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Equality Between Adults and Children: Its Meaning, Implications, and Opposition

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EQUALITY BETWEEN ADULTS AND CHILDREN: ITS MEANING, IMPLICATIONS, AND OPPOSITION

James G. Dwyer*

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Family law scholars have devoted much attention to equality among groups of adults and some attention to equality between groups of children. There has been little exploration, however, of the notion of equality between adults and children. In this Article, I first explain what it means at a basic, theoretical level to speak of such equality. I then identify some practical implications. Finally, I consider why there is great resistance to many practical implications of children’s equality, even among those who would consider themselves advocates for child welfare.

I. WHAT IT MEANS TO TREAT CHILDREN AS EQUAL PERSONS

The law treats children and adults differently in many ways. A theory of equality between adults and children might help us determine when and to what extent that is morally appropriate. Everyone would agree that sometimes it is and sometimes it is not.

Most people today, and certainly family law professors, view children and adults in the abstract as equal in moral status, or as “equal persons.”¹ This is an implication of the widely held view that all humans are persons and all persons are of equal moral status.² But what does it mean to say

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1. JAMES G. DWYER, MORAL STATUS AND HUMAN LIFE: THE CASE FOR CHILDREN’S SUPERIORITY 2 (2011).

2. Historically, and even still today, some have maintained that children are of lesser status, and even not “persons.” See *id.* Neither view—that children are equal persons or that children occupy an inferior moral status—has ever had much theoretical support; they have been more assumed or asserted than demonstrated. See *id.* at 1-3. And so several years ago, I set out to develop a comprehensive theory of moral status and then apply it to children.

children and adults are morally equal or equal persons? What follows from that premise?

At the most basic level, it means children's and adults' interests matter equally in moral decision making. No moral actor should treat children's interests as inherently less important or weighty than identical or similar interests of adults. That includes state actors, who presumably should act morally. It would be difficult to determine in every context precisely how to treat children's interests as of equal weight; children have some interests different in kind from any that adults have, and vice versa, making some comparisons difficult if not impossible. It is true also across groups of adults that some have interests quite unlike and incommensurate with interests of others. For example, it is not clear how one could compare a woman's interest in not being forced to continue an unwanted pregnancy with any interest that men have. Also, adults with particular types of disabilities might have some interests or needs that other persons do not. So the possibility of two groups of people having non-coextensive sets of interests is not limited to adults versus children, and it does not make nonsensical or otherwise inapt the idea of according them equal respect or treating them equally at a fundamental level.

One thing we can productively do, in the face of some differences in interests, is to distinguish fundamental and ulterior interests for both adults and children,³ and to stipulate that fundamental interests of one person presumptively trump ulterior interests of another when there is a conflict. For example, some forms of public expression in which some adults engage might be modestly disturbing to children who hear it—for example, apocalyptic warnings from a soapbox preacher. But the adults' fundamental interest in expressive liberty might outweigh the non-fundamental interest children have in being spared from modest disturbance, and so the law might appropriately protect the adults' speech rights in such circumstances.

We can also identify some interests that both adults and children possess and say that if the interests are equally strong for both then they should

Id. I concluded that it is most plausible to view children as occupying a higher moral status than adults, because an adequate theory of moral status would recognize many attributes as giving rise to it and because children outdo adults on many of those attributes, such as sentience and "aliveness." *Id.* at 3. But I will not argue from that unconventional position here. At a minimum, the book demonstrates that the "children are less than equal persons" view, which rests on the undefended and self-serving assumption that autonomy is all that matters to moral status, is untenable. See generally *id.* So I begin the analysis here with the more modest and common assumption that children and adults are of equal moral status.

3. This distinction in levels of interest traces to Joel Feinberg. Feinberg gives as examples of a fundamental or "welfare interest[]": physical health, the integrity and normal functioning of one's body, basic intellectual abilities, emotional stability, "the capacity to engage normally in social intercourse," some minimum of financial resources, and "a certain amount of freedom from interference and coercion." See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 37 (1984).

receive equally strong legal protection. Sometimes protection of adults' interests, especially their fundamental interests, takes the form of rights—in law, as a matter of statute, constitutional provision, or common law. Thus, if the law, in one form or another, confers on adults rights that protect particular interests of theirs, and if children have those interests as well and they are of at least equal importance for children, then the law should also confer rights on children with respect to those interests, and the rights should be identical or equivalent, if not stronger (even if subject to override on different grounds).

By “equivalent,” in characterizing rights as protections of like interests of children, I mean providing as much presumptive protection for those interests as adults' rights provide, even if the rights take somewhat different form in the case of children. As a general matter, many rights of young children must differ from rights of adults in the manner by which they are effectuated; whereas adults generally assert their own rights and give content to the rights themselves by having and expressing preferences, young children's rights generally must be enforced by a proxy, based on the proxy's best judgment of what is in the child's best interests.⁴ For example, adults have a legal right not to be punched, which they themselves choose to assert or waive vis-à-vis particular other persons in particular circumstances, and they themselves enforce that right when violated by lodging a legal complaint (though they might have an agent, such as an attorney, assist them in doing so). Similarly, infants have a legal right not to be punched, only that right *must* be exercised and enforced by an agent, such as a parent or child protection agency, perhaps along with an attorney; proceeding pro se, as we say, is not possible for an infant. The right in its core content, imposing a duty on others not to punch, is the same for both. What differs between adults and children is the mechanism by which the right is effectuated, and for that reason the right of a child might be deemed equivalent rather than identical to the right of an adult.⁵

That is really all the theory one needs to support some fairly robust critiques of existing laws governing children's lives. To recap: Children's equal moral status means the law must confer on them protections for their interests comparable to protections it confers on adults for like or equally

4. Cf. FED. R. CIV. P. 17(c) (2004) (“Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.”).

5. For a defense of an interest-protecting conception of rights, with particular focus on children as rights bearers, see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 291 app. (2006).

weighty interests. When protections take the form of rights, their content should be similar for both children and adults when identical or similar interests are at stake for both; neither law nor moral deliberation should accord children weaker rights simply because they are children or on the basis of their being less autonomous.⁶ The main difference between children's rights and adults' rights, when they are in similar circumstances, should be simply that young children's rights must be effectuated by a proxy.⁷

II. IMPLICATIONS OF TREATING CHILDREN AS EQUALS

Standing upon this easily constructed but secure theoretical foundation, one can look at a given legally sanctioned social or governmental practice impacting children and ask: What type of interests do children have at stake? And: When adults have the same interest or a similar or equally weighty interest at stake, what protection does the law give them? And then: Is there any justification for any disparity in treatment that is rational and respects the equal personhood of children?

