contract context, for instance, attending to children's interests in such cases would undermine the goals of contract law by creating inefficient and autonomy-reducing outcomes.

*Systemic Effect on Children.* The analysis of whether to take children's interests into account changes, however, in areas of private

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323. Moreover, if we were to take into account children's interests at the time of contract enforcement, even those who seem like they might become parents down the road could seem like risky contractual partners, creating an even larger category of those who would be potentially disempowered.

324. See discussion *supra* Part III.B.

325. See Eben Colby, Note, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 658 (2002) (contending that the furniture company responded to the decision by making it more difficult for poor consumers to obtain credit).

law where children's interests tend to be systemically—even if indirectly, and not inevitably—at stake. Consider, for instance, cases related to residential housing, such as those involving real estate contracts, leases, and mortgage agreements. More than a third of all households include at least one child under the age of eighteen.<sup>326</sup> A legal dispute involving a home, then, has a fair chance of indirectly affecting a child to some degree. Other situations where a child is likely to be significantly affected by a private dispute involving a parent include personal bankruptcy proceedings, which can determine whether a parent will be able to support his or her family, and, for the same reason, certain types of employment disputes.

Where we can isolate a subset of private law that is systemically likely to have a significant effect on children, it makes sense to think more carefully about whether to take children's interests into account in cases involving their parents. Even here, however, taking children's interests into account on a case-by-case basis—for instance, treating a foreclosure case differently when it involves a home where a child resides—would replicate the problems described in the preceding Section. To allow the outcome of any given case to hinge on the presence of children would inefficiently and unfairly burden whichever private actors happen to do business with parents. This burden, in turn, could make it more difficult for parents to enter into agreements in the first instance.

But a case-by-case approach to children's interests is not the only possible approach where children's interests are systemically at stake. Here, rather than single out parents for special treatment, we can instead create across-the-board rules that will tend to protect children but will apply regardless of whether children are present in a particular case. For example, since children tend to live in family homes, we can create special rules that protect both the tenants and the purchasers of residential homes. This approach would still raise the problem of fairness, in that it would distribute the cost of attending to children's interests to a particular group or industry, such as landlords or banks. But it would eliminate some of the inefficiency concerns that we saw in a case-by-case approach, in that all members of the industry—for instance, all landlords—would be subject to the same costs, and therefore none would suffer a competitive disadvantage. And an across-the-board approach would protect children's interests without creating a situation in which parents are discriminated against by those who fear that their agreements will not be enforced.

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326. See ROSE M. KREIDER & DIANA B. ELLIOTT, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007, at 3 tbl.1 (2009), available at <https://www.census.gov/prod/2009pubs/p20-561.pdf> (showing that 38,052,163 out of 112,377,977 households had at least one child under the age of eighteen).

3. Step Three: Balancing Children's Interests Against Competing Concerns

*a. State Action Against Individuals—Case-by-Case Approach*

If we are to take children's interests into account in cases involving state action against their parents, how should this be accomplished? The proposal this Article makes is a modest one. The Article does not suggest that children's interests should trump all other considerations, or even that they should play a role in every case where they are at stake. To treat children's interests as paramount outside the context of family law would render other areas of law unworkable. The goals of the relevant area of law must be given weight as well.

What this Article suggests, rather, is that in a case where the state takes coercive action against a child's parent, courts should consider how this will affect the child's course of development and should be given the discretion to take the child's interests into account accordingly. Where a decision will inflict significant harm on the child's development, such that it will likely diminish the child's eventual autonomy, the court should articulate this risk and balance it against all other relevant considerations before making a final determination. This balancing does not mean that the state should refrain from acting whenever a child will be harmed in the process. It means, rather, that where the state takes actions such as separating child from parent for a significant period of time, it should understand itself to be actively reshaping a child's life and should do so only after determining that this is for the best, all things considered.

