UNEASY TENSIONS BETWEEN CHILDREN'S RIGHTS AND CIVIL RIGHTS

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This essay begins an exploration of the opposition between, and intersection of, children's rights and civil rights. Children's rights, a phrase I will define and explore more fully below, are sometimes placed under the umbrella of the civil rights movement. Children's rights to equal protection in education, protections against arbitrary state action, and limited freedom of speech and reproductive control, are tied to civil rights historically and conceptually. Yet many other children's rights, such as the right to protection, support and continuity in a caregiver, arise out of the child protection strain of *parens patriae* doctrine, a tradition essentially aimed at social control, rather than tolerance or liberation, of non-dominant[1] populations and, of course, women. The children's rights movement thus has aspects that are liberating or empowering but also, I hypothesize, aspects that derive from and even reinforce conditions and rhetoric that undermine liberty. Moreover, these non-liberatory aspects of the children's rights movement may undermine the civil rights of adults.

In this essay, I explore the various faces of children's rights in the context of the Indian Child Welfare Act (ICWA).[2] This Symposium's occasion and location in Las Vegas, Nevada provides a fresh setting for exploration of these tensions. Nevada gained statehood in 1865 to bolster the Union[3] in the war that would outlaw slavery, a status that denied its holder basic civil rights – to vote, to own property, to rear his or her own children. Nevada is also a state with fourteen Indian Reservations in a portion of the country to which Native Amer-

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[1] I use "non-dominant" and "dominant" to reflect the power of, and normative judgments reflecting, groups and values. *See* Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of Judge in a Pluralistic Polity*, 58 MD. L. REV. 150, 160-205 (1999) (describing differences between dominant epistemologies and differences between dominant and nondominant world-views); *see also* Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood,* 34 U. MICH. J.L. REFORM 683, 780-86 (2001) (describing dominant and non-dominant norms in the family context). Although non-dominant is often synonymous with minority groups, I generally reserve the terms "minority" and "majority" in this article for age, not demographic or racial minorities, unless specifically indicated.

[2] 25 U.S.C. §§ 1901-1963 (2000).

[3] *See* Michael W. Bowers, THE SAGEBRUSH STATE: NEVADA'S HISTORY, GOVERNMENT, AND POLITICS15, 23, 29 (2d. ed. 2002). The territory containing Las Vegas belonged to Arizona until 1867. *Id.* at 24.

icans were sent to make way for white settlers east of the Mississippi.[4] Today, the western United States is home to nearly one-half of the Native American and Alaskan Native population.[5]

Las Vegas, which sits in Clark County, is a metropolitan area with 1.6 million residents, up from just 273,000 residents in 1970.[6] This phenomenal growth has produced what looks like a city, at least by western United States standards, but with a social and legal infrastructure struggling to meet the growth. The Clark County Juvenile Court, where civil cases involving charges of abuse and neglect are heard, operated much like an old fashioned social work court when I first arrived in 1998. The explosion of lawyers and procedural protections in these proceedings, promoted by federal funding law, had not reached Southern Nevada. Few children, and fewer parents, received legal representation. Since 1998, I have seen, and been part of, the creation of the Children's Attorneys Project, which now provides six lawyers to represent children in abuse and neglect proceedings, and the Family Defense Project, which provides two attorneys to represent parents in such proceedings. Parental and children's rights are being pressed consistently for the first time in Southern Nevada. This new advocacy has come to a head around the protections the ICWA affords Indian children, their families, and their tribes.

Prior to the existence of specialized parental rights attorneys, the state and county child welfare agencies and the court disregarded the ICWA in many (if not most) cases to which it applied.[7] When a number of these cases came to the attention of the specially trained parents' attorneys, pursuant to the ICWA, they moved to vacate the earlier rulings. These vacations in turn led to reunification of children with their parents or extended family or transfer of jurisdiction to the appropriate tribal court. The children's attorneys have expressed concerns about these changes and are considering strategies to undermine the ICWA's privilege of Indian heritage, parental rights, and tribal authority. Thus, perhaps for the first time in Southern Nevada, the civil rights of parents against

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[4] Nevada State Library and Archives, *Location of Native American Areas in Nevada*, http://dmla.clan.lib.nv.us/docs/nsla/sdc/native/Indian_map.htm, (last visited Aug. 30, 2004). *See* Indian Removal Act, Ch. 148, 4 Stat. 411-12 (1830) (providing for the removal of Native Americans living east of the Mississippi River to the west of that river to make room for European American settlers). Of course, Native Americans lived in Nevada for centuries (millennia) before the relocation of eastern tribes. Bowers, *supra* note 3, at 1. Current census figures place the number of Native Americans in Nevada at 26,725. Census Bureau, *American Community Survey of 2002 General Demographic Characteristics, Nevada 2002* (last revised Sept. 2, 2003), http://www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Tabular/040/04000US321.htm, (last visited Aug. 30, 2004).

[5] Census Bureau, *The American Indian and Alaska Native Population: 2000, Census 2000 Brief* 6, *at* http://www.census.gov/prod/2002pubs/c2kbr01-15-pdf, (last visited Apr. 7, 2004. No other region in the country has a higher percentage of American Indians and Alaska Natives. *Id.*

[6] Launce Rake, *Task Force on Growth to Focus Most on County,* LAS VEGAS SUN, Feb. 3, 2004, at 2B. Due to the extraordinary rate of growth in Nevada, this number will surely be outdated by the time this paper is published.

[7] This phenomenon is not unique to Nevada. *See* Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L. J. 1, 4 (1990) ("last year in New Mexico, state courts ignored the mandates of the ICWA in seventy cases"); H.R. REP. NO. 104-808, at 2 (1996) (noting failure of Alaska state social workers to notify tribes in 52.7 percent of cases reviewed).

state intervention into their parenthood and the rights of children, as understood by their advocates, are systematically in explicit opposition. Moreover, as the children's bar in Nevada evolves, these types of conflicts no doubt will increase just as they have in other parts of the country.

The perceived conflicts between children's interests and parents' rights under the ICWA are a ripple in a larger and longer-standing tension between protecting children's rights and civil rights. The fact that we even have attorneys to represent children is a recent phenomenon arising out of at least two originally separate movements: the child protection and civil rights movements. The child protection movement began in the mid-nineteenth century, though its historical roots date to colonial times,[8] and has spawned a massive governmental and legal industry to protect and advocate for children, an industry of which I have been part since 1988. The civil rights movement, beginning arguably with advocacy for and finally abolition of slavery through the Thirteenth Amendment, reinforced by the Fourteenth and Fifteenth Amendments, and reaching its peak during the third quarter of the twentieth century, produced the legal doctrine and climate for the notion that children have the right to be free from arbitrary (including invidious race-based) governmental treatment. This movement has also led to the creation of lawyers for children who continue to press for children's rights in criminal courts, juvenile justice proceedings and reproductive choice.

Although the lawyers for both strands of the children's rights movement may overlap and the notions of civil rights and dependency are present in each, these two strands have distinct histories and purposes that are at odds with each other. The protective strand is rooted in challenges to, and continues to threaten, what we now consider to be the fundamental civil rights of poor families, especially families of color. The civil rights strand is rooted in opposition to race-based or coercive state intervention in private ordering and civic participation, including the creation and maintenance of family relationships.

This essay explores the distinctions between children's dependency rights and civil rights. The second section rehearses the role and primacy of parental rights as civil rights in a liberal republican democracy,[9] illustrating the point with the government's historic, value-based disruption of Native American families and culture. The third section compares children's civil and dependency rights and the development and growth of children's rights, with particular attention to the child protection movement and Native American children. That section explains how children's dependency rights and civil rights diverge and conflict. The final section draws distinctions between children's depen-

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[8] Of course, we inherited *parens patriae* from England. Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195 (1978).

[9] I use the phrase "liberal, republican democracy" to designate the United States' form of government and its philosophical underpinnings. M.N.S. SELLERS, THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM AND THE LAW 22, 23-27, 99-102 (1998); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 104 (1997) (acknowledging the "growing sense of historians that 'liberalism' and 'republicanism' did not stand in sharp opposition to each other at the Founding and that the debate between them is 'sterile'"); *see also* Appell, *supra* note 1, at 689-90 n.15 (highlighting liberal theory, but acknowledging the role of republican theory, undergirding the U.S. constitutional system).

dency and civil rights as vehicles for liberation and cautions against reflexive extensions of dependency rights under rubrics of liberty and justice.

I. PARENTAL RIGHTS AS CIVIL RIGHTS: NATIVE AMERICAN CONTEXT

The primary adult civil right this paper addresses is the right to rear children, a right fundamental to membership in a liberal democracy.[10] Professor Peggy Cooper Davis has demonstrated how the right to rear children was, and still is, integral to the freedoms and protections contemplated by the Thirteenth and Fourteenth Amendments.[11] Professor Davis illustrated this point in her rich and compelling exploration of the important historical, logical and legal role freedom to rear one's own children played in the abolition of slavery.[12] Professor Dorothy Roberts connects parental rights and civil rights through her examination of the child welfare system's treatment of Black families.[13] Pointing to the disproportionate and punitive removal of Black children from their mothers, Professor Roberts argues that family liberty, though in contemporary parlance an individual right, is grounded in opposition to race-based oppression.[14] As such, the state's disproportionate removal of Black children from their parents,[15] despite its purportedly benign intention, constitutes a group-based harm that interferes with "blacks' collective ability to overcome institutionalized discrimination and work toward greater political and economic strength."[16] I too have explored the political role of parental rights and their centrality to liberal democracy which places the creation of moral value (within liberal parameters) in private, not public, hands.[17] Parents thus have a fundamental right to rear their children according to private values and the state is prohibited from interfering with individual families based on a disagreement about those values as they relate to the child's interests.[18] Thus the connection between child rearing and civil rights relates both to moral and political autonomy and to the development and maintenance of political power.

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[10] PEGGY COOPER DAVIS, NEGLECTED STORIES, THE CONSTITUTION AND FAMILY VALUES (1997) [hereinafter DAVIS, NEGLECTED STORIES]. The right to decide whether to bear a child is often addressed as a civil right, but the right to rear children is often absent. *See, e.g.*, A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW, A MULTIRACIAL APPROACH (Timothy Davis, et al. eds., 2001) (very rich anthology of over 800 pages that omits the topic of child rearing).

[11] *E.g.*, DAVIS, NEGLECTED STORIES, *supra* note 10; Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348 (1994).

[12] DAVIS, NEGLECTED STORIES, *supra* note 10, at 1324-57.

[13] DOROTHY E. ROBERTS, SHATTERED BONDS, THE COLOR OF CHILD WELFARE (2002); Dorothy E. Roberts, *Child Welfare and Civil Rights,* 2003 U. ILL. L. REV. 171 (2003).

[14] Roberts, *Child Welfare and Civil Rights*, *supra* note 13, at 179.

[15] In some urban areas, from ten percent to a majority of families in Black neighborhoods are involved in the child protection system. *Id.* at 179-80 (noting that in the Englewood neighborhood in Chicago, a majority of families are involved in protective services and ten percent of the children in Central Harlem in New York City are in foster care).

[16] *Id.* at 179.

[17] Appell, *supra* note 1, at 706-07.