Some scholars have written analyses of this sort. For example, in writing about corporal punishment, Susan Bitensky asks whether children have interests in bodily integrity, freedom from humiliation, and avoidance of pain comparable to those interests in adults, and after finding that they do argues that children should therefore have a right comparable to adults' right not to be hit, for disciplinary or other purposes.⁸ Judges have sometimes adopted this line of analysis as well, mostly regarding civil liberties, such as First Amendment speech rights,⁹ procedural due process protections for minors charged with crimes,¹⁰ and the liberty to move about unsuper-

6. Their being less autonomous might mean that their interests of a particular sort—for example, in freedom of religion—are weaker than adults' interests of that sort, or that they do not have certain interests at all. But when they have an equally strong interest of a particular sort—for example, in avoiding pain—their moral equality means they should not be denied equal protection for that interest simply because they are relatively less autonomous.

7. When the transition should occur in a person's life from proxy-controlled interest-protecting rights to choice-based rights that the right-holder controls is a complex question that I bracket for present purposes.

8. See generally SUSAN H. BITENSKY, *CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION* (2006).

9. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (upholding First Amendment speech rights of public high school students and stating that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

10. See, e.g., *In re Gault*, 387 U.S. 1, 13, 29 (1967) (holding that children have due process rights entitling them to procedural safeguards prior to confinement in an institution for juvenile delinquents and stating that “[i]f he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial

vised in public.¹¹ They adopt a starting point of rights equal to those of adults and then ask if there is special justification for infringing those rights in the case of minors in some settings, such as a school.¹²

Mostly unexplored, though, are the implications of the equal personhood premise for parental control over children's physical and intellectual development, such as their medical care and schooling and for formation and dissolution of parent-child relationships. One reason for this neglect is likely that these are contexts in which children's situations appear entirely unlike that of adults, yet I will explain below why it nevertheless is appropriate in these contexts also to rest normative analysis on the equal personhood premise.

A. Rights in Ongoing Family Relationships

With respect to the control that legal parents, once the state confers that status, exercise over children's upbringing, the equal personhood premise makes problematic not only some specific conduct toward children, such as corporal punishment, but also the very concept of parental entitlement.¹³ As articulated in the American legal system, that concept has entailed a legal liability (i.e., vulnerability to loss of rights) for children.¹⁴ Modern western society rejects in every other context the idea that one person has a *right* to control the life of another person, even if the other person is presumed incapable of controlling his or her own life.¹⁵

With respect to incompetent adults, for example, the persons who exercise control over certain aspects of their lives—that is, their guardians—are viewed as fiduciaries rather than right-holders.¹⁶ If the guardians object to some legal requirement for their decision making or conduct, they must express that objection in terms of the welfare and rights of their ward and not in terms of their own entitlement.¹⁷ To ascribe control *rights*, rather than merely a privilege to exercise limited authority, to guardians would mean subordinating the interests of wards to the interests of guardians, even

rights under the Constitution of the United States as well as under Arizona's laws and constitution").

11. See, e.g., *Anonymous v. City of Rochester*, 915 N.E.2d 593, 596-97 (N.Y. 2009) (striking down a city's curfew as unconstitutional and stating that "[f]reedom of movement is the very essence of our free society, setting us apart[;] . . . [f]or an adult, there is no doubt that this right is fundamental and an ordinance interfering with the exercise of such a right would be subject to strict scrutiny" (internal quotation marks omitted)).

12. See *supra* notes 9-11.

13. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1378-79 (1994).

14. See *id.*

15. *Id.* at 1405-23.

16. See DWYER, *supra* note 5, at 300.

17. See *id.* at 80-93; Dwyer, *supra* note 13, at 1419-20.

though the interests at stake for wards in connection with their care and habilitation are presumptively weightier than those at stake for guardians. That would be inconsistent with treatment of incompetent adults as equal persons and with the way in which the legal system ordinarily assigns rights. Thus, in *Cruzan v. Director, Missouri Department of Health*, the Supreme Court rejected a claim by parents of an adult who was in a persistent vegetative state that they had a First Amendment right to make medical decisions concerning their daughter based on their religious beliefs.¹⁸ The parents could claim no entitlement in connection with decision making about their adult daughter; only the daughter had any rights in the matter, rights necessarily exercised by proxy but still her rights rather than anyone else's.¹⁹

Why *not* say that a guardian for an elderly person with dementia has a right to refuse medical care for the ward based on *the guardian's* religious beliefs? One reason is that the strong normative claim a moral or constitutional right entails is deemed fitting only for a person's self-determination and fundamental interests, which does not include control over the life of other persons. Another reason is that ascribing to one person a right to control another would contravene a dignitary interest of the latter. It is generally deemed incompatible with proper respect for persons to make them objects of others' rights. An additional reason is that it would increase the likelihood of decisions contrary to the welfare of the incompetent adult, whose interests in connection with her care are presumed to be greater than anyone else's interests. When people view their authority as an entitlement, they naturally feel less constrained to exercise that authority on any basis other than their own preferences and interests.

It is also true of child rearing that it is not, for parents, a matter of self-determination.²⁰ Nor is it, from an objective standpoint, a fundamental interest of *parents* to exercise control over a child's life. Children also have a dignitary interest in not being treated as an object of someone else's rights.²¹ And children, too, are vulnerable to having their welfare sacrificed in connection with central aspects of their lives, such as their medical care or education, if the state ascribes to some other persons an *entitlement* to govern children's lives, rather than just a privilege to exercise limited authority.²² This is so even if the state endeavors to scale back that entitlement to some degree by imposing limits, especially if those limits are vaguely worded (e.g., "neglect," "grievous harm," or "unreasonable").²³

18. 497 U.S. 261, 266-67, 285-87 (1990).

19. *See id.*

20. Dwyer, *supra* note 13, at 1406-07.

21. *Id.* at 1434.