One practical difficulty with this proposal is that a court without experience in family law may not be well equipped to articulate the effect of a decision on a child's development. It is outside the scope of this Article to provide the definitive solution to this problem, but there are a number of possibilities. One is that the court could appoint a guardian ad litem, akin to those appointed in the family-law context, in certain types of cases where children's interests are significantly at stake, such as those involving the possibility of parental incarceration. The guardian could submit a report for the court's consideration about the likely effect of potential outcomes on those children, and in developing this report the guardian could perhaps enlist the participation of expert witnesses such as those that currently testify in child custody cases.

Another possibility, in the criminal law context, is that the corrections officials who write presentence reports can include in these an assessment of how the defendant's children are likely to be affected by various sentencing alternatives.<sup>327</sup> In 2009, San Francisco's

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327. See THE OSBORNE ASS'N, A CALL TO ACTION: SAFEGUARDING NEW YORK'S CHILDREN OF INCARCERATED PARENTS 25 (2011), available at

Department of Probation began to take just such an approach by incorporating “family impact statements” into the presentence investigation reports that the department submits to sentencing courts. These statements describe each defendant’s caretaking responsibilities and assess the impact of various sentencing possibilities on the defendant’s minor children.<sup>328</sup> The Osborne Association, a criminal justice advocacy group, has recommended the widespread adoption of family impact statements at sentencing and suggested that such reports be supplemented by defense attorneys or other advocates to ensure that sentencing judges, along with corrections officials, are aware of how defendants’ minor children are likely to be affected by their parents’ incarceration.<sup>329</sup>

Even more problematic than how to make courts aware of children’s interests in cases involving their parents is how courts should balance children’s interests against other considerations, such as deterring crime. It is true, as opponents of considering children’s interests have observed, that any differential treatment of parents, however structured, may increase the likelihood that parents will commit crimes.<sup>330</sup> But in criminal law as in other areas of law, considerations of legitimacy often outweigh, and can also be deeply related to, pragmatic concerns such as the reduction of crime. It is for this reason that we do not punish the innocent, even if this might help to deter crime in the short run.<sup>331</sup> Moreover, even insofar as our goal in imposing criminal punishment is simply the instrumental one of reducing crime, taking children’s interests into account may well promote that goal by reducing the likelihood that they commit crimes themselves.<sup>332</sup> This Article argues that the benefits of protecting children’s future autonomy—and, more generally, of considering the

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<http://www.osborneny.org/NYCIP/ACalltoActionNYCIP.Osborne2011.pdf> (recommending that presentence investigation reports give greater attention to how children are likely to be affected by a parent’s incarceration and that courts take this information into account at sentencing).

328. See THE OSBORNE ASS’N, FAMILY IMPACT STATEMENTS: CONSIDERING THE NEEDS OF CHILDREN 2 (2012), *available at* [http://www.osborneny.org/images/uploads/printMedia/FamilyImpactStatementFactSheet\\_Osborne.pdf](http://www.osborneny.org/images/uploads/printMedia/FamilyImpactStatementFactSheet_Osborne.pdf).

329. See *id.* Other jurisdictions that have begun using family impact statements in a limited number of cases involving potential parental incarceration include Arkansas and Tennessee. See *id.*; see also STEVE CHRISTIAN, NAT’L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 8 (2009).

330. See discussion *supra* note 169 and accompanying text.

331. On the importance of legitimacy to the deterrent effect of the criminal law, see discussion *supra* Part III.A.

332. See discussion *supra* notes 154–59 and accompanying text.

connection between children's interests and the goals and premises of the relevant area of law—are sufficient to merit at least considering how children are affected by coercive state action against their parents, and balancing this against competing concerns, even though doing so will necessarily have some counterproductive incentive effects.