[18] *Id.* at 703-05.

Indeed, a well-rehearsed line of United States Supreme Court cases embraces this connection between parental and civil rights.[19] These cases have established that parental rights are so fundamental that they demand special protections against undue state interference or termination.[20] These protections are warranted, in part, because of the awesome resources of the state, particularly against impoverished parents who cannot marshal the same resources or expertise in proving parental worthiness.[21] The private interest at stake here is the relationship between parent and child that the state has no interest in disrupting unless the parent is unable or unfit to maintain the child.[22] Until this time, the state does not have an interest in assessing or promoting a particular child's interests because that assessment is integral to moral development which is primarily a private endeavor under a liberal democratic scheme.[23]

This value-creation distinction between parent and state is particularly cogent for Native American families whose bonds have been subject to brutal disruption and whose culture has been so heavily and forcefully devalued under color of law. The ICWA was a culturally sensitive attempt to preserve Native American cultures through their most important resource – Indian children.[24] In contrast to dominant mainstream cultural norms of nuclear families and individual rights, the ICWA was designed to protect Native American expansive conceptions of family, conceptions that did not include the notion of termination or transfer of parental rights.[25] The ICWA, through its promotion of parental rights and tribal sovereignty, aims to protect the very civil existence of Native Americans and tribal governance.[26]

There may be philosophical or cultural dissonance in placing Native American families within constitutional family protections, particularly because these protections are construed as individual rights and because the family is a primary unit in the liberal republican philosophy undergirding the Constitu-

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[19] Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923).

[20] *E.g.*, Santosky v. Kramer, 455 U.S. 745 (1982); M.L.B. v. S.L.J., 519 U.S. 102 (1996); *see also* Stanley v. Illinois, 405 U.S. 645 (1972) (hearing for putative father required before state may remove children from his custody); *but see* Lassiter v. Dep't Social Servs., 452 U.S. 18 (1981) (mother has no per se right to counsel in termination of parental rights trial).

[21] *Santosky*, 455 U.S. at 763.

[22] *Id.* at 760-61.

[23] Appell, *supra* note 1, at 703-05; *see also* Lawrence v. Texas, 539 U.S. 538 (2003) (noting the state does not have an interest in legislating morality).

[24] This cultural preservation is also recognized as a human right of indigenous peoples in international law. Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 365 (2003).

[25] Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 36-39 (1997).

[26] As Mississippi Band of Choctaw Indians Chief Calvin Isaac testified in support of the ICWA, "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities." H.R. REP. NO. 104-808, at 17 (1996) (citing Hearing on S. 1214, 95th Cong., 2d Sess. 193 (1978)).

tion.[27] Native American tribal cultures, on the contrary, are (or were) nearly the antithesis of liberal individualism, organized instead collectively, subordinating the individual to the whole[28] and holding expansive concepts of family.[29] Moreover, individual rights may threaten tribal sovereignty and tribal preservation.[30] However, as described below, the physical and legal relationships between Native Americans and federal and state governments make Native American families extraordinarily vulnerable to state-sanctioned disruption and this disruption ultimately threatens the entire tribe.[31] This vulnerability arguably warrants liberal rights to protect the very cultures whose values diverge from liberalism and rights discourse.[32]

It is well-known and documented that the European-Americans and leaders view(ed) themselves as superior to Native Americans.[33] In addition, law and policy pertaining to Native Americans has ranged from slaughter and tribal termination to containment and forced assimilation, with an occasional nod to

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[27] Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1224-34 (1999).

[28] Tsosie, *supra* note 24, at 372; *see also* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 590 (2000) (noting tribal representatives' testimony against the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1994), for imposing Anglo-American values upon Native Americans); *see also* Atwood, *supra*, at 604 (describing Winnebego Tribal court's approach to gender based equal protection claim).

[29] *See* Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 330-34, 341-43, 346-47 (1986) (describing differences between white and American Indian family structures); H.R. REP. No. 95-1386, at 10 (1978) (noting Native Americans may define families so expansively as to include hundreds of "close relatives" and that Native Americans may even include community social workers as family members); *see also* Atwood, *supra* note 28, (generally describing contemporary differences between Anglo-American and tribal court approaches to family).

[30] Tsosie, *supra* note 24, at 387-89 (discussing conflicts between tribalism and individual constitutional rights); Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L. J. 889, 890-91 (2003) (describing tension between individual rights and tribal revitalization).

[31] According to the U.S. Census Bureau, approximately 2.4 million Native Americans belong to at least one tribe. Census 2000 PHC-T-18, *American Indian and Alaska Native Tribes in the U.S.: 2000*, http://www.census.gov/population/cen2000/phc-t18/tab001.pdf (last visited Apr. 9, 2004). Over one-half million Native Americans live on reservations. U.S. Census Bureau Facts for Features, *American Indian/Alaska Native Heritage Month: November 2002*, http://www.census.gov/Press-Release/www/2002/cb02ff17.html (last visited Apr. 9, 2004).

[32] See Tsosie, *supra* note 24, at 372-73, 375-76 (describing both the contingency of the meaning of rights and the complex relationship of Native Americans to tribe and to Anglo-American government); Goldberg, *supra* note 30, at 913 (exploring differences between tribal and non-tribal understandings of individual liberty).

[33] To put it mildly. George Washington, among others, equated Native Americans with "beasts." THE WRITINGS OF GEORGE WASHINGTON, 133-40 (John C. Fitzpatrick ed., 1938), excerpted in RACE AND RACES 181 (Juan F. Perea, et al., eds., 2000). More mild dehumanization characterized Native Americans as savages and unenlightened. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 27-28 (1831) (Justice Johnson, in his concurrence referred to "Indian tribes" as "wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state"); *but see also id.* at 53 (Justice Thompson, dissenting, describing Native Americans as self governing "moral persons who live together in a natural society, under the laws of nations").

self governance and economic support.[34] The inability of the United States to appreciate Native American values (and, therefore, culture) has historically, and presently, produced a climate for coercive assimilation of American Indians.[35] Anglo-American legal hegemony[36] deprived Native Americans of their relationship to their land,[37] culture and their own family norms.[38]

Beginning in colonial times, missionaries sought to "educate" Indian children.[39] In 1819, the federal government established the Civilization Fund that provided grants to "private agencies, primarily churches, to establish programs to 'civilize the Indian.'"[40] By the late nineteenth century, the federal government's official policy was to separate Native American children from their tribes. As a result, the government and private agencies established boarding schools to acculturate Native American children to Anglo-American language, religion and other cultural norms.[41] Federal practice also included placing Native American children on farms in the East and Midwest to acquire European-American values.[42] This generally coercive policy, designed to separate children from their culture, tribes, and parents, by placing children in boarding and day schools, continued into the mid-twentieth century.[43] The next step in this move to extinguish Native American culture began in 1959 when the

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[34] *See, e.g.*, Rennard Strickland, *Genocide-at-law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986) [hereinafter Strickland, *Genocide-at-law*] (describing the cultural, though acknowledging the physical, genocide of "the American Indian"); *see also* Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER, RACE & JUST. 325, 328 (1998) [hereinafter Strickland, *Aboriginal Ghosts*] (citing forced sterilization of Native American women as recently as the 1980s).

[35] *See, e.g.*, Strickland, *Genocide-at-law*, *supra* note 34, at 721; Lacey, *supra* note 29. Professor Daan Braveman argues that the Supreme Court has been most deferential to Indian sovereignty when Native Americans were acting like Indians but less deferential when Native Americans were behaving like dominant groups. Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 100-01 (2003).

[36] This is not to say that this "conquest" was not violent and bloody. *See, e.g.*, Strickland, *Genocide-at-law, supra* note 34, at 734-35 (describing murders of Indians to obtain land).

[37] Beside the removal of entire tribes from the lands on which they had lived to defined reservations, the legal transformation of Indian lands from communally held to individually owned parcels in an attempt to turn Native Americans into citizen farmers, shrunk Native American land, autonomy, community and culture. Strickland, *Genocide-at-law, supra* note 34, at 724-26; Lacey, *supra* note 29, at 350-56.

[38] For example, in the late nineteenth and twentieth centuries, Indian Courts and police intervened into marital relations, gender roles, dress, hairstyles, rituals regarding death and other passages, and even names. Atwood, *supra* note 28, at 587-89; Lacey, *supra* note 29, at 364-69; Strickland, *Genocide-at-law, supra* note 34, at 726, 728, 730.

[39] Lacey, *supra* note 29, at 356-60.

[40] H.R. REP. No. 104-808, at 15 (1996).

[41] *Id.*; Lacey, *supra* note 29, at 356-60, 363-64. "Many of these institutions housed more than a thousand students ranging in age from three to thirteen." H.R. REP. No. 104-808 at 15. Nevada hosted the Stewart Indian School, "established in 1887 as a facility for Native American education emphasizing self-reliance and cultural assimilation." Nevada Department of Cultural Affairs, Division of Museums and History, http://dmla.clan.lib.nv.us/docs/museums/reno/expeople/eth800.htm, (last visited Nov. 10, 2003). This Indian child-saving movement coincided with movements to save poor, immigrant children through orphan trains, boarding schools, apprenticeships. *See infra* text accompanying notes 105 to 115.

[42] H.R. REP. No. 104-808, at 15.

[43] H.R. REP. No. 104-808, at 15-16; Lacey, *supra* note 29, at 359-61.

Bureau of Indian Affairs (BIA) and Child Welfare League of America, the standard-bearer for child welfare practice then and now, joined forces to create the "Indian Adoption Project" which removed Indian children from their Indian homes and placed them for adoption with non-Indian families.[44] During the 1960s and 1970s, state social workers removed twenty-five to thirty-five percent of Indian children from their homes to foster and adoptive homes and more institutionalized settings.[45]

It was because of this history that, in 1978, Congress finally acted to stem the tide of removal of Native American children and passed the ICWA.[46] The ICWA created a somewhat unique and complex set of rights, both for the parents and Indian custodians of Indian children[47] to heightened procedural and substantive protections of their child-rearing role, and for the child and tribe to maintain tribal integrity. The ICWA's purpose is to protect the best interests of Indian children and promote the stability and security of Indian tribes and families.[48] Through the ICWA, Congress determined that, as a general matter, it is in the best interests of Indian children to be protected from culturally-biased intrusion into their family relations, for their welfare to be determined by interested tribes, and for their Indian ties to be preserved.[49] Specifically, in enacting the ICWA, Congress found that "[b]lood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe" and that, unlike an Indian adult, an "Indian child because of his minority, does not have the capacity to make a reasoned decision about exercising his right to enroll in his tribe."[50] These findings acknowledge both the close connection

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[44] H.R. REP. No. 104-808, at 16.

[45] *Hearings Before Subcommittee on Indian Affairs*, 93d Cong. 2d Sess. 15 (1974); H.R. REP. No. 104-808, at 16.

[46] Jeanne Louis Carriere suggests that romanticization of Native American culture in the preceding decade played a role too. Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 587-88 (1994). For a description of the legislative history of the ICWA, see *id.* at 601-610. In fact, a Native American mother from Fallon, Nevada, Mrs. Townsend, testified in early hearings regarding her family's experience with Nevada State Welfare Department the treatment of her family. *Problems That American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction, 1974: Hearings before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, U.S. Senate, 93d Cong. 40-44 (1974) (statement of Margaret Townsend, Fallon Nevada).

