
Article

A Positive Right to Protection for Children

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*Concepts that are useful in other areas of human rights break down in the context of children. Because children are dependent on adults for their development, they are an anomaly in the liberal legal order, which views negative rights as implying fully rational, autonomous individuals that can exercise free choice. This Article argues for a positive right to protection for children, rooted in dignity, by probing the problematic nature of the positive/negative rights duality and exploring alternate legal approaches to protecting children's rights in both international and comparative law. The adoption of positive rights for children would help assure adequate protection, which the current American legal regime, as typified by the case *DeShaney v. Winnebago County Department of Social Services*, fails to do.*

I. INTRODUCTION

Children are an anomaly in the liberal legal order. Conceptualizations that work in other areas of human rights break down in the context of children. Children defy the conventional view of rights as implying fully rational, autonomous individuals who can exercise free choice and require freedom from governmental interference. Lacking fully developed rational capabilities, children are dependent “incompetents” by definition. Furthermore, unlike the term “individual,” the term “child” does not stand alone from all others, but necessarily implies a relationship.

The founders of liberal rights theory perceived children to be outside the scope of their philosophies. John Stuart Mill¹ excluded children from

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¹ John Stuart Mill, an English philosopher who lived from 1806-1873, wrote about the

his conception of liberty. He wrote:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children . . . Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury . . . Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.²

Thus, interestingly, while children do not have a negative claim to liberty according to Mill, they have a positive claim for protection. Mill highlights a recurring tension between liberation and protection in the debates around children's rights.

Locke, likewise, held children to be an exception to his general proposition that "all men by nature are equal."³ For Locke, rights flow from the human capacity for reason, and the exercise of reason qualifies the individual for the exercise of freedom.⁴ He viewed children as not fully rational and saw the human mind at birth as a "white [p]aper, void of all [c]haracters, without any [i]deas."⁵ As children were not rational individuals who could freely give their consent to civil government, children could not be parties to the social contract or rights-holding citizens of the state.⁶ Children's incomplete reason not only disqualified them from citizenship, but also warranted their subjugation to their parents. Parents "have a sort of [r]ule and [j]urisdiction over them" until they arrive at full rationality.⁷ Locke thus excluded them completely from the social contract. However, within Locke's worldview, this does not make sense. If rationality is only gradually developed, why should the granting of rights be an all-or-nothing proposition?⁸

nature of liberty, and argued for the broadest possible freedom of thought and expression, and for constraints on government power. For further information, see GERTRUDE HIMMELFARB, *ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL* (1974); JOHN ROBSON, *IMPROVEMENT OF MANKIND: THE SOCIAL AND POLITICAL THOUGHT OF JOHN STUART MILL* (1968).

² JOHN STUART MILL, *ON LIBERTY*, 22-23 (Legal Classics Library 1992) (1869).

³ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 54, at 304. (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). John Locke, an English philosopher who lived from 1632-1704, is widely regarded as the father of English liberalism. He wrote works devoted to the origins of civil government and the foundations of knowledge, arguing that individuals possessed fundamental rights to life, liberty, and property, and that the purpose of government is the protection of these rights. For further information, see RICHARD I. AARON, *JOHN LOCKE* (Oxford 3d ed., 1971); DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 1-12 (1993); MAURICE W. CRANSTON, *JOHN LOCKE: A BIOGRAPHY* (1979).

⁴ LOCKE, *supra* note 3.

⁵ JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 104 (Peter H. Nidditch, ed., Oxford 1975) (1690).

⁶ LOCKE, *supra* note 3, § 57, at 305.

⁷ *Id.* at § 55, at 304.

⁸ In fact, Locke himself recognized the continuity in the development of reason and, with regard to parental authority, he advocated that the parent's exercise of power over the child's freedom should be proportionate to the degree of the child's development and experience.

Although children defy the conventional view of negative rights, they lend themselves more readily to a positive rights regime. Their very dependence and capacity for growth call for a positive right to protection and to the means necessary for their development. In fact, in the United States, while positive rights are only accepted “grudgingly and with suspicion,” in connection with adults, they are much more easily accepted in relation to children.⁹ Many state constitutions have recognized children’s education as a fundamental right.¹⁰ State legislatures have further created “welfare rights” especially applicable to children.¹¹

Not only is the adoption of positive rights for children conceptually sound, but it would help assure adequate protection for children, which the current regime fails to do. American jurisprudence is typified by the *DeShaney* case, decided in 1989, in which the United States Supreme Court held that no rights were violated when a four-year-old child was beaten by his father to the point of brain damage, while the government stood by and a social worker “dutifully recorded these incidents [of abuse] in her files.”¹² Conceptualizing the Constitution in negative terms, the Court explained that children have no right to protection from harm, even when there is already government involvement in their lives.¹³

This paper argues for a positive right to protection for children, rooted in dignity. Protecting the psychological integrity of children requires access to education, while protecting their physical integrity requires freedom from physical harm. In this paper, I focus on the more controversial of the two—looking at the corporal punishment of children within families and the duty of state intervention and protection. Part II defines positive rights and argues that their rejection is simplistic and untenable, using international, domestic, and comparative sources. Part III examines the American approach towards children, highlighting certain flaws. Part IV explores alternate legal approaches toward children using both international and comparative law. Part V advances a rights model rooted in dignity for the protection of children. Finally, Part VI grapples with the practical and conceptual problems posed by a positive right to protection for children, looking at both conflict and enforcement.

II. POSITIVE RIGHTS

This section examines the notion of positive rights. It gives content to the distinction between positive and negative rights and traces its origins and development. As is evident from international, domestic, and

JOHN LOCKE, *Some Thoughts Concerning Education*, in THE EDUCATIONAL WRITINGS OF JOHN LOCKE, § 41, at 145-46 (James L. Axtell, ed., Cambridge 1968) (1693).

⁹ Lee E. Teitelbaum, *Children’s Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 804-805 (1999).

¹⁰ Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT’L L. & POL’Y 1233, 1240 (1995).

¹¹ Teitelbaum, *supra* note 9, at 804.

¹² *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989).

¹³ *Id.* at 201.

comparative treatment of positive rights, their categorical rejection is both simplistic and untenable.

A. The Distinction Between Positive and Negative Rights

Traditional liberal thought has developed an opposition between positive and negative rights.¹⁴ Negative, or non-interference rights, prevent the state from violating individual autonomy, while positive, or integrative rights, impose a duty on the state to provide certain goods and services.¹⁵ Thus, negative rights create distance around individuals, while positive rights connect.¹⁶ This differentiation also reflects two conceptions of liberty: negative liberty, or liberty from, and positive liberty, or liberty to.¹⁷

The classical Western notion of rights is negative, stressing choice and autonomy.¹⁸ Since the rights system is rooted in Western political traditions and philosophy, this led the human rights movement to historically assume a greater emphasis on negative rights.¹⁹ Locke's conception of natural rights was intrinsically bound up with the individual's capacity to exercise rational choice as an autonomous human being. Thus, natural rights comprised negative freedoms to protect the individual's self-determination from violation by the state.²⁰ In this way, the rights model traditionally pits the individual against the state and erects barriers to protect the individual's selfhood from arbitrary government incursion. A fear of tyranny lies at the base of restrictions on governmental power through constitutional rights.²¹

Western liberal theory asserts the status of the individual and the individual's priority over both the state and society.²² Under the social contract theory, the state is a product of individual choice, and the individual precedes and justifies the state.²³ Society is the mere sum of free individuals, organized to reach otherwise unreachable goals.²⁴ As Robert Cover explains, "[T]he first and fundamental unit is the individual and 'rights' locate him as an individual separate and apart from every other

14 Henry J. Steiner & Phillip Alston, *Comment on Some Characteristics of the Liberal Political Tradition*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 189 (Henry J. Steiner & Phillip Alston eds., 1996) [hereinafter *H.R. IN CONTEXT*].

15 *Id.*

16 Teitelbaum, *supra* note 9, at 806.

17 Steiner & Alston, *supra* note 14.

18 Charles Taylor, *Human Rights: The Legal Culture*, in *H.R. IN CONTEXT*, *supra* note 14, at 175. However, interestingly, liberty was originally defined as a right to participate in government, not as rights against the state.

19 Steiner & Alston, *supra* note 14, at 187.

20 David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in *H.R. IN CONTEXT*, *supra* note 14, at 171.

21 Steiner & Alston, *supra* note 14, at 190.

22 Taylor, *supra* note 18, at 49.

23 Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in *H.R. IN CONTEXT*, *supra* note 14, at 181-182..

24 Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?*, in *H.R. IN CONTEXT*, *supra* note 14, at 203.

individual.”²⁵ Thus, the human being is fundamentally individual, and the individual is seen as an end and kind of absolute.²⁶

B. International Treatment of Positive Rights

International human rights documents, such as the Universal Declaration of Human Rights (UDHR), the foundation document of the human rights movement, espouse this negative/positive rights distinction. Negative rights are regarded as the civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR),²⁷ and positive rights are regarded as the economic, social, and cultural rights appearing in the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²⁸

The “official” position, dating back to the UDHR and reaffirmed in multiple resolutions since that time, is that negative and positive rights are “universal, indivisible and interdependent and interrelated.”²⁹ This reveals a recognition that: (1) for civil and political guarantees to have any meaning, it is necessary to assume a base level of living conditions; and (2) as the individual is not self-sufficient, the very conditions of life are assured by society.³⁰ The international approach thus connects rights with

²⁵ Cover, *supra* note 23, at 65.

²⁶ Pannikar, *supra* note 24, at 65. However, perhaps it is also possible to use the social contract myth to legitimate positive rights. After all, under the terms of this myth, individuals voluntarily trade a portion of their autonomy for certain benefits from the government.

²⁷ International Covenant on Civil and Political Rights, Mar. 23, 1976, Preamble, 999 U.N.T.S. 171, 172-73 [hereinafter ICCPR]. However, this characterization is not completely realistic. As Jeremy Waldron points out, many civil and political rights, like the right to vote, require the positive and costly establishment of frameworks and institutions. JEREMY WALDRON, *LIBERAL RIGHTS* 24 (1993).

²⁸ International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]. Children’s right to protection by the government is a positive social right under the ICESCR. Article 10(3) of the ICESCR asserts that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons,” and Article 12 speaks of “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

²⁹ Henry J. Steiner & Philip Alston, *Comment on Historic Origins of Economic, Social and Cultural Rights*, in *H.R. IN CONTEXT*, *supra* note 14, at 256 (quoting World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, para. 5, U.N. Doc. A/CONF.157/23 (1993)).

³⁰ As Isaiah Berlin wrote:

It is true that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?

ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 124 (Oxford, 1969). Adopting this logic, President Roosevelt characterized “freedom from want” as one of the four basic freedoms. He explained, “We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are out of a job are the stuff of which dictatorships are made.” Pannikar, *supra* note 24, at 258 (quoting *Eleventh Annual Message to Congress* (Jan. 11,

needs and reflects the understanding that the satisfaction of basic needs is essential for the realization of freedom. However, negative and positive rights are not on equal footing, and unlike the ICCPR's treatment of negative rights, the ICESCR only undertakes to realize positive rights "progressively" and "to the maximum of . . . available resources."³¹

The trend in international law has been toward the recognition of greater complexity in human rights than the simple duality between negative and positive rights. Since the adoption of the UDHR in 1948, the United Nations has continuously developed more comprehensive rights instruments, recognizing three categories of rights.³² "First generation," or blue rights, are the civil and political rights associated with liberal democracies.³³ These are rights to political participation, free speech, freedom of religion, freedom from torture, and fair trial, considered important for the maintenance of democracy and individualism.³⁴ "Second generation," or red rights, are the socio-economic and cultural rights preferred in socialist and communist regimes.³⁵ These rights are to goods, such as shelter, medical care, education, work, and leisure.³⁶ Finally, "third generation," or green rights, are group or solidarity rights of the greatest interest to developing countries.³⁷ These are peoples' rights to national self-determination and to such diffuse goods as peace, environmental and cultural integrity, and healthy economic development.³⁸ This last set of rights, rooted in communities, has moved the furthest from the original Western conception of rights and recognizes humanity as fundamentally social beings with social and communal needs.

C. American Treatment of Positive Rights

By contrast with the international position, the American approach reflects a more narrow understanding of government and rights.³⁹ The United States prides itself on having a negative constitution that tells state officials what they may not do, rather than what they must do.⁴⁰ This notion of the Constitution as a charter of negative liberties pervades

1944), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 2875, 2881 (J. Israel ed., 1966)).

³¹ ICESCR, *supra* note 28, art. 2.

³² Kathleen Mahoney, *Theoretical Perspective on Women's Human Rights and Strategies for their Implementation*, 21 BROOK. J. INT'L L. 799, 837 (1996).

³³ *Id.* at 837-38; Barbara B. Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 9, n.26 (1999).

³⁴ WALDRON, *supra* note 27, at 5; Mahoney, *supra* note 32, at 837-38.

³⁵ Woodhouse, *supra* note 33, at 9, n.26; Mahoney, *supra* note 32, at 838.

³⁶ Woodhouse, *supra* note 33, at 9, n.26; WALDRON *supra* note 27, at 4.

³⁷ Woodhouse, *supra* note 33, at 9, n.26; Mahoney, *supra* note 32, at 838.

³⁸ WALDRON, *supra* note 27, at 5.

³⁹ Louis Henkin, *International Human Rights and Rights in the United States*, in H.R. IN CONTEXT, *supra* note 14, at 271.

⁴⁰ HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 232 (2000).

judicial thinking and serves to exclude whole categories of individual needs and government misconduct from constitutional protection.⁴¹ The Supreme Court has rejected claims to housing, medical services, education, and welfare.⁴² The Court has further resisted recognizing any “affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”⁴³ Moreover, the Supreme Court accepts any justification for inequality in the distribution of basic necessities, such as food, shelter, and personal safety, that is “reasonably conceivable” and not patently arbitrary, provided that no suspect classes are involved.⁴⁴

This American attitude is a result of both philosophical and practical objections. First, there is an anti-government national ethos,⁴⁵ echoing the days of colonial rebellion and the pioneers out West. The Madisonian constitutional scheme reflects a deep distrust of government action and power, including mechanisms, such as the separation of powers, to slow down government. Jeffersonian liberalism states that government is best that governs least.⁴⁶ Americans have traditionally been suspicious of big government and skeptical about national programs to achieve social goals, preferring to place their faith in self-reliant individualism.⁴⁷ Thus, government has been perceived in a “passive role, bound to respect pre-existing rights,” rather than “as an active agent in promoting, enforcing, and interpreting them.”⁴⁸ Second, Americans have questioned whether positive rights are consistent in principle with the establishment of a free, democratic, market-oriented civil society.⁴⁹ A third important factor is the belief that only negative rights can be fully enforced, coupled with the view that, almost by definition, constitutional rights depend on complete

41 Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2308 (1990).