22. *Id.*

23. *See, e.g.*, Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children: Converging Evidence from Social Science Research and*

Therefore, parents, like guardians for incompetent adults, should be viewed as fiduciaries, exercising limited authority as a matter of privilege rather than entitlement, and any resistance they mount to state restrictions on their caretaking, they should have to express in terms of detriment to the children rather than in terms of their own entitlement. The Amish parents in *Wisconsin v. Yoder*²⁴ should have had to argue, in terms secular courts could comprehend (i.e., in terms of this-worldly and empirically verifiable well-being), that attending school would be bad for their children, rather than that they wanted to act in accordance with their religious beliefs or to make their children unquestioning adherents to the Amish faith and way of life. And the Court's analysis of the conflict should have entailed a balancing of competing interests of the children—for example, continuity of ideological environment and undisturbed family life versus development of moral autonomy and having broader career options—rather than a balancing of children's welfare against a supposed entitlement of Amish adults.

This reasoning extends also to communities that might have collective preferences regarding child rearing. It is also inconsistent with children's equal personhood to attribute to groups, including the state or minority cultural communities, a collective right to dictate children's lives.²⁵ We would never ascribe to the Amish or to Native American tribes a right to possess and control the lives of some adults, even though some such groups might like to have that right. Likewise, we should not attribute to them a right to possess and control the lives of children.²⁶

Some practical implications of these conclusions about rights to control children's lives are not so dramatic. For example, one implication is that if any state decided to begin regulating private schools in a meaningful way, to ensure that children in them are receiving an adequate education,²⁷ parents could not assert rights of their own in opposition, but rather would have

International Human Rights Law and Implications for U.S. Public Policy, 13 PSYCHOL. PUB. POL'Y & L. 231, 247-48 (discussing courts' varied interpretations of an "unreasonable" standard in physical abuse cases).

24. 406 U.S. 205, 234 (1972) (holding that Amish parents were constitutionally entitled, under the First and Fourteenth Amendments, to an exemption from compulsory education laws).

25. See JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 102-20 (1998).

26. Thus, the Indian Child Welfare Act (ICWA), insofar as it treats certain children as "tribal resources," constitutes a moral affront to those children. 25 U.S.C. § 1901 (2006) ("Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."); see James G. Dwyer, *Adoptive Couple v. Baby Girl, Erasing the Last Vestiges of Human Property*, 93 B.U. L. REV. ANNEX 51 (2013), available at <http://www.bu.edu/bulawreview/files/2013/11/DWYER.pdf> (critiquing the ICWA and discussing the Supreme Court decision limiting its application).

27. For documentation that states currently do not do this, see James G. Dwyer, *No Accounting for School Vouchers*, 48 WAKE FOREST L. REV. 361, 363-64 (2013).

to argue that the regulations are somehow contrary to their children's secular interests. They should argue in legislative fora solely on the basis of children's interests, and if it becomes necessary to challenge enacted legislation in court, parents could argue that their children have a Fourteenth Amendment substantive due process right against unwarranted interference with their guardians' educational choices and that the new school regulations violate that right because they are unjustified on child welfare grounds. That implication is not of great practical significance, however, given the existing constitutional boundary between state and parental authority. Even when it has ascribed to parents constitutional rights to control children's education, the Supreme Court has emphasized that states are nevertheless free to regulate private schools as they see fit, to protect and promote what the state views as children's educational interests.²⁸ The reason private schools today are unregulated is that state legislators simply do not care enough about what happens to children in private schools to demand academic accountability from those schools.

The same is true with respect to children's medical care. States impose on parents a legal duty to secure preventive care of certain kinds and to obtain treatment when children are sick or injured.²⁹ And although nearly all states have religious exemptions in some of their statutes relating to children's medical care,³⁰ Supreme Court doctrine and most decisions of lower courts embrace the position that states are not constitutionally required to have such exemptions and that parents are not constitutionally entitled to an exemption on grounds of religious opposition from medical neglect laws.³¹

28. See, e.g., *Yoder*, 406 U.S. at 213-15; see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

29. See James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C.L. REV. 1321, 1353-54, 1356-57 (1996).

30. See *id.* at 1354, 1359-60.

31. See, e.g., *Jehovah's Witnesses v. King Cnty. Hosp. Unit No. 1*, 390 U.S. 598, 598 (1968), *aff'g* 278 F. Supp. 488 (W.D. Wash. 1967) (affirming the lower court's decision ordering blood transfusions for a child needing surgery over the free exercise objection of Jehovah's Witness parents); *Spiering v. Heineman*, 448 F. Supp. 2d 1129, 1139-40 (D. Neb. 2006) (rejecting the parents' free exercise claim for an exemption from a newborn metabolic screening law); *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) (rejecting a parental claim to entitlement to a religious exemption to a child immunization law); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (same); *Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644, 647-48 (Ark. 1965) (same); *Cude v. State*, 377 S.W.2d 816, 819 (Ark. 1964) (same); *Anderson v. State*, 65 S.E.2d 848, 851-52 (Ga. Ct. App. 1951) (same); *Mosier v. Barren Cnty. Bd. of Health*, 215 S.W.2d 967, 969 (Ky. 1948) (same); *Davis v. State*, 451 A.2d 107, 111-13 (Md. 1982) (same); *Brown v. Stone*, 378 So. 2d 218, 222-23 (Miss. 1979) (same); *Douglas Cnty. v. Anaya*, 694 N.W.2d 601, 607-08 (Neb. 2005) (rejecting the parents' free exercise claim for an exemption from a newborn metabolic screening law); *Sadlock v. Bd. of Educ. of Carlstadt*, 58 A.2d 218, 222 (N.J. 1948) (rejecting a parental claim to entitlement to a religious exemption to a child immunization law); *Com-*

Thus, no dramatic change in judicial doctrine relating to parental control over children's medical care would necessarily follow from jettisoning the notion of parents' rights. If legislators support statutory religious exemptions because of a mistaken belief about parents' constitutional rights, then eliminating the concept of parental entitlement from their thinking could have a dramatic impact, if it resulted in their acting to eliminate these gratuitous and harmful parent-gratifying exemptions.³²

In some other child-rearing contexts, though, instantiating children's equal personhood might have more immediate effects, because it would entail not only eliminating parental rights, but also ascribing to children rights against some currently common practices. Some parental practices that are now widespread but difficult to justify on child welfare grounds infringe on negative rights that children ought to possess. Negative rights generally carry more weight in our legal culture than positive rights such as a right to education or medical care. I mentioned above corporal punishment, which infringes the negative right against being hit. Another example is the still-widespread practice of routine male circumcision.³³ Such practices that involve affirmative conduct toward children are problematic not only insofar as their justification rests on an illicit notion of parental entitlement, but also insofar as they infringe a basic negative right to bodily integrity that the law should ascribe to children as a matter of moral equality. That right to bodily integrity should presumptively be equally strong for children and adults, and so the incursions on children's bodies that spanking and circumcising involve could be justified, if at all, only if those who would do it satisfy a very demanding burden of proof—for example, that the incursion is demonstrably necessary to prevent immediate and serious harm to the child.