[47] The ICWA defines an Indian child as: "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2000). Thus Native American ancestry is not sufficient to bring a child into the ICWA's purview. Congress found its authority for the ICWA in constitutional plenary power that grants Congress authority over Indian tribes, members of tribes and those eligible for tribal enrollment. H.R. REP. No. 95-1386, at 15-19 (1978).

[48] 25 U.S.C. § 1902 (2000). These twin purposes both acknowledge the interrelationship of child, family and tribe and reclaim the "best interests of the child" standard from dominant child welfare norms. *See infra*, notes 168 to 169 and accompanying text (discussing, *inter al.*, the best interests of the child standard).

[49] 25 U.S.C. §§ 1901, 1902, 1915 (2000) (creating barriers to removal of Indian children from their parents or Indian custodians, including permitting tribes to intervene in, or assert jurisdiction over, foster care and adoption matters and prescribing placement with relatives or other Native American families).

[50] H.R. REP. No. 95-1386, at 20.

between family relations and culture, and the autonomous, or adult, nature of the decision to partake in that culture.

The ICWA contains, therefore, a number of provisions that protect parents of Indian children from coercive state custodial intervention. When an Indian child is the subject of foster care placement or termination of parental rights proceedings, the parents must be provided with counsel.[51] In removal and subsequent foster care proceedings, the state must prove that the child is neglected or abused by clear and convincing evidence, rather than the more common preponderance of the evidence standard;[52] in termination of parental rights proceedings, the state must prove the grounds to terminate parental rights by evidence beyond a reasonable doubt.[53] In both of these types of hearings, in addition to any proof of parental unfitness, a decision to remove the child or terminate parental rights must be supported by qualified expert testimony that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[54] The state must also apply "active" rather than "reasonable" efforts to provide remedial services to the parents.[55] Moreover, the child's tribe must be notified of the proceedings and may intervene; the court must transfer the proceeding to the tribe's court should it assert jurisdiction.[56] Orders entered in violation of these aforementioned provisions are subject to invalidation upon motion of the parents, Indian custodian or tribe.[57]

The ICWA's provisions can, nevertheless, undermine the authority (right) of a parent, or Indian custodian, of an Indian child to determine the best interests or placement of that child because the statute provides for placement guidelines and tribal assertion of jurisdiction over the child in certain circumstances.[58] The ICWA may, thus, limit the civil rights that parents of Indian

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[51] 25 U.S.C. § 1912(b) (2000). The court may appoint counsel for an Indian child when in his or her best interests. *Id.*

[52] 25 U.S.C. § 1912(e).

[53] 25 U.S.C. § 1912(f).

[54] 25 U.S.C. §§ 1912(e) & 1912(f). *See also,* Jose Monsivais, *A Glimmer of Hope: a Proposal to Keep the Indian Child Welfare Act of 1978 Intact,* 22 AM. INDIAN L. REV. 1, 11 (1997) ("The Act does not specifically address whether testifying experts must be knowledgeable in Indian cultures. However, most courts have inferred from section 1912 of the Act that a qualified expert, in addition to being a domestic relations specialist, is one also educated in Indian cultures.").

[55] *Compare* 25 U.S.C. § 1912(d) *with* 42 U.S.C. § 671(a)(15)(B) (2000).

[56] 25 U.S.C. § 1911 (c) & (b) (2000), respectively. Transfers of jurisdiction are subject to the "good cause" exception and parental objection (§ 1911(b)) and good cause is also grounds for departing from the ICWA's placement preferences. 25 U.S.C. § 1915(a) & (b) (2000). There is also a judicially created exception to the ICWA, the "existing Indian family" requirement that has been developed to avoid application of the ICWA to Indian children. *See infra.*, notes 144 to 160 and accompanying text.

[57] 25 U.S.C. § 1914 (2000).

[58] For example, when a child is domiciled, for purposes of the statute, on Indian land, the tribe has exclusive jurisdiction. 25 U.S.C. § 1911(a); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43-53 (1989). Thus the parent of an Indian child cannot seek to avoid tribal involvement with the placement of his or her child – including placement for adoption. A parent of an Indian child not domiciled on the reservation may, however, veto the assertion of tribal concurrent jurisdiction. 25 U.S.C. § 1911(b). A child over twelve years old may also object. BIA Guidelines C.3(b)(ii), 44 Fed. Reg. 67584, 67591 (1979).

children would otherwise share with parents of non-Indian children. For example, unlike non-Indian children whose parents may determine to place the child without regard to the child's cultural or racial affinities, parents of Indian children cannot alienate the Indian child from his or her tribal affiliation.[59] Similarly, the ICWA's custodial hierarchy and the tribe can contravene parental placement preferences.[60] Yet the ICWA also offers higher protection for parental rights in coercive and non-coercive intervention matters. For example, parents of Indian children can revoke consent to foster care placement or a relinquishment of parental rights anytime before an adoption is completed.[61]

No doubt, there are arguments on both sides regarding whether the ICWA promotes parental civil rights. On balance, however, the ICWA provides significant legal protections of the integrity of Indian families and cultures against coercive state disruption. The ICWA does so in a context that respects Indian families' distinct heritage while using liberal tools modified for non-individualistic cultural structures. Indeed, the ICWA reflects the cyclic connection between children, parents, tribe, culture, and political survival.

II. CHILDREN'S RIGHTS

The ICWA recognizes that for most of their childhood, children lack the capacity necessary for agency, but they have needs and interests that the law can define and protect. Thus, the ICWA does not, for the most part, empower children to exercise rights; instead the ICWA vests in the child's tribe, parents and courts the power to promote children's interests.[62] Similarly, more general discourse regarding children's rights is as often about governmental determina-

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[59] *See Holyfield*, 490 U.S. at 51 (noting that tribal jurisdiction was not meant to be defeated by the actions of individual members of the tribe); *See* Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543 (1996) (arguing that the ICWA deprives parents of their rights). Moreover, even the ICWA's parental protections could seem restrictive of parental liberties in some instances. For example, relinquishment of an Indian child for adoption, unlike most other children, must occur in open court. 25 U.S.C. 1913(a) (2000); *compare* JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE §§ 4.11[6][c]-[I], 11[4][b] (1988) (describing law and process regarding relinquishments and suggesting that they may be made outside of court). Some parents may prefer relinquishing rights in a less formal and more private setting.

[60] 25 USC § 1915 (2000).

[61] 25 U.S.C. § 1913(b) & (c) (2000). Parents of non-Indian children are generally not allowed to revoke relinquishment for adoption except under certain narrow conditions. *See* NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, 2003 ADOPTION STATE STATUTE SERIES STATUTES-AT-A-GLANCE: CONSENT TO ADOPTION 2 (May 31, 2003), http://naic.acf.hhs.gov/general/legal/statutes/consent.pdf (last visited May 12, 2004) (generally, states do not permit revocation of adoption consents, permit it only for cause, or limit the time for revocation without cause).

[62] Congress defined the interests of Indian children after five years of hearings regarding the damage done to children, parents and tribes in the name of Indian children's best interests. *On Problems that American Indian Families Face in Raising Their Children and How these Problems are Affected by Federal Action or Inaction, 1974: Hearings Before the Subcomm. On Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 93rd Cong. 2nd Sess. 40, 72-94 (1974); *Indian Child Welfare Act of 1977: Hearing on S. 124 Before* the U.S. *Senate Select Comm. on Indian Affairs*, 95th Cong. 537-603 (1977); H.R. REP. NO. 95-1386 (1978).

tions and the empowerment of adults to act on behalf of children as this discourse is about empowering children themselves.[63] This variety in children's rights discourse arises out of children's developmental progression which requires adults to determine and execute children's rights and interests throughout much of a child's minority. It may not be surprising then that "children's rights" is a vague and capacious phrase the contents of which are so large and varied that it is difficult to address systematically.[64]

Indeed, the ideas of "children" and "rights" are separately and together extraordinarily complex and variable. Like all categories, "children" is contingent, its meaning varying according to discipline, culture and time period, but for legal purposes, the category generally refers to human beings from birth to eighteen years old.[65] This definition very roughly corresponds to developmental literature that regards human beings during this age span as immature: dependent on others for care, education, affection, and basic physical needs; lacking cognitive capacity to make sound decisions and exercise reasoned judgment; and highly vulnerable to influence from others.[66] The late adolescent years are most complex developmentally and legally.[67] Moral and political philosophers have only recently turned their direct attention to the status of children, although as in the law, Western philosophers have long viewed children as undeveloped adults or the property, or extensions, of their parents.[68]

Like "child," "rights" has various meanings within and across disciplines.[69] In the context of children, "rights" refers to positive and negative legal claims or forbearance,[70] procedural protections,[71] interpretative tools,[72]

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[63] Appell, *supra* note 1, at 715.

[64] Theresa Glennon & Robert G. Schwartz, *Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1559 (1995). This statement may also be made of the concept of rights in general. *See, e.g.*, Pierre Schlag, *Rights in the Postmodern Condition*, *in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 263, 263-304 (Austin Sarat & Thomas K.Kearns, eds., 1997) (noting that "'rights' defy easy identification").

[65] Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 559 (2000). Children younger than eighteen who commit crimes may be deemed adults for purposes of criminal prosecution and punishment. *Id.* at 557.

[66] *Id.* at 550-51.

[67] *See, e.g.*, Scott, *supra* note 65 (reviewing differing laws regarding voting, consent to medical treatment and abortion, and juvenile justice and describing adolescent decision-making that is unduly influenced by peers and under appreciates risk and time).

[68] David Archard & Colin M. Macleod, THE MORAL AND POLITICAL STATUS OF CHILDREN 1 (2002). *See generally*, THE MORAL AND POLITICAL STATUS OF CHILDREN, *supra*; Harry Brighouse, *How Should Children be Heard?*, 45 ARIZ. L. REV. 691 (2003); Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575 (2003).

[69] Again Pierre Schlag captures the multiple meanings and functions of "rights" in general in America, including serving as legal claims, forbearance, political claims, and, primarily, as the subject of normative debate. *Supra* note 64, at 263-67.

[70] For example, substantive due process, equal protection, right to recover in tort, right to benefits, right to protection under criminal and child protective laws, etc. *See generally* ROBERT C. FELLMETH, CHILD RIGHTS & REMEDIES (2002).

[71] *E.g.*, *In re* Gault, 387 U.S. 1 (1967) (right to due process); FED. R. CIV. P. 17 (Foundation Press 2002) (discussing party status); FELLMETH, *supra* note 70, at 33-35.

[72] *E.g.*, Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. REV. 1860, 1876 (1987) ("Rights in this sense are not 'trumps,' but the language we use to try to persuade others to let us win this round. When advocates for children ask a court to recog-

rhetorical devices,[73] needs,[74] legal interests,[75] and voice,[76] to name a few. Indeed, "children's rights" is used extraordinarily loosely and broadly.[77] The notion of children as rights holders is further complicated by the close tie between autonomy or agency and rights. Although most lawyers and philosophers probably would agree that it makes sense to talk about children's rights as protection of their needs or promotion of their welfare,[78] there is less agreement regarding whether children have, or should have, associational, expressive, or religious freedom. Those freedoms, as applied to children, are more controversial because of children's emotional and cognitive limitations and the political implications of treating children as autonomous decision-makers.