42 *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (rejecting the idea of a fundamental right to housing); *Harris v. McRae*, 448 U.S. 297, 318 & n.20 (1980) (finding no constitutional obligation for government to provide financial assistance to indigent women seeking to exercise reproductive choice); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 2 (1973) (finding no fundamental right to education); *Dandridge v. Williams*, 397 U.S. 471, 485, 487 (1970) (holding that public welfare administration is subject only to rational basis review).

43 Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1133 (1999) (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989)).

44 Schwartz, *supra* note 40, at 232. *But see* *U. S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that the exclusion of households with unrelated members from receipt of food stamps created an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment). In cases involving suspect classes, the equal protection clause provides an important crack in the wall of a negative constitution. *DeShaney*, 489 U.S. at 197, n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

45 Schwartz, *supra* note 10, at 1235.

46 Judge Posner characterizes this ideal as follows: “The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.” *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir., 1983).

47 DEREK BOK, *THE STATE OF THE NATION: GOVT AND THE QUEST FOR A BETTER SOCIETY* 11 (1996).

48 Woodhouse, *supra* note 33, at 11.

49 Schwartz, *supra* note 10, at 1234-35.

judicial enforceability.⁵⁰

Additionally, it is important to remember the age of the American Bill of Rights. Dating back over 200 years, the venerable age of the American Bill of Rights distinguishes it from the constitutions of other countries, many dating only as far back as the period post-World War II. The first ten amendments to the United States Constitution were in place long before the legislature began “to attend systematically to the health, safety, and well-being of citizens.”⁵¹

Nonetheless, the Constitution does not allow for a simple characterization as negative. Some constitutional provisions clearly mandate government action. For example, the Sixth Amendment requires the government to provide the accused with a speedy public trial, compulsory process, and the assistance of counsel to indigent criminal defendants.⁵² The Supreme Court has interpreted the Fifth Amendment to require *Miranda* warnings.⁵³ The equal protection clause sometimes requires that government take affirmative steps to ensure that certain groups are not treated unequally.⁵⁴ The Thirteenth Amendment prohibition on slavery covers private actions, and individuals are entitled to assistance from the state in enforcing it.⁵⁵ Even conventional negative rights, like the First Amendment, may require the government to take affirmative steps to allocate resources and ensure public access to forums and information to protect that right.⁵⁶

Furthermore, state constitutions specifically call for the enforcement of positive rights. Every state constitution establishes explicit substantive goals that regulate government power and provide the basis for a variety of positive claims against the state.⁵⁷ Almost all state constitutions provide for the right to education and some states recognize constitutional rights to welfare, housing, health, and abortions.⁵⁸

Moreover, despite powerful resistance, the United States now has

⁵⁰ *Id.*, at 1235.

⁵¹ Mary Ann Glendon, *Interdisciplinary Approach: Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 521 (1992).

⁵² U.S. CONST. amend. VI.

⁵³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁴ *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197, n.3 (1989) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

⁵⁵ Schwartz, *supra* note 10, 1241.

⁵⁶ Under the enhancement model, the First Amendment does not just place constraints on government actors, but it also places a mandate to promote speech and, in the words of *New York Times v. Sullivan*, facilitate “uninhibited, robust and wide-open” debate. Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, in *THE FIRST AMENDMENT: A READER* 262-63 (1996) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). There is no such thing as free speech, especially in a public forum. Government bears the costs of speech when cleaning up fliers and handbills that litter the public streets, *Schneider v. State*, 308 U.S. 147, 148 (1939), or when hiring police to make sure violence does not break out in the course of a march or protest, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

⁵⁷ Hershkoff, *supra* note 43, at 1135, 1138.

⁵⁸ See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HAST. L. J. 79, 97-98 (1992).

many of the characteristics of a welfare state⁵⁹ (for instance, Social Security and Medicare programs) due to the efforts of Congress and the individual states. Ironically, negative rights stood in the way of this positive rights' development. Notions of individual rights, such as economic liberty and freedom of contract, forestalled government programs during the *Lochner* era. This example demonstrates that the inherent tension and contingency between rights necessitates difficult balancing choices.⁶⁰

D. Comparative Treatment of Positive Rights

While American academics heatedly debate the wisdom of including positive economic or social rights in constitutional norms, the question, as a practical matter, is moot in much of the world.⁶¹ Outside the United States, positive rights are widely accepted as matters of right that people are entitled to demand from the government, and most other liberal democracies enshrine affirmative government obligations in their constitutions.⁶² "[F]ormulations vary from a bare recitation in the German Basic Law of 1949 that the Federal Republic of Germany is a 'social' state (Article 20) to detailed lists of specific social and economic rights such as that contained in the constitutions of France, Italy, Japan, Spain, and the Nordic countries."⁶³ Positive rights take a central place in the South African constitution⁶⁴ and in almost all Central and East European constitutions.⁶⁵

As these developments show, an outright rejection of positive rights is both simplistic and untenable. The international trend is toward a greater espousal of positive rights; American resistance to positive rights is not the full story; and international law reflects a movement toward an increasingly complex and realistic understanding of rights. Some legal theorists have not only accepted the fundamentality of positive rights, but

⁵⁹ Henkin, *supra* note 39, at 33 (1996).

⁶⁰ For instance, there exists a tension between rights within the due process clause itself: the exercise of police power for the public interest frequently conflicts with individual property rights. See *Miller v. Schoene*, 276 U.S. 272, 279-280 (1928) (holding that when forced to make a choice, "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public"; and, preferment of the public interest "over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property").

⁶¹ SCHWARTZ, *supra* note 40; Schwartz, *supra* note 10, at 1234.

⁶² For example, in 1995, the Hungarian Constitutional Court struck down as violative of social and economic rights twenty-six provisions of the austerity package enacted by the Socialist/Alliance of Free Democrats government, which called for cuts in sick leave benefits, substantial changes in long-term maternity and child care benefits, and staffing cuts in higher education. SCHWARTZ, *supra* note 40, at 7. See also Glendon, *supra* note 51, at 92.

⁶³ Glendon, *supra* note 51, at 524 n.16. However, these countries do not necessarily place social and economic rights on the same footing as civil and political liberties, sometimes presenting them more as aspirational principles. *Id.* at 527.

⁶⁴ Woodhouse, *supra* note 33, at 9, n.26.

⁶⁵ SCHWARTZ, *supra* note 40, at 219. In fact, the constitutional courts of Russia, Poland, and Hungary are much more occupied with the enforcement of economic and social rights than they are with civil and political ones. *Id.*

perceive that all rights have positive aspects. Tom Campbell, for instance, views rights as entailing four types of duties: the responsibility to respect, protect, ensure, and promote.⁶⁶ Thus, each right involves refraining from certain actions, while specifically taking others. Jeremy Waldron likewise perceives each right as “generating a multiplicity of duties.”⁶⁷ He describes “successive waves of duty, some of them duties of omission, some of them duties of commission, and some of them too complicated to fit easily under either heading” for every right.⁶⁸ These “waves of duties” support each right and root it in a “complex and messy reality.”⁶⁹ Waldron further posits that each set of duties in turn gives way to “further duties of enforcement and inquiry.”⁷⁰

III. THE AMERICAN APPROACH TOWARDS CHILDREN

To understand the *DeShaney* decision, it is necessary to place it within the context of the American approach toward children. This section therefore examines the status of children’s rights in the United States, the balance struck with parents’ rights, and the American approach toward violence against children. Such an analysis points to the following flaws: children’s rights are inadequately recognized and eclipsed by parental rights; violence towards children is legally sanctioned; and courts avoid grappling with difficult issues by adhering to false action/inaction, public/private formalities.

A. The Rights of Children and Parents

Although the Supreme Court has recognized many constitutional rights for children, children’s rights remain limited in comparison to those of adults, and they are easily trumped within the family and subsumed under the rights of parents.⁷¹ The Supreme Court extended autonomy-based rights claims to children in the First Amendment and criminal contexts by incremental interpretation of the constitution.⁷² However,

⁶⁶ Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, in H.R. IN CONTEXT, *supra* note 14, at 277 (1996).

⁶⁷ WALDRON, *supra* note 27, at 203.

⁶⁸ *Id.*, at 25. For instance, the right not to be tortured creates a duty to refrain from torture, but also imposes duties to investigate complaints of torture and to set up a political and administrative system to prevent it.

⁶⁹ *Id.*, at 212.

⁷⁰ *Id.*, at 212-13.

⁷¹ See e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stephanie L. v. Benjamin L.*, 602 N.Y.S. 2d 80 (N.Y. 1993); *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

⁷² *Erzonznik v. City of Jacksonville*, 422 U.S. 205 (1975) (recognizing the right of children to receive information); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (recognizing First Amendment rights to political expression for very young children); *In re Gault*, 387 U.S. 1 (1967) (holding freedom from physical confinement applicable to children and extending privilege against self-incrimination to a minor because children are entitled to decide whether and how they will participate in proceedings affecting their liberty); *Teitelbaum*, *supra* note 9, at 811.

outside criminal or administrative proceedings,⁷³ children's rights are diluted and often downgraded to interests.⁷⁴ Courts accept greater governmental authority to regulate the activities of minors than would be allowable for adults.⁷⁵ For instance, states may require attendance at school by minors,⁷⁶ restrict the religiously motivated activities of children when applying a rule of general applicability,⁷⁷ and limit minors' access to "objectionable" but not "obscene" material that could not constitutionally be kept from adults.⁷⁸

One barrier to the constitutionalization of children's rights lies in federalism concerns. Federal courts are reluctant to interfere with state regulation, deeming children's interests both local and private.⁷⁹ Children's rights are perceived as part of family law, the paradigmatic turf of the states.⁸⁰

While refusing to constitutionalize children's rights, American constitutional traditions have, nonetheless, long recognized parental rights over children. Although the Constitution is silent on specific rights for children or any other family members, parental rights gained a constitutional foothold during the heyday of substantive due process.⁸¹ By exercising constitutionally protected rights to physical custody and control over upbringing, parents can define the rights of children.⁸²

1. Parents' Substantive Due Process Rights and Their Limitation

The *Meyer* and *Pierce* line of cases stated that a parent's right to custody and control of children is a fundamental substantive due process right.⁸³ As *Meyer* explained, "substantive due process" "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children."⁸⁴ The Court applied this substantive due process right when finding unconstitutional a statute that prohibited teaching children languages other than English. Two years later, the Court

⁷³ *But see* *Parham v. J.R.*, 442 U.S. 584 (1979) (holding that a commitment scheme with minimum due process is constitutional).

⁷⁴ *Woodhouse*, *supra* note 33, at 8-9.

⁷⁵ *Teitelbaum*, *supra* note 9, at 813.

⁷⁶ *Yoder*, 406 U.S. at 213 (acknowledging that a State has the power "to impose reasonable regulations for the control and duration of basic education"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (asserting that the State can require "all children of proper age to attend some school.").

⁷⁷ *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("The power of the state to control the conduct of children reaches beyond the scope of its authority over adults.").

⁷⁸ *Ginsberg v. New York*, 390 U.S. 629 (1968).

⁷⁹ *Woodhouse*, *supra* note 33, at 25.

⁸⁰ *See e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000).

⁸¹ *Woodhouse*, *supra* note 33, at 48.

⁸² *Id.* at 8-9.

⁸³ *Barbara B. Woodhouse, A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 393-94 (1996).

⁸⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

echoed this concept in *Pierce*, upholding the “liberty of parents and guardians to direct the upbringing and education of children under their control,” striking down a statute that prohibited children from attending private or parochial school.⁸⁵ In 1972, *Yoder* followed in the footsteps of these earlier cases, recognizing the right of Amish parents to educate their children at home, despite a compulsory school attendance law. The Court, however, somewhat toned down the rights language and referred to “the fundamental *interest* of parents, as contrasted with that of the State, to guide the religious future and education of their children.”⁸⁶

These cases protected the family unit from destructive state intervention, but at a price for children.⁸⁷ Instead of focusing on children’s rights to a religious education or an upbringing that reflected their family’s values, the Court emphasized the parents’ rights to control their children. The best guardian of the child’s welfare may ordinarily be a parent, but the Court went beyond this proposition and constitutionalized the “parents’ ‘right’ to speak, choose, and live through the child.”⁸⁸ Thus, the control of children appeared an element of parental “liberty.”⁸⁹ However, as *Pierce* himself observed, “[I]t is a strange perversion of the word ‘liberty’ to apply it to a right to control the conduct of others.”⁹⁰ This formulation denies the child’s “own voice and identity” and treats the child as the “conduit for the parents’ religious expression, cultural identity, and class aspirations.”⁹¹ Children’s rights are thus eclipsed by those of the parents, creating a tension between them.

This line of cases further established a parental property interest in children. *Meyer* and *Pierce* were grounded in economic substantive due process precedents from the *Lochner* era, and the concept of ownership was an important subtext in the parents’ rights rhetoric they employed.⁹² “[E]mphasizing parental rights as private goods flowing from the simple biological fact of parenthood,” with no corresponding parental obligations, treats children as “objects, a form of private property.”⁹³ Conceiving children as parental property enabled parents’ claims that government regulation of their children infringed their own rights to fall neatly into paradigmatic constitutional protection of property interests.⁹⁴ In this way, substantive due process in the family arena, just as in the economic arena, can serve as both a liberating force and a conservative one maintaining the

85 *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

86 *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (emphasis added).

87 Woodhouse, *supra* note 33, at 29.

88 Barbara B. Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM & MARY L. REV. 995, 1115 (1992).

89 Woodhouse, *supra* note 33, at 2.

90 Woodhouse, *supra* note 88, at 1042 (quoting Supplement to the Brief of the Appellant, Governor of the State of Oregon, at 8; *Pierce v. Society of Sisters*, 268 U.S. 510 (1924)).

91 *Id.* at 1114.

92 *Id.* at 1042.

93 Barbara B. Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 GEO. J. ON POVERTY L. & POL’Y 313, 319 (1998).

94 Woodhouse, *supra* note 33, at 28.

status quo of traditional social structures.⁹⁵

Nevertheless, *Meyer*, *Pierce*, and *Yoder* did not envision the absolute dominion of parents over children. They presented “the notion that the work of parenthood is both a right and a duty, endowed with special public value.”⁹⁶ The Court in *Pierce* explicitly made this link between parental rights and duties: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁹⁷ Furthermore, parental rights may not be exercised to actually harm the child. In *Meyer*, the Court reasoned that for children to learn a foreign language at their parents’ request “cannot reasonably be regarded as harmful.”⁹⁸ In *Pierce*, the Court struck down Oregon’s compulsory public education law because it banned “a kind of undertaking not inherently harmful, but long regarded as useful and meritorious.”⁹⁹ Finally, in *Yoder*, the Court explained that the “power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”¹⁰⁰ The court thus recognized a limit to parental rights at the point of harm, without identifying the source or explaining the rationale for this limitation. The source and rationale, however, become readily apparent upon shifting focus to the child as a subject in possession of rights, rather than the mere object of the rights of others.