Other implications of ascribing to children in the course of family life rights comparable to those that adults enjoy would require changing the legal rules in some other areas of family law, at least in some jurisdictions. For example, just as adults have a right not to relocate if they do not wish to do so when a fellow family member does, the law presumably should treat children as entitled not to relocate, even if their custodial parents want to relocate them, unless this would on the whole be in their best interests, rela-

monwealth v. Nixon, 761 A.2d 1151, 1153-54, 1156 (Pa. 2000) (rejecting free exercise and "mature minor" defenses to the parents' manslaughter conviction based on medical neglect). At most, some courts in older cases established a high threshold of harm avoidance as a necessary basis for a court's ordering of treatment. See Dwyer, *supra* note 13, at 1399-1401.

32. See generally Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73 (1998).

33. For a child welfare cost-benefit analysis of these practices, see Gershoff & Bitensky, *supra* note 23. See also Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87 (1998).

tive to the available alternatives.³⁴ When the only alternative to relocating with parents is to be placed in the care of non-parents, it is almost always in children's interests on the whole to relocate with their parents.³⁵ But in a post-divorce context, this right of children might dictate a change of custody from a parent who plans to relocate to a parent who does not plan to relocate.³⁶ The usual analysis of relocation disputes between parents in terms of rights of and fairness to the adults involved would be inapposite;³⁷ children's right to the residential decision that is best for them all-things-considered would control.

On the flip side of the topic of residence, children should, like adults, be ascribed a right to move out of a dangerous and dysfunctional home or neighborhood, even if that means separating from a family member who insists on living in such a place.³⁸ Child-centered justifications for infringing that right—for example, that separating from a parent who insists on living in that home or neighborhood would be even worse than continued exposure to the dangers in the current environment—would be legitimate. But a supposed right of parents to possess their children or to dictate where their children live would not be a legitimate justification.

Similarly, just as an adult woman has a right to leave a relationship with a man who repeatedly speaks in a way demeaning of women, a girl should have a similar right in the context of child-custody decision making. A court deciding custody between her mother and a father who repeatedly makes misogynist comments should take into account the harmful consequences for her of the father's speech, and the court should not attribute to the father any right against incurring a "custody penalty" because of his speech.³⁹ Likewise, it should count against a mother in a custody battle that

34. See James G. Dwyer, *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 ARIZ. L. REV. 79, 98-101 (2012).

35. *Id.* at 98.

36. *Id.* at 98-101.

37. See, e.g., Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1753-57 (2007) (describing the current analysis used in relocation disputes).

38. See, e.g., Linda L. Bryant & James G. Dwyer, *Promising Protection: 911 Call Records As Foundation for Family Violence Intervention*, 102 KY. L.J. 49 (2013) (discussing the right of the child not to be forced to live in a home with recurrent domestic violence); James G. Dwyer, *No Place for Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and "Adult-Only" Residential Zoning*, 62 ALA. L. REV. 887, 925-28 (2011) (discussing the right of children not to live in dangerous and dysfunctional neighborhoods).

39. Thus, Eugene Volokh's argument for protecting parental speech in such cases is mistaken, and its fault lies in failing to appreciate the implications of children's equal personhood. Dwyer, *supra* note 34, at 108-10. See generally Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

she routinely denigrates males in front of her son; a ten-year-old male, like a thirty-year-old male, should have a legal right to avoid such speech.⁴⁰

B. Rights in Formation and Dissolution of Family Relationships

The most dramatic implications of children's equal personhood, however, pertain to the more fundamental child-welfare issues of formation and dissolution of legal parent-child relationships—that is, to whom state laws assign parental status and when states should sever legal parent-child relationships that they have created.⁴¹ In this realm, almost no one thinks in terms of comparing rights of children with the rights of adults.⁴²

But that is a mistake, because obviously adults also form and dissolve family relationships and in doing so have at stake many interests similar to those that children have at stake in connection with family relationships. Indeed, with respect to incompetent adults, the state creates legal family-like relationships (that between guardian and ward) that are structurally the same as the parent-child relationship, with one member of the relationship caring for and having authority over the life of another.⁴³ But even intimate partnerships between adults (i.e., horizontal rather than vertical relationships) serve interests of adults that are of a kind which parent-child relationships also serve. And in all of these just-mentioned contexts, all adults, whether autonomous or not, enjoy quite strong and well-recognized constitutional rights in connection with formation and dissolution of family relationships.⁴⁴

In connection with state formation of children's relationships, then, we should first ask: Do children have at stake in the decision as to with whom they will form a parent-child relationship interests that are the same as or similar to the interests adults have in connection with their decisions as to whether and with whom they will form any family relationships? Consider a

40. I am not implying here that it is not detrimental for boys to hear misogynist comments or for girls to hear things denigrating to males as a group. The examples I offer simply seem stronger examples of detriment.

41. See James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 785 (2009).

42. One arguable exception was a brief flurry of interest in the 1990s in children's ability to petition for termination of their legal relationship with their parents, characterized by some as the right to "divorce" one's parents. This scholarly discussion ensued from a decision of a court in Florida granting a teenage boy standing to petition for termination of parental rights (TPR) so that he could formalize the de facto family relationship he had formed with another set of adults. See *Kingsley v. Kingsley*, 623 So. 2d 780, 783 (Fla. Dist. Ct. App. 1993). But what was in dispute in *Kingsley* was really just the procedural question of whether a minor should have standing to seek TPR, not what the substantive rule for TPR should be.