Notwithstanding the complexity of, and barriers to, children as rights holders, many children's rights advocates view children as another oppressed group that must be free from adult (often parental) control that does not serve children's interests or take sufficient account of children's wishes.[79] That is, scholars and politicians evoke or promote children's rights as vehicles to protect children's interests in autonomy (particularly when older),[80] in certain

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nize children's rights to privacy, due process, or other protections, they seek judicial statement that will articulate new boundaries and connections between children and adults.").

[73] *E.g.*, Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1257-57 (1999); Barbara Bennett Woodhouse, *Hatching the Egg: A Child Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1841-42 (1993).

[74] *See* Esperanza Ochaíta & M. Angeles Espinosa, *Needs of Children and Adolescents as a Basis for the Justification of Their Rights*, 9 INT'L J. CHILD. RTS. 313 (2001) (suggesting that children's rights be conceived as what is needed for their physical health and autonomy, according to a child's developmental level).

[75] Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, *Recommendations of the Conference*, 64 FORDHAM L. REV. 1301 (1996).

[76] *E.g.*, Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996).

[77] It is then perhaps not surprising that much of the call of children's rights has come from lawyers (including law professors), social workers and politicians, but not philosophers. *See* Brighouse, *supra* note 68, at 692 (noting that in the United Kingdom education and social work professionals and academics have supported children's rights, but the movement has found little support among philosophers).

[78] *E.g.*, Brighouse, *supra* note 68; Onora O'Neill, *Children's Rights and Children's Lives*, 98 ETHICS 445 (1988); *but see* James Griffin, *Do Children Have Rights?*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 19, 24-27 (Archard & Macleod eds., 2002) (arguing that infants have needs, not rights).

[79] *E.g.*, Catherine A. Crosby-Currie & N. Dickon Reppucci, *The Missing Child in Child Protection: The Constitutional Context of Child Maltreatment from Meyer to DeShaney*, 21 L. & POL'Y 129 (1999); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995); Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

[80] Griffin, *supra* note 78; Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999); see also Richard Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of* Wisconsin v. Yoder, *in* IAN SHAPIRO, DEMOCRACY'S PLACE 137 (1996) (arguing for child-rearing that maximizes children's future autonomy).

associations,[81] and in basic physical health and safety.[82] For purposes of this paper, I do not address the difference between rights and interests, positive and negative rights, or agency and welfare rights.[83] Instead, I use "rights" to encompass both rights children can press affirmatively themselves, or through a next friend or guardian ad litem, and those interests of children that laws protect.

Calls for children's rights in both of these senses often fail to take into account the different contexts for the children's rights they press. That is, some children's rights are conceptually, and historically, within civil rights movements that protect members of non-dominant groups (*e.g.*, racial and sexual minorities and women) from state interference with the right to be full persons, that is, to be autonomous beings in the moral and legal sense. These rights include the freedom to vote, control reproduction, rear children, dissent, and otherwise be arbiters of one's own values. Other children's rights arise out of state intervention *into* private realms. These rights, contrary to those based in civil rights, exist because of children's dependency and are not designed to promote independence or autonomy during minority, although the long-term goal for children is that they will become free-thinking adults.[84] These latter rights are what I term dependency rights; the former, I term quasi-civil rights. They are "quasi-civil rights" because most of them do not extend to children in the same way or with the same breadth as they do to adults, but are still rights that relate to curbing state interference with liberty.[85]

The distinction between these two rights categories reflects both the difference between rights applied to children *despite their minority* and rights applied *because of their minority* and the difference in origin; the quasi-civil rights arising out of civil rights movements, or at least constitutional amendments, and the dependency rights arising from an older, less liberatory tradition. I explain the different origins and natures of these two categories of children's rights next and then return to the ICWA in Section III to illustrate how dependency rights diverge from civil and quasi-civil rights.

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[81] *E.g.*, Fitzgerald, *supra* note 76, at 102-05; Gilbert A. Holmes, *The Tie That Binds: The Constitutional Rights of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 362, 395 (1994); Suellyn Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41, 52-56 (1995).

[82] Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

[83] *See* Brighouse, *supra* note 68, at 696-701 (distinguishing between rights and interests and identifying welfare rights – those pertaining to well-being, e.g., food, shelter, healthcare, – and agency rights – the right to act on one's own judgment, e.g., to choose medical treatment, religion); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (exploring negative and positive constitutional rights).

[84] Appell, *supra* note 1, at 707-09, 717 n. 47.

[85] Children have other types of rights, for example, to sue in tort, own property, enter into contracts. Similarly, children have certain enhanced rights, such as the right to renounce contracts. I do not address these types of rights here.

A. *Quasi-Civil Rights*

Although constitutional law has continued to view children as embedded in families, children have, particularly as they mature, gained certain rights against unwarranted state intrusion into physical and moral liberty. These rights follow those of adults but are extended only partially, or differently, to children because of their minority status. These rights recognize children as persons under the Constitution and extend due process and equal protection of the law to them, but in limited, or even special, ways because of their minority.

It was not until the middle of the twentieth century that the United States Supreme Court recognized children as "persons" under the Fourteenth Amendment entitled to equal protection and procedural due process. Considered the beginning of the modern children's rights movement,[86] in 1954, *Brown v. Board of Education*, acknowledged that Black children have a right to equal protection of the laws.[87] The National Association for the Advancement of Colored People (NAACP) brought the case as part of its mission to promote social and economic justice and to overturn *Plessy v. Ferguson*.[88] After *Brown*, the Supreme Court continued to apply the equal protection doctrine to children, ruling that the state should treat children alike, despite their race, national origin, or the marital status of their parents. For example, in a series of cases involving denial of benefits to non-marital children, the Supreme Court extended to "illegitimate" children the status of "persons" within the meaning of the Equal Protection Clause.[89] The Court next extended the Equal Protection Clause to immigrant children.[90]

The Supreme Court has also applied the Due Process Clause to children. In *In re Gault*, another milestone for children's civil rights, the Court famously stated "neither the Fourteenth Amendments nor the Bill of Rights is for adults alone."[91] Thus, the Court held that children in delinquency proceedings have a right to procedural due process, including the right to a lawyer when a child's physical liberty is at stake.[92] The Court did not, however, grant the same constitutional rights to children in delinquency proceedings that adult defendants

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[86] Glennon & Schwartz, *supra* note 64, at 1559-60; David Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HISTORY REV. (2005) (forthcoming) (note 3 in draft). Professor Tanenhaus contests that *Brown* was the first children's rights case. *See infra* note 92.

[87] 347 U.S. 483 (1954).

[88] 163 U.S. 537 (1896). *See* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 7-8 (1996) (noting that the desegregation cases were part of the NAACP's twenty year effort to dismantle *Plessy* and to change public policy).

[89] *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Gomez v. Perez, 409 U.S. 535 (1973); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

[90] Plyler v. Doe, 457 U.S. 202 (1982).

[91] 387 U.S. 1, 13 (1967).

[92] *Id.* at 41. Tanenhaus, *supra* note 86, relates an even earlier due process case in Illinois nearly 100 years before *Gault*. That case, brought just after passage of the Fifteenth Amendment, makes comparisons between children's civil rights and civil rights for people of color. *Id.* Tanenhaus considers the case, *People v. Turner*, 55 Ill. 280 (1870), to be "the first modern children's rights case." Tanenhaus, *supra* note 86.

receive in criminal proceedings.[93] Subsequently, the Court applied the Due Process Clause to children subject to school discipline.[94] In fact, the first case to do so, *Goss v. Lopez*, arose out of the Civil Rights Movement.[95] Lopez and the other plaintiffs challenging the school district's actions were Black students disciplined for protesting against racial discrimination at three Columbus, Ohio high schools during a time (1971) of overt racial strife.[96] Also in 1971, in response to the draft for the Vietnam War, the Twenty-sixth Amendment was ratified, giving eighteen to twenty year-olds the right to vote.[97]

In addition, the Court has recognized limited autonomy-based freedoms against state intrusion into children's lives in such areas as speech and reproductive control. For example, in 1969, the Court upheld the right of students to protest the Vietnam War by wearing black arm bands against a school regulation banning such expression.[98] The Court subsequently granted minors limited rights to reproductive choice in a series of cases arising out of the women's rights movement.[99] In a challenge brought by adults and organizations on behalf of themselves and minors, the Supreme Court struck down a ban on

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[93] Indeed, the Court has granted additional, but not co-extensive with adults, due process protections in juvenile delinquency matters. Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy); *In re* Winship, 397 U.S. 358 (1970) (reasonable doubt).

[94] *See* Ingraham v. Wright, 430 U.S. 651 (1977) (holding deprivation hearings post imposition of corporal punishment sufficient under due process clauses, but declining to require pre-deprivation hearings or apply the Eighth Amendment); Goss v. Lopez, 419 U.S. 585 (1975) (finding liberty and property interest in education requiring minimal pre-deprivation hearings in school suspensions).

[95] Goss v. Lopez, 419 U.S. 585 (1975). *See* Franklin E. Zimring & Rayman L. Solomon, Goss v. Lopez*: The Principle of the Thing*, *in* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 449 (1996) (describing the civil rights and racial dimensions of the events leading up to the *Goss v. Lopez* litigation). Although the local NAACP was instrumental in beginning and framing the lawsuit, involvement of the national students rights community drove and characterized the case as a "'student rights' not a 'racial rights'" case. Zimring & Solomon, *supra*, at 470-71. Still, the plaintiffs' lawyer recognized, though underplayed, the fact that poor and Black students were disproportionately subject to punitive discipline. *Id.* at 472. Thus what began as a civil rights case was recast as a children's rights case – a matter about children without regard to race, gender, or class.

[96] *Id.* at 459-466.

[97] Scott, *supra* note 65, at 563-64.

[98] Tinker v. Des Moines, 393 U.S. 503 (1969); *but see* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding prohibitions against selling sexually explicit magazines to minors). Twenty-three years before *Tinker*, the Supreme Court struck down state requirements that school children salute the flag and recite the Pledge of Allegiance, but that case was brought by parents on behalf of themselves and their children. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 627 (1943), *aff'g* 47 F. Supp. 251 (D.C. Va. 1942); *see also* Vincent Blais & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought, in* CONSTITUTIONAL LAW STORIES 433-475 (Michael C. Dorf, ed., 2004) (describing circumstances of, and leading up to, *Barnette*, including the *children's* refusal to salute the flag). The Court also sustained a child's First Amendment challenge to school board's removal of books from school library. Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

[99] *See* Bellotti v. Baird, 443 U.S. 622 (1979) (right to seek judicial, rather than parental, consent to abortion); Carey v. Population Servs., Int'l, 431 U.S. 678 (1977) (right to contraception); *see also* Robert H. Mnookin, Bellotti v. Baird*: A Hard Case, in* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY

distribution of non-prescription contraceptives to children under sixteen years of age.[100] Two years later, the Court held that the state cannot require a pregnant girl under the age of eighteen to involve her parents in her decision to have an abortion; instead, there must be procedures available to her for obtaining judicial consent.[101] Because abortion is a medical procedure, over which parents normally have control, these cases afford young women some freedom from parental and state interference with intimate, life-altering decisions regarding reproduction.[102]

These children's rights, or quasi-civil rights, are similar to adult civil rights in that they protect children from unfair, arbitrary, punitive and intrusive state action. Quasi-civil rights arose out of movements designed to resist coercive or forbearing state action that interferes with the power of individuals to define themselves or their children. These rights resist state action and challenge the status quo. Their extension to children is mediated by children's developmental status and their position as dependents in a liberal democracy.