2. Seeds for a Positive Right to Protection for Children

The *Prince* case, decided in 1944, established the state as the *parens patriae*, or parent of the country, with the power to regulate children and the family. The Court declared, “Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”¹⁰¹ Thus, “neither rights of religion nor rights of parenthood are beyond limitation,”¹⁰² and the “state’s authority over children’s activities is broader than over like actions of adults.”¹⁰³ The Court thereby recognized the special status of children and the ability to protect them even when this entailed stepping on parental rights.

Although the decision made explicit reference to the “rights of children,”¹⁰⁴ it only conceived of them in negative terms.¹⁰⁵ Thus, the Court

⁹⁵ Woodhouse, *supra* note 88, at 1110.

⁹⁶ Woodhouse, *supra* note 83, at 393.

⁹⁷ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

⁹⁸ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁹⁹ *Pierce*, 268 U.S. at 534.

¹⁰⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

¹⁰¹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citations omitted).

¹⁰² *Id.*

¹⁰³ *Id.* at 168.

¹⁰⁴ *Id.* at 165.

¹⁰⁵ *Id.* at 164 (“[T]wo claimed liberties are at stake. One is the parent’s, to bring up the

perceived the only children's right at stake to be children's right to freedom from government interference with the free exercise of their religion. A positive right to protection for children was glaringly absent from the analysis.

Nonetheless, the Court planted the seeds for the positive rights concept. The Court recognized "the interests of society to protect the welfare of children . . . It is the *interest of youth itself*, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."¹⁰⁶ Although mostly focusing on the interests of society, the Court also referred to the interests of children, planting the seeds for their positive right to protection from harm. Conceiving such a positive right would both reaffirm children's essential human dignity and provide the societal interest more force. Furthermore, perceiving a right to be at stake on the other side of the scale, rather than a mere interest, would make sense of a decision that trumps both the right to freedom of religion and substantive due process parental rights.

3. The Parental Best Interest Presumption and Its Limitation

While *Prince* and the *Meyer* line of cases looked at where the state may be involved in regulating children, *Parham v. J.R.*, decided in 1979, examined when the state must be involved to safeguard children's rights.¹⁰⁷ In this case, the Supreme Court approved a commitment scheme for children whose parents seek to have them admitted to mental institutions, with no formal hearing and minimal procedural due process. Children's rights were thus pared down from adult constitutional rights and to a certain extent swallowed by the parental best interest presumption.¹⁰⁸

Parham established this strong presumption that the parents' decisions reflect the child's best interest. As the Court explained, "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their

child in the way he should go, which for appellant means to teach him the tenets and the practices of the faith. The other freedom is the child's, to observe these.").

¹⁰⁶ *Id.* at 165 (emphasis added). This is the case as a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Id.* at 168.

¹⁰⁷ See generally, *Parham v. J.R.*, 442 U.S. 584 (1979).

¹⁰⁸ The Court in *Parham*, however, did not allow for complete parental dominion over the child and acknowledged that the child has some, albeit limited, autonomy interests. As it explained, "[T]he child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized." *Id.* at 604. Thus, a child's commitment always requires some, albeit minimal, procedure.

children.”¹⁰⁹ The Court’s policy is thus rooted in a certain historic narrative and construction of the family. As the Court stated, “Our jurisprudence has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”¹¹⁰

It is important to remember, however, that parental control is not absolute and hinges on the theory that it supports the child’s best interests. The parental best interest presumption thus contains its own limitation. It can be rebutted by a showing that the parent is unfit and that it is necessary for the state to step in and protect the child from harm. The Court has interpreted this to be a very high bar, though, and the “traditional presumption” applies “absent a finding of neglect or abuse” by the parent.¹¹¹

Despite its application in this case, the parental best interest presumption is a useful and beneficial concept. Linking parental authority to the best interests of children is both logical and healthy. However, if defined without reference to the rights of children, this presumption enables an evisceration of children’s status and dignity.

B. Violence Towards Children

1. The State Context

In the United States, not only do children receive inadequate protection from the infliction of violence, but parents have a legally-protected right to administer “reasonable” corporal punishment to their children. Children are thus exempted from criminal and tort rules that prohibit assault against another individual. Forty-nine states (all except Minnesota) permit the corporal punishment of children by parents or guardians.¹¹² States have also “given parents broad discretion to determine what is reasonable.”¹¹³ “As recently as in 1920 a parent who killed a child in the course of punishment could claim a legal excuse for homicide in no fewer than nine states.”¹¹⁴

¹⁰⁹ *Id.* at 602.

¹¹⁰ *Id.* The Supreme Court recently decided *Troxel v. Granville*, 530 U.S. 57 (2000), relying on this parental best interest presumption. It found unconstitutional an order for grandparent visitation that does not accord special weight to the decisions of a fit custodial parent. The judge’s estimation of the child’s best interests cannot trump that of fit custodial parents without violating the Due Process Clause of the Fourteenth Amendment, which “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel*, 530 U.S. at 66. As the Court explains, “[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of the parent’s children.” *Troxel*, 530 U.S. at 68-69.

¹¹¹ *Parham*, 442 U.S. at 604.

¹¹² Susan H. Bitensky, *Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 355-356 (1998).

¹¹³ Mary K. Kearney, *Substantive Due Process and Corporal Punishment: Democracy and the Excluded Child*, 32 SAN DIEGO L. REV. 1, 30-31 (1995).

¹¹⁴ Woodhouse, *supra* note 93, at 314.

The corporal punishment of children is widespread in the United States. "By official estimates, over ninety percent of American parents use corporal punishment to discipline their children," and "Gallup Poll Results indicate that the amount of corporal punishment in the United States is actually several times greater than what official reports indicate."¹¹⁵ These figures reflect the wide acceptance of corporal punishment of children as an appropriate educational method. "A 1989 Harris poll showed that 86% of the respondents, representing 'a random, representative sample of 1250 Americans,' supported parental spanking."¹¹⁶ This is the case although children's specialists have long called for the abolition of corporal punishment, and studies have repeatedly shown that besides leading to the possibility of abuse,¹¹⁷ the corporal punishment of children is more harmful than helpful; it teaches humiliation, insult, and violence and does not lead to the internalization of a message.¹¹⁸

115 Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 984 (1996) (citing Gallup Poll, *Gallup Poll Finds Far More of American's Children Are Victims of Physical and Sexual Abuse than Officially Reported*, 14 A.B.A. JUV. & CHILD WELFARE L. REP. 171-72 (1996)). Note that this poll measured the amount of corporal punishment in the United States (the number of separate incidents) and not the number of parents who use corporal punishment. Thus, while official figures estimate that ninety percent of parents use corporal punishment, it is still statistically possible to conclude that the amount of corporal punishment in the United States is several times that of government estimates. "[A] 1985 survey of a representative sample of over 3000 families with children under 17 found that [eighty-nine] percent of parents had hit their 3-year-old child during the previous year, [and] about a third of 15 to 17 year-olds had been hit." Peter Newell, *Respecting Children's Right to Physical Integrity*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE 217 (1995). In a 1992 study, "researchers indicated that ninety-three percent of American males and ninety-two percent of American females experienced corporal punishment as children." Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 428 (1998) (citing Anthony M. Graziano et al., *Physical Punishment in Childhood and Current Attitudes: An Exploratory Comparison of College Students in the United States and India*, 7 J. INTERPERSONAL VIOLENCE 147, 149 (1992)).

116 Bitensky, *supra* note 112, at 355, n.3. However, there is also evidence of a decline in approval rates. According to one study, "[w]hen asked in 1968 whether there is sometimes a role for corporal punishment in child rearing, ninety-three percent of parents" responded in the affirmative. "By 1986, parental approval of corporal punishment had declined to eighty-three percent, and, by 1994," it dropped to sixty-nine percent. David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Underevaluating Children*, 35 HOUS. L. REV. 147, 151 (1998).

117 According to the national family violence survey, each year a minimum of 1.7 million children are severely assaulted by their parents and an additional 5.4 million children are hit with objects. According to the United States Advisor Board on Child Abuse and Neglect, 2000 children die annually at the hands of their parents or caretakers, 18,000 are permanently disabled, and approximately 142,000 are seriously injured. Edwards, *supra* note 115, at 993. In many cases, abusers claim they are exercising parental rights to discipline their child. In one study examining child fatalities in forty-one states, fatal child abuse was the cause of death in eighty-one cases, and forty-one percent of the parents who killed their children defended their action on the basis that "they were only trying to discipline them." *Id.* at 994.

118 Johnson, *supra* note 115, at 429; Orentlicher, *supra* note 116, at 147. Although not on the basis of rights, Locke himself frowned on the use of corporal punishment for its inefficacy and harmfulness, writing "[t]he usual lazy and short way by Chastisement, and the Rod . . . is the most unfit of any to be used in Education." LOCKE, *supra* note 8, § 47, at 148. Locke explains that corporal punishment promotes the natural disposition to avoid pain at the

The Model Penal Code typifies the American attitude, explicitly protecting parents' right to use physical force on children as long as two conditions are met—the force is used for the purpose of “promoting the welfare of the minor,” and it is not excessive.¹¹⁹ While “approximately half of the states have statutes establishing a parental defense” for the corporal punishment of children, “the remaining states rely on case-law precedent to define the scope of the privilege.”¹²⁰ The majority rule is “that a parent is not criminally liable for an assault on a child if the blows to the child's body constitute ‘reasonable force’ and are administered as a means of discipline.”¹²¹

The policies of the state of Minnesota, however, stand in interesting contrast with the rest of the United States. Reading Minnesota's various relevant statutory provisions together, it becomes apparent that what would be “reasonable” corporal punishment of children in any other state is an assault under Minnesota law.¹²² Since corporally punishing children “intentionally inflicts or attempts to inflict bodily harm” or “cause fear . . . of immediate bodily harm,” even mild forms, such as spanking, would constitute a fifth degree assault under Minnesota law.¹²³ Minnesota has lived under this prohibition on corporal punishment for many years. However, Minnesota has exercised prosecutorial restraint in enforcement, and “there are no reported cases of a parent being prosecuted for administering mild corporal punishment to children.”¹²⁴ Furthermore, although no corporal punishment is legal, reports are only mandated when a physical assault actually produces injury.¹²⁵ The main result of Minnesota eliminating from parents the right to hit children has been to avoid the

expense of reason's development. Thus, “[t]he Child submits and dissembles Obedience, whilst the Fear of the Rod hangs over him; but when that is removed, . . . he gives the greater Scope to his natural Inclination; which by this way is not at all altered, but on the contrary heightened and increased in him.” *Id.* § 50, at 150. Corporal punishment can also breed an aversion to the good and break the child's spirit. *Id.* § 49, at 149; § 51, at 150. For these reasons, “[b]eating . . . and all Sorts of slavish corporal Punishments, are not the Discipline fit to be used in the Education of those we would have wise, good, and ingenuous Men; and therefore very rarely to be applied, and that only in great Occasions, and Cases of Extremity.” *Id.* § 52, at 150.

¹¹⁹ Model Penal Code, part I, art. 3, § 3.08(1).

¹²⁰ Johnson, *supra* note 115, at 436.

¹²¹ Victor I. Vieth, *When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force*, 32 PROSECUTOR 29, 29 (1998).

¹²² It is necessary to read Minn. Stat. § 609.379, which appears to permit “reasonable” corporal punishment of children, in conjunction with §§ 609.224 and 609.02. At one time Minnesota law permitted parents to use force or violence on children. *See* Minn. Stat. § 619.40 (1961). However, the law was amended and replaced with § 609.379, which enables parents to use reasonable force, but not violence on children. As modified by §§ 609.224 and 609.02, “[r]easonable force” in § 609.379 has been interpreted to provide parents with a defense to charges of false imprisonment or neglect when, for instance, grounding a child or denying a child dessert, but no protection for corporal punishment. Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 143 (1998)[hereinafter *Passover*]; Bitensky, *supra* note 112, at 386-387.

¹²³ Minn. Stat. § 609.224. *See also* *Passover* *supra* note 122 at 143.

¹²⁴ Bitensky, *supra* note 112, at 388; *Passover* *supra* note 122, at 144.

¹²⁵ *Passover* *supra* note 122, at 144.

often endless litigation endured in other states¹²⁶ over what constitutes a reasonable blow to a child,¹²⁷ and not necessarily an end to the widespread use of corporal punishment against children.¹²⁸ Minnesota's approach thus takes important steps towards safeguarding children by not exempting them from general tort and criminal law protections against assault, but it lacks conceptual force and clarity.

2. Federal Supervision and Constitutionality

a. Corporal Punishment in Schools

State law has further sanctioned the use of corporal punishment against children by adults who stand in *loco parentis*¹²⁹ to a child. In 1977, the United States Supreme Court looked at the corporal punishment of children in schools and upheld its constitutionality in *Ingraham v. Wright*.¹³⁰ In this case, a student was paddled by his teacher so severely "that he suffered a hematoma requiring medical attention and keeping him out of school for several days."¹³¹ The Court held that the corporal punishment of students does not violate the Eighth Amendment's prohibition against cruel and unusual punishment since children have "little need" for its protection as "the public school is an open institution" that children can leave, and the child is supervised by family, friends, teachers, and other pupils "who may witness and protest any instances of mistreatment."¹³² Furthermore, although the Court conceded that due process liberty interests under the Fourteenth Amendment "are implicated,"¹³³ it concluded that "there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege."¹³⁴ This decision thus reveals a deep reluctance by the Court to step on the turf of states or the family in order to protect children.¹³⁵

b. Corporal Punishment in Families

The Supreme Court dealt with corporal punishment in families in the *DeShaney* case, decided in 1989, where it held that protection from harm is

126 *E.g.*, *State v. Crouser*, 911 P.2d 725 (Haw. 1996).

127 *Passover supra* note 122, at 143, n.78.

128 *Id.* at 144.

129 Refers to parent figures.

130 *Ingraham v. Wright*, 430 U.S. 651 (1977).

131 *Id.* at 657.

132 *Id.* at 670.

133 *Id.* at 674.

134 *Id.* at 676.

135 However, although the Supreme Court found the corporal punishment of children to be constitutional, over half of the states now statutorily prohibit its use by teachers. By 1994, 27 states had outright prohibitions and an additional 11 states, by local rules, banned the corporal punishment of children in public schools. Edwards, *supra* note 115, at 1014, n.230 (1996).

not a constitutional right for children and conceptualized the Constitution in negative terms, building a wall against state intrusion. The Court thus determined that due process rights were not violated when a four-year-old child was beaten by his father to the point of brain damage, while the government stood by and a social worker “dutifully recorded these incidents [of abuse] in her file.”¹³⁶ The Court drew a sharp distinction between public and private violence, admonishing that “it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua’s father.”¹³⁷ It thus refused to find responsibility for Joshua’s injury in the state even though the State of Wisconsin had removed Joshua in 1983 when he had been admitted to a local hospital with multiple bruises and abrasions, and subsequently returned him to his father’s custody. As Justice Brennan noted, his abuse had been “chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it.”¹³⁸ When told of Joshua’s last beating, the caseworker said: “I just knew the phone would ring some day and Joshua would be dead.”¹³⁹

The Court based its holding on the reasoning that the Due Process Clause confers no right to government protection against private violence. As Justice Rehnquist wrote for the Court:

But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.¹⁴⁰

Thus, although the government itself “may not deprive the individual” of life, liberty, or property without due process, it is not responsible for safeguarding these interests against the actions of private citizens.¹⁴¹ The Court construed the Due Process Clause as a purely negative “protection against unwarranted government interference” and not “an entitlement” to government aid.¹⁴²

The Court’s analysis, however, relies on the ability to distinguish clearly between public and private action, which was challenged by Justice Brennan’s and Justice Blackmun’s vigorous dissents. Justice Blackmun criticized the Court’s “sterile formalism,” and attributed the Court’s failure

136 *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989).