The hope of this Article is that articulating the effect of legal decision making on children's development will encourage more innovative thinking about how to reconcile children's interests with competing and equally significant policy goals. In the parental incarceration context, for instance, there may be ways of achieving the usual goals of criminal law—namely, deterrence, retribution, rehabilitation, and incapacitation—while also avoiding the infliction of harm on a developing child. One possibility, in cases involving nonviolent first-time offenders, would be to defer the parent's incarceration to an extent that would minimize harm to the child, for instance by waiting until the child has reached a developmental stage where the separation will be less damaging.<sup>333</sup> Another would be to consider alternatives to incarceration, such as fines and community service.<sup>334</sup> While these and other child-protective approaches to

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333. Deferring a sentence of incarceration to protect a child's interests, while unusual, is not unheard of. Thus, in what Myrna Raeder has described as one of "those rare instances when sentencing takes the impact [on] children into account," the court sentencing two of the married Enron defendants, Andrew and Lea Fastow, agreed to stagger their sentences in order to ensure that their children would not be left without a parent to care for them. See Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 25 & 32 n.33 (2012). It is a hope of this Article that making this sort of solicitude for children's interests routine will help to ameliorate the racial and socioeconomic injustice of the current approach, where consideration of children's interests seems especially likely to occur in cases involving privileged white-collar defendants such as the Fastows.

334. By bringing greater attention to the harms inflicted on children by parental incarceration, judicial consideration of children's interests in such cases might also encourage non-judicial actors, such as legislatures and prison administrators, to develop better institutional mechanisms for protecting children whose parents are incarcerated. These could include changing prison policies to better facilitate parent-child contact, see Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation Policies: A Fifty State Survey* (Nov. 5, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2171412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171412) (surveying prison visitation policies in the fifty states and describing how a number of these impede parent-child contact); taking family ties into consideration when deciding where to locate prisons, see MARKEL ET AL., *supra* note 3, at 55 ("If prisons are built in remote rural areas, or if prisoners are sent to prisons far from their families, then it will be harder for the families of most prisoners to visit."); and expanding programs such as prison nurseries that permit incarcerated mothers who meet certain criteria to reside with their children, see Joseph R. Carlson,

parental incarceration have been criticized as undermining the fairness and legitimacy of criminal law,<sup>335</sup> from the perspective of protecting children's future autonomy, they can be seen, instead, as enhancing the legitimacy of criminal law, or of any area of law that treats adults as if they are autonomous.

*b. Litigation Between Private Parties—Systemic Approach*

In most instances of litigation between private parties, children's interests should not be considered in cases that affect them only indirectly, for the reasons set forth in the preceding Section.<sup>336</sup> The one subset of private litigation where the indirect effect on children should play a role is where cases tend to affect children systemically and in a significant way, as in foreclosure proceedings and other litigation involving eviction from family homes. Here, for the reasons explained above,<sup>337</sup> children's interests should be taken into account not on a case-by-case basis, but through presumptions and rules that protect children but apply across the board.

This proposal, in fact, is consistent with much of what we already do, although it is not always framed as such. Take, for instance, the warranty of habitability, which is implied by law into every lease of residential property.<sup>338</sup> The warranty of habitability requires that every residence meet a certain minimum standard of safety and livability.<sup>339</sup> This warranty extends protection from dangerous conditions to a large class of children, namely, all children who live in rented homes. While early case law on the warranty of habitability sometimes mentions the protection of children as a rationale for imposing the warranty,<sup>340</sup> the rule does not single out children for

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Jr., *Prison Nurseries: A Pathway to Crime-Free Futures*, 34 CORRECTIONS COMPENDIUM, Spring 2009, at 17, 18–19 (2009) (noting that, as of 2009, nine states offered either prison nursery programs or residential treatment centers for incarcerated mothers, and two more were considering similar programs).

335. See discussion *supra* Part II.A.3.

336. See discussion *supra* Part IV.B.2.b.

337. See discussion *supra* Part IV.B.2.b.

338. 49 AM. JUR. 2D *Landlord and Tenant* § 447 (2006).