B. Dependency Rights

This category of rights is older than the quasi-civil rights category – predating the Constitution. In addition, dependency rights belong to, or are developed on behalf of, children because they are dependent and therefore more vulnerable; they need assistance, not freedom, from the state. These rights also relate to children's unique situation in families and as future citizens. Dependency rights reflect the mutual relationship between parent and state regarding children in a liberal democracy, an interdependence in which the state assigns the obligation and freedom of rearing children – feeding, protecting, nurturing, teaching and inculcating values – to the parents, while the state oversees and checks this process by ensuring that parents are meeting children's basic needs and that children receive the basic tools to become democratic citizens.[103] This parent-child-state relationship is thus marked by social development and control: parental control of children and state control of parents and of "parentless" children.

Unlike quasi-civil rights, which curb state action and are patterned after adult rights, dependency rights invite state action and are unique to children because of children's special vulnerability. These laws consist of: provisions for the protection of children; material benefits such as medical insurance; food and cash subsidies; and educational benefits. These rights do not always belong to the child but are designed to inure to children certain benefits through their parents, custodians, or the state. The history and nature of dependency

149-264 (1996) (describing the *Bellotti* case and the circumstances surrounding its litigation).

[100] *Carey*, 431 U.S. at 691-99.

[101] *Bellotti*, 443 U.S. 622 (a pregnant minor, "Mary Moe," was one of the plaintiffs).

[102] *See* Jennifer Durcan & Annette R. Appell, *Minor Birth Mothers and Consent to Adoption: An Anomaly in Youth Law*, 5(1) ADOPTION Q. 69 (2001) (discussing adolescents' rights to consent to adoption, abortion and other medical and mental health treatment); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002) (exploring the limitations to minors' abortion rights).

[103] This is an admittedly schematic and overly simplified version that does not address present or historic material, legal and social limitations to full participation in society.

rights, which both define and arise out of a child's minority, reveal that they are limited and marked by control rather than freedom.

The idea that children have needs that adults are obliged to meet, predates contemporary notions of children's rights.[104] Even in the colonial period, free children had the legal right to defend themselves against parental abuse and children could be removed from parents who failed to protect the child's interests, safety or morals.[105] Orphans' courts and other state entities provided protections of orphaned children's interests, including their property, if any, and of their right to be free from abuse.[106] These protections were designed to place children in situations that would ensure they would not become, or remain, public charges; thus, children were bound out to work for families or placed in orphanages where they were taught Christian morals and industry.[107] Eventually some authorities established reformatories and other homes for dependent and disorderly children both to protect and educate children without adequate parental supervision and to protect the public from these children.[108] These "protections" were enjoyed primarily by free children with the lowest socioeconomic resources.[109]

By the middle of the nineteenth century, free children were increasingly viewed as separable and separate from their families of origin.[110] In 1851, Massachusetts passed the first general adoption statute enabling adults to adopt children by petitioning a court and showing, among other things, that the adoption would be good for the child; by the end of the century, nearly every state had enacted such a law.[111] In addition, a new and growing child protection movement aimed to provide better lives for neglected, abused and otherwise

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[104] Tanenhaus, *supra* note 86.

[105] JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION 1-7 (1991); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 7-12 (1994). Joseph Hawes claims that these early laws, the basis for later more elaborate child protection provisions, were the first "anywhere in the world to offer legal protection of any kind to children. . . ." HAWES, *supra*, at 5. Mary Ann Mason provides a less positive account of children's status and legal treatment in colonial times, *supra*, at 1-47, but she does describe the role of courts in resolving disputes about free children and, eventually, of indentured children. MASON, *supra*, at 1-13. Mason notes that colonial family and indenture laws were inherited from England, but "the unique experience of slavery created custodial arrangements for children that were unknown to common law." *Id.* at 3.

[106] HAWES, *supra* note 105, at 7-8. Slave laws governed the care and custody of child slaves. ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM 23 (1972).

[107] *See* HAWES, *supra* note 105, at 7-9 (describing protections of orphans and noting that such devices were designed to protect the public fisc and promote social order); MASON, *supra* note 105, at 4, 7 (noting that courts could remove children from fathers for failing to prepare children for work and or provide economic support); *see also supra* text accompanying notes 39-45 (describing similar attempts to protect Native American children's moral development).

[108] BILLINGSLEY & GIOVANNONI, *supra* note 106, at 22-23; HAWES, *supra* note 105, at 16-25.

[109] Appell, *supra* note 1, at 771-72.

[110] Of course, slavery had for centuries treated enslaved children as separable from their families by failing to accord legal protection to the parent-child relationship.

[111] *See* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1971) (summarizing the early history of adoption).

dependent children. Although some child advocates sought to provide assistance to children within their families, much of the advocacy movement protected children by removing them from their families and communities and placing them in institutions, as apprentices or with other families, often hundreds of miles away from their homes.[112] Protecting children generally meant socializing them into white, middle-class protestant values and work ethic.[113] The children protected were primarily from immigrant and working class families[114] or Native American tribes,[115] although free Black children were also targeted and indentured or housed in segregated orphanages.[116] Protecting children did not include protecting enslaved or newly freed children. Indeed, the nineteenth century child protection movement barely registered the needs of Black children in the North and did not respond to the extraordinary poverty and other challenges facing newly emancipated child slaves in the South.[117]

The child protection movement eventually transformed itself into the modern child welfare (foster care) system which continues to remove children from poor, abusive, or neglectful parents and places them with licenced foster care families.[118] As an outgrowth of the developing social work and psychology professions, in 1899, Cook County, Illinois established the first juvenile court, itself an institution protecting children from the hardships of the adult world while protecting children's and their parents' rights.[119] Within twenty years, all but three states followed.[120] In this context, and through the eyes of professionals, children were particularly salvageable and malleable.[121] No longer was biology (with the exception of "race") the sole determinant of potential; instead, social science viewed children's needs, mental health and development as both measurable and dependent upon parental conduct, which was also mea-

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[112] DUNCAN LINDSEY, THE WELFARE OF CHILDREN 13-14 (2d ed., 2004). LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999). Hawes, *supra* note 105, at 17-24.

[113] This is not meant to minimize the dire circumstances of dependent (and often orphaned) children prior to the child protection movement. These children lived on the streets or in alms houses, where they were not segregated from adults. LINDSEY, *supra* note 112, at 12. There were attempts to bolster families, however. During the Progressive Era, mother's pensions were created to help worthy poor mothers raise their children. *Id.* at 21-22; DAVID TANENHAUS, JUVENILE JUSTICE IN THE MAKING 58-67 (2004). Federal programs such as Aid to Families with Dependent Children (AFDC) and its successor Temporary Assistance for Needy Families (TANF) replaced these benefits. LINDSEY, *supra* note 112, at 22-23.

[114] GORDON, *supra* note 112, at 8-13.

[115] *Supra* text accompanying notes 39-45.

[116] BILLINGSLEY & GIOVANINNI, *supra* note 106, at 27-30.

[117] *Id.*, at 38-41.

[118] Appell, *supra* note 1, at 771-73; *see* also LINDSEY, *supra* note 112, at 11-24 (describing transformation); MASON, *supra* note 105, at 101-11 (describing early removal of children from their mothers due to poverty and immorality).

[119] For a history of this court, see TANENHAUS, *supra* note 113.

[120] Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 26 (1998). These juvenile courts provided and still provide adjudicatory forums regarding children in need of supervision, rehabilitation, care, or protection. *Id.*

[121] HAWES, *supra* note 105, at 26-32. Hawes also ties this development to the eventual regulation and prohibition of child labor. *Id.* at 40 ("Only after working-class and immigrant families came under the scrutiny of social workers and experts was the issue of child labor taken seriously.").

surable.[122] In the first half of the 20th century and as part of the New Deal, child protection grew increasingly professionalized and the Federal government became a major player in protection of dependent children.[123] These protections included the establishment of the social security system providing benefits to mothers with dependent children and eventually the foster care system.[124] Various benefits for dependent children were aimed at preventing juvenile delinquency and promoting "suitable" homes for children.[125]

By the 1950s, the modern child welfare system "began to emerge as a major public institution, with child welfare agencies becoming professional state agencies . . . separate from the public welfare agencies, a circumstance that added to the popular support and professional prestige of the child welfare system."[126] In the 1960s, physicians identified and described the "battered child syndrome" and advocated the reporting of child abuse to authorities.[127] In the next decade, professionals coined another new phrase, "psychological parent" which defined "parent" according to a particular theory that privileged conscious psychological ties between children and parental figures, nuclear family forms and subjective, time-limited assessments.[128] These developments drove a wedge between children's and parents' rights and interests and provided "scientific" rationale and guidelines for the contemporary child welfare system.[129]

This child welfare system is based on a series of federal statutes and funding guidelines for states that prescribe certain protective, foster care and adoption services for children and require judicial oversight of abused and neglected children.[130] In this system, every child subject to child welfare proceedings must be represented by a guardian ad litem.[131] This mandate created a demand for attorneys for children and led to additional professionalization of the system.[132] To further protect children, Congress enacted the Adoption Assistance

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[122] *See* HAWES, *supra* note 105, at 54-55, 58-59, 61-63.

[123] *Id.* at 66-79.

[124] Appell, *supra* note 1, at 771-73.

[125] HAWES, *supra* note 105, at 75, 80-85, 89-91.

[126] LINDSEY, *supra* note 112, at 23.

[127] In the 1960s, physicians identified the "battered child syndrome." HAWES *supra* note 105, at 99-100.

[128] Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 347-48, 350-54 (1996).

[129] HAWES, *supra* note 105, at 99-105; *see also* Bette L. Bottoms, Margaret Bull Kovera, & Bradley D. McAuliff, *Children, Social Science, and the Law: An Introduction to the Issues, in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 1 (Bette L. Bottoms, et al., eds., 2002) ("'there are few other areas of law where the courts rely as heavily on social science data as they do for decisions about children's welfare'"); LINDSEY, *supra* note 112, at 29-40 (describing early social science research that helped form the framework for the contemporary child welfare system).

[130] Glennon & Schwartz, *supra* note 64, at 1560.

[131] Child Abuse and Prevention Treatment Act (CAPTA), 42 U.S.C. § 5106a(b)(2)(A)(ix) (2000).