137 *Id.* at 203.

138 *Id.* at 209 (Brennan, J. dissenting).

139 *Id.*

140 *Id.* at 195.

141 *DeShaney*, 489 U.S. at 196.

142 *Id.* at 196 (quoting *Harris v. McRae*, 448 U.S. 297, 317-318 (1980)).

to recognize duty to its “attempts to draw a sharp and rigid line between action and inaction.”¹⁴³ Instead, the dissenting justices advocated focusing “on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the State failed to take.”¹⁴⁴ The State put Joshua in a dangerous situation by returning him to his home, and thus “the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney—intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed.”¹⁴⁵ Why did the Court assume there would be state action if the State removed Joshua from his father’s custody, but not when it returned him to his father’s custody after hospitalization, while continuing to monitor his condition? This is the case because the Court perceived state action only when the state is involved in changing, not in preserving, the status quo. But, then, the question becomes what is the status quo, and who will get to define it.

“As Justice Brennan argued, assumptions about the starting point, or baseline, may preordain the conclusion about whether the state acted to cause harm.”¹⁴⁶ The public/private label varies with the baseline used. In deciding this case, the Court was willing to start at a time when no social services existed and posited a situation where the state would provide no services when faced with abuse. Thus, the Court could conclude that Joshua was no worse off than he would have been at that time, and state involvement was not responsible for his injury.¹⁴⁷

This scenario, however, does not reflect reality. This case took place within the context of pervasive social regulation by the state, and the state failed to provide statutorily required services to Joshua. The very existence of the state’s child-protection program altered the status quo and constituted interference in Joshua’s life. “The Department of Social Services (‘DSS’) consolidated and, in many respects, supplanted the preexisting web of relatives, friends, and [officials] . . . which used to attempt to assist abused children.”¹⁴⁸ As Justice Brennan wrote, “Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse,”¹⁴⁹ and “[t]hrough its child-welfare program . . . the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS.”¹⁵⁰ Thus, by establishing DSS, the state took over the business of child protection and created a reliance interest in its actions. This reliance interest creates a duty for the state to abide by its promises. Justice Brennan asserted, “[I]f a State cuts off private

143 *Id.* at 212 (Blackmun, J. dissenting).

144 *Id.* at 205 (Brennan, J. dissenting).

145 *Id.* at, 212 (Blackmun, J. dissenting).

146 Bandes, *supra* note 41 at 2289.

147 *Id.*

148 *Id.*

149 *DeShaney*, 489 U.S. at 208 (Brennan, J. dissenting).

150 *Id.* at 210.

sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."¹⁵¹

In this way, the existing legal structure is not a passive background, but rather an important actor in Joshua's story. As Justice Brennan explained, the "State's prior actions may be decisive in analyzing the constitutional significance of its inaction . . . Children like Joshua are made worse off by the existence of [a child protection] program when the persons and entities charged with carrying it out fail to do their jobs."¹⁵² The real question is where to draw the action/inaction line, and this involves value judgments and confrontation with difficult questions about government responsibility.

Even the Court could not sustain a purely negative view of the Constitution, and it made room for two small openings, the logic of which has the potential for expansion. The Court conceded that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."¹⁵³ However, it narrowly circumscribed this to one exception, namely prisoners: "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."¹⁵⁴ In explaining the rationale for this exception, the Court emphasized the loss of the prisoner's "freedom to act on his own behalf," highlighting the impropriety of this model for children who are dependent by definition.¹⁵⁵ Perhaps Joshua could not lose "the freedom to act on his own behalf," but the state rendered him helpless against danger when returning him to his father's custody and "imprisoning" him in his violent home.

Furthermore, in footnote three, the Court wrote, "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."¹⁵⁶ Once the state enters the playing field and starts distributing benefits, it cannot do so unequally. The Court thus recognized that the power to do nothing does not entail the power to do anything, even when this involves acting inadequately or unjustly.

However, Justice Rehnquist also employed this very same reasoning to discharge the state of responsibility. Besides finding that there was no state action, the Court held there was no constitutional deprivation on which to sue, and thus it would make no difference even if the state took some action. Rehnquist explained that if the state does not have to act at all, then it can also act a little and not very well without being subject to liability. As he stated, "If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State

¹⁵¹ *Id.* at 207.

¹⁵² *Id.* at 208, 210.

¹⁵³ *Id.* at 198.

¹⁵⁴ *DeShaney*, 489 U.S. at 199-200 (Brennan, J. dissenting).

¹⁵⁵ *Id.* at 200.

¹⁵⁶ *DeShaney*, 489 U.S. at 197, n. 3.

cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.”¹⁵⁷ However, if the state is not required to provide any services, it does not necessarily follow that it need not provide them competently.¹⁵⁸

The *DeShaney* case points out some of the fundamental problems with the American approach. The Court avoided grappling with difficult issues by clinging to empty formalities—the false action/inaction, public/private distinctions and the assumption that the greater power not to do anything automatically includes the lesser power to do something and not very well. The Court further sought to sidestep conflict by minimizing children’s rights. The Court speculated:

[H]ad [DSS] moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.¹⁵⁹

Thus, failing to respect parents’ rights to control the custody and upbringing of the child would trigger a constitutional claim by the parent. Worried about being caught in the middle, the Court preferred to diffuse conflict by ignoring the rights of children, instead of engaging in any sort of balancing or wrestling with difficult choices and justifications. Even with evidence of abuse, the presumption that the parent has the child’s best interest at heart continues to govern. *DeShaney* thus “maintains traditional disincentives for over-intervention and under-intervention is cost free, since the victim . . . cannot state a justiciable claim.”¹⁶⁰

In this way, out of fear of the ghost of *Lochner* and reluctance to give the Due Process clause substantive power, the Court went to the opposite extreme and refused to accept a right to government protection even when the government places an individual in a situation of known danger. The Court further preferred to defer to the states in family matters, bypassing sticky problems.

IV. ALTERNATE APPROACHES TOWARDS CHILDREN

This section explores alternate approaches towards children, using both international and comparative law. These sources raise the possibility of a positive right to protection for children, rooted in a recognition of their essential dignity.

¹⁵⁷ *Id.* at 196-197.

¹⁵⁸ The Court rejected the positive version of this type of reasoning in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where it held that a greater power does not necessarily include the lesser, and the power to entirely prohibit conduct does not justify all restrictions. Thus, even within categories of speech that the state can completely ban, it is unconstitutional to make viewpoint-based restrictions.

¹⁵⁹ *DeShaney*, 489 U.S. at 203.

¹⁶⁰ Woodhouse, *supra* note 33, at 48.

A. International Law

By contrast with the United States, children's rights, at least in terms of rhetoric, are commonplace and non-controversial within the international human rights community.¹⁶¹ Although children's rights are the newcomers to the community—comprehensively articulated only in 1989—they were quickly and almost universally recognized.¹⁶²

International human rights law dealing with children abandons the public/private, negative/positive dichotomies. The traditional view was that international human rights instruments followed the public/private distinction and applied only to deprivations by a government and its agents, not private individuals.¹⁶³ "The traditional view, however, has lost much of its credibility and influence by virtue of the inclusive language of many post-World War II international human rights instruments."¹⁶⁴ The Convention on the Rights of the Child,¹⁶⁵ for instance, "uses language . . . indicative of an intent to impose human rights obligations protective of children on both state parties and private actors."¹⁶⁶ Nonetheless, the Convention is still "a charter of children's rights in relation to the state . . . not a domestic relations statute" with a detailed codification of family responsibilities.¹⁶⁷

1. United Nations Declaration of the Rights of the Child

The United Nations Declaration of the Rights of the Child, approved by the United Nations General Assembly in 1959, is the first expression of international human rights law concerning children. This Declaration does not impose binding obligations on states and aims for the progressive realization of children's rights. The Declaration sets out a positive right to protection for children. Thus, in the Preamble, it explains that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection," linking needs and rights.¹⁶⁸ Principle 2 goes on to assert, "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity."¹⁶⁹ Principle 9 refers specifically to abuse, stating,

¹⁶¹ Martha Minow, *What Ever Happened to Children's Rights?* 80 MINN. L. REV. 267, 267 (1995).

¹⁶² Woodhouse, *supra* note 160, at 1.

¹⁶³ Bitensky, *supra* note 112, at 388-89.

¹⁶⁴ *Id.* at 389.

¹⁶⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention].

¹⁶⁶ Bitensky, *supra* note 112, at 389.

¹⁶⁷ Woodhouse, *supra* note 93, at 315.

¹⁶⁸ U.N. Declaration of the Rights of the Child, Preamble, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess. Supp. No. 16, at 19, U.N. Doc. A/4354 (1959) [hereinafter Declaration].

¹⁶⁹ *Id.* at princ. 2.

“[T]he child shall be protected against all forms of neglect, cruelty and exploitation.”¹⁷⁰ In the Declaration, children’s rights are rooted in the inherent “dignity and worth of the human person.”¹⁷¹ By virtue of their humanity, children are entitled to the protections necessary for them to live with dignity.

The Declaration does not seek to radically restructure the family. It does not wish for the state to replace traditional parents and explicitly recognizes the importance of the parental relationship to the child. Its policy is that the child, “wherever possible, [should] grow up in the care and under the responsibility of his parents.”¹⁷² Thus, it acknowledges the sanctity of the parent-child relationship, but also that that relationship’s status does not stem from any right of the parent to control the child’s custody and upbringing, but rather from the child’s best interests. The Declaration states, “[The] best interests of the child shall be the paramount consideration” guiding the state.¹⁷³

2. United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child, approved unanimously by the United Nations General Assembly in 1989, presents the first comprehensive international articulation of children’s rights.¹⁷⁴ “It went into force in 1990 and was ratified by more nations in a shorter period of time than any other international convention in history.”¹⁷⁵ By its tenth anniversary, the Convention had been adopted by 191 states—every nation except two: Somalia, which lacked a functioning government, and the United States.¹⁷⁶

Unlike the 1959 Declaration, the 1989 Convention “imposes binding obligations on all of the nations that have ratified it.”¹⁷⁷ The Convention created the Committee on the Rights of the Child to monitor the compliance of the treaty’s parties, but the Committee has no enforcement power.¹⁷⁸ Since the Convention has no direct method of formal enforcement and no court to assess claims, it places great weight on reporting. Two years after ratification, each government is expected to send the United Nations Committee a report detailing progress made in fulfilling

¹⁷⁰ *Id.* at princ. 9.

¹⁷¹ *Id.* at Preamble.

¹⁷² *Id.* at princ. 6.

¹⁷³ *Id.* at princ. 2.

¹⁷⁴ Gerald Abraham, *Giannella Lecture: The Cry of the Children*, 41 VILL. L. REV. 1345, 1361 (1996).

¹⁷⁵ *Id.*

¹⁷⁶ Woodhouse, *supra* note 160, at 41; (Timor-Leste, which became independent in 2002, also has ratified the Convention.) Bitensky, *supra* note 112, at 390; (President Clinton signed the Convention in February 1995, but the Senate refused to consider its ratification.) Woodhouse, *supra* note 83, at 401, n.36.

¹⁷⁷ Abraham, *supra* note 174, 1363.

¹⁷⁸ *Id.* at 1366.

obligations under the Convention.¹⁷⁹

The Convention includes a multitude of provisions affirming children's positive right to protection. Article 19 instructs, "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."¹⁸⁰ Thus, in cases of abuse, the child explicitly "has the right to the protection of the law against such interference or attacks."¹⁸¹ Article 20 further specifies cases where a child "shall be entitled to special protection and assistance provided by the State."¹⁸²

The Committee on the Rights of the Child has paid particular attention to a child's right to physical integrity and protection from corporal punishment in monitoring implementation of the Convention.¹⁸³ The Committee has repeatedly stressed that the corporal punishment of children is incompatible with the Convention, and it is necessary to ban it in families in order for reporting countries to achieve treaty compliance.¹⁸⁴ Guidelines for country reports require that they indicate "whether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including corporal punishment, deliberate humiliation, injury, abuse, neglect or exploitation, *inter alia* within the family."¹⁸⁵

As the basis for this policy, the Committee has interpreted Article 19 (above) as an absolute prohibition on the corporal punishment of children. The Committee has further pointed to Article 37's prohibition of "torture or other cruel, inhuman or degrading treatment or punishment"¹⁸⁶ and to Article 24, ¶3 to support its interpretation. Article 24, ¶3 states, "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children," and the Committee perceives the use of physical force to educate children as such a practice.¹⁸⁷

Marta Santos Pais, the Committee's rapporteur, links the prohibition on the corporal punishment of children to their fundamental human dignity. In 1996, she explained, "The right not to be subject to any form of physical punishment . . . flows as a consequence of the consideration [in the Convention of the Child] of the child as a person whose human dignity

179 JANE FORTIN, *CHILDREN'S RIGHTS AND THE DEVELOPING LAW* 44-45 (London, 1998).

180 Convention, *supra* note 165, art. XIX.

181 *Id.* art. XVI, 1577 U.N.T.S. at 49.

182 *Id.* art. XX, 1577 U.N.T.S. at 50.

183 Bitensky, *supra* note 112, at 392.

184 *Id.* at 392.

185 *Id.* at 395 (quoting *General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(b), of the Convention*, U.N. GAOR, Comm. on the Rts. of the Child, 343d mtg., U.N. Doc. CRC/C/58 (1996)).