43. See DWYER, *supra* note 5, at 80-93 (describing the law governing this process).

44. Dwyer, *supra* note 41, at 773-89.

comparison with adults' decisions to marry. Both the parent-child relationship and a marriage satisfy important psycho-emotional needs for the people in them—for example, to receive loving attention and physical contact, to feel and express love, to have a special place in the life of another, and to have someone with whom to talk and share experiences. Both relationships typically also provide material benefits, sometimes primarily to one party and later to the other.

And as to both psycho-emotional and material interests, children's interests impacted by a parent-child relationship are generally weightier than the interests adults have at stake in getting married: The interests children have at stake when state laws determine who their legal parents will be are clearly fundamental. One especially important and distinctive need that infants have is to form a secure attachment to a nurturing caregiver, and being thrust into a legal relationship with adults who are incapable of providing this is likely seriously to undermine a child's prospects for a healthy and fulfilling life.⁴⁵ In contrast, though courts have often spoken of adults having a fundamental interest in legal marriage, that is not very plausible today; today legal marriage is entirely unnecessary to having an intimate relationship and cohabiting.⁴⁶ Legal marriage today has little real impact on people's lived experience; the consequences of that status are primarily financial.⁴⁷ In contrast, children's lives typically are largely determined by which adults have legal custody of them.

Even if one compares formation of parent-child relationships not with legal marriage but simply with formation of intimate partnerships between adults (whether or not legally formalized), and even conceding that adults have important interests at stake in formation of intimate partnerships, it must be acknowledged that children's developmental needs are at least as important and probably more so. Custodians largely determine the quality of a child's experience of the world and whether basic needs for safety, nourishment, and attachment are satisfied, and this in turn largely determines a child's life course.⁴⁸ One's choice of marital partner can be momentous, but it generally does not impact fundamental well-being to the same degree as does the state's selection of a newborn child's parents.

What follows, then, from this assumption that children have at least as much at stake in connection with the state's decision about their family relationships as adults have in making decisions themselves about their intimate partnerships? Recall the conclusion earlier that similar interests of similar

45. See James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 415-28 (2008).

46. See Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1168-70, 1173 (2006).

47. *Id.* at 1166-73.

48. See Dwyer, *supra* note 45, at 419-27.

importance presumptively should receive equal protection, and presumptively should give rise to equal or equivalent rights. If we ask, then, what rights adults have in connection with forming family relationships, the answer is that they have (1) a right to make themselves available to (almost) anyone, and (2) an absolute right to make themselves *unavailable* to anyone—that is, to refuse a relationship with any other particular persons. We adults have this second right regardless of how strongly any other person wants to have a relationship with us, regardless of how the relationship might serve the other's interests, regardless of what kind of connection another person might think they have with us, regardless of the effect our relationship choices could have on a cultural or racial community or socio-economic class, and regardless of whether our choice might impede societal progress toward some abstract aim like racial equality. We are entitled to base our choice entirely on our own interests.

It would be unthinkable, for example, for a government authority to tell an adult that he or she may not refuse a relationship with another adult despite that adult's unfitness as a spouse (e.g., because of a propensity to partner violence) because the other adult has had a difficult life and is not to blame for being unfit. Or even for a government authority to mandate, more modestly, that one must allow an abusive partner some time to attempt rehabilitation before one makes a final decision about whether to continue the relationship. It would be unthinkable to tell someone whom a Native American tribe claims is a member that he or she must marry someone who is also a tribe member, because otherwise the tribe will grow weaker, as members choose to form families with outsiders and to move away. Even merely to pressure or try to shame adults into forming relationships on such grounds would be unacceptable.

Turning back to the parent-child relationship, it follows straightforwardly that the right of any adult with respect to formation of such a relationship should be just simply the right to choose to be available for it or not (a right adults do currently enjoy).⁴⁹ It follows also that children have an absolute right to refusal of such a relationship as to any particular adult if forming the relationship with that adult would be contrary to their welfare, a right that for newborns simply must be exercised by a proxy. Because children have the most fundamental interests at stake in the choice of who will

49. Adults are legally free to refuse a social relationship with any child, even a biological offspring. Courts will not order birth parents to take custody of or even visit their offspring. The law does impose a legal relationship on unwilling biological parents, but the sole duty that legal relationship entails is one of financial support. See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 937, 952-53 (2003).

parent them, they equally deserve constitutional protection of their interests, and that means equal or equivalent rights.⁵⁰

A similar analysis would apply to dissolution of relationships. The law has always made exit from non-marital relationships between adults easy and unrestrained, and today that is largely also true of marriages.⁵¹ We adults who marry have the freedom to end the relationship based on nothing more than a belief that doing so would be in our best interests. It is no longer necessary to prove that one's spouse engaged in particular types of seriously blameworthy conduct; it is enough that the relationship is simply not "working" for one of the spouses.⁵² Adults are deemed to have a sufficiently strong interest in not being stuck in a dysfunctional marriage that they are entitled to sever the relationship against the other person's wishes, regardless of how much suffering this might cause the other person or third parties such as the couple's children.

Respecting children's equal moral status should mean that their interest in discontinuing a family relationship with an adult, when the relationship is on the whole contrary to their welfare, receives comparable protection. If a particular parent-child relationship is not in the child's best interests, taking into account all relevant factors and what realistic relationship alternatives are available for the child, then the child should have an absolute right to exit the relationship. The right would, again, simply have to be exercised by a proxy, such as a child protection agency or a guardian ad litem.