[132] Ann M. Haralambie & Kari L. Nysee-Carris, *Children's Legal Representation in Civil Litigation, in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 106, 109 (Bette L. Bottoms, et al., eds., 2002) (discussing attorney representation of children under CAPTA). By the 1980s, "pediatric law began to form as a distinct subspecialty within the law." *Id.* at 110; *see also*

and Child Welfare Act (CWA)[133] designed to provide supportive services to families at risk of abusing or neglecting their children, foster care payments to the states, procedural protections for families and children including judicial oversight, and subsidies for adoption of certain foster children. Before the CWA, the child welfare system did not have procedural or administrative checks on the use of funds or service provision for children; the result was "foster care drift," a system in which children were moved from placement to placement, lost contact with their families, were not adopted and often did not receive basic medical care.[134]

In 1997, as a result of the CWA's reputation for being overly protective of parents and insufficiently attentive to children's interests, Congress amended the CWA to promote adoption of children.[135] These amendments limit family reunification efforts and establish a presumption that parental rights should be terminated after children have been in care for fourteen months.[136] Congress also passed the Interethnic Placement Act, designed to promote trans-racial adoption by forbidding the consideration of race in the placement of children for adoption and creating a private cause of action for adoptive parents or children when the state has denied placement based on race.[137]

Children's dependency rights thus arise out of a history of protection and social control of non-dominant children and families along with a developing vision of children as dependent but separate and separable from their families and communities of origin. Accompanying these two foundational themes of dependency rights is a view that children have a right to a certain kind of environment or family life and that state actors, rather than parents, can discern with scientific and legal certainty which environment or family is best for the child. In this way, dependency rights are contrary to adult civil rights relating to child-rearing because dependency rights are so closely tied to social control and definition of children, parents and families. It is also difficult to identify children's dependency rights as quasi-civil rights because the former define children's interests rather than free children to decide those interests for them-

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Bruce Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281 (1996).

[133] Public Law 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C.).

[134] MaryLee Allen, Carol Golubock, & Lynn Olson, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, *in* FOSTER CHILDREN AND THE COURTS 575, 576-86 (Mark Hardin, ed., 1983).

[135] CONG. REC. H10776-04, H10782 (daily ed. Nov. 13, 1997) (statement of Rep. Shaw).

[136] Adoption Assistance and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-189, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C. (1997)). For critiques of ASFA, *see, e.g.*, Martin Guggenheim, *The Foster Care Dilemma and What to Do about It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children Are Entering Foster Care*, 2 U. PA. J. CONST. L. 141 (1999); Dorothy Roberts, *Is There Justice In Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

[137] Section 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §1808, 110 Stat. 1755, 1903-04 (1996); codified at 42 U.S.C. §§ 671, 674, & 1996b (2000). At about the same time, Congress also reformed its welfare system for families with dependent children, limiting the nature and amount of government benefits poor families with dependent children can receive. Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 459-61 (2004).

selves. In other words, these dependency rights serve children by granting authority to parents or state actors – *e.g.*, judges, social workers, and attorneys – to make decisions for and about children.

III. Dependency & Civil Rights: The ICWA

The contradiction between civil and dependency rights is illustrated in the implementation of the ICWA.[138] The civil rights aspects of the ICWA, explored above, provide added barriers to protective, i.e., dependency-based, intervention into Indian families in order to counter-balance culturally-biased destruction of Native American families and to preserve the cultural and political existence of Indian tribes. The ICWA's dependency rights, intended to protect children from unwarranted state intervention, address substantive and procedural aspects of decision-making regarding who will rear Indian children in need of governmental protection. These protections are designed to counter the dominance of white middle class culture in protective custody proceedings relating to Indian children.[139] In other words, the ICWA's aim was to counter the regressive aspects of dependency rights by providing additional civil rights to parents of Indian children and their tribes in dependency matters.

The core of the ICWA's dependency rights revolves around children's entitlement to have their Native American culture preserved – to privilege their Indian blood ties, even when their parents, judges, social workers, and others have different ideas about what is best for the child.[140] When placement is necessary, children have the right for the decision-maker to place them with members of their extended family, other members of the child's tribe, or with persons from another tribe, in that order of preference.[141] Moreover, under the ICWA, an Indian child has the right to have his or her tribe provide input into custodial decisions through intervention or assumption of jurisdiction, should the tribe so choose. The child also has a right to appointed counsel should the court find, in its discretion, that such appointment would be in the best interests of the child.[142]

Reported litigation under the ICWA reveals the persistence of dominant culture hegemony and the vulnerability of dependency-based rights to social control, because what is done in the name of children's interests is related to adult visions of where children belong and what is best for the specific child

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[138] Indeed, the ICWA itself could be said to arise out of the unique dependent status of Indian tribes in the U.S. The ICWA's Congressional findings acknowledge this connection: "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2) (2000). Thus, the ICWA would appear to embrace especially multi-layered connections between dependency and civil rights.

[139] Native Americans perceived state child welfare systems as applying standards that were unrelated to the child's welfare. Carriere, *supra* note 46, at 602 (citing the early ICWA hearings).

[140] The ICWA's civil rights core relates to the preservation of tribes and added protection of parental rights. In the text, above and following this note, I discuss the ICWA's dependency rights.

[141] 25 U.S.C. § 1915 (2000).

[142] 25 U.S.C. § 1912(b) (2000).

subject of the litigation.[143] Given the adult, value-based nature of dependency rights, it is not surprising that state courts have developed exceptions to the application of the ICWA. These exceptions include the judicially-created "existing Indian family exception" and the inclusion of the child's "best interests" as "good cause" not to transfer Indian child welfare cases to the tribe. These judicially-created doctrines reveal the tenacity of cultural hegemony in dependency rights even when applying a statute designed to counter that hegemony.

The existing Indian family exception holds that the ICWA does not apply when the Indian child has been removed from a family that is not engaged in Native American cultural life,[144] despite the ICWA's statutory definition of an Indian child as one who is either (a) a member of an Indian tribe; or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[145] The existing Indian family exception disregards the tribe's determination of who is an Indian child and permits Anglo-American courts to define "Indian" and "family." Thus an Indian father who is single or is living with a non-Indian mother is not an Indian family,[146] and an Indian couple not living on a reservation or involved with their tribe is not an Indian family.[147] The existing Indian family exception operates to avoid the application of the ICWA altogether. This existing Indian family exception is thus stunningly ironic in that it removes the power to define Indian children and Indian families from the tribe (as the ICWA contemplates) and awards it to non-tribal, non-Indian decision-makers. The exception thus thwarts the primary goal of, and reason for, the ICWA.[148]

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[143] Jeanne Louise Carriere describes implementation of the ICWA as reflecting "the limits on dominant culture's willingness to abandon its own representation of the subordinate culture and its control over it." Carriere, *supra* note 46, at 590.

[144] *Adoption of Baby Boy L.*, 643 P.2d 168 (Kansas 1982), was the first case to establish such an exception. Other courts have followed. *E.g.*, S.A. v. E.J.P., 571 So.2d 1187 (Ala. Civ. App. 1990); Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); Kentucky Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996); Hampton v. J.A.L., 658 So.2d 331 (La. Ct. App. 1995); S.A.M. 703 S.W.2d 603 (Mo .App. 1986); Baby Girl S., 690 N.Y.S.2d 907 (Sup. 1999); Adoption of Baby Boy D., 742 P.2d 1059 (Okla. 1985); S.C., 833 P.2d 1249 (Okla. 1992); Morgan, 1997 WL 716880 (Tenn. Ct. App. 1997); Adoption of Crews, 825 P.2d 305 (Wash. 1992); Santos Y, 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001); *see also* Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D.L. REV. 465 (1993). Many states have rejected the exception. *See e.g., In re* Adoption of T.N.F. 781 P.2d 973 (Alaska 1989); Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. App. 2000); Baby Boy Doe, 849 P.2d 925 (Idaho 1993); Adoption of S.S., 657 N.E.2d 935 (Ill. 1995); Elliott, 554 N.W.2d 32 (Mich. App. 1996); Welfare of S.N.R., 617 N.W.2d 77 (Minn. App. 2000); Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); Adoption of Baade, 462 N.W.2d 485 (S.D. 1990); D.A.C., 933 P.2d 993 (Utah App. 1997).

[145] 25 U.S.C. § 1903(4) (2000).

[146] *Baby Boy L.*, 643 P.2d at 175.

[147] Bridget R., 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996), *overruled by* CAL. WELF. & INST. CODE § 360.6 (1999), *statute found unconstitutional by* Santos Y, 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001).

[148] The exception also removes the power to define oneself as an Indian. *See* Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 124-139 (2003/2004) (exploring how courts, using majoritarian, essentialist notions of Indianness, determine whether a parent is sufficiently Indian to make the child an "Indian child" for purposes of the ICWA).

The highly publicized California case involving the Rost twins[149] illustrates the tensions between civil rights and dependency rights, and the tenacity with which dependency rights reinforce dominant culture rather than promote autonomous (in the moral sense) decision-making. The Rost twins were, under the ICWA, "Indian children," who were not born on a reservation.[150] Their married parents, Richard and Cindy, were young, poor and already raising two sons when Cindy, a Mexican Yaqui Indian, became pregnant with the twins.[151] Cindy was living in a shelter with their two children when she and Richard, a Dry Creek Rancheria Pomo Indian, decided to contact an adoption attorney because they did not have the means to raise two more children.[152] Within three days of the twins' birth, Cindy and Richard executed relinquishments of the twins for adoption to an agency for placement with the Rosts, a non-Indian Midwestern couple. Three days later, the twins were living with the Rosts in Ohio.[153]

The ICWA's requirement that such relinquishments only be given in court was not followed because the adoption attorney advised Richard that disclosure of his Indian heritage would delay the adoption.[154] Richard told his mother about the birth and relinquishment after the fact. She in turn, about a month after the twins were born, notified the tribe and they developed an alternative care plan to place the twins with Richard's sister who would rear them.[155] When the twins were about six months old, their tribe sought to intervene in the proceedings and, with their father, to invalidate the relinquishments under the ICWA; the court obliged, denied the prospective adoptive parents' petition to terminate the twins' parents' parental rights and ordered the twins placed with their paternal grandparents.[156]

The California Court of Appeal, which had stayed the trial court's order to place the twins with their kin, held that if the children's parent or parents had maintained "significant social, cultural or political relationship with their tribe" then the ICWA would apply.[157] If the parents did not have such a relationship, then substantive due process and equal protection doctrines precluded applica-

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[149] *Bridget R.*, 49 Cal. Rptr. 2d 507.

[150] *Id.* at 516-17.

[151] *Id.* The ICWA does not appear to apply to children who are descended from Indian tribes outside the United States borders. T.I.S., 586 N.E.2d 690, 692-93 (Ill. App. 1991), *appeal denied*, 591 N.E.2d 22 (1992), *cert. denied*, 506 U.S. 880 (1992).

[152] *Bridget R.*, 49 Cal. Rptr. 2d at 517. At this time, their other two children were only one- and two-years-old respectively. Beside the financial hardship of raising four children, the prospect of caring for four children age three and under must have been daunting.

[153] *Id.* at 517-18. The Rosts had paid $14,000 for attorneys fees and the birth mother's expenses to the adoption attorney whom the twins' parents had approached when they realized they would not be able to care for the twins. *Id.* at 517.

[154] *See id.* at 517 (noting that Richard identified himself on the relinquishment form as Native American, but "when told the adoptions would be delayed or prevented if Richard's Indian ancestry were known, Richard filled in a revised form, omitting the information that he was Indian").