339. *Id.*

340. See, e.g., *P.H. Inv. v. Oliver*, 818 P.2d 1018, 1022 (Utah 1991) (noting that tenant “with little or no resources or income, with seven children, and pregnant” is “typical of the individuals we sought to protect by adopting the warranty of habitability”); *Hilder v. St. Peter*, 478 A.2d 202, 206 (Vt. 1984) (mentioning danger to tenant's child and grandchild, including possibility “that her two year old child might cut herself on the shards of glass” from a broken window, in holding that a warranty of habitability is implied in every lease concerning a residential dwelling unit).

protection, and extends to childless homes as well. We thus have an across-the-board rule that tends toward the protection of children, without requiring that tenants with children be accorded special treatment.

Children's interests are arguably also behind our current across-the-board rules governing foreclosure law—witness the repeated reference to children and “families” in recent debates on the subject.<sup>341</sup> The protection of children from extreme deprivation may well be behind bankruptcy law as well. While there is little direct discussion of how children's interests are at stake in the bankruptcy context, it is often claimed that one of the traditional goals of bankruptcy is to enable the breadwinner to support his or her dependents, many of whom are typically children.<sup>342</sup>

Because the discussion of children's interests in these contexts is typically oblique, there is little explicit assessment of whether and why children's interests should factor into legal decisionmaking. We should make explicit the extent to which the protection of children's interests might drive some of the generally applicable rules that we already do apply in various areas of law, as well consider creating new rules to achieve this same goal.

Even when we decide to protect children through a rule that applies across the board, instead of on a case-by-case basis, the question of whether to impose a child-protective rule in the first instance will necessarily be a matter of extensive debate. In the housing context, for instance, many vigorously oppose across-the-board rules, such as rent control and the warranty of habitability, that shift burdens from tenants to landlords. These rules are criticized as unfair redistributions of wealth, and some claim that they are inefficient and harm both tenants and landlords by artificially distorting the housing market.<sup>343</sup> It is not within the scope of this Article to resolve that debate here. The goal, rather, is to add to the debate a consideration of children's interests, and of the ways in which one or another rule will affect the likelihood that children will develop into autonomous adults capable of making free, rational, and efficiency-enhancing decisions of their own.

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341. See discussion *supra* Part II.B.3.

342. See discussion *supra* Part II.B.3.

343. See, e.g., POSNER, *supra* note 206, at 445–48 (arguing that housing code enforcement disadvantages landlords and tenants alike by driving up landlords' maintenance costs and reducing the supply of low-income housing).

## CONCLUSION

Family-law scholars are currently engaged in challenging family law's exceptional status. One aspect of this challenge has been a call to expand the boundaries of family law by importing the tools and insights of other fields. This Article argues that the process of doctrinal influence should go both ways: Scholars across the legal canon should be encouraged to consider how family law's insights relate to discussions and debates within their respective fields.

The Article has begun this project by demonstrating the relevance of children's interests in cases involving their parents—an issue today either largely overlooked or too easily dismissed—to seemingly unrelated debates within criminal law and contract law. Consideration of children's interests, and of why and how childhood matters, is largely cabined within the exceptional realm of family law. Yet, as this Article has shown, children's development can be affected, often profoundly, by cases involving their parents across a number of doctrinal fields. These effects, in turn, have bearing on the likelihood that children will become what each of these fields will later presume them to be: an adult legal subject who is autonomous, in the sense of both rational and free, and as such can be held responsible for his or her actions and decisions.

The perspective of family law thus brings out a previously unrecognized connection between how a doctrinal area of law treats children and the assumptions that will be applied to each child upon reaching adulthood. The Article argues that if an area of law, such as criminal law or contracts, is to treat adults as if they are autonomous and to hold them responsible accordingly, then it has a corresponding obligation to consider taking into account the ways in which legal decision making affects children's future autonomy, or any other relevant aspects of adult capacity.



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