Existing statutory rules for termination of parental rights¹ (TPR), which are quite protective of parents' desires to remain in a parental role,⁵³ thus fail fully to respect children's equal personhood. The legal rule for TPR should be simply that ending the relationship would be in the child's best interests. Everything that empirical evidence shows is relevant to a child's welfare should factor into that determination.⁵⁴ This would include a child's emotional connection to an existing parent, whatever shortcoming the parent might have. It would also include a child's interest in being part of a biologically related family. Moreover, it might be best for children if courts applied a fairly high evidentiary standard for finding the best-interests test met—for example, "clear and convincing."⁵⁵ But there is no justification for "balancing" children's rights against the interests or supposed rights of par-

50. See generally Dwyer, *supra* note 41 (presenting an extended argument for this position).

51. Lynn D. Wardle, *What Is Marriage?*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 53, 80 (2006).

52. *Id.*

53. See Dwyer, *supra* note 49, at 954-64.

54. See, e.g., Dwyer, *supra* note 45, at 427.

55. This is the standard the U.S. Supreme Court constitutionally required in order to respect the rights of parents. See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

ents in this context. The law does not compel adults to compromise their welfare for the sake of others when deciding whether to exit a relationship,⁵⁶ and it would be inconsistent with children's equal personhood to impose such a compromise upon them.⁵⁷

Concededly, effectuating rights by proxy, as must be done with young children, presents practical difficulties and raises concerns about the imperfection of the proxy. But such practical difficulties or concerns cannot justify entirely jettisoning the approach of ascribing to children rights equivalent to those we adults insist on for ourselves, as many defenders of parental entitlement are wont to do.⁵⁸ Significantly, we do not make that unprincipled leap in regard to decision making for incompetent adults who need to be in the custody of a caretaker, which raises very similar difficulties and concerns.⁵⁹ Instead, we trust state actors to do the best they can faithfully to implement incompetent adults' rights, because assigning rights instead to someone else hardly seems more likely to serve well the interests of the incompetent adults. We should do the same concerning children.

People are generally accepting of this when thinking about the state's creating parent-child relationships by adoption. In that context, one rarely hears concerns about the impracticality of assessing potential parents' ability to care for and provide a good home for a child, nor about the competence of state actors to wield such power over people's lives.⁶⁰ It is, I think, principally the unfamiliarity of the idea of excluding some biological par-

56. Wardle, *supra* note 51, at 80.

57. A seeming counterexample might be legal rules precluding legal parents from voluntarily severing their legal tie to children if that would be detrimental to the child. *See, e.g., In re D.W.K.*, 365 N.W.2d 32, 35 (Iowa 1985). But those legal rules do not have an effect on parents that comes close to the effect on children of legal rules precluding them from exiting a relationship with an unfit parent who wants to remain in the relationship. The effect on parents who want out is solely financial; the state will continue to impose a child support obligation but will not force the parents to associate in any way with a child. In contrast, trapping a child in a dysfunctional legal parent-child relationship means either that the child must live with the parent or that the child must live in the temporary and often detrimental situation of foster care while the state gives the parent time to improve.

58. *See* DWYER, *supra* note 5, at 213-39 (responding to critics of best-interests decision making for children).

59. *See, e.g.,* Dwyer, *supra* note 41, at 773-80.

60. The principal exceptions have been concerns about prejudice-driven exclusion of some categories of people from eligibility to adopt at all or to adopt particular children—specifically, race matching, a practice motivated by an impulse to protect a subordinated community, and prejudice against homosexuals. *See, e.g.,* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1201-06 (1991). Significantly, many who oppose such exclusions do so in terms of their violating children's rights or negatively impacting children, rather than in terms of adults' rights. *See, e.g., id.* I have never seen complaints about the criteria adoption agencies use for assessing the quality of parenting and home environment for applicants or about how agencies implement those criteria.

ents from legal relationships with newborn children that leads people to invoke state incompetence or untrustworthiness as an objection.

How might we go about operationalizing children's rights in connection with formation of parent-child relationships? For a start, we should identify and exclude grossly unfit parents more systematically than we now do. When adults contemplate forming intimate partnerships, they generally put substantial effort into learning about potential partners' backgrounds and current strengths and weaknesses. Today they are likely to do so more systematically, with the prevalence of Internet dating sites and the availability of criminal records online. A woman seeking a male partner would undoubtedly want to know if a particular man has a history of violence toward other women or is currently addicted to drugs, and such red flags would undoubtedly be enough for her to refuse the relationship. We could do the same for newborn children who are "seeking" an adult for family formation, using information already in the state's hands; a simple computer program could compare all birth records that a state's health or vital-records agency receives with child maltreatment and criminal record databases that states maintain.⁶¹ Red flags such as a history of violence toward other children or current drug addiction might not trigger immediate rejection of a birth parent as a candidate for legal parenthood, but it could trigger an in-depth and individualized assessment of whether entering a parent-child relationship with that adult is in the newborn child's best interests, taking into account all relevant aspects of a child's well-being. In the case of chronically and deeply dysfunctional birth parents, this assessment should lead to rejection. The state should never confer legal parent status on those adults, as to their biological offspring or any other children.

III. WHY EQUALITY FOR CHILDREN TRIGGERS OPPOSITION

There is generally great resistance to thinking about children's relationships and upbringing in the way I have suggested above—that is, to extending to children the rights we demand for ourselves. The prevailing mode of analysis regarding parental control and regarding formation and dissolution of parent-child relationships is *sui generis*, treating that relationship as if it were completely unlike any other. By falsely treating the parent-child relationship as in all respects unique, objectors obviate the need for comparison, and indeed often writers seem to perceive no need to appeal to general principles or objective considerations at all. As a result, we see in the legal, policy, and social science literatures many undefended, unprinci-

61. At least one state, Michigan, is now doing some form of background check on birth parents. See generally Terry V. Shaw et al., *Child Welfare Birth Match: Timely Use of Child Welfare Administrative Data to Protect Newborns*, 7 J. PUB. CHILD. WELFARE 217 (2013).

pled normative claims concerning children, and about rights of legal or biological parents.⁶² One especially telling example is the common tendency to speak of child rearing as a matter of parents' autonomy.⁶³ With respect to no other relationship do people mistakenly speak of one member's control over the other as a matter of autonomy—that is, of self-determination.⁶⁴

Even those who think children should have some rights tend to assume that children should have a special set of rights of their own, that it would be nonsensical or inadequate, or perhaps asking too much, to just extend to children the same rights that adults enjoy. There is a huge literature on “children's rights,” as a distinct body of rights, and not so much on “applying universal rights to children.” I have argued in connection with international adoption that this way of thinking is dangerous for children, for the same reason it was dangerous for women during and after coverture to assume they needed a special set of legal protections rather than the same as those enjoyed by the normative person of a legal system (i.e., a male adult).⁶⁵ Children might need special rights in some realms, such as education, but there is a danger in always assuming that to be so. The problem is that “special” rights for a powerless group are likely to be inferior and might even be harmful rather than protective.