[155] *Id.* at 518.

[156] *Id.* at 514. The Rosts obtained a stay of the court's order pending appeal. *Id.*

[157] *Id.* at 530, remanding the case to the trial court for such determination.

tion of the ICWA to these children.[158] As a result of this decision, California amended its dependency statute in 1999 to overrule the existing Indian family exception, stating, *inter alia*, that:

> A determination by an Indian tribe that [a child] is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.[159]

This explicit recognition of the political content and context of the parent-child relationship did not survive the California courts. In 2001, the California Court of Appeal held that the state statute, and the ICWA, as applied to a child who was not removed from an existing Indian family, were unconstitutional.[160]

Ultimately, the Rosts did adopt the twins after the adults, including their paternal grandmother and the tribe, agreed to settle the case.[161] The settlement provided that the Pomo Tribe and the parents would forego their rights and permit the Rosts to adopt the twins in exchange for yearly family visits after adoption, an agreement that may be unenforceable under Ohio law.[162] At the time of the settlement, the twins' parents, who were still together and raising the older siblings, were deeply pained; for Ms. Rost, the settlement was a gift.[163] Nearly three years earlier, Ms. Rost had written to her U.S. Representative begging assistance to keep the twins from going "back to a pathological family situation."[164] These divergent interests and Ms. Rosts' negative opinion of the twins' family could have prevented such a settlement and could yet interfere with ongoing execution of the potentially unenforceable settlement.

State courts have developed another method to privilege dominant norms and circumvent the ICWA's attempts to restore power to Native Americans to

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[158] *Id.* at 516 (applying the 5th, 10th & 14th Amendments). The court's opinion opens with the well-worn assertion that "children are not merely chattels belonging to their parents." *Id.* at 507. This statement, typically evoked in custody contexts by those who side with the physical, non parental, custodian who claims that the child should remain with the person who had custody the longest, is ironic. This view of a child's "best interests" evokes the property doctrine of adverse possession. Moreover, the devaluation of a child's birth and cultural ties is recognized by some adoption scholars as a method of commodifying children. RICKIE SOLINGER, BEGGARS AND CHOOSERS 26 (2001); Barbara Yngvesson, *Placing the "Gift Child" in Transnational Adoption*, 36 LAW & SOC'Y REV. 227, 239 (2002).

[159] CAL. WELF. & INST. CODE § 360.6(c) (West 1999) (emphasis added). *See In re* Santos Y., 112 Cal. Rptr. 2d 692, 723 (2002) (noting that section 360.6 was enacted as a legislative response to the *Bridget R.* appellate court ruling).

[160] Santos Y., 112 Cal. Rptr. 2d 692, 723-31 (Cal. App. 2001), *review denied*, 2002.

[161] Randall Edwards, *Rosts Celebrate Their Twin Win,* THE COLUMBUS DISPATCH, Dec. 8, 1998, 1998 WL 16500243.

[162] *Id.*

[163] K. Connie Kang, *As Adoption Fight Ends, 2 Families of Twins Meet Reconciliation: Adoptive and Birth Parents Share Pizza and Watch the Children Play. Settlement is Expected to be Finalized Monday*, L.A. TIMES, at BI, 1997 WL 14007625. The reporter describes the birth mother as barely able to speak and quotes the parents' attorney "[the birth father] has been weeping like a baby. He knows he is doing the right thing, but it doesn't make it easy." *Id.* Mrs. Rost said the settlement was "a very nice Christmas gift." For a thoughtful analysis of the meaning and prevalence of characterizing the adoptee as a "gift," *see* Yngvesson, *supra* note 158.

[164] 141 CONG. REC. H6023-02, H6024, June 15, 1995.

determine the identity and placement of their children. The ICWA provides a "good cause" exception to transferring cases in which state and tribal courts have concurrent jurisdiction.[165] The ICWA does not define the exception, but Federal guidelines suggest that passage of time between notice to the tribe and the tribe's assertion of jurisdiction, parental absence *and* the child's lack of contact with the tribe, or *forum non conveniens*-like grounds may constitute good cause.[166] Nevertheless, state courts have, sometimes gratuitously, utilized the Indian child's "best interests" in remaining with his or her current foster parents to deny transfer.[167] In this context, "best interests" are synonymous with psychological attachment and stability, otherwise known as the psychological parent theory, a dominant Anglo-American norm in custody disputes.[168]

Both of these judicially created exceptions to the full or partial application of the ICWA un-self-consciously apply some of the very norms that the ICWA was designed to challenge. These norms include: "psychological" versus cultural or biological ties; preference for nuclear and two-parent families versus single parent or extended families; the supremacy of Anglo-American courts and the notion that they are seats of unfettered, rational decision-making versus the competence of tribal courts to make good decisions about children; and children as private and connected only to current family verus children as part of a political and cultural collective with multiple and changing attachments.

How does this happen, despite the clear statutory pronouncements designed to minimize discretionary application of dominant norms? The obvious answer – at least from a critical perspective – is that those who represent children's interests, as lawyers, judges, policy makers, social workers, etc., view children through the representatives' own norms – frequently the same norms that are socially and legally dominant. Children are, after all, vessels onto whom adults place or project their own values. Indeed, in many cases, children cannot meaningfully articulate or identify their interests; they do not have the developmental capacity in some cases to speak and in others to project

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[165] 25 U.S.C. § 1911(b) (the State "court, in the absence of good cause to the contrary, shall transfer such proceedings to the jurisdiction of the tribe . . .").

[166] Department of the Interior, Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67, 591 (1979).

[167] *E.g.*, Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245, 1251 (Ct. App. Az 1991); In re N.L., 754 P.2d 863, 869 (Okla. 1988); *see also* A.P., 961 P.2d 706, 712-13 (Kan. Ct. App. 1998) (denying transfer because witnesses most relevant to disposition of case were those who could testify regarding events in Kansas where the child had spent most of his life in foster care). I use the term "gratuitously" because in some cases good cause arguably existed on other grounds so a finding regarding the child's best interests was not necessary to the court's denial of transfer of jurisdiction to the tribe. *E.g.*, Maricopa County, 828 P.2d at 1249-51 (finding that the Pueblo unreasonably delayed asserting jurisdiction and that location of most witnesses were in or near Phoenix); N.L., 754 P.2d at 869 (finding both presence of witnesses in Oklahoma and child's best interests supported good cause denial of transfer).

[168] Davis, *supra* note 128, at 348 (noting that the psychological parent theory dominates decision-making in child protection proceedings). This deference to psychological attachments may also be encompassed within the "status quo bias" in decisionmaking. *See* Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 ROUNDTABLE 139, 148-50 (1995) (describing the tendency of decisionmakers to avoid making decisions that would change existing circumstances and avoid decisions that would disrupt the status quo).

their lives or choices over time. For example, the Rost twins, as newborns, were clearly unable to identify, articulate, or press their interests, so they were appointed attorneys at trial and appellate court levels.[169] By the time they were five, the twins certainly identified the Rosts as their parents and their primary family, along with the Rosts' other daughter. The twins may have known their birth parents, grandparents, and their older brothers, but they could not assess (if indeed anyone can) what they would be losing and gaining by staying with the Rosts. They would not have the life experience or capacity to understand at five-years-old what it might mean to have been reared with one family or the other, as they would at twelve-year-olds, or as teenagers or parents.[170] These developmental limitations are at the core of child dependency rights. This group of rights both protects children, who cannot otherwise protect themselves, and places responsibility for making decisions about who should take care of children in the hands of adults.

It is not surprising then that, at least in the context of Native American children and families, the drive to protect children's dependency rights – their safety, well-being and relationships to parents – seems to reproduce and protect dominant norms and families while devaluing or demeaning non-dominant families, despite clear federal and state legislative direction to the contrary. In other words, even in a context designed to ameliorate the regressive aspects of dependency rights, the hegemony of majoritarian values presumes in individual cases that children's dependency needs are best met in a context of marital, nuclear, white, middle-class families and by adults to whom the children are psychologically attached.[171] In this context, decisionmakers often underestimate the value of the poor parents of color, the child's ties to them and to his or her cultural heritage.[172]

IV. EMPOWERING CHILDREN: DEPENDENCY RIGHTS VERSUS CIVIL RIGHTS

The ICWA and its implementation starkly illustrate a dissonance between dependency rights and civil rights. The former are part of an adult-oriented,

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[169] Bridget R, 49 Cal. Rptr.2d 507, 515 n. 2 (Cal. Ct. App. 1996). In fact, apparently even adults have some problem identifying the Rost twins' interests. The court noted that "the twins have been represented by three different attorneys over the course of these proceedings and have shifted sides in the controversy with each change of attorney." *Id.* For a discussion of the contingency and indeterminacy of the "best interests of the child" standard, see Annette R. Appell & Bruce Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 78-82 (1995).

[170] *See* DAVID M. BRODZINKSY, MARSHALL D. SCHECHTER, & ROBIN MARANTZ HENIG, BEING ADOPTED (1992) (exploring how adoptees view adoption and identity at various developmental stages).

[171] The Rost case exemplifies the contingency of children's dependency rights. The Rost twins had three different attorneys over the course of the case and each attorney had a different position for the children. Bridget R., 49 Cal. Rptr. 507, 515 n.2 (Cal. App. 1996) (first attorney took position the ICWA should not apply; second attorney took position the ICWA should apply; and appellate counsel took position the ICWA should not apply). It becomes clear then that children's interests are indeterminate and that it is adults who decide what is in the children's interests – not the children themselves.

[172] *See* Appell, *supra* note 1, at 765-79 (exploring the devaluation of poor families and families of color).

not-child-empowering doctrine that relates to adult ideas about protecting children, including with whom children should live and how they should be raised. Adoption is a quintessential dependency right – the transfer of parental rights to a child from one parent to another. Once bestowed, parental rights are adult civil rights that limit state intervention and allow parents to express themselves through the decision to have children and then to create and reproduce values through child-rearing. Unlike parental rights, children's rights in the ICWA or any dependency context are precisely about state determinations regarding custody and control, not the child's self-determination or liberation from custody and control. Dependency rights have a complicated relationship to civil and quasi-civil rights, but at root are based in state, rather than individual, power that may be inconsistent with civil and quasi-civil rights.

The ICWA examples illustrate how children's dependency rights can conflict with parental civil rights. In the name of children's rights to, or interests in, care or protection, dependency rights permit the government to assess which families are families and which are not. This assessment can coercively substitute the values of an external decision-maker (judge, social worker, legislature) for the values of the parents. This awesome state power to shape or interfere with the parent-child relationship can dictate the racial or cultural identity of a parent or a child, as in the case of the ICWA.[173] The conflict between state and parental power to rear children is present in child protection proceedings more generally, but also exists in custody and adoption disputes, as well as family welfare programs.[174]

The ICWA also illustrates that children's dependency rights are not quasi-civil rights because dependency rights do not promote the child's freedom but instead dictate who will have custody of the child, how the child will be raised, and how the child will be educated. These are rights that relate to, or arise out of, the child's dependent status; they are not, for the most part, rights that the child him or herself presses against the state. For with the exception of mature or nearly mature minors, children need adults to identify and assert children's often complex, shifting and competing interests regarding who can, and how to, meet the child's dependency needs. It is the child's attorney or guardian ad litem, the judge, and other adults who identify and press the child's interests, not the child. Claims that children have independent substantive due process rights in this context, then, are likely to be about adult autonomy, not children's.[175]

Civil rights, in contrast to dependency rights, are primarily tools to remove government imposed or tolerated barriers to full and equal participation in civil society.[176] Civil rights movements arise out of histories of cultural, racial, and

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[173] *See supra* notes 144 to 148 and accompanying text.