186 Convention, *supra* note 165, art. XXXVII, 1577 U.N.T.S. at 55.

187 *Id.* art. XXIV, para. 3, 1577 U.N.T.S. at 52.

should be respected.”¹⁸⁸ Former High Commissioner for Human Rights Mary Robinson, echoed this notion. She stated:

The recourse to physical punishment by adults reflects a denial of the recognition, by the Convention on the Rights of the Child, of the child as a subject of human rights. If we want to remain faithful to the spirit of the Convention, strongly based on the dignity of the child as a full-fledged bearer of rights, then any act of violence against him or her must be banned.¹⁸⁹

Despite its strong child protection language, the Convention is essentially a pro-family document, like the Declaration before it. The Convention “recognizes the family as the natural environment for child development and makes clear that parents have the primary right and responsibility to raise their own children, without interference from their government” or the United Nations.¹⁹⁰ The Convention further includes numerous provisions aimed to preserve the integrity of the family.¹⁹¹ For instance, the Preamble asserts that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”¹⁹² Furthermore, Article 7 imbues the child with the explicit “right to know and be cared for by his or her parents.”¹⁹³ This is the flip-side of the American right for parents to control their child’s custody and upbringing. In this way, “the Convention actively protects the family and the parent-child relationship as integral elements of the rights of children.”¹⁹⁴

While the Convention safeguards the parent-child relationship, it maintains “the best interests of the child” to be “a primary consideration.”¹⁹⁵ Children’s rights are not defined as antagonistic to parents’ rights, but rather as their source. Of course, the question remains what the child’s “best interests” actually are, and who gets to define them. However, the rest of the Convention gives content to this open-ended standard, and at least conceptually, it holds the child’s best interests as the guiding principle.

188. Marta Santos Pais, Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (quoted in Bitensky, *supra* note 112).

189 Statement of the then UN High Commissioner for Human Rights, Mrs. Mary Robinson, on the occasion of the launch of the “Global Initiative to End all Corporal Punishment of Children.” (Apr. 10, 2001), <http://endcorporalpunishment.org/pages/into/supporters.html>.

190 Abraham, *supra* note 174, at 1362.

191 *Id.*

192 Convention, *supra* note 165, pmb1., 1577 U.N.T.S at 44.

193 *Id.* art. VII, 1577 U.N.T.S. at 47.

194 Woodhouse, *supra* note 93.

195 Convention, *supra* note 165, art. 3, 1577 U.N.T.S at 46.

B. Laws of Other Countries

Looking at developments in the laws of other countries further challenges the positive/negative, action/inaction, and public/private dichotomies. Modern constitutions, statutes, and court cases affirm the importance of state obligations to protect children.

1. Constitutional Protection of Children—South Africa

The 1996 Republic of South Africa Constitution contains the most explicit constitutionalization of children's rights to date.¹⁹⁶ It includes a detailed Bill of Rights for children, recognizing children as rights bearers with distinct claims to justice.¹⁹⁷ The Constitution "makes various rights binding not only on public but also on private action,"¹⁹⁸ and portrays "government in an active rather than passive role in furthering rights."¹⁹⁹ Children can claim both negative and positive rights, and the Constitution specifically states that children have "the right to . . . social services" and "to be protected from maltreatment, neglect, abuse or degradation."²⁰⁰ Children's rights further take on primary importance.²⁰¹ "Unlike American law, which provides for diluted due process rights for children, the South African provisions single out children in detention for heightened due process rights."²⁰² Furthermore, when the state is confronted with competing claims to resources, children can claim a judicially-enforceable priority.²⁰³

Just as in the international documents, family relationships are "conceptualized from the child's perspective as a right of the child."²⁰⁴ The Constitution provides, "Every child has the right to . . . a family or parental care."²⁰⁵ Echoing the Declaration and the Convention, the South African constitution declares, "A child's best interests are of paramount importance in every matter concerning the child."²⁰⁶

The South African Constitution further elevates the concept of dignity to the level of key principles, like equality and freedom—again a reverberation from international law.²⁰⁷ The constitution affirms, "Every person shall have the right to respect for and protection of his or her dignity."²⁰⁸ Recognizing this right to dignity is an acknowledgment of the

196 Woodhouse, *supra* note 79, at 36.

197 S. AFRICA CONST. of 1996, ch. 2, § 28.

198 Woodhouse, *supra* note 79, at 4.

199 *Id.* at 33.

200 S. AFRICA CONST. of 1996, ch. 2, § 28(1).

201 Woodhouse, *supra* note 160, at 40.

202 *Id.* at 42.

203 *Id.* at 40.

204 *Id.* at 49.

205 S. AFRICA CONST. of 1996, ch. 2, § 28(1).

206 *Id.* ch. 2, § 28(2).

207 Woodhouse, *supra* note 160, at 44.

208 S. AFRICA CONST. of 1996 ch. 2, § 10.

intrinsic worth of human beings.²⁰⁹

2. Statutory Protection of Children

a. Sweden

In 1979, the International Year of the Child, Sweden became the first country to enact a statute banning the corporal punishment of children.²¹⁰ As amended in 1983, the statute states, "Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subject to corporal punishment or any other humiliating treatment."²¹¹ The use of the phrase "respect for their person" evokes the concept of dignity.

Sweden has exercised a policy of prosecutorial restraint in enforcing this ban on corporal punishment, preferring instead to pour its energies into educating the public. The law itself appears in the civil, not criminal code, and it does not provide specific sanctions for violators.²¹² The government's stated intent in passing the law was two-fold: primarily "to stop beatings," but also "to create a basis for general information and education for parents as to the importance of giving children good care and as to one of the prime requirements of their care."²¹³

The government thus supplemented the law with a sweeping education campaign, and by providing vast support services to families.²¹⁴ The public school system served as an important vehicle to reach children, and children were taught what parents could and could not do and how they should respond when punished corporally. Parental education programs instructed parents on alternate discipline methods that did not make use of physical punishment.²¹⁵ The government also distributed 600,000 copies of a mailing to families with young children and to daycare facilities.²¹⁶ Finally, the media inundated the public with information about the new law.²¹⁷ Milk cartons in Sweden carried a cartoon of a girl saying, "I'll never ever hit my own children," and an explanation of the law.²¹⁸

Since the 1960s, when legal reforms against physical punishment in Sweden began, there has been evidence of dramatic changes in the attitudes of Swedish parents. Although most Swedes opposed the law

209 Woodhouse, *supra* note 160, at 44.

210 Geraldine Van Buren, *The Family and the Rights of the Child in International Law*, in *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 88 (1995).

211 Bitensky, *supra* note 112, at 362 (quoting Swedish Children and Parents Code, ch. 6, § 1 (Swedish Ministry of Justice trans.)).

212 Edwards, *supra* note 115, at 1019.

213 *Id.* at 1018.

214 Bitensky, *supra* note 112, at 366.

215 Edwards, *supra* note 115, at 1019; Johnson, *supra* note 115, at 477-78 (1998).

216 Newell, *supra* note 115, at 219.

217 Edwards, *supra* note 115, at 1019.

218 Newell, *supra* note 115, at 219. (quoting Swedish Ministry of Justice, *Can You Bring up Children Successfully Without Smacking and Spanking?* (1979)).

upon its enactment fifteen years ago, they now favor it by a wide margin.²¹⁹ Public opinion polls carried out between 1965 and 1981 showed a doubling of the proportion of parents who believed that children should be raised without corporal punishment (from 35% to between 71% and 74% of women and 68% of men). "Over the same period, the proportion of people who believed corporal punishment was 'sometimes necessary' halved from 53% to 26% and 'don't knows' came down from 12% to 3%."²²⁰ A 1995 report indicated that only 11% of the Swedish population supports the use of corporal punishment, and as "societal tolerance for corporal punishment steadily declined . . . so has the rate of fatal child abuse."²²¹

b. Finland

In Finland, a prohibition on the corporal punishment of children in the family was enacted as part of an overhaul of Finnish law governing child custody.²²² The ban was adopted unanimously and "practically without debate" and went into effect on January 1, 1984.²²³ The act states, "A child shall be brought up with understanding, security and gentleness. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence, responsibility and adulthood shall be supported and encouraged."²²⁴ Here the word "humiliated" seems to refer to the concept of dignity. Parents who violate the prohibition may be prosecuted for assault or sued for damages.²²⁵ The Finnish government also conducted a nationwide campaign to educate adults about alternative ways to teach their children.²²⁶

Opinion polls suggest a significant drop in support for corporal punishment. In 1989, Finland's Central Union for Child Welfare conducted a major survey of fifteen- and sixteen-year-old teenagers, who were already ten years old when the law was enacted. The survey found that nineteen percent of the teenagers had experienced mild violence from their parents within the last year, and five percent severe violence. However, when asked whether they believed they would use physical punishment in the upbringing of their own children, only five percent said yes.²²⁷

²¹⁹ Edwards, *supra* note 115, at 1018 .

²²⁰ Newell, *supra* note 115, at 220.

²²¹ Johnson, *supra* note 115, at 478 (1998).

²²² PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT 87 (1989).

²²³ *Id.*

²²⁴ Bitensky, *supra* note 112, at 368. (quoting Child Custody and Right of Access Act, 361/1983 ch. 1, §1(3) (Finnish Department of Legislation, Ministry of Justice trans.).

²²⁵ *Id.* at 370.

²²⁶ NEWELL, *supra* note 222, at 87-89.

²²⁷ Newell, *supra* note 115, at 221.

3. Court Protection of Children—Israel

The case of *A. v. State of Israel*,²²⁸ decided by the Supreme Court of Israel on January 25, 2000, similarly prohibited the use of corporal punishment as an educational tool by parents. Since Israeli legislation does not criminalize physical discipline, the Court supported its decision by referring to Israel's 1992 Basic Law: Human Dignity and Liberty as well as the Convention on the Rights of the Child. Even though Israel does not have an official constitution, its Basic Laws create a constitution piecemeal, and a Basic Law can trump legislation. Citing the Basic Law and international principles thus elevated the decision to a constitutional level and to a matter of fundamental rights.

Framed in the language of children's rights, the decision explicitly recognized a positive right to protection for children. It stated, "the child is an autonomous person, with interests and independent rights of his own; society has the duty to protect him and his rights."²²⁹ The Court called for state intrusion into the "sacrosanct" privacy of the family home and close regulation of parent-child relations. It asserted that "the law imposes a duty on state authorities to intervene in the family circle and protect the child when needed, *inter alia* from his own parents."²³⁰ This is the case since the state has the "duty to protect those who are unable to protect themselves"²³¹ and ensure that "even a small man is entitled to all the rights of a large man."²³²

This case again grounded children's rights in the concept of dignity. Significantly, the main support for the Court's decision lies in the Basic Law: Human Dignity and Liberty.²³³ As the Court explained, this Basic Law "elevated the status of human dignity to a super-legislative constitutional right."²³⁴ Upholding the "child's right of dignity, bodily integrity, and mental health,"²³⁵ the Court concluded that "corporal punishment of children, or their humiliation and degradation by their parents as an educational method is totally improper."²³⁶

Even with its focus on children, the decision also recognized parents' rights, but they are subordinated to the rights of children. As the Court explained, "the rights of parents to rear and educate their children are not absolute rights. The relative nature of these rights is reflected in the duty of the parents to care for the child, his welfare, and rights."²³⁷ Although the

228 Cr. A. 4596/98, *A. v. State of Israel*, 54(1) P.D. 145. Translated in Isr.L.R. 4596/98, available at http://62.90.71.124/files_eng/98/960/045/n02/98045960.n02.pdf (website maintained by the Judicial Authority of Israel).

229 *Id.* at 37.

230 *Id.* at 35.

231 *Id.* at 36.

232 *Id.* at 37.

233 Emphasis added.

234 *A. v. State of Israel*, *supra* note 228 at 38.

235 *Id.* at 30.

236 *Id.* at 39.

237 *Id.* at 35.

decision even went so far as to call the right of parents to control their children's upbringing "a natural right,"²³⁸ it emphasizes that this right can be forfeited. Since "the child is not the property of his parents . . . [w]hen the parent does not carry out his duties properly, or abuses the discretion or the parental authority in a way that endangers or harms the child, the State will intervene and protect the child."²³⁹ Thus, "[t]he discretion of parents is limited, and it is also subject to the needs, welfare, and rights of the child."²⁴⁰

Despite using strong children's rights language, the Court counseled prosecutorial restraint in this decision. As it explained, "the prosecution has discretion not to put someone on trial if there is no public interest."²⁴¹ Similarly, "the criminal law contains the defense of '*de minimis*', which can also prevent criminal liability being imposed for the insignificant use of force by a parent against a child."²⁴² The Court thus reassured the public that "an act that a person of normal temperament would not complain about" and "normal physical contact between a parent and his child" will not serve as a basis for criminal liability.²⁴³

V. A RIGHT TO PROTECTION ROOTED IN DIGNITY

A. Why a Right to Protection?

This section advances a positive right to protection for American children, rooted in their essential dignity, that has both practical and conceptual appeal. As made abundantly clear by *DeShaney* and the Minnesota case study, the tools of tort and criminal law are insufficient to ensure the well-being of children. The Model Penal Code and a multitude of state statutes explicitly sanction the use of violence against children and defend the parental right to inflict corporal punishment. Recognizing children's essential dignity would end their exclusion from protections against violence and assault in tort and criminal law. It would further force the U.S. government to confront children's claims to basic protection and promote a more realistic and healthy understanding of the link between children's and parents' rights.

Moreover, the seeds for a positive right to protection for children already exist in American case law. As explained above, the *Meyer* line of cases limits parents' rights to control a child's upbringing at situations of harm—where "parental decisions will jeopardize the health or safety of the

²³⁸ *Id.* at 34.

²³⁹ *A. v. State of Israel*, *supra* note 228, at 35.

²⁴⁰ *Id.* at 34.

²⁴¹ *Id.* at 41.

²⁴² *Id.*

²⁴³ *Id.* Other countries that have rejected the use of corporal punishment against children are Denmark, Norway, Austria, Cyprus, and Italy. For a more complete discussion, see Tamar Ezer, *Children's Rights in Israel: An End to Corporal Punishment?*, 5 OR. REV. INT'L L. 139, 170-78 (2003).

child, or have a potential for significant social burdens.”²⁴⁴ The parental best interest presumption further solidifies this limitation on parental rights, linking parental authority to the best interests of children. Thus, the interests of children appear as both the source and limitation of parental rights. Remaining true to this logic and acknowledging its full implication would lead to the realization of a positive right to protection for children.

Additionally, children are the epitome of a group requiring the protection of the courts, and a right implicating their fundamental human dignity is the epitome of a right deserving of court protection. Children are a non-voting, relatively powerless group in need of protection.²⁴⁵ Furthermore, threats to children’s physical integrity implicate their fundamental dignity, the most basic of rights, as discussed below.

B. Why Rooted in Dignity?

1. Dignity as the Most Basic Right

Although dignity does not figure prominently in the American system, it has been the foundation of the international human rights movement and other rights systems around the world.²⁴⁶ Thus, the human rights movement was founded on the notion of rights that “derive from the inherent dignity of the human person.”²⁴⁷ As Mary Ann Glendon observes, dignity “enjoys pride of place” in the Universal Declaration of Human Rights. “[I]t is affirmed ahead of rights at the very beginning of the Preamble; it is accorded priority again in Article 1; and it is woven into the text at three other key points.”²⁴⁸

²⁴⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

²⁴⁵ The famous fourth footnote of the *Carolene Products* case indicates that legislation involving “discrete and insular minorities” may necessitate stricter scrutiny by courts to ensure adequate protection. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). This footnote was later expanded upon by the Warren Court to elaborate “a vision of fundamental law in an inclusive and pluralistic democracy.” Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 25 (1997); see also J. ELY, *DEMOCRACY AND DISTRUST* 75 (1980). The Warren Court used *Carolene Products* to protect African Americans and the expression of minority opinions during the McCarthy era. Horwitz, at 25-27. Although children may not be minorities *per se*, their status is legally defined to be that of “minors” possessing less power, and a more discrete and insular group is hard to imagine. As Barbara Woodhouse notes, children, “the least powerful members of both the family and political community, are also the least dangerous of rights-bearers and the most in need of affirmative rights rhetoric in order to be heard.” See *infra* note 259.