62. See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 172, 179, 199 (1993) (arguing for greater parental control over the education of children as an aspect of the parents' religious “autonomy”); *id.* at 174 (arguing that parents should be entitled to remove their children from certain components of public school education, such as sex education, to which they have religious objections, because this will help preserve “epistemological diversity” in our society); CHARLES FRIED, *RIGHT AND WRONG* 152 (1978) (“[T]he right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself.”); Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 *ETHICS* 6, 17 (1980) (“To set terms for . . . parenting more stringent than required for the protection of children from abuse and neglect constitutes an interference in a person's claim to establish intimate relations except on the society's terms.”); Edgar Page, *Parental Rights*, 1 *J. APPLIED PHIL.* 187, 195-96 (1984).

63. See, e.g., Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 *U.C. DAVIS L. REV.* 1773, 1777 (2008); Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 *SUPREME CT. ECON. REV.* 69, 74 (2001) (asserting that some third-party child-visitation statutes do not “meaningfully protect parental autonomy”); Diane L. Abraham, *California's Stepparent Visitation Statute: For the Welfare of the Child, or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where Are the Constitutional Safeguards?*, 7 *S. CAL. REV. L. & WOMEN'S STUD.* 125, 126 (1997); Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 *YALE L.J.* 645, 646-47 (1977).

64. On the incoherence of “parental autonomy,” see James G. Dwyer, *Children's Interests in a Family Context—A Cautionary Note*, 39 *SANTA CLARA L. REV.* 1053, 1063-64 (1999).

65. See generally James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 *U. PA. J. INT'L L.* (forthcoming 2014).

A sameness/difference debate, involving in part the question whether a historically subordinated group should be legally assimilated to the dominant group or instead should receive different treatment, has played out, it seems, in many progressive movements—for example, in the feminist movement, with its divide among liberal, cultural, and radical feminists.⁶⁶ Children might be just another group for whom this question arises: Is it better in some sense to treat them simply as persons and apply to them, insofar as possible, all the rules that apply to persons generally, or instead to treat them as a separate category of humans to which a separate set of rules ordinarily should apply? The predominant approach today implicitly assumes the latter, but I believe the future of the field of “child law” or “children theory” scholarship lies in exploration of the former possibility.

In exploring that possibility, scholars will need to address some of these questions: Is there really something about the adult rights vs. child rights analysis that makes it categorically different from women vs. men, or blacks vs. whites, homosexual vs. heterosexual, disabled vs. normal, in the sense that some factual difference between adults and children really makes a wholesale difference in normative treatment ineradicable and unavoidable? Is there really some hard and fast dissimilarity that makes comparisons like those I make simply inapt or irrational? Conversely, should history with other struggles, like that for equal treatment of women or against giving lesser rights to people with disabilities, make everyone less confident about their fixed assumptions?

In short, is there any persuasive reason not to change our normative framework so that there is always a presumption, in every context, that children have rights equal or equivalent to those of adults, such that the burden of justification falls on anyone who would deny that? At some point with all the equality struggles, there had to be a flip. Women at some point argued: Why do we have to prove we are the same, rather than men having to prove we are different *and* that any difference justifies giving us lesser rights? The burden of proof switched to the side of inequality. Why should that not be true also when thinking about the rights of children?

Scholars, policy makers, and other adults might be resistant to thinking in terms of equal rights for children because they fear the impact of doing so on adults, and in particular on parents. The abstract idea of equal respect might be appealing, but the thought of the state’s frustrating some parents’ wishes as to how they raise their children or denying parents even the opportunity to raise their offspring likely triggers a negative gut reaction. Adults might tend to identify and empathize strongly with other adults, imagining themselves in the situation of those adults. This is especially like-

66. See John Capps, *Pragmatism, Feminism, and the Sameness-Difference Debate*, 32 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC’Y 65, 66-75 (1996).

ly when they share some additional characteristic with those other adults, such as being of the same gender or race, or some important commitment, such as to religious faith. It is also more likely when they feel special sympathy for a group that the parents belong to, such as “the poor” or “persons of minority race,” not because they also belong to that group but because they view the group as victimized by social injustice and, in fact, view the parents’ predicament vis-à-vis their offspring as itself the product of social injustice—for example, where parental unfitness is the outcome of a life of deprivation, danger, and denial of opportunity.

It would seem much more difficult or unlikely for adults to identify and empathize instead or primarily with the children who might suffer because of parental ideology or unfitness. Those who participate in the theoretical, legal, and social science debates are unlikely themselves to have suffered as children from maltreatment, and in any case their childhood is an ever-receding memory, whereas their adult experience is immediately accessible. I am frequently asked when I present arguments against parents’ rights and for more aggressive protection of children’s welfare whether I am a parent myself or whether I have spoken to any of the parents whose situations I am discussing. I am never asked whether I was ever a child in a similar situation or whether I have spoken with any children who are in the situation I am addressing. An adult audience is likely first, and perhaps last, to turn its empathic gaze toward other adults, and not toward children. This psychological disposition gives rise to a presumption against any policy measures that inflict suffering on adults because of their beliefs or misfortune, and in turn against any normative arguments that lead to such measures. It also generates a tendency to look for or fabricate any facts that count against such measures, and on the other hand to reject factual premises that support such measures absent irrefutable evidence. It leads to categorical rejection of proposals rather than careful consideration of whether they might be better tailored.

One particular policy area that illustrates this phenomenon is the quickly expanding practice of the state’s placing babies into prisons to live with incarcerated birth mothers. Advocates for incarcerated women are pushing legislatures to create “prison nurseries” and claiming that having newborn babies reside for one to three years in prison with their mothers is conducive to the children’s welfare.⁶⁷ They make this claim about children despite the absence of empirical evidence to support it, and they ignore the numerous reasons why one might suppose it is not a good thing for children to start life in a prison and to form a legal parent–child relationship with someone who just began a prison sentence and who likely suffers from se-

67. See James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. (forthcoming 2014) (manuscript at 1).

vere mental health problems and drug addiction.⁶⁸ Prison nursery proponents do not support a policy of individualized best-interests decision making for such a newborn by a competent authority, with placement in prison just one option among a range of choices that includes placement for adoption, but rather endorse giving the birth mother the power to decide if her newborn baby will join her in prison.