[174] Appell, *supra* note 1, at 769-73.

[175] *Id.* at 696-705.

[176] Realizing the full promise of civil rights arguably requires affirmative removal of economic and social, not just legal, barriers to full civil participation. *See, e.g.,* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 18-27 (1990) (addressing institutional means, though not ignoring the material requirements, for social justice); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (rehearsing distributive approaches to material conditions for equal citizenship); Robin West, *Rights, Capabili-*

gender distinctions that oppressed, disenfranchised, and excluded persons based on their membership in a disfavored or non-dominant group. These rights include the right of persons to exist on their own terms, to be authors of their own lives, and be free from legal limits to participation in civil society by virtue of their group belonging.[177]

Some children's rights advocates place children in the civil rights camp because children are, or are purported to be, like the groups who fought for civil rights: categorized and disenfranchised; in other words, children are excluded, discriminated against, and sometimes oppressed, all because of their status as minors.[178] As for other groups who seek civil rights, the law defines children as dependent upon adult authority (with some exceptions) without regard to their particular circumstances. Because of their youth, all children are, perhaps arbitrarily, assumed to be incompetent for most purposes under the law until they are eighteen. The state thus oppresses and excludes children through laws that do not permit children to vote and forbids them many of the privileges adults have, including deciding where to live, what entertainment to enjoy, what medical care to receive, what religion to practice, and what school to attend. Parents then are the primary oppressors because they make decisions for and about children, including whether to relinquish parental rights, how to educate their children, and with whom the children will associate.[179] Calls for children's independence then may carry both quasi-civil and dependency rights strains, depending on whether these calls seek to limit state or parental power.

It is true that "children" are an identifiable group – generally, human-beings between the age of birth and eighteen years. It is also true that under color of dependency law, children are subordinate to their parents, legal guardians or custodians and have only those freedoms that their parents or other caregivers permit. Thus, children are not necessarily free to make their own decisions about such basic liberties as travel, health care, associations, education or religion. It is not clear, however, that this is the same type of group status or oppression that undergirds civil rights or that freeing children from dependence on adults is possible or liberatory. Although superficially, children may seem like other disempowered groups, there are some critical distinctions. First, unlike woman, racial and sexual minorities, the label of "child" does not carry with it moral disapprobation.[180] We adults may negatively assess children's

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ties and the Good Society, 69 FORDHAM L. REV. 1901 (2001) (arguing that material preconditions are necessary to achieve autonomy).

[177] *See* YOUNG, *supra* note 176, at 41 (1990) (defining oppression).

[178] *See*, FELLMETH, *supra* note 70, at 22 ("children represent the politically weakest grouping of persons. . ."); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359 (1992) (likening children to slaves); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247 (1999) (comparing children to women who have historically been legally oppressed, lacking personhood). Children's rights advocates also argue that children should have a role in the political process. *E.g.*, Barbara Bennett Woodhouse, *Enhancing Children's Participation in Policy Formation*, 45 ARIZ. L. REV. 751 (2003).

[179] *E.g.*, Arneson & Shapiro, *supra* note 80, at 138; James G. Dwyer, *Parents' Religion & Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1383-90 (1994).

[180] *See* YOUNG, *supra* note 176, at 41 ("oppression refers to the vast and deep injustices some groups suffer as a consequence of often unconscious assumptions and reactions . . .");

judgment, veracity, and knowledge, but we do so in the context of our current conceptions of childhood – as a time of cognitive, moral and physical development from total dependence to near independence. As such, it is not clear that these judgments are unjust or sufficiently like those judgments when made about racial or sexual minorities or women who never outgrow their perceived disability. Second, and relatedly, on a societal level, a gain in children's status would not threaten the status of adults, as, for example, power gains for women or, in a particularly timely vein, homosexual marriage, threaten the gender hierarchy.[181]

Of course, children's status vis-à-vis parents is precisely hierarchical in that each is defined in contradistinction to the other and parental status confers power on parents. Nevertheless, the difference between children and other oppressed groups in the dependency context is that children will always be dependent on an adult, as long as children are unable to fend for themselves. Children will not necessarily be free once one oppressor is removed. The "oppression" will last roughly as long as their dependency, regardless of which adult acts as the guardian. In other words, removing children's minority status would not obviate their dependency.

Unlike other groups seeking civil rights, children will outgrow their disability. Thus, they will, generally on their eighteenth birthday, receive most of the adult rights and privileges previously denied. In addition, society's treatment (cabining) of children is less arbitrary than that of African Americans, Native American, Latinos, Asians, and women, to name a few.[182] While one of the most important aspects of civil rights is self-determination, children are, as a developmental matter, limited in their ability to direct themselves.[183] It is not surprising, then, that older children who are more like adults developmentally[184] have more rights regarding their own lives.[185]

Dependency rights govern the care of dependents and do not protect, or even recognize, their self determination or moral agency. On the contrary, dependency rights arise out of a history of social control and state action. Treating dependency rights as a platform for empowering children is challenging because such rights regard who cares for children, how they care for children, and what treatment children are entitled to within custodial relationships. These are important considerations for the protection of children, but they are a poor foundation for liberty, in part, because they are not grounded in liberty.

The existing Indian family exception cases reveal the problem of conflating liberty with dependency rights. In these cases, state courts held that the

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J.M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313, 2366-67 (1997) ("status hierarchies make traits morally relevant" in the sense that the higher groups group view the lower group as unworthy).

[181] *See* J.M. Balkin, *supra note* 180, at 2328-2331, 2361-62 (explaining the concept of social group status as defined in opposition to other groups and the connection between such status relationships and conceptions of what is natural).

[182] Brighouse, *supra* note 68, at 703.

[183] *Id.* at 701-02

[184] Scott, *supra* note 65, at 555-56. Differences still exist. *Id.* at 591-93.

[185] *Id.* at 555-56, 567-76; *see also* Ross, *supra* note 80 (asserting that more mature children should have sufficient information to exercise their constitutionally recognized liberty interests).

ICWA does not apply and may violate Indian children's equal protection and substantive due process rights when their families of origin were not Indian enough or were not family enough, as defined by Anglo-American courts.[186] Using dependency rhetoric regarding the children's psychological ties and need to have access to non-Indian adoptive homes, these cases strike down a remedial law designed to preserve the vital political and cultural connections of Indian children to their families and tribes *against* dominant culture's centuries-long programs to appropriate Indian children for itself.[187] In the end, the children are still in custody – in the ICWA cases, the custody of parents who better reflect dominant culture.

This scenario is distinct from that in *Brown v. Board of Education*,[188] which applied the Equal Protection Clause to Black children. In *Brown*, the equal protection claim was grounded in centuries of enslavement and segregation of Blacks by and from whites. The child and parent plaintiffs in *Brown* sought access *to* the privileges and benefits of dominant culture while maintaining their families and communities, and thus their cultural connections and integrity. The equal protection sought in *Brown* related to the attainment of social justice on the non-dominant community's own terms. The existing Indian family exception is a creation of Anglo-American courts to usurp from tribes and parents the determination of what is best for individual Indian children. This usurpation does not give control to the children.

Similarly, the application of substantive due process doctrine to the Indian child's relationship with substitute care-givers undermines the civil rights aspect of the doctrine. The Constitution protects parental rights in part because families are a forum for reproducing culture and independent democratic citizens.[189] The roots and continued importance of the constitutional status of family privacy are directly related to anti-subordination principles of the Thirteenth and Fourteenth Amendments.[190] In the context of coercive state intervention into families, the Supreme Court has specifically recognized the vulnerability of poor families and families of color against the massive resources of the State and value-laden nature of custodial decision-making.[191] The Supreme Court has never held that a child has a liberty interest in remaining with psychological parents. On the contrary, the child's liberty interest is to maintain the parent-child relationship until parental rights are lawfully terminated.[192] Moreover, adults, not children, will necessarily decide in which relationship a young child's liberty interest resides, as in the case of the Rost

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[186] *See supra* notes 143-160 and accompanying text. The California cases also found Tenth Amendment violations. Santos Y., 112 Cal. Rptr. 692, 731 (Cal. Ct. App. 2001); *In re* Bridget R., 49 Cal. Rptr. 2d 507, 528-29 (Cal. Ct. App. 1996).

[187] *Bridget R.*, 49 Cal. Rptr. 2d at 524-27.

[188] 347 U.S. 483 (1954).

[189] Appell, *supra* note 1, at 709-11; *see also supra* text accompanying notes 10-23.

[190] *Supra* text accompanying notes 10-23

[191] Santosky v. Kramer, 455 U.S. 745, 762-62 (1982); Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 835 n. 36 (1977); s*ee also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) (applying the ICWA).

[192] *Santosky*, 555 U.S. at 760; *see also Smith*, 431 U.S. at 842-47 (discussing foster parents' interest in a relationship with their foster child).

twins.[193] Thus, it is difficult to characterize such a right as liberating the child; on the contrary, it is precisely a dependency right that promotes state power, not individual freedom.

Clarity regarding what rights we are advocating for children is important: whether the rights relate to freedom from arbitrary state action and freedom to exercise autonomy, *e.g.*, reproduction or speech; or whether rights are related to protection, *e.g.*, what is best for children. For, as the ICWA cases illustrate, when rights are promoted because of children's dependency, then they are likely to be no more than a question of competing adult values, in which dominant values – those appreciated by the state – are likely to prevail. This state interventionist aspect of children's dependency rights masks this cultural hegemony because these norms are utilized in decisions about protecting individual children who in many cases conveniently cannot speak for themselves. Children's rights in these contexts have the content the decision-makers choose[194] and dependency rights are precisely about governmental notions of what children need and how these needs must or should be met. These rights are not about liberty or expression – at least of the child; instead, they are about in whose custody the child will be or who will make the decisions for or about the child. Thus, they are, at least from the child's perspective, the antithesis of freedom or autonomy.

Although this essay's preliminary taxonomy of children's rights may be imperfect, I hope it begins to raise some questions about the relationship between child advocacy and justice. It seems that pressing children's dependency rights without a full appreciation of their difference from, and connection to, civil rights is not necessarily liberatory, empowering, or reformative. As children's advocates, we may better serve children as a class if we ground our agendas in larger theoretical frameworks regarding justice and the potential regressive implications of enlarging children's dependency rights. This more cautious approach may be more empowering for children in the long run.

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[193] The Rost twins' attorneys made those decisions. *See supra* text accompanying notes 169 -170. The attorney for the toddler Santos Y. chose. In re Santos Y., 112 Cal. Rptr. 692, 699. Adolescents generally have a voice in determining whether parental rights will be terminated or they will be adopted. JOAN HOLLINGER, 1 ADOPTION LAW & PRACTICE §2.08, at 2-76.1 (2000).

[194] Of course this is true of civil rights as well. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).