²⁴⁶ For instance, in Israel, citizens’ rights flow from two basic laws: the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. The Supreme Court of Israel has interpreted the Basic Law: Human Dignity and Liberty to protect the right to life, bodily integrity, privacy and personal confidentiality, property, liberty against arrest and imprisonment, and liberty to enter and leave the country. This law has thus served as the foundation for other rights. The Court has further interpreted dignity as a top value that cannot be sacrificed for other values. Aharon Barak, *Human Dignity as a Constitutional Right*, 41 HA’PRAKLIT 271, 275-78 (1994); Ezer, *supra* note 243 at 147-49.

²⁴⁷ ICCPR *supra* note 27, pmb. at 172-3.

²⁴⁸ Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE

2. Privacy v. Dignity

A workable regime of children's rights needs to respect the autonomy of parents and children and to protect them from destructive state interference. This is the case as parents are not fungible; "[t]he link between parent and child has substantial and intrinsic value to the child . . . the state is not well suited to substitute for parents in the job of rearing children."²⁴⁹ Furthermore, rational individuals can disagree on the best way to raise children.²⁵⁰

These concerns have been translated into the language of privacy. Liberal thought, with its emphasis on limited government, conceptualizes a sharp division between the private and public realms, and civil and political rights create this dichotomy since they exist "to prevent the public world from intruding into areas of private life."²⁵¹ The family—usually the nuclear family—has figured as the ultimate private sphere.²⁵² In this way, the family appears as a separate domain outside legitimate state authority and social concern, and parents are sovereign within the little "state" of the family.

However, the public/private division is a false formality that is oftentimes more harmful than helpful. Thus, a dignity model presents a better way to protect the autonomy interests of parents and children.

As discussed above, the conceptualization of the "private" family relies on a false division between public and private space. There is a constant interplay between public and private actors in the life of the family. The *DeShaney* case, for instance, describes an intricate series of interlocking acts and omissions by the state and private parties. "Public institutions play a complementary role of partnership with parents, providing public education, public health services, and other collective goods benefiting families."²⁵³ Furthermore, "the power of parents to use the law to enforce their authority undergirds much of family law."²⁵⁴ Thus, "[f]amilies do not exist in a vacuum, but are embedded in their societies" and require their support.²⁵⁵ A "balanced, collaborative partnership between parents and government" is fundamental to children's welfare.²⁵⁶ In this way, personal rights take on a positive, social form once it is recognized that the

DAME L. REV. 1153, 1172 (1998).

249 Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2415 (1995).

250 ARCHARD, *supra* note 3, at 132.

251 Steiner & Alston, *supra* note 14; Mahoney, *supra* note 32, at 845. At first glance, social and economic rights do not appear to invoke this individual versus the state distinction; a right to government aid and protection rather invites the state to enter the private sphere. However, they continue to assume a public sphere by focusing on state sources of oppression. *Id.* at 851.

252 For instance, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1994) referred to the "private realm of family life which the state cannot enter."

253 Woodhouse, *supra* note 83, at 411-12.

254 *Id.* at 412.

255 *Id.* at 420-21.

256 *Id.* at 395.

individual is not self-sufficient.

Furthermore, as Susan Bandes explains, this public/private distinction “is the familiar governmental action/inaction distinction in slightly different linguistic clothing.”²⁵⁷ The public realm is that in which the state has acted affirmatively, while the private realm is that in which citizens are harmed by other forces. Under the state action doctrine, the government cannot be held liable for its failure to act, and there must be a causal relation between state action and harm.²⁵⁸ Children usually find themselves on the wrong side of the line drawn between the public and private spheres, requiring “state action” to trigger constitutional protections.²⁵⁹

However, the action/inaction distinction is essentially fluid and dependent on both context and values. Even Judge Easterbrook, a zealous opponent of requiring affirmative duties, concedes that “it is possible to restate most actions as corresponding inactions with the same effect, and to show that inaction may have the same effects as a forbidden action.”²⁶⁰ If the determining factor is whether government acted to deprive individual rights or simply failed to act by ignoring existing deprivation, it becomes crucial to determine when the deprivation occurred.²⁶¹ Causation does not exist in a vacuum, but rather hinges on rights, relationships, and duties.²⁶² The action/inaction division is dependent on the boundary drawn between government and the individual and the baseline defining the status quo. The baseline adopted is a normative conception. It expresses the standard against which all conduct is measured and legitimate expectations from government.²⁶³

As the lesson of *Lochner*²⁶⁴ reveals, government is intimately involved in maintaining this baseline status quo. The state does not stand outside civil society, and it is implicated in the hierarchical outcomes of private interaction. Furthermore, under current conditions of pervasive government regulation, even when the government fails to act, a regulatory system remains in place, and the bureaucracy continues to function.²⁶⁵ Thus, government activity is ongoing, inducing reliance on

257 Bandes, *supra* note 41, at 2285.

258 *Id.* at 2282-86.

259 Woodhouse, *supra* note 160, at 30.

260 *Archie v. City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988). *See also Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 297 (1990) (Scalia, J. concurring) (finding “specious” the “nice distinction between ‘passively submitting to death and actively seeking it’” in cases considering a right to refuse medical treatment. “The distinction may be merely verbal, as it would be if an adult sought death by starvation instead of a drug.”) (quoting *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 581-582 (1971)). Scalia also writes, “In the prosecution of a parent for the starvation death of her infant, it was no defense that the infant’s death was ‘caused’ by no action of the parent but by . . . the infant’s natural inability to provide for itself. *Cruzan*, 497 U.S. 261, 297 (1990) (Scalia, J. concurring). “A physician, moreover, could be criminally liable for failure to provide care that could have extended the patient’s life, even if death was immediately caused by the underlying disease that the physician failed to treat.” *Id.*

261 Bandes, *supra* note 41, at 2284.

262 *Id.* at 2337.

263 *Id.* at 2343-44.

264 *Lochner v. New York*, 1980 U.S. 45 (1905).

265 Bandes, *supra* note 41, at 2283.

state regulation and services,²⁶⁶ and government more often causes harm by inertia or denial of benefits than through a direct violation of the individual's bodily integrity. Consequently, a conception of negative rights as freedom from coercive violence does not seem well-suited to shaping constitutional restraints on government.²⁶⁷

The action/inaction or public/private distinction is an unhelpful formality that obscures, but does not obviate, value choices. The Court has relied on these conclusory labels to avoid addressing essential questions like the government's proper role under the Constitution.²⁶⁸ As Martha Minow writes, words, like "private" function "as talismans to ward off the facts of the case" and do the work of judgment.²⁶⁹ However, these dichotomies are false bright line rules since reality is much too complex to fit within these polar categories, and they are based on untenable assumptions. Furthermore, these formulae themselves rest on value judgments.²⁷⁰ Thus, as Susan Bandes explains, "the question of the proper reach of governmental power must be faced on its own terms and cannot be avoided through the fiction that the public/private distinction is a natural construct."²⁷¹ The correct focus of the constitutional discourse is on the requisites of the Constitution, but the Constitution cannot be interpreted without reference to values.²⁷²

It is further important to remember that the family is a social construct—a valuable one, but nonetheless "a legal fiction that may have an ancient pedigree."²⁷³ The family is not "a single, historically unchanging social unit," and there is nothing natural or necessary about the modern Western conception of the family.²⁷⁴ This conception draws the curtain of privacy around the nuclear family and can be violently antagonistic to families falling outside this model.²⁷⁵ However, in many non-Western cultures, parenting is a shared responsibility amongst a number of adults.²⁷⁶ Thus, family privacy can be easily re-conceptualized from the accepted nuclear association to more extended relations, and perhaps to the entire community. According to this understanding, the community

²⁶⁶ *Id.* at 2283, 2293.

²⁶⁷ *Id.* at 2283.

²⁶⁸ *Id.* at 2279, 2285.

²⁶⁹ Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1668 (1990).

²⁷⁰ Bandes, *supra* note 41, at 2271, 2323, 2326.

²⁷¹ *Id.* at 2286.

²⁷² *Id.* at 2343.

²⁷³ Barbara B. Woodhouse, *Privacy and the Family: Panel II The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1252 (1999).

²⁷⁴ ARCHARD, *supra* note 3, at 115.

²⁷⁵ *E.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down a grandparent visitation statute); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that father of child by an adulterous affair with married mother did not have substantive due process right to declare paternity and visit child); *In re State In Interest of Black*, 283 P.2d 887 (Utah 1955) (holding that polygamy is sufficient to render a parent unfit and terminate parental rights). *But see Moore v. East Cleveland*, 431 U.S. 494 (1977) (holding that the constitutional right to live together is not limited to the nuclear family, but rather also encompasses the extended family).

²⁷⁶ ARCHARD, *supra* note 3, at 127.

would not be overstepping any privacy boundaries in actively participating in the child's upbringing.

On the other side, the family's privacy comes up against the privacy of the individual.²⁷⁷ At least centering privacy around the individual has the fact that it is based on natural divisions between entities to commend it. The individual's privacy would implicate the individual's physical integrity, pointing towards, not against, interference with the parent-child relationship in order to protect the child. In international law, there is authority for this proposition that corporal punishment violates the child's right to privacy because the concept of privacy encompasses bodily integrity.²⁷⁸ This would argue for focusing attention on the individual parent and child and for preventing the privacy of a fictional entity from obscuring the humanity of either.

Additionally, it is necessary to acknowledge that the concept of privacy has a dark side that has been used to hide a multitude of wrongs historically. The public/private distinction has reflected a gender bias. The public sphere was conceptualized to exclude families and the world of women. Thus, by definition, women and their concerns fell outside the public sphere and were invisible to the law. At an extreme, women's legal identity and will were once subsumed in that of their husbands.²⁷⁹ Kept outside the purview of law and constitutional protections, harms suffered by women within the family could not obtain public recognition and redress, and injuries to women's integrity and autonomy were officially tolerated.²⁸⁰ In this way, the state's non-intervention functions to support the structure and roles of a particular kind of private family, and these structures, in turn, have public import.²⁸¹ Feminist theorists developed this insight into the fundamental interconnection between the public and private. They perceived the private realm as "the heart of politics," and the post-1968 women's movement adopted the slogan: "the personal is political."²⁸² With the recognition of women's rights in the United States, the state has had to deal with domestic violence and violations within the family, weakening the public/private divide. A recognition of children's rights is now overdue.

Shrouding the parent-child relationship in privacy is particularly harmful. Endowing an unequal unit, such as the parent-child relationship, with the privacy right to be free of state intervention serves to reinforce the

²⁷⁷ The individual's privacy has been recognized, for instance, in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), upholding the woman's right to privacy which enables her to choose to have an abortion before viability without undue interference from state.

²⁷⁸ Bitensky, *supra* note 112, at 412 (citing GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 15 (International Studies in Human Rights Vol. 35, 1995)).

²⁷⁹ Woodhouse, *supra* note 273, at 1252.

²⁸⁰ Catherine MacKinnon, *Disrupting Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 172 (2000).

²⁸¹ ARCHARD, *supra* note 3, at 114.

²⁸² Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation*, 21 BROOKLYN J. INT'L L. 799, 801 (1996).

power of its dominant member. Thus, the state confers unregulated authority on the parent and shields the victimization of children from public scrutiny.²⁸³ Furthermore, while screening a relationship in privacy may work well for people linked in voluntary association with a right of exit, such as marriage, it is not as appropriate to the parent-child relationship from which the child has few if any exit options.²⁸⁴ Children, far more than women, depend on the protection of the community when “the myth of family harmony encounters the reality of abuse and neglect.”²⁸⁵

In this way, the parent’s and child’s right to dignity would provide a better way of protecting against destructive state intrusion than creating a fictional wall of privacy around an entity that does not exist.²⁸⁶ Although the Constitution does not mention dignity as a protected right, it does not mention privacy either, and dignity is an essential ingredient in the penumbras of many constitutional rights.²⁸⁷ While the concept of privacy is an impediment to recognizing children’s positive rights to protection and support, the concept of dignity is fundamental to their conceptualization. Significantly, regimes that uphold positive rights for children almost invariably invoke the concept of dignity.²⁸⁸ The dignity of the parent and child would both function as a limit and rationale for state interference. The right to dignity yields a doctrinal push that a right to privacy lacks. And, as Laurence Tribe remarks,

[M]eaningful freedom cannot be protected simply by placing identified . . . spheres of action beyond the reach of government . . . Ultimately, the affirmative duties of government cannot be severed from its obligations to refrain from certain forms of control; both must respond to a substantive vision of human personality.²⁸⁹

3. Human Dignity as the Source of Children’s Rights

The various models, positing different sources for rights, shed light on different aspects of children’s rights. Children’s rights thus stem from their autonomy, dependence, and capacity for development. However, children’s rights ultimately flow from their essential humanity. “As human beings, children deserve the kind of dignity, respect, and freedom from arbitrary treatment that rights signal.”²⁹⁰

The classic autonomy model links rights with choice. It implies fully

283 Woodhouse, *supra* note 273, at 1255.

284 *Id.* at 1253-54.

285 *Id.* at 1254.

286 *Id.* at 1260.

287 *Id.* at 1261-62.

288 See discussion of international law, the South African Constitution, statutory protection of children in Sweden and Finland, and the *Baku* case, *supra* Part IV.

289 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 15-2 (2d ed. 1988).

290 Minow, *supra* note 161, at 296.

rational, autonomous individuals capable of exercising judgment and protecting their self-interests, and requiring freedom from governmental interference.²⁹¹ Rights thus protect the individual's autonomy by providing a choice,²⁹² and individuals are free to reject or waive them.²⁹³ A positive right to a good or service is the right to choose to accept it, and competent adults are free to decline if they desire.²⁹⁴

However, the classic autonomy model is inadequate for children. As discussed above, children are dependent "incompetents" that defy the conventional view of rights. Moreover, children are not free to reject goods and services. For example, the United Nations' formulation of a right to education does not end with the creation of a governmental duty to provide education, but also presumes the corresponding duty by children to accept the benefit of that right.²⁹⁵ The Declaration of the Rights of the Child states, "The child is entitled to receive education, which shall be free and compulsory."²⁹⁶ Thus, adult holders of positive rights retain their autonomy, while a duty is imposed on children to accept the benefit of positive rights.²⁹⁷ This raises the questions of whether it is possible to have a compulsory right with no choice, and whether rights for children undermine the critical relationship between autonomy and rights. Positive rights for adults may be predicated on a hypothetical choice, justified on the ground that all reasonable persons would wish to have certain social goods available. However, the situation is more complicated with regards to children, whose actual choices regarding positive rights are not entitled to respect.²⁹⁸

Furthermore, this legal fiction only highlights the flaws of a theory that premises rights on complete autonomy. Under this conception, children who are dependent on adults for support would not be entitled to any rights at all and could be treated as property—a clearly unacceptable proposition. It is also problematic because this theory implies that rights are an all-or-nothing proposition (children do not have rights, while autonomous adults do), but maturation is a gradual process. Furthermore, no one is fully autonomous. The very notion of autonomous rights-bearing individuals presupposes "a community willing to recognize and enforce individual rights."²⁹⁹ Thus, the community, as much as the individual, is a

²⁹¹ Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1882 (1987).