Nowhere in the advocacy literature promoting imprisonment of babies is there any consideration of whether children, like adults, have a right to enter into the legal family relationships that, among those available to them, are the most promising for them. Nor is there any consideration of whether children, like adults, might have a constitutional right that places limits on the power of the state to put them in prison.⁶⁹ The only mention of rights is the question-begging assertion that children have a right to be with “their mothers,” without any consideration of whether someone other than the birth mother should be the legal and social mother when a baby is born to an incarcerated woman. There is no effort to generalize the arguments that are made; rather they treat the babies’ situations as if it were *sui generis*, entirely unlike the situations of any other persons. Yet it seems unlikely that anyone would embrace more general positions like: “The state should put incompetent persons in prison to live with biologically related inmates if that might reduce criminal recidivism and might be good in some ways for some such incompetent persons.”

It is not entirely an adult vs. child phenomenon that explains the resistance to thinking in terms of children’s equality. There is also an intense attachment to some vague sense that biological relatedness dramatically alters the normative framework of policymaking. There is little resistance to thinking in terms of children’s rights in contexts when children’s interests are not in conflict with those of their biological parents. Thus, for example, there is no resistance to the idea that the state may make adults compete

68. See Lili Garfinkel, *Female Offenders and Disabilities*, in *WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES* 39-1, 39-3 (Russ Immarigeon ed., 2006) (“[T]he typical female offender had been hospitalized at least once for a psychiatric episode (usually a suicide attempt), had been violent in a school setting, and had a diagnosis of ODD (oppositional-defiant disorder). Because of girls’ histories of abuse and violence it is likely that they also have abuse-related disorders such as PTSD”); Diane S. Young & Liette C. Dennis, *The Complex Needs of Mentally Ill Women in County Jails*, in *WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES*, *supra*, at 42-1, 42-2 to 42-3 (stating that the “vast majority . . . had previously been in psychiatric and/or alcohol or drug treatment” and two-thirds had received psychiatric medication in the past); JESSICA MEYERSON, CHRISTA OTTESON & KRISTEN LYNN RYBA, *CHILDHOOD DISRUPTED: UNDERSTANDING THE FEATURES AND EFFECTS OF MATERNAL INCARCERATION I* (2010) (noting incarcerated mothers have higher rates of mental illness and substance abuse than incarcerated fathers).

69. I argue that children do have such a right. See Dwyer, *supra* note 67 (manuscript at 52-61).

with each other for adoption of a child whose biological parents have had their rights terminated voluntarily or involuntarily; that the state should select adoptive parents for a child based solely on the child's best interests; and that in doing so the state may encroach upon adoption applicants' privacy (inspecting their homes and supervising their interactions with a child), religious and intellectual freedom (e.g., rejecting applicants who would subject an adopted daughter to authoritarian sexist teaching), and child-rearing freedom (e.g., adoption rules prohibiting use of corporal punishment prior to finalization of an adoption).⁷⁰

I hesitate to attribute to anyone the archaic view that biological parents own their offspring as if they were property; it would be difficult to find anyone today who seriously expresses that view. But it is difficult to explain the vast difference in attitudes that most people display as between adoption policy and policies relating to unfit birth parents except by attributing to them an inchoate belief that biological parents have some entitlement to possession and enjoyment of their offspring independently of whether that is good for a child. Biology is relevant to children's welfare in our society; having a biological connection with one's parents typically becomes psychologically significant to children at some point in their lives, if for no other reason than "being normal" has some significance for most older children.⁷¹ But it cannot plausibly be regarded as of such monumental importance to children's welfare that it fully explains this vast difference in attitudes or justifies state decisions such as placing newborn offspring of dysfunctional, incarcerated women into adult prisons rather than into adoptive homes.

This stubborn belief in biological parents' entitlement to their offspring cannot rationally co-exist with a belief in children's equal personhood, and this suggests that most people have not really embraced the latter belief. Most people appear to operate unconsciously, without articulating precise distinctions, on an assumption that there is a continuum in moral status running from quintessential property, such as an automobile, to quintessential personhood, represented by autonomous adults. They place different types of animals in various places in between those extremes, mostly based on their relative affinity to autonomous adults, and children occupy a location somewhere in between household pets, which are the most favored animals but still subject to "ownership," and autonomous adult humans. Young children operate cognitively at a level that to adult human observers might appear to resemble that of dogs and cats, but they have a potential to become autonomous human adults that dogs and cats do not have, and so

70. See, e.g., GA. COMP. R. & REGS. 290-9-2.06(3), (7), (10) (2013); CAL. FAM. CODE § 8612(c) (West 2013); 750 ILL. COMP. STAT. 50/14(e) (2013).

71. See generally H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964).

they get placed in between those two categories in adults' unconscious moral ranking.⁷²

There might, then, be a disjuncture today between how most people really think about children and their express endorsement of the proposition that children are equal persons. It is a common phenomenon, actually, for our express views to run ahead of our commitments, when giving full effect to our intellectual conclusions would require giving up some advantage we currently enjoy. This has been true for some men who have endorsed women's equality, for some whites who have expressed support in the abstract for racial equality, and for some who acknowledge the force of arguments for animal rights. It will undoubtedly long remain true with respect to equality for children that there will be much cheap talk but not full commitment to effectuating its implications.

CONCLUSION

"Children are equal persons" is easy to say, but the academy has barely begun to study and endorse the implications of that proposition. The people best positioned to conduct that study might be family law professors. But family law professors are almost uniformly advocates for women who give lexical priority to feminist positions, and the reality is that some implications of children's equal personhood are in conflict with some feminist positions—for example, relating to custodial parent relocation after divorce, state intervention to prevent exposure of children to domestic violence, and placing children in prisons rather than adoptive homes. Family law academics are also almost uniformly liberal in a broader sense, and the reality is that some implications of children's equal personhood are in conflict with liberal sympathy for disadvantaged groups—for example, because they include denying legal parent status more often to dysfunctional birth parents, who are disproportionately poor and of minority race,⁷³ and thus increasing the suffering these adults endure. Substantial progress toward realization of children's equal personhood might occur only after the family law academy openly acknowledges and directly addresses these conflicts among commitments.

72. See DWYER, *supra* note 1, at 95-117 (critiquing theorists who treat higher cognitive functions as the sole basis for moral status).

73. Cf. Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 910-18 (2009) (discussing studies documenting the disproportionate occurrence of child maltreatment in poor and minority-race families).