²⁹² For instance, freedom of speech enables the individual to decide whether or not to speak and to decide on the contents of this speech.

²⁹³ Thus, for instance, it is possible to waive the right to a jury trial or to consent to a search.

²⁹⁴ Teitelbaum, *supra* note 9, at 815.

²⁹⁵ Lee E. Teitelbaum, *Foreword: The Meanings of Rights of Children*, 10 N.M. L. REV. 236, 238 (1980).

²⁹⁶ Declaration, *supra* note 168, at art. 7. Similarly, the Convention on the Rights of the Child aims to "[m]ake primary education compulsory and available free to all." Convention, *supra* note 165180, at art. 28(1)(a).

²⁹⁷ Teitelbaum, *supra* note 9, at 806.

²⁹⁸ *Id.* at 815.

²⁹⁹ Minow, *supra* note 291, at 1882-83.

precondition for the exercise of rights.³⁰⁰

A second theory conceptualizes children's rights as arising from their needs—rights to receive basic nurture and protection.³⁰¹ This view characterizes children's rights as a product of, rather than existing despite, their essential nature.³⁰² Children's needs-based rights to care "flow not from their autonomy, but from their dependency."³⁰³ As John Stuart Mill maintains, "Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury."³⁰⁴ The Preamble to the Declaration of the Rights of the Child likewise explains, "the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection," linking needs and rights.³⁰⁵

"A theory of rights that emphasizes needs rather than choice places its primary emphasis upon integration . . . into society."³⁰⁶ Thus, "by defining children's rights as flowing from their needs, it is possible to affirm rather than undermine an ethic of care for others."³⁰⁷ Rights to education and physical protection "are neither intended nor usable as weapons against society; rather . . . they provide children with a ticket to full membership in society and equal participation in its progress."³⁰⁸ In this way, "the controversy over rights of children is part of a more general conflict between integrative and libertarian conceptions of rights."³⁰⁹ However, divisions are not always so clear. Children are dependent yet evolving individuals, and their rights flow from both their dependency and developing autonomy.

A third theory places the emphasis not on children's early dependent state or their ultimate "autonomy," but rather on the very process of development. Children are viewed "as potential adults . . . needing care on the way to adulthood."³¹⁰ Their rights stem from an equal opportunity principle that requires the availability of educational, social, and career opportunities to all children with the ability and talent.³¹¹

Americans are most comfortable with this third conception of positive rights. The United States has long been idealized as the "land of

300 Additionally, even traditional rights possessed by adults are not always voluntary. For instance, the right to "life, liberty and security of person" in Article 3 of the UDHR cannot be waived, and Article 4 of the UDHR prohibits slavery. Universal Declaration of Human Rights, art. 3-4, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

301 Woodhouse, *supra* note 83, at 394.

302 Woodhouse, *supra* note 88, at 1056.

303 Woodhouse, *supra* note 83, at 420.

304 Mill, *supra* note 2, at 484.

305 Declaration, *supra* note 168, pmb1.

306 Teitelbaum, *supra* note 295, at 238.

307 Barbara B. Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 327 (1994).

308 Teitelbaum, *supra* note 295, at 242.

309 *Id.* at 252.

310 Minow, *supra* note 161, at 277.

311 Stephen G. Gilles, *Hey Christians, Leave Your Kids Alone! Religious Schools v. Children's Rights*, 16 CONST. COMMENTARY 149, 172 (1999) (reviewing JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998)).

opportunity," and the search for opportunity has been central to the American experience, nourished by successive waves of immigrants arriving in hopes of a better life. Americans have been much more in favor of equality of opportunity than of equalizing resources. While "Americans may not care very much about equality of results [and] . . . have tolerated greater disparities in income and wealth than citizens of any other industrial democracy . . . what they do believe in strongly . . . is equality of opportunity."³¹² "Americans profess a firm belief in giving everyone an opportunity to succeed to the full limit of abilities and ambitions."³¹³ It thus makes sense that the right to education has gained the widest acceptance in the United States.³¹⁴ In fact, the United States was the first country to provide universal public education "as a means to enable everyone to accomplish as much as their talents and efforts would allow."³¹⁵

This logic can be expanded to argue for a positive rights regime, specifically for children. It would seem that Americans would have less trouble with such a regime than with positive rights in general. The case for government intervention to ensure equal opportunity for success applies most forcefully to children, who are dependent and developing. A society "which bases its rewards so heavily on achievement . . . should give all young people a decent chance to compete and succeed."³¹⁶ Thus, not surprisingly, according to a Louis Harris poll, sixty percent of Americans support early childhood programs in education and health and would be more disposed to vote for candidates who favored children's programs. Furthermore, two-thirds of Americans believe that "as a society, we spend too little on the problems of children."³¹⁷

Grounding positive rights in children's development and potential has deep roots, and a common theme is the need to prepare them for citizenship. To become full citizens, children must develop their capacity for rational choice and autonomous action.³¹⁸ Entitlements are "essential to achieving the capacity for rational choice on which membership in liberal society is founded."³¹⁹ As the Declaration of the Rights of the Child makes clear, the thrust of the right to education is to become a useful member of society. Locke views children as imperfect and incomplete versions of adults, and it is toward becoming fully rational and knowledgeable members of the community that education is devoted.³²⁰ Children's rights are thus logically paired with duties of acceptance since they exist so that

312 BOK, *supra* note 47, at 10.

313 *Id.* at 171.

314 Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1240 (1995).

315 BOK, *supra* note 47, at 172.

316 *Id.* at 158.

317 *Id.* at 159 (citing GIVING CHILDREN A CHANCE: THE CASE FOR MORE EFFECTIVE NATIONAL POLICIES (George Miller, ed. 1990)).

318 Teitelbaum, *supra* note 295, at 253.

319 Teitelbaum, *supra* note 9, at 805.

320 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 104 (Peter H. Nidditch, ed. 1975)(1690); LOCKE, *supra* note 8; JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 57, at 32 (C.B. Macpherson, ed. 1980).

children might grow and learn to *do right*.³²¹

The United States Supreme Court has recognized this connection between the protection of children and their preparation for citizenship. In *Prince v. Massachusetts*, the Court acknowledged that it is the interest of “the whole community” “that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens,”³²² since “democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”³²³ The Supreme Court further recognized a connection between education and citizenship in *Plyler v. Doe*.³²⁴ In this case, the Court struck down as unconstitutional a Texas statute denying undocumented school-aged children the free public education it offers to other children residing within its borders. The Court stressed that education is “the very foundation of good citizenship,”³²⁵ since it is “necessary to prepare citizens to participate effectively and intelligently in our political system,”³²⁶ and education “provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”³²⁷ It, therefore, found that children have a right to education that cannot be denied merely on the basis of their status as illegal aliens.

In this way, while certain rights flow from children’s autonomy, their simultaneous dependence and capacity for growth lead to a positive right to protection and to the means necessary for their development. Standing alone, neither emphasis on autonomy, dependence, nor development provides a complete picture of children’s rights. These three conceptions of rights must be taken together as they respond to different facets of children’s essential humanity. Recognizing children’s human dignity thus requires a more realistic and holistic understanding of rights.

VI. GRAPPLING WITH PRACTICAL AND CONCEPTUAL PROBLEMS

A. Children’s Rights as Creating Conflict

This section grapples with the notion of children’s rights as conflicting with parents’ rights and creating conflict more generally.

1. Conflict with Parents’ Rights

In developing a notion of children’s rights, it is essential to address

³²¹ Woodhouse, *supra* note 88, at 1056.

³²² *Prince v. Massachusetts*, 321 U.S. 158, 165 (1994) (emphasis added).

³²³ *Id.* at 169.

³²⁴ *Plyler v. Doe*, 457 U.S. 202 (1982).

³²⁵ *Id.* at 223 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). See also BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 223 (2001).

³²⁶ *Plyler*, 457 U.S. at 221 (1982) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

³²⁷ *Id.*

their relationship with the claims of parents. One criticism of children's rights is that they fundamentally conflict with parents' rights. This section evaluates three different conceptualizations of the relationship between children and parents: children as the property of parents; parental rights as natural rights; and the responsibility model, which demonstrates that children's and parents' rights can be mutually reinforcing. It is both healthier and more realistic to view children's and parents' rights as fundamentally linked to each other.

As previously discussed, the *Meyer* line of cases conceptualized the parent-child relationship as a vested property and liberty interest in parents, protected by substantive due process.³²⁸ Conceiving parental rights as rights of ownership would provide no room for the recognition of children's rights. Under this scheme, parental rights would be "absolute and an end in themselves, rather than . . . an outgrowth of parents responsibilities and a means to secure the well-being of their children."³²⁹

Another view of parental rights, echoed by *A. v. State of Israel* decision in Israel, treats them as natural rights preceding the state.³³⁰ Under this view, parental rights preserved in the state of nature cannot be legitimately abrogated or abridged by the government.³³¹

However, Locke himself, the founding figure of the notion of natural rights, perceived children's rights, rather than parents' rights, as natural. Locke stated a strong claim for children's rights, maintaining that children have the right "not only to a bare Subsistence but to the conveniences and comforts of Life, as far as the conditions of their Parents can afford it."³³² Locke further asserted that parental authority does not "belong to the Father by any peculiar right of Nature, but only as he is Guardian."³³³ Thus, parents' power to bring up children derives from their obligations and is constrained by the natural right of children to be cared for and protected.³³⁴ Locke specifically rejected the idea that natural parents have any sort of rights of ownership over children that can be alienated or transferred.³³⁵ While parental power is normally assumed by natural parents, it can be forfeited by disregarding parental duties, and foster parents can acquire rights by fulfilling these duties.³³⁶ Parental power is thus gained or lost to extent that "the office and care of a Father" is adequately discharged, and parental rights are a reflection of parental responsibilities.³³⁷ This view of a reciprocal parent-child relationship makes sense within Locke's overall philosophy, which challenges the existence of forms of authority that are natural, rather than artificially created by

328 Woodhouse, *supra* note 160, at 8.

329 See Woodhouse, *supra* note 93, at 313.

330 Woodhouse, *supra* note 83, at 395.

331 ARCHARD, *supra* note 3, at 9; *A. v. The State of Israel*, *supra* note 228, at 34.

332 LOCKE, *supra* note 3, § 89, at 207.

333 *Id.* § 65, at 310.

334 *Id.* § 58, at 306.

335 *Id.* § 100, at 214.

336 *Id.* § 100, at 214, § 65, at 310.

337 *Id.* § 100, at 214.

contract.³³⁸

Barbara Woodhouse uses the fiduciary theory to characterize Locke's conception of parent-child relations. "Locke contended that God was the true owner of children. God created children and gave them into their parents' care: thus parental powers were a form of trusteeship of the Creator's property."³³⁹ Under this theory, the parent is the fiduciary acting in the best interest of the child, or beneficiary. The trusteeship metaphor substitutes the concept of stewardship for the ownership of children.³⁴⁰ Children are recognized as people in their own right, and the law can impose an ethic of care and condemn selfish exploitation.³⁴¹ This conception does more than simply place limitations on parental power: it points the way to a positive right to protection for children.

In this way, rather than perceiving parents' rights as either property interests or natural entitlements, a better model would follow in the footsteps of Locke and emphasize reciprocal rights and duties. Just as children's positive rights to protection and to goods and services are paired with a duty of acceptance, parental rights are coupled with parental duties. Parents need authority to fulfill their responsibilities to children, and these two elements—authority and responsibility, the right and the duty—necessarily go together. However, responsibilities are primary and authority is derivative, as reflected in the child-centered perspective adopted in international law. This conception demonstrates respect for the dignity of parents, as well as children. Further, it shifts the emphasis from individual rights in isolation to the relationships and connections between individuals. It is not just a matter of autonomy rights, but of positive rights and duties, connecting children and parents to the community.

Moreover, the responsibility model of relations between parents and children does not pose a zero-sum game with every gain to children's rights necessitating an equivalent loss from the rights of parents. Rather, these rights are mutually reinforcing. Children and parents are equally important members of their joined community, and they have common interests.³⁴² Furthermore, the rights of parents are grounded in the rights of their children. Thus, strengthening children's rights will contribute to the rights of parents, and correspondingly, societal respect for parental rights and authority is an integral part of children's rights to care and protection.³⁴³

Any limitations on parental rights posed by the rights of children are already intrinsic in the concept of parents' rights. This is the case as parental and children's rights are fundamentally linked. To divorce parental rights from the rights of children would render them meaningless.

338 *See id.*

339 Woodhouse, *supra* note 93, at 313.

340 For a detailed discussion of a trust or stewardship model, *see* Scott & Scott, *supra* note 249.

341 Woodhouse, *supra* note 83, at 394; Woodhouse, *supra* note 307, at 328.

342 Woodhouse, *supra* note 273, at 1260.

343 Woodhouse, *supra* note 93, at 318-19.

Thus, in children's rights lies both the source and limitation of parental rights—just as the parental best interest presumption functions as a source of power containing its own limitation.

2. Rights as Selfish and Conflict-Creating

Besides pointing to conflicts with parental rights, opponents of children's rights criticize the very use of rights language as selfish and destructive. This is part of a more fundamental critique, viewing all rights, not just those of children, as antagonistic to society in general, not just parents. The claim is that rights talk elevates the individual over society and "undermines the ethic of care and the collaboration values needed to sustain families and communities."³⁴⁴ According to this logic, the language of rights is especially pernicious within families. Echoing previous resistance to women's rights, critics fear that the recognition of children's rights would "inject conflict and individualism into the sphere of the family and disturb the usual arrangements for caring for children."³⁴⁵ Thus, it is charged that children's rights do not merely conflict with parental rights, but their use of the rights concept itself creates conflict and adversarial relations.³⁴⁶

However, the language of rights already permeates American family law, which is structured around parental rights.³⁴⁷ Unhooked from children's rights, parental rights lack purpose and treat children as mere property. Moreover, "legal language translates, but does not initiate, conflict."³⁴⁸ The assertion of rights gives already existing discord public expression and provides a method for public resolution.³⁴⁹ It creates conflict only in the sense of bringing it to the surface and giving public voice to people previously ignored.³⁵⁰

Rather than generating conflict, the exercise of rights affirms relations to the community, integrating individuals into the system. Rights claims take place within a communal dialogue. As Martha Minow explains "[t]he rhetoric of rights draws those who use it inside the community and underscores . . . the power of the established order to respond."³⁵¹ Claimants of rights implicitly accept community procedures for resolving disputes and agree to abide by their results.³⁵² The rights language itself is communal in meaning, articulating connections and relationships.³⁵³ Positive rights, especially, function as integrative rights by focusing on

³⁴⁴ Woodhouse, *supra* note 307, at 324; *see also* Minow, *supra* note 291, at 1860 (stating that scholars criticize rights because they "fail to promote community and responsibility").

³⁴⁵ Minow, *supra* note 161, at 284.

³⁴⁶ Minow, *supra* note 291, at 1870.

³⁴⁷ Woodhouse, *supra* note 344, at 324.

³⁴⁸ Minow, *supra* note 291, at 1871.

³⁴⁹ *Id.* at 1872.

³⁵⁰ *Id.* at 1873.

³⁵¹ *Id.* at 1877.

³⁵² *Id.* at 1875-76.

³⁵³ Minow, *supra* note 291, at 1876.

responsibilities, joining people to society and to each other.

B. Enforcement

Most people would agree that the state should interfere to protect children from abuse. Even the *Meyer* line of cases limits parents' right to control a child's upbringing in situations of harm "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."³⁵⁴ However, practical and conceptual concerns arise around enforcement.

1. Practical Concerns

At the most basic level, a question arises as to what degree of harm is necessary to trigger intervention, and how it should be determined. The Convention on the Rights of the Child repeatedly invokes a "best interest standard"³⁵⁵ as the basis for legitimate authority in regards to children. Therefore, harm to children is any action taken in violation of their best interests. In the United States, children have no constitutional right to a "best interests" level of care.³⁵⁶ Rather, courts use a standard that places the burden on the state to show that failure to intervene will result in severe detriment or serious risk of physical harm.³⁵⁷ Relying on family privacy and autonomy, some people even argue that parents' rights can include the use of whipping and caning.³⁵⁸ The general rule is a reasonableness test because "the state is more likely to do harm than good to children when it overrides the reasonable choices their parents make on their behalf."³⁵⁹

But can there be reasonable corporal punishment, or is this a contradiction in terms? Courts have struggled with this question, attempting to interpret statutes that permit the reasonable corporal punishment of children.³⁶⁰ Trial courts frequently find these statutes vague and express difficulty with their enforcement. However, appellate courts have rejected vagueness claims no matter the language of the statutes. Holding that these statutes provide due notice, courts have left it to parents

³⁵⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972). In *Meyer*, the Court noted that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In *Pierce*, the Court struck down Oregon's compulsory public education law because it effectively banned private primary schooling—an "undertaking not inherently harmful, but long regarded as useful and meritorious." *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

³⁵⁵ Convention, *supra* note 165, arts. III, IX, XVIII, XX, 1577 U.N.T.S. at 46-50.

³⁵⁶ Randy F. Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 349 (1994).

³⁵⁷ Woodhouse, *supra* note 93, at 318.

³⁵⁸ Woodhouse, *supra* note 273, at 1256-57.

³⁵⁹ Stephen G. Gilles, *Hey Christians, Leave Your Kids Alone!* 16 CONST. COMMENTARY 149, 168 (1999) (reviewing JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998)).

³⁶⁰ *E.g.*, *State v. Crouser*, *supra* note 126.

and fact finders to struggle with them.³⁶¹

The international trend points to a better approach.³⁶² Children should not be excluded from general tort and criminal law protections. However, as with adults, *de minimis* cases should not be prosecuted. Prosecution should occur where there is injury to the child³⁶³ and where corporal punishment is systemic and used as an educational method.³⁶⁴ It is further necessary to send a clear message that not only can children rely on general tort and criminal protections, but that they have a right to the protection of their physical integrity. The protection of children is a matter of fundamental rights and should not be left to the generosity of each individual state.

Next is the question of who should enforce children's right to protection. Children may theoretically bring claims on their own behalf, but this is highly unlikely, given their fundamental dependency.³⁶⁵ Guardians can bring claims on behalf of children, but this means of protection is inadequate when the guardians themselves are the source of abuse. It thus makes sense for the state to assume responsibility for bringing these claims. Negative rights will not adequately protect children because they cannot exercise them. Therefore, children need positive rights to government aid in order for their negative rights to be meaningful.

As for the appropriate remedy, severe cases may require the child's removal from the home, but this should be a last resort. Other options include monitoring, fines, and social programs. Children have a right to a relationship with their parents that should be protected as long as consistent with their physical integrity.³⁶⁶

361 Johnson, *supra* note 115, at 450-56.

362 In January 2000, Israel became the tenth in a string of countries to reject the corporal punishment of children. GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, LEGAL REFORMS: CORPORAL PUNISHMENT OF CHILDREN IN THE FAMILY, at <http://www.endcorporalpunishment.org/pages/frame.html> (last visited Feb. 12, 2004).

363 In Minnesota, for instance, reports are only mandated when a physical assault actually produces injury. Vieth, *supra* note 121, at 144.

364 The decision in *A. v. State of Israel* appears to take this approach, stating that "the use by parents of corporal punishments or measures that humiliate and degrade the child as an educational method is now forbidden in our society." Cr. A. 4596/98, *A. v. State of Israel*, 54(1) P.D. 145. Translated in Isr.L.R. 4596/98, available at http://62.90.71.124/files_eng/98/960/045/n02/98045960.n02.pdf (website maintained by the Judicial Authority of Israel).

365 Moreover, children in the United States historically could not bring tort suits against their parents and others standing *in loco parentis* for harm.. Edwards, *supra* note 115, at 1007-08 (1996). However, some courts have since shown a willingness to restrict application of parental tort immunity and to permit civil lawsuits by children against parents. *E.g.*, *Gillett v. Gillett*, 335 P.2d 736 (Cal. Dist. Ct. App. 1959). As of 1988, 17 states still retained this immunity. Karen A. Bussel, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, 676 n.91 (1991).

366 Article 7 of the Convention on the Rights of the Child, for instance, recognizes "as far as possible, the [child's] right to know and be cared for by his or her parents." Convention, *supra* note 165, art. 7. Likewise, the South African constitution states, "Every child has the right to . . . family or parental care or to appropriate alternative care when removed from family environment." REPUBLIC S. AFRICA CONST., *supra* note 197, ch. 2, § 28(1).

2. Conceptual Concerns

Another central question with a positive right to protection for children, as with all positive rights, is whether it is possible to have a right that is not completely enforced. This is the case since an individual's right to resources is necessarily dependent on the total resources of the state. The obvious first response to this is that not all negative rights are fully enforced either, but they can be enforced to a point where these guarantees are meaningful. There is no reason why this should not also be the case for a positive right to protection for children.

It is a myth that the enforcement of negative rights does not entail the expenditure of resources. Even negatively phrased rights impose positive obligations on a state. If nothing else, negatively-phrased rights at least require the establishment of a judiciary for their enforcement.³⁶⁷ As Mary Ann Glendon explains, "all rights depend on conserving the social resources that induce people to accept and respect the rights of others."³⁶⁸ Thinking about scarcity and practicability forces confrontation with issues of distributive justice and inevitable balancing and trade-offs.³⁶⁹

Thus, no rights can be completely realized. In theory, rights may be absolute, timeless, and unbending. However, in practice, all rights are potentially conflicting, and there are inherent tensions throughout the human rights corpus.³⁷⁰ Some constitutions and international documents explicitly acknowledge the impossibility of a complete realization of rights. For instance, the Canadian Charter of Rights and Freedoms includes a limitation clause in Section 1. This clause explains, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."³⁷¹ Similarly, limitation clauses are commonplace in international human rights documents. For instance, under Article 4 of the ICESCR:

The States Parties to the present covenant require that, in the enjoyment of those rights provided by the state in conformity with the present covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible

³⁶⁷ See also the discussions of the First Amendment, *supra* note 56..

³⁶⁸ Glendon, *supra* note 51, at 537.

³⁶⁹ WALDRON, *supra* note 27, at 33.

³⁷⁰ Jeremy Waldron identifies two types of right conflicts: intra-right conflicts, or conflicts between different instances of the same right (for instance, where food is scarce, and there are several starving people), and inter-right conflicts, or conflicts between particular instances of different rights. *Id.* at 217. For an example of the tension between rights within the due process clause, see *supra* note 60.

³⁷¹ CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Limitations Clause, § 1. The Basic Laws of Israel likewise contain a limitation clause, stating "The rights conferred by this Basic Law shall not be infringed save where provided by a law which befits the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required, or under an aforesaid law by virtue of an explicit authorization therein." Israel Basic Law: Human Dignity and Freedom, S.H. 150, § 8 (1991-92).

with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.³⁷²

Although the American Bill of Rights contains no limitation clause, American courts have recognized that rights to “equal protection” and “freedom of speech” cannot be absolute, and they have had to imply qualifications on rights in order to accommodate legitimate restraints. Judicial interpretation of the Equal Protection Clause is built around an elaborate system, specifying different levels of scrutiny for different classifications. The *O’Brien* test, measuring the constitutionality of restrictions on expressive conduct, allows for incidental restrictions on expression as long as they are no greater than essential for the furtherance of an interest.³⁷³ Thus, as our jurisprudence has shown, incompleteness in the enforcement of rights is no reason for their abandonment. Rights serve as important ideals, guiding lawmaking and adjudication.

Moreover, even if the language of positive rights will not have immediate and direct practical significance, it still fulfills a crucial normative and educative function. Human rights in the international sphere depend upon the development of a community that believes in them rather than an authority—court or legislature—that will enforce them.³⁷⁴ The very process of articulating these rights and having them ratified can be quite powerful. The prohibitions on corporal punishment of many countries also take this approach—relying more on education than prosecution for their enforcement. Thus, the effort to give meaning to rights importantly takes place outside the courts. As Martha Minow explains, “‘Rights’ can give rise to ‘rights consciousness’ so that individuals and groups may imagine and act in light of rights that have not been fully recognized or enforced.”³⁷⁵ The rights rhetoric frames relationships in the mind and in public discourse, shaping people’s conduct. In this way, the description of relationships between parents, children, and the state powerfully affects how individuals and society treat children.³⁷⁶

It is not just the use of rights, but exactly how they are articulated that is significant: whether the parent-child relationship is conceptualized from the parent’s perspective, or from the child’s point of view; whether parental rights will be linked to children’s rights; and whether rights will be rooted in notions of dignity or privacy. As Barbara Woodhouse asserts, “The difference between using privacy theory as opposed to some other theory for protecting women and children against destructive state intrusion . . . may be no more than rhetorical. . . . Yet . . . rhetoric

372 ICCPR, *supra* note 28, art. 4; European Convention on Human Rights, art. 15.

373 *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968). But note that this test was modified by *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989), where the court held that infringements on speech must be “narrowly tailored” to ends, but the state need not employ the least restrictive means of obtaining an objective.

374 Minow, *supra* note 161, at 297.

375 Minow, *supra* note 291, at 1867.

376 Woodhouse, *supra* note 93, at 319.

matters.”³⁷⁷

It is therefore necessary to separate the issue of identifying constitutional norms from problems of enforcement. To deny the existence of important duties based on current judicial reluctance or inability to enforce them is to risk permanently sacrificing their implementation.³⁷⁸ As Richard Parker writes:

We shall have to be willing to speculate freely about these matters without making the conventional assumption that anything we advocate necessarily must be capable of immediate enforcement by the courts. Judicial enforcement and its timing may depend, after all, on all sorts of prudential concerns; and unless we segregate those concerns and insist on their clearly subsidiary status, we shall allow—just as our predecessors have allowed—our perception of the present condition of our polity and of what can immediately be accomplished within it to stunt our vision of what our polity might, one day, become and our criticism of what it now is.³⁷⁹

VII. CONCLUSION

A positive right to protection for children, rooted in dignity, holds both descriptive and normative force. The American conception of rights as absolute and entirely negative is simplistic and untenable, and problems show up most clearly with regards to children, who do not fit the liberal mold of fully autonomous, rational individuals. Children, however, lend themselves more readily to a positive rights regime, and have rights not despite, but due to their essential nature. Their rights stem from their dependence, capacity for growth, and autonomy—facets of their fundamental human dignity.

Not only is the adoption of positive rights for children conceptually sound, but it is necessary to assure basic protection for the physical integrity of children. As exemplified by the *DeShaney* case, the current regime minimizes the rights of children, sanctions violence against them, and avoids grappling with difficult issues by adhering to false action/inaction, public/private dichotomies. Developments in other countries and international law point the way towards the protection of children’s physical integrity through a recognition of their essential dignity.

A positive rights framework rooted in dignity is thus of practical necessity and conceptual superiority. The tools of tort and criminal law are insufficient to prevent violence against children and have, in fact, been used to promote violence. Non-voting and dependent, children are the

³⁷⁷ Woodhouse, *supra* note 273, at 1257.

³⁷⁸ Bandes, *supra* note 41, at 2342.

³⁷⁹ Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST.L.J. 223, 258-59 (1981).

epitome of a group in need of basic protection by courts. The recognition of dignity is also the most fundamental of human rights and has been the cornerstone of the human rights movement. Moreover, respecting children's and parents' right to dignity presents a better way of protecting their autonomy against destructive state intrusion than constructing a false and porous wall of privacy.

Recognizing positive rights for children need not undermine either the rights of parents or those of society. Children's rights do not threaten parent's rights, but, in fact, underpin them. Parent's rights are empty and meaningless when divorced from the needs of children. Children's rights do not create conflict, but rather translate existing tensions, forcing us to wrestle openly with difficult questions. Not only do positive rights for children not create conflict, but, to the contrary, they affirm connections to the community. Bound up with duties and responsibilities between the state and individuals, rather than contributing to dissolution, they strengthen connections.

It is a myth and a contradiction that there can be reasonable corporal punishment. It is important to eliminate the parental justification for corporal punishment, recognizing the full humanity of children and their fundamental right to protection of their physical integrity, and to prosecute cases where there is injury to the child or corporal punishment is systemic and used as an educational method. However, as with tort and criminal law prohibitions on violence against adults, *de minimis* cases should not be prosecuted. Although no right is absolute and ever fully enforced, rights can be meaningfully enforced, and their very articulation is significant. As the Children's Defense Fund exhorts us, "Dietrich Bonhoeffer, the German theologian executed for opposing Hitler's holocaust, believed, 'The test of the morality of a society is what it does for its children.' It is time for our rich, powerful nation to pass Bonhoeffer's test."³⁸⁰

³⁸⁰ The Children's Defense Fund, About CDF: Progress and Peril, <http://www.childrensdefense.org/about/default.asp> (last visited Apr. 9, 